4780

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Queen's Bench, Manitoba,

WITH

TABLES OF CASES AND PRINCIPAL MATTERS.

BY

JOHN S. EWART,

ONE OF HER MAJESTY'S COUNSEL.

VOLUME I.

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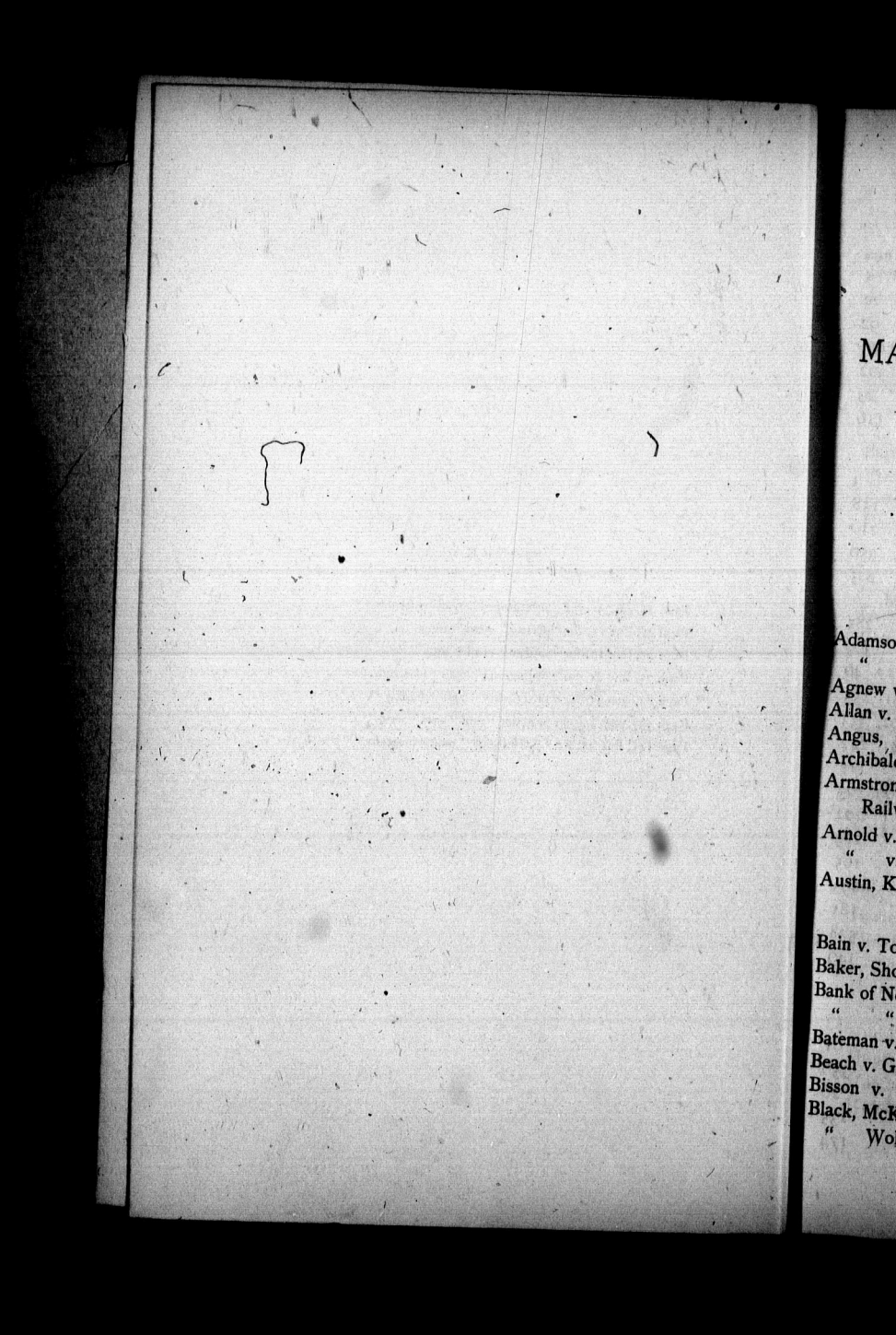
WINNIPEG:

ROBERT D. RICHARDSON, PUBLISHER.

1884.

ERRATA.

Page 21, line 31, for "substituted" read "substitute."
Page 22, line 11, for "giving" read "filing."
Page 22, line 12, for "under" read "with."
Page 23, line 21, for "objections" read "objection."
Page 23, line 35, for "practically" read "frankly."
Page 137, line 7 from foot, for "suit" read "writ."
Page 145, line 24, for "preference" read "pressure."



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VOLUME I.

1884.

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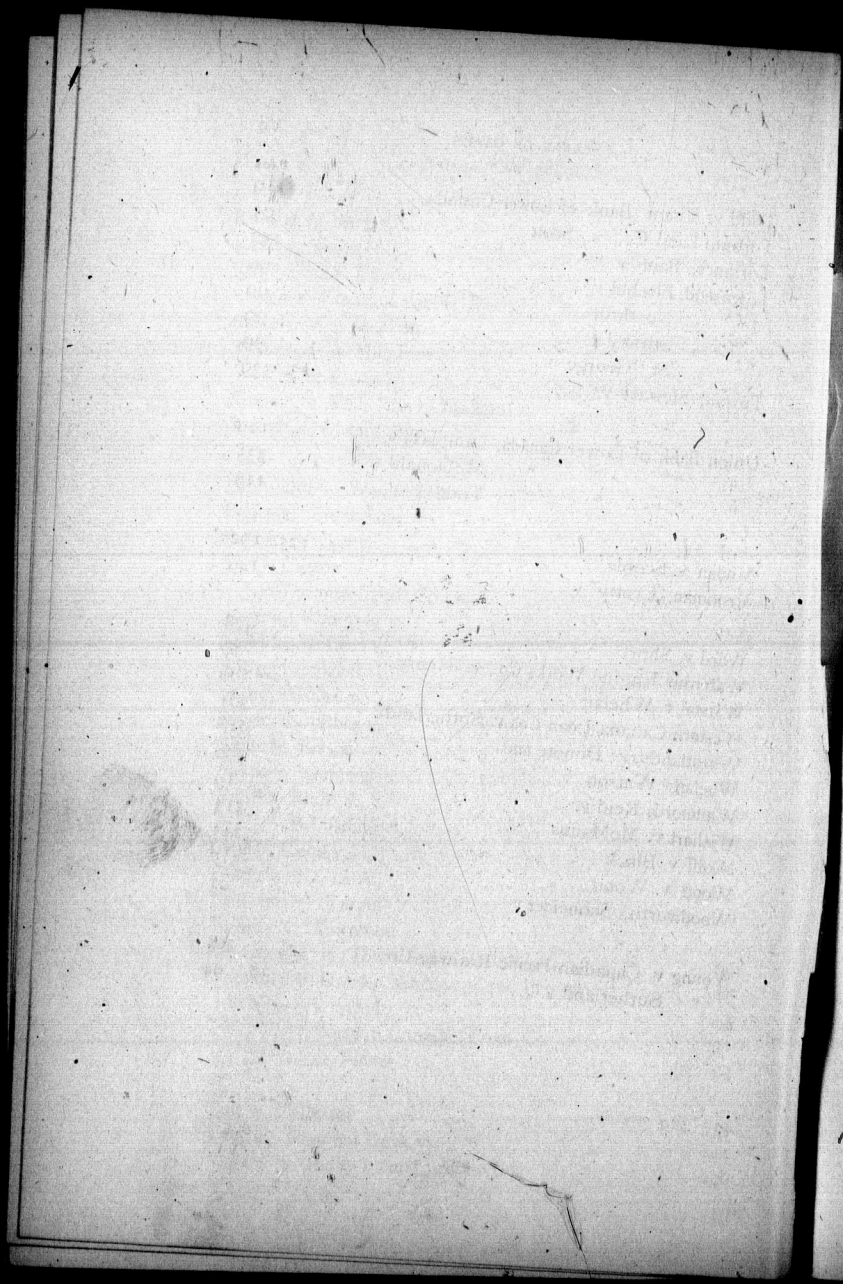

THE MANITOBA LAW REPORTS.

KASSON v. HOLLEY.

Action on Promissory Note—Statute of Limitations—"Beyond the Seas."

Declaration on three promissory notes made by defendant in 1871.

Plea (*inter alia*) "that the alleged causes of action did not accrue within six years before this suit."

Replication, "that at the time when the said causes of action did accrue to the plaintiff, he, the defendant, was in the United States of America beyond the seas, within the meaning of the statute in that case made and provided; and the plaintiff commenced this suit within six years next after the defendant first returned from parts beyond the seas after the accruing of the said causes of action."

Rejoinder, "that the said cause of action accrued to the plaintiff at the city of Buffalo, and at that time, and for a long time thereafter, both the plaintiff and defendant were permanent residents of the said city in the State of New York, one of the United States of America, beyond the seas, within the meaning of the statute in that case made and provided; and that the plaintiff is still a resident beyond the seas as aforesaid, and the defendant avers that the said cause of action did not accrue within six years before this suit."

Demurrer, "that the rejoinder is bad in substance." Allowed.

J. A. M. Aikins, for plaintiff, referred amongst other cases to *Williams* v. *Jones*, 13 East 439; *Hart* v. *Wilson*, 6 U. C., O. S. 22; *Lane* v. *Small*, 4 U. C. Q. B., 448.

D. Glass, for defendant, quoted *Pardo* v *Bingham*, L. R., 4 Ch. App. 735; 39 L. J. Ch. 170.

[*21st November, 1883.*]

WALLBRIDGE, C. J.—The Statute of Limitations begins to run from the time of the breach of contract, in the present instance, from the times the

promissory notes and draft became due, which exceeded six years at the time of the commencement of the suit. The defendant pleads the statute in this view of it.

The plaintiff replies that the defendant, at the time the causes of action and each of them accrued, was beyond the seas, and the plaintiff commenced his suit within six years after his return from parts beyond the seas aforesaid; the defendant does not deny this replication, but says that in addition to the defendant being beyond the seas, the plaintiff was so, also, and adds that the cause of action accrued there, and that the plaintiff is still a resident there, and that the causes of action and each of them did not accrue within six years.

To this the plaintiff is obliged to demur. I cannot see how the plaintiff's residence beyond the seas can be of any assistance to the defendant. It is true that in the statute of 21 Jac. I. c. 16, s. 7, it is provided that if the plaintiff be an infant, covert, non compos, a prisoner, or beyond seas, when the cause of action accrues, the six years shall run only from the removal of the disability. This was not an advantage to the defendant, but, on the contrary, was such to the plaintiff, as he had then a further time to bring his suit. It was never anything which the defendant could set up, but was set up by the plaintiff, giving him a further time to sue the defendant. I cannot see why the defendant sets this up in his rejoinder. Besides, it is no longer the law, as this disability, which was in fact an advantage to a plaintiff, has been taken away by the Mercantile Law Amendment Act of 1856, 19 and 20 Vict., c. 97, s. 10, but there never was a limit to the time in which the plaintiff might not bring his action, if the defendant himself was not within some clause of the Act of 21 Jac, 1, c. 16, by which the remedy against him was barred. The statute 4 and 5 Anne, c. 3, declares that, in case the defendant was beyond the seas at the time the cause of action accrued, the action might be brought against him within six years after his return.

With the disabilities clause, the statute of James and the provisions referred to in the statute of Anne, were provisions in favor of a plaintiff and not of a defendant.

The Mercantile Law Amendment Act deprived the plaintiff of the advantage which his absence beyond the seas conferred upon him, and to that extent was an enactment in the defendant's favor. If a defendant, being in England, and, in that sense, not beyond the seas, the cause of action having accrued there, although the plaintiff may have been beyond the seas before and after the accruing of the cause of action, yet the plaintiff would be barred in his action, because the defendant was not beyond the seas, and the plaintiff's privilege in that respect has been taken away. In fact, the taking away the plaintiff's disability was an advantage and gain to the defendant. It remains then, that the plaintiff may bring his action at any time if the defendant can not protect himself by the Statute of Limitations.

If the defendant was beyond the seas when the cause of action accrued, then the plaintiff may bring his action within six years after his return, let the time be ever so great during which the defendant was absent, the statute only begins to run on his return.

The use of the word "return" seems at first not applicable to a case where the defendant was not, when the cause of action accrued within the country, and was beyond the seas; but this expression has been before the courts and received authoritative interpretation in *Lafond* v. *Ruddock*, 13 C.B. 813, and *Pardo* v. *Bingham*, L. R., 4 ch., app. 735, in the former of which cases it is held that the word "return" in the Act does not imply that the defendant ever had been in the country before. As to the meaning of the words "beyond the seas," see *Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. 4. If the defendant really intended to set up that the cause of action accrued in a foreign country, that defendant is a subject of that country, and that they have Statutes of Limitations by which the debt is extinguished, he should have pleaded this foreign law and these facts; the defendant should also bear in mind the distinction between barring the remedy and extinguishing the debt. *Fowler* v. *Vail*, 27 U.C., C.P. 427.

Foreign statutes of limitation which bar the remedy, and not the right, have no operation here. *Harris* v. *Quine*, L.R., 4 Q.B., 653. *Huber* v. *Steiner*, 2 Bing., N.C. 202. In my opinion the rejoinder is bad for causes alleged, and the demurrer is allowed. The defendant may amend within five days, if he be so advised.

THE CANADIAN BANK OF COMMERCE v. ADAMSON.

Bill of Exchange Act, 18 and 19 Vic., c. 67— Leave to appear—Striking out appearance.

Held—That the Imperial Act 18 & 19 Vic., c. 67, is in force in Manitoba.

Held—A judge may grant leave to defendant to appear to a writ, either *ex parte* or upon summons.

Held, That where an order is granted *ex parte* no application under the statute of 1883 for leave to sign final judgment, setting aside the appearance, will be entertained, but an application to rescind the *ex parte* order may be made to any judge,

This was an appeal heard by the full Court in Michaelmas term, 1883, from an order of a single judge.

Action brought under Imperial Bill of Exchange Act, 18 and 19 Vic, c. 67. Defendant obtained summons for leave to appear on the ground that plaintiffs were not *bona fide* holders.

An order was made dismissing the summons. Defendant appealed.

Mr. F. McKenzie, for defendant, contended that the Imperial Bill of Exchange Act is not in force in Manitoba. The Provincial statute introducing the laws of England in this Province, (Con. Stat., c. 31, s. 4,) cannot have the effect of introducing that Act, because bills of exchange and promissory notes are subjects over which, by the B. N. A. Act, 1867, the Parliament of Canada has exclusive jurisdiction.

Mr. J. A. M. Aikins, for plaintiff, contended that the Act does not in any way affect the validity of bills of exchange and promissory notes or

the mode of making, drawing, endorsing, transferring, or otherwise negotiating them; but it is merely an act regulating the procedure, according to which actions on bills of exchange and promissory notes may be instituted and conducted. Procedure is a subject coming within the jurisdiction of the Provincial Legislature.

[*8th October, 1883.*]

DUBUC, J.—We find that the laws of England were introduced in this country by the Council of Assiniboia, by its ordinance or enactment of the 7th January, 1864, amending the ordinance on administration of justice of the 11th April, 1862. This was over six years before the country became the Province of Manitoba.

By the Imperial Act, 31 and 32 Vic, c. 105, s. 5, known as the "Rupert's Land Act, 1868," it is provided that, until otherwise enacted by the Parliament of Canada, all the powers, authorities and jurisdiction of the several courts of justice then established in Rupert's Land, shall continue in full force and effect therein.

By the Dominion Act, 32 and 33 Vic, c. 3, s. 5, it is enacted that all the laws in force in Rupert's Land and the Northwestern Territories at the time of their admission into the Union or Dominion of Canada shall remain in force until altered by the Parliament of Canada.

By the Dominion Act, 33 Vic, c. 3, s. 36, the next above mentioned Act, 32 and 33 Vic, c. 3, is continued in force until the end of the next session of Parliament. This Act is known as the Manitoba Act.

The Act 34 Vic., c. 13, s. 7, continues in force permanently, the next above mentioned Act.

So the laws which were in force in England in 1864 were introduced in this country by the Council of Assiniboia, and afterwards the Provincial Legislature enacted that the laws in force in England on the 15th July, 1870, shall be applicable to this Province, and particularly the practice and procedure which existed and stood in England on the above date, shall be the practice and procedure of the Court of Queen's Bench of Manitoba.

From the above, one may safely infer and hold that the Bill of Exchange Act is in force in this Province.

As to the other ground taken in the summons, it is contended that the judge should either grant or refuse the application of the defendant on his affidavit, and should not entertain affidavits in reply, because the Act does not give him that power.

But we are of opinion that the judge, having a discretion to exercise as to whether he will grant the leave to appear, or not, must have the faculty and power to exercise his said discretion after hearing both parties.

The application may be made *ex parte*, and if the judge finds the evidence sufficient, he may grant an *ex parte* order. If the ground on which the application is made is not sufficiently strong the judge may refuse the order and grant only a summons to show cause, and on return of summons he may hear affidavits in reply.

When an order for leave to appear is made *ex parte*, a judge will not entertain an application under the statutes of last session (1883) for leave to sign final

judgment, setting aside the appearance; but an application to rescind the *ex parte* order may be entertained by any judge.

But when an order for leave to appear has been granted on summons, after hearing both parties, no application to set aside, or rescind, said order will be entertained by a single judge.

Appeal dismissed without costs.

BLAIR v. SMITH.

Cloud upon title—Parties—Costs.

S. conveyed land to the plaintiff, who registered his conveyance. S. afterwards conveyed the same land to Fr., who conveyed to Fo., who conveyed to the defendant.

Held, that although the registry showed a good title in plaintiff, the defendant's conveyances should be declared to be clouds, and be removed.

Held, that Fo. and Fr. were not necessary parties.

Held, that defendant must pay the costs.

The facts sufficiently appear from the judgment.

H. M. Howell for plaintiff.

A. C. Killam for defendant.

[*26th February, 1883.*]

TAYLOR, J.—The plaintiff claims title to the lands in question under a conveyance from John Schultz, and divers mesne conveyances by which the title conveyed by Schultz has now become vested in him. The suit is brought to have several subsequent conveyances, which have been registered against the property, declared to be clouds upon his title, and to have them removed from the registry.

The deeds, which the plaintiff complains of, are as follows: (1) Hon. Jno. Schultz to Jno. Fraser, dated 29th April, 1881; Memorial No. 13,770. (2) Jno. Fraser to Jno. Fowler, dated 31st January, 1882; Memorial No. 25,071, and (3) Jno. Fowler to W. C. Smith, the defendant, dated 2nd February, 1882; Memorial No. 25,197.

The plaintiff's title to the land is not disputed, but it is contended that these deeds, showing a title derived from a person who has already conveyed away all his estate in the lands, and the deed from Schultz being registered subsequent to the registration of the deed under which the plaintiff claims title, the plaintiff does not require the intervention of a court of equity to declare them clouds upon his title, and that the relief prayed is such as the court will not, under the authorities, give. It is also objected that the suit is defective for want of Fraser and Fowler as parties. Also, that in any event, the court should not award costs against the defendant, because the plaintiff should have made Fraser and Fowler parties, and claimed costs against them.

In *Hurd* v. *Billington*, 6 Gr. 145, the court refused to declare the deed objected to, a cloud upon the plaintiff's title; but the deed was, the court said, void upon its face, having been executed by an attorney who had no power to convey. But the court, while dismissing the bill without costs, prefaced the decree with a recital of the reasons for doing so. This decree, with the recital, the plaintiff could register, and, by doing so, he practically achieved the whole object of his suit. The case of *Buchanan* v. *Campbell*, 14 Gr. 163, was a case of a voluntary deed, which, as the law then stood in Ontario, was void as against the subsequent conveyance for value under which the plaintiff claimed.

"In later cases," it is said by the present learned Chief Justice of Ontario, in *Dynes* v. *Bales*, 25 Gr., at p. 597, "the court has been more disposed than in *Hurd* v. *Billington*, to regard an adverse and unwarrantable registration as a cloud upon title." In support of that proposition, the learned judge quotes the judgment of the late Chancellor Blake, in *Harkin* v. *Rabidon*, 7 Gr., 249; that learned judge said: "Would it have been a reasonable answer that the plaintiffs could defend themselves at law? Would not the plaintiffs have a right to say, 'true we can defend ourselves at law, but we have a right to come into equity for relief which we cannot have at law. We ask to have that deed cancelled for the purpose of being placed beyond the reach of those dangers and annoyances which the improper use of it would, at any moment, entail, and for the further and more material purpose of having that removed which forms not only a cloud upon our title, but is, in effect, an incumbrance, detracting, as it does, most materially from the market value of our property.'"

In *Truesdell* v. *Cook*, 18 Gr., 543, V. C. Strong said: "I find no authority for saying that the existence of an unregistered deed, passing no interest, and not appearing to be a link in the title, can give ground for the jurisdiction; but the registration has such a tendency to embarrass the title of the true owner that there would be a great want of remedy if this court could not decree cancellation in such a case." That observation, not necessary for the disposition of the particular case then before the learned judge, and in which relief was decreed to the plaintiff on other grounds, is no doubt a mere *obiter dictum*. It has, however, subsequently received judicial sanction, for in *Dynes* v. *Bales*, Chancellor Spragge said: "It places, as I think, the title to relief upon the true ground."

Shaw v. *Ledyard*, 12 Gr., 384, was a case in which a bill was filed to set aside and remove from the registry a deed, made by a sheriff on a tax sale, alleging that there had been no sale to warrant such a deed. There V. C. Mowat said: "If two strangers, even, through a mere mistake of fact or law, claim a man's property, and put on registry an instrument setting forth such claim, or purporting to deal with it, such a claim, however unfounded, must prejudice the sale of the property, and may create embarrassment otherwise; and I would be sorry, unless compelled by the authorities, to hold that the owner is in such a case without remedy." He, therefore, overruled the demurrer for want of equity.

The latest case on this subject to which I was referred is *Dynes* v. *Bales*, 25 Gr., 593. There the plaintiff got relief against the conveyance from a person having apparently no title, and which had been registered subsequent to his own.

Mr. Killam sought to distinguish that case from the present on the ground that the relief there was given because the bill had been taken *pro confesso*, I do not think, upon reading the case, that that was the reason for giving the relief, notwithstanding the expressions made use of on page 595.

The learned judge there put it, that although there would be a defect in the absence of a link in the chain of title between the grantee in the last registered deed, and the grantor in the next, Scott (the grantor in the deed complained of), it would not necessarily follow that Scott had no title, for he might have had it by descent.

So in the present case it does not follow that Schultz, when he conveyed to Fraser in April 1881, had no title because he had previously conveyed to Emerson. Emerson might have reconveyed to him before conveying to the plaintiff.

The plaintiff, at all events, if selling or mortgaging the land, would certainly be called upon to explain and account for these subsequent conveyances appearing upon the registry.

Even should it be, that the authorities found on the books, do not fully warrant the making of a decree in the plaintiff's favor in such a case as the present, I am quite prepared to extend the jurisdiction and to make a precedent.

In a country like the present, where lands pass from one owner to another so frequently and with so little formality; and where a registry has been established for the purpose of showing to all the world who is the true owner, and how he derives his title, the court should in my opinion stretch a point to aid in keeping that registry pure, and see to it that nothing is improperly put there which can in any way embarrass the true owner, or prevent his dealing at any moment with his property in the most ample and beneficial manner.

The plaintiff is therefore entitled to a decree declaring the three conveyances in question to be clouds upon his title.

As to the costs, I see no reason why they should not be awarded against the defendant. It is true he was not the person who put on registry the first of the deeds which form the cloud, but he claims title to the property through that deed. The plaintiff's title appeared on the registry at the time the defendant took the conveyance to himself. If he had the title searched he had actual notice, and should not have taken the conveyance he did. If he did not search he was careless, and must bear the consequences. He had, at all events, constructive notice.

ARCHIBALD v. GOLDSTEIN.

Principal and Agent—Purchase by Agent in his own name—Statute of Frauds.

Plaintiff, desirous of purchasing property from one T., employed defendant as his agent to negotiate the purchase. Defendant purchased the property, using his own money, and took the conveyance to himself.

Held, that defendant was trustee for plaintiff, and that the Statute of Frauds was no protection.

H. M. Howell for plaintiff.

W. R. Mulock for defendant.

[*27th March, 1883.*]

TAYLOR, J.—In the early part of 1881, the plaintiff was desirous of purchasing a parcel of land in the Parish of St. Francois Xavier, being lot 224, according to the Dominion Government survey of that parish. The owner of the land was one Treston, with whom the plaintiff had previously had one or more conversations on the subject of buying the land, but who refused to sell at the price ($3,000) which the plaintiff seems to have been at that time willing to give.

The plaintiff now alleges that having, by the month of April, come to the conclusion that he could not secure the land for less than $5,000, he arranged with the defendant, who was a neighbor of Treston, and had previously bought from him an adjoining lot, to act as his agent in endeavoring to purchase the land. He agreed, he says, to give him, if he succeeded in getting the lot for $5,000, a commission of $150; and that if he got it for less than $5,000 he would allow him the difference up to that sum. The defendant, he says, undertook this agency but in breach of faith and of his duty, bought the land for himself, and obtained a conveyance thereof from Treston.

The defendant, by his answer, denies that he was ever employed by the plaintiff as his agent, or that he accepted the trust and confidence alleged in the plaintiff's bill, and he pleads the Statute of Frauds in bar of the plaintiff's claim.

The evidence which has been adduced leaves no doubt whatever that the plaintiff did employ the defendant as his agent, that the defendant undertook his agency, and that, instead of buying for the plaintiff, he bought it on his own account.

The agreement which was drawn up by the plaintiff, a solicitor, to be signed by Treston in the event of his agreeing to sell, was in the form of an agreement for the sale by Treston to the defendant. It was explained by the plaintiff that he drew it in this way at the defendant's request, because the latter said he might have to pay something down, and if the agreement was not in his name he would have no security for what he might so pay in the event of anything happening to the plaintiff before the transaction was com-

pleted. Before the defendant left the office with this document, a clerk of the plaintiff was called in, and the true arrangement explained to him in the presence of the defendant. It was also arranged, that as soon as Treston agreed to sell, he should be brought in to Winnipeg to the plaintiff, and a conveyance prepared and executed. The plaintiff at the same time offered to give the defendant some money with which to make a deposit, but the defendant declined taking it, saying he could arrange that.

Armed with this document, the defendant went home, and soon after purchased the land from Treston, informing him that he was buying it for the plaintiff. He then brought Treston in to the city, but instead of taking him to the plaintiff's office he told him that the plaintiff was out of town, and took him to the office of another solicitor. There a deed was prepared and executed by Treston, who, after executing it, saw that it was not to the plaintiff. He seems to have said nothing about this until they came out together from the solicitor's office, when he spoke to the defendant about it, saying he doubted he (defendant) had been committing a depredation on the plaintiff. At this the defendant only laughed, at the same time tearing up and scattering a paper which he had. The suggestion is made that this paper was a diagram of the land, which the plaintiff had prepared and given him, showing the quantity of the land Treston owned, somewhat less than he appears to have at some time or other claimed he had.

There is not, and there never was, anything in writing to evidence the defendant's agency for the plaintiff. No part of the purchase-money was paid by the plaintiff, or out of funds furnished by him.

Such being the case, the defendant pleads the Statute of Frauds as a complete bar to the plaintiff's claim, and relies on the case of *Bartlett* v. *Pickersgill*, 1 Ed. 515.

That case, decided more than one hundred and twenty years ago, is no doubt an authority to support the proposition laid down by Storey in his work on Eq. Jur., sec. 1,201: "Where a man employs another person by parol as an agent, to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase-money is paid by the principal; there, if the agent denies the trust, and there is no written agreement establishing it, he cannot, by a suit in equity, compel the agent to convey the estate to him; for (as it has been truly said) that would be decidedly in the teeth of the Statute of Frauds."

Lord St. Leonards, in his work on vendors and purchasers (14 Ed.), p. 703, states the law in almost the same terms. But when treating, on another page, 702, of the case of purchase, by a trustee, who takes the conveyance in his own name, he puts it in a more qualified manner, and says: "It seems doubtful whether parol evidence is admissible against the answer of the trustee denying the trust." And, on page 48, he puts it broadly: "If the agency be established, the agent will be compelled to transfer the benefit of the contract to his principal, although he made the contract in his own name, and swears that it was on his own account."

A few years ago, one of the judges of the Court of Appeal in Chancery, Lord Justice Giffard, in the case of *Heard* v. *Pilley*, L.R. 4, Ch. App. 553, expressed, as his opinion, that *Bartlett* v. *Pickersgill* was inconsistent with all

the authorities of the court, which, he said, proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud. In the same case, Lord Justice Selwyn said that such an argument on the part of an agent was "an attempt to make the Statute of Frauds an instrument of fraud." It is true that it was not necessary, for the purpose of disposing of *Heard* v. *Pilley*, to overrule *Bartlett* v. *Pickersgill*, and the Lords Justices did not profess to do so, but they certainly expressed, in unequivocal terms, their opinion against the authority of that case. Against this it must, however, be borne in mind that Mr. Lewin, no mean authority, in the last edition of his book on trusts, published since *Heard* v. *Pilley* was decided, takes no notice of it, or of the remarks of the Lords Justices, but treats *Bartlett* v. *Pickersgill* as if an unshaken authority. On the other hand, that writer nowhere refers to the case of *Lees* v. *Nuttall*, 1 R. & M. 53; 2 M. & K., 819, which is one of the authorities relied on by Lord St. Leonards in support of the passage last quoted from his work.

It was argued here, on behalf of the defendant, that the principal might, perhaps, succeed in such a case as the present, if he brought his suit against the agent and the vendor before the latter had actually conveyed the property to the agent. Reference was made, in this connection, to the case of *Cave* v. *McKenzie*, 46 L. J. Ch. 564, in which, the suit having been brought before conveyance, a decree was made in favor of the plaintiff. In that case the Master of the Rolls did seem to draw the distinction referred to, for, remarking on *Bartlett* v. *Pickersgill*, he said he had no doubt that there had been a conveyance to the agent in that case, so that he was the legal owner, and the case came within the 7th clause of the statute.

I do not think the distinction sought to be drawn can avail so long as the case of *Lees* v. *Nuttall* stands unreversed. That seems to me an authority directly in favor of the plaintiff here.

From the report of the case in 1 R. & M., it cannot be gathered whether the estate had been conveyed or not. On turning to the fuller report in Tamlyn, p. 282, it will be found that it had. In that case, a lady and her sister, being mortgagees of certain land, the husband of one of them desired to acquire the equity of redemption. He accordingly entered into negotiations with the mortgagor, through his son, and agreed to purchase for £1,200. No agreement was signed, and the vendor, being lame, could not go to a solicitor's office, but it was arranged that a lawyer should be sent to him. The plaintiff's son then went to the defendant, who was the plaintiff's solicitor, and with whom he had had a great deal of talk about the purchase in question, and whom he had desired to try and effect it for him. The solicitor, on being informed of what had been done, was much enraged, saying that what he had been building up they had been pulling down. "Why did you not come to me first; you knew I was buying it for you." He also said he could buy it for £200 or £300 less. He advised them to leave the matter in his hands, which they seem then to have done. After that he went and purchased the property for himself at £1,100, and took a conveyance to himself. The Master of the Rolls, Sir John Leach, on these facts declared him to be a trustee for the plaintiff, and ordered him to convey, as such. On appeal, this decree was affirmed by the Lord Chancellor, 2 M. & K., 819.

I do not see that there was, in that case, any change in the position of the plaintiff which it was urged here was the only thing which could justify a decree against the defendant, and on which it was sought to distinguish the case of *Ross* v. *Scott*, 21 Gr. 391; 22 Gr. 29. The plaintiff, simply at the request of the agent, abstained from any personal negotiation with the vendor, and in consequence of the agent's wrongful conduct, failed to get his desired purchase.

The evidence in this case shows clearly that the defendant, as in the case of *Lees* v. *Nuttall*, represented to the plaintiff that he could secure the land for him on more favorable terms than he could himself. He asked the plaintiff to say nothing to Treston, as it would interfere with the arrangements. The plaintiff did accordingly refrain from any negotiations with Treston, relying on the defendant acting as his agent.

There was, I think, "a fraudulent inducement held out, on the part of the defendant, in order to lead the plaintiff to confide to him the duty which he undertook to perform," such as to bring the case within the principle enunciated by both Lord Hatherley and Lord Westbury, in *McCormick* v. *Grogan*, L. R. 4, H. L. pp. 89 and 97.

To the case of *Ross* v. *Scott*, already referred to, I do not attach so much importance, for there were in that case two important facts in favor of the plaintiff to which nothing analogous exists in the present case. These were, first, that it had been arranged that the plaintiff's son-in-law should advance for him part of the deposit required at the auction sale, and the defendant actually obtained from the son-in-law $50 to assist in making the deposit. The second, that the defendant, although in possession of the land, had kept an account of his expenditure on the property, for the purpose of charging the defendant with the amount.

Considering as I do the case of *Lees* v. *Nuttall*, an authority directly in point, and that the case of *Bartlett* v. *Pickersgill* has been, if not overruled, yet rudely shaken, the plaintiff is, in my opinion, entitled to a decree with costs.

LA VERANDRYE ELECTION.

Election Petition—Setting aside service.

Motion to set aside the service of an election petition upon the grounds:

1. That the copy served was not signed by the petitioner, and did not show that the original was signed.
2. That the copy of the recognizance served did not show that the original was under seal, and if the original was under seal the copy served is not a true copy.
3. That there was no style of cause in the petition.

Refused with costs.

[*1883.*]

TAYLOR, J.—The respondent applies to set aside the service on him of the petition and recognizance upon three grounds.

The first ground is, that while the original petition filed is duly signed by the petitioner as required by the statute, the copy served is not signed, and has, in fact, nothing to indicate that the original is signed, so that it is not a true copy, The second objection is that the copy of the recognizance does not show that it is under seal, and that if the original in fact is so that it is not a true copy. The third objection is that there is no style of cause in the petition.

No cases were cited in support of or against these objections, and I have found none among the reports of election cases to which I have had access. I must therefore dispose of them upon analogy.

In an action at law it is necessary to serve the defendant with a copy of the writ. The original writ by immemorial custom, or by statute in newer countries is always signed by the officer issuing it. Now, in *Carrol* v. *Light* 1 P. R., 137, on a summons to set aside an arrest, one ground being that the copy of the writ served did not contain the name of the Clerk of the Crown, Burns, J., held that without the signature being copied, the paper purporting to be a copy, was such, for the signature is not part of the writ. In *Leach* v. *Jarvis*, 1 Ont. Ch. R, 269, Macauley, C. J., said, "I find no case in which a service had been set aside because the copy did not contain the name of the signer of the writ at the bottom."

That the signature of the officer is no part of the writ was held in *Clutterbuck* v. *Wiseman*, 2 C & J, 213, "It may be necessary," said Lord Lyndhurst, "to authenticate the process, but it is no part of the writ." To have the signature of the petitioner to this original petition is exceedingly important, as evidence that it is filed with his knowledge and approval, and that he makes himself responsible for the proceedings. I cannot, however say, looking at the analogous case of a writ, that the signature forms part of the petition, and that a service of a copy of the petition, without a copy of the signature is an irregularity, for which the service must be set aside.

Reference on this point may also be made to *Hopkins* v. *Haskayne*, 1 Ont., P. R., 184.

In dealing with the second objection, the case of a writ again affords us an analogy.

In *Cameron* v. *Wheeler*, 6 U. C. Q. B., 355, a motion was made to set aside service of a writ on the ground that the copy served was not a true copy, because there were not on it any letters or other designation showing that the writ was sealed with the seal of the court. Mr. Justice McLean said, "In making a copy it is customary to make on such copy some letters, or the word 'seal,' to show that the original was under seal, and the place of such seal on the original; it must, however, be obvious that the seal cannot be copied, and the addition, in fact, of any letters or any word to denote the place of a seal cannot possibly be a copy of the original; the objection then seems to be this, that because the plaintiff has not added something which could not form any part of the copy of the writ he has been guilty of an

irregularity." He held the objection untenable and discharged the application with costs.

This case was followed by Mr. Justice Burns in *Carroll* v. *Light*, already cited.

As to the third objection there is no doubt it may be inconvenient in future proceedings, should the petition be further prosecuted, that there is no style of cause, but I cannot set the service aside on that ground.

The statute says, sec. 17, "The petition may be in any prescribed form; but if, or in so far as no form is prescribed, it need not be in any particular form."

No form has, so far as I can learn, ever been prescribed. That being the case, with such a provision in the statute as I have just quoted, the want of a style of cause cannot render the petition irregular. It is within my recollection that even a bill in chancery required any style of cause.

The respondent asked by his summons for further time to answer. He has, by statute, five days still within which to do so, and from what was said when the summons was argued I understand that is all he requires. No order giving time, therefore, is necessary.

The summons must be discharged with costs.

SUTHERLAND v. SCHULTZ.

Equitable assignment—Registration of patent—Recitals in patent.

A half-breed child conveyed all his "right, title, interest, claim, property, and demand both at law and in equity of which he is now in possession, or of which he may hereafter become possessed, of, in and to the said land to which he is, or may become, entitled as heir at law of such half-breed in the said Province of Manitoba, wheresoever the same has been, or may hereafter be, allotted."

Held, a good equitable assignment.

Held, that a vendor is bound to register the patent through which he claims title.

Held, that a recital, in a patent two years old, of a death intestate, is not sufficient evidence of the fact, as between vendor and purchaser.

G. A. F. Andrews for plaintiff.

J. B. McArthur for defendant.

[*1883.*]

TAYLOR, J.—This is a suit for specific performance brought by the vendor against the purchaser. There is no dispute between the parties as to the agreement, or any of its terms. The suit is a friendly one, instituted for the purpose of submitting certain questions of title for the opinion of the court.

Charles Ross, as the heir at law of one Jean Ross, one of the half-breed children entitled to share in the lands set apart for the half-breed children of the heads of families, in Manitoba, at time of the transfer thereof to the Dominion, on the 3rd of April, 1880, executed an agreement for the sale of his share of these lands. By that agreement, after reciting the fact that he was so entitled, he granted, bargained, sold, transferred, quitted claim, assigned and set over to the vendee all his "right, title, interest, claim, property, and demand both at law and in equity, of which he is now in possession, or of which he may hereafter become possessed, of, in, and to, the said land to which he is, or may become, entitled, as heir at law of such half-breed, in the said Province of Manitoba, wheresoever the same has been, or may hereafter be allotted."

The same agreement also contained a power of attorney appointing *Heber Archibald* the true and lawful attorney, irrevocable of the said *Charles Ross*, to enter into, and upon, and to take possession of all messuages, farms, lands, tenements and hereditaments whatsoever, whether in possession, or in expectancy, and wheresoever situated, derived, or to be derived, from the Crown, as the sole heir-at-law of the child of a half-breed head of family, under the provisions of the statutes heretofore recited. The power also authorized the attorney to sell, and convey, the lands, sign receipts for the purchase money, sign, seal, execute, and deliver, good, sufficient and valid deeds of conveyances and assurances for conveying the lands to the purchaser, his heirs and assigns.

No specific lands are mentioned or described anywhere in the agreement. The first question submitted is, whether under that assignment the title of the half-breed became vested in the purchaser from him.

In my opinion that assignment was a good equitable assignment of the interest of the half-breed in the land in question.

Many assignments and conveyances which would not be good at law, or sufficient to convey to the grantee the legal estate in law, are nevertheless recognized in equity. Thus, while a widow cannot at law convey her dower in the lands of her deceased husband until it has been assigned to her, yet a conveyance of her dower before assignment has been held good in equity, *Rose* v. *Simmerman*, 3 Gr., 598.

The first section of the statute, 44 Vic., c. 19, seems to have been passed for the express purpose of removing any doubt upon this subject. That section is one which it was in my opiuion quite competent for the Manitoba Legislature to pass.

The second question submitted is—Can the purchaser require the vendor to register the crown patent in the registry office of the registration division in which the lands are situated?

I am of opinion that the patent should be registered. The title is a registered one—one conveyance at least having been registered as affecting the land.

In Ontario, with a registry law similar to our own, it has been held that in case of a registered title, a vendor cannot make out a good title unless all

the deeds are registered. *Kitchen* v. *Murray*, 16 U. C. C. P. 69; *Brady* v. *Walls*, 17 Gr., 703. Since these cases *Scott* v. *McLeod*, 14 U. C. Q. B., 574, cannot be relied on as an authority. Apart altogether from the question of the title being a registered one, it is, I think, quite in accordance with the spirit of the registry laws to require registration of the patent. The policy of the registry law is that in some public office near where the lands lie, there should be a record of every transaction or alienation thereof, to use the words of the first registry act passed in the old Province of Canada (35 Geo. 3, c. 5), "for the better securing, and more perfect knowledge, of the same."

It is true the patent is an instrument of record in the proper department at Ottawa, but situated as this Province is, at such a distance from the capital, it is desirable that there should be some record of such an important instrument, more easily accessible in the event of the original being lost or destroyed.

The registration of the patent *in extenso* seems contemplated by the Registry Act, for in it provision is made for the manner in which crown patents may be registered.

It is important, too, in this connection, to remember that the Dominion Lands Act contains no such provision as that in the Ontario Registry Act, under which the Provincial Registrar is required every three months to furnish to each registrar "a statement containing a list of the names of all persons to whom patents have issued from the crown for grants of land within the country since the former statements, and with such general or particular description as the case shall require," Unless these patents are registered by the owners of the land, there will not, in our Manitoba registry offices, be found any record showing the persons to whom lands were originally granted by the crown.

The patent in the present case, after stating that Jean Ross was entitled to the land in question, contains the following recital: "And whereas, the said Jean Ross has since died intestate, leaving him surviving the said Charles Ross of the said parish of St. Francois Xavier and Baie St. Paul, his father and sole heir at law," and then grants the land to the said Charles Ross. The third question submitted is, whether that recital in the crown patent is sufficient evidence of the death, intestacy, and heirship?

The general rule acted upon by conveyancers is thus stated in *Lee on Abstracts*, page 360, "Statements contained in deeds thirty years old or upwards, may be considered as good, secondary evidence; and where the facts recited are not very important, a purchaser may be satisfied with such recitals without other evidence, even if contained in deeds of more recent date, twenty years old, for instance, may be sufficient. Where, however, the facts are very important, a purchaser should not rely on the recitals even of an old deed. Thus, it has been held, that it is not sufficient to prove an important descent in a pedigree, for the vendor to produce deeds which recite the pedigree, although these deeds are upwards of thirty years old. *Slaney* v. *Warde*, 1 M. & C. 358; *Fort* v. *Clarke*, 1 Russ, 601. It is more important to require further evidence, than a mere recital, of the death of a person, where by the probable duration of life he may still be supposed living, *Coventry's Conveyancer's Evidence*, 298.

In the present case the instrument containing the recital is not yet two years old, so that clearly in the case of an ordinary conveyance, this recital could not be accepted as evidence.

Does it then make any difference, that the instrument containing the recital is not an ordinary conveyance, but a patent under the great seal? In my opinion it does not.

I have been unable to find any reported English or Canadian case upon this point. In an anonymous case reported, 12 Mod, 584, it was decided that a recital in an Act of Parliament, stating J—— S—— to be the heir of a particular person, was not evidence of the fact.

Penrose v. *Griffith*, 4 Binney, 231, was a case in which the Supreme Court of Pennsylvania was called upon to decide whether the recital contained in a patent from the State, of divers mesne conveyances, by which the interest of the original locatee had become vested in the patentee, was sufficient evidence of this, and the Court held it was not. The same question of the sufficiency as evidence of recitals in a patent came before the Court in *Weidman* v. *Kohr*, 4 S & R, 174, and there also it was said that they were not.

Reference may also be made to *May* v. *May*, Bull N P, 112.

Following these authorities I should hold that the recital in the patent of the death intestate of Jean Ross, and of the heirship of Charles Ross, is not sufficient evidence thereof, but that the purchaser is entitled to call for proof of these facts.

The bill contains no prayer for costs, and on the argument it was stated that neither party made any claim for these.

HUTCHINSON v. CALDER.

Fraud—Rescinding sale.

Defendant H. sold land to defendant C. at $10 an acre; defendant C. sold to plaintiff at $30, representing to him that he was acting as agent for the owner; plaintiff purchased, believing defendant C. to be an agent merely. Plaintiff would have made further enquiries before purchasing had he known that C. was the real owner. C. procured H. to convey direct to plaintiff. The consideration expressed was the higher price. H. was no party to the fraud.

Held, That the plaintiff was entitled to have the transaction cancelled.

Held, That as against H. the bill must be dismissed with costs.

The bill was filed by the plaintiff, a purchaser from defendant Calder, to rescind a sale and for repayment of purchase money.

It stated as follows:—

In January, 1881, defendant Calder applied to plaintiff, to sell to him a parcel of land in Manitoba at $30 an acre, defendant represented the land to be good, arable land, and that he knew it personally and it would soon become valuable and sell for $50 an acre; defendant Calder always referred to the owner of the lands as being a third person, whereas he was himself the owner, and had recently bought same from the defendant, Harvey, for $10 an acre; plaintiff subsequently discovered the real facts, and that the land was not good, arable land, but low, wet land, commonly called poor hay land.

S. Blanchard and *W. R. Mulock* for plaintiff.

A. C. Killam for defendant Calder.

H. M. Howell for defendant Harvey.

[*27th March, 1883.*]

TAYLOR J.—After a careful consideration of this case I have come to the conclusion that the plaintiff is entitled to relief as against the defendant Calder. I do not attach so much weight, as the counsel for the plaintiff seemed to do, to any intimacy existing between the plaintiff and defendant prior to their meeting in Winnipeg. The plaintiff, did, however, seem to place some reliance upon the defendant's knowledge of real estate matters here, and to have been influenced first by the defendant making statements about the land in question being an investment he was about to offer to George Jackson in London, and second by the manner in which the defendant acted (I cannot help saying) with the deliberate intention of making the plaintiff suppose that he was merely an agent, with no personal interest in the land while he was, in fact, the owner himself.

That something was said about the land being intended as an investment for this "George," there can be little doubt. The plaintiff could not man-

ufacture such a conversation out of nothing. The defendant admits that he was making some investment for this "George." That the plaintiff knew this George Jackson to be a friend of the defendant, and a person for whom he was acting as agent in Winnipeg, was well calculated to throw him off his guard.

Then, unless the defendant had some sinister motive, why was the defendant so careful to conceal from him that he was the owner. Why did he, when the plaintiff asked who was the owner, answer "A man in Winnipeg." When the plaintiff said he preferred paying half cash and getting time for the balance, according to his statement defendant said he must consult the owner. The defendant denies saying this, but admits that he did say he would see by morning, and then told him that 5 per cent. off was the best he could do for him. It it plain that he spoke and acted in the way he did to raise in plaintiff's mind the belief that he was not the owner.

The reason for his conduct now assigned, that he did not wish the bank to know that he was dealing in real estate, cannot be accepted as a satisfactory one, for he seems to have had no objection to everybody but the plaintiff knowing that he was so dealing.

What the real value of the property may be it is hard to say. It is, I think, very doubtful if it was at the time of the sale of anything like the value at which the plaintiff bought it.

The defendant represented to the plaintiff that he knew the land from personal observation, having shot over it, and he referred the plaintiff, for confirmation of what he said, to a man then in his employment. It now appears that on one occasion when out on a shooting expedition they drove across a part of the country in the neighborhood of this land. I am quite satisfied from the evidence, that the plaintiff, had he known that the defendant was owner of the land, would have made further enquiries, and would, before closing with defendant, have obtained the information which he afterwards acquired. That plaintiff put the case in the hands of two agents for sale, putting on it a price higher than he paid, does not tell against him. He bought the land to resell at a profit, and having paid a high price, he had, if he expected any profit, to put it with them at a higher price. They seem, from the first, not to have held out to him any hope that they could realize such a price for him, although, they said, they would do their best.

Such a course of dealing as was pursued here by the defendant is, perhaps, not uncommon, and may not by many people be regarded as severely censurable, but courts of equity require scrupulous good faith in transactions which even the law might not repudiate.

It was said by V. C. Page Wood, (afterwards Lord Hatherly) in *Blissett v. Daniel*, 10 Hare, 536, "The view taken by this Court as to the morality of conduct among all parties is one of the highest morality. The standard by which parties are tried here is a standard, I am thankful to say, far higher than the standard of the world." To the language so used by that learned judge I fully subscribe.

As to the defendant Harvey, I do not see that I can give the relief sought against him. He would certainly have acted better had he not executed the deed purporting to convey the land to the plaintiff with the increased price stated as the consideration; but he in no way misled the plaintiff to induce him to enter into the bargain. He had sold the land to Calder at $10 an acre, and then defendant having informed him that he had resold to the plaintiff at $30, he executed the deed with the increased consideration mentioned in it, and at Calder's request received the cheque for the whole amount, and handed back to him the amount of profit Calder was making.

Even after the transaction was all over Calder denied to Johnston, the plaintiff's son-in-law and agent, that he had been interested, and insisted that he had only received a commission on the sale of the land as an agent.

The plaintiff is entitled to a decree rescinding the sale and for repayment of the purchase money, and for costs against the defendant Calder. Against the other defendant, Harvey, the bill is dismissed with costs.

[This case stands for judgment on rehearing before the full court.]

REID v. WHITEFORD.

Estate tail—Barring entail—Enrolment of deed.

A conveyance barring an entail does not require enrolment, registration being sufficient.

By deed dated the 16th December, 1880, made between James Kerr, of the first part, Laura Jane Kerr, his wife, of the second part, and Alex. M. Bell, David C. Bell, and John Alex. Kerr, of the third part, James Kerr settled certain lands therein described "for the separate use and behoof af the said party of the second part for and during her natural life," and after the decease of the said party of the second part, "for the said James Kerr, party of the first part," and after the decease of the said James Kerr "for the heirs of the body of the party of the second part by the said party of the first part, lawfully begotten, and on default of such issue then surviving, then upon trust for the said James Kerr, his heirs and assigns for ever."

Subsequently, by deed dated the 22nd December, 1882, made in pursuance of the Act respecting short forms of conveyance, between Alex. M. Bell, David G. Bell, and John Alex. Kerr of the first part, Laura Jane Kerr of the second part, James Kerr of the third part, and Hayter Reed of the fourth part, after reciting the estates and interests of the parties under the deed of 16th December, 1880, and that the parties of the first, second and third parts had agreed with the party of the fourth part, for the sale

to him of the unencumbered fee simple in possession of the hereditaments thereinafter expressed to be granted, the several parties, according to their respective estates and interests, did grant and confirm unto the party of the fourth part, certain lands, being the same as those described and conveyed by the deed of 16th December, 1880, to have and to hold the said premises, thereinbefore expressed to be thereby granted, unto the said party of the fourth part, his heirs and assigns for ever, freed and discharged from the said estate tail, and all other estates tail, of the said party of the second part in the same premises, and all remainders and reversions, estates, rights, interests and powers, to take effect before or after the determination, or in defeasance, of such estate tail or estates tail, to the use of the said party of the fourth part, his heirs and assigns forever.

This deed contained a covenant on the part of the parties of the first part that they had done no act to encumber, and covenants by the parties of the second and third that they had done no act to encumber; that they had the right to convey; for further assurance; and that they had a good title to their respective estates; on this deed was endorsed a certificate that Laura Jane Kerr had acknowledged the deed and had been examined separately and apart from her husband, touching her knowledge of the contents of said deed and her consent thereto, and that she had declared the same to be freely and voluntarily executed by her. This certificate purported to be signed by "W. Leggo, Master in Equity, Manitoba."

On the first of May, 1883, the plaintiff contracted to sell part of the land conveyed by the above mentioned deeds to the defendant. The defendant having taken certain objections to the title, the present suit was instituted for the purpose of enforcing specific performance of the agreement for purchase.

P. A. Macdonald, for the plaintiff.

Hough, for the defendant.

[*30th June, 1883.*]

TAYLOR J. — The objections taken by the defendant are: That although a deed pretending to bar the entail has been executed, it has not effectually done so, and that there is no method in this country by which an estate tail can be barred. He claims that the conveyance barring the entail must be enrolled in chancery, and that a certificate of the Master in Equity as to the acknowledgment of the execution of the deed by Laura Jane Kerr, verified by affidavit, must be filed in the Court of Common Pleas at Westminster; but neither of these requirements has been, and in fact neither of them can be, complied with. In answer to these objections the plaintiff contends that the deed in question has been registered in the registry office for the City of Winnipeg, where the lands lie, and that such registration is a sufficient compliance with the terms of the statute under which the deed is executed.

In the absence of any local legislation on the subject, the method of barring an estate tail in this Province seems to be governed by the provisions of the Act for the abolition of Fines and Recoveries, 3 & 4 Wm. IV., c. 74.

The 41st section of that Act provides that "no assurance by which any disposition of lands shall be effected, etc., by a tenant in tail shall have any operation under this Act, unless it be enrolled in Her Majesty's High Court of Chancery within six calendar months after the execution thereof." The 84th section requires, in the case of a married woman, an acknowledgment before a judge, master in chancery, or two perpetual commissioners, and the 85th section requires a certificate of this acknowledgment, verified by affidavit, to be filed with some officer of the Court of Common Pleas at Westminster, appointed by the Lord Chief Justice. I am not aware that the question raised has ever been so before in this Province, nor can I find any decisions in Ontario before the passage of the Act of Upper Canada respecting the barring of estates tail.

There are, however, several Ontario decisions respecting deeds under a statute which contains some similar provisions.

The Court there has held that the Statute 9, Geo. II, c. 36, the Statute of Mortmain, was introduced into Upper Canada by the Constitutional Act of 1792, or recognized by the legislature as in force. The first section of that Act provides that no manors, lands, etc., shall be given, granted, etc., unless such gift, conveyance, etc., be made, etc., "and be enrolled in Her Majesty's High Court of Chancery within six calendar months next after the execution thereof." In the case of *Hallock* v. *Wilson*, 7 U. C., C. P. 28, in which the plaintiff claimed title under a deed for a charitable use, and not enrolled in chancery, Hagarty, J., who delivered the judgment of the court, said, at p 30, "If the case were to turn on the mere question of enrolment in chancery, we think any court in this country would hesitate long before deciding against the plaintiffs, taking into consideration the object of enrolment under the Act of 9 George II, to ensure publicity in a country where only two counties enjoyed a land registry office."

Although in the earlier part of the judgment, the Upper Canada Statutes, 1 Wm. IV, c. 1, s. 47, and 13 & 14 Vic., c. 63, s. 6, which dispense with the enrolment of deeds of bargain and sale, and substituted therefor registration, are referred to as affording an additional reason for holding the plaintiff's deed valid, yet in the concluding part the court seems to rest its finding broadly on the fact that enr olme of deeds had never prevailed to any extent in the Province, the absence of the necessary machinery to carry it out, and the reason and object of enrolment itself. The case was followed by *Mercer* v. *Hewston*, 9 U. C., C. P., 349, when the question arose as stated by Draper, C. J., whether the deeds in question, "which, according to the express language of 9 George II, would be wholly inoperative and void unless enrolled in the Court of Chancery, can pass the estate, either because enrolment was not requisite in Upper Canada, or because registration is equivalent thereto." There the court, after a full consideration, held that the deed in question having been executed before 1837, *ex necessitate* enrolment must be dispensed with, there having been no court of chancery in which it could be enrolled. Here we have a Court of Queen's Bench which possesses and exercises "all such powers and authority as by the laws of England are incident to a superior court ot civil and criminal jurisdiction, and which shall have, use, enjoy, and execute all the rights, incidents and privileges as fully to all

intents and purposes as the same were on the 15th day of July, 1870, possessed, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster, or by the Court of Chancery at Lincoln's Inn." Possibly under this, the deed in question and similar deeds might be enrolled in the Court of Queen's Bench, although it may be observed that in the 6th section of cap. 31 of the Con. Stat., which defines the jurisdiction and powers of the Court of Chancery in England, which may be exercised by this court, there is no general head under which the enrolment of deeds could well be said to fall. However this may be, it is evident that the other requirements of the 85th section of the English Act, and which is as imperative as the enrolment in chancery, namely, the giving of a certificate of the acknowledgment of the execution of the deed under some officer appointed by the Lord Chief Justice ot the Court of Common Pleas, cannot be complied with.

Such being the case, considering that the provisions of the Imperial Act, or similar provisions, cannot well be complied with, and considering that the object of enrolment was to secure publicity, and that that can be obtained as fully, and indeed more effectually by registration in the registry office of the district where the lands are situate, I think I should hold that in this Province enrolment is not necessary, but that registration in the registry should be considered as sufficient.

Entertaining that opinion, I must hold that so far as the objections taken before me by the defendant extend, the deed of the 22nd December, 1882, was effectual as a bar of the estate tail in the lands in question.

[NOTE.—Compare with this a point which arose under the marriage laws in Upper Canada The Imperial Act, 26 Geo. II, c. 33, forbade the issue of a license for the marriage of persons under age without the consent of their parents. The 11th section declared that marriage in contravention of this Act should be null and void. The 12th section allowed an application to be made to the Lord Chancellor for his consent where the parents were *non compotes mentis*, beyond the seas, or withheld their consent unreasonably. It was held in *R.* v. *Roblin*, 21 U. C., Q. B. 352, and *Hodgins* v. *McNeil*, 9 Gr., 305, that although the Imperial Act was generally in 1orce in Upper Canada, the 11th and 12th sections were not. The reason given in the former case was the impossibility of compliance with the requirements of the 12th section.]

(*Above case and note are taken from the "Canadian Law Times."*—REP.)

BOULTBEE v. SHORE.

Specific performance—Damages--Date of assessing damages.

In an action by a purchaser, for specific performance of a contract respecting lands, intended to be held by him for sale, where damages have been decreed, instead of specific performance, on account of the sale, by the vendor. of the lands to a third party, the date of the breach of the contract is the period at which the value of the land in question is to be estimated for the purpose of assessing the damages.

Appeal from the Master in Equity. The facts of the case sufficiently appear in the judgment.

Mulock, for the appeal.

Howell and *Hough*, contra.

[*27th March, 1883.*]

TAYLOR, J.—Since the passing of the Imperial Act, 21 & 22 Vic., c. 27, (generally known as Lord Cairn's Act) the Court of Chancery may, if it think fit, award damages either in addition to, or in substitution for, specific performance. The present case is one falling within the class of cases intended to be provided for by that Act.

A decree has been made which directs the Master to make enquiry into, and take an account of, the damages to which the plaintiff is entitled from the defendant. The decree further declares that the defendant, being a trustee of the legal estate in the lands in question, and having in violation of his duty wilfully, and fraudulently, sold, and conveyed away, the lands, is on this ground also liable to account to the plaintiff. Pursuant to this decree, the Master has made a report, against which the defendant appeals on the ground that the Master has taken the account of damages on a wrong principle, and so charged too much against the defendant.

The learned counsel for the plaintiff contended that the court should not interfere, because it will do so only where the damages awarded are grossly extravagant, which is not shown to be the case here. The objections taken, however, that too great damages have been awarded, because the Master has proceeded upon a wrong principle in fixing the amount, seems to me quite open to the defendant.

The object of the Imperial Act, 21 & 22 Vic., c. 27, was to enable a court of equity to do complete justice in cases where it previously had jurisdiction, but where circumstances had occurred which disabled the court from decreeing specific performance, and so rendered it necessary for the plaintiff to seek relief in a court of law for damages. Under the Act the court can do complete justice between the parties by the award of adequate damages for the non-performance of the contract.

The learned counsel for the defendant conceded that the present is not a case where the failure to convey has arisen from defective title, or anything of that nature, whereby the defendant is liable for nominal damages merely. He practically admitted it to be a case in which the defendant must pay substantial damages. The only question is how should the *quantum* of these damages be ascertained.

That the defendant is by the decree declared liable to account as a trustee does not, so far as I can see, make any difference in the extent of his liability. Where a trustee is guilty of a breach of trust, the rule of the court is that he shall not be allowed to benefit by his own improper act; that any profit he has thereby made shall be handed over to his *cestui que trust*, who is to be placed in the same position, which he would have been in, had the breach of trust not occurred. In exactly the same way, where a vendor has failed to carry out his contract under circumstances, which, as here, render him liable for substantial damages, "the rule of law," it was said by Lord Chelmsford

in *Bain* v. *Fothergill*, L. R. 7 H. L. 158, "is well settled, that the measure is the difference between the contract price and the market value. It is true that often it is difficult to determine the market value, but it can in the case of real, as of personal property, be determined by a comparison of sales of property nearly similar in the situation and quality of the lands."

The question then remains, what period of time is to be fixed upon as that at which the value is to be taken for the purpose of estimating the damages. The Master has taken the month of February, I presume, because the defendant says he intended holding the property until then.

One American case places the time at the empanelling of the jury; *McConnell* v. *Dunlop*, Hardin, 41. In *Sedgwick on Damages*, at page 374, an English case of *Robertson* v. *Dumaresq*, 2 Moo. P. C. N. S. 66, is referred to. I have been unable to see the report of that case; but in Sedgwick it is stated that the plaintiff was held entitled to compensation measured by the value of the specified land at the time of bringing suit. In Fisher's Digest, where the same case is referred to, it is said to have been "at the time of the trial." Singularly enough this case does not seem to have been referred to in any of the more recent cases.

The weight of the authority seems to me to be in favor of fixing upon the the date of the breach of the contract as the date at which the value is to be estimated. The question is, what was the value of the land upon that day, What sum would on that day have enabled the plaintiff to purchase other land, similarly situated and of equal value.

The arguments and the reasoning which apply in the case of lands contracted for, with the purpose of being held by the purchaser or built upon and occupied by him, have no place in this case, which is one of lands bought with the intention of turning them over at the first opportunity to the highest bidder.

In my opinion, the 26th of November, when the defendant became aware that the land had been conveyed away should be the date fixed as that on which the breach of contract occurred.

Mr. Howell argued that to fix upon that date or the 24th of November would have the result of making the defendant hand over merely the increased price at which he sold, and would not in any way punish him for his misconduct.

Damages by way of punishment are sometimes given in cases of tort, not so far as I am aware in cases of breach of contract. Even where there has been a breach of trust, restitution, not punishment, is what the court aims at.

The appeal must be allowed with costs.

FORTIER v. GREGORY.

(IN CHAMBERS.)

Time for pleading—Christmas and three following days.

The plaintiff signed judgment in default of pleas on the twenty-seventh day of December, 1883, the last day to plead falling on Christmas day.

The defendant moved to set aside judgment on the ground that Christmas day does not count, nor the three following days, in a notice to plead, and that the judgment was signed before the time to plead had expired.

The defendants relied on Rule 175, Hilary Term, 1853, under the Common Law Procedure Act, which reads, "The days between Thursday next before, and the Wednesday next after Easter day and Christmas day, and the three following days, shall not be reckoned as included in any rules, notices or other proceedings, except notices of trial or notices of inquiry.

G. B. Gordon for plaintiff.

A. E. McPhillips for defendant.

[*15th January, 1884.*]

WALLBRIDGE, C. J.—*Held*, that Christmas day and the three following days could not be reckoned in any rules, notices or other proceedings; that rule 175, Hilary Term, 1853, was in force in this Province, and set aside judgment.

BISSON v. SINNOTT.

(In Chambers.)

Affidavit of Service of Writ—Endorsements on Writ.

Summons to set aside judgment signed in default of pleas, on the ground (*inter alia*) that the affidavit of service of the writ of summons did not show that the copy served on the defendant had been endorsed with particulars of plaintiff's claim, and that there was therefore no evidence before the prothonotary to prove the amount of plaintiff's claim.

A. E. McPhillips for plaintiff.

C. P. Wilson for defendant.

[*17th January, 1884.*]

Wallbridge, C. J.—*Held*, that the affidavit of service must show that the defendant had notice of the endorsement on the writ.

Also, that the words "writ of summons" in the affidavit refer merely to the writ itself, not to the endorsements.

BEACH v. GRAVES.

DOMINION TYPE CO. v. GRAVES.

(In Chambers.)

Garnishee orders—Priority—Sheriff and Deputy Sheriff.

A garnishee order was taken out in the first suit in the County Court at Emerson, and served on sheriff's bailiff at Emerson, and the deputy-sheriff at Winnipeg.

In the second suit a garnishee order issued out of the Court of Queen's Bench was served on the sheriff personally, subsequently to the service effected in the first suit.

Plaintiff in the first suit took out a summons to settle the priorities.

A. E. McPhillips for plaintiff in first suit.

W. E. Perdue for plaintiffs in second suit.

[*12th January, 1884*]

WALLBRIDGE, C. J.—*Held*, that service on the deputy-sheriff in his office during office hours was good service on the sheriff, and therefore an order so served had precedence over an order subsequently served on the sheriff.

MEYERS v. PRITTIE.

(IN CHAMBERS.)

Foreign Judgment—Defence which might have been set up in original action.

Plaintiff, an Ontario solicitor, recovered judgment against defendant, a resident of Ontario, for default of appearance, in an action for professional services.

Defendant applied before the Master in Chambers to set aside the judgment, alleging that he had not received properly signed bills of costs, that services had been charged for, which he had not authorized, and on other grounds.

Mr. Dalton held the judgment good, but ordered that on payment of the cost of the application, defendant should be allowed a certain time to tax plaintiff's bills, the judgment in such case to be reduced by the amount taxed off, and that failing such payment and taxation, within such time, the judgment should stand for amount for which signed.

An appeal from this order to a judge was dismissed.

Defendant allowed the time limited by the Master's order to pass without paying the costs of the application or taxing the bills.

In an action on the Ontario judgment defendant pleaded:—

Never indebted, and two other pleas, alleging respectively, that plaintiff was not a duly certificated attorney according to the law of Ontario, and that he had not delivered signed bills according to such law, and a fourth plea by way of counter-claim for damages resulting from alleged want of skill on plaintiff's part. The plaintiff now applied to strike out the defence on the ground of embarrassment and delay.

A. E. Richards, for plaintiff.

G. B. Gordon, for defendant.

TAYLOR, J.—*Held*, that as defendant could under the circumstances of the case have availed himself of these defences in Ontario, his pleading them here caused embarrassment and delay, and ordered pleas to be struck out.

KEELER v. HAZLEWOOD.

(IN CHAMBERS.)

Attachment—Setting aside—Defective Affidavit.

A writ of attachment was issued upon an order made upon an affidavit which omitted to state that the indebtedness was due "after making all proper and just set-offs, allowances and discounts" as required by Con. Stat. c. 37, ss. 14, 1. Defendant moved to set the writ aside as irregular on account of the omission.

G. B. Gordon, for plaintiff.

Aikins, Culver & Hamilton (*N. D. Beck*), for defendant.

[*December, 1883.*]

WALLBRIDGE, C. J.—*Held*, that the omission of the words was fatal, and without those words the judge who made the order had no jurisdiction.

Also, that any judge might entertain an application to set aside the writ, it not being based on the assumption that the judge who made the order had in doing so erred in judgment or discretion.

GLASS v. McDONALD.

(IN CHAMBERS.)

Time—Service of Notice of Intention to Appeal.

An order of the Hon. Mr. Justice Taylor, on appeal from the Master's Report was dated 10th December, 1883, but the minutes of it were not settled till 14th December. Notice of intention to appeal from the order was served on the plaintiff's solicitor on 19th December.

Chester Glass, for plaintiff, moved before the Referee in Chambers to set aside the notice of appeal on the ground that it was given too late, and for irregularities in the form of the notice, and cited *Re Risca Coal and Iron Co., Ex parte Hookey*, 8 Jur. N. S. 900. *Ontario Chancery Orders*, numbers 324 and 329.

J. S. Hough, for defendant, cited *Harvey* v. *Boomer*, 3 Ont., Ch. Ch. R. 14, also *Equity Orders*, 162, 170, 315 and 316.

WALLBRIDGE, C. J.—*Held*, affirming the order of the Referee, that the time for the service of the notice must be reckoned from the date of order and not from the date of settling it, and that the notice of appeal was given too late.

Leave was however given to proceed with the rehearing, notwithstanding the lapse of time, there having been a *bona fide* intention to appeal.

BRISEBOIS v. POUDRIER.

(IN CHAMBERS.)

County Court—Jurisdiction—Where Cause of Action arose—Prohibition.

The defendants, by letter written from Brandon, directed to the plaintiff, who is the Registrar at Minnedosa, ordered certain abstracts of title which were mailed by plaintiff at Minnedosa, addressed to defendants at Brandon.

Plaintiff sued for his fees in the County Court at Minnedosa. The defendants defended and raised the question of jurisdiction, contending that the cause of action did not arise within the jurisdiction of the court at Minnedosa.

Walker, C. C. J., gave a verdict in favor of the plaintiff.

Thereupon the defendants took out a summons in the Court of Queen's Bench to restrain further proceedings, and to show cause why a writ of prohibition should not issue.

A. E. McPhillips, for plaintiff, showed cause, and argued that the cause of action arose within the jurisdiction of the Minnedosa County Court, and cited as to where contract completed, *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Potter* v. *Saunders*, 6 Ha. 1; *Dunlop* v. *Higgins*, 1 H. L. C. 381. He also argued that a writ of prohibition will not be granted unless an excess of jurisdiction shown, *Ricardo* v. *Maidenhead Board of Health*, 2 H. & N. 257; nor where jurisdiction doubtful, *Re Birch*, 15 C. B. 743; *Barnes* v. *Marshall*, 18 Q. B. 785, and *Jackson* v. *Beaumont*, 11 Ex. 300, where it was held that where goods were ordered at Leeds, deliverable at Manchester, the County Court at Leeds had no jurisdiction to try the case, and argued that in this case the delivery was at Minnedosa, namely, by posting abstracts at post office when delivery was complete.

Aris v. *Orchard*, 6 H. & N. 160; *Watt* v. *VanEvery*, 23 U. C., Q. B., 196; *Newcomb* v. *DeRoos*, 2 E. & E. 271, which, he argued, was parallel with the case in question.

T. D. Cumberland, for defendants, cited *Hagel* v. *Dalrymple*, 8 Ont. Pr. R. 183.

[*9th January, 1884.*]

DUBUC, J.—*Held*, that writ of prohibition would not lie, on the ground that the cause of action arose within the jurisdiction of the County Court of Minnedosa, and dismissed the summons with costs.

IMPERIAL BANK OF CANADA v. PRITTIE.

(IN CHAMBERS.)

Special endorsement of writ for service out of jurisdiction—Appearance—Motion for judgment.

The writ issued was for service out of the jurisdiction, and was specially endorsed.

Defendant appeared.

Aikins, Culver & Hamilton (*N. D. Beck*), for plaintiffs, took out a summons under 46 and 47 Vic., c. 23, s. 16, to strike out the appearance, and for leave to sign judgment.

T. H. Gilmour, for defendant.

[*10th December, 1883.*]

DUBUC, J.—*Held*, that a writ of summons for service out of the jurisdiction should not be specially endorsed, but that the defendant had waived the objection by entering an appearance, and made the order as asked.

KEELER v. HAZLEWOOD.

(IN CHAMBERS.)

Form of Interpleader Order.

The ordinary form of an order directing an interpleader issue had been drawn up and came before the judge for settlement.

G. B. Gordon, for plaintiff.

Aikins, Culver & Hamilton (*N. D. Beck*), for defendant.

I. Campbell, for sheriff.

WALLBRIDGE, C. J.—*Held*, (1) that where an interpleader issue is directed at the instance of a sheriff, the general rule is that the order should direct the sheriff to withdraw from possession upon payment to the sheriff by the claimant of the possession money from the date of the order, not from the date of the seizure or of the making of the claim.

(2) Under 46 and 47 Vic. c. 30, the proper issue to direct is "Whether at the time of the seizure of the goods by the sheriff the goods were the property of the claimant as against the execution creditor."

In both these respects the printed forms in use are incorrect.

BAIN v. TORRANCE.

IMPERIAL BANK GARNISHEES.

(IN CHAMBERS.)

Bank and its Branches.

Plaintiff applied for payment over, by the Bank, of money deposited with them at their branch office at Winnipeg.

Previous to the garnishee order being made the money had been paid over by the head office at Toronto under sequestration issued against T. in Ontario.

Held, following *Irwin* v. *Bank of Montreal*, 38 U. C., Q. B. 375, that a bank and its branches are but one concern, and that the application must therefore be discharged with costs.

W. E. Perdue for plaintiff.

Aikins, Culver & Hamilton (*N. D. Beck*), for garnishees.

[*2nd February, 1884.*]

TAYLOR, J.—This is an application for payment over, by the Imperial Bank, of a sum of money alleged to have been deposited with the bank by Torrance, the judgment debtor, in answer to which the Bank says that there was not, when the garnishing order was made, any such money on deposit.

No affidavits are filed, but by consent certain facts are stated, upon which I am asked to deal with the application. These, as I understand them, are as follows:

Torrance deposited in the Savings Bank Branch in Winnipeg, of the Imperial Bank, certain moneys. The Imperial Bank is a chartered bank having its head office at the city of Toronto, in the Province of Ontario. By a decree made in the Chancery Division of the High Court of Justice of Ontario, Torrance was ordered to pay a sum of money, and he having failed to obey the decree, a writ of sequestration was issued. Notice of this was given by the sequestrator to the Imperial Bank at its head office in Toronto, and thereupon at the request of the Bank in Toronto the money on deposit in Winnipeg was remitted to Toronto, and paid over to the sequestrator. After the money had been so remitted the garnishing order in this action was obtained and served upon the Bank in Winnipeg.

I do not think that a sequestration issued by a Court in the Province of Ontario could affect choses in action in this Province. It was held in *Bloomfield* v. *Brooke*, 8 Ont., Pr. R. 266, that an attachment or sequestration issued against executors in the Province of Quebec did not affect the assets of the estate in Ontario.

Where the Court of Chancery in England appointed a receiver of an estate in Ontario, and the receiver sent out an agent to take possession of the estate, it was found necessary to file a bill in the Court of Chancery in Ontario, and to have the agent appointed receiver by that court, *Louth* v. *Western of Canada Oil Company*, 22 Gr. 557. But although a sequestration issued in Ontario may not bind choses in action in this Province, that is, could not be put in force against them here, yet it may be a question how far a voluntary payment made would be good. In *Wilson* v. *Metcalfe*, 1 Beav. 269, while Lord Langdale considered that although the mode in which a sequestration could be made effectual in respect of choses in action, might be a question requiring much consideration, a voluntary payment would be protected.

In re Thorpe, 15 Gr. at p. 81, V. C. Mowat held that payment of mortgage money to a foreign administrator would not be sufficient, at all events, for the purposes of the Act for Quieting Titles. In support of his view he has the opinion of Mr. Justice Story in his work on the Conflict of Laws, sec. 515, and against it on the other hand there is a dictum, if not a judgment, of Chief Justice Tindal in *Whyte* v. *Rose*, 3 Q. B. 510, and the opinion of Chancellor Kent in *Cutter* v. *Davenport*, 1 Pickering 81.

Then there must be considered the relation in which branches of banks stand to the head office and to one another. It has been held that notice to the head office is notice to all the agencies, *Willis* v. *Bank of England*, 4 A. & E. at p. 39, so where a customer has money at his credit in one branch, and an account which is overdrawn in another, the sum at his credit may without notice to him be transferred to the branch where his account is overdrawn in order to balance it, *Garnet* v. *McKewan*, L. R. 8 Ex. 10.

A bank, although having many branches and places of business, is still only one body, the bank is the only debtor to the depositor.

The question raised upon this application is one of considerable importance, but I think that in disposing of it I must follow the authority of *Irwin* v. *Bank of Montreal*, 38 U. C., Q. B. 375.

In that case, Wm. Irwin, after living a number of years in Upper Canada, went home to Ireland, and after living there two years died. He had a sum of money deposited in the Cobourg branch of the Bank of Montreal. On his death, Gardiner, in whose house he died in Sligo, got possession of the deposit receipt, and by falsely representing himself to be the cousin and sole next of kin of Irwin, obtained from the Ballina Registry in Ireland, letters of administration to his estate. In May, 1872, Christopher Irwin, the only brother of Wm. Irwin, gave notice to the Bank at Cobourg that he was the only brother and next of kin, and that he claimed all the moneys, securities and property his brother died possessed of. In September, 1872, Gardiner, by his attorney, produced and filed in the proper office of the Superior Court of Lower Canada an exemplication of the letters of administration granted to him in Ireland, and procured from the Court certified copies of these according to the law of Quebec. Thereafter the Bank, at its head office in Montreal, paid over the money to the attorney of Gardiner. Before this payment was made a will of William Irwin was found, and letters of administration, with the will annexed, were granted by the Court of Probate in Dublin, to John Irwin, a relative, until Christopher Irwin, his brother, should apply for them to himself, and on the 31rst of May, 1873, letters of administration, with the will annexed, were granted by the Surrogate Court of Northumberland and Durham, in Ontario, to Christopher Irwin.

He then began an action against the Bank, in which, besides raising a number of questions as to the validity of the letters of administration under which the money was paid, he claimed that the money having been deposited at Cobourg it was assets of William Irwin's estate in Ontario, and the Bank could not deal with it or pay it out at its head office in the Province of Quebec. At the trial, Chief Justice Hagarty entered a verdict for the defendants, with leave to move to enter a verdict for the plaintiff. On an application in Term pursuant to the leave reserved the Court, although holding that the money was payable at Cobourg, yet as the debtor, the Bank, had two residences, one in the Province of Quebec, and "chose to consider the money as

payable there, and did pay it there, the money became payable there, and was rightly paid there," the plaintiff's rule was therefore discharged.

This seems to me an analogous case, and that I should therefore decide this present application in favour of the Bank. I have read the regulations printed at the beginning of the pass book issued to the depositor, but I do not think they contain anything which affects the question. When the application was made nothing was said as to costs, but the Bank is entitled to have the summons discharged with costs.

GAULT v. McNABB.

(IN CHAMBERS.)

Foreign Judgment—Striking out Pleas disposed of in original action.

Action upon a judgment obtained in Ontario for goods sold and delivered to a firm of which defendant was a member. The defendant defended the original action upon the ground that prior to the sale of the goods the defendant had left the firm and had so notified the plaintiff. After a verdict had been entered for the plaintiff the defendant moved in Term for a new trial, upon the ground that the verdict was against law and evidence and the weight of evidence, but his motion was refused and judgment was entered for the plaintiff. In the present action the defendant pleaded the same defence.

On motion to strike out the pleas, upon the ground that they delayed and embarrassed the plaintiff,

Held, that the pleas should be struck out, and the plaintiff permitted to sign judgment.

Ewart, for the plaintiff. The pleas are said to be justified by Con. Stat. c. 31, s. 28. The court will not so hold unless compelled to do so. In construing a statute the court will never give it a meaning which it believes the Legislature could not have had in contemplation. *Re Goodhue*, 19 Gr. 366. Every civilized country respects the judgments properly obtained in other countries, and the court will struggle against any interpretation which will make Manitoba the sole exception. *Philli-*

more's International Law, vol. 4, c. 48. The statute does not permit defences which were pleaded to be pleaded again. It only refers to defences which "might have been" raised but were not. At all events the court will exercise the power given it by the last clause of the section, and will not refuse to recognize the comity of nations or the comity which ought to be more strongly felt as between Provinces.

Martin, for the defendant. The court must be guided by the statute, and not by its own views of the propriety of legislation. The statute says that notwithstanding the existence of a judgment the defendant may plead to the merits, and that is what we have done. There is no ground for suggesting delay in this case. We will consent that evidence which was taken before may be read upon the trial. The defendant was at a disadvantage at the last trial, his evidence having been taken upon commission, and some statements being made at the trial which, if he had been present, he could have contradicted.

[*January, 1884.*]

DUBUC, J, after having taken time to consider the matter made an order striking out the pleas, and permitting the plaintiff to sign jndgment. He referred to *Godard* v. *Gray*, L. R. 6, Q. B. 139; *Schibsby* v. *Westenholtz*, L. R. 6 Q. B., 155; *Copin* v. *Adamson*, L. R. 9 Ex., 345; in appeal, L. R. 1 Ex. D., 17.

WATEROUS ENGINE WORKS CO. v. HENRY.

(IN CHAMBERS.)

Replevin—Goods affixed to realty.

A writ was issued to cover certain machinery in a planing mill. Plaintiffs claimed the goods as vendors, under a hire and sale receipt. Defendants claimed property as part of the realty under a mortgage from the purchaser under the same receipt.

On motion to set aside the writ,

Held, 1. That replevin would lie.

2. Upon the affidavits filed, that the machinery was personalty.

C. H. Campbell, for defendants, after appearance, took out summons to set aside the writ on the ground that the Con. Stat. c. 37, s. 1, did not authorize the issue of the writ for recovery of

the property, and that the machinery being affixed to the land was realty, and not the subject of replevin.

L. G. McPhillips, for plaintiffs, showed cause, and contended that by defendant's appearance they waived any objection to writ or cause of action and cited *Forbes* v. *Smith*, 10 Ex. 717. *Gurney* v. *Hopkinson*, 3 Dowl. 189.

That if appearance did not waive objection that the summons was not taken out within a reasonable time, as the last defendant was served on 13th December, 1883, and the summons was not taken out until 8th January, 1884. *Davis* v. *Skerlock*, 7 Dowl. 530; *Tyler* v. *Green*, 3 Dowl. 439.

That although on comparing Con. Stat. c. 37, s. 1, with 38 Vic. c. 5, s. 1, from which the section is taken, it is evident that the words "thereof and for the recovery" have been omitted after the word "recovery" in the twelfth line, yet still the other directions in the Act clearly show that a writ of replevin for the recovery of the goods detained might issue.

That the property having been sold under an agreement, by which it was agreed the property should remain personal property, and belong to plaintiffs until fully paid for, did not become realty. *Dearden* v. *Evans*, 5 M. & W. 11; *Minshall* v. *Lloyd*, 2 M. & W., 451; *Carscallen* v. *Moodie*, 15 U. C., Q.B. 304; *G. W. R.* v. *Bain*, 15 U. C., C.P., 229; *Weeks* v. *Lalor*, 8 U. C., C. P., 239; *Davy* v. *Lewis*, 18 U. C., Q. B. 21.

C. H. Campbell, in support of the summons argued that the omission from the Act of the words quoted above could not be supplied, and the provisions of the Act were not applicable to a case of goods detained, and that the alleged goods were not the subject of replevin, and cited *Banks* v. *Angell*, 7 A. & E. 855; *Foster* v. *Miller*, 5 U. C., Q. B., 509; *Longbottom* v. *Berry*, L. R. 5 Q. B. 137; *Mather* v. *Fraser*, 2 K. & J., 536; *Climie* v. *Wood*, L.R. 3 Ex. 257; *Holland* v. *Hodgson*, L. R. 7 C.P. 328; and *Dart's Vendors and Purchasers* (5th edition), 535.

[*28th January, 1884.*]

DUBUC, J.– *Held*, that the statute was sufficient to authorize the issuing of the writ. He thought that the authorities were much divided on the question of fixtures, but that the tendency of the later cases was to the effect that the intention of the parties was to be considered, and that in this case the intention of the parties was clearly that the machinery should remain as goods and chattels.

SUTHERLAND v. YOUNG.

Title to land—Production of original will—Age—Certificate of Baptism.

Held—To prove title to land the original will must be produced and execution proved—probate is not sufficient.

Held—That a certificate of baptism, signed by the proper official under Con. Stat. c. 16, ss. 1 and 16, was admissable in evidence.

At the hearing the plaintiffs sought :—

(1) To prove the title of Peter Sutherland to the land in question, as devisee of Mary Sutherland, by producing the probate of her will.

(2) To prove the age of one Napoleon Laroque, by production of a certificate of his baptism under the hand of the proper official, having the custody of the parish register of St. Boniface.

G. A. F. Andrews, for plaintiff.

W. R. Mulock and *W. E. Perdue*, for defendant Young.

J. B. McArthur, for defendant Schultz.

[*15th January, 1884.*]

TAYLOR, J.—*Held*, that the object being to establish a devise or testamentary disposition of real estate, the original will must be produced, and its execution by the testatrix proved.

Also, that the certificate, which was in accordance with the provisions of Con. Stat. c, 16, ss. 1 and 15, was admissible in evidence as proof of the baptism.

CHADWICK v. HUNTER.

Mechanics' lien—Materials provided—Time for registration.

Materials were supplied from time to time as the building progressed, not under any contract, but as they were required and ordered.

Held—That each sale was a separate transaction, and the subject of a separate registration.

The bill was filed by Chadwick & McLennan, hardware merchants, of Rat Portage, against R. H. Hunter and R. J. Short, to enforce a mechanic's lien for materials supplied to the defendants to be used in the erection of a mill. Materials amounting to about $375 were supplied from time to time between the 1st of May and the 7th of July, and to an amount less than $20.00 between the 7th of July and the 25th of August. On the 31st of August the plaintiffs filed a lien in the registry office for the County of Varennes, and in the statement of claim the land was described as being situate in the County of Varennes, in the Province of Manitoba, or in the District of Algoma in the Province of Ontario. On the 9th of August, Hunter conveyed all his interest in the property to the Imperial Bank, who registered their deed on the 15th of August. The bill was filed on the 11th of September, and amended on the 31st of October, by adding the Imperial Bank as parties defendant, and was further amended on the 3rd of December, after demurrer by the Imperial Bank. The cause came on for examination and hearing as against the Imperial Bank and for hearing *pro confesso* against Hunter and Short.

N. F. Hagel and *G. Davis*, for plaintiffs.

W. H. Culver and *G. G. Mills* for defendants the Imperial Bank, contended:—

(1) That there being no specific contract to furnish materials, each order given and the materials furnished thereunder was a separate contract, and gave a separate right of lien, and as prior to the amendment of "The Mechanics' Lien Act" on the 7th of July, 1883, the lien had to be filed within five days, consequently the lien not having been so filed must fail as to all materials furnished prior to the 7th of July; and that the lien must also fail as to the materials furnished after the 7th of July, their value being less than $20.

(2) That no bill was filed within 90 days, as the 3rd of December, the date of the last amendment, must be regarded as the filing of the bill.

(3) That there was no *lis pendens* filed in this suit, the only *lis pendens* filed having been registered on the 14th of September before the Imperial Bank were parties to the suit.

(4) That the statement of claim was bad, in not showing the Imperial Bank to be one of the reputed owners of the property at the time of the filing of the lien.

(5) That prior registration of the deed from Hunter to the Bank gave the Bank priority, as actual notice of the lien was not proved.

(6) That the court has no jurisdiction, as it appears from the statement of claim the land may be in the Province of Ontario.

[*25th January*, 1884.]

TAYLOR, J.—I hold that no lien exists in favor of the plaintiffs. There was no contract to supply any specific articles, or any quantity of them, as all the hardware required for the building and so on. Even on the plaintiff's contention, that furnishing the articles gave a lien, and registration was only necessary to continue it, the articles here were supplied day by day, and each day's supply was a complete transaction in itself. The lien then should have been registered within five days. No lien was registered up to the time the Act of last session was passed. The goods supplied since the passing of that Act do not amount to $20, so as to them there can be no lien. The bill must be dismissed with costs against the Imperial Bank. Even as against Hunter and Short, it must be dismissed. When a bill has been taken *pro confesso* the plaintiffs can have only such relief as the bill shows them entitled to, and the bill here shows on its face the facts which negative the existence of any lien.

SCHNEIDER v. WOODWORTH.

Action on Foreign Judgment.

Action upon a judgment obtained in the Province of Quebec. Service of the writ in the original action had been effected by advertisement. Defendant never resided in or carried on business in the Province of Quebec, and had no personal knowledge of the proceedings in the action.

Held, that the defendant was not bound by the judgment.

Plaintiff delared on two promissory notes made by the defendant in favor of the B. W. M. Co., and endorsed by the Company to plaintiff. The notes, when produced, appeared to be endorsed by the Company, but the plaintiff did not obtain title direct from the Company. The Company had become insolvent and the notes had become vested in D., the official assignee. Subsequently R. was appointed creditors' assignee, who sold the notes to the plaintiff.

No assignment from D. to R. was proved.

Held, that without such proof plaintiff could not recover.

H. M. Howell, for plaintiff.

A. C. Killam, for defendant.

[*2nd February*, 1884.]

TAYLOR, J.—In this case, which was tried before me without a jury, I find the facts as follows:

(1) At the time the goods, in payment for which the two promissory notes declared on, were given, and also those mentioned in the open account, were purchased, the defendant was and had all his life been a resident of King's County, Nova Scotia, and at the time the judgment was recovered in the Superior Court of the Province of Quebec, he was a resident in this Province. The defendant never resided, or carried on business in the Province of Quebec, although on some occasions he was for a day or two in that Province on business.

(2) The goods were purchased by the defendant in King's County, Nova Scotia, from a travelling agent of the Baylis Wilkes Manufacturing Co. of Montreal. The goods were delivered to the Railway Co. at Montreal for the defendant, he paying freight on them from Montreal to his place of business in Nova Scotia.

(3) The two promissory notes, one of them payable at Kentville, Nova Scotia, and the other at Montreal, were signed by the defendant at King's County, N. S. They were either sent to the defendant from the Baylis Wilkes Manufacturing Company by mail for signature, and by him returned to the Company by mail, or they were handed to him by the travelling agent of the Company, and after signature returned to the agent.

(4) In the action brought in the Superior Court of Quebec the defendant was not personally served with any process. The service upon him was effected by public advertisement. He did not appear in the action, and the judgment in the action was recovered by default. The defendant had no notice or knowledge of the proceedings in that action until about the time when he was served with the writ in the present action.

(5) In November, 1879, a writ of attachment under the Insolvent Act issued against the Baylis Wilkes Manufacturing Co. directed to Mr. M. M. Duff, official assignee. Subsequently at a meeting of the creditors of the company, on 10th December, 1879, James Ross, of the city of Montreal, accountant, was appointed assignee of the insolvent Company's estate. At a meeting of the inspectors of the insolvent estate on 7th December, 1880, the assignee reported that there were a large number of book debts and notes uncollected, which it would be expensive to collect, and thereupon "he was instructed to offer the same by public auction, after advertisement, at such time as he should judge best."

(6) At a public auction the plaintiff became the purchaser of all the claim of the insolvent Baylis Wilkes Manufacturing Co. against the defendant, and James Ross executed a transfer or bill of sale according to the form M. in the Insolvent Act, 1875, to the plaintiff, dated 12th February, 1881, under which he claims title to the notes and account.

The plaintiff is not, in my opinion, entitled to recover upon the judgment obtained against the defendant in the Superior Court of Lower Canada. The defendant has proved the truth of his second plea. He never was within the jurisdiction of that Court, and so was not in any way subject to its jurisdiction. He was not personally served, and he did not appear or in any way submit to the jurisdiction.

I do not think Mr. Howell's argument that the action in question having been one respecting promissory notes which are the subject of Dominion legislation, the defendant was therefore subject to the law in the Province of Quebec, can prevail. If it were so, then a merchant carrying on business in this Province who had given a promissory note to another merchant in this Province for goods purchased here would be liable to be sued upon that note in Prince Edward Island or in any other Province the holder of the note might select. Unless the defendant is amenable to the process of the particular court, when set in motion and served according to the particular forms and modes of procedure sanctioned by the local laws of the Province or foreign country in which the court sits, he cannot be considered subject to its jurisdiction. Unless he is amenable to such process and modes of procedure or has voluntarily submitted to its jurisdiction it cannot be, as to him, a court of competent jurisdiction.

As to the claim made by the plaintiff upon the promissory notes which formed the consideration for part of the judgment he has failed to prove the allegation that the Baylis Wilkes Manufacturing Company endorsed them to him. It is true, both the notes as we now find them bear the endorsation of the Company, signed by the proper officers, but it is clear they were never endorsed to the plaintiff. The endorsation may have been for the purpose of discounting them, or in order to their presentation for payment. The one note fell due on the 23rd December, 1877, and the other on the 29th December, 1877, but at the date of the insolvency of the Company in November, 1879, they were in the possession of and were the property of the Company. The plaintiff acquired the notes after the 7th of December, 1880, and the Company conld not then endorse them.

Any title that the plaintiff has to the notes must be derived from his having purchased them at the auction, and received a bill of sale from Ross, the assignee. Mr. Killam objected to any title being proved as derived in that mode, the plaintiff having declared upon them as the endorsee of the Company. He also contended that the plaintiff could not by the transaction disclosed here acquire a title to the notes, because the resolution of the inspectors under which they were sold does not order any advertising as required by section 67 of the Insolvent Act, but left it to the discretion of the assignee, and also because that section requires all debts amounting to more than $100 to be

sold separately, while the bill of sale is *prima facie* evidence of selling all together for $68.

These objections cannot be given effect to. The statute simply says that the assignee may sell with the sanction of the inspectors, after such advertisement thereof, as they may order. It does not say that they are to specify the number of times the advertisement is to be inserted, or in what papers. The resolution they passed says the sale is to be "after advertisement," to comply with that, one advertisement would be necessary, and if they had said "after one advertisement," who could have objected. The statute gave them a discretion as to the advertising. What they left to the discretion of the assignee was the time of selling.

The evidence does not show that the claims purchased by the plaintiff at the auction for $68 were not sold separately. The bill of sale relied upon as showing that they were not, is a transfer of "all claim by the insolvents against Joseph E. Woodworth." Now the claim against him was one debt, although the insolvents held two promissory notes as security for part of it.

But even if the plaintiff is entitled to rely now under his present pleadings upon his title as derived from the assignee, or if he should have leave to amend by setting up such title, as asked by Mr. Howell, there is, in my opinion, a fatal defect in his proof.

By the writ of attachment the estate and effects of the insolvent Company, including the claim against the defendant, and those notes, vested in Duff, the official assignee, and there is no evidence that he ever executed an assignment of the estate in favor of Ross, the creditors' assignee, as required by section 30 of the Insolvent Act.

So far as the evidence before me goes, the estate is still vested in Duft, and if so, the plaintiff could acquire no title to any part of it under the bill of sale from Ross. There should be a nonsuit entered. Perhaps the defendant is entitled to a verdict in his favor on his second plea.

ARCHIBALD v. GOLDSTEIN.

(IN APPEAL.)

Principal and agent—Purchase by agent in his own name—Statute of Frauds.

Plaintiff, desirous of purchasing property from one T., employed defendant as his agent to negotiate the purchase. Defendant purchased the property, using his own money, and took the conveyance to himself.

Held, affirming decree that defendant was trustee for plaintiff, and that the Statute of Frauds was no protection.

H. M. Howell, for plaintiff.

W. R. Mulock, for defendant.

For the statement of the case see 1 M. L. R. 8.

[*4th February*, 1884.]

WALLBRIDGE, C. J., delivered the judgment of the court. I concur in the judgment already given by my learned brother Taylor.

The case shortly stated, is this:—Agency can be proved by consent, either express or implied, or by ratification. *Markwick* v. *Hardingham*, L. R. 15 Ch. Div. 349.

If agency were proved, the agent can acquire nothing for himself. *Thompson* v. *Holman*, 28 Gr. 35.

The contract will be construed to effectuate the intention, and will be construed to have been made with the principal, although made directly with the agent.

A sale made by an agent to his principal cannot be upheld even in the absence of fraud, and may be repudiated as soon as discovered, although in every respect fair and equitable, the confidential relation between them forbidding such transaction. *Waddell* v. *Blockey*, 4 L. R. Q. B. Div. 678. The result is, the defendant must account to the plaintiff.

The decree is affirmed with costs.

HUTCHINSON v. CALDER.

(IN APPEAL.)

Fraud—Rescinding sale.

Defendant H. sold land to C. at $10 an acre; defendant C. sold to plaintiff at $30, representing to him that he was acting as agent for the owner; plaintiff purchased, believing defendant C. to be an agent merely. Plaintiff would have made further enquiries before purchasing had he known that C. was the real owner. C. procured H. to convey direct to plaintiff. The consideration expressed was the higher price. H. was no party to the fraud.

Held, reversing the decision of Taylor, J., that to the rescission of a contract "there must be a false representation knowingly made, that is, a concurrence of fraudulent intent and false representation"; that the contract having been entered into deliberately, the plaintiff's statements should have been corroborated; and where the evidence is contradictory the court ought to be satisfied that the plaintiff's account is strictly true, and that the evidence in the present case was insufficient, and the bill must be dismissed with costs.

S. Blanchard and *W. R. Mulock*, for plaintiff.

A. C. Killam, for defendant, Calder.

H. M. Howell, for defendant, Harvey.

For the statement of the case see 1 M. L. R. 17.

[*4th February*, 1884.]

WALLBRIDGE, C. J.—The bill is filed to cancel a sale, and for the repayment of the amount paid as purchase money on the execution of the conveyance.

The defendant, Harvey, had the fee simple of the land, and Calder had paid him $100, and held his receipt for this sum on account of the purchase of the same land by him. No conveyance had been executed by Harvey to Calder, and he was not, by the agreement between them, entitled to get a conveyance until he should pay the balance of the purchase money; there was, as evidence of this bargain, a simple receipt for money, expressing on what account it had been given. There was no obligation on Calder to purchase, although there was on Harvey to sell. This was the state of the title when Hutchinson, the plaintiff, and Calder met. Plaintiff and Calder had a slight acquaintance with each other in London, Ont., but nothing amounting to intimacy, and no evidence can be found from which a confidential relation could be supposed to exist between them; they were, to use a common expression, at arms length.

The plaintiff and Calder came to an agreement for the sale of the property, by which Calder got a very large advance upon what he had agreed to pay, an increase from $10 an acre to $30. The deed was made by Harvey direct to the plaintiff, and the whole purchase money paid to him. He deducted the amount due to him, and paid over the balance to the defendant Calder.

During the treaty for this purchase, which was effected by Calder, he said to the plaintiff: "See what I am sending down to George;" he then had a paper in his hand. In the course of this treaty Calder said again: "I can get something else for George," meaning one George Jackson, of London, with whom they were both acquainted; and again he said: "See what I have got for George."

The bargain was finally concluded, the plaintiff by paying cash got an abatement of 5 per cent. on the whole purchase. The whole money was paid to Harvey, and he, after deducting the purchase money, paid the balance to Calder. It is also proved that the plaintiff suspected or had been informed that Calder was simply an agent for sale. He asked Calder: "To whom does the land belong?" Calder answered, "To a man in Winnipeg." When this question was asked the bargain had not been concluded, and it could hardly have been expected that Calder would have told the name of the owner. It would have enabled the plaintiff to deal directly with the owner. If plaintiff thought he was dealing with Calder, representing himself to be selling as an agent, he must have been aware that a direct answer to such a question would have interfered with his rights as such, and could not have expected any other answer than such as he got.

Did the plaintiff expect that Calder would have dealt more favorably with him on account of their previous acquaintance? The plaintiff is a lawyer, and must have known that if Calder made better terms with him on account of their previous acquaintance, it must necessarily have been at the expense of his principal. This last question was in every sense improper.

It is now however contended that this conversation contains such misrepresentations that the plaintiff can have the contract rescinded, and have his purchase money returned.

This is a case of an executed contract (not one asking for specific performance). At first sight the great profit made by Calder leads me to think that the plaintiff was in some way

deceived, but if we rescind all contracts made here during the time of excitement when this bargain was made, our hands would be full, for they all are of this very character. At the time when this conversation occurred it appears the statements were true. To whom does the land belong? "To a man in Winnipeg." In the eye simply of a court of equity it might be said that it belonged to Calder, but only in equity. Reverse the case, suppose Calder had said, "It is my own," would that have been true? Certainly, only in equity. Then as to the other parts of the conversation, the land may have been "for George" or not. Calder got a cheap bargain and one probably he could have easily got rid of, though not at so great an advance.

The law in regard to misrepresentations, when a plaintiff asks to rescind an executed contract is: "There must be a false representation knowingly made, that is, a concurrence of fraudulent intent and false representation."

Reese River Silver Mining Co. v. *Smith*, L. R. 4 H. L. 64 & 79, and the late case of *Joliffe* v. *Baker*, L. R. 11 Q. B. Div. 255; *Fellowes* v. *Gwydyr*, 1 Simons, 63.

Besides, the plaintiff supports his case mainly upon his own testimony, which the defendant Calder flatly contradicts.

Before a contract entered into as deliberately as this can be rescinded, the plaintiff should corroborate his statements, though the same rule does not now prevail as to the evidence required to rebut the sworn answer of the defendant. The reason still exists, and where the evidence is wholly contradictory the court ought to be satisfied that the plaintiff's account is strictly true. Parties now give evidence, and their interests may influence their account of what passed. This must be considered.

East India Co. v. *Donald*, 9 Ves., 275; *Morphett* v. *Jones*, 1 Swanston, 172; *Toole* v. *Medlicott*, 1 Ball & B., 393.

The defendant does not prove fraudulent misrepresentations acted upon by him, that is, a misrepresentation of a thing giving occasion to the contract, or, as it is expressed, *dans locum contractui*, and fails on that account.

As the defendant, Calder, now succeeds, the rehearing at the instance of the plaintiff, to make defendant Harvey, also liable, necessarily fails. The order to be made should dismiss the rehearing against the defendant Harvey, with costs, reverse the original decree as against the defendant Calder, and dismiss the bill against him with costs, including the costs of this rehearing.

AGNEW v. MORPHY.

Registry Acts—Actual notice.

H. J. B., on 24th December, 1873, conveyed a parcel of land to D., and on the 24th of September, 1874, conveyed the same piece of land to M. D's conveyance was registered on 11th May, 1875, and M's on 25th September, 1874.

M. was the solicitor for H. J. B. on the sale to D., and on the 5th of May, 1874, made the usual affidavit of the execution of the deed to D.

Held, that M. had actual notice of D's deed at the date of the affidavit of execution. That such notice would be assumed to have continued until the date of M's deed. That it would be no use for M. to say that it did not; and that his deed must be postponed to D's.

Held, that under the Registry Act then in force, 36 Vic., c. 18, priority of registration did not apply to conveyances registered before the issue of the patent.

The facts sufficiently appear from the judgment.

G. A. F. Andrews, for plaintiff.

Sedley Blanchard and *E. H. Morphy*, for defendant.

[*2nd February*, 1884.]

WALLBRIDGE, C. J.—The bill in this case was filed against Henry B. Morphy, who, dying before answer, the suit was revived against the defendants, as his trustees and executors.

The bill states that Harriet J. Burrows was the common grantor, under whose title plaintiff and defendant claim; that she conveyed to one Donald, who conveyed to the plaintiff; that she subsequently conveyed to H. B. Morphy, who registered the deed to him prior to the registration of the deed to Donald; that the patent had not then issued, and that H. B. Morphy, when he got the deed to him, had actual notice of the deed to Donald, and asks to have the registration of the deed to Morphy vacated and his (plaintiff's) title established.

The proof was that Harriet J. Burrows, on 24th December, 1873, conveyed the land in question to D. Donald. This deed was not registered until the 11th day of May, 1875. In the

meantime Harriet J. Burrows, in consideration of $100, bargained and sold the same land to Henry B. Murphy, by deed, dated the 24th of September, 1874, and registered on the 25th of the same month, and before the deed first given to Donald. The trustees of H. B. Morphy's estate claim priority over the deed first given to D. Donald, by virtue of the prior registration, the deed being for valuable consideration.

The plaintiff, on the contrary, contends that this deed to him having been first executed, and for valuable consideration retains its priority, and charges that Henry B. Morphy had actual notice of the deed to Donald, at the time he became the purchaser of the lands in the bill mentioned.

Both the deed to Donald and the deed to Henry B. Morphy were executed and registered before the patent from the Crown issued. The patent issued on the 27th of August, 1875, and was registered on the 5th August, 1876.

The plaintiff also contends that the Registry Act then in force, 36 Vic. c. 18, ss. 43, 44, 45, did not apply to deeds executed before the patent issued, and that he consequently had not lost his priority. Section 43, relating to the registration of deeds, commences with the words "after any grant from the Crown and letters patent issued therefor, every instrument," &c. This seems to me clearly not to apply to instruments executed before letters patent issued. The defendant then contends that if that be the true construction of 36 Vic. c. 18, s. 43, it is remedied by the amended Registry Act 48 Vic. c. 35, s. 1, which latter Act received the Royal assent on the 14th of May, 1875, and this statute re-enacts the 43rd sec. of 36 Vic. c. 18, and adds that such re-enactment shall be deemed and construed as having been the 43rd section, and as now and hereafter being the 43rd section of the said Act on the passing thereof; and all interests shall be bound as though the same had formed the said 43rd section on the passing of the same Act; and in such re-enactment of the 43rd section it is more expressly to apply to the registration of such instruments "whether there has been any grant from the Crown of such lands or not."

At the time of the passing of that Act, 38 Vic. c. 35, (14th May, 1875) the plaintiff had, on the 11th of May of that year, registered his deed and had then priority; and if he is, by virtue

of that retrospective legislation, deprived of his title, it must be by force of legislation alone.

The Act 44 Vic. c. 3 (6th May, 1881) brings into force and operation the Consolidated Statutes of Manitoba. In my opinion s. 1, 38 Vic. c. 35, is repealed by the Act giving effect to these Consolidated Statutes, and the plaintiff is thus restored to his rights by the repeal of the retrospective legislation.

The Lands Registration Act of Manitoba, Con. Stat. c. 60, s. 40, has reference only to conveyances "to be registered" and does not affect the registration of the present deeds, taking this view of the statute, and holding that the Registry Act, 36 Vic. c. 18, ss. 43, 44, 45, did not apply to instruments executed and registered before patent issued, and that the Act acting retrospectively is itself repealed it follows that instruments executed at the dates in these deeds mentioned are not now affected by the Registry laws, and simple priority of execution gives priority to the deed so first executed.

Upon this view of the statutes the plaintiff would be entitled to succeed. But he urges further that Henry B. Morphy was a witness to the deed from Harriet J. Burrows to D. Donald, and on the 5th of May, 1874, made the affidavit of its execution and of the duplicate thereof, before the date of the deed to him.

The Registry Act before referred to, does not give priority to the subsequent deed when the grantee has actual notice of the prior unregistered deed.

The question, therefore, is, had Henry B. Morphy actual notice of the prior deed at the time of the execution of the deed under which the defendants claim. Upon this, as a fact, I find that he had.

He witnessed the prior deed on the 24th of September, 1873, and had sufficient recollection of it to swear to its execution and that of the duplicate on the 5th of May, 1874; and I think it is not too much to hold that his recollection of that event extended four months and nineteen days longer, namely, to the date of the deed to him.

But I do not hold that it is incumbent on any grantee, whose deed is sought to be postponed, to prove that actual notice once proved in the second grantee, continued, and was present to his

mind when he acquired his deed. The words of the statute do not require that the recollection of such notice shall continue, but declares that the instrument to be adjudged fraudulent and void, shall only be so adjudged as against a subsequent mortgagee or purchaser, for valuable consideration, without actual notice, which means without actual notice at the time he so purchases.

I find that Henry B. Morphy had actual notice, on the 5th of May, 1874, and the deed to him is dated 24th September, 1874. I assume that such actual notice as the making the affidavit implies, continued to the time he got the deed to him.

I do not think the plaintiff is bound to show that Henry B. Morphy did recollect it, and I think it is no excuse to say he did not.

Burrows v. *Lock*, 10 Ves. 470.

The plaintiff is the grantee of Donald, and is entitled to stand in his place.

H. J. Burrows is the common grantor, and the plaintiff is not bound to go further back in his title. The decree will be that the plaintiff's title be established and the registration of the deed to H. B. Morphy be vacated, and defendants pay the costs of the suit.

McILROY v. DAVIS.

Deed obtained by Fraud—Intoxication—Evidence.

Plaintiff gave defendant a mortgage and subsequently executed a conveyance to him of the equity of redemption. Plaintiff asserted that the conveyance was obtained from him by fraud and while intoxicated through drink supplied to him by the defendant, at his (defendant's) hotel.

Held, that the evidence did not establish the fraud charged.

Held, that though plaintiff was a hard drinker he had not become so incapacitated for business that equity would relieve him from his acts, and the bill must be dismissed with costs.

N. F. Hagel and *G. Davis*, for plaintiff.

S. Blanchard and *W. R. Mulock*, for defendants.

[*2nd February, 1884.*]

TAYLOR, J.—The plaintiff filed his Bill, claiming that under an indenture of mortgage dated the 24th day of January, 1873, made between himself, of the first part, and the defendant, of the second part, he is entitled to the equity of redemption in the lands comprised therein.

It states that subsequently, and on or about the 1st of October, 1873, the defendant, for the purpose of getting in an alleged outstanding interest in the land applied to the plaintiff to join in a conveyance with one John C. Schultz to the defendant, and the plaintiff did so but received no consideration therefor, and in no way intended to part with his equity of redemption in the lands. This conveyance, it is charged, was obtained by the fraud of the defendant, and by the undue influence of the defendant, and by the defendant leading the plaintiff to believe that the conveyance which he signed was nothing but a further mortgage upon the lands.

The bill further alleges that the defendant received rents more than sufficient to pay the debt, and has sold the lands for a large although an inadequate sum of money.

The prayer is that the deed of 1st October, 1873, may be declared to be a mortgage, and the plaintiff entitled to redeem the same; that an account may be taken of the rents and profits and purchase money received by the defendant, and that after

allowing the defendant for the sums due him upon his mortgage, the balance may be paid over to the plaintiff.

The defendant claims that the conveyance of 1st October, 1873, was intended to be an absolute conveyance of the land to him, and denies all fraud.

The plaintiff's account of these transactions is that he was intimate with the defendant, who, at the time, kept a hotel in Winnipeg. He says he at that time unfortunately indulged in the habit of drinking to excess, the defendant's hotel being his chief place of resort. Requiring a loan of money he applied to the defendant personally, who, after negotiations which lasted about a week, agreed to make the loan. The mortgage of 24th January, 1873, is the security given by the plaintiff for this. He says it was executed in the bar room of defendant's hotel, and the amount advanced upon the execution of that document was, he says, $400, although the instrument on its face secures the repayment of $450. The difference, $50, was, he says, as he understood it, the interest. The money, the $400, was given to him by the defendant himself in the shape of a check on the Merchants' Bank, which he took to the Bank and had cashed.

The property comprised in the security was a lot on Notre Dame Street, in Winnipeg, purchased by the plaintiff from Dr. Schultz, he says, for $1000, payable in three instalments.

At the time the mortgage was given no deed had been executed by the vendor, but the plaintiff held a bond for a deed, and has paid, he says, the first instalment of one third of the purchase money. This bond he says he showed to the plaintiff or handed it to him upon effecting the loan.

After some months, as Dr. Schultz was pressing for payment of the remainder of the purchase money, further security was, the plaintiff alleges, given to the defendant to secure to him the repayment of the amount he had to pay Dr. Schultz.

This security is the deed of 1st October, 1873, by which, in consideration of $1070.50, the property in question was conveyed to the defendant. The parties to that deed are John C. Schultz and the plaintiff, of the first part, Agnes Schultz, of the second part, and the defendant, of the third part. It is a deed absolute in form, but the plaintiff insists that it was intended to be and he understood it to be a mortgage, covering the $400 which had

been advanced under the mortgage of 24th January, and the amount which had to be paid to Dr. Schultz as the balance of purchase money due on the property. The arrangement, according to the plaintiff, was that the defendant should have possession of the property until the rents had paid him off, or if he could sell the property to advantage he was to do so, repay himself, and hand over the balance to the plaintiff.

This second instrument, the plaintiff says, was also executed in the bar room of defendant's hotel. He admits that it, or something, was read over to him before he signed it, but he says he was so much the worse of liquor that he did not understand what was read. He had been drinking a good deal, and he says the defendant treated him several times before the document was produced and he was asked to sign it. He does not directly charge the defendant with having made him intoxicated for the purpose of procuring his signature, but that is no doubt what he intends to convey by his evidence.

He does not, however, go the length of saying that he was in a state of total incapacity through drink, although he does say that had he had his senses about him, he would never have signed the deed. He says he had very likely taken more than was good for him, "I was pretty well tight."

He says he never discovered that this second document was an absolute deed, until some time in the early part of last year, when he was told by the defendant that it was so.

He is quite positive that the original loan was negotiated for between himself and the defendant personally, and that he received from the defendant the amount advanced, only $400. He had nothing to do, he says, with the late Mr. Cornish in the transaction.

He continued living on the property for nearly a year after the second deed was executed, paying no rent and never being asked for any. Then he moved out of the city to a homestead, his wife remaining on the property for two or three days after he left, when she followed him.

The plaintiff is seeking to contradict or vary the terms of a written instrument by parol evidence, and it is important that such evidence should be strong and clear; that the evidence which he himself gives should be corroborated by that of disinterested and independent witnesses.

Unfortunately for him, he is contradicted on most of the points to which he has spoken. Mr. Thibaudeau, a practising lawyer in Winnipeg, is called for the defence. He was in 1873 practising his profession in partnership with the late Mr. Cornish, and the firm were the legal advisers of the defendant, and acted for him in investing money. The defendant, he says, left Winnipeg on the 31st of December, 1872, and did not return until about the end of the following month, certainly not until after the 15th, though he cannot say he did not return before the 20th. The defendant himself says he left on the 31st of December for Moorhead; four days were occupied in the journey there; he stayed two weeks, and spent six days on the return trip owing to a storm. During his absence, according to Mr. Thibaudeau, the plaintiff applied to his firm for a loan, and his application was accepted. On the day the defendant returned, or the next day, he was notified that the loan had been negotiated, and he handed to his solicitors the money to be advanced. The books of Cornish & Thibaudeau were produced. In the cash book appears on the debit side, under date of 25th January, 1873, the entry "Cash Davis & McIlroy loan, $450"; and on the other side, under the same date, the entry "McIlroy loan and Davis, $442.50." In the journal under the same date the office is credited with $7.50 for the conveyancing, the entries are in the handwriting of the late Mr. Cornish. The money was paid, Mr. Thibaudeau says, by cheque handed to the plaintiff.

The mortgage was executed, not in the bar room of the hotel, but at his office in the day time, and the plaintiff was sober. The defendant had, he says, nothing to do with the negotiations for the loan, for he was absent from the city.

The second instrument, that of the 1st of October, 1873, was also prepared by Mr. Thibaudeau, and he declares positively to the transaction, as one by which the plaintiff was selling to the defendant his equity of redemption in the property, as he was unable to pay Dr. Schultz the balance of the purchase money due to him.

He says the deed was executed not in the hotel but in his office; the plaintiff, he says, was sober when he executed it, and Dr. Schultz and the defendant were present, as well as the plaintiff and the solicitor.

The defendant in his evidence corroborates Mr. Thibaudeau as to what occurred. He denies positively that the second trans-

action was a further mortgage upon the land. He had, he says, no knowledge personally that the plaintiff's title at the time of the first transaction was not one in fee simple. He says that he did not wish to purchase the property, but was forced to do so.

The plaintiff had not the money with which to pay Dr. Schultz, and unless the amount due was paid, he, the defendant, would have lost his security, while the plaintiff would have lost the land and still have been liable on the covenant in the mortgage. Under these circumstances, he agreed to take the land and himself pay off Dr. Schultz. He accounts for the sum expressed in the deed being given as $1070.50 in this way:—The property was sold by Dr. Schultz for $1000, payable in two sums, not three, as plaintiff puts it; the plaintiff had paid the first payment, $500, and he, the defendant, $570.50, the cheque for which is produced. As Dr. Schultz was the granting party in the deed the amount paid to him, $1070.50, was named as the consideration. The explanation seems a very reasonable one.

The plaintiff's family continued to live in the house as appears from the evidence of his daughter, not one year but nearly three years after the execution of the second deed. But instead of the plaintiff going to his homestead and being followed by his wife in two or three days after, it appears from the wife's evidence that the plaintiff left nearly nine months before his family did.

That they were permitted to remain so long in possession, rent free, is accounted for by the defendant who says he had gone into politics; the plaintiff was a supporter of his and under such circumstances to have ejected him would not have been a prudent step.

The only apparent corroboration of the plaintiff is from what his wife says respecting a conversation with the defendant the day she left the place. It was to the effect, that when the place was sold all that would come of it over the mortgage should be handed to her. The defendant's account of the conversation is that Mrs. McIlroy feeling bad about her husband's conduct, he said that he would be only too glad if he (defendant) or she could get a purchaser for the place before spring to get back his money, and then she could have the difference.

Hadskis, the tax collector, says that for the year 1877 the defendant was assessed for the land in question and paid the taxes, that afterwards the books for some previous years were placed in

his hands for the collection of arrears. In these he found the plaintiff assessed for the property and applied to him for payment, but was referred to defendant. He could not give the plaintiff's exact words, but says he said it was not his place, it was defendant's property, and he would have to pay the taxes. He accordingly went to defendant who paid them.

It is, however, sought to impeach the deed of 1st October, 1873, on the ground of the grantor's incapacity through the excessive use of intoxicating liquors.

From the appearance of the plaintiff when examined, and from his own statements, there seems no reason to doubt that he has been what is known as a hard drinker. It is not by any means clear, however, that at the period when this deed was executed, his drinking habits had reached such a stage that he could be said then to be in the condition described by the Chancellor in *Clarkson* v. *Kittson*, 4 Gr. (at p. 254), "a person of intemperate habits; that his debasing vice had grown upon him to a most lamentable extent, so that he had become, at the time he executed this deed, broken in body and mind—an habitual drunkard, his intellect weakened and his constitution shattered."

The evidence of his wife, which was the only evidence adduced besides his own, does not go the length of establishing such a state of things as that. His daughter, who was examined for the purpose of fixing the date at which the family left the property, when asked as to his habits, expressed her unwillingness to speak on the subject, and Mr. Hagel very properly declined to press for an answer. Her unwillingness to give any evidence about it no doubt arose from the feeling that if pressed she could only speak of a father's shame.

But even drunkenness, carried to excess, is not sufficient to justify the court in setting aside a transaction.

The law is thus stated by Mr. Justice Story in his work on Equity Jurisprudence, s. 231, "To set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, when the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part; without this no contract or other act can or ought to be binding by the law of nature. If

there be not that degree of excessive drunkenness then courts of equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him."

In the case of *Corrigan* v. *Corrigan*, 15 Gr. 341, where a deed was sought to be set aside, Chancellor Vankoughnet said the question was narrowed down to these considerations :—1st. Was the deceased at the time of his executing the deed in such a state of intoxication that he did not know or understand what he was doing, and that advantage was taken of him in this state to procure the deed from him. 2nd. Or had he by a long course of dissipation become so weakened in intellect that he had lost all mental capacity for business, and was incapable of volition, and so at the mercy of any one who sought to extract anything from him. The learned judge found that he was "the victim of intemperance—a slave to strong drink—but that, like most other such slaves he had his moments of freedom from it." But he also found that he was not in a state of actual intoxication at the time he executed the deed, though he had but just partially recovered from a debauch ; that he knew what he was doing and that no advantage or undue means were taken to obtain the deed ; he therefore dismissed the bill.

In the present case the evidence of the plaintiff himself does not by any means prove, that when he executed the deed he was "utterly deprived of the use of his reason and understanding." Besides, even if the evidence as to his condition when the deed was executed stood uncontradicted there is only his own evidence unsupported, and it would be exceedingly dangerous to set aside a deed upon the sole evidence of the grantor as to the want of capacity.

Was there here then any advantage taken of the plaintiff, or any undue means used, any "contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication." Here again the only evidence is that of the plaintiff himself, and the furthest that he goes is to say that the defendant treated him several times before the deed was produced and executed. As to this he is contradicted flatly by the defendant, who denies any treating of the plaintiff on the occasion, and also by Mr. Thibaudeau, who says, and the defendant agrees

with him, that the deed was executed, not as plaintiff says, in the bar room of the hotel but in Cornish & Thibaudeau's office.

The cases to which I was referred by the counsel for the plaintiff were all widely different from the present.

In *Clarkson* v. *Kitson*, 4 Gr. 244, the deed was obtained from the grantor by a tavern keeper with whom he lived, and who was in the habit of supplying him with whatever drink he desired.

Hume v. *Cook*, 16 Gr. 84, was a case in which an old man, who had for years given himself "wholly up to the gratification of his passion for strong drink," who was greatly enfeebled in body and mind, and whose life was a very bad one, went to live with the keeper of a tavern of which he was the proprietor, made a conveyance of all his property, real and personal, to the tavern keeper, in consideration of receiving a bond of the tavern keeper for his support for life, which was a grossly inadequate consideration. There the deed was set aside, V. C. Mowat saying: "The case is very strong against such a transaction, when the grantee is a tavern keeper, who was dealing with a drinking lodger."

McGregor v. *Boulton*, 12 Gr. 288, was another case in which the conveyance was set aside, but that also was the case of a deed given to a tavern keeper with whom the grantor lived. That fact, that the grantor was living with the tavern keeper and daily plied by him with liquor was dwelt on by the learned judge.

In *Crippen* v. *Ogilvie*, 15 Gr. 490, a man made a mortgage upon his property for about one fourth of its value, and within a year after, the mortgagee obtained from him a release of the equity of redemption for a trifling if any further consideration than the mortgage debt, and relief against the deed was given. But then there was abundant evidence to satisfy the Court that the grantor was incapable of understanding business transactions. The man was a carpenter by trade, who had sold his tools, and as one witness said, everything he could lay his hands upon for drink. The learned V. C. Spragge said:— "The evidence presents altogether a most deplorable case of utter abandonment to drunkenness," and further, "It is scarcely possible that the plaintiff could have exercised an assenting mind to the execution of an absolute conveyance. * * * His habits and mental condition are placed beyond doubt by the evidence."

On appeal (18 Gr. 253) a majority of the judges upheld the decree of the Court of first instance, on the ground that the evidence showed the release of the equity of redemption to have been given upon a parol trust for the benefit of the mortgagor and his family, and setting it up as an absolute purchase was a fraud. The Court was not unanimous as to giving relief on the ground of incapacity through intoxication.

The evidence here does not satisfy me that the plaintiff was, at the period when the impeached deed was executed, incapable of understanding or transacting business. I cannot, on the evidence before me, find that there was any contrivance or management to draw him into drink for the purpose of obtaining an unfair or undue advantage. No other exercise of undue influence is proved. The bill should therefore be dismissed, and it must be with costs.

DOIG v. HOLLEY.

Liability of Agent—Award and Contemporaneous Memorandum —Signing Award.

A contract was expressed to be made between "D., of the city of Toronto, of the first part, and H., Superintendent, of the city of Winnipeg, Manitoba, o the second part." It goes on to say:—

"The said party of the first part in consideration of the agreement of the said party of the second part hereinafter contained, hereby agrees to build, construct, and set up complete in the city of Winnipeg gas plant of wrought and cast iron for a Gas Works there, as follows." Then after a detailed statement of the articles to be supplied, "In consideration of the agreement herein set forth and stipulated to be performed by the party of the first part, the said party of the second part agrees to pay to the said party of the first part the full sum of $12,500 for such iron gas plant as hereinbefore described, to be paid as follows," and then the time and mode of payment are set out.

H. appended to his signature the words:—"Superintendent for Building Gas Works at Winnipeg for W. Merrick, of Oswego, N. Y., and others."

Held, that H. was personally liable upon the contract.

An arbitrator enclosed in an envelope his award and a memo. containing an exhaustive review of the cases bearing on the question decided by him, and showing that he had taken an erroneous view of the law. The envelope was marked "Doig v. Holley, Award, Arbitrator's fee, $100." On the memo. was endorsed:—"This memo., after perusal by the party taking up the award, is to be given to the opposite solicitor, who, after perusal, is to return it to me. W. L."

Held, that when the grounds of the arbitrator's decision appear in some contemporaneous document delivered with the award, the Court can look at it, and will entertain an application to set aside the award as founded upon an erroneous view of the law.

Upon the argument of a rule to set aside an award it was objected, that the motion paper on which the rule was obtained, making the order of reference a rule of court was not signed by Counsel.

Held, that the objection, if a good one, should be raised by some proceeding to set aside or discharge the rule.

It was further objected that there was no evidence proving the execution of the award. The order required that the award should be in writing.

Held, that it was not necessary that the award should be signed.

W. H. Culver, for plaintiff.

D. Glass, for defendant.

[*4th February, 1884*]

TAYLOR, J., delivered the judgment of the court:—

In this case the writ was issued on the 29th of June, 1882. The declaration setting out an agreement upon which the plaintiff founds his claim was filed and served on the 22nd of August following. On the 16th of October the defendant filed and served his pleas. 1. Did not agree. 2. Never indebted. 3. Payment before action brought. 4. Set off. On the 22nd of December, 1882, an order was made on the application of the plaintiff, referring the cause and all matters in difference between the parties to arbitration.

On the 22nd of October, 1883, the plaintiff's attorney having learned that the award of the arbitrator was ready, instructed a clerk to call upon him, pay his fees and take up the award. On the same day the clerk received from the arbitrator a sealed envelope endorsed on the outside "Doig v. Holley, Award, Arbitrator's fee, $100."

The envelope was the same day opened by the attorney, when it was found to contain two papers, the one a formal award dated 20th October, 1883, signed by the arbitrator; the other, a long pencil memorandum, dated 18th October, with the arbitrator's initials at the end. On the latter paper was endorsed the following:—"This memo. after perusal by the party taking up the award, is to be given to the opposite solicitor, who, after perusal is to return it to me. W. L."

The award is in favor of the defendant, finding, (1) That he did not agree as in the declaration alleged, and that the plaintiff hath not and never had any cause of action against the defendant as in the said declaration alleged. (2) That the defendant never was indebted to the plaintiff, as in the declaration alleged. Costs of the suit, submission and reference were awarded to the defendant against the plaintiff.

On the 6th of November the order of reference was made a rule of court. On the 12th of November the plaintiff obtained a rule *nisi* calling on the defendant to show cause why the award should not be set aside on the following grounds:—

1. That the arbitrator was mistaken in the law as to the liability of the defendant, Samuel J. Holley, under the contract or agreement sued on in this action, inasmuch as the arbitrator decided that the defendant, Samuel J. Holley, contracted with the plaintiff as agent, when, as a matter of law, he became personally liable, and so contracted as principal in the contract sued on herein, and became personally liable to the plaintiff.

2. That the arbitrator was mistaken in the law as to the liability of the defendant, Samuel J. Holley, under the contract or agreement sued on in this action, in as much as the arbitrator decided that the defendant, Samuel J. Holley, only contracted as agent, and was not personally liable, when as a matter of law if he did contract as agent, he contracted as agent for a foreign principal, as appears from said contract, and so became personally liable to the plaintiff, and credit was given to the defendant personally.

3. On the ground that the said arbitrator by his said award entered a non-suit, and did not decide all the issues or questions referred to him, and so the said award is not final, and does not decide all the matters in question between the parties hereto which were referred to the said arbitrator.

The defendant argues against the regularity of the plaintiff's proceedings, and against the Court entertaining the questions raised, upon several grounds. He objects, first, that the proceedings are irregular because the motion paper on which the rule was obtained, making the order of reference a rule of court, is not signed by Counsel.

This objection is at once disposed of, by saying that while on the present application the rule making the order of reference a rule of court is before the Court, the papers on which it was obtained are not. The objection, if a good one, should be raised by some proceeding to set aside or discharge the rule, said to have been irregularly obtained. The rule itself is proper and regular in form.

The second objection is that there is no evidence proving the execution of the award; no affidavit of execution by the attesting witness or by any one.

The order of reference does not, however, require any signature of the award by the arbitrator.

It does not provide, as such orders generally do, that the arbitrator is "to make the award in writing under his hand, ready to be delivered, &c.," but simply, that he is to make his award "in writing." The arbitrator therefore might make his award in writing without signing. *Baby* v. *Davenport*, 6 U. C. O. S. 643. If, then, there is evidence identifying the document moved against, as the document which the arbitrator delivered out as his award, that would seem to be sufficient.

Here there is an affidavit from the clerk that he, on the 22nd of October, obtained from the arbitrator a sealed envelope which he identifies, marked "Doig v. Holley, Award," and which he handed to the plaintiff's attorney without its being opened. Then there is an affidavit from the attorney that he received from the clerk, the sealed envelope which he also identifies; that he opened it and found therein two papers which he also identifies, and one of which is the award moved against. That would seem to be sufficient verification of the award in the present case.

The third objection is, that the pencil memorandum found in the envelope cannot be read or looked at, because it is not mentioned or referred to in the rule *nisi*.

The rule is drawn up upon reading certain papers and among them the affidavit of the attorney. In that affidavit the pencil memorandum is referred to as an exhibit, and the memorandum itself is properly marked as such exhibit under the hand of the commissioner before whom the affidavit was sworn. In *Lush's Pr.* (page 873) where the annexing or marking of exhibits referred to in affidavits is spoken of, it is said, "The latter course is often adopted for convenience, but though it is not in such case required to be filed with the affidavit it is considered part of it," and see *Attenborough* v. *Clarke*, 2 H. & M. 588. The document is therefore properly before the Court.

The main objection urged for the defendant is, that the Court will not set aside an award on the ground of the arbitrator having mistaken the law, unless that appears on the face of the award, and there is nothing on the face of the award here to show any such mistake.

The plaintiff argues that the pencil memorandum or document dated the 18th of October is really the award, or that he is entitled to treat it as such, so that the mistake of law does appear on the face of the award.

I do not think that document can be considered or taken as the award, but for disposing of this objection it is wholly immaterial that it is not.

It is no doubt well settled, as a general rule, that the Court will not entertain a motion to set aside an award on the ground of mistake by the arbitrator, unless the award shows on its face that he did make such mistake. That general rule is, however, subject to this qualification, that when the grounds of the arbitrator's decision appear in some contemporaneous document delivered with the award, the Court can look at that and will entertain the application.

Kent v. *Elstob*, 3 East, 13, an old case, but one referred to in the last edition of the standard work, Russell on Awards, as still a recognized authority, is a clear authority for this.

There the arbitrator delivered his award, and with it a paper containing observations on the evidence laid before him, and his reasons for making the award. In argument it was insisted that the Court could not look at this paper but when giving judgment, LeBlanc, J. said:—"The paper in question was deliv-

ered, together with the award by the arbitrator, as containing his reasons for coming to the conclusion which he did. We must therefore take them to be such, as much as if they were inserted in the award itself, and this could only have been done for the purpose of enabling any party, who was dissatisfied with the award to take the opinion of the Court upon the validity of those reasons."

Price v. *Jones*, 2 Y. & J. 114, was a case in which it was sought to set aside an award, on the ground of mistake in law. The objection did not appear on the face of the award, but affidavits were filed that the arbitrator before he made his award intimated his opinion upon the law, which was an erroneous one. The Court under such circumstances refused to interfere, but Alexander, C. B., said:—"Where the reasons appear on the award itself, or are delivered by the arbitrator contemporaneously with the award, the Court are enabled to see the ground upon which he proceeded."

In *Leggo* v. *Young*, 16 C. B. 626, the award was accompanied by a letter, from the umpire to the plaintiff on separate paper, in which he expressed an opinion that the costs of the action, reference and award should be paid by the defendant, and that he would have so ordered, but could not do so inasmuch as the order of reference was silent as to costs. The Court refused to look at this paper, holding that the parties were bound by the award. But Maule, J., distinguished the case from *Kent* v. *Elstob*, saying:—"There the arbitrator delivered with his award, a paper containing observations upon the evidence laid before him, and his reasons for making his award as he did. That, therefore, was a paper which substantially formed part of the award, and was intended so to do. Here, however, there is no document delivered with the award to both the parties, but merely a letter addressed to one of them, intimating the umpire's regret that he could not give him the costs."

In the present case the document delivered with the award consists of observations not upon the evidence as in *Kent* v. *Elstob*, but upon the cases cited to the arbitrator by Counsel. There is, however, in principle, no difference between the two, and the Court can undoubtedly look at the document to ascertain the grounds of decision, and to see whether the arbitrator has, as alleged, mistaken the law applicable to the case. The

memorandum endorsed upon the document cannot prevent the Court from doing this. Indeed the wording of that memorandum leaves no doubt, that it was delivered with the award for the very purpose as was said in *Kent* v. *Elstob*, of enabling any party dissatisfied with the award, to take the opinion of the Court upon the validity of the reasons the arbitrator had for making it.

The question then remains to be considered. Has the arbitrator in disposing of this case mistaken the law? The pencil memorandum is an exhaustive review of all the leading cases, bearing on the question of an agent's liability, decided in England during the present century, and of a number of the cases on the same subject in Ontario.

The earlier cases, in which no doubt the Court applied somewhat stricter rules to the construction of agreements and contracts than are applied to them now, may be passed over.

Fairlie v. *Fenton*, L. R. 5 Ex. 169, was a case in which the plaintiff, a broker, signed and delivered to the defendant a bought note, as it is called, expressed thus:—"I have this day sold you on account of——&c.; signed, E. F., Broker." The Court held that he was not a party to the contract, and could not bring an action against the defendant for breach of contract, in not accepting the goods. In this case, the plaintiff in the body of the contract stated that he was selling "on account of" another person, and he appended the word "Broker" to his signature.

The case of *Paice* v. *Walker*, L. R. 5 Ex. 173, was decided by the same Court a few days after *Fairlie* v. *Fenton*. The defendants signed a contract for the sale of wheat in these words:—"Sold A. J. Paice, Esq., London, about 200 quarters of wheat (as agents for John Schmidt & Co., of Dantzic) &c., Walker & Strange." On this contract they were held personally liable. Kelly, C. B., said:—"Although it may be difficult to reconcile, I do not say all the cases, but all the dicta in the cases on this subject, there is no difficulty in extracting from the authorities, a very sound rule and one on which we can always safely act. That rule is very well laid down in the note to *Thomson* v. *Davenport*, 2 Sm. L. C. 377, in these terms:—"It may be laid down as a general rule, that where a person signed a contract in his own name without qualification, he is *prima facie* to be deemed

to be a person contracting personally, and in order to prevent this liability from attaching, it must be apparent from the other portions of the document, that he did not intend to bind himself as principal."

This case, the arbitrator says, has been practically if not expressly overruled by *Gadd* v. *Houghton*, L. R. 1 Ex. Div. 357. In that case fruit brokers gave a sold note, "We have this day sold to you on account of James Morand & Co., &c.," and signed it without any addition to their signature. In appeal, reversing the judgment of the Exchequer Division, it was held that the words "on account of" showed an intention to make the principal and not the agents liable. This was quite in accordance with the case of *Fairlie* v. *Fenton*, decided before by the Court of Exchequer, in which the same words being used the agent was held not to be a party to the contract.

James, L. J., when giving judgment in *Gadd* v. *Houghton* expressed disapproval of *Paice* v. *Walker*, saying:—"I cannot conceive that the words "as agents" can be properly understood as implying merely a description. The word "as" seems to exclude that idea. If that case were now before us, I should hold that the words "as agents" in that case had the same effect as the words "on account of" in the present case, and that the decision in that case ought not to stand." Mellish, L. J., said, "I am of the same opinion." * * * If there are plain words to show that he is contracting on behalf of somebody else, why are we not to give effect to them.

Notwithstanding these expressions made use of in *Gadd* v. *Houghton*, Pollock, B., followed *Paice* v. *Walker* in *Hough* v. *Manzanos*, L. R. 4 Ex. Div. 104, and held, that when the defendants signed in their own names without qualifying their signature, a charter party, which in the body of it purported to be made by them "as agents for charterers" they were personally liable. He considered Paice v. Walker as binding upon him, though he certainly, judging by his language, did not fully approve of it.

The Common Pleas followed Paice v. Walker in *Southwell* v. *Bowditch*, L. R. 1 C. P. Div. 100, and held that on a contract expressed thus:—"I have this day sold by your order and on your account to my principal about five tons, &c.," the defendant had made himself personally liable. But this was before *Gadd* v. *Houghton* had been decided by the Court of Appeal.

Mr. Pollock, in his excellent work on Contracts, says:—"*Paice* v. *Walker* is nearly, but not quite, overruled." It was never regarded by the profession as a satisfactory decision, and it cannot now be relied on as an authority.

The present case is one much stronger against the defendant

The contract or agreement sued upon, does not contain in the body of it, a single word or expression to indicate that it is being made by the defendant, not on his own behalf, or which indicate. in the remotest manner, that any other person is liable or intended to be made liable. It is expressed to be made "By and between Alexander Doig, of the city of Toronto, of the first part, and Samuel J. Holley, Superintendent, of the city of Winnipeg, Manitoba, of the second part."

It goes on to say "The said party of the first part in consideration of the agreement of the said party of the second part hereinafter contained, hereby agrees to build, construct and set up complete in the city of Winnipeg gas plant of wrought and cast iron for a Gas Works there, as follows." Then after a detailed statement of the articles to be supplied, "In consideration of the agreement herein set forth and stipulated to be performed by the party of the first part, the said party of the second part agrees to pay to the said party of the first part the full sum of $12,500 for such iron gas plant as hereinbefore described, to be paid as follows," and then the time and mode of payment are set out.

It is quite true that, at the beginning, the defendant describes himself as "Samuel J. Holley, Superintendent, of the city of Winnipeg," but that is a mere word of description, just as "Merchant" or "Gentleman" would be.

Then at the foot he appended to his signature the words:—"Superintendent for Building Gas Works at Winnipeg for Mr. Merrick, of Oswego, N. Y., and others." But that, too, is mere description. He does not sign "as Superintendent."

There is not, either in the description of the contracting parties in the body of the agreement, or in the signing, any words "on account of" or similar words, such as in *Fairlie* v. *Fenton*, and *Gadd* v. *Houghton*, were held to relieve the agent from responsibility. There are not even such words as were found in *Paice* v. *Walker*, *Southwell* v. *Bowditch* and *Hough* v. *Manzanos*,

indicating agency, even though insufficient to prevent personal liability from attaching.

Even if the defendant was only an agent, the case seems to be governed by the rule stated by Blackburn, J., in *Fleet* v. *Murton*, L. R. 7, Q. B. 126. "I take it that there is no doubt at all that the rule of law laid down in the case of *Higgins* v. *Senior*, 8 M. & W., 833, and the other cases there cited, such as *Jones* v. *Littledale*, 6 A. & E. 486, is perfectly correct, namely, that where the agent of the purchaser though really making the contract between two principals, chooses to make the contract in writing in a form in which he declares himself to be the contracting party, he therefore says, "I am to be liable."

Here the defendant has clearly, in the body of the contract, and he drew it up himself, declared himself to be the contracting party, and he does not when signing attempt to qualify that by signing even "as Superintendent."

In the Ontario case of *Hagarty* v. *Squire*, 42 U. C. Q. B. 165, where the defendant was held personally liable, on the ground that there was nothing on the face of the bill to indicate that he did not intend to make himself personally responsible, Harrison, C. J., said:—"While the addition of the word "Agent," "Inspector," "Director," "President," "Secretary," or "Treasurer," or other words of mere description is not enough to rebut the *prima facie* intention of personal liability expressed on the face of the instrument, the addition of such words as "for," or "on behalf of," or "on account of," the principal, naming the principal in the body of the instrument, or in the signature, are sufficient to absolve the agent and charge the principal."

This case, the arbitrator says, "is strongly in favor of the defendant. * * * He did qualify his signature by indicating plainly that he was acting for others, and he gave the name of one of these others." In fact he did nothing of the kind. He did not qualify his signature. In the beginning of the document he described himself as "Superintendent," and when signing he amplified that by stating what sort of Superintendent he was—nothing more.

Even if the evidence can, as the defendant contends, be looked at, to find the intention of the parties when entering into the

contract, it does not here show that the plaintiff contracted or even intended to contract with the defendant only as an agent.

He undoubtedly knew that the defendant was acting for the Company, and he wrote to Mr. Merrick. He says, "I wanted to know if he (meaning defendant) could give me any security. He referred me to a gentleman, I presume one of the Company, Mr. Merrick. I wrote to him and got a reply from him. I asked him if he would be answerable for the work defendant was ordering from me. * * * I wanted to know how my money would be paid." In another place he says, "I did not enter into particulars about the Company."

Had the plaintiff intended to contract with the Company or with "Mr. Merrick and others," his enquiry of Mr. Merrick would not have been if he would be answerable for the work defendant was ordering, but it would have been an enquiry about his paying for work plaintiff had undertaken, or was undertaking to do for him and others.

It seems unnecessary to consider the other question raised, that the defendant acting for a foreign principal is in any event personally liable, or that he is liable when acting for undisclosed principals.

The arbitrator having mistaken the law applicable in this case, the award should be set aside. The plaintiff objects to any reference back to the arbitrator.

The award seems defective in this, that the defendant's plea of set off is not by it disposed of.

The third ground taken in the rule, that the arbitrator entered a non-suit, and did not decide the issues referred to him, applied only to the document of 18th October, and need not be considered, as that document is not the award.

The plaintiff should have costs against the defendant.

PRITCHARD v. HANOVER.

Cloud upon title—Proof of Patent—Patent as evidence of title.

Held—1. That the copy of a patent filed in the registry office and produced by the registrar is not evidence of the patent.

2. Where the bill alleged a patent and asked that certain deeds to the defendant should be set aside as clouds upon title, and the answer prayed by way of cross relief, that the patent referred to in the bill might be set aside as a cloud upon the defendant's title, that no proof of the patent was necessary.

4. That a patent from the Crown is *prima facie* evidence of title. If it be desired to set up title through a purchaser from the Hudson's Bay Company as against a patent evidence must be given to bring the case within "The Rupert's Land Act, 1868." (Imp.)

The facts sufficiently appear from the judgment.

Ewart and *Bodwell* for the plaintiff.

We have proved the patent, which is *prima facie* evidence of title, and we have shown that the defendant has registered three deeds from the same man who originally conveyed to the plaintiff. We are entitled to a decree.

Howell and *Hough* for the defendant.

(1) There is no proof of the patent. The copy from the registry office is not evidence of it without notice, and no notice was given. (2) In Manitoba a patent is not *prima facie* evidence of title, at all events in cases where there was occupancy in July, 1870, for by the Manitoba Act, s. 32, the title which was held on that day by occupancy or otherwise was expressly recognized, and the Crown was authorized, not to take it away, but to confirm it. The bill alleges, that prior to the issuing of the patent Livingston owned the property, title must therefore be traced from him and not from the Crown, and the deeds executed by him may not include the property in question.

Ewart in reply. (1) The objection to the copy of the patent would have been good if taken before it was received in evidence and read. Secondary evidence may be excluded, but if admitted

cannot afterwards be objected to, *Read* v. *Lamb*, 6 H. & N. 75; *Taylor on Evidence* (7th Ed.) p. 1558. At all events the answer asks, that the patent may be declared to be a cloud upon the defendant's title, and that is a sufficient admission of its existence. (2) If a patent be not *prima facie* evidence of title then there will be an endless confusion, an inquiry into the original occupation of invaluable property with undefined boundaries will make certainty in titles impossible. Section 32 of the Manitoba Act is expressed to be "for the quieting of titles and assuring to the settlers in the Province the peaceable possession of the lands held by them." The statute 38 Vic. c. 53, provides for the appointment of commissioners to investigate conflicting claims under sub-sections 3 and 4, of section 32, of the Manitoba Act, and expressly reserves by section 15 the right of the Minister to investigate, or cause to be otherwise investigated, all adverse or conflicting claims. The patent recites that the plaintiff, having claimed the property in question, his title had been duly investigated and found to be good. After such proceedings the Court will assume, in the absence of evidence to the contrary, that the plaintiff's title is good. Again the jurisdiction of this Court to set aside a patent, rests upon 42 Vic. c. 31, s. 78, and the only grounds upon which the Court can proceed are fraud, improvidence or error.

[*20th February, 1884.*]

WALLBRIDGE, C. J.—The bill sets out that the plaintiff is patentee of lot 36 in the Parish of St. John, in the County of Selkirk, in the Province of Manitoba, by patent from the Crown, dated 21st March, 1878, as shown on a map or plan of river lots in the Parish of St. John, St. James and St. Boniface, dated 1st January, 1875, signed by John Stoughton Dennis, Surveyor-General of Dominion Lands, containing 93¼ acres, more or less, to hold to the plaintiff, his heirs and assigns; that prior to the grant of the said letters patent, and prior to the 31st October, 1870, one Neil Livingston was entitled to the said lands; that by deed poll dated 31st October, 1870, Neil Livingston sold said lands to the plaintiff; that after the 31st October, 1870, and prior to 15th July, 1874, the Government of the Dominion of Canada caused the said and adjoining lands to be surveyed, and the claims of the various persons in respect thereof ascertained and defined with a view to the issue to such persons of letters patent therefor; that the said lands were by the survey set out

and ascertained, and the bounds thereof defined; that the said Neil Livingston, by indenture bearing date the 15th July, 1874, granted and conveyed the said lands to the plaintiff; that the said patent and deeds were duly registered in the proper registry office in that behalf, long prior to the execution of the deed to the defendant hereinafter referred to; that the defendant applied to the said Neil Livingston and obtained from him two conveyances, in consideration of $20, one of which is dated 5th May, 1883, and describes the lands as lot 36, in the Parish of St. John, according to the Dominion Government Survey by Duncan Sinclair, D. L. S., on 26th January, 1875, being in the city of Winnipeg, and the other of the said conveyances is dated the 8th of May, 1883, and describes the said lands as all and singular, that certain parcel or tract of land situate in the city of Winnipeg, and composed of all lots on the plan of a subdivision of Parish lot 36, made by the Rev. Samuel Pritchard, and being lots 1 to 456 inclusive, and blocks 1, 2, 3, 4, 5, 6, 7, 8 and 9, in said sub-division of Parish lot number 36, of St. John, in the city of Winnipeg, made by the said Reverend Samuel Pritchard; that the said lands are of the value of $200,000; that the defendant has caused the deeds to him to be registered in the registry office as against the said lands, and the same now form clouds upon the title of the plaintiff; that the plaintiff has sold large portions of the lands as city lots, and there is due the plaintiff thereon $15,000, and the plaintiff is engaged in selling other portions of the said lands by auction and private sale; that the defendant, on 13th May, at and during an auction of the said property, publicly said, "Mr. Pritchard (meaning the plaintiff) has no title to these lots." The plaintiff submits that he is entitled to have the said deeds removed from the registry office and to be paid damages, and prays that the defendant's deeds may be declared to be a cloud upon the title of the plaintiff to the said lands; that defendant may be ordered to pay the plaintiff the damages sustained; that defendant may be ordered to pay the costs of this suit, and for other relief.

The defendant answers that Neil Livingston was entitled to a portion of the lands in question in this cause, prior to 31st Oct., 1870; that he is informed by the said Neil Livingston that he never sold, or agreed to sell, any portion of the said lands in question to the plaintiff, and says that the deed poll (if any) was never registered, and he had no notice or knowledge of the same

if it had been, or was, made at the time of the defendant's purchase therein mentioned; that he has no personal knowledge of the allegations contained in the fourth paragraph of the bill, and answers the fifth paragraph—that Neil Livingston informs him he never executed that deed to the plaintiff, and says if there be such a conveyance it was obtained by fraud by the said Pritchard; that the conveyances from Neil Livingston to the defendant were *bona fide* and for valuable consideration; and claims the lands as his, the defendant's, by virtue of the conveyances, and that the plaintiff should account to defendant for sales; that he is informed by Livingston that he never contracted to sell, and the only conveyance he ever intended to make to the plaintiff was Parish lot 57, being the lands lying to the east of Main street, in the city of Winnipeg; that he is informed and believes, and charges the fact to be, that the plaintiff procured Livingston to make the deed of the lands in question by fraud and deception, the plaintiff alleging that the lands intended to be conveyed were those east of Main street, whereas in truth they were the lands west of Main street, the lands lying east of Main street being now known as Parish lot 57, and those on the west as Parish lot 36; that the deed from Livingston to the plaintiff was not read over, and the description of the land was never explained to him, except, that the plaintiff told him it was a deed of the land east of Main street, and he conveyed to the plaintiff, believing he was conveying the lands east of Main street only; that the conveyances from Livingston to the defendant were *bona fide* and for valuable consideration; and he claims the lands thereunder, and that the plaintiff should account to him for the lands sold.

The defendant files a supplemental answer and sets up, that he does not admit that Livingston was entitled to the lands prior to the 1st day of August, 1871, and says that Andrew Goudré claimed to be entitled to the southernmost portion thereof, and that plaintiff has not obtained title thereto, and as such has no right to file a bill against defendant; and claims the benefit of the statutes affecting the registration of lands; and that by prior registration of the deed from Neil Livingston to him, to that of the deed poll made by Livingston to the plaintiff, he is entitled to the lands; and that he bought the lands from Neil Livingston in good faith and for valuable consideration, and without notice of plaintiff's claim; and he claims title to that portion of the lands in question, namely, parts of lots 2, 7, 8, 9

and 10, in accordance with subdivision of part of lot 36, of the Parish of St. John, west of Main street, which is described in the deed, Holes to defendant, as commencing on the west of the Queen's highway, &c., by virtue of a conveyance thereof to him dated 6th March, 1882, duly registered; and being the owner, is entitled to a declaration to that effect; and he claims that he is entitled to a declaration from this Court, that the patent to the plaintiff, and the deeds set forth in the plaintiff's bill, under which he claims title to the said lands, are clouds upon his title.

The plaintiff sets out in his bill, that he is patentee by virtue of a patent to him, dated 21st March, 1878, and that prior to 31st October, 1870, one Neil Livingston was entitled to the lands.

The defendant by his answer, says the conveyances referred to in the bill, made by Livingston to him, are *bona fide* and for valuable consideration, and he claims the lands under the conveyances set out in his answer; and that the plaintiff should account to him for the proceeds of the lands sold.

The plaintiff, in order to prove his patent, produces what purports to be a certified copy of it from the registry office of the city of Winnipeg. To this objection was taken, that a patent could not be proved by the copy from the registry office. Con. Stat. c. 60, s. 14, provides that grants from the Crown may be registered; section 15, that such grants may be registered by production thereof to the registrar, with a true copy sworn to by any person who may have compared the same with the original, such copy to be filed with the registrar. All other instruments, excepting wills, shall be registered by deposit of the original instrument, or of a duplicate, or other original part thereof. Section 30 declares that all instruments which shall be registered under this Act shall be registered at full length, but grants from the Crown shall not be registered at full length, as other instruments, but shall only be filed with the registrar. Section 59 provides that a copy of any instrument duly registered in any registry office in this Province, certified to be such, under the hand and seal of the registrar in whose office the instrument is, or his deputy, shall be receivable and admissible in all controversies in Courts in this Province, without proof of the execution of the original, of which it purports to be a copy. The patent is not retained in the registry office, and is not therefore an instrument in his (the registrar's) office, and is not therefore one

of the instruments which can be proved by producing a certified copy under the hand and seal of the registrar.

I hold, therefore, that the copy of the grant from the Crown, produced from the registry office, is not legal evidence of the grant. It does not come within the words of the 59th section. A grant from the Crown is only properly proved by the production of the original, or of an exemplification of it. So expressly held in *McCollum* v. *Davis*, 8 U. C. Q. B. 150, 153.

The plaintiff then puts in an instrument (not under seal) dated 31st Oct., 1870, by which Neil Livingston sells to the plaintiff all his right, title, and interest in the lot of land in St. John's Parish "at present occupied by me," consisting of 110 acres, more or less, with all the buildings and fences standing thereupon, and secondly the lot of land, of ten chains frontage, situate on the east side of the Red River, in Kildonan Parish, in the Province of Manitoba, and by which the said Neil Livingston also agrees to give up possession of the above mentioned houses and lands on or about the first day of June, 1871. This paper is signed by Neil Livingston and witnessed by S. P. Matheson, and certified as registered 4th March, 1873.

Without evidence to show what land Neil Livingston was in possession of, at the time of the execution of this instrument, it can not be told what land it was intended to sell. It is inoperative as a deed. It does not pretend to convey any estate, is not under seal, and specifies no lands, excepting by the very general terms, "in the Parish of St. John, occupied by me, consisting of 110 acres, more or less, with buildings and fences standing thereon. Secondly, the lot of land of ten chains frontage, on the east side of Red River, in Kildonan Parish, in the Province of Manitoba." This is too vague to be held to amount to a conveyance.

The plaintiff then produces a certified copy of a deed, dated 15th July, 1874, from Neil Livingston to himself, consideration £162 sterling, in consideration of which Neil Livingston grants, bargains, sells, conveys and confirms unto the plaintiff, his heirs and assigns, certain lands, described with great particularity, but not so described that a person, unless he well knew the situation, surroundings and locality, could identify the land as that described in the bill.

The plaintiff then calls Wm. N. Kennedy as a witness. He is the registrar of deeds in the city of Winnipeg. He produces the instruments just referred to.

It is now objected, that the certificates on the deeds produced bear date, and are given by the registrar, before the passing of the Act making such certificates evidence. The registrar, however, is in the box, and is asked to certify to it there. This gets over that difficulty. It is now urged that the defendant, in the fourth paragraph of his supplemental answer expressly admits the grant from the Crown, which I think he does. This paragraph also admits the deeds as set forth from Neil Livingston to the plaintiff. I hold them admitted by the supplemental answer and thus proved.

The defendant then puts in the deeds under which he claims. First deed, John Christian Schultz and Agnes Schultz, to Andrew Holes, dated 19th October, 1872, registered 5th November, 1872. The land is described in this deed in such manner, that by the ordinary reading of it, it could not be told to be the land in question. No evidence is given to shew how John Christian Schultz got it. Then, by deed Andrew Holes and Susan L. Holes, on 6th March, 1882, convey to defendant, for the consideration of $3,000. This deed is registered 13th April, 1882. The description in this deed would require knowledge of its boundaries, to identify the land as that now in dispute. Then follow three deeds from Neil Livingston to the defendant, dated 5th May, 1883, 8th May, 1883, and 14th July, 1883, respectively. No further evidence is called by either party.

It is objected that the land cannot be identified as that in the bill, by the deed of 15th July, 1874, from Neil Livingston to plaintiff. In respect to this, Mr. Kennedy the registrar says the description is sufficiently definite to enable him to register it against the lot; that the plaintiff and he took maps in the office and he could make it out, and that from his knowledge of the situation of the land, and the maps in his office, as registrar, he can identify the land as the same as covered by the patent. It is objected that Mr. Kennedy has no knowledge of the place, but such as is common to every one else, that he is not a surveyor and thus not enabled to speak with any authority, so as to identify the land. In my opinion, this is not necessary. Any one may speak of the place and position of the land, although

not a surveyor, and the weight to be attached to his evidence depends upon his credibility and means of knowledge. Mr. Kennedy has been the registrar for Selkirk, as appears by the deeds produced in this cause, since 3rd February, 1873, and is a man of education and intelligence. This land is situate within the city of Winnipeg, and in my judgment, Mr. Kennedy is particularly well qualified to speak of its location and boundaries—in law he is a competent witness for that purpose. This question is not a new one, and has been before the courts in Ontario, and in *Potter* v. *Campbell*, 16 U. C. Q. B. 109, this has been expressly held. But the plaintiff is not driven either to prove the patent, or to identify the land in the patent with that in the deed of the 15th July, 1874, Livingston to Pritchard.

I hold both patent and deeds admitted in the supplemental answer of the defendant in paragraph four.

The plaintiff, independently of the grant from the Crown, is entitled to succeed against the defendant, by simply producing the deed from Livingston to him, the plaintiff, as the defendant sets up title under the same person. It is well settled, that when the parties claim under the same person, the plaintiff need not go further back in his title. The plaintiff claims by deed, under Neil Livingston, dated 15th July, 1874, registered 18th July, 1874, and the defendant, by deed long subsequent, claims under the same person.

The defendant also puts in deeds from John Christian Schultz to Andrew Holes, dated 19th October, 1872, registered 5th November, 1872, and from Andrew Holes to him (defendant) dated 6th March, 1882, and registered 18th April, 1882. It is not shewn, however, what land these deeds cover, and no evidence is given to identify those lands with the lands in the bill, or that one of those deeds covers the land covered by the other. It may be so, but it requires explanation and evidence to establish it. Moreover, it is not shewn that John Christian Schultz had any title or possession when he conveyed to Andrew Holes, or that Holes had possession when he conveyed to the defendant.

The beginning of this title, so far as any proof offered goes, shews that the Crown granted this land to the plaintiff. Her Majesty is seized of the lands in this Province in right of Her Crown, and a grant from the Crown must be held to confer

title. It is true that in the "Rupert's Land Act, 1868," the Governor and Company are authorized to surrender to Her Majesty all the lands, territories, &c., &c., upon terms, &c., which terms and conditions are contained in the deed of surrender dated 19th November, 1869, the tenth of which conditions is, "that all titles to land up to the 8th of March, 1869, conferred by the Company, are to be confirmed"; afterwards extended to 15th July, 1870. But any one desiring to obtain title under that Company must bring himself within that statute, and the deed of surrender and conditions. No evidence whatever upon this point has been offered in this suit. When a grant has been obtained by fraud, error or improvidence, the person seeking to render such grant void must prove the fraud, &c., and the grantee is not called upon to give evidence until his title is impeached, again no evidence is offered. *McIntyre* v. *The Attorney General*, 14 Gr. 86. And where the Government have settled the respective rights of the parties after investigation made, then it is not in the power of the Courts to review their decision. *Boulton* v. *Jeffrey*, 1 Ont. E. & A. R. 111; *Burns* v. *Bromer*, 10 Gr. 532; *Kennedy* v. *Lawlor*, 14 Gr. 224.

The plaintiff is entitled to the decree as asked for—the deeds to the defendant are a cloud on plaintiff's title, and the registration thereof should be vacated. The defendant must pay the costs of the suit.

ARNOLD v. CALDWELL.

Indorser of Cheque diverted from its original purpose—Using papers at trial.

H. being indebted to the defendant in the sum of $500, procured him to indorse his (H's) cheque for $1,000, upon a bank at N., out of the proceeds of which the debt was to be paid. H. and the defendant went to a bank at W. to get the cash for the cheque. H. alone, went into the manager's room, and on his return, informed defendant that the cheque had been left with the manager, who would send it for collection to N. H. in fact retained the cheque and afterwards transferred it to plaintiff for value.

Held, that defendant was liable upon the cheque.

Held, that the examination of a party to an action, taken for the purpose of discovery, may be used at the trial, to contradict the same party, but cannot be put in evidence as an admission.

J. B. McArthur for plaintiff.

G. Patterson for defendant.

[*4th February, 1884.*]

DUBUC, J., delivered the judgment of the Court :—

This is an action against the indorser of a cheque.

One Henderson, from Nelsonville, met in Winnipeg the defendant Caldwell, and obtained his indorsement on a cheque for $1,000. The cheque was drawn on Sutton, Wayley & Lafferty, of Nelsonville, and the indorsement of the defendant was required for the purpose of cashing it at the Merchants Bank in Winnipeg. Henderson owed the defendant $500. The understanding was that out of the $1,000, the defendant would be paid his $500 and the rest would go to Henderson. The defendant went with Henderson to the Merchants Bank, and after the cheque had been made and indorsed, Henderson went into the manager's office to get his consent for cashing the cheque. When Henderson returned from the manager's room, he said to the defendant, "They will send it forward for collection;" they then parted. But instead of the cheque having remained in the manager's office to be sent to Nelsonville for collection, Henderson had kept it. He on the same day went to the plaintiffs,

who are wholesale grocers in this city, purchased goods to the amount of $601.35, gave the cheque in payment, and received, in cash, the balance, $398.65. The plaintiffs sent the cheque to Nelsonville and it was dishonored and protested. They afterwards brought this action. The case was tried at the last assizes, and resulted in a verdict for the plaintiffs.

At the close of the trial, Mr. Patterson, counsel for the defendant, offered to put in as evidence, the depositions, taken before an examiner, of two of the plaintiffs, one of whom was not called as a witness. The learned judge refused to allow them as evidence.

It is contended, on the part of the defendant, that the depositions should have been received, as admissions of the plaintiffs under their signature. The learned judge properly held, I think, that, at common law, such depositions could not be received as evidence.

These examinations are had, at the instance of the adverse party, for the purpose of discovery. When so examined the party has only to answer the questions put to him; and is entitled to disclose only so much of his case as the questions lead him to, and as he cannot properly help disclosing. He is not bound to go into lengthy explanations, which would show his whole case, unless he is brought to it by the questions. If, at the trial, the case is made without his evidence, or if he is absent from the country, it might be unfair to him to use such deposition as evidence, because it might be taking his direct answer to a particular question, which answer might be true in fact, but might be shown by explanation to have a different and more favorable meaning. It is true that, at such examination, he may give the full explanation, if he chooses, and his attorney may bring it out by cross examination; but, as I have stated, he is brought there by the opposite party, to answer the questions put to him, and he is not bound to volunteer explanations which would show his whole case. And unless it is well known, as a settled practice, that the deposition, so taken for a particular purpose, the purpose of discovery, shall be used as evidence at the trial, he may not think it necessary, nor even proper, to disclose his whole case. The statements made in those depositions are not voluntary, but compulsory statements, made in answer to questions, for the particular purpose of discovery. It is proper that they should be

used for the purpose for which they are made, and also to contradict the party at the trial, when he is giving evidence, because he may then explain the portions of his answers which may require explanation.

It was no doubt to meet this difficulty, and remove all doubts on this point, that the Ontario Legislature has effectually enacted that such depositions may be read as evidence at the trial. *Revised Stat. Ont.* c. 50, s. 165. With such enactments, the party examined knows what use may be made of his depositions, and may answer accordingly.

Now, the principal ground raised on the argument was, that the general practice as to cheques, was to indorse them only for the purpose of obtaining the money, and not to make the indorser liable on it. This is true enough, but here it was not an ordinary cheque drawn on a local bank, where the drawer had funds in the bank. In this case the cheque was drawn on funds, supposed to be in Nelsonville to the credit of the drawer; and as the cheque was intended to be cashed by a local bank, where the drawer had no funds, the defendant's indorsement was obtained as security to induce the bank, on such security, to advance the funds, and secure the bank in case there were no funds to meet it in the bank on which the cheque was drawn. This shows that the indorser wrote his name on the back of the cheque for the purpose of becoming surety, and for no other purpose. The case of *Keene* v. *Beard*, 8 C. B. N. S. 372, is exactly in point. The argument, as in this case, was that a cheque is not to be classed with bills of exchange, so far as to be capable of creating a liability in an indorser, to the person who may be the holder or bearer of the instrument. To this, Earle, J., said:—"I may add that I do no injustice to the able argument of Mr. Grant, the counsel, when I observe that it would have been deserving of more attention, if it had been addressed to the Court a hundred years ago." *Daniel on Negotiable Instruments*, s. 1652, says that whenever a cheque is negotiable, it is undoubtedly subject to the same principles which govern ordinary bills of exchange, in respect to the rights of the holder, and may be transferred by indorsement.

In *Cross* v. *Currie*, 5 Ont. App. R. 37, Moss, C. J. A. quoted the doctrine laid down in an American case by Black, C. J., who says: "He who chooses to put himself in front of a negotiable

instrument, for the benefit of his friend, must abide the consequences, and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way."

The other ground taken by defendant's counsel is, that the plaintiffs were guilty of contributory negligence in receiving such cheque, and not asking the defendant, when they saw him the same day or the day after, if he had indorsed the cheque for the purpose of becoming surety, as it is not a usual thing to have an indorser to a cheque. There might be some force in the argument, without saying that it would be conclusive, if the cheque had been drawn on a local bank, where the cheque would have had only to be presented to get the money. But as this cheque was drawn on a certain bank at Nelsonville, the true and natural inference for the plaintiffs to draw was, that the name of defendant was put there to render the instrument more reliable and better insure its payment. When it is a question for the jury to determine, whether the indorsee of a bill acted in good faith in taking it, gross negligence in taking the bill may be evidence of bad faith, but it is not equivalent to it. *Goodman* v. *Harvey*, 4 Ad. & E. 870. But here there is no evidence of bad faith, nor even of gross negligence. The evidence shows conclusively that the plaintiffs took the cheque in good faith, believing that the defendant had put his name on it as an ordinary indorser, with all liability to be derived from an ordinary indorsement, and had no reason to view it otherwise.

I think that the verdict should stand, and the rule be dismissed with costs.

GEMMEL *v.* SINCLAIR.

Tax sale—Irregularities—Non-Resident Lands.

On a bill to set aside a sale for taxes,

Held, 1. That when, at a public meeting, the ratepayers had determined to raise $300 for the erection of a school-house, the trustees had no power to increase the amount.

2. That there is no power to assess unoccupied or non-resident lands under 36 Vic., c. 22.

3. That the absence of a warrant from a justice of the peace to the secretary-treasurer, and of a return by the latter to the trustees, are each fatal to the validity of the sale.

4. That the fact that the *Gazette* was not published in three consecutive weeks prior to the sale, was no sufficient excuse for non-compliance with the statute.

5. That the requirements of statutes working forfeitures are to receive a strict construction.

G. A. F. Andrews for plaintiffs.

W. R. Mulock and *E. H. Morphy* for defendant.

[*1st March, 1884.*]

WALLBRIDGE, C. J.—The bill is filed by Gemmel as mortgagee, and by Burrage as owner of the equity of redemption, against Sinclair, who is a purchaser at a sale for taxes of the south-east quarter of section 36, and the north quarter of the north half of north-east quarter of section 25, in township 14, range 2 east, in the Province of Manitoba; and the prayer is that the deed thus given on the sale for taxes, may be declared null and void, and the registration thereof vacated.

The plaintiffs make out a good paper title as follows:—The patent for the lands was issued on the 8th October, 1877, to Gilbert Dennet, his heirs and assigns, for all those parcels or tracts of land being composed of the south-east quarter of section 36, and the north half of the north-east quarter of section 25. On the 17th August, 1877, Gilbert Dennet conveyed the same lands to William P. Clark, and he, on the 27th December, 1878, conveyed the same to Alexander Gemmel; Gemmel, on the 6th March, 1882, conveyed the same to William R. Bur-

rage, who, on the same day, mortgaged the same to Gemmel for $1000. A clear title is thus made out to Burrage, as the owner of the equity of redemption, and to Gemmel, as mortgagee for $1000.

The plaintiff alleges, that the secretary-treasurer of the school district of Victoria, on 3rd March, 1879, sold the south-east quarter of section 36 aforesaid, and the north quarter of the north half of north-east quarter of section 25, for alleged arrears of taxes assessed for school purposes, and, on the 25th April, 1881, assumed to, and did execute an indenture to the defendant of the last mentioned parcels, for the consideration of $8.60, which deed the defendant accepted, and registered in the registry office for the registration division in which the said lands are situate: the plaintiff also alleges that the deed under which the defendant claims, is void by reason of the non-compliance by the parties acting on the imposition of the tax for which the same was sold, and the unauthorized manner in which the assessment made of the lands, and the subsequent sale thereof were made. The plaintiff has proved a good title, and unless that title is defeated by the sale under which the defendant claims, the plaintiff must succeed.

The defendant answers, by putting the plaintiff to the proof of the allegations in his bill, and says the plaintiff has been guilty of laches and delay; that the deed to him having been registered before the deed to the plaintiff Burrage, given by his co-plaintiff Gemmel, and the mortgage by Burrage to Gemmel, he has acquired a priority by the registry laws, and sets up, that the title he holds, not having been questioned in a court of competent jurisdiction, his title has become good, and he puts the plaintiff to strict proof to impeach the title thus acquired.

The case came to be heard before me on the 22nd January, 1884, when it was proved that the *Manitoba Gazette* of the 11th February, 1878, contains a proclamation dated 7th February of that year, in which His Honor the Lieutenant-Governor sanctions the erection of the following school districts, made by the Protestant section of the Board of Education, and names Monday, the 3rd day of March then following for holding the election of school trustees; and, in that proclamation, names a section Victoria, which consists of township 14, range 2, east. This meeting was called by virtue of 34 Vic.,

c. 12, s. 20 as amended by 35 Vic., c. 12, s. 1, by which Acts the Lieutenant-Governor in Council is authorized to name a day for the meeting of the school district, for, amongst other things, electing trustees. In pursuance of this proclamation, the meeting for the election of trustees was held on the first Monday in March, 1878.

By sub-section 24 of section 20 of 34 Vic., c. 12, this meeting might decide to erect a school-house, and vote a sum of money therefor, which, if the meeting so decide, shall be raised by assessment. The meeting decided to raise the sum of $300, by assessment, for building the school-house and for other school purposes. On the 11th March, 1878, Martin Shipley was appointed assessor. At a meeting of the trustees, on April 15th, a report was received from the assessor, showing the rateable property of the township to be $61,085; the trustees then resolved to raise $550, required for the then present year. At the time of the passing these resolutions the School Act, 36 Vic. c. 22, was in force, and it is by section 24 of that Act enacted that the ratepayers, at the annual school meeting, shall decide upon the amount of money which shall be raised in their school district, for common school purposes for the ensuing year. The evidence shows but one meeting of the ratepayers was called, which was the meeting of the first Monday in March, authorized by the proclamation of His Honor the Lieutenant-Governor in Council, of the 7th of February, 1878. This annual meeting fixed the sum to be raised, during that year, at $300. This was the authority which the trustees had to raise money, and the extent to which they were authorized to go. The trustees do not seem ever to have acted upon this vote of $300, but, without any other meeting of the ratepayers, by resolution passed by themselves on the 15th April, 1878, they resolve to collect $550, by a rate of one cent on the dollar on $61,085, being the amount of the assessment as ascertained by the assessor appointed by them. This was the rate levied, and for the non-payment of which, the lands mentioned in the bill were sold. I can find no authority for levying this sum at all, or any sum above the $300 authorized by the annual meeting held on the first Monday in March. It is contended, on the part of the defendant, that by 36 Vic., c. 22, s. 21, s.-s. 4, if the amount voted at the annual meeting should be insufficient to defray all the expenses, the trustees themselves might assess and collect an additional rate,

in order to pay the balance of the teachers' salary, and other expenses of the school.

Upon looking at this sub-section, it appears that the trustees have power to provide for the salaries of teachers, and all other expenses, in such manner as may be desired by a majority of the freeholders, and householders of such section, at the annual school meeting, or at a special meeting called for that purpose by the superintendent, and should the sum thus provided be insufficient, then the trustees may assess and cause to be collected an additional rate.

The only money ever voted for erecting a school-house, was by the meeting of the first Monday of March, 1878, and that meeting voted the sum of $300 for that purpose. They do not appear at that meeting, to have voted any sum, to provide "for the salary of teachers and other expenses." This section 21 does not apply to building school-houses at all, but for sustaining the school after it is in operation.

The section applicable to erect school-houses is section 24, and the amount to be raised for that purpose, must be decided at the annual meeting. In this instance, the sum of $300 was authorized for the purpose of erecting a school-house, and nothing more.

I can find no authority by which the trustees increased the amount so levied to $550, and none either for subsequently adding $50 more to this sum. They justify it only on the ground, that it was easier to calculate the $600 to be raised on $61,085, by one cent on the dollar. This is the only reason given, for adding $50 to the $550. In my opinion the whole amount, so far as it exceeded the $300 voted at the annual meeting, is in excess of the powers of the trustees.

By 36 Vic., c. 22, s. 41, the school assessment shall be laid equally, according to valuation, upon the rateable real and personal property, and shall be payable and recoverable from the owner, occupant and possessor of the property liable to be rated.

When no assessment roll has been made by the clerk of the peace, under the 34 Vic., c. 34, of the Statutes of Manitoba, the school trustees are required, within twenty days after the annual meeting of the ratepayers, to appoint an assessor being a resident

ratepayer. In this case the assessor was appointed by the trustees. (No evidence was given that an assessment had been made by the clerk of the peace). I shall, therefore, assume that the assessor named by the trustees was the legally appointed assessor. By 36 Vic., c. 22, s. 42, s.-s. 1, the duties of this assessor shall be the same, as if appointed by the county grand jurors. By turning to 34 Vic., c. 34, s. 2, I find that the assessors shall make out a roll of all male persons of full age, in the county, and a valuation, to the best of their ability, of the property, real or personal, of such persons. The duties of the assessors for school purposes, shall be the same as if appointed by the county grand jurors. Upon turning to the Act 34 Vic., c. 34, s. 2, defining their duties, I can find no authority for assessing unoccupied or non-resident lands by them at all.

It is in evidence that the lands in the bill mentioned, were not occupied at the time the assessment was made, but the same were sworn to have been unoccupied, and to have so continued, up to the time of the hearing. It is true that this land was assessed in the name of Gilbert Dennet, but the assessor swears, that he took that name from the St. Clement's half-breed allotment list. It now, however, appears that Dennet conveyed away the land to W. P. Clark, on the 17th August, 1877, and the deed thereof was registered the next day; this assessment was made on the 15th April, 1878, or about eight months after the said Dennet had sold, and conveyed the land to W. P. Clark. Dennet, therefore, at the time of the assessment, was not the owner or possessor, and against him the assessor had no right to assess this property. The assessor swears it was unoccupied at the time of the assessment; it was, in fact, land for which I can find no authority whatever to assess, and I must hold it unlawfully assessed against Dennet, and not liable to be assessed at all.

The rate having been apportioned according to 36 Vic., c. 22, s. 42, s.-s. 3, it was the duty of the secretary-treasurer to apply to a justice of the peace, for a warrant, directing the secretary-treasurer to collect from each person named in the assessment roll, the amount payable by him. This part of his duty seems to have been entirely omitted.

By sub-section 4 the secretary-treasurer is required, within two months after receiving his warrant, to make a return to the school trustees under oath, and to specify in his return the sev-

eral persons who have paid their rates, and also the persons whose rates remain unpaid. This duty, he swears, was wholly omitted. In fact, he says he applied for a warrant to James Sinclair, a justice of the peace, but did not get it. The secretary-treasurer says he was executor of the said James Sinclair, and in 1882, in looking over Sinclair's papers, he found what he believes to be the warrant he applied for, and, as he considered it worthless, he burned it up. The contents he does not give, and it is hardly probable he could do so. Never having had the warrant, he could not have complied with the statute, by making the necessary oath as to who had paid and who had not. He says himself, he had not the warrant to make this oath upon, as the statute requires. The requirements of 40 Vic., c. 12, s. 19, which directs the proceedings, seem to have been almost wholly omitted. This section requires, that the secretary-treasurer shall prepare a statement of all non-resident lands, or lands vacated by the owners, which are in arrears for taxes for the previous year, and on which there is no property to distrain; and shall therein show, opposite each lot or parcel, the reason why he could not collect the same, by inserting the words "non-resident," "no property to distrain." It shall contain a description of the lands, showing the amount of arrears opposite each lot, and cost of advertising. This section requires that the statement shall be inserted, at least three weeks in succession in the *Manitoba Gazette*, and in a weekly newspaper.

Unfortunately it happened, that the *Manitoba Gazette*, at the time, was only published every alternate week, so that it was impossible to comply with the direction in the statute, to publish the statement "at least three weeks in succession."

I find the 19th section not complied with as to publication, and the statement prepared, did not follow the directions of the statute, inasmuch as it did not contain the words "non-resident," or "no property to seize," as required by the statute. Although this statute authorizes the sale of non-resident lands, I can find no statute authorizing the same to be assessed, and none has been pointed out to me; and, in the absence of assessment, it is clear no sale could be made, as there would be no sum to sell for.

I find the sale bad, and cannot be upheld,

1. Because the land was charged, even if properly assessed, with a rate of $600 struck upon the amount assessed, $61,085, whilst the annual meeting only authorized the sum of $300 to be raised for that year.

2. Because no provision is made in the Act, establishing a system of education, for assessing unoccupied or non-resident lands.

3. The land was unlawfully assessed to Gilbert Dennet, after he had sold and conveyed it away, and was not the owner thereof, and it was at the time unoccupied and non-resident land.

4. The secretary-treasurer never had a warrant from a justice of the peace, without which he, the secretary-treasurer, was not authorized to collect the amounts payable, much less was he authorized to sell.

5. The land was not advertized for three consecutive weeks, in the *Manitoba Gazette*, as directed by law.

6. No return was made under oath, by the secretary-treasurer to the school trustees. This is a proceeding required to be had, or taken by the secretary-treasurer, within two months after receiving the warrant, and before he is directed by 40 Vic., c. 12, ss. 19 and 22, to sell, and is a condition which is to be performed before the sale is made.

A sale of lands for taxes, has been held by the Supreme Court of Canada, to be a proceeding which works a forfeiture, and in England and in Ontario, it is unequivocally laid down, that Acts for that purpose are to receive a strict construction. *McKay* v. *Crysler*, 3 S. C. R. 436; *Hall* v. *Hill*, 2 Ont. E. & A. R. 574; and *Hughes* v. *Chester & Holyhead Railway*, 7 L. T. N. S. 203, in the latter of which cases it is said: this doctrine is so clear that it is unnecessary to refer to cases upon the subject. This rule of construction may seem hard upon the purchaser, who believes he can rely upon the performance, by officials, of the directions contained in the statutes; but, on the other hand, infants, absentees, and even lunatics and persons under other disabilities, may be deprived of their land without having the slightest idea of it ever having been assessed or liable to be sold, and the least that can be done, in their behalf, is to see that the forms of law are complied with, before the lands of such persons are absolutely lost. Before a creditor can sell the land of his

debtor, he must obtain a judgment against him; and before a person selling under a power of sale in a mortgage, power of attorney, or other instrument, he must comply with the terms under which he is authorized to make such sale; and it is not asking too much, before a person can be deprived of his land, that the forms which the law prescribes, shall at least be gone through with. In my opinion, the sale of this land is void for the reasons stated.

I order that the sale of the said land be declared void, and set aside, the deed given upon the said sale and registration thereof, be vacated, and the defendant ordered to pay the costs of the suit.

BRADBURY v. MOFFATT AND CARMAN.

(IN APPEAL.)

Set off—Production of books not belonging to defendants.

Defendants pleaded a set off, the items of which were contained in the books of the N. W. L. Co. Defendants were shareholders in the Company, and originally the sole owners of the stock.

Plaintiff obtained an order to examine the defendant Carman on his pleas, and gave him notice to produce the book containing the items of the set off, upon such examination. Production was refused.

Held, reversing the order of Dubuc, J., that Carman could not be compelled to produce the books.

P. McCarthy, for plaintiff.

J. B. McArthur, for defendants.

[*4th February, 1884*]

TAYLOR, J., delivered the judgment of the Court:—

In my judgment, the defendant Carman, cannot be compelled to produce the books and papers referred to in the order now complained of. These documents are not the property of the defendant but of the North-West Lumber Company. It is true he is a shareholder in that Company, and it would appear that

at one time he and his co-defendant were the sole owners of the stock of the Company. That can make no difference. The defendants in this suit, and the Company are entirely distinct.

The present case is much stronger against the plaintiff's contention than *Hadley* v. *McDougall*, L. R. 7 Ch. App. 312, was. There the defendant, carrying on business in partnership with his father, entries relating to a contract between the defendant and the plaintiff had been made in the partnership books, yet the Court refused to order production of them. Here the books of which production is sought, are the books of a corporation.

The case of *Freeman* v. *Fairlie*, 3 Mer. 24, was one where a trustee had mixed the trust accounts with his private accounts. In such a case he is clearly bound to produce his books.

Taylor v. *Rundell*, 1 Y. & C. 128, was a case where the defendants were trustees of a mining property for a partnership, and were also two of the directors of the concern. The bill was filed by the executors of the lessor really against the partnership, and in respect of the partnership business, although the two trustees were the nominal defendants. They had with the others joint possession of the books, and there the Court saying that it was the duty of the defendants to inspect the books if they could, and that they had not sufficiently, or in a manner to which a court of justice ought to attend, shown that they could not, held an examination as to documents insufficient, and ordered production.

Had the present been a suit against the defendants, as trustees for the North-West Lumber Company, as to business of the Company, the two cases would have been parallel, but the present is a suit against the defendants in respect of transactions of their own.

McDonell v. *McKay*, 2 Ch. Ch. R. 141, is an authority showing, that where the Court cannot order production, it cannot order the giving of copies.

The order should, in my opinion, be set aside with costs.

The defendants are of course bound to give all the discovery and information they can, in respect of the matters in question.

SUTHERLAND v. YOUNG.

Costs of defendant against co-defendant.

The bill was filed against Y. and S. to remove from the registry a conveyance from a former owner to Y. as a cloud on the title. Plaintiffs had agreed to sell to S., who declined to complete on account of the registration of the deed sought to be removed. S. allowed the bill to be noted *pro confesso* against him, but appeared at the trial, and asked for costs against his co-defendant Y., on the ground that by registering the conveyance to him the suit had been occasioned.

Held, that the appearance of S. was unnecessary, and he was not entitled to costs.

G. A. F. Andrews, for plaintiff.

W. R. Mulock and *W. E. Perdue*, for defendant Young.

J. B. McArthur, for defendant Schultz.

[*2nd February*, 1884.]

TAYLOR, J.—At the close of the argument a decree was made in favour of the plaintiffs, but the question of costs was reserved.

The plaintiffs are, the mortgagees of certain lands and the owners of the equity of redemption. The defendants are Young, who has a conveyance of the same land, subsequent to that under which the plaintiffs derive their title, but who claims to be a *bona fide* purchaser for value without notice, and the Hon. John Schultz, to whom the plaintiff Sutherland has agreed to sell his equity of redemption, but who declines to complete his purchase on account of the registration of the conveyance under which Young claims.

The object of the suit is to have the registration of the conveyance under which Young claims, cancelled as a cloud upon the plaintiff's title.

Against Schultz the bill has been noted *pro confesso*, but he appeared by counsel at the hearing, and claims costs against his co-defendant, Young. He does so, on the ground that Young, who had notice of his agreement to purchase by its registration, has by registering the impeached conveyance, occasioned this suit, to which he, Schultz, is a necessary party.

I do not think he is entitled to costs. He had no doubt, under general order 91, a right to appear at the hearing, and on waiving all objections to the note *pro confesso*, to argue the case upon the merits stated in the bill. But what necessity was there for his appearing. The bill prays no relief against him, and the plaintiffs could not whether he was present or absent, obtain any decree against him in this suit. Neither could the defendant Young possibly have any. His appearance at the hearing was wholly unnecessary, unless in the interests of and to aid the plaintiffs. The bill being *pro confesso* against him he could, even if given costs, tax none, except for appearing at the hearing.

The defendant, Young, urged that the plaintiffs should have no costs against him, because the bill charges fraud, while none has been proved. On perusing the bill I can find no charge of fraud contained in it. The 11th paragraph, it is true, in technical language, charges that the conveyances are fraudulent and void as against the plaintiffs, and the prayer asks that they may be declared to be so, but it is not such statements as these which call for the exercise of the rule that costs will not be given, even to a party who succeeds, but who has made groundless allegations of fraud.

That rule was laid down, and has long been acted upon, because in the language of Sir John Leach, *Wright* v. *Howard*, 1 S. & S., 206, "It is the duty of the Court to discourage the abuse of its proceedings, by the introduction of imputations disgraceful to character, which prove to be altogether unfounded." There are no such imputations here, and the plaintiffs are entitled to their costs.

I think it proper to add, that I do not think any fraudulent conduct could be imputed to the defendant Young. He purchased the land without making proper enquiries, and has now to suffer for his incautious act.

IMPERIAL BANK v. ADAMSON.

(IN APPEAL).

Examination of defendant on application to sign judgment.

Upon an application under 46 and 47 Vic., c. 23, s. 16, one defendant made an affidavit of merits, and the presiding judge in chambers made an order for the examination of two other defendants.

Held, affirming order of Dubuc, J., that the examination of these defendants was in the discretion of the judge, and the appeal should be dismissed with costs.

P. McCarthy for plaintiff.

J. B. McArthur for defendants.

[*18th February, 1884.*]

TAYLOR, J., delivered the judgment of the Court:—This suit was originally begun by writ of summons issued under the Bills of Exchange Act. The defendants having moved against it, it was amended and made an ordinary writ. To this the defendants appeared, and afterwards the plaintiffs obtained a summons in chambers, under 46 and 47 Vic., c. 23, s. 16, calling upon the defendants to show cause, why the plaintiffs should not be at liberty to sign final judgment. In answer to this, cause was shown, supported by an affidavit made by one of the defendants. Thereupon the plaintiffs obtained, *ex parte*, an order from the presiding judge in chambers, for the *viva voce* examination of two of the other defendants. This order, so made, is now appealed against.

It is sought to support the order, as one properly made under sections 46 and 47 of the Common Law Procedure Act, 1854. Section 46 provides as follows: "Upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined, *viva voce*, either before such court or judge, or before the master; and, upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just."

Section 47 provides for the proceedings upon such rule or order, when made, and the mode of conducting the examination.

There are cases which would seem to show, that this section will be acted upon, only when it is necessary to have documents produced for the information of the court or judge, or when it is in the opinion of the court or judge proper that evidence should be taken, and that it was not intended for the case of parties to the proceeding desiring, of their own motion, to have evidence taken. But the more recent case of *Morgan* v. *Alexander*, L. R. 10 C. P. 184, shows that an order may be made at the instance of a party, and not merely when the court, or a judge, desires that the examination should take place.

It is not necessary, however, to resort to these sections of the Common Law Procedure Act, to support the order in this case. The 17th section of the Act, under which the plaintiffs were applying to the Court, after providing for the mode in which a defendant may show cause to the application, says: "And the judge may, if he thinks fit, order the defendant to attend and be examined upon oath, and to produce any books or documents, or copies of or extracts from the same."

The former part of the section speaks of the defendant showing cause "by affidavit," and it will be observed that the concluding part of the section does not say that the judge may order him to attend, and be cross-examined upon the affidavit he has filed, but to "be examined upon oath." In this respect its terms are wider than those of Con. Stat. c. 31, s. 30, under which a party filing a pleading, or any person, whether a party or not, making an affidavit, may upon a judge's order be compelled to submit to a *viva voce* cross-examination upon his pleading or affidavit.

As a statute already existed, under which a defendant showing cause by affidavit, to an application under 46 and 47 Vic., c. 23, s. 16, could be cross-examined thereon, it must be presumed that when the Legislature, in the 17th section, used language which provides for a wider discovery from the defendant, and for his examination, they did so advisedly.

No doubt it is fair matter for argument, that if the examination of the defendant under that statute, or of witnesses, by in-

voking the power given by section 46 of the Common Law Procedure Act, is necessary to support an application under 46 and 47 Vic., c. 23, s. 16, then the case is not one for proceeding summarily under that Act. With that we have nothing to do at present. The judge has a discretion as to ordering the examination of the defendant. That discretion he has exercised in this case, and with the exercise of his discretion we should not interfere. The application must be dismissed with costs.

IMPERIAL BANK v. ANGUS.

FRASER, GARNISHEE.

(IN CHAMBERS).

Garnishee—Examination.

Writ issued in the Western Judicial District. An order was obtained for the examination, at Brandon, of the garnishee, on an affidavit made by him. The garnishee resided in Winnipeg.

C. H. Allen, for the garnishee, applied to vary the order so that the examination might be held at Winnipeg.

Aikins, Culver & Hamilton (N. D. Beck) for plaintiffs.

DUBUC, J.—*Held*, that the order ought to be varied, and directed the examination to be held at Winnipeg.

FISCHEL v. TOWNSEND.
STIRSKY v. TOWNSEND.
NORTHUP v. TOWNSEND.
ST. GEORGE v. TOWNSEND.

(IN CHAMBERS.)

Attachment—Execution Creditors—Priorities.

Three creditors issued writs of summons, prior to the issue of a writ of attachment, against the same defendants by another creditor. A fifth issued a writ of summons after the attachment. The three obtained executions first.

In settling the priorities,

Held, 1. Mere irregularities, which might be taken advantage of by the defendant, are not open to third parties.

2. A judgment may be attacked by a third party on the ground that it is signed as against the firm, and that the debt was the private debt of a member of the firm only.

3. The fifth creditor was entitled to share with the attaching creditor, it not being necessary for subsequent creditors to issue attachments.

T. D. Cumberland, *Isaac Campbell*, *J. J. Robertson*, and *E. Goulding*, for execution creditors.

Aikins, *Culver & Hamilton* (*N. D. Beck*), for attaching creditors.

[*23rd February, 1884.*]

TAYLOR, J.—In these matters, questions arise as to the order of priority, between a creditor who proceeded against the defendants by writ of attachment, and certain execution creditors, who proceeded by ordinary writs of summons.

The objection is taken, as to some of these, that the proceedings were irregular, orders for substitutional service having been obtained, when the practice did not warrant such being made, also, that the service under these was really, if proper at all, service within the jurisdiction, while the writs issued, were for service out of the jurisdiction. I do not think that these objec-

tions are open to the attaching creditor. The ordinary rule is, that mere irregularities, which might be taken advantage of by the defendant, are not open to third parties. Thus the right of an attaching creditor, to impeach prior judgments, seems governed by Con. Stat., c. 37, s. 31, and none of these objections come within that section.

In the case of *Stirsky et al* v. *Townsend*, the judgment was signed on the 29th of January, 1883, two days before the writ of attachment issued, so that execution is clearly entitled to priority. It is, however, alleged that the judgment is fraudulent, being one obtained against the two partners, and now being enforced against the partnership assets, while the debt is the private debt of one individual partner. It is, I think, open to the attaching creditor to attack it on that ground, under Con. Stat. 37, s. 31.

In the two cases of *Northrup et al* v. *Townsend* and *Fischel et al* v. *Townsend*, the writs of summons were issued the day before the writ of attachment issued, and it is admitted that copies of them were mailed, under the orders allowing substitutional service, upon the 31st of January, the day on which the writ of attachment issued, but before it was issued. As the objections against the service are not, in my opinion, open to the attaching creditor, these executions must be held to have priority, execution having been obtained and put in the sheriff's hands, before the attaching creditor obtained execution. The contention, that the attachment related back to the earliest moment of the day cannot, under the circumstances, be maintained. The issuing the attachment was not a judicial act.

St. George v. *Townsend* is a case, in which also the writ of summons was issued the day before the attachment. The evidence, I think, shows that service of this writ was effected, under the order allowing substitutional service, at an earlier hour on the 31st than the issuing of the attachment. This execution is, therefore, also entitled to priority.

In *Allan* v. *Townsend*, the writ of summons was issued after the attachment, and therefore the execution has not priority. It may not be important, in view of my having held, that several of the other executions have priority over the attachment, to decide the question, whether this creditor is entitled to share

pari passu with the attaching creditors. I, however, express the opinion that he is.

The Con. Stat., c. 37, s. 38, provides it is true that, where several persons sue out writs of attachment, the proceeds of the property and effects attached shall be rateably distributed among such of the attaching plaintiffs as shall, in due course, obtain judgment and sue out execution. But this seems a copy of the old Act of Wm. IV. in Ontario, which was passed, because the court there, had held, that the first attaching creditor took priority over all subsequent ones. To hold that, when once an attachment has issued, all persons afterwards suing must proceed by attachment, would seem improper. A writ of attachment can only be obtained upon affidavits, swearing to a certain existing state of facts. Now, although one creditor may be able to make that affidavit, another may not. Then, if the property and effects of the debtor have already been taken by the sheriff, under an attachment, what object is there in another writ commanding him to attach the property he already has. Then the writ itself commands the sheriff to attach, &c., to secure and satisfy the attaching creditor a certain debt, and to satisfy the debts, claims and demands of such other persons, to whom the debtor "may be liable for debts or damages, as shall duly place their writs of attachment in your hands, or otherwise lawfully notify you of their claims and duly prosecute the same."

If only attaching creditors can share, adding the words "or otherwise lawfully notify you of their claims" was meaningless, putting in the sheriff's hands, a writ of execution issued upon a judgment, obtained in a suit begun by ordinary writ of summons, is surely lawfully notifying him of the claim.

The creditors in the suit of *Stirsky et al*, *Northrup et al*, *Fischel et al*, and *St. George* v. *Townsend* are entitled to priority, subject however to the right of the attaching creditor, to attack the judgment of *Stirsky et al*, as a judgment obtained against the two partners, for the private debt of one.

TAIT v. CALLOWAY.

(IN CHAMBERS.)

Application to set aside judgment.—Delay.

The writ was issued on 23rd June, 1883. Judgment was signed 10th July, and execution issued 16th July, 1883. On 3rd March, 1884, defendant applied to set aside the judgment, on the ground of irregularity, and on the merits.

Held, application refused.

D. Glass for defendant.

A. E. McPhillips for plaintiff.

[*12th March, 1884.*]

WALLBRIDGE, C. J.—The plaintiff served his writ on the 23rd June, 1883, in an action of covenant contained in a mortgage. Defendant produces an affidavit of a person in the employment of the defendant's attorney, that an appearance was left with a clerk in the prothonotary's office within the time allowed for appearing. No entry was made of such appearance in the appearance book, and none is found in the files. The plaintiff, after having searched for an appearance, made the requisite affidavit of no appearance having been entered, and signed judgment on the 10th July following, and issued executions against goods and lands on 16th July, 1883. The defendant became aware of the executions very shortly after they had been issued, and took no steps to set aside this judgment until the 3rd March, 1884. The judgment is for $56,225.79, a large amount. The defendant, on the said 3rd March, first applied for a summons to set aside the judgment, upon the ground of the above irregularity and upon merits. He shows that a bill was filed, on the same mortgage for foreclosure, on the 8th October, 1883, and defendant filed an answer, on 10th November, 1883, setting up, as a defence, what he now swears to as merits, in order to set the judgment aside. His merits at best extend only to half the debt, and are fully met by the plaintiff's affidavit. It is not an inflexible rule to reject affidavits in answer to an affidavit of merits; *Wilson* v. *Town of Port Hope*, 10 U. C. Q B. 405. In *Bank of Upper Canada* v. *Vanvoorish*, 4 U. C. L. J., 232, three months' delay was held too great when judgment had been signed for want of appearance, though an appearance had actually been entered, and it is in such case

only an irregularity. The plaintiff has lost a trial, *Arnold* v. *Robinson*, 4 U. C. L. J. 69, and special circumstances would have to be shown, and delay should be satisfactorily accounted for, which is not done. It is alleged that defendant was negotiating a settlement, but all this proceeds from the defendant and not the plaintiff. How has the plaintiff contributed to the delay? I cannot see that he has done so. In an extreme case the judgment might be set aside on the money being brought into court, or otherwise secured, but that the defendant does not desire. It is also to be considered that the defendant is not without remedy; he may apply to the equity side of the court in the suit now pending there on the same mortgage in which cross relief is claimed. I think this summons should be discharged, but without costs. The defendant does appear to have some merits, and this discharge is without prejudice (if necessary) to an application for an injunction in the suit on the equity side.

BRADLEY v. McLEISH.

(IN CHAMBERS.)

Where cause of action arose—Jurisdiction.

The writ was issued, specially endorsed for money payable on a mortgage of lands in Manitoba, executed by defendant in Ontario, and payable to the mortgagee or his assigns, but not at any particular place. The plaintiff, who was the mortgagee, resided in Manitoba.

Held, that the act of the defendant which gave the plaintiff his cause of complaint—the non-payment of the money—occurred within the Province, and that the court had jurisdiction.

J. H. D. Munson, for defendant, took out a summons to show cause why the writ and service and copy thereof should not be set aside, on the ground that the cause of action arose out of the jurisdiction, and the defendants were served out of the jurisdiction.

A. Dawson for plaintiff.

[*7th September, 1883.*]

TAYLOR, J.—For the defendant it is admitted that the mortgages sued upon were made in Ontario, but that they are pay-

able in Manitoba. He relies upon the case of *Cherry* v. *Thompson*, L. R. 7 Q. B. 573, as an authority for discharging and setting aside the writ herein. In that case there is no doubt the Court of Queen's Bench held that the contract must be proved to have been made, and the breach to have taken place, within the jurisdiction. This case, he contends, overrules the case in which the contrary had been held by the Court of Common Pleas, namely *Jackson* v. *Spittal*, L. R. 5 C. P. 542, where it was decided that "cause of action" in the statute did not mean the whole cause of action, contract and breach; but the act, on the part of the defendant, which gave the plaintiff his cause of complaint. There seems to have been great conflict among the English Courts, and, in some cases, among different judges of the same Court, as to the meaning of these words.

Now *Jackson* v. *Spittal* has been established as the authority which is to govern. This appears from *Vaughan* v. *Weldon*, L. R. 10 C. P. 47. In consequence of the point being raised in that case, there was a conference of all the judges, and, after that had been held, Lord Coleridge announced that a majority of them were in favor of following the decision of the Common Pleas, and "that consequently, in future, all the courts would act upon the decision in *Jackson* v. *Spittal*."

In the Ontario Court of Queen's Bench, C. J. Harrison, delivering the judgment of the court in *O'Donohoe* v. *Wiley*, 43 U. C. Q. B. 360, said: "The decision in *Jackson* v. *Spittal* appears to commend itself to our acceptance rather than the decisions opposed to it."

The Ontario Court of Common Pleas took in *Gildersleeve* v. *McDougall*, 31 U. C. C. P. 164, the same view of the wording of the statute, as had been taken by the Court of Common Pleas in England in *Jackson* v. *Spittal*. The judgment of that Court was reversed on appeal, 6 Ont. App. R. 553, but not on the ground, that the Court below had wrongly construed the words of the statute, but because the Court held that the whole cause of action, contract and breach had arisen in the Province of Quebec.

Here, the act of the defendant, which gave the plaintiff his cause of complaint—the non-payment of the money—occurred within the jurisdiction. That being the case, I must, on the authorities, discharge this summons with costs.

TORONTO LAND CO. v. SCOTT.

(IN CHAMBERS.)

Dismissal of bill for want of prosecution—Non-production by defendant—Undertaking as to damages.

On a motion to dismiss the bill for want of prosecution, it was objected that one of the defendants had not obeyed an order to produce.

Held, that mere default on the part of a defendant to obey an order to produce does not preclude him from moving to dismiss, unless the plaintiff has been taking active steps to enforce the production.

On appeal, the recital in the order of the material used will govern in case of dispute.

The referee in chambers has no jurisdiction to order a reference as to damages caused by the issue of an injunction.

J. B. McArthur for defendants.

G. B. Gordon for plaintiffs.

[*11th March, 1884.*]

TAYLOR, J.—The plaintiffs appeal against an order made by the referee, on the application of the defendants dismissing the bill for want of prosecution, and against another order made by the referee, on the same day, refusing the plaintiffs leave to amend.

The plaintiffs object that the certificate of the state of the cause, now produced by the defendants, cannot be read on their behalf, as it was not actually produced and read before the referee, and was, at all events, not filed until the day on which the order was settled, some days after it had been pronounced by the referee.

There is a dispute between the solicitors as to whether the certificate was actually before the referee or not, and the solicitor for the plaintiffs says the referee's book can and should be referred to, for the purpose of ascertaining what the fact really is. For this he cites *Perrin* v. *Perrin*, 3 Ch. Ch. R., 452. In that case, however, the order must not have shown what was read on the original motion. Here the order recites that the certificate of

the state of the cause was read, and that the order was not settled and issued *ex parte*, but in presence of the solicitor now taking the objection.

As to the objection that the certificate was not filed when used, but only some days after, it would have been a good objection to take at the time of the motion, that the certificate could not be read because it had not been filed, and the proper stamp for filing it cancelled. In ordinary practice I am aware great looseness prevails in this respect; affidavits being constantly read in support of, and in answer to motions, which are not at the time properly filed, and which, I am afraid, in some cases are never filed, and it would be well to insist upon greater strictness. The terms of the statute (Con. Stat., c. 8., s. 10) are imperative, and more attention should be paid to them. See also, as to filing, *Campbell* v. *Madden*, Dra. 2.

The plaintiffs, however, do not appear to have taken any objection when the motion was made, or when the order was settled, and it is now too late, not having been taken then the court would, at all events, under the circumstances, permit it to be filed *nunc pro tunc*.

The further objection is taken that the certificate cannot be read, because it is a certificate of the clerk of records and writs, while the notice of motion served states that the "registrar's" certificate will be read. This objection cannot be given effect to, as it was not imperative to state in the notice the intention to read any certificate. *Hodgson* v. *Bank of Upper Canada*, 8 U. C. L. J., 328.

As to so much of the order as dismisses the bill, it seems to me right, and should stand. The defendants moved, before the referee, to dismiss on the 18th of January last. The motion then made was refused, and the plaintiffs were given three weeks to amend or file replication. This time was fixed by consent. The plaintiffs, in my opinion, then took the risk of their being able to make the necessary amendments, or to put the cause at issue within that time.

The excuse now given for not doing so is that the defendant, W. J. Scott, had not obeyed the order to produce. It is stated that, until he did so, the plaintiffs could not safely amend, but no affidavit swearing to this is filed.

Have the plaintiffs proceeded with due diligence to enforce production from that defendant? His answer was filed on the 2nd of November last; the order to produce was issued on the 12th of that month. There was some delay in obeying the order, and the defendants were given further time, they agreeing to extend the time allowed the plaintiffs for filing their replication. On the 17th of December the affidavit of the defendant, William Scott, was filed. On the 27th of December the plaintiff's solicitor wrote to the solicitor for the defendants, reminding him that W. J. Scott had not obeyed the order, to which a reply was sent, assigning as the reason for not filing the affidavit, that he had nothing to produce, but offering, if an affidavit from him was really wished, to prepare one, and have him go through the form of swearing to it. On the 5th of January the plaintiff's solicitor answered this by a letter, saying that the affidavit had better be got in the usual way.

No affidavit being filed the plaintiff's solicitor did nothing, by way of enforcing production, until the 1st of February, when he served a notice of motion to take the bill *pro confesso* against the defaulting defendant, on account of his neglect to produce. An order was then made, giving the defendant until the 18th to file his affidavit.

Mere default, on the part of a defendant, to obey an order to produce does not preclude him from moving to dismiss, unless the plaintiff has been taking active steps to enforce the production. The authorities are not very consistent upon this question; but, in the present case, I do not think the plaintiffs have been sufficiently active. The case, too, is one in which an injunction has been issued, and the ownership of land is in question. It seems to me more like the case of *Wilson* v. *Black*, 6 Ont. Pr. R. 132, than any of the other cases cited. In that case Chancellor Spragge dismissed the bill, saying "the delay in production of papers by the defendant is no answer to the application, arising as it did out of the plaintiff's own delay in taking out orders to produce. From its nature keeping the ownership of property in abeyance, it was a case proper for as early adjudication as possible."

Here, too, the amendments proposed to be made do not depend upon any information to be gained from production by W. J. Scott. In his answer, filed on the 2nd of November, he

sets up the defence of infancy. The plaintiffs seek, by their proposed amendments, to allege, that he when the contract in question was made, represented himself as of age, and that since his coming of age he has, by his conduct, ratified and confirmed the agreement. These amendments they, by the consent order of 18th January, took the risk of making within three weeks from that date.

As to the argument that, owing to the state of business in the court, the cause could not have been tried before this, no effect can be given to it. The answers were filed on the 2nd November last, and, had due diligence been used, the cause might have been brought on for hearing on the 10th of January last, when a number of equity cases were disposed of. At all events, had the cause been ready and set down for hearing then, even if not reached, the defendants could not have accused the plaintiffs of delaying the cause.

The order complained of, however, goes further than merely dismissing the bill. It directs enquiries being made and accounts taken by the master as to damages sustained by the defendants, by reason of the injunction having been issued.

In this respect I think the order is wrong. It is quite true that an undertaking given by the plaintiffs to be answerable in damages when the injunction was issued, may be enforced, even where the bill is dismissed. The undertaking is given to the Court, and is something outside the suit.

I do not think, however, that the referee had any power to make an order respecting these, or to direct any enquiry. The giving damages, or directing a reference to ascertain whether the defendants have sustained any, is not a necessary consequence of the injunction being dissolved or the bill dismissed; *Featherstone* v. *Smith*, 20 Gr. 474. *Hessin* v. *Coppin*, 21 Gr. 253.

Even where the bill is dismissed by a judge for want of prosecution, that does not seem the proper time for making an order as to damages. *Southworth* v. *Taylor*, 28 Beav. 616. In that case the injunction had been dissolved, and then the defendant served a notice of motion to dismiss, and for an enquiry as to damages he had sustained. The Master of the Rolls was of opinion that the defendant was entitled to a reference, but held that on a motion to dismiss was not the proper time for obtaining it.

The order made by the referee should be varied, by striking out the 2nd, 3rd, 4th and 5th paragraphs, leaving the first standing.

It is unnecessary to consider that part of the appeal which relates to the refusal of the leave to amend.

As the plaintiffs succeed in part of their appeal, I give no costs to either party.

CHADWICK v. HUNTER.

(IN CHAMBERS.)

Staying proceedings pending re-hearing.

The bill was filed to enforce a mechanic's lien, and was dismissed at the hearing with costs. 1 M. L. R. 39.

After taxation, plaintiff having served notice of intention to re-hear, moved to stay proceedings under the decree, pending the re-hearing, offering to give security for costs.

G. G. Mills for plaintiff.

G. Davis, for defendant, cited *Stovel* v. *Coles*, 10 C. L. J. N. S. 342, and *Campbell* v. *Edwards*, 10 C. L. J. N. S. 343.

[*8th February, 1884.*]

TAYLOR, J., *Held*, (reversing the decision of the referee who had followed the English authorities, and dismissed the motion with costs,) that the Court here had decided not to follow the English practice, but to act on the practice laid down in the Supreme Court Act, and made an order that the proceedings be stayed, upon plaintiffs giving security, to the satisfaction of the referee, for the costs of the defendants, including the costs of re-hearing.

[In the County Court of the County of Manchester.]

PHILLIPS v. CANADIAN PACIFIC RAILWAY CO.

Railway crossing—Cattle guards—Accident—Liability of Company—Contributory negligence.

Action for the value of a cow, killed by defendants' locomotive. A boy was in charge of the cow but it ran away and got on the track through the cattle guards being full of snow.

Held defendants liable.

A. McKay for plaintiff.

Aikins, Culver & Hamilton (*W. Bearisto*) for defendants.

[*19th March, 1884.*]

Ardagh, Co. J.—This cause was set down for hearing at the September Court for this county, and a verdict was then given for the plaintiff, for the amount claimed, there being no defence at that time to the action.

A new trial was afterwards granted, on payment of costs by the defendants, it being shown, that the service of the writ of summons had not come to the knowledge of the defendants' solicitor, and on the sworn allegation, that there was a good defence on the merits.

The cause was re-heard at the December sittings of the Court, and judgment reserved.

The amount claimed by plaintiff as the value of the cow, ($50), is not disputed, the defendants relying upon the contention that plaintiff is estopped from bringing a suit or recovering damages for the alleged wrong, by the clauses of the Consolidated Railway Act, 1879, 42 Vic. c. 9, the meaning and construction of which, in certain particulars, has been settled by a number of decisions of the courts in Ontario.

Section 79, of this Act, provides that "no horses, sheep, swine, or other cattle, shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway or grade, unless such cattle are in charge of some person, or persons, to prevent their loitering or stopping at such highway at such intersection."

Section 81 declares, that, "no person, any of whose cattle, being at large, contrary to the provision of section 79, are killed by any train at such intersection, shall have any action against any railway company in respect to the same being so killed."

In the present case it was shown, that the plaintiff lived close to the railway station at Dominion City, and was the owner of some cattle, which it was customary with him to have watered, at a watering place on the same side of the track with his own premises, and to and from which they were usually driven by his son, a lad thirteen years of age, who was shown to have been with the cattle and professedly in charge of them, when the accident occurred.

When offered as a witness, at the first hearing of the case, this lad, on being interrogated, admitted that he did not understand the nature of an oath. Judgment was reserved on that occasion, and subsequently an order was made, that the case should be further heard, and that the witness, Lester Phillips, should in the meantime receive the necessary instructions to enable his evidence to be received.

At the last hearing he was again produced on behalf of the plaintiff, and after having satisfied the Court, as to his capacity to become a witness, and being sworn, stated, in substance:—That he had been put in charge of the cow which had been killed, (together with two others), by his father the plaintiff, with instructions to keep her from the track, and take her to water every evening; had the cows in charge at the time of the accident; was driving them when another cow got with them, and all of them started and went in on the track, over the cattle guard, which was full of snow and the fence down; continued to walk after the cows, and was about the length of the building (meaning the court room, about 50 to 60 feet), when they began to run and got on the track; it was about 5 or 10 minutes from time cows began to run, until they got on the track; the fences were down and the cattle guards full of snow; had let the cows out of the stable; passed two street crossings from the house; the cows went down second crossing; was near second crossing when cattle turned down; ran after them; had got on the track before witness got to crossing; was about second crossing when accident happened; it would take 5 or 10 minutes to reach the place of the accident, after cows began to run; was just on cross-

ing when cow struck; about length of room from where she was killed; the cows went too fast to head them.

The witness was evidently not very clear in his ideas, as to time and distance, but his evidence was on the whole, sufficiently clear and definite.

At the first hearing, witnesses were examined on the part of the plaintiff, for the purpose of showing negligence on the part of the driver of the train, it being alleged that the train was running at a higher rate of speed than is allowed, when approaching a station, and that the cow being in the act of crossing the track when struck, would not have been struck, had the train not been running at such speed. This evidence was contradicted on the part of the defence, and I was satisfied that no blame could attach to the persons in charge of the engine or of the train. This contention, however, could not affect the result in any way.

The question then to be considered was, whether or not the plaintiff was within his rights, under the clauses of the Act quoted above.

Mr. Bearsto, for the defendants, cites a number of decisions, and makes out an apparently very strong case as against the plaintiff, and on certain points the meaning of sections 71 and 81, as laid down by the courts in Ontario, cannot be disputed, at least by an inferior tribunal.

In *Simpson* vs. *The Great Western Railway Company*, 17 U. C. Q. B. 57, which is one of the first cases I can find decided under the clauses of the above Act, it is held that although the plaintiff's horse got upon the railway, owing to defects in the cattle guards, and was killed, at some distance from the point of intersection of the highway with the track, the plaintiff was not entitled to recover, because his horse was "unlawfully upon the highway, and having got thence upon the track the company were not responsible, notwithstanding the defects in the cattle guards." In this case, the animal had escaped from a stable, and was not in charge of any person.

Referring to sections quoted, the Court held that, "the whole object of the Act was to secure the public, as much as possible, against accidents," and speaking of the intention of the Legislature, went on to say, that its meaning was no more than this: "that if any animal shall be permitted to be at large, upon a

highway near a railway crossing, and not being in charge of any person, shall get from the road upon the railway, at a crossing, and be killed, the owner shall have no action. On the other hand, the language of the clause in this point, is perfectly plain and explicit, so much so, that we do not think it can be said to take away the right of action in terms, except in a case where the animal is killed at the point of intersection."

In *Cooley* v. *The Grand Trunk Railway*, 18 U. C. Q. B. 96, the decision in the last case was followed:—The plaintiff's servant drove three horses to a watering place, to reach which it did not require that the railway should be crossed. He used no halter, but drove them loose before him. The watering place was frozen over, and while he was endeavouring to break the ice, one of the horses got upon the track and was killed. The jury found for the plaintiff, and that if the cattle guard had been kept clear, the horses could not have got upon the track, but Robinson, C. J., held, "that the plaintiff's horse, when it got upon the railway, was not in charge of any person within the meaning of the Statute," and that consequently he could not maintain his action.

The last case, and that of *Thompson* v. *The Grand Trunk Railway*, 37 U. C. Q. B. 40, appear to be, in almost all respects, similar to the one now under consideration, and they, with other decided cases make it clear, that in order to entitle the plaintiff in the present suit to recover, it must be shown that the cow was in charge of some person, within the meaning of the Statute, before she got upon the track, and that it made no difference in the defendants' responsibility, whether she was killed at the point of intersection or otherwise, if she was not so in charge. Contributory negligence on the part of the Railway Company is not, under such circumstances, to be taken into account. I have, then, in the present case, to consider whether the animal was, or was not in charge of some person, within the meaning of the Act as interpreted by the courts.

In *Cooley* v. *The Grand Trunk Railway*, *ante*, the horses were being driven loose by a man, who, apparently forgetting the proximity of the railway, or not expecting the approach of a train, did not take the precaution to head them off from the track before he attempted to break the ice. The fact that horses are usually and properly led with a halter, and the temporary

abandonment as it were of his charge, by the man, must have been taken into account by the Court in deciding the case.

In *Thompson* v. *The Grand Trunk Railway*, *ante*, a boy was driving four horses in order to put them into a field, and, while opening a gate, they passed on to the track and three of them were killed. The plaintiff was considered to have been guilty of negligence, "in sending his horses in charge of a boy, without a bridle, or any means of control, after dark, and that the horses could not be considered to have been in charge of the boy, within the meaning of the Statute, so that he could prevent their loitering or stopping in the highway, at the point of intersection with the railway." * * "All that can be said is, that he knew where they were, and might have seen them if there had been light enough."

It is unnecessary to continue further the examination of decided cases. In those referred to, the courts have gone beyond the meaning of the precise language of the Act, and held, that the Legislature meant rather more than it said in so many words. The point of intersection of a highway and railway is held to be, not only the actual point of intersection itself, but a point some distance from it, and the meaning of the words, "in charge of some person or persons," is held to mean, that the charge must not only be continuous, and watchful, but within the means and reasonable capacity of the party to fulfil, as to the purpose for which the charge was confided to him.

This purpose is no doubt the prevention of an accident, at or near the point of intersection or crossing, by requiring the owner of an animal, which has to be allowed on the highway within a certain limit, to have some person in charge competent under ordinary conditions to prevent the animal from loitering at a crossing, and so incurring the risk of an accident from the passage of a train.

I take it then, that before arriving at a decision in the present case, I have to satisfy myself as to whether or not the provisions of the Act as interpreted, have been complied with by the plaintiff.

The cows had a lawful right to be on, or be driven along the highway, in charge of some person. The boy was shown to have been placed in charge, by the plaintiff, and to have been accustomed to the task of driving them, to and from the watering place. The watering place, and the plaintiff's premises were

on the same side of the track. The boy stated, that he was driving the cows as usual, and not loitering, (of which fact there was no positive contradiction), and that they suddenly ran away from him, and before he could prevent it, they had got to the crossing and passing over the cattle guard, turned on to the track. He was about 50 or 60 feet from them when they began to run. The cow was the length of the court room (about 40 feet) from the crossing when struck, and he was at the crossing at the time, but the cows had gone so fast that he could not head them.

In two of the cases before referred to, the animals in charge were horses, and some stress is laid upon the fact, that they were not led by a halter. In one instance, they were being driven by a boy of fourteen, but it is not held or intimated, as the opinion of the Court, that he did not on that account, come within the intention of the Act, when it speaks of the necessity of a "person" being in charge, etc. It is not customary to lead cows by a rope, or halter, when driving them to or from a watering place, from one point to another, in a locality which is known to them; nor is it a thing that a man of ordinary prudence would be expected to do, although if a cow gets excited, and runs with such speed as cows are capable of, neither a man nor a boy could head her, for some time at least; but either of them (man or boy) might be able, and in the present case, would no doubt have succeeded in preventing her from loitering on the track, where it crossed the highway, and being struck at this point of intersection. The cow in the present instance, was shown to have passed into the Company's enclosure, over the cattle guard, and after going a short distance beside the track tried to cross the rails, and in doing so was struck by the engine. Had the cattle guards not been defective, or useless, she would doubtless have continued on the highway past the crossing, and if she had attempted to loiter at the point of danger, the person in charge would apparently have been in time to drive her from that point, and so accomplish the purpose, which the Act is declared to have had in view, when it speaks of leaving animals "in charge of some person or persons," to prevent their loitering or stopping on such highway, at such intersection.

Baron Parke, in the case of *Sharrod* v. *The London and North Western Railway Company*, 4 Exch. 580; 20 L. J., Ex. 185, is quoted as saying:—"If the cattle had an excuse for being there,

as if they had escaped through the defect of fences, which the Company should have kept up, the cattle were not wrong doers; they had a right to be there, and their damage is a consequent damage, from the wrong of the defendants, in letting their fences be incomplete or out of repair, and may be recovered." In the present case the Company's fences were said to have been down, and it was not attempted to be denied, that the cattle guards were full of snow, etc. That the animal in question being, as I consider lawfully on the highway, and having gone thence on to the defendants' railway, in consequence of defective cattle guards or the negligence of the defendants, and been killed by defendants' locomotive, I am of opinion that the plaintiff is entitled to recover, and I give judgment accordingly, for the amount claimed (fifty dollars), and costs.

RE FISHER AND BROWN.

(FULL COURT.)

Setting aside award—"In Equity" inserted in a rule.

F. & B. agreed to an arbitration. The following was one of the provisions: "It is distinctly agreed that each party hereto shall at once obey the award, and shall not appeal from or move against the same, or in any way resist the same; * * * * and no resort shall be had to any legal or equitable proceedings to resist or alter the same."

On an application by rule *nisi* to set aside the award for misconduct of the arbitrators, and on other grounds,

Held, by the full court, that although, under the provisions of the agreement, the parties were prevented from having the submission made a rule of court under C. L. P. Act, 1854, s. 17, yet, as a bill could have been filed in equity to impeach the award, the rule might be amended by adding, after the style of court, the words "in equity," after which relief could be granted.

H. M. Howell and *J. H. D. Munson* for Fisher.

N. F. Hagel and *G. Davis* for Brown.

[*26th September, 1884.*]

TAYLOR, J.—Perhaps I go further than the other members of the Court, as to the consequences which result from this Court being a court exercising both legal and equitable jurisdiction. It is not necessary to enter upon that question at present; by the party amending his rule, by the addition of two words, "In Equity," he should be allowed to proceed.

CASTON v. SCOTT.

Security for costs.—Plaintiff resident out of jurisdiction, but owner of real estate within the Province.

Held.—That the ownership of unincumbered real estate within the Province is not sufficient answer to an application for security for costs. A mortgage to an officer of the Court upon such real estate may be sufficient security.

A. C. Killam, for plaintiff.

J. B. McArthur, for defendant.

[*February, 1884.*]

TAYLOR, J., delivered the judgment of the Court:—

Two questions are raised before us: 1st. whether a plaintiff resident out of the jurisdiction of this Court, but possessed of real estate within the jurisdiction, can be required to give security for costs; and 2nd, whether, if the possession of such real estate is an answer to such an application, the property must not be unincumbered.

In Ontario, the possession of real estate within the jurisdiction has for a long time been held to relieve the plaintiff from the necessity of giving security: *White* v. *White*, 1 Ch. Ch. R. 48, and subsequent cases. It has, however, been held that it must be unincumbered property: *Gault* v. *Spencer*, 3 U. C. L. J. N. S. 70; *Ganson* v. *Finch*, 3 Ch. Ch. R, 296.

In England, on the question whether the possession of money, exchequer bonds, or other floating capital is not an answer to the application, Mr. Archbold says (Arch. Pr. 12th Ed. p. 1415) it would be so, if the plaintiff "be in possession of chattels, real or other property of a fixed and permanent nature and available to process by the defendant."

From *Swinborne* v. *Carter*, 23 L. J. Q. B. 16, I should infer that in England also it must be unincumbered property.

For the plaintiff it was said that, even if under mortgage, the possession of real property should in this Province be a sufficient

answer to the application, because such property is available to process, since the equity of redemption can be reached by an execution. That, however, is scarcely the test. In England, ever since the 1 & 2 Vic. c. 110, under which exchequer bills and stock could be reached and charged by process, the possession of such property has not been held sufficient: *Edinburgh and Leith Ry. Co.* v. *Dawson*, 7 Dowl. 576. Such property was said in that case not to be sufficient security because "it may be passed so easily from one person to another."

In this Province lands do as a matter of fact pass from one person to another almost as easily as personal property, and therefore, in my opinion, the mere possession of real estate should not be accepted as a sufficient answer to an application for security.

A party may not have anyone in the Province whom he could ask to give security on his behalf by bond, but he can always answer the application by paying money into Court; and it would not be unreasonable to say that where the plaintiff owns real property a mortgage, given to an officer of the Court, conditioned to be void upon payment of a certain sum should costs be awarded against him, should be accepted.

The present application should be allowed, and an order for security given; but as the point is a new one, and raised for the purpose of settling the question, the application should be allowed without costs.

TODD v. THE UNION BANK OF LOWER CANADA.

Pleading—Demurrer—Indorsement of Cheque.

Action for non-payment of cheques.

The second count alleged the drawing of a cheque, payable to O., that the cheque was delivered to O. in payment of debt due O. from the plaintiff, "and the said O. being the lawful holder of the said cheque, and entitled to receive the amount thereof, duly presented," &c. Plea, that the cheque was not delivered to O. in payment of a debt.

Held, plea bad.

The fourth count alleged the drawing of a cheque payable to the order of the Union Bank of Lower Canada, who presented it, &c. Plea, that the said Bank did not indorse the cheque to the defendants, and refused to indorse it.

Held, plea good.

Hagel and *Howden* for the demurrer.

The second count alleges that O. was the holder, and it is immaterial, whether the cheque was delivered to him, in payment of a debt. As to the fourth count, the payees were the defendants themselves and no indorsement was necessary.

Ewart and *Brophy* for the pleas.

The second count does not allege that O. was the holder. It shews title, and the allegation "O. being the holder" is only a conclusion from the former statement and not a distinct averment. *Cooper* v. *Watson*, 23 U. C. Q. B. 345. A plea that the cheque was not delivered to O. would be good, and the other words, "in payment of a debt," are only a "needless particularity" in the traverse. *Sheeran* v. *O'Connor*, 15 U. C. Q. B. 418. As to the fourth count, the payees and the defendants cannot be the same, for it is alleged that the payees presented the cheque to the defendants.

[*10th March, 1884.*]

WALLBRIDGE, C. J.—In this second count the plaintiffs allege that they drew a cheque, payable to T. E. Owens or order, for

$200, and delivered the cheque to the said T. E. Owens, in payment of a debt due the said Owens from the plaintiffs, and the said Owens, being the lawful holder of the said cheque, and entitled to receive the amount thereof, presented the same at defendant's banking house for payment, and there were sufficient funds, yet the defendants did not pay the same.

The plea ought to answer the whole count, as it professes to do. A full answer to that count would be, that Ovens was not the lawful holder of the said cheque, if that was what the defendants mean by their plea; but instead of that, they plead that the plaintiffs did not deliver the said cheque to the said T. E. Ovens, in payment of the debt so due and owing. This does not deny but that the said Ovens was the lawful holder, by other means than for the said debt, *non constat*, he may be such lawful holder, and if so the count is not answered. This plea, in fact, admits, by not denying it, that the plaintiffs are the lawful holders of it, in some other way than for the said debt, and if they were such lawful holders that sustains their count, so the plea does not answer the count it professes to answer, and every plea not limited in its commencement, is taken to be a plea to the whole count to which it is addressed. *Hastings* v. *Whitley*, 2 Ex. 611; *Fraser* v. *Welsh*, 8 M. & W. 629.

A plea is construed most strongly against the party pleading. *Goldham* v. *Edwards* 18 C. B. 399-400.

The fourth count charges, that the plaintiffs drew a cheque on the defendants, payable to the order of the Union Bank of Lower Canada, for $250, and delivered it to the Union Bank, in payment of a draft to be drawn at the request of the plaintiffs, by the defendants, in favor of the Best Brewing Company, and the Union Bank being the holders of the cheque, and entitled to receive the money, duly presented the cheque at the banking house of the defendants for payment, then being the lawful holders thereof. There are the requisite allegations, that plaintiffs had money in defendants' bank to meet the cheque, etc.

To this the defendants plead, did not indorse the cheque, and refusal to indorse it to the defendants. If the Union Bank of Lower Canada and the defendants are the same body, then the plea is no answer to the count, but the plaintiffs studiously avoid calling them the same, and on the contrary state, that the cheque was made payable to the order of the

Union Bank, delivered to the Union Bank, and the Union Bank being the holders and entitled to payment, presented it to the defendants.

The demurrer states, that the plea meets no allegation in the count; that the count does not allege indorsement by the Union Bank, and such allegation is not necessary, and the plea does not answer any part of the declaration.

The plaintiff evidently treats this plea, as if it were a traverse of some matter in the declaration, which it in fact is not, and does not profess to be a traverse, but is a plea in confession and avoidance, and sets up a new fact—namely, that the cheque being payable to the order of the Union Bank was, as stated in the count, their property, and they refused to indorse it; this is a new fact and one which, if true, defendant has a right to set up by way of confession and avoidance. The plaintiffs wish me to assume that the Union Bank and defendants are the same body. Why did they not so allege it? They have taken special care to treat them as if they were not the same, and I cannot assume it for them. On the contrary, the law assumes them to be different. *Britten* v. *Webb*, 2 B. & C. 483; *Boulcott* v. *Woolcott*, 16 M. & W. 584-9.

The demurrer as to the eighth plea is allowed with costs, and the demurrer to the fifteenth plea, is overruled or disallowed with costs. Either party may amend in ten days.

ROBINSON v. HUTCHINS.

Remanet—Notice of Trial.

A record was entered for the Spring Assizes in Winnipeg in 1883, and made a remanet. At the Autumn Assizes it was placed on the docket by the prothonotary. No one appeared for the plaintiff, but defendant's counsel insisted upon a verdict being given in his favor.

Held—That a new notice of trial was necessary, and the verdict was set aside with costs.

G. B. Gordon, for plaintiffs.

H. J. Clarke, for defendants.

[*18th February, 1884.*]

TAYLOR, J.—Delivered the judgment of the Court:—

The record in this case was duly entered for trial at the Spring Assizes in Winnipeg, in March, 1883. It was not then reached, and was made a *remanet*. At the Autumn Assizes it was placed on the docket by the prothonotary, and on the 29th October, 1883, the cause was reached. When called on no one appeared for the plaintiffs, but counsel for the defendants being present he insisted upon having a jury sworn and a verdict entered for them. In Michaelmas Term counsel for the plaintiffs obtained a rule calling on the defendants to show cause why the verdict and all subsequent proceedings should not be set aside, on the ground that no notice of trial had been served.

Cause has this Term been shown by counsel for the defendants who takes the position that the Assizes in Winnipeg correspond with the Town sittings, for the trial of issues in London, England, so that no fresh notice of trial is required to be given. The practice, as stated in *Arch. Pr.* (12th Ed.), p. 313, is that where a record has once been entered for trial at the Town sittings, and is made a *remanet*, no fresh notice of trial need be served, although in country causes it must, under similar circumstances, be so.

By the Queen's Bench Act, Con. Stat. c. 31, the practice and procedure of the Court in this Province is to be regulated and governed by the modes of practice and procedure of the Superior Courts in England, as they existed and stood on the 15th day of July, 1870.

The 24th Section of the Act provides that "all civil actions and suits in the Court of Queen's Bench may be entered for trial at the sittings of the Court of *Nisi Prius* according to the practice in that behalf."

Con. Stat., c. 32, provides for the holding of courts of assize oyer and terminer, and general gaol delivery. In it, reference is made to proceeding "according to the practice in that behalf of the court of assize and *Nisi Prius* in England."

In chapter 33 provision is made for holding Assizes for the Western District when organized. More recently by "The Administration of Justice Act, 1883," ss. 6 and 7, the holding of Assizes for the Central and Western Districts has been provided for.

In any of these Statutes the only reference made is to the Courts of Assize and *Nisi Prius* in England. The Town Sittings, in London and Middlesex are never referred to.

These Sittings and the Assizes held throughout the country are quite distinct, and in many respects dis-similar.

Blackstone, when treating of the courts, speaks of an eleventh species of courts, "I mean" he says, "the courts of Assize and *Nisi Prius*." He goes on to say that these are composed of two or more commissioners who are twice in every year sent by the King's special commission all round the Kingdom except London and Middlesex. On these circuits the judges sit by virtue of five several commissions: (1) The commission of the peace; (2) A commission of oyer and terminer; (3) A commission of general gaol delivery; (4) A commission of assize to take the verdict of a peculiar species of jury called an assize, and summoned for the trial of landed disputes. An assize is defined in *Bacon's Abr.* to be "A remedy which the law hath appointed for the restitution of a freehold of which the party has been disseied." The other commission was: (5) A commission of *Nisi Prius*, which empowers them to try all questions of fact issuing out of the courts at Westminster that are then ripe for trial by jury.

As to the Town Sittings, Mr. Christian in a note to his edition of Blackstone (vol. 3, page 50), says, "The Courts of *Nisi Prius* of London and Middlesex are called Sittings. In ancient times

issues in actions brought in that country were tried in the Terms, at the bar of the court in which the action was instituted, but when the business of the courts increased, these trials were found so great an inconvenience, that it was enacted by the 18 Eliz. c. 12, that the Chief Justice of the King's Bench should be empowered to try within the Term, or within four days after the end of the Term, all the issues joined in the Courts of Chancery and King's Bench; and that the Chief Justice of the Common Pleas, and the Chief Baron should in a like manner try the issues joined in their respective Courts."

By a subsequent statute provision was made for a judge or baron sitting in place of the Chief of his Court, and the time for holding such trials after Term has been extended by several statutes.

The practice to be followed in this Province was, I think, plainly intended to be that which obtained at the Assizes in England, properly so called, that is, those held in the country. We should hold that when a cause is made a *remanet*, no matter whether at the Assizes in Winnipeg, or in the Central or Western Districts, it is necessary to serve a fresh notice of trial. It would be exceedingly inconvenient and confusing to have a different practice prevailing in different judicial districts. The rule should be made absolute with costs. Costs should follow, as the point now raised was, in fact, decided by my brother Dubuc, last spring.

VIVIAN v. SCOBLE.

Jurisdiction of master.—Principal and agent.—Drunkenness.

In a suit between principal and agent, upon the footing of an agreement by which the agent was to receive a commission of 20 per cent. on all sales of real estate, the decree directed the master to take certain accounts, and ordered the agent to pay into court any balance found due by him, "less the defendant's commission of 20 per cent."

Held that the master had no jurisdiction to set aside the agreement.

Held that the agent, in employing the services of an auctioneer, should have used diligence to make a reasonable bargain for his remuneration. The auctioneer, having retained out of the moneys received by him, an excessive fee, the agent was charged with the excess.

Held that drunkenness is not a ground for setting aside a contract, if it caused excitement only, and did not rise to that degree which may be called excessive drunkenness.

H. M. Howell and *J. S. Hough* for plaintiff.

A. C. Killam for defendant.

[*3rd March, 1883.*]

TAYLOR, J., delivered the judgment of the Court:—This is a re-hearing of an order, made by my brother Dubuc, dismissing an appeal from the master's report. The order is not one expressing the mind of the learned judge, but is a formal one, drawn up by consent of the parties, in order that the report complained of might come under review by the full court.

The suit is one in which the plaintiff seeks an account of moneys received by the defendant as his agent, in connection with the sale of certain lands. The defendant, in his answer, sets up an agreement under seal, executed by the plaintiff, and by which he agreed to give the defendant, in consideration of services to be rendered in selling the land, collecting the purchase money, and keeping the accounts of the transaction, 20 per cent. of the total receipts of the sale. The agreement also provided "that all expenses of, and incidental to the said sale, the preparation and registration of plans, the paying of auctioneer's fees, and the preparation of conveyances, shall be borne in the fol-

lowing proportions, that is to say, the party of the first part shall bear and allow to be deducted out of the proceeds of such sale, four-fifths of the total of said expenses, and the party of the second part shall pay out of the 20 per cent. so allowed to him, as above mentioned, the remaining one-fifth of said total expenses."

The cause having come on for hearing, a consent decree was made on the 15th of September, 1882, declaring the plaintiff entitled to an account of the dealings and transactions of the defendant with the lands in question. It then went on to direct the taking by the master of the following accounts: (1), of all sums of money received by the defendant as agent for the plaintiff, in regard to the sale of the lands in the bill of complaint set forth; (2), an enquiry when such sums of money were respectively received; (3), an account of the expenses properly incurred by the defendant in connection with the sale of the said lands; (4), an account of what moneys, if any, were paid by the defendant to the plaintiff out of the proceeds of said sales. The decree then went on to order that the balance found due to the plaintiff upon taking the said accounts, if any, should be paid into court, less the defendant's commission of 20 per cent. upon the moneys actually received by him.

The master, having proceeded under this decree, made on the 25th of November, 1882, the report now appealed from.

It may be remarked, in passing, that this report in its findings does not follow the enquiries directed by the decree.

It finds, in answer to the first enquiry, the amount received by the defendant to be $26,126.16. It then finds the amount paid out by defendant, to and for the plaintiff, between 16th of January, 1882 and 14th of February, 1882, to be $13,569.93. It then goes on: amount allowed defendant, being 20 per cent. commission on the sum of $25,326.16, equal to $5,165.25. These two sums of $13,569.93 and $5,165.25, are deducted from the first sum of $26,126.16, and the balance $7,390.93, is stated to be the amount due from the defendant to the plaintiff. The report nowhere shews when the sums of money were received by the defendant, nor the amount of the expenses properly incurred by him. It sometimes happens, that when a decree is being proceeded upon in the master's office, the solicitors do not desire,

or find that it is not necessary to make all the inquiries, or take all the accounts directed by it. Where that is the case, the report should show on its face, that the parties waived the making of certain inquiries and taking certain accounts, as the master's justification for not obeying the decree in its entirety.

The parties here, may have waived the inquiry as to the times when the various sums were received, they certainly did not waive the inquiry as to expenses properly incurred, for it is out of the master's disposition of one item of these expenses that the present appeal arises.

From the written judgment of the master, which we have had before us, it appears that upon the decree being brought before him, he proceeded to inquire into the validity of the agreement set up in the defendant's answer, and, after taking evidence on this subject, declared it invalid on the ground of improvidence and undue advantage taken of the plaintiff by the defendant.

Now, in my judgment, the master had no power to deal with this agreement in the manner he has done. It is quite true that a master has very extensive powers, and under the General Orders of this Court, much more extensive powers than were ever possessed by the masters in England, but the right to exercise these powers must be determined by the manner in which the particular case comes before him.

In the case of *Hodgins* v *McNeil*, 9 Gr. 305, referred to by the master in his judgment, a decree was made for the administration of an estate. In prosecuting the decree, the master had necessarily to inquire as to who were the next of kin. In answer to a claim to be one of the next of kin, the objection was taken, that the claimant was illegitimate, as being the issue of a marriage between a man and his deceased wife's sister; clearly in such a case the master had to dispose of the question then raised, exceedingly important although it was.

So in *The Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 230, in taking the account of what was due to the plaintiffs as the assignees of one Gamble, the question arose, whether the plaintiffs' claim was limited to the amount due Gamble at the time the first deed was executed, or whether an agreement subsequently made, by which Allen charged the surplus in Gamble's hands, after satisfying the trusts of the deed, with

further advances made to him, enured to their benefit or not. That agreement had been referred to in the pleadings, but it related merely to the account to be taken under the decree, and to the question whether the account claimed was to stop at a particular date or not. So the Court held that the master could deal with it.

In *Sunter* v. *Johnston* (not reported), a partition suit, the claim of two members of a family to be heirs-at-law, was disputed, on the ground that they were born before a marriage between their parents was celebrated in the United States. There the master had to decide the question, a decision of which was evaded by the late Chancellor Vankoughnet, in *Cullen* v. *Cullen*, namely, whether a previous secret marriage in Montreal, by a catholic priest, without license or publication of banns, was valid or not.

So in *Re Smith* (not reported), a suit for administration and partition, a woman came forward claiming dower as the widow of the intestate, and to be entitled to a life estate in the share of her deceased child. Her marriage to the intestate being disputed, the master had to inquire into it, and found that no marriage had taken place, and that the marriage certificate produced was a forgery.

In *Darling* v. *Darling*, 16 C. L. J. N. S. 112, which was an administration suit, an office copy of the decree was served upon an annuitant under the will, who came in claiming the full annuity given her, and a large amount for arrears unpaid. In answer to the claim, the executor produced a document, by which she had many years before released a portion of the annuity. This document, the annuitant then alleged, had been obtained from her by the fraudulent representation that the will was void, and that she was entitled to nothing but what the charity of the next of kin chose to give her, a fraud which she never discovered until she had been served in the suit. The question of whether the release had been so obtained, the master held could be entertained by him.

In all these cases it will be seen that the question was one which emerged in the master's office, and could not have been raised at an earlier stage in the suit.

The case here is entirely different. The agreement was set up in the answer, and is the foundation of the defendant's claim to

the remuneration asked for his services. Had the plaintiff desired to impeach that document, he should have amended his bill, setting up that the alleged agreement had been obtained from him improperly and by taking undue advantage of him. But he did nothing of the kind.

Then the Court made a decree directing certain inquiries, and ordering that the balance in the defendant's hands, "less the defendant's commission of 20 per cent.," should be paid into court. By so doing, the Court recognized that instrument as valid, for the only right the defendant had to a commission of 20 per cent. was derived under it. The master, then, had no power to declare that agreement void, and the first ground of appeal should be allowed.

The second, third and fourth grounds of appeal, are practically arguments why the first should be allowed.

The fifth ground of appeal should also be allowed. I have been unable to find, on a careful perusal of the evidence, anything which will support a finding that the plaintiff was intoxicated at the time of making the agreement.

There is no doubt, from the evidence, that the plaintiff was, about the time in question, drinking heavily. But to set aside a contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. *Crippen* v. *Ogilvie*, 15 Gr. 490; 18 Gr. 253. It must rise to that degree which may be called excessive drunkenness; where the party is deprived of his reason and understanding. *Lightfoot* v. *Heron*, 3 Y. & C. Ex. 586. Nor is there any evidence here that the defendant by contrivance induced the plaintiff to take too much drink, and afterwards took advantage of his condition, by entering into the agreement with him. See *Cook* v. *Clayworth*, 18 Ves. 12; *Say* v. *Barwick*, 1 V. & B. 195; *Nagle* v. *Baylor*, 3 Dr. & War. 60.

The sixth ground of appeal is, that the master improperly disallowed the commission of five per cent. charged by the auctioneer.

The agreement says, that the expenses, mentioning among these "the paying of auctioneer's fees," are to be borne by the parties in certain proportions. The master, however, while allowing the defendant the 20 per cent. commission, has charged

against him, not a proportion, but the whole of the auctioneer's fees. At least it was so stated by counsel on the argument. The defendant appeals on that ground, and the plaintiff's counsel admitted that it was so. No person reading the report would ever discover that to be the case, for in it the master allows him for commission $5,165.23, which is $100 more than the proper commission upon the amount stated as having come to his hands.

In connection with this sixth ground of appeal, I presume the seventh should be taken. It is as follows: "Because the master, in his said report, charges the defendant with moneys which never came to his hands and were never received by him."

The foundation for this seventh objection, as I understand it, is, that the auctioneer's fees charged by Wolf were not paid to him by the defendant out of moneys which he had received, but were retained by Wolf out of moneys in his hands, proceeds of sales of the lands in question. The evidence shows that the lands were sold by Wolf, the plaintiff assenting to his being employed, and that Wolf charged and retained a commission of five per cent. upon the amount realized. This is objected to as excessive and improper, because it resulted from the defendant's negligence in not making a bargain with Wolf before the sale.

Under the terms of the decree, this was a matter which was quite competent, nay, which it was incumbent upon the master to inquire into. He has, however, in my judgment, erred in charging the whole amount against the defendant.

For the present I waive the consideration of the seventh objection.

Under the agreement, "the paying of auctioneer's fees," was part of the expenses to be borne by the parties, in proportion to their interests. The auctioneer here was employed with the assent of the plaintiff. He was the medium through which the property was actually offered to the public, and the person by whom the large sum realized was obtained. Benefit was derived from his services, the master should, therefore, have inquired what would have been the proper amount of his charges, had the defendant been careful to make a bargain with him before the sale, and have allowed, as part of the expenses properly incurred,

the amount so ascertained. Were I to express an opinion as to what would be, from my reading of the evidence, the amount at which the services of this auctioneer, or of a competent auctioneer could have been secured, had care been taken to make a special arrangement with him beforehand, I should say about 2 per cent. The remainder of the sum falls within the scope of the seventh objection. As to it, notwithstanding Mr. Killam's able argument against the defendant being liable for the money, when it never came to his hands but was retained by Wolf, I have come to the conclusion that the defendant should be charged with it.

He was the paid agent of the plaintiff, paid a high commission to attend to all matters connected with the sale of this land. It was, as such agent, part of his duty to make arrangements with an auctioneer, and to see that no unnecessary expenses were incurred. From the evidence it is clear that by a special arrangement made beforehand, the services of a competent auctioneer could have been obtained for a smaller amount. It was owing to his negligence that such an arrangement was not made, and therefore, I think the loss which accrued to the plaintiff, by his neglect, may very fairly be charged against him. The report must be referred back to the master to be reviewed, unless guided by the foregoing findings, the parties can come to a conclusion upon the proper amounts to be allowed and charged, in which case an account may be taken by the order, thus avoiding delay and expense. Costs of appeal and rehearing to be taxed and allowed according as parties failed or succeeded, following *Bank of Montreal* v. *Ryan*, 13 Gr. 204.

[In the County Court of the County of Selkirk.]

ALLAN v. GORDON.

Liability of shareholders for amount of unpaid stock.

The defendant signed the following memorandum, which was written upon a page of a book, kept as a minute book of the meetings of various persons who intended forming a company:

"We, the undersigned, do hereby agree to pay for the amount of stock after our respective names, and we further agree and bind ourselves to abide by the by-laws, rules, and regulations of the association."

The defendant did not sign the petition for letters patent, nor any memorandum of association, but paid $10 on account of his subscription for a share.

In an action by the plaintiff, a creditor of the company, for unpaid calls,

Held, that the defendant was not liable.

George Patterson for plaintiff.

J. S. Hough for defendant.

[*7th March, 1884.*]

Ardagh, Co. J.—This case was heard at a special sittings of this Court, when judgment was reserved. Upon the best consideration I have been able to give the matter, I am of opinion that on the evidence before me, the plaintiff is not entitled to recover from the defendant.

I have arrived at this conclusion on the following grounds:—First, this suit is brought under the provisions of Sections 271 and 272 of the Manitoba Joint Stock Companies Incorporation Act, which provides that "each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company to an equal amount to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part," etc. The liability of the shareholder is restricted by Section 272 to the unpaid amount of his shares. I felt inclined to hold, if I could do so with any hope that the decision would be upheld on

appeal, that the persons who subscribed what is apparently a stock list in the minute book produced as containing a record of the proceedings of the proposed company, were liable to the creditors of the company, as I think they ought and intended to be; but with the best intentions in this direction in favor of the plaintiff, I find myself unable to carry out my first impression without putting too great a strain upon the equitable view of the question.

The subscription referred to appears to have been made at the first meeting of the promoters of the company held on the 26th of February, 1883, but the formal agreement heading the list makes no mention of the proposed company, or of the amount of each share. There is nothing to show for what amount the subscribers intended to make themselves liable, or to whom. The list is not even connected with the proceedings of the meeting by being above the signature of the chairman, nor is it afterwards in any way authenticated. There is no reference to the Act under the provisions of which this suit is instituted, and even the "By-Laws, Rules and Regulations" referred to in the heading are not produced to show any connection between the subscription and the liability sought to be imposed on the defendant. A number of meetings of so-called directors are subsequently held and at one of them a ballot for members takes place at which twelve were elected, although there were nearly double that number of subscribers who had paid a deposit. In the absence of the by-Laws, etc., the meaning of this proceeding cannot be fully known, but an inference can be reasonably drawn from it, that the original subscribers were not to be considered shareholders or members of the proposed company until elected, and if this is the construction to be put upon the proceedings, the elected members would be entitled to notice in order to confirm the previous subscription. What was to become of those who had not been elected it was difficult to say; but it appears by the record of proceedings that some of the subscribers were rejected as members, and, in one case at least, that a subscriber's money was refunded. During all this time there was no legally constituted body entitled under the Act to do business as the "Winnipeg open Board of Trade and Stock Exchange," with a limited liability; but there did exist a voluntary association, of apparently unlimited responsibility, which proposed to itself at some future time to merge into an incorporated body, with cer-

tain rights and privileges, and undefined responsibilities. To obtain this status a number of the promoters of the company,—not less than five,—had to petition the Lieutenant-Governor in Council, and after complying with certain requirements of the Act, they, and others who might become shareholders in the company are created a body politic and corporate, for the certain purposes mentioned in the application. The petition is required to be signed by all the shareholders whose names are proposed to be inserted in the letters patent, or otherwise a "Memorandum of association signed by all the parties whose names are to be inserted" has to be filed. The letters patent are issued to the subscribers of the petition, and to "all and every such person or persons, as now is, are or shall at any time thereafter become shareholders in the said company under the provisions of the said Act, and of the by-laws of the company made under the authority thereof." The words "and all and every such other person, as now is and are," I hold to mean those persons who have subscribed to the memorandum of association if any, but who are not subscribers to the petition.

The present defendant is not a petitioner, and it is not shown that any memorandum of association to which he is a subscriber has been filed. I think therefore that whatever liability he may have incurred by subscribing the list in the minute book, and taking part in certain proceedings out of which the present and other claims arose, he cannot be held liable under the special provisions of the Joint Stock Companies Act already referred to. Some proceedings appear to have been taken subsequent to the date of the letters patent, but the defendant is not shown to have taken part in them, or to have been in any way formally recognized, or treated as a shareholder of the company after it was legally constituted.

That debts were incurred on the responsibility of the subscribers to the original list, and to a considerable amount, is evident, and that those subscribers should consider themselves responsible even if the law does not make them so, is, I think, very plain. It may be said of course on the other hand that no one was obliged to become the creditor of an irresponsible body,—if they were so; and that before giving credit to an alleged corporate body, the fact of its legal existence, and the extent of its liability should have been inquired into by the party most interested.

The only case bearing upon the matter that I have had time to look at is that of *Nasmith* v. *Manning*, 29 U. C. C. P. 34; 5 Ont. App. R. 126, but there the company had been incorporated by special Act of the Legislature, and the proceedings under which it was sought to make the defendant liable were taken under the charter and not previous to it. The decision in this case might seem to favor the defence in the present suit, but I am not quite satisfied that it does so when the different mode of procedure under a general and special Act is taken into account.

As the question is presented before me in the present action, the proper course seems to be to order the plaintiff to be non-suited which I do accordingly.

UNION BANK OF LOWER CANADA v. DOUGLASS.

Confessing judgment—Fraudulent preference.

In pursuance of an agreement made between the defendant H. (who was then in insolvent circumstances) and certain of his creditors, two documents were executed. By the first the creditors released H. from all liability in respect of notes, held for his indebtedness to them, and undertook to indemnify him against the payment of any such notes as might be under discount. By the same instrument the original debts were revived, and became immediately payable.

By the second instrument the creditors assigned all their claims to the defendant D, in order that an action might be brought for the recovery of all the claims.

It was at the same time verbally agreed that such an action should at once be brought, and that defendant H. should facilitate the obtaining of the judgment.

On the day after the execution of these documents, a writ was issued. Service was at once accepted by an attorney for H. Declaration and pleas were filed on the same day. On the day following, the defendant was examined on his pleas, and on the next an order was made striking out the pleas, upon which judgment was signed and execution issued.

Upon a bill filed by a subsequent judgment creditor,

Held, that the judgment obtained by D. was void, as against the plaintiffs, as being a fraudulent preference.

A. C. Killam, *J. B. McArthur* and *G. F. Brophy*, for plaintiffs.

F. B. Robertson, *G. B. Gordon* and *H. E. Crawford*, for defendants.

[*25th April, 1884.*]

TAYLOR, J.—This suit is instituted by the plaintiffs as creditors of George Hodder, who carried on business under the style of Hodder & Sons, to have a judgment recovered by the defendant Douglass against Hodder, and the writ of execution issued thereunder declared fraudulent and void as against them. The bill as originally filed was against Douglass, the judgment creditor, and Hodder, the debtor. Afterwards it was amended by adding James L. Turner as a defendant, and charging him with being the instigator of the alleged fraud, and the active agent of Douglass in carrying it out.

From the evidence it appears that in the summer of 1883, Hodder was in insolvent circumstances. Besides the judgment impeached in this suit, which is for $9,174.97, there are in the sheriff's hands executions, one at the suit of Ward for $710.22, another at the suit of Flanagan for $858.73, and then executions upon judgments recovered by the plaintiffs for the aggregate amount of $4,070.72. These make up a total amount of $14,814.64. His stock in trade and assets when seized by the sheriff under the execution of Douglass, appeared by the inventory to be $7,849.52, but when sold the amount realized was $4,081.75.

In the latter part of June, 1883, the firm of Turner, McKeand & Co. had issued a writ against Hodder. Soon after, the defendant Turner, who is a member of that firm, by a telephone message asked Hodder to come and see him, in response to which, Hodder being out of town, the son W. E. Hodder, waited upon him, or young Hodder, the son, voluntarily went to see Turner. Both were examined, and they do not quite agree as to which of them made the first move towards their meeting. At all events they came together, and there was a conversation as to Hodder's financial position. The young man says he

mentioned the names of all the merchants to whom his father owed money, but said nothing about his liabilities to the Banks. He was not, he said, asked as to that. Turner says that before this interview he had heard rumors that Hodder was on paper at the Banks. By sending telephone messages to different parties, he learned that some had issued, or were about to issue writs. He says he heard writs would be issued, and inferred it might be by the Banks.

He and young Hodder then went to consult a solicitor, the young man acting throughout, as is admitted by the defendant Hodder, when examined in this suit, as agent for his father. The result of the interview with the solicitor was negotiations being opened with the defendant Douglass, whose firm were also creditors, and the withdrawal by Turner of the writ which had been issued by his firm against Hodder. The indebtedness of Hodder to the various merchants, was at this time in the form, partly of open accounts, partly of overdue notes, and partly of notes under discount at banks. Two papers were accordingly prepared, by one of which exhibit D., after reciting that the creditors signing it had claims against Hodder upon promissory notes which he had given them, they released him from all liability thereon, and undertook to indemnify him against all liability in respect of them, by retiring them as they fell due at the Bank, reserving, however, their rights and claims against him, for and in respect of the original considerations in respect of which the notes were given. By the other paper, exhibit B., the several creditors assigned, transferred, and set over to the defendant Douglass, all the debts and choses in action, owing to them respectively by Hodder and belonging to them as against him.

The papers were taken round by the defendant Turner for signature by the creditors, he taking care, he says, in each case to have the exhibit D. signed first.

The date upon which these papers were signed was the 27th of June. On the next day, the 28th, a suit was issued in the name of the defendant Douglass, as plaintiff, an attorney accepted service and undertook to appear for Hodder, the appearance was entered, declaration filed and served, and plea of never indebted filed, all on the same day.

On the 29th, Hodder was examined on his plea, when he admitted the correctness of the claims severally set out in the

declaration, that they had been assigned to the plaintiff and that he had no defence. Next day, the 30th, an order was obtained on the examination of Hodder, striking out his plea and allowing final judgment to be signed. Judgment was signed the same day; execution issued and placed in the sheriff's hands.

In due course the stock in trade and assets were exposed for sale by the sheriff, when they were purchased by the son, W. E. Hodder, professing to act as the agent of H. S. Black. This Black is in the employment of a clothing firm, apparently travelling for them. The business is now managed by young Hodder. Black, he says, takes no part in it.

After the sale which the deputy sheriff says produced a fair price, and which was a cash one, the several creditors who had signed the exhibits B. and D. signed another document by which they agreed, in consideration of the sheriff letting Black into possession of the stock, to guarantee to the sheriff payment by Black, on demand, of the balance of the purchase money, which was in fact the whole amount, less $1000 paid down.

The assignment made to Douglass by his own firm of Griffin & Douglass, and by the other creditors of Hodder, was made without consideration, not under seal, and he when examined said, the object of taking it was to save costs by having only one writ, and to divide the proceeds of sale when realized, *pro rata* among the assigning creditors.

Such being the case, the plaintiffs urge that there was no indebtedness from Hodder to Douglass, at the time the writ was issued, and the judgment signed. That the judgment obtained in an action brought by the assignee in his own name cannot be upheld, as the statute, Con. Stat. c. 37, which by the 99th section, permits an assignee of a debt or chose in action to sue in equity or bring an action at law in his own name, in the 100th section defines "assignee" to be "any person . . . becoming entitled to any . . . assignment or transfer, or any derivative or other title to a debt or chose in action, and possessing at the time the action or suit is brought, the whole and entire beneficial interest therein, and the right to receive the subject or proceeds thereof."

It seems to me doubtful whether, the judgment having been recovered, any one but the debtor himself can take this objection. The question of whether the action is properly brought by the assignee in his own name, or whether it should have been

brought in the name of the assignor, is one which peculiarly affects him, as he should not be exposed to the risk of a second suit, brought against him for the same cause of action by another person. At all events, in the view I take of the present case, it is not important to further consider this objection.

The main ground upon which the plaintiffs rely for setting aside this judgment is, that it is a fraudulent preference of certain creditors to the prejudice of the plaintiffs, and as such void under the provisions of our statute, Con. Stat. c. 37, s. 95, against fraudulent preferences.

The learned counsel for the defendants frankly admitted, that the judgment was obtained by arrangement with Hodder, for the purpose of securing payment of the claims mentioned in the assignment to Douglass, and that the object was to get in ahead of the Banks. They do not, however, admit that there was any fraud, and contend that it cannot be impeached at common law, or under the statute of Elizabeth, nor does it come within the class of transactions specified in our own statute and thereby declared to be fraudulent preferences. A number of cases decided in Ontario are confidently relied on as supporting the defendants' position.

The first of these is *Young* v. *Christie*, 7 Gr. 312, in which it was held, that the fact that a debtor defends one action brought against him by a creditor, and allows judgment by default for want of an appearance in another suit, is not such an undue preference of one creditor as will render the judgment void under the Ontario Act, of which our Act is a transcript. This was so held by the late Chancellor Blake and afterwards by the full Court. But the Chancellor while he said he did not feel "at liberty in the present unsatisfactory state of the law to go beyond what is written," added, "although I admit that the argument in favor of the plaintiff's view is of great force."

The next case was *McKenna* v. *Smith*, 10 Gr. 40, in which Smith being indebted to McKenna and also to one Hutty, was sued by both. To the action brought by McKenna he entered a defence, while he did not defend the action brought by Hutty, to enable the latter as he said to get a first judgment. An *ex parte* injunction restraining Hutty from proceeding to enforce the execution issued upon his judgment, having been granted, a motion to continue it was refused by Chancellor VanKoughnet,

following *Young* v. *Christie*, which he said, "very properly, I think, decides that one creditor facilitated, another delayed, by the recognized forms of law, in obtaining a judgment, affords no ground for interference."

The learned Chancellor was in that case pressed with the feeling, that granting relief, is really taking away the preference from one creditor and giving it to another. That consideration exists as well, and has often been urged by counsel, where chattel mortgages are attacked as fraudulent, but the Court has never, on that account, been deterred from giving effect to well-grounded objections to such instruments.

The judges who decided the earlier cases did not, I think, contemplate dealing with cases in which there were any active steps taken by the debtor, to facilitate one creditor at the expense of another, further than the mere entering an appearance in the one suit, and refraining from it in the second would do so.

Thus in the case just cited, the learned Chancellor said, "While the Act endeavours to prevent the debtor himself when in insolvent circumstances, from helping a particular creditor by any act of his own, to a portion of his property, it leaves it open to any such creditor by active proceedings on his part, the debtor being passive, to sweep away the whole estate from all the other creditors." In course of time, however, the Court of Chancery in Ontario got beyond that, and *Labatt* v. *Bixel*, 28 Gr. 593, was decided by Chancellor Spragge. The defendant was in insolvent circumstances, and being sued by Labatt, and also by his son, he defended the suit by Labatt, and only entered an appearance in the son's suit, whereby he was enabled to get an earlier judgment. It was admitted that the appearance in that suit had been put in, in order to judgment being recovered more rapidly. The learned Chancellor, after remarking upon *Young* v. *Christie*, *McKenna* v. *Smith*, and some other cases, and that if construing the Statute for the first time, he would hold that what had been done was not within the Statute, said, "The Statute avoids a judgment, the recovery of which is facilitated by the debtor in order to its gaining priority, but not all such judgments. There are several ways in which the recovery of a judgment may be facilitated. By confession, *cognovit actionem*, or warrant of attorney; that is a class. By ab-

staining from making any defence in one suit. By entering appearance and making no further defence. Only the first class *in terms* is prohibited by the Statutes."

After quoting the language of C. J. Draper in *Kraemer* v. *Gless* 10 U. C. C. P., at page 475, that where a Statute contains provisions, which are a departure from the common law, while it is proper, so far as necessary to give these full effect, to hold the common law superseded by them, yet it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give, he proceeded to say, "The Statute did remedy an evil. It might have gone further, in the same direction, but did not. If the Courts go further in the same direction, where the Legislature has stopped, what would it be but legislation?"

The next case was *McEdie* v. *Watt*, decided by V. C. Blake and affirmed by the Court of Appeal. It never appeared in the regular reports, but in 17 U. C. L. J. 473 and 1 C. L. T. 722, the following short note of the judgment of the Court of Appeal is given: "Held, affirming the decision of Blake V. C. that the cases under the Absconding Debtor's Act do not apply to cases coming under R. S. O. c. 118, *Labatt* v. *Bixel*, approved and followed."

In *Heaman* v. *Seale*, 29 Gr. 278, the debtor entered an appearance, and filed pleas in the suit first begun against him. To the second action he entered an appearance and filed pleas, but on the same day that the latter were filed he signed a *relicta verificatione*, after which judgment was signed and execution issued. Proudfoot V. C. held that the judgment did not offend against the Statute, saying, "A *relicta verificatione* is neither a confession nor a cognovit, nor a warrant of attorney, and is therefore not prohibited by the Statute."

The same learned judge also held in *King* v. *Duncan*, 29 Gr. 113, that, "Under the decisions there would be no violation of the Statute in a debtor not taking advantage of a credit not having expired, or in his not insisting upon a merger of the debt, if there were any such merger, for the Statute only avoids a confession of judgment, a *cognovit actionem*, or a warrant of attorney to confess judgment."

Davis v. *Wickson*, 1 Ont. R. 369, was a case in which an order had been obtained in chambers, on consent, striking out

the defence, and giving leave to enter up judgment. Although Chancellor Boyd, who heard the cause, says he does not think that the plaintiff could have successfully attacked the judgment recovered by Wickson against Foster, yet that is a mere *obiter dictum*, for he had previously said, that for the purpose of deciding the questions before him, "It becomes unnecessary to express any opinion upon the validity of the judgment recovered by Wickson against Foster."

The question came before the Queen's Bench Division of the High Court of Justice, in Ontario, in *Turner* v. *Lucas*, 1 Ont. R. 625. There the debtor's solicitor in one of two suits brought against him, gave a consent to an order striking out the statement of defence, and giving leave to sign final judgment, whereby priority was gained over another creditor. On an interpleader issue, in which the creditor who so obtained the earlier judgment was defendant, Burton, J. A., before whom it was tried, gave a verdict in his favor, but stated that had he not felt bound by authority, he would have given it in favor of the plaintiff. In Term, on a motion to set aside the verdict, Mr. Justice Armour in a vigorous judgment, expressed his dissent from the view which had been taken by the Court, but he came to the conclusion that the rule *nisi* must be discharged, because the cases already decided, and which were authorities binding upon him, had limited the words, confession of judgment, *cognovit actionem*, and warrant of attorney to confess judgment, strictly to the instruments technically known as such, at the time of the passing of the Act.

C. J. Hagarty and Mr. Justice Cameron gave no judgments, but contented themselves by concurring in the conclusion at which he had arrived.

The latest case is *MacDonald* v. *Crombie*, 2 Ont. R. 243, which was before the same Division of the High Court of Justice. There Armour, J., having decided an interpleader issue in accordance with the views he had expressed in *Turner* v. *Lucas*, the verdict was set aside in Term, C. J. Hagarty and Mr. Justice Cameron both delivering lengthened judgments, in which they upheld the views expressed in previous cases. Mr. Justice Armour adhered to his original judgment. This case has since been carried to appeal, and the judgment has been affirmed.

These cases show, that a large number of the judges in Ontario uphold judgments obtained under circumstances like those in the

present case, although the obtaining of them is assisted by the debtor, for the express purpose of giving a particular creditor a preference, and that they uphold them on the narrow and technical ground, that they are not within the letter of the Statute. That they should have done so, is, in the interests of commercial morality, and of plain honest dealing, in my humble judgment, greatly to be regretted.

The principle already referred to, as enunciated by C. J. Draper in *Kraemer* v. *Gless*, or as it was stated by C. J. Hagarty in *Macdonald* v. *Crombie*, "When the Legislature make use of words of known significance and meaning, we are not at liberty to extend them as applicable to all matters that we consider to be of cognate character, or capable of effecting a mischief equal to those that are specially prohibited," is no doubt correct. Yet it is equally true, that whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance. It is a sound maxim, *Quando aliquid prohibetur fieri ex directo prohibetur et per obliquum.*

It was thus stated by Lord Chancellor Cranworth in *Philpott* v. *St. George's Hospital*, 6 H. L. at p. 349, "Prohibitory statutes prevent you from doing something which, formerly, it was lawful for you to do, and whenever you can find that anything done is substantially that which is prohibited, I think it is perfectly open to the Court to say that that is void, not because it comes within the spirit of the Statute, or tends to effect the object which the Statute meant to prohibit, but because by reason of the true construction of the Statute it is the thing, or one of the things, actually prohibited."

Now what is it that the Statute prohibits here? Is it not the preferring one creditor at the expense of another by an insolvent debtor? It declares that where a debtor in insolvent circumstances, and knowing himself to be so, voluntarily or by collusion with a creditor, acts so as to give that creditor a preference or priority over his other creditors and thereby to hinder, defeat or delay them, the means taken to effect such purpose shall be null and void. That, in short, such a preference is a fraudulent one.

No doubt in the 95th section, it is only such a preference effected by means of a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, that is specifically dealt with, but I am not disposed to put upon that section the narrow

construction put upon it by the Ontario judges. On the contrary I concur in, and am prepared to adopt, the language used by Mr. Justice Armour, in *Turner* v. *Lucas*, when he said: "Speaking for myself alone, had the matter been *res integra*, I would have held that where a defendant, being a debtor in the circumstances and with the intent in the act mentioned, had actively interfered to enable a plaintiff, his creditor, to recover a judgment against him sooner than he could have recovered it by due course of law, and without such interference, such defendant was giving a confession of judgment, within the very words of the Act, and certainly within its spirit, and was doing the very mischief aimed at by the Act; and I would not have thought that in so construing the Act I was legislating, but only making "such construction as should suppress the mischief, and advance the remedy, and should suppress subtile inventions and evasions for continuance of the mischief, and *pro privato commodo*, and should add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." The decisions binding upon him as authorities prevented him from giving effect to his convictions, but I am not trammelled by these. Besides there is authority for giving the expression, "confession of judgment," a wider meaning than that given it in the Ontario cases, a meaning wide enough to cover the present case.

The 6 Geo. 3, c. 106, s. 133, which provided in respect of bankrupts, that no creditor having security should receive more than a rateable proportion of his debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of, or lien, upon any part of the property of such bankrupt before the bankruptcy, had a proviso added, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateably with such creditors. *Andrews* v. *Diggs*, 4 Ex. 827, was the case of an interpleader issue, to try whether certain goods taken in execution by the defendant were liable to be sold by the sheriff. The execution had been issued under a judgment obtained by judge's order. It was contended that this was not a judgment by confession, but Baron Rolfe, before whom the issue was tried, held otherwise, and directed a verdict for the plaintiff. The jury found that the defendant's execution was *bona fide* levied. Upon a motion in Term to

enter a non-suit, it was argued that the words "default, confession or *nil dicit*," must be construed according to their strict and technical meaning. But C. B. Pollock said "The question turns entirely upon the meaning of the words 'judgment by confession.' The question, therefore, turning merely on the meaning of the word 'confession,' this order is, in every way in which it can be viewed, a judgment by confession, and nothing else."

Baron Parke said, "This is not a judgment by 'default' or '*nil dicit*,' but a judgment by confession simply, because the party has agreed to sanction the judge in ordering that the action shall be confessed." And Baron Platt said, "The word 'confession' in the 108th section, is not to be understood in the confined sense for which Mr. Chambers contends, though no doubt in ordinary parlance, a judgment by confession is understood to mean a judgment by *cognovit actionem*. This is not a judgment by 'default' or '*nil dicit*,' but it is in substance a judgment by confession."

It is true that in that case the Statute in which the word occurred, was one providing for the rateable distribution of the debtor's estate, and that on the judgment being set aside, the creditor would share with other creditors, but that is not important. The case is still a direct authority against the view, that the word "confession" must be taken in its strict and limited sense.

In the present case, the judgment was not given as the result of preference on the part of the creditors. There is nothing whatever to support such a contention as that.

The course adopted to secure the judgment was the result of a conference between Turner and young Hodder, acting as the agent of his father, followed up by a consultation with a solicitor, at which both were present.

The debtor attended voluntarily to be examined, and when so examined admitted the correctness of the claims made, and that the creditor Douglass was the assignee of all the claims, and entitled to sue and recover in respect of them. Then on that examination a judge's order was obtained, striking out the defence and allowing final judgment to be at once signed.

All this was done, it is admitted, for the purpose of securing payment of these claims, and of getting in ahead of the Banks, the other creditors.

In my judgment this was a fraudulent preference of these particular creditors, to the prejudice and injury of the others; the transaction should be set aside, and the judgment declared null and void as against the plaintiffs.

I therefore make a decree, declaring the judgment recovered by the defendant Douglass against the defendant George Hodder, and the execution issued thereon, fraudulent and void as against the plaintiffs.

The plaintiffs are entitled to costs, as against all the defendants.

ARCHIBALD v. GOLDSTEIN.

Application for a new hearing—Additional evidence.

Cause heard and decree in plaintiff's favor made on 27th March, 1883, when defendant though absent appeared by counsel; cause re-heard by the full Court in Easter Term, 1883, and judgment affirming decree given 4th February, 1884.

On 6th February, 1884, defendant presented a petition, praying that the decree might be set aside, and that he might be allowed to adduce evidence in his own behalf, and that the suit might be set down again for hearing and examination of witnesses, on the ground that defendant was absent from Manitoba and never made aware of the date of hearing.

Held, that application must be dismissed with costs.

W. R. Mulock and *E. H. Morphy* for petitioner.

H. M. Howell and *J. S. Hough* for respondents.

[*13th Feb., 1884.*]

TAYLOR J.—This cause was heard before me on the 10th of March, 1883, and on the 27th of the same month a decree was pronounced in favor of the plaintiff. At the hearing, counsel for the defendant applied for a postponement on the ground of the defendant's absence, which was refused as he did not even know where his client was, and could not name any time within which it was probable he could be communicated with.

In Easter Term last the case was, at the instance of the defendant, re-heard before the full Court, and a few days ago judgment was given dismissing the re-hearing.

An application is now made to re-open the case and to allow a fresh hearing, in support of which there are read an affidavit of the defendant sworn at Rio Vista, in the State of California, an affidavit of his wife sworn at the City of Winnipeg, and affidavits of Philip Brown, and of the defendant's solicitor.

I do not think that the defendant is precluded from making this application by counsel having appeared for him at the original hearing, cross-examined the plaintiff's witnesses, and addressed the Court. The application is not one however that should, under the circumstances, be granted.

I have read the affidavits filed in support of the motion, and a number of other affidavits filed in the cause at different times, and which were remarked on by counsel for plaintiffs. They relate chiefly to the defendant's movements and wanderings during the last twelve or eighteen months. They are exceedingly contradictory, and some of them certainly cannot be true. The defendant seems to have been, according to his own account, suddenly called away from Winnipeg in October 1882. At that time this suit was pending, but he seems to have left no address with his wife, nor to have taken any trouble or concern about this suit, until the plaintiff having obtained under the decree a report of the master finding a considerable amount due him, began a suit against his wife for the purpose of setting aside a fraudulent conveyance of lands made to her. During the time which has elapsed since he left Winnipeg, he must, taking his own account of his wanderings, have been once at least, if not oftener, in Chicago; yet he never turned aside to come up here and attend to this business.

His wife, who left Winnipeg soon after he did, was here in the month of June last, and was examined as a defendant in the suit against herself and her husband. When examined on oath on the 25th of June, she stated that her husband, the defendant, was then in England. It is a remarkable fact that his answer as a defendant in that suit, was sworn on the 19th of July following, in San Francisco. From the time which it is shown upon the present application is required for communication by mail between Winnipeg, and the defendant's place of abode in California, the

answer must have been sent off to be sworn to just about the time the wife was examined here, and when she swore that he was in England.

The only evidence which it appears could be adduced if a new hearing is granted would be that of the defendant and his wife. The evidence that Brown can give, according to his affidavit, would in no way contradict the evidence given by the plaintiff.

The defendant by his original answer denied that he acted as agent for the plaintiff, and in fact denied the whole case made by the plaintiff. The evidence which the defendant and his wife would now give, as disclosed in their affidavits, would not in my judgment, outweigh or displace the evidence given by the plaintiff, Treston, Vivian and Isaac Goldstein, the defendant's brother.

Then, even were the hearing opened, the defendant says that the condition of his business is such that he is unable to leave it. With the evidence before me, or even excluding that from consideration, from the affidavits before me made by the defendant and his wife, and the different stories told at different times as to his whereabouts and his movements, to permit his evidence to be taken on commission or anywhere except in open court could not for a single moment be thought of.

In my judgment the application must be dismissed with costs.

CROTTY v. VROOMAN.

Patent.—Cancellation.

S. entered for a homestead and pre-emption, and subsequently by deed conveyed to A through whom plaintiffs claimed. Before the patent was issued the defendant made application for the same land, alleging that S. had not complied with the requirements necessary to entitle him to the land.

Upon the report of the Land Board the Minister of the Interior cancelled the entry of S. and allowed the defendant to be entered for the land.

The bill prayed that a patent from the Crown granting the lands to plaintiffs might be issued, and that the entry made by the defendant should be set aside.

Held, that the Court had no jurisdiction to grant the relief prayed.

H. M. Howell and *T. S. Kennedy* for plaintiffs.

J. A. M. Aikins and *G. G. Mills* for defendant.

[*9th April, 1883.*]

TAYLOR, J.—In the spring of 1879 one J. E. Stirton had himself entered for 160 acres of land, the N. E. quarter of section 24, in township 2, range 10, west of the first principal meridian, for the purpose of securing a homestead right in respect thereof, under section 34 of the Dominion Lands Act, 1879. He at the same time exercised his right of pre-emption, by taking the S. E. quarter of the same section. During the summer of 1879, and during the two following years, he was at different periods on the land and did work thereon, although the length of time he was in actual occupation, and the extent of the work done, or improvements made, are matters in dispute.

By deed dated the 29th of Nov., 1881, he conveyed both quarter sections to one Adamson; two days after, on the 1st of December, an application was made to the local agent at Nelsonville, to obtain a patent under the 15th subsection of section 34 of the Land Act, by paying the government price of $1 per acre. The money was paid and a recommendation for patent made by the local agent. On the 31st of December following, Adamson, by

deed of that date, conveyed to one Cochrane, who, by deed dated the 23rd of January, 1882, conveyed to the plaintiffs.

On the 1st of June, 1882, in reply to an application from the plaintiff's solicitors, a communication was received by them from the Department of the Interior at Ottawa, that the patent was in course of preparation, and when issued would be sent to Winnipeg.

In the meantime, however, by letters dated the 16th of January and 24th of February, 1882, the defendant applied to the Minister of the Interior about the land in question, alleging that Stirton had not complied with the requirements of the Department, so as to entitle him to the land, and seeking to obtain an entry for it for himself.

The matter was thereupon, on the 17th of March, 1882, referred for enquiry to the Commissioner of Dominion Lands at Winnipeg, and the Board constituted under the order in council of the 31st of October, 1881. After an investigation by that Board, a report was made on the 9th of May, 1882, that Stirton had not complied with the requirements in reference to his homestead, and that he was not entitled to purchase or obtain a patent therefor; the report then went on to state "that the entry of Stirton for the N. E. quarter of section 24, township 2, range 10 west, as homestead, and the S. E. quarter of the same section as a pre-emption and subsequent sale thereof to him be cancelled, and that entry for the same be granted to Smith Vrooman."

Upon this report the Minister of the Interior took action, cancelled the entry of Stirton, and allowed the defendant to be entered for the land. The present suit has in consequence been instituted, the prayer of the bill being, "That it may be ordered that a patent from the Crown granting the said lands to your complainants may be issued, and that the entry of the said lands made by the defendant may be set aside."

Into an examination of the lengthened and conflicting evidence upon the matter of fact, as to whether Stirton did, or did not, comply with the requirements as to occupation, settlement, and cultivation, it is not in my opinion necessary to enter. I have come to the conclusion, upon the authorities, that the Court has no jurisdiction to entertain the suit or to grant the relief prayed. It is true the order-in-council of the 31st of October, 1881,

provides in clause 3, subsection (*b*), as follows: "The decision of the Board, as a general rule, to be held as final, subject, of course, to the jurisdiction of the legal tribunals," but what the jurisdiction of the legal tribunals may be, must be sought for elsewhere. If the Court has not jurisdiction given it by statute, the order-in-council cannot confer it.

As to so much of the prayer of the bill as seeks an order for the issuing of a patent from the Crown in favor of the plaintiffs, I am not aware of any jurisdiction possessed by this Court to decree specific performance against the Crown. That the Court has no such jurisdiction, has been decided in *Simpson* v. *Grant*, 5 Gr. 271. Even had the Court such jurisdiction, it could not be exercised without the Minister of Justice, as Attorney-General of the Dominion, being a party to the suit. In a case such as the present, touching a subject matter with which the Local Legislature of this Province has no power to deal, he, and not the Attorney-General of the Province, is the proper person to represent the interests of the Crown. I do not forget the provision in the Queen's Bench Act, (Con. Stat. c. 31, s. 6, sub-s. 8) by which, among the subjects in respect of which the Court may exercise jurisdiction, is stated "The decreeing of the issue of letters patent from the Crown to rightful claimants." Even if that provision should not be held to apply merely to cases in which patents can be issued by the Local Government, it is a jurisdiction which can be exercised only when the Crown itself brings the matter before the Court, for the purpose of having conflicting claims adjudicated upon.

As to that part of the prayer which asks that "the entry of the said lands made by the defendant may be set aside," the objection might be taken that an entry is not "a patent, lease, or other instrument," and so not affected by the provision of the 78th section of the Dominion Lands Act, 1879, as amended by the Dominion Statute, 43 Vic., c. 26, s. 8. Waiving, however, that objection, and dealing with the question as if the words "other instrument" would cover an entry, the section of the Dominion Lands Act just referred to is the only one I can find, giving the Court any jurisdiction to deal with such matters.

The section as amended is as follows: "In all cases wherein patents, leases, or other instruments respecting lands have issued

through fraud, or in error, or improvidence, any court having competent jurisdiction in cases respecting real property in the Province, or place where such lands are situate, may, upon action, bill or plaint respecting such lands, and upon hearing of the parties interested, or upon default of the said parties, after such notice of proceedings as the said court shall order, decree such patent to be void; and upon the registry of such decree in the office of the Registrar-General of the Dominion, such patent shall be void to all intents."

This section is, except as to the designation of the tribunals by which the jurisdiction may be exercised, a copy of the 26th section of the Public Lands Act of Canada, 16 Vic. c. 159, (Con. Stat. Canada, c. 22, s. 25). The effect of that clause has on several occasions been considered by the Court of Chancery in Ontario. In that Province it had been held, in the case of *Boulton* v. *Jeffrey*, 1 Ont. E. & A. R. 111, decided by the Court of Appeal as long ago as 1845, that where the Government had examined into the claims of opposing parties, to lands leased from the Crown, and had granted them to one of those parties, the Court of Chancery had no authority to declare the grantee of the Crown, a trustee of the lands for the opposing party.

The late learned Chief Justice Robinson in delivering the judgment of the Court said, "We agree with the argument of Mr. Esten, that, even if it could be charged that the patent had issued improvidently, or that the Crown had been in any manner misled, the consequence of that could in general only be, that upon a proper proceeding by the Crown, at the instance (it might be) of the person showing himself to be prejudiced by it, the grant should be repealed, and thus the land would be again vested in the Crown, which unquestionably must be allowed to exercise its will in disposing of its property." In a more recent case of *Lawrence* v. *Pomeroy*, 9 Gr. 474, the Court considered itself unable to grant relief, although the patent had issued in ignorance of the opposing claim of the plaintiff, upon the fraudulent representations of the patentee, and concealment by him of facts from the Crown Land Department.

The subsequent case of *Barnes* v. *Boomer*, 10 Gr. 535, was decided by the then V. C. Spragge, now Chief Justice of Ontario, who held that the Court was concluded by *Boulton* v,

Jeffrey, and that the Public Land Act 16 Vic. c. 159, s. 26, did not extend the jurisdiction of the Court.

The same learned judge in a still later case of *Kennedy* v. *Lawlor*, 14 Gr. 228, said "The Court cannot review the decision of the Commissioner of Crown Lands, even although it might, under the circumstances, have taken a different view of the case in the first instance, from what he did."

The late Chancellor VanKoughnet in the case of *Lawrence* v. *Pomeroy*, already cited, expressed a strong opinion, that in such a case, the Attorney-General was the proper party to invite the action of the Court. In *Barnes* v. *Boomer*, V. C. Spragge said, that *Boulton* v. *Jeffrey* had decided, that the proceeding should be by the Crown itself. In the face of the unanimous decisions of such eminent judges as those whose language I have quoted, it would be impossible for me to entertain the jurisdiction and to grant the relief prayed. Even if the contention of the learned counsel for the plaintiff should be correct, that upon the plaintiff paying the Government price for the land, as he did on the 1st of December, 1881, it ceased to be a case of homestead entry, and became one of a sale, with which the Land Board could not deal, I do not consider that I have any power to deal with it. The case of *Boulton* v. *Jeffrey* was a case of a sale and not of a free grant; so were some, at least, of the other cases.

But here the cancellation of Stirton's entry, and the substitution of the defendant was not the act of the Land Board, it was the act of the Minister of the Interior, acting, it is true, upon a report of that Board, but still acting as and for the Government, and assuming the responsibilities of the act. There can be no doubt as to the power of the Minister of the Interior to do so, under the 16th sub-section of section 34 of the Dominion Lands Act.

In my judgment it is very questionable whether the payment by Stirton of the Government price for the land, converted the transaction from one of homestead entry to an ordinary case of purchase. The case of ordinary purchase and sale of lands is dealt with in section 30 of the Act; homestead rights are dealt with by section 34. The 15th sub-section of that section provides for any person who has availed himself of the foregoing

provisions for entering a homestead, obtaining a patent before the expiration of three years, by paying the Government price at the date of entry. He, in fact, pays for the privilege of getting his patent at an earlier date, the price which the Government was charging for the land, when he made his original entry. That the Legislature did not intend the transaction thereby to become one of ordinary purchase, seems clear, from the concluding words of the sub-section, which require in addition to the payment of the money, proof of settlement and cultivation for not less than twelve months from the date of entry.

It must also be remembered that in this case the sale by Stirton to Adamson was made before the price was paid, and the recommendation for patent made by the local agent, which, under the statute, is to be deemed evidence of an abandonment of the right.

Even if the Court had jurisdiction to entertain the suit, the relief prayed could not be granted without the Minister of Justice or Attorney-General of the Dominion, being made a party.

As, however, the Court has, in my judgment, no jurisdiction to interfere, the bill must be dismissed with costs.

The case is one of apparent hardship upon the plaintiffs, and I cannot help remarking upon the way in which it was dealt with by the Land Board. Knowing that Stirton, or those who represented him, made a claim to the land, the investigation was proceeded with *ex parte*. Stodders, who was sent to examine and report as to any improvements, was instructed to go to the defendant, the party seeking to have Stirton's entry cancelled, and to obtain the necessary sworn statements as to Stirton's residence on the land. By adopting such a course, the Board was laying itself open to attack, by any one inclined to question the *bona fides* and impartiality of the investigation.

It is to be hoped the Government will cause some further enquiry to be made, with a view of doing justice between the parties.

ARNOLD v. CALDWELL. (a)

Using examinations of parties at trial.

Held, that the examination of a party to an action, taken for the purpose of discovery, may be used at the trial, to contradict the same party, but cannot be put in evidence as an admission.

[*4th February, 1884.*]

TAYLOR, J.—I concur in the conclusion arrived at by the Chief Justice, and my brother Dubuc, that the verdict in this case should stand.

But I desire to state my views upon the point of practice raised before me at the trial, and which was also argued in Term, as to the admitting as evidence on a trial, depositions taken under the 30th section of chapter 31 of the Con. Stat. The learned counsel for the defendant contended that he had a right to make use of the depositions of two of the plaintiffs, taken under that section, and on proof of their signatures to use them in the same manner, and to the same extent that he could make use of any document signed by them. At the trial I refused to allow these depositions to be so used, and further consideration of the matter has confirmed me in the opinion I then expressed.

I do not think that in the absence of statutory authority, the depositions can be so used.

It may be observed in passing, that the concluding clause of the section, "and the practice under this section shall, as near as may be, conform to the settled practice in this respect, in equity," applies to the proceedings under the section to obtain the discovery, the time at which the examination for discovery may be had, and the mode in which the examination and cross examination is to be conducted. It does not say that depositions so taken may be used as in proceedings in equity. It is well known, that in courts of equity at one time the bill contained interrogatories which the defendant was compelled to

(a) The judgment here reported should have appeared with the judgment of Mr. Justice Dubuc at page 81. Its existence, however, was unknown at the time that judgment was published.

answer, and in the event of his not making full and complete discovery, his answer could be excepted to for insufficiency. When interrogatories in bills were abolished, and also cross bills by defendant against plaintiff for discovery, which also contained interrogatories were abolished, the method of obtaining discovery by the *viva voce* examination of the defendant was introduced. The depositions so taken were considered as part of the answers; they stood, in fact, in place of the answers to the old interrogatories, and on that ground could be used at the hearing against the defendant to the same extent that his answer could formerly be used. *Proctor* v. *Grant*, 9 Gr. 26. Even this was at one time doubted, and I believe the late Chancellor Blake in *Simpson* v. *Hutchinson*, (unreported) held that they could not be read.

The distinction between such depositions and any other document signed by a party, and which on being proved could be read, seems to me to be, that they are not voluntary statements, but something forced from the party, and therefore cannot be used unless their use is provided for by statute.

The right to obtain discovery from the opposite party at common law, was, I believe, first given by the 51st section of the Common Law Procedure Act, which permitted the delivery to the opposite party of interrogatories.

That statutory authority to use the answers to these as evidence is required, or at least was thought necessary in Ontario, is shown by the fact that the Common Law Procedure Act passed there, contained a clause (19 Vic. c. 43, s. 178. Con. Stat. U. C. c. 22, s. 192) that in case of omission without just cause to answer interrogatories so delivered, a judge might order an oral examination, and then went on (19 Vic. c. 43, s. 179: Con. Stat. U. C. c. 22, s. 193) to provide that the examinations and depositions should be received and read as evidence, saving all just exceptions. The same provision is found in R. S. O. c. 50, s. 165.

I find no such provisions in the Statutes of this Province.

In answer to the objection stated during the argument in Term, that the distinction lay in these not being statements voluntarily made by the party, counsel urged that they might be regarded as such, because the signing of them was the voluntary act of

the party. This does not seem to be the case, the signature seems to be an essential part of the deposition.

In the old case of *Copeland* v. *Stanton*, 1 P. Wms. 414, a witness was partially examined, and the examination being adjourned until another day, he was suddenly taken ill and died. The report goes on to say that the Master of the Rolls was moved "that this witness' depositions, so far as they were taken, might be made use of," which without the order of the Court, could not be, the witness not having signed his examination. But his Honor having advised with Sir Thomas Geary, the master then in Court, denied the motion for that the examinations were imperfect and could not be made use of. It seems after the witness is fully examined, the examinations are read over to him, and the witness is at liberty to amend or alter any thing, after which he signs them, and then (but not before) the examinations are complete and good evidence.

So in Ontario after the practice of taking such examinations in short-hand was introduced, special statutory provision was made, (Ont. Stat. 41 Vic. c. 8, s. 8,) that where the examination is taken in short-hand, "It shall not be necessary for the depositions to be read over to, or signed by, the person examined, unless the judge so directs, when the examination is taken before a judge, or in other cases, unless any of the parties so desire."

To hold that depositions so taken could be read at the trial, would lead to great inconvenience and expense. If a party is examined by the opposite party, for discovery, any examination by his own counsel is only by way of explanation, yet if the depositions can be used at the trial, it would be necessary for his own counsel to examine him as fully as if he were giving evidence at the trial, or in every case every client must be called at the trial. If he do not, the party would be exposed to the very danger to which the plaintiffs were exposed in this case. Two of the plaintiffs had been examined for discovery, but one of them was not called as a witness on his own behalf at the trial. At the close of the defendant's case, the counsel for the defendant proposed to use the depositions of the plaintiff not called, he having then no opportunity of giving full evidence in his own behalf, or explaining anything.

I still hold that the depositions were properly excluded at the trial.

[In the County Court of the County of Selkirk.]

ROACH v. CANADIAN PACIFIC RAILWAY CO.

Liability of Railway Company as carriers.

Plaintiff delivered certain goods to the Grand Trunk Railway for carriage to Winnipeg. Defendants in the course of transit received the goods and were paid freight charges over their line. Defendants delivered the goods at Winnipeg to a cartage company to be delivered to plaintiff, but some of them were not so delivered.

Held defendants liable.

C. P. Wilson for plaintiff.

Aikins, Culver & Hamilton (*W. Bearisto*) for defendants.

[*21st March, 1884.*]

Ardagh, Co. J.—This action is brought to recover the value of certain household goods, delivered to the Grand Trunk Railway on the 21st of December, 1883, at Montreal, for carriage to Winnipeg and delivery here to the plaintiff, and which it is alleged came into the possession of the defendants and were lost by them.

On the 31st of January, 1884, the Manitoba Cartage Company notified the plaintiff that the goods in question, with others, had been received by the defendants at St. Vincent and brought to Winnipeg.

On the 1st of February, the Cartage Company made delivery of all the goods that had been shipped, with the exception of those for the value of which this action is brought.

The plaintiff paid to the Cartage Company $13.75 claimed by the defendants for freight and charges from St. Vincent to Winnipeg. It was shown that an agreement existed between the defendants and the Cartage Company, for the delivery by the latter, of freight arriving at Winnipeg in charge of the former. There was some discrepancy between the number of packages shipped and delivered, the former number being 103, and the latter 109. This was accounted for by some of the original packages being broken up.

The defendants offered to prove that the articles mentioned in the advice note sent to the plaintiff had been delivered to the Cartage Company, and it was admitted that such proof could be given. The plaintiff seems to have given sufficient proof that the goods in question were not delivered to him.

The allegation of the defendants that they delivered the goods to the Cartage Company, and their advice note traces the property into their custody, by admission. The value of the property is proved to be as claimed.

The defendants contend that the Grand Trunk Railway is primarily liable, and I think it was also contended, although I do not find it in my notes, that if the defendants could at any time have been liable, the Cartage Company must under the evidence be now held responsible, as the latter are a chartered company of common carriers, in the same sense that the defendants are so, and the defendants having shown that the goods had been handed over to, and taken in charge by, the Cartage Company to deliver to the plaintiff, the plaintiff should sue either them or the Grand Trunk Railway.

I have stated this last proposition as it presents itself to me, from what I assume to be the defendants point of view. In this Court the ordinary and simple statement of the claim, in cases like the present, must be considered as covering the ordinary formal counts in which plaintiffs declare their cause of action, and the legal liability of the defendant in the superior courts of law and equity; and the defendant's simple denial of liability must also be held to entitle him to raise the same issues of fact and law, as he might do by formal pleadings or a demurrer in the Courts above.

The plaintiff may be considered then as claiming the value of the goods in question in assumpsit *ex contractu*, and in tort *ex delicto*. The defendants, as common carriers, undertook and promised to carry the plaintiff's goods from St. Vincent to Winnipeg, and there to deliver them to the plaintiff, and they also, having received the goods for a specific purpose, committed a wrong for which the plaintiff at common law claims to be entitled to damages, the outcome of the wrong or tort being the failure to deliver.

The defendants will be considered as alleging that they made

no promise to the plaintiff, and only carried the goods as agents of or sub-contractors with the Grand Trunk Railway; and that they have not been guilty of any wrong for which the plaintiff is entitled to recover damages from them.

The authorities which affect the whole question of liability in respect to claims like the present one are very numerous, as might be expected, when the nature and extent of railway traffic on this continent and in England is considered. The following English cases are among those most frequently referred to in this connection:—*Muschamp* v. *Lancaster Ry. Co.*, 8 M. & W. 421; *Martin* v. *Great Indian P. R. Co.*, L. R. 3 Ex. 9; *Willy* v. *W. Cornwall R. Co.*, 2 H. & N. 703; *Bristol and Ex. R. Co.* v. *Collins*, 7 H. L. 194; *Mytton* v. *Mid. R. Co.*, 4 H. &. N. 615; *Phillips* v. *Clarke*, 2 C. B. N. S. 156; *G. W. R. Co.* v. *Goodman*, 12 C. B. 313; *Gill* v. *Manchester Ry. Co.*, L. R. 8 Q. B. 186; *Hayn* v. *Culliford*, L. R. 4 C. P. Div. 182; *Coxon* v. *G. W. R. Co.*, 5 H. & N. 274; *Alton* v. *Mid. R. Co.*, 19 C. B. N. S. 213; *Foulkes* v. *Met. Dis. R. Co.*, L. R. 5 C. P. Div. 157.

I have as far as time permitted looked over these cases, which I have set down in the order as to time in which they have been published, but it will not be necessary in this suit to refer particularly to more than two or three of the latest decisions, which I take it ought as a rule to be considered as governing the previous ones if they do not affirm them.

In the case of *Martin* v. *Great Indian Peninsular Railway Company*, *ante*, the defendants were employed by the Indian Government to carry certain troops and their effects, including the plaintiff's baggage. The baggage while in defendants' possession was destroyed by fire. By the terms of the contract, the baggage was to remain in charge of a guard provided by the troops, "the Company accepting no responsibility." It was held that this last stipulation did not exempt the defendants from liability for a loss arising from their own negligence. Held also, that although the plaintiff could not sue the defendants for non-performance of their duty as carriers, he was entitled to sue for an injury done to his property through their negligence whilst the goods were in their custody. The declaration in this case alleged, that the defendants did not safely and securely carry and deliver the luggage, but conducted

themselves with such carelessness and want of skill that the luggage was set on fire and burnt, etc. A great number of pleas, mostly formal, were set up by the defendants, but the only important one is that, which avers in substance that it was not by virtue of any contract with the plaintiff that his luggage was received and carried by defendants, but that it was so received and carried under a contract with the Government, etc. Chief Baron Kelly in giving judgment on the demurrer in favor of the plaintiff says, "As to the first count which sounds in contract, and in substance, though not in form, charges the violation of a contractual obligation, the plea is a sufficient defence, for if the contract was not with the plaintiff but with other persons—and the only charge is one of non-performance of the obligation created by it—no action can be maintained except by the person with whom the contract was entered into. As to the second count which charges the defendants with negligence and by which it appears that the plaintiff's luggage was lawfully on the defendants' railway, and, being properly there, was lost by their neglect, I should have been disposed to think that the neglect and breach of duty charged, constituted only a breach of duty constituted by contract, and that the contract being made with persons other than the plaintiff, this plea was liable to the same objection as the last. But my learned brothers take a different view and think that the second count charges a wrong done, by which the plaintiff is affected in his property, and for which therefore, independently of contract, he has a right to obtain redress. I do not wssh to dissent from this view." Barons Bramwell, Channell and Pigott concurred. Channell, B., in giving his judgment, says, "The plea (11th) is no answer to the second count, which is not to be considered as charging the mere breach of a contract by non-performance, but as charging something done by the defendants in the nature of an affirmative act, injurious to the plaintiff's property. On that ground the plaintiff is entitled to our judgment on the demurrer to this plea."

In *Alton* v. *The Midland Railway Co.*, *ante*, it was held, as stated in the head note, that "one who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract," but this was a suit by a master to recover damages for a personal injury done to a servant, and the contract was held to have been made with the latter and not with the

master, also that it was not a case in which the master could sue for the loss of service. An extract from the case of *Foulkes* v. *The Met. Dis. R. Co.*, *ante*, will show how far the head note above quoted is inapplicable to the case I am called upon to decide. In the former case the plaintiff brought an action to recover damages, for an injury sustained in stepping out of a railway carriage of the defendants, on to a platform to which the carriage was unsuited. His ticket had been purchased from another company, whose line or part of whose line the defendants used, and at one of whose stations the accident occurred. It was held, that the defendants having permitted the plaintiff to travel by their train, were bound to make provision for his safety, and that an action lay against them for having failed to do so. There was no difference of opinion amongst the learned judges as to the law on the subject. Bramwell, L. J., says, "What grounds or reason is there for saying that they (defendants) are not contractors to carry. The journey is indeed part over the road of the S. W., and the servants of the S. W. in the first instance received the fare. But how does that affect the case? If the defendants' servants had in the first instance received the fare, it is clear the contract would have been with the defendants; and it is therefore clear that the ownership of the road does not affect the question. Nor can it matter whether the defendants receive the fare by the hands of their own servants or those of others; nor in truth, that by arrangement with the S. W. the S. W. should receive it mainly for themselves and in part for defendants. The defendants, I repeat, are the carriers, and the contract for carriage is with them. If the interest of the S. W. in the matter affects this reasoning it would at the outside go to show that the two companies are partners and the contract was with them jointly. That would not disentitle the plaintiff to recover against these defendants alone. There was according to the finding a tort whether in defendants alone or in conjunction with the S. W. does not matter; the plaintiff is entitled to recover." Baggally, L. J., after intimating that a liability on the part of the S. W. might co-exist with a liability on the part of the defendants, in respect of the negligence alleged against them, and that in his view of the case, a contract was created between the defendants and the plaintiff, goes on to say, "It appears to me sufficient to say, that apart from and irrespective of any such

questions as those to which I have just referred, a duty or obligation was imposed upon the defendants when they accepted the plaintiff as a passenger by their train, not only to carry him safely to the station where he was to alight, but to provide safe means for his alighting when he arrived."

I now come to what seems to be the latest reported case in our own Canadian Courts bearing upon the question: *Leslie* v. *Canada Central R. Co.*, 44 U. C. Q. B. 21. The plaintiffs sent a consignment of trees from Toronto to Cobden by G. T. R. addressed to themselves. The agent of the defendants delivered the whole consignment to one Simpson, contrary to instructions. There were two counts—one for failing to deliver and one in trover. Pleas—1st, not guilty; and 2nd to 1st count, that plaintiffs did not deliver to the defendants, nor did they receive from plaintiffs the said goods in said count mentioned, or any of them, for the purpose or on the terms therein alleged. The remaining three pleas are of no consequence. Simpson paid the whole of the freight from Toronto to the defendants. Per Hagarty, C. J., who delivered judgment, "It seems to us that if the disposition made by the defendants was to any other person than the persons whom alone they could recognize as owners, and with full notice of the true ownership, they place the goods in the hands of such other they must be liable to the plaintiffs as fully as the G. T. R. would have been, if Cobden had been a station on the line of the latter Company."

In the unreported case of *Todd* v. *C. P. R.* in our own Provincial Court of Queen's Bench, the learned Chief Justice appears to hold that the plea set up in that case, that there was no contract made by the defendants with the plaintiff, but that the contract and breach was by another company, having a line connecting with the defendants' railway, was bad as to both the count in contract and the count in tort; and he cites the cases I have already quoted from of *Foulkes* v. *Met. Dis. R. Co.* and *Leslie* v. *Canada Central R. Co.* In respect to the question of contract, there appears to be something like a conflict of opinion. In *Martin* v. *Great Indian P. R. Co.*, Chief Baron Kelly was clearly of opinion, that to a count charging the violation of a contract to carry, under the circumstances set out in that case, a plea that the agreement was entered into by the defendants with another party (seemingly in confession and

avoidance) was a good defence. On the other hand, it is intimated in some of the cases that the party to whom the goods are in the first instance delivered, may be considered as the agents of the plaintiff, to contract with a third party so as to make the latter primarily liable.

Applying the law as laid down generally in the decisions I have quoted from, and in numerous other cases, to the facts proved or admitted in the suit at present under consideration, it seems clear to me that the plaintiff was entitled to bring his action either against the Grand Trunk or the defendants, and on the evidence is entitled to recover the value of the goods which appear to have been lost, and which are shown not to have been delivered. It would certainly be a hardship if shippers of goods had in all cases to sue the Company to whom the property was first delivered. In a case like the present, the recovery of the value would not compensate for the trouble.

The defendants admit having received the property, for they claim a specific delivery of the whole bill to the Cartage Company, and their advice note corresponds with the plaintiffs receipts from the Grand Trunk. They also claimed and received a certain sum as freight charges from St. Vincent to Winnipeg, or from the commencement of their own line, which might fairly be held to imply an agreement between them and the plaintiff—the Grand Trunk acting as agents for the latter—for the carriage and proper delivery of the goods; supposing that such an agreement had to be shown, or legally inferred, in order to give the plaintiff a ground for action, which I think is not necessary in this case.

I do not think it necessary to enter into any discussion of the question of the Cartage Company's alleged liability to the plaintiff, having satisfied myself as to his right to follow the defendants. The defendants were bound to deliver the goods to the plaintiff, and they attempted or proceeded to do so, through the Cartage Company as their servants or agents, but apparently failed. The Cartage Company may be a responsible corporate body, or it may not. The plaintiff was not given any choice in the matter, and for anything the latter could know to the contrary, the defendants might select any ordinary and irresponsible teamster to make the delivery.

Judgment will be for the plaintiff for fifty-five dollars ($55).

McPHAIL v. CLEMENTS.

Sale of goods—Partial delivery—Refusal to accept excusing further delivery.

Defendant ordered goods—some manufactured and some to be manufactured—from plaintiff. Defendant contended that the agreement was, that the goods were to be shipped not later than the 6th of October, while plaintiff and his witnesses swore to the 20th of October, as the date agreed upon. On the 16th of October defendant wrote, cancelling the order. This letter was received by the plaintiff on the 19th of October, and on that day he shipped a portion of the goods. In an action for the price of the goods shipped,

Held, that even if the plaintiff's contention as to the date were upheld, yet that the defendant was not bound to accept a portion of the goods, and that the letter of the 16th of October did not excuse a complete performance.

W. R. Mulock for plaintiff.

F. McKenzie for defendant.

[*31st January, 1884.*]

WALLBRIDGE, C. J.—The plaintiff sues for the value of goods sold and delivered under the following circumstances:

The defendant has paid into court the sum of $247, the goods to that extent form a separate parcel, and it only becomes necessary to inquire as to them for the purpose of disposing of the question of costs.

The claim of the plaintiff is reduced to the sum of $472.75 by deducting one item of $57.50 twice charged, if he be at all entitled to recover.

The defendant went to Toronto on the 22nd September, 1882, agreed with the plaintiff to purchase from him the goods forming the subject of inquiry, consisting partly of goods then manufactured, and of others to be manufactured.

The agreement is not wholly disputed, and the real dispute between the parties turns upon a few facts, which alone need be inquired into. The plaintiff proves that he was to manufacture certain furs into coats, three of which and twelve caps, being all

the caps, had been then already completed, and the plaintiff was further to manufacture twenty-four other coats.

The plaintiff proves by himself and two other witnesses that he was to manufacture those not then manufactured, and to add to them the coats and caps already finished, and to forward them to the defendant at Winnipeg by way of the Northern Railway and Collingwood, within three or four weeks from the 22nd September, 1882. On the contrary the defendant swears that the time for forwarding them by that route was limited by express agreement to two weeks from the 22nd September, 1882, the four weeks would expire on the 20th October, 1882, and the two weeks on the 6th October, 1882. The evidence for the plaintiff was taken wholly by commission, and the defendant was sworn on his own behalf. This evidence with letters and memoranda formed the whole case. The goods which the defendant received on the first consignment being simply a number of beaver skins used for trimmings of coats, sent by express and paid for, are now out of the question. The other goods the defendant contends were at the furthest to be shipped in two weeks, that is by 6th October, 1882, and on the 16th October, 1882, the defendant wrote to the plaintiff cancelling the order; this letter and a telegram in January are very material in considering this matter. The letter reached the plaintiff on the 19th October. In answer to this letter, the plaintiff on the 19th October writes to the defendant claiming that the goods "have already been sent." If this statement were satisfactorily proved, one of the difficulties of the case would have been overcome. The defendant produces a memorandum which he swears was made at the time the goods were ordered, and it contains a memorandum that the goods were to be shipped within two weeks, and he swears that this was the bargain and that his reason for making a limit to the time was that the sales for those articles in Winnipeg is for a limited time only, namely, from the first of October to Christmas, and after that time they are not saleable for another year. His allowing a sufficient time to elapse after the 6th October, 1882, for the arrival of the goods, or at the least for the arrival of the invoice, and then on the 16th October, 1882, writing to the plaintiff, cancelling the bargain, satisfies me that he really believed what he swears to is and was the bargain, and he entirely negatives

the idea of any longer time having been agreed on for the delivering the goods. On the other side, Thos. Jocelyn swears that three or four weeks was the time. Jocelyn, a commercial traveller, and no doubt an intelligent man, is equally positive of the time he swears to. Alex. Huit swears the goods were shipped on the 16th October, and he says that two or three weeks was the time at which the goods were to be shipped. Richard McPhail, the plaintiff, was sworn—he says that Jocelyn mentioned as the time for sending the goods that of two or three weeks, and that defendant did not object to it. Which of these parties tell the truth? Defendant is corroborated by all surrounding circumstances, which give weight to what he says. He was sworn before me, and I have the utmost confidence in his truthfulness. On the other side, Mr. Huit swears the goods were shipped on the 16th October, only part of them were then or ever shipped, for there are eight of the fur coats not shipped at all. This part of Mr. Huit's testimony is proved not to be true. It is proved that the shipping bill made out by the plaintiff is dated the 16th October, but the carter put on the face of this bill that the goods were not given to him to take to the Northern Railway until the 20th October, and the railway officials prove that Doyle's (the carter's) testimony is true. Mr. Huit's evidence is therefore not reliable. It is said on his behalf that it is a mistake arising from the date put at the head of the shipping bill in the plaintiff's own shop or office. But then he ought not to have sworn to this, and if defendant had not been able so clearly to contradict him, he would have sworn to a most damaging fact against the defendant. Besides this, the plaintiff received defendant's letter cancelling the sending of the goods on the 19th October, and on the same day Mr. Huit writes the letter saying that the goods had been already shipped, another thing manifestly untrue. There is too much method in these mistakes to lead me to accept them as mistakes. They may be so, but I must weigh the evidence, its value and credibility as a jury would. This very day, 20th, was according to the evidence adduced by the plaintiff, the last on which he had a right to deliver the goods, and the testimony of Mr. Huit at this critical moment ought to have been more guarded.

When was this contract to have been performed? on the 6th or at the end of three or four weeks on the 20th. The plaintiff

and Mr. Jocelyn's evidence say the 20th, the defendant's evidence, his memorandum now produced made at the time, and the market where the goods were to be sold and his letter to plaintiff on the 16th October cancelling the bargain all speak the other way. I wish I had the assistance of a jury to determine the weight and value of the testimony, but supposing the goods were to have been shipped by the 20th October, part of them were so shipped in fact, there was just one-third of the fur coats short or not shipped, the defendant even then was not obliged to receive part of the goods and only part were shipped. The plaintiff says he was not obliged to ship the whole after the receipt on the 19th of the defendant's letter of the 16th October and claims that as a waiver. The plaintiff had taken from 22nd September to 19th October to manufacture 16 of these coats and was he to manufacture the other eight in one day, for according to his own account he had only one day to do it in. He claims now the right to fail in delivery of the other eight by the waiver of the letter of the 16th received 19th October, the 20th being the last day. Waiver must be largely a question of intention. It is clear the defendant never intended to waive any right he had. His letter of the 16th claimed as a waiver was written without the slightest necessity for it, and shews that whilst he thought the time for delivery past, he yet thought it necessary to countermand the shipping of the goods at all. The plaintiff after first replying that the goods had been shipped on the 16th, which was not true, then sets up this letter as the waiver of the necessity for sending the full complement of goods. My opinion is that the letter of 16th was not so intended and the plaintiff fails because the defendant was not bound to accept less than the full quantity ordered. And if I am obliged to find whether the contract was to be performed on the 6th or 20th October, I should say on the 6th. The defendant's whole course of conduct, the purpose for which he required the goods, the market in which they were to be sold, the written memorandum made at the time and the letter written on the 16th (which the plaintiff now is forced to rely on as a waiver) seem all to agree and point to the one fact as sworn to by defendant. The defendant's demeanor is also very much in his favor. I am thoroughly satisfied he swears to what he believes to be true. The goods sent are at the railway station in Winnipeg and there is little in dispute in this suit but the costs of it, and who shall

hold the goods over to another season for sale. I find the value of the goods to be $472.75, for which the plaintiff has leave to move to enter a verdict for him, but I find for the defendant as at present advised.

KELLY *v.* McKENZIE.

Mechanics' Lien—Assignment—Affidavit—Commissioner—Time for commencement of action.

Held, 1. An assignee of the mechanic is entitled to a lien and may make the affidavit necessary for registration.

2. A commissioner to adminster oaths has no power to take an affidavit verifying a statement of claim to be filed.

3. The statement of claim read: "The time or period within which the same was to be done or furnished. Between the 3rd day of July, 1882, and 1st day of August, 1883."

Held, sufficient.

4. Proceedings must be commenced within 90 days after the completion of the work, and the making good of trifling defects in the work does not extend the time.

The Attorney-General (*J. A. Miller, Q. C.*) for plaintiff.

H. M. Howell, and *E. C. Goulding* for defendant.

[*25th April, 1884.*]

TAYLOR, J.—On the 3rd of July, 1882, the plaintiff and one John Lyons entered into a contract with the defendant to erect for him a hotel in the city of Winnipeg. By the terms of the written contract or agreement between them, the work was to be completed on or before the first day of May then next. The plaintiff claims that although this date was the one named in the contract the time really agreed upon was the 1st of June, and that under a provision contained in it for extending the time in event of alterations or additional work being performed

it was further extended. The defendant is willing that the time for completion after the arrival of which he claims to enforce the penalty clause should be taken as the 1st of June. He claims that the extension from the 1st of May to the 1st of June, was the extension in consideration of the alterations and additional work and he does not admit that the time was ever further extended.

On the 13th of March, 1883, Lyons assigned by a memorandum of agreement under seal to the plaintiff all his interest in the contract, and in the moneys payable thereon and in the materials then on the ground and the plaintiff agreed to proceed to complete and carry out the contract. Notice of this assignment was at once given to the defendant.

On the 15th of August, 1883, the plaintiff registered in the proper registry office a statement of claim under the Mechanics' Lien Act, verified by his own affidavit claiming the sum of $21,-326.93 and a lien on the property for that amount.

On the 3rd of November, 1883, the plaintiff filed his bill for the purpose of enforcing the lien so claimed. The defendant has filed his answer and now that the suit has been brought to a hearing takes a number of objections. Some of these it is necessary to consider.

It is objected that John Lyons is a necessary party to the suit as the contract was made with him and the plaintiff jointly, and a right of lien it is said cannot be assigned. In support of this American authorities are relied on. These are mentioned in *Phillips on Mechanics' Liens.*

Our Statute however does in the 23rd section (Con. Stat. c. 53) provide, that "The right of a lien holder may be assigned by any instrument in writing."

At one time the right of an assignee to register the lien seems to have been doubted in Ontario. One McElroy, a contractor, having assigned to Currier, the moneys coming to him under a contract, Currier assigned back to McElroy, who then executed the papers necessary for registration of a lien, and then re-assigned to Currier. V. C. Proudfoot on a bill having been filed by Currier to enforce the lien, held, that there was nothing connected with the assignment to the plaintiff, and the assignment back to McElroy, that should affect the lien, "and," he said,

"possibly no necessity existed for the temporary re-assignment to McElroy." *Currier* v. *Friedrick*, 22 Gr. at page 245.

In *Bank of Montreal* v. *Haffner*, 29 Gr. 319, where however the assignment to the Bank was of a lien which had been registered, V. C. Proudfoot speaking of the Ontario Statute (R. S. O. c. 120) and of section 16, which is exactly the same as section 23 of our Act, said, "The 16th section expressly provides that the lien may be assigned, thus putting an end to a question much disputed in the American courts."

More recently it has been held, in *Grant* v. *Dunn*, 3 Ont. R. 376, that a claim to a lien may be assigned before registration and that in such a case the affidavit verifying the statement of claim must be made by the assignee.

An objection is further taken to the statement of claim that it contains these words, "The time or period within which the same was or was to be done or furnished. Between the 3rd day of July, 1882, and 1st day of August, 1883."

The expression in the statute, Con. Stat. c. 53, s. 5, sub-sec. 1, as amended by 46 & 47 Vic. c. 32, s. 6, "Was or was to be done or furnished," it is claimed was intended to meet the different cases provided for in s. 5, of registering a lien before or during the progress of the work, or registering one after its completion. In the first case, the statement of claim would mention the time fixed for the completion of the work, the time at which it was to be done; in the other it would state that the work was done at a certain time.

It is difficult to say how the expression came to be used in the Statute. It is evident, that in the case of a lien registered before, or during the progress of the work, the exact words of the Statute could not be used with correctness. No one could say of work not yet performed, or only in progress, that it "was to be done" at such a time. The work "is to be done" at such a time, would be the proper expression to use in such a case.

Looking at the statement filed in the present case, it is at once apparent, that the four sub-sections of section 5 have been treated as so many headings or questions in a schedule, answers to which must be filled in. Thus each clause of these sub-sections is given thus: "1. The name and residence of the claimant. Thomas Kelly, of the City of Winnipeg, contractor. And of the

reputed owner of the property. Frederick McKenzie, of the City of Winnipeg, barrister-at-law. Of the person for whom the work was done and materials provided. The said Frederick McKenzie. And the time or period within which the same was or was to be done or furnished. Between the 3rd of July, 1882, and 1st of August, 1883. 2. The work done or materials or machinery furnished. The erection of the hotel offices and appurtenances on said lots and materials furnished therefor." And so on through each sub-section using the words of the Statute and adding thereto the information required to be given.

I do not think the objection which is taken to the statement a well-founded one.

The objection is further taken, that the statement of claim is not verified, because there is only what purports to be an affidavit, sworn before a commissioner, and that such an officer had no power or authority to take such an affidavit.

This is the same objection as was taken during last Term on the rehearing of the case, *Chadwick* v. *Hunter*. Judgment has not yet been given by the full Court, but in my opinion, this objection, unless it has been cured, as it is claimed it has by an Act passed during the present session, would be a fatal one.

The Act has required the statement of claim to be verified by affidavit, but no person has been authorized to administer the oath. A commissioner has no power given by his commission to take such an affidavit. The Statute respecting commissioners in the Queen's Bench (Con. Stat. c. 35) confers no such power.

That special provision had to be made for taking affidavits of a similar kind by commissioners is evident, because the Act respecting chattel mortgages and bills of sale, (Con. Stat. c. 49), has a section (the ninth) providing for the taking of all affidavits and affirmations required by the Act before certain named persons including among them commissioners. So also the Registry Act (Con. Stat. c. 60) provides in section 20, that affidavits made under the authority of that Act may be made before, among other persons, "A commissioner authorized by any of the courts to take affidavits."

The Mechanics' Lien Act in Ontario, makes provision for the affidavit being sworn before a commissioner of the county in which the property is situated.

This objection need not however be further considered, as it seems to me that the objection also taken, that the suit was not begun within the time limited by the Act, is fatal to the plaintiff's success.

The Statute (Con. Stat. c. 53, s. 7) as amended by 46 & 47 Vic. c. 32, s. 5, says, "Every such lien shall absolutely cease to exist within ninety days after such work shall have been completed or material or machinery furnished, unless in the meantime proceedings shall have been instituted to realize such claim under the provisions contained in this Act, and a certificate of *lis pendens* thereof be registered in the proper registry office."

It may be remarked in passing, that no evidence has been given of the registration of any certificate of *lis pendens*.

The proceeding to enforce the lien, that is the institution of a suit for that purpose must be within ninety days after the completion of the work. At what date was the work completed in this case? No date is mentioned in the bill. No evidence has been offered on the subject, except what may be gathered from the documents put in. In my opinion the plaintiff has placed the date as the first of August, 1883. He has done so in the statement of claim filed, by saying the work was, or was to be done between the 3rd day of July, 1882, and the 1st day of August, 1883.

On the 1st of August, 1883, he wrote a letter to the defendant, (exhibit C.) which begins, "Under the contract entered into on the 3rd of July, 1882, between myself and John Lyons and yourself, for the erection of the hotel offices and appurtenances on lots 424 and 425 in block 3, H. B. Reserve, I beg to notify you that said works are complete."

If this be the date at which the work was complete, then it was necessary to preserve the lien, that proceedings should be instituted within ninety days, or certainly not later than the 2nd of October following. The bill, however, was not filed until the 3rd of November. The defendant objecting that the bill filed on that day was not filed within the ninety days, shows that he places the completion of the work as not later than the 4th of August.

Certain objections were taken as to some defective work after the 1st of August and the plaintiff made good, some at all events,

if not all the matters to which objection was taken. The making good such defects would not, however, under the authority of *Neill* v. *Carroll*, 28 Gr. 30, extend the time for proceeding to enforce the lien. They were some trifling defects which had to be made good. The plaintiff could not in my judgment now say, that the time should run from the perfecting of these, for he has himself, by his statement verified by affidavit fixed the completion of the work as of the 1st of August.

The lien has, on account of the delay in proceeding with the suit, ceased to exist, and the bill should be dismissed with costs.

As there is, however, a cross claim made by the defendant and a dispute between the parties, as to the one in whose favour the balance is, if they desire it, there may be a reference to the master, to take the account between them, In that case, the decree must be prefaced by a declaration that no lien exists. The plaintiff should pay the costs up to and including the hearing, and the subsequent costs should follow the result of the accounting.

MARTEL v. DUBORD.

Particulars of plaintiff's residence, &c.—Practice.

An order having been made *ex parte* by Taylor, J. that the profession, occupation, quality, and place of abode of the plaintiff should be given, a summons was taken out to set aside the order.

J. Fisher for plaintiff showed cause.

A. E. McPhillips for defendant.

[*22nd April, 1884.*]

TAYLOR, J., *Held*, that an order could be made *ex parte*, in the discretion of the judge, but that the correct practice was to proceed by summons. After reviewing the facts of this case, he discharged the summons without costs.

BANK OF NOVA SCOTIA v. McKEAND.

Confessing judgment—Fraudulent preference.

In pursuance of an agreement made between the defendant McL. (who was then in insolvent circumstances) and certain of his creditors, two documents were executed. By the one, the creditors signing it agreed to release McL. from any liability upon any notes they had received from him then under discount, and to indemnify him by retiring these at maturity, reserving however, their claims against him in respect of the original consideration for which the notes were given. By the other document the same creditors assigned and transferred all their claims against McL. to the defendant McK. in order that one action might be brought for the aggregate amount of the claims. The amount recovered to be distributed among these creditors *pro rata*.

A writ was issued on the 26th of June, and defendant McL. served. An appearance was entered on 28th of June, the same day a declaration was filed and served, and a plea of payment filed for the defendant. The same day defendant McL. was examined, and on the next day an order was made striking out the plea, upon which judgment was signed and execution issued.

Upon a bill filed by the plaintiffs who were subsequent creditors,

Held, that the judgment recovered by McK. against McL. and the execution issued thereon, were fraudulent and void as against the plaintiffs.

A. C. Killam for plaintiffs.

F. B. Robertson and *H. E. Crawford* for defendants, McKeand & Turner.

[*25th April, 1884.*]

TAYLOR, J.—The bill in this suit is filed against Alfred McKeand, Archibald D. McLean and James L. Turner, praying that a judgment recovered by McKeand against McLean, and the writ of execution issued thereon, may be declared fraudulent and void as against the plaintiffs. Turner is charged with being the active agent of his partner, McKeand, in procuring the judgment.

At the hearing as soon as the pleadings had been read, and before any evidence was taken, counsel for the plaintiffs stated, that they abandoned any case made by the bill, charging collusion without the knowledge of his client, on the part of the attorney who acted for McLean, in the action at law.

Between the 29th of June and 20th of August, 1883, there were placed in the hands of the sheriff of the eastern district, fifteen writs of execution against McLean, for the aggregate amount of $18043.57, of these the second in order of priority was the execution impeached in this suit, for the sum of $7321.98. Two others, the third and tenth in order of priority, were on judgments recovered by the plaintiff, and were for $421.23 and $1459.01 respectively.

The seizure of McLean's stock in trade and assets was made under two writs of execution, in a suit of *McLean* v. *Dingle*, on the equity side of the court, which had not been satisfied when the first of the already mentioned fifteen writs, was placed in the sheriff's hands.

The inventory of the stock in trade and assets, made at the time of the seizure, amounted to $10,069, and they realized at the sale $7551.75.

Counsel for the defendants, McKeand and Turner, at the opening of the case made certain admissions, and from these and the evidence taken it appears, that Turner and McLean went together to a solicitor, to whom McLean stated, that he desired to consult him about taking steps to protect his legitimate creditors, afterwards explained by him to mean his commercial creditors, against claims the Banks had upon accommodation notes, which he thought had been paid, but which had not, and upon which they were likely to sue. He then gave the names of the creditors he wished to prefer, and the solicitor prepared two papers, by one of which, the creditors signing it agreed to release McLean from any liability upon any notes they had received from him then under discount, and to indemnify him by retiring these at maturity, reserving however, their claims against him in respect of the original consideration for which these notes were given, and by the other paper, the same creditors assigned and transferred all their claims against him to McKeand. These papers were carried round by Turner and the several creditors signed them. The object in having all the claims so assigned to McKeand, was stated to be, to save costs by having only one writ, and to enable him to recover judgment for the aggregate amount of the claims, on the understanding that what he recovered under it, he should distribute among these creditors *pro rata*.

The assignment was absolute in form, and no consideration was paid to any creditor for so transferring his claim.

After the signatures of the creditors had been obtained, a writ was issued on the 26th of June, and McLean was served. The attorney by whom it was issued endorsed on the copy, instructions to another attorney to act for McLean, and McLean signed the memorandum of instructions so endorsed.

This other attorney was then sent for, and he duly entered an appearance on the 28th of June. The same day a declaration was filed and served, and a plea of payment filed for the defendant. The same day an order was obtained for the examination of McLean, and he was examined. When examined he stated the amounts owing to the various creditors, whose claims were embraced in the declaration, and said that these amounts were owing to the plaintiff, and that he had no set off of any kind against any of them. On the 29th of June upon reading this examination, and hearing counsel, an order was made striking out the plea and allowing the plaintiff to enter judgment for the full amount and issue immediate execution. Judgment was accordingly entered, execution issued and placed in the sheriff's hands the same day.

At the sheriff's sale one Bateman became the purchaser, and the sheriff having declined to take from the creditors a guarantee that he would pay the purchase money, they made and discounted a note, by means of which the amount was raised and paid to the sheriff.

In most respects this case is the same as that of the *Union Bank of Lower Canada* v. *Douglass* (*a*), just disposed of. Here, as there, there was no pressure. McLean came voluntarily to Turner and McKeand, and proposed giving them a bill of sale. This, Turner thought would be objected to, if suits were brought, and so the course actually followed out was proposed and adopted.

Following the case of the *Union Bank of Lower Canada* v. *Douglass* (*a*), which I have just disposed of, I must hold that the plaintiffs are entitled to a decree with costs, declaring the judgment recovered by McKeand against the defendant McLean, and the execution issued thereon, fraudulent and void against the plaintiffs.

(*a*) *ante* p. 135.

McLEAN v. MERCHANTS BANK.

Communication between Manager of Bank and Head Office—Principal and agent.

The manager of a branch bank at W., having its head office at M., laid an information against plaintiff, who subsequently brought an action against the bank for malicious arrest. On an examination of the manager:

Held: 1. That he ought to have answered the following questions: "When did you first communicate with them (defendants) about it?" "How did you first communicate, by letter or telegraph?"

2. That he was right in refusing to answer the following question:—"Did you from time to time communicate the facts previously stated in your examination as they occurred?"

W. R. Mulock for plaintiff.

J. B. McArthur for defendant.

[*4th February, 1884.*]

WALLBRIDGE, C. J.—An order was taken out to examine the local manager of the defendants' bank under the statute known as the Queen's Bench Act, Con. Stat. Man., c. 31, s. 30, as amended by the Act 46-47 Vic., c. 23, s. 6. The practice under this section shall conform to the settled practice in this respect in proceedings in equity. He attended to be examined. The question was put to him:

"When did you first communicate with the defendants as to laying the information?"

Ans.—"Not till after information laid."

Then follow the questions which the agent, under the advice of counsel, refused to answer.

1. "When did you first communicate with them (defendants) about it?" This he ought to answer.

2. "How did you first communicate, by letter or telegraph?" This also he ought to answer.

3. "Did you from time to time communicate the facts previously stated in your examination as they occurred?"

As to this third question, I think the agent is not bound to answer it. Letters written by an agent to his principal containing a narrative of past transactions, are not admissible in evidence against the principal. *Kahl* v. *Jansen*, 4 Taunt. 565, and *Fairlie* v. *Hastings*, 10 Ves. 128.

4. "Did you receive a communication from the head office relating to the circumstances to which you have referred?"

If this communication was by letter I think the defendants may be compelled to produce it, or the plaintiff may give secondary evidence of its contents, excepting in the case where the letters were written upon communication between solicitor and client, and are communicated to the agent as coming from that source and the reply to it are both privileged. *Merchants Bank* v. *Moffatt*, 6 Ont. Pr. R. 348. The defendants may shew the facts in the letters they are thus forced to produce or give evidence if produced, if not true or are written in mistake. The defendants are not estopped by the contents. *Heane* v. *Rogers*, 9 B. & C. 586.

The rule will be made absolute, that the local agent shall attend at the defendants' expense (as to his fees); the costs to be costs in the cause to the successful party.

DUBUC, J.—This action is one of tort. The wrong complained of is the act of the manager of the defendants' local branch here in laying the information which caused the arrest of the plaintiff. The manager swears that he wrote no letter, and had no communication with the head office in Montreal, on the subject of the said information before it was laid. He is asked to produce the letters or communications which may have passed between him and the head office, after the information was laid. It appears to be a well settled doctrine that the letters of an agent to his principal containing a narrative of past transactions in which he had been employed, are not admissible in evidence against the principal. *Langhorn* v. *Allnutt*, 4 Taunt. 511; *Fairlie* v. *Hastings*, 10 Ves. 128; *Betham* v. *Benson*, Gow 45. Here the transaction in question is not even one in which the agent was employed by his principal, or in which the principal had any interest. It was an act of the agent, outside of the scope of his authority, done of his own movement, in the interest of the public. Whether the plaintiff

would have been convicted on the prosecution and sent to the penitentiary, or acquitted, this would not have brought any benefit or loss whatever to the bank. If the letters and communications asked for were part of the transaction complained of, they might be viewed in another light. But, even if the manager wrote the same day after laying the information, his letter could not be considered as forming part of the transaction or act complained of. It would only be a narrative of a past transaction, and on the authorities above cited the letter could not be admissible in evidence.

BANK OF NOVA SCOTIA v. LYNCH.

(IN CHAMBERS.)

Bills of Exchange Act—Service of writ.

Held, An order may be made for substitutional service of a writ under the Bills of Exchange Act.

A writ under the Bills of Exchange Act was issued, but before service thereof, the defendant left the Province, to remain abroad for some time.

The plaintiffs served the writ on the wife of the defendant, under an order for substitutional service, she still remaining in the Province.

W. E. Perdue for defendant, applied to set aside the order for substitutional service.

J. W. E. Darby for plaintiff.

[*June, 1883.*]

TAYLOR, J., *Held*, that notwithstanding the provision of the Bills of Exchange Act, that writs issued under that Act shall be served personally, an order may be made for substitutional service under Con. Stat. Man. c. 31, s. 35.

FARMERS AND TRADERS LOAN Co. *v.* CONKLIN.

Tax sale—Irregularities—Foreign Corporation—Banking business.

A foreign corporation loaned money on mortgage in this Province. The mortgage was executed in the foreign country and the advances made there. The corporation had no licence to do business in Manitoba,

Held, That the mortgage was valid and vested the land in the corporation.

The plaintiff corporation had for its purposes "The investment of capital on the security of real estate, personal property, assets and obligations," and was prohibited from engaging "in the business of banking." The plaintiff corporation made loans to L. & Co., taking notes from which the interest was deducted in advance. D. a member of the firm of L. & Co. made a mortgage to the plaintiff corporation to secure payment of the moneys so advanced,

Held, That the mortgage was not *ultra vires*.

Held, That where on a tax sale the deed was dated on the 15th of October 1881, and a suit was begun on the 14th of October 1882, the suit was begun "within one year from the execution of the deed," as provided by the Statute.

That where the advertisement published had no proper description of the lands mentioned in it, and the reason why the taxes had not been collected was not stated,

Held, A fatal objection.

That where a sale took place on the 3rd of March, and an advertisement appeared on 15th, 22nd and 28th of February, it was not advertised "at least three weeks in succession," as required by the Statute.

A tax deed recited that "G. then treasurer &c." sold the lands, and proceeded "Now know ye that I, G, treasurer, in pursuance of such Act do hereby grant &c." The testatum clause was "In witness whereof I, G. have hereunto set my hand and affixed the seal of the municipality this, &c." It was signed, "G. treasurer of municipality of S. and S." and the seal of the municipality was affixed. G. was not the treasurer who sold but his successor.

Semble, The deed was invalid.

Held, To a perfect registration it is essential that all the requirements of the Registry Act should be complied with.

Quære. Whether unpatented lands can be sold for taxes.

F. B. Robertson and *H. E. Crawford* for plaintiffs.
S. C. Biggs for defendants.

[*25th April, 1884.*]

TAYLOR, J.—The plaintiffs are mortgagees of the N. W. quarter of section 31, in township 11, range 5 east of the principal meridian, and the N. E. quarter of section 36, in township 11, range 4 east of the principal meridian in this Province, under and by virtue of a mortgage made to them by one Whitfield Douglas, dated the 3rd of March 1881, and registered in the proper registry office on the 3rd of April 1881.

On the 3rd of March 1879, the lands embraced in the mortgage were offered for sale, for arrears of taxes due to the Municipality of Springfield and Sunnyside, and were purchased by Edward Benson, the N. W. quarter of section 31 for $8.40, and the N. E. quarter of 36 for $8. He received certificates of his being the purchaser pursuant to the Statute, and on the 15th of October 1881, conveyances of the lands were made to him; these conveyances were duly registered on the 18th of the same month. The certificates given at the time of the sale were not registered.

On the 18th of October 1881, Benson conveyed the lands to the two defendants, Elias G. Conklin and Mark Fortune, who registered their conveyance on the 11th of February 1882.

The present suit is instituted against them to have the tax deed to Benson, and the conveyance from Benson to them, declared void as against the plaintiffs and a cloud upon the plaintiffs' title to the lands as mortgagees, or to declare that the defendants' title to the lands, should the Court be of opinion that they have any, is subject to the plaintiffs' mortgage. The bill alleges various matters, on account of which it is claimed that the tax sale and the deed given thereunder are void.

The defendants have answered the bill, claiming to be *bona fide* purchasers for value, without notice of any irregularities or defects in the proceedings, prior to or in connection with the tax sale. They insist that the proceedings were regular in every particular, and they pray that the plaintiffs' mortgage may be declared a cloud upon their title, and that the registration thereof may be cancelled, without prejudice to the claims of the plaintiffs against Whitfield Douglas.

Several objections are taken by the defendants to the plaintiffs' right to institute and maintain this suit. The 45 Vic. c 16, s 7,

which provides that a deed given on a tax sale shall "notwithstanding any informality or defect in, or preceding such sale be valid and binding to all intents and purposes, except as against the Crown, if the same has not been questioned before some court of competent jurisdiction, by some person interested in the land so sold, within one year from the execution of the deed," is relied on. The deed here was given on the 15th of October 1881, and the present suit impeaching it was begun on the 14th of October 1882. The argument is, that as a person born on the 15th of October, would be of full age immediately after 12 o'clock on the night of the 13th of October twenty one years afterwards, so here the year within which this sale could be impeached ended with the 13th of October, and a suit begun on the 14th is too late.

This objection cannot prevail. By the Interpretation Act, "year" means a calendar year, Gen. Stat. c. 1, s. 7, sub. sec. 14. The Common Law Procedure Act of Upper Canada, section 249, provided that a writ of execution "shall remain in force for one year from the *teste*," and where a writ was tested and issued on the 16th of May 1861, the Court held, in *Bank of Montreal* v. *Taylor*, 15 U. C. C. P. at page 114, that the writ remained in force until the last moment of the 15th of May 1862. So under the Act relating to chattel mortgages, which enacted that every mortgage should cease to be valid against the creditors of the mortgagor, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy should be re-filed, where the first filing was on the 15th of May 1852, a re-filing on the 14th of May 1853, was held clearly in time, *Armstrong* v. *Ausman*, 11. U. C. Q. B. 498. Reference may also be made to *The King* v. *Adderley*, 2 Doug. 463, and *Norris* v. *The Hundred of Gantris*, 2 Roll. Abr. 520. pl. 8. Hob. 139. The latter was an action under the Statute of Hue and Cry, 27 Eliz. c 13, which required any suit or action to be brought "within one year next after such robbery," and the writ having been issued on the 9th of October, 14 Jac. 1. while the ro bbery was laid and proved to have been on the 9th of October, 13 Jac. 1, it was held that the suit was begun a day too late.

Another objection is, that the plaintiffs are a foreign corporation, not entitled to do business in this Province, it not

being shown that they ever received a licence under Con. Stat. c 30. There is no evidence that they have ever carried on business in this Province. The mortgage in question was executed at the City of Hamilton, in the Province of Ontario, where the head office of the Company is situated, where the mortgagor resides, and where the advances to secure re-payment of which it was given, were made.

The Act, Con. Stat. c 30, has been repealed by 46 & 47 Vic. c 38, but the latter Act does not apply to the present case, the plaintiffs' mortgage having been taken, and this suit instituted, while the former Act was in force.

The section of Con. Stat. c. 30, which can in any way be said to apply to the plaintiff company, is the first, that is the one which relates to institutions or corporations, incorporated under the laws of the Parliament of Great Britain and Ireland, or of the Dominion of Canada, or the laws of the late Province of Canada, or any of the Provinces of Canada, for the purpose of lending or investing moneys.

The section provides, that where any institution or corporation incorporated as above, may apply for and receive a license authorizing it to carry on business &c., and is an incomplete sentence. It stops without saying what, in such case, the corporation may do. As the section stood on the statute book, it was absolutely meaningless.

It will be observed too, that neither that Statute, nor the 46 & 47 Vic. c. 38, say that a foreign corporation shall not carry on business in this Province without such a license. The latter Statute merely provides, that a foreign corporation having obtained such a license, shall have the same powers and privileges, as if incorporated under a Statute of this Province.

Can then a foreign corporation carry on business in this Province, in the absence of any statutory enactment forbidding it to do so, unless licensed?

The present is not the case of a foreign corporation purchasing and holding real estate, but of a loan of money, and a mortgage upon real estate taken as a pledge or security for the repayment of the loan. The two things are quite distinct; see *Silver Lake Bank* v. *North*, 4 Johns. ch. 370, and *United States Mortgage Company* v. *Gross*, 7 Central L. J. 226.

The right of foreign corporations to carry on business in another country was very fully discussed by the Court in Ontario, in *The Howe Machine Co.* v. *Walker*, 35 U. C. Q. B. 37. That was an action in which the plaintiffs, an American Company incorporated in the state of Connecticut, sued the defendant upon a promissory note given in the Province of Ontario, on account of sewing machines sold there by the plaintiffs' agent. After a full review of the leading authorities, C. J. Richards came to the conclusion, that in the absence of any legislative enactment prohibiting them, they could do so. That learned judge quoted from the judgment of Mr. Justice Denio in *Bard* v. *Poole*, 12 N. Y. at page 504, as follows, "They (corporations) are beings existing only in contemplation of law, and have no other attributes than such as the law confers upon them: and as the laws of a country have in general no extra territorial operation, a corporation cannot challenge, as a matter of right, the privilege of dealing in a country, not under the jurisdiction of the sovereignty which created it. Any of the States of the Union may, as this and several other States have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business within its jurisdiction. But in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law, and not inconsistent with the policy of the State as indicated by the general scope of the laws or institutions, corporations are permitted by the comity of nations to make contracts and transact business, in other States than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other States. It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter, to make; and it must be one which would be valid if made at the same place by a natural person, not a resident of that State." After making that quotation, the Chief Justice said, "It seems to me, the above extract lays down rules of decision, that may well be followed in relation to cases of this sort." The defence raised in that case was, that the plaintiffs were not a corporation having the right to carry on business in Canada, as a corporation, and were incapable of contracting or being contracted with in Canada, by reason whereof the plaintiffs have no right to sue the defendant. "Such a defence," said Mr. Justice Wilson, "if successful, would affect insurance companies, but a provis-

ion is made with respect to them by statute, and various loan and investment societies, and would hamper, if not ruin, business of every kind, especially transactions of magnitude, where we are obliged to resort to a wealthier country than our own for the pecuniary aid which we have not among ourselves. I do not see any difference between a foreign corporation making a sewing machine here and selling it here, or making it abroad and only selling it here, or between either of these cases, and a foreign corporation borrowing money here, or for that matter both lending and borrowing. There may as well be a lending of money here, as a lending or selling of goods and chattels here; and I think it is the commonest kind of business transaction, for a corporation to buy and sell and trade in other countries to which their charters do not extend."

A further objection taken is, that the plaintiffs cannot maintain any suit upon this mortgage because their charter expressly says, they are not thereby authorized "to engage in the business of banking," while the evidence shows that the transactions in connection with which it was given were essentially banking business.

The purposes and objects for which the plaintiff company is incorporated are expressed to be, "The investment of capital on the security of real estate, personal property, assets and obligations." From the evidence it appears that the plaintiffs did business with a firm of B. Lewis & Co., and made loans to them, for which the notes of that firm, either as makers or indorsers, were taken. The interest upon these loans was deducted in advance when they were made. Whitfield Douglas, the mortgagor, was one of the partners of B. Lewis & Co., and the manager of the plaintiff company, after specifying in detail the various notes and the amounts due upon them, says, "The moneys so due were advanced by the plaintiffs to the firm of B. Lewis & Co., on the security of the mortgage."

To discount notes, or what is the same thing, to purchase them, is not to carry on banking business. And it makes no difference in this respect whether the interest is deducted from the face of the note, or added to the amount and made payable with the principal at the maturity of the note.

No doubt the discounting of notes is part of the business which is transacted by banks. But merely to discount notes or

which is the same thing to purchase them, (for where a banker discounts a bill for a customer, giving him credit for the amount of the bill, debiting him with the discount, it is a complete purchase of the bill by the bank. *Grant on Banking*, 350) is not to carry on a banking business.

The Freedom of Banking Act of the old Province of Canada, 13 & 14 Vic., c. 21, s. 7, defined banking business as the making and issuing of bank notes, the dealing in gold and silver bullion and exchange, discounting of promissory notes, bills and negotiable securities, or such other trade as belongs legitimately to the business of banking.

From Mr. John Stuart Mills' *Principles of Political Economy*, it is clear that the issuing promissory notes payable to bearer on demand, which are to circulate as a substitute for metallic currency, and the interchange of credits, vastly enlarged by this substitution of such paper money for bullion, are the leading, indeed the essential features of a banking business. The same thing is apparent from the language of Adam Smith in the *Wealth of Nations*, book 2, chap. 2.

Even if the transaction could be held one not authorized by the plaintiffs' charter, it would seem rather to belong to the Government of Ontario, using the language of Chancellor Kent, in the case of *Silver Lake Bank* v. *North*, already referred to, "to enact a forfeiture of their charter than for this Court in this collateral way to decide a question of misuser."

The plaintiffs are, in my judgment, entitled to maintain this suit, it is therefore necessary now to consider the objections taken to the validity of the sale. These are numerous, but I do not intend to deal with them all.

The objection that two years taxes, legally imposed, could not be due at the date of the sale, the 3rd of March, 1879, because the patent for one parcel had issued only on the 11th of October, 1877, and for the other only on the 7th of February, 1879, raises the question whether unpatented Dominion lands are liable to be assessed under any Statute of this Province. To dispose of such an important question satisfactorily, would require an examination of all the Dominion Land Acts which have been passed, and the numerous amending Acts, a task which, with the limited time at my disposal, I cannot at present undertake.

The form of the deeds given is also objected to. The Statute 38 Vic. c. 31, s. 39, provided that the treasurer should convey "in the name of the municipality," but no form of deed was given. By a subsequent Act a form of deed was given. That form, while professing to be for the purpose of carrying out the provision of the Statute, that the treasurer is to convey "in the name of the municipality," really is a form of deed in which, after reciting the sale by the treasurer, he grants, bargains, and sells the land, making no mention whatever of the municipality. Then the deed is to be under his hand and seal. The form given in 44 Vic. c. 3, which came into force before the deeds in question were executed, provides for the seal of the municipality being affixed to it, but that form is intended only for sales under later Statutes to carry out which the warden and treasurer are the parties to convey. The deeds in this case recite, "that R. E. W. Goodridge then treasurer &c.," sold the lands and proceed, "Now know ye that I, William Goodridge, treasurer, in pursuance of such sale etc., do hereby grant, bargain and sell etc." The testatum clause is, "In witness whereof, I, William Goodridge, have hereunto set my hand and affixed the seal of the municipality this etc." The deed is signed, "William Goodridge, treasurer of municipality of Springfield and Sunnyside," and the seal of the municipality is affixed. Now apart from other questions which might be raised, under such a state of things, what authority had William Goodridge to convey these lands. They were not sold by him. He was only the successor, as treasurer, of the person who sold. In Ontario, one of the old tax Acts under which the sheriff was the person to sell, provided for the conveyance being made by the sheriff "for the time being." Then in subsequent Acts, these words were omitted, and it was not until a number of years after, that a general Act relating to sheriffs gave a sheriff power to execute deeds in the case of sales made by a predecessor.

It is also contended, that while the Statute 45 Vic. c. 13, s. 7, requires deeds of land sold for taxes, to be registered within eighteen months after the sale, the deeds in question are not yet registered so that the defendants cannot insist upon any priority. The deeds have been received by the registrar and placed upon the registry books, but the objection taken to the registration is, that there are not on these deeds any affidavits of their execution. To a perfect registration it is essential, that all the require-

ments of the Act should be complied with. In *Read* v. *Whitehead*, 10 Gr. 448, V. C. Esten said, "It is undoubtedly essential that the requirements of the registry Acts should be strictly observed, and any material failure in that respect will vitiate the registration." So in *Robson* v. *Waddell*, 24 U. C. Q. B. 574, the objection was taken that in the memorial the addition of the witness to the deed was not given, though his name and place of abode were stated. In delivering judgment, C. J. Draper said, "We may think the objection to be strictly literal and technical, and may regret an omission such as has been made, which has not, and scarcely could under all the circumstances have operated to the prejudice of the subsequent mortgagee; that in fact it may have been rather to a search after objections, than for notice or information that the discovery of this defect is owing, but we cannot see in all this a sufficient reason for disregarding the language of the Act, our judgment therefore must be founded upon the Statute. We are bound to hold, that this non-compliance with one of its express requirements, makes the prior deed fraudulent and void, as against the subsequent mortgage."

To complete and perfect registration under our Act, Con. Stat. c. 60, an affidavit of execution by a subscribing witness in the case of an instrument other than a will, seems essential. The 17th section as amended by 45 Vic. c. 13, s. 2, is as follows, "In the case of an instrument other than a will a subscribing witness to such instrument shall, in an affidavit setting forth in full his name, place of residence and addition or calling swear to the following facts etc." Then the 18th section says, "The said affidavit shall be made on the said instrument, or securely attached thereto, and such instrument and affidavit shall be copied at full length in the registry book."

It is true that the seal of a corporation proves itself, and that the deed of a corporation under its corporate seal requires no further proof of execution. But these deeds are not the deeds of a corporation, although the seal of the municipality has been affixed to them. They are the deeds of the treasurer only. Even if it should be possible to hold them deeds of the corporation, our registry Act in force when they were registered, limited the cases in which the seal of a corporation is sufficient proof.

The 26th section of the registry Act provided as follows, "The seal of any court of record, or of any corporation affixed to any instrument in writing shall, of itself, with the signature of the secretary, or presiding officer thereof, be sufficient evidence of the due execution of the same by such corporation or the judge, registrar, clerk or officer of the court signing the same, for all purposes respecting the registration thereof, and no further evidence or verification of such execution shall be required for the purpose of registration."

Under that section the seal of the corporation must be accompanied by the signature of the "secretary, or presiding officer thereof." The deeds in question have the signature of neither of these officials.

Apart however from all these objections, there are two which are in my opinion fatal to the validity of the sale. The advertisement for sale was not in the form, nor did it contain the particulars required by the Act.

The 38 Vic. c. 31, s. 36, required the treasurer on or before the 15th of January in each year, to prepare a statement of all non-resident lands in arrear for taxes for the previous year, and on which there was no property to distrain, and in it he was to shew opposite to each lot, or part of a lot, the reason why he could not collect the taxes, by inserting the words, "non-resident," or "no property," as the case might be. The statement was also to give a description of all the lands in arrear.

This statement was required to be published at least three weeks in succession, and was also to state, that the lands would be offered for sale on the first Monday in March immediately following.

The advertisement published in this case, has no proper description of the lands mentioned in it, and certainly is not a copy of such a statement as required by section 36. In no case is the reason why the taxes have not been collected stated.

In Ontario "pt. of s. pt. 111, 1st con. Tay, 40 acres, $12.95," has been held an insufficient description, *Grant* v. *Gilmour*, 21 U. C. C. P. 18. So an advertisement which did not, as required by the Statute, specify whether the lands were patented or held under a lease, or license of occupation from the crown, has been held bad, *McAddie* v. *Corby*, 30 U. C. Q. B. 349.

Then it was necessary that the sale should be advertised, "at least three weeks in succession," before the day of sale. Here the sale took place on the 3rd of March, and the advertisement appeared in the *Gazette* in the issues of the 15th, 22nd and 28th of February, and in no others. It also appeared in the issues of the Weekly *Free Press* on the same days. This was not advertising it for at least three weeks.

In *Connor* v. *Douglas*, 15 Gr. 456, the Court of Appeal for Ontario held, under an Act which required an advertisement to be published for the space of three months, that publication for thirteen weeks, from and including the 1st of August to and including the 24th of October, though not an advertisement for three months, which would have required it to be continued until 31st October, was sufficient. From this judgment, two very learned and able judges, C. J. Draper and V. C. Mowat, dissented.

In coming to that conclusion, there is no doubt the Court were influenced by the fact, that at a particular period of the year, when the month of February intervened, there might be an advertising for three months and yet only thirteen insertions. I do not think it is possible to hold, where lands are to be sold after such a short advertising as "at least three weeks in succession," that an advertising three times, with the first advertisement appearing only sixteen days before the day of sale, is a compliance with the Statute.

The plaintiffs are entitled to a decree, with costs, declaring the sale of the lands in question void as against their mortgage, and that the deeds from the treasurer to Benson, and the deed from Benson to the defendants, are a cloud upon their title to the lands as mortgagees.

VIVIAN v. SCOBLE.

Further directions, what can be read.—Revocation of agent's authority.—Collection by agent.—Security.

Held,—That on further directions, a defendant may on the question of costs read his answer, although it cannot, where replication has been filed, be read as evidence upon the questions in dispute except by consent. Only the decree and master's report, with any intermediate orders or certificates, can be made use of for that purpose.

In a suit for an account by principal against agent the decree on further directions contained a declaration that the agency of the defendant was revoked,

Held,—That the decree must be varied as the plaintiff had power to revoke the authority independently of any decree and had already revoked it.

The decree further declared that the plaintiff should have the exclusive right to the collection of moneys and debts,

Held,—The decree must be varied as the moneys and debts were the plaintiff's own moneys and he had a right to collect them without any such declaration.

The defendant claimed to be entitled to a commission of twenty per cent. upon any moneys which might afterwards be received by the plaintiff. The decree directed the plaintiff to give security that he would pay over to the defendant, what the defendant might be entitled to receive,

Held,—The decree must be varied, as if defendant had a right to the commission, he could take such steps as he might be advised, to obtain an account and payment.

H. M. Howell and *J. S. Hough*, for plaintiff.

A. C. Killam, for defendant.

[*4th February, 1884.*]

TAYLOR, J., delivered the judgment of the Court:—

This is a re-hearing, at the instance of the plaintiff, of the decree on further directions pronounced the 4th of October, 1883. The portions complained of are the third, fourth and fifth paragraphs.

Upon the argument a question arose as to what can be read or referred to, on a hearing on further directions. Counsel for the defendant insisted upon his right to read the pleadings and an

agreement to which, in his answer the defendant craved leave to refer. The reference in the answer to this agreement is sufficient in form to make it part of the answer.

On the question of costs a defendant may read his answer, although it cannot where replication has been filed, (except by consent) be read as evidence on his own behalf, upon the matters in dispute between him and the plaintiff. The practice is thus stated by Mr. Daniel: "In disposing of the question of costs however, the Court will permit the defendant's answer to be read on his own behalf."

Under *General Order* 147, "At the hearing of any cause, or of any further directions therein, affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be used by consent, or by leave of the Court; and such consent may be given on behalf of persons under disability, with the approbation of the Court." This is an exact copy of the Ontario *Con. Gen. Ord.* 176.

These orders are merely extensions of the Imperial Act 13 & 14 Vic. c. 55, s. 28, which provided as follows: "And be it enacted, that notwithstanding any rule or practice of the said court to the contrary, it shall be lawful for the said Court at the hearing of any cause or of any further directions therein, to receive proof by affidavit of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said court to order payment of any moneys belonging to any married woman, and of all such other matters not directly in issue in the cause, as in the opinion of the said Court may safely and properly be so proved."

Except under these provisions, it appears that nothing can be made use of at a hearing on further directions, except the decree and master's report with any intermediate orders or certificates.

Mr. Daniel says, "upon the hearing or further consideration, the Court will make such further order in the cause as upon reading the chief clerk's certificate appears to be consistent with the justice of the case, as it stands upon the decree and certificate.. *Dan. Pr.* 1229." And upon page 1236 (note e.), it is said, "The brief of each party on further consideration will consist of the decree, or order made at the former hearing, the chief clerk's certificate and any intermediate orders or certificates."

On this point reference may also be made to *Gould* v. *Burritt*, 11 Gr. 234, *McGill* v. *Courtice* 17 Gr. 271, and *Downey* v. *Roaf* 6 Ont. Pr. R. 89.

The counsel for the defendant contended that the original decree having directed that certain books papers and documents should be brought into court, to remain open to the inspection of both parties, subject to the further order of the Court, no intelligent disposition can now be made of these upon reading the decree and report. That to dispose of this question, the pleadings and agreement mentioned in the answer must be referred to.

It would appear however, that there can be no difficulty in dealing with these, upon the decree and the findings in the report.

The decree made at the hearing declares that the plaintiff is entitled to an account of the dealings and transactions of the defendant with the lands in the bill of complaint set forth. The master is directed to take an account of all sums of money received by the defendant as agent for the plaintiff in regard to the sale of these lands and to enquire when such were received. Also to take an account of the expenses properly incurred by the defendant in connection with the sales and of what moneys were paid by the defendant to the plaintiff out of the proceeds of the sales. The decree then went on to order that the balance found due to the plaintiff upon taking the accounts, should be paid into court, less the defendant's commission of twenty per cent. on the moneys actually received by him.

The result of the taking of the accounts under this decree is, that the master has found a balance to be due from the defendant to the plaintiff of $6,459.94.

The objections to the fourth and fifth paragraphs of the decree made by the plaintiff are the following. He says that the decree does not need to declare and should not declare as it does in the third paragraph, that the agency of the defendant is revoked, for the plaintiff has power independently of any decree to revoke the authority given his agent, and he has revoked it. He also objects that the Court should not have declared as is done in the fourth paragraph, that the plaintiff shall have the exclusive right to collect the moneys and debts, because they are his own

moneys, and he has a right to collect them without any such declaration or provision. He further objects to the provisions of these paragraphs, that the agreement between the parties, dated the 2nd of January, 1882, shall stand as to the right and claim of the defendant to commission upon moneys collected after the 12th of October, 1882, that the plaintiff shall pay one-fifth of the collections after deducting expenses to the defendant, and that the plaintiff must give security in the sum of $10,000, for the faithful payment of whatever the defendant may be entitled to receive.

The defendant is satisfied with the decree as it stands, but insists that if varied as asked by the plaintiff, then that the second paragraph which orders the delivery to the plaintiff of the deeds, documents, writings, plans, and papers relating to the sale of the property in question should be struck out, and the defendant intrusted with these papers, for the the purpose of collecting the moneys still unpaid under them.

The decree in my judgment should have contained no such provisions as those complained of but should simply have ordered payment of the $6,459.94, though even that was not necessary, as the decree at the original hearing contained a sufficient order for payment, delivery of the deeds to the plaintiff, and payment of costs by the defendant.

The decree at the hearing was a consent one and was made on the footing of the defendant being the agent of the plaintiff and gives him a commission upon the money actually received by him. The master has found a balance due from the agent to the plaintiff, his principal.

The plaintiff has a perfect right to terminate the agency at any time he pleases, and he says he has done so. At the hearing it was very well to order the documents to remain in court, subject to further order, for at that time the accounts were not taken, and the defendant claimed a large balance as due to him, for which he might have a lien upon the deeds and papers. Any question of that kind has now been disposed of, for the defendant has been found largely indebted to the plaintiff, why then should the plaintiff not at once receive the deeds and papers which relate to his own property, and to sales made for him by his agent. That the defendant makes a claim to one-fifth of the future col-

lections, seems no sufficient reason why the plaintiff should not get possession of his own papers, or why he should give security to the defendant. Even if the defendant is entitled to this one-fifth, as to which there is a question, the plaintiff is entitled to four-fifths and the balance of interest is, therefore, largely in his favour.

That the agreement relied on describes the defendant as agent, that he has consented to a decree for an account against him as agent, and that a large balance has been found due from him, are quite sufficient reasons for the plaintiff getting his papers, and being allowed to proceed to collect moneys due to him, without his being required to find security.

If the defendant has a vested right to the one-fifth in future collections which he claims to have, he can take such steps as he may be advised hereafter to obtain an account and payment from the plaintiff.

The decree, therefore, should be varied as asked.

CAMERON v. McILROY.

(IN CHAMBERS.)

Master's Report.—Issue of execution before confirmation.

Held, that under the usual mortgage decree plaintiff has a right to issue execution immediately after the making of master's report and before its confirmation.

Plaintiff obtained the usual præcipe foreclosure decree, containing the order "that the defendant do forthwith after the making of the master's report, pay to the plaintiff what shall be found due to him for principal money, interest and costs at the date of the said report."

Two days after the date of the report the plaintiff issued execution and an application was now made to set it aside.

E. H. Morphy for defendant.

The master's report is not absolute until the expiration of fourteen days from its date. *Equity order* 247. This is a report "strictly so-called," and therefore requires confirmation. Leggo Ch. Pr. 859: it is only where the master's report is final and does not require confirmation, that proceedings may be taken on it though the fourteen days have not elapsed. In *re Yaggie* 7 U. C. L. J. 293. *Empringham* v. *Short*, 11 Sim. 78. The issue of the *fieri facias* is irregular, as the report has not been confirmed. The making of the report is not equivalent to entering up judgment in this Province. *Jellett* v. *Anderson*, 8 Ont. Pr. R. 387, does not apply.

G. G. Mills for plaintiff.

It is quite evident from the wording of *Equity order* 456 and from the very strong wording of the decree "And it is further ordered and decreed that the defendant do forthwith after the making of the master's report, pay to the plaintiff, &c," that it was intended that the report should be acted on at once without waiting for its confirmation. Making and confirmation are distinct and different terms. If it had been so intended, the decree would have said forthwith after confirmation. The following

authorities show clearly that the writs were properly issued:—*Holmested's Chancery orders* pp. 132, 133 and 135; *Empringham* v. *Short*, 11 Sim. 78; *re Yaggie*, 7 U. C. L. J. 293; 1 Ch. Ch. R. 168; *North of Scotland Canadian Mortgage Company* v. *Beard*, 9 Ont. Pr. R. 546; 3 C. L. T. 354; *Jellett* v. *Anderson*, 8 Ont. Pr. R. 387.

Held by the referee that the motion must be dismissed with costs, on the ground that under the words of the decree the plaintiff had a right to issue his execution forthwith after the making of the report—adding that the defendant might have obtained a stay of execution upon a proper application, and that he was not deprived of his right to appeal from the report. The Court, he said, would probably have stayed the plaintiff's proceedings until an appeal had been determined.

CAMERON v. McILROY.

(IN CHAMBERS.)

Suit in equity.—Power to garnish.

Held,—Affirming the order of the referee, that under Con. Stat. c. 37, s. 78, the Court has power to issue garnishing or attaching orders in equity suits.

E. H. Morphy, for the defendant, appealed from the order of the referee. The Court of Queen's Bench here is governed by the modes of practice and procedure as in England on the 15th of July, 1870, Con. Stat. Man., c. 31, s. 4, and the judges have power to make rules and practice, section 20, and for practice and procedure, recourse shall be had to the practice and procedure in England, except as modified by the orders made by the judges. The Court of Chancery in England had no power to garnish. *Horsley* v. *Cox*, L. R. 4 Ch. App. 92. The Court of Chancery in Ontario acquired this jurisdiction by Statute, 22 Vic. c. 33. *Cotton* v. *Vansittart*, 6 Ont. Pr. R. 96. The practice here to compel payment of money found due by decree is by sequestration. *Daniel's Ch. Pr.* 907, *Equity Order* 288. The equity side of this

court has no power to attach debts. Con. Stat. Man. c. 37, s. 45, gives that power to the common law side only. The whole section is subject to the English Common Law Procedure Acts, and the procedure thereunder shews that the application must be made on the common law side. *Chitty's Archbold* vol. 1, p. 718. The affidavit on which the order was obtained is insufficient, as it does not follow the wording of the Act.

G. G. Mills, for plaintiff, contra.—The order of the referee is right.

It may be admitted that there is no authority in the English Practice for the attaching order. We, however, rely not on the English practice, but on the Statutes of this Province. The attaching order was made under Con. Stat. Man. c. 37, s. 44. There is only one court with two sides. The *General Orders in Equity* regulate the practice on the equity side of the court so far as they go, but there is no provision in them to enable a plaintiff to recover his debt from a third person. Sequestration applies only to enforcing payment by the defendant himself. Unless the defendant can show clearly that attachment of debts is excluded from the equity side, his case fails and the onus is on him. The mere fact of the word "judgment" alone being used in the 44th section proves nothing. All the law dictionaries define "decree" to be the *judgment* of a Court of Equity and further state that it has all the force and effect of a judgment. See 1 & 2 Vic., c. 110, s. 18, *Chitty's Statutes* vol. 3, p. 712. Con. Stat. Man. c. 31, s. 32, and Con. Stat. Man. c. 37, s. 78.

The affidavit is sufficient, although it does not in express terms say "judgment has been recovered," yet the words "by the decree made in this cause it was ordered and decreed that the defendant should pay to the plaintiff" &c., are quite as broad as the Act, no precise words being required by the Act. Con. Stat. Man. c. 1, s. 7, sub-sec. 28.

[*25th April, 1884.*]

TAYLOR, J.—This is a suit upon a mortgage brought upon the equity side of the Court. By the decree dated the 12th of March, 1884, a reference to the master was directed and the defendant was ordered forthwith after the making of the master's report to pay to the plaintiff the amount which should be found due at the date of the report for principal, interest and costs.

On the 26th of March the report was made pursuant to the direction in the decree, finding the amount due to be $10,389.63. Upon the 28th of March on the *ex parte* application of the plaintiff, an order was made by the referee in Chambers whereby it was ordered that all debts, obligations and liabilities due, owing or payable, or which are accruing and will be due or payable from the Mayor and Council of the city of Winnipeg to the defendant, be attached to answer the amount due to the plaintiff from the defendant under the decree and the report of the master. On the 12th of April the defendant applied to the referee, on notice to the plaintiff, to discharge and set aside that order and this application was, on the 15th of April, discharged with costs. From the order then made the defendant appeals.

The principal ground of appeal is, that there is no authority for making a garnishing order, in a suit on the equity side of the court.

It is contended, that the Court of Chancery in England has no power to make such an order, the provisions of the Common Law Procedure Act in that behalf, applying solely to the Courts of Common Law. No doubt this is correct.

It is further argued, that the Statute in this Province does not warrant such an order being made. In the section of the Statute, which provides for the mode of proceeding to garnish debts the word "decree" is not used, but only the word judgment. It is argued that no where in the Interpretation Act, or in the Statutes is there any provision, that "judgment" shall mean or include "decree". The proper course it is said, to attain the desired end in suits on the equity side of the Court is, to proceed by way of sequestration. The cases in Ontario are said to be no authorities here, as there is there express statutory provision on the subject which is wanting here.

Unfortunately for the defendant's contention, it is founded upon an entire mistake. Con. Stat. Man. c. 37, s. 78, says, "For the purpose of enforcing payment of any money, or of any costs, charges or expenses payable by any decree or order in equity, or any rule or order of a court or of a judge at law, the person to receive payment in the case of the payment of money into Court, or to any person having the carriage of a

decree or order, shall be deemed the plaintiff, and entitled to writs of *fieri facias* and *venditioni exponas*, respectively, against the property of the person whose duty it is to pay the money aforesaid, and the said decrees and orders in equity, and the said rules and orders at law whether of the court or a judge shall, when filed, constitute a judgment and shall have all the force and effect of judgments at law, and writs thereon may issue, and all proceedings thereunder be had and taken that might be had and taken on a judgment recovered in the ordinary way at law."

That is quite as wide as the Statute in Ontario under which garnishing orders are made in the Court of Chancery there, and is in my judgment amply sufficient to warrant such an order as was made by the referee in this case.

The objection that the affidavit on which the attaching order was granted is insufficient, because it does not state that judgment has been recovered has no weight. It states that by the decree made on such a day payment of the money was ordered. The Statute just cited says, that decree is equivalent to a judgment.

The appeal is dismissed with costs.

WESTERN CANADA LOAN COMPANY v. SUTHERLAND.

(IN CHAMBERS.)

Writ for service ex juris—Application to sign judgment.

In an action on a covenant in a mortgage, a writ for service out of the jurisdiction was issued and served.

A. E. McPhillips for defendants showed cause to a summons for leave to sign final judgment, and argued that the writ was not a writ specially endorsed under 46 & 47 Vic., c. 23, s. 16.

J. H. D. Munson for plaintiffs.

WALLBRIDGE, C. J., *Held*, that such a writ was not within the statute and discharged the summons with costs.

GRISDALE v. CHUBBUCK.

(IN CHAMBERS.)

Evidence by commission—Order to read at the hearing.—Orders to examine made before cause at issue.

Held,—Affirming the order of the referee, that evidence taken abroad under an order may be read at the hearing, although the order does not state that the evidence may be so read,

The proper time to obtain a commission (where the bill is not merely for discovery) is after issue. But where upon notice orders to take evidence abroad had been made before issue,

Held,—That the depositions would not on that account be suppressed, the proper course was to have appealed against the orders.

H. E. Morphy, for plaintiff.

A. C. Killam, for defendant.

[*13th May, 1884.*]

TAYLOR, J.—The bill herein was filed on the 11th of June, 1881, against the defendant, Harriett J. Chubbuck. On the 25th of January, 1882, it was amended in several respects and Alfred W. Burrowes was added as a defendant. Their answers were filed on the 6th of March, 1882. On the 20th of March an order was made upon consent for the examination of the defendant Chubbuck at Ottawa, in Ontario, before the local master of the High Court of Justice there and on the 13th of April an order was made for the examination of the defendant Burrowes at the city of New York in the United States of America, before two special examiners named in the order or either of them.

The depositions of the defendant, Chubbuck, were taken on the 22nd of June, 1882, and have been returned to the Court although they bear no endorsement to show when they were so. The depositions of the defendant, Burrowes, were taken on the 15th of June, 1882, and returned on 3rd of July following.

The plaintiff on the 24th of March, 1884, obtained from the referee, on notice to the defendants, an order that the depositions so taken may be read at the hearing of the cause.

Replication was not filed until the 31st of March, 1884.

The defendants now appeal from this order of the referee. The objection to it is, that the depositions taken under the orders of the 20th of March and the 13th of April, 1882, cannot be read at the hearing, because the orders were issued, and the evidence taken under them, before the cause was at issue and because they do not say that the evidence may be read at the hearing.

It does not seem to be necessary in orders issued, according to the more recent practice in England, for appointing special examiners to take evidence abroad instead of commissioners, and which was followed in this case, to state in the order that the evidence may be read at the hearing. Forms of such orders are given in *Crofts* v. *Middleton*, 9 Ha. App. 75, and *London Bank of Mexico and South America* v. *Hart*, L. R. 6 Eq. 467, and in neither of them is it so stated. So far therefore, I do not see that any order from the referee was necessary.

As to the other objection, that the cause was not at issue when the orders were made, and the evidence under them taken, there is no doubt, that where the bill prayed relief and it does so here, the proper time for obtaining a commission to examine witnesses was after issue joined. It was only where the bill prayed merely for discovery, and a commission to examine witnesses in aid of an action at law, or of a defence to such a proceeding, that a commission could be obtained at an earlier stage. Indeed in such a suit issue was never joined.

The question however, is, are the defendants entitled to take objection now and to adopt the course they are doing? They can do so, in my opinion, only if they could succeed on a substantive motion to suppress these depositions.

The objection is, that the orders of the 20th of March and the 13th of April, 1882, should never have been made. That a commission had improperly been granted was never a cause for suppressing depositions. The proper course in such a case was to appeal against the order. I know of no authority for moving to suppress depositions on such a ground, unless where the order was obtained *ex parte*, which the orders here were not.

The grounds upon which depositions could be suppressed were such as that the interrogatories were leading, or that they and the depositions taken under them, were scandalous, or else that some other irregularities had occurred in relation to them. *Daniel's Pr.* (Perk. ed.), 1140; *Smith's Pr.* 392. So also, where it was discovered that one of the commissioners was the nephew and agent of the plaintiff, the depositions were suppressed, the application being made within a reasonable time after the discovery of the objection. *Lord Mostyn* v. *Spencer*, 6 Beav. 135.

In the case of the order of the 20th of March, there is too an insuperable difficulty in the way of the defendants now saying it should not have issued, it was made upon the consent of the defendants' solicitors.

The orders are as expressed, wide enough for the examination of the defendants as witnesses and not merely for their cross-examination on their answers.

On the examination all parties were represented, and a glance at the depositions shews that the examination was not for discovery merely, and then in explanation, but that the whole case was fully gone into.

Such being the case, great expense having been incurred in taking the evidence, and the proper course for the defendants to have pursued being, not to have consented to the one order but to have moved against both if made, notwithstanding their objection that issue had not been joined, I must hold that the present application is not open to them.

The appeal is dismissed with costs.

YOUNG v. CANADIAN PACIFIC RAILWAY CO.

Delivery of goods to carrier.—Admission by agent.

Plaintiff sent by S. a box of goods to defendants' station at W. to be carried to Y. at P. S. saw several men working at defendants' freight shed and told one of them he had brought a box for Y.; the man told him "to bring it in and put it there," and S. put it where he was told. He got no receipt. The box was lost. Plaintiff then went to the station at W. and saw the man already referred to, who admitted that he got the box but could not say what he had done with it.

Held, that whether the goods were to be carried at the risk of the consignor or of the consignee was a question for the jury, and the Court would not disturb their verdict.

Held, that the admission of the man, whom plaintiff saw, was not admissible as evidence against the defendants, and as it was the only evidence of delivery, the plaintiff should be non-suited.

S. C. Biggs for plaintiff.

J. A. M. Aikins for defendants.

[*2nd June, 1884.*]

DUBUC, J. delivered the judgment of the Court:—

The plaintiff, who lives at St. Andrews, sent, by a man named Saunders, a box of goods to the defendants' station, at Winnipeg, to be carried to his brother, W. R. Young, at Portage la Prairie. He gave Saunders, along with the box, a shipping note, and told him to get a receipt from the railway officials. Saunders came to the defendants' freight shed, in Winnipeg, saw several men working there, told one of them, the first he saw, that he was bringing a case for W. R. Young; the man told him "to bring it in, and put it there," and he put it where he was told. He signed nothing and got no receipt. The box was lost. The plaintiff says that, about eight days afterwards, he went to the defendants' freight shed and saw the man who admitted that he got the box, but could not say what he had done with it.

He brought his action, and at the trial the jury gave a verdict in his favor for $69.94.

The defendants have moved to set aside the verdict and enter a non-suit, on the grounds: 1st, that the action should have been taken by the consignee of the goods, W. R. Young, instead of by the consignor; 2nd, that there is no proof of delivery of the goods to the defendants.

As to the first ground, there is no doubt that, generally speaking, when goods are delivered to a carrier to be carried and delivered to a consignee, the party entitled to sue for their loss is the person who is entitled to the goods, and at whose risk they are carried. And in ordinary cases, that person is the consignee, because the delivery of the goods to the carrier commonly vests the property in the consignee. But if the consignor makes a special contract with the carrier, the necessity of showing the ownership is superseded, and the consignor may bring the action. *Dunlop* v. *Lambert*, 6 Cl. & F. 600. But whether the goods were to be carried at the risk of the consignor, or of the consignee, is a question for the jury.

In this case, no special contract was proved between the consignor and the carrier, but the question as to whether the goods were at the consignor's or at the consignee's risk, was left to the jury, and they have found, by their verdict, that they were at the consignor's risk. Whether there was sufficient evidence to sustain such finding is doubtful. But as they have so found, and it was a proper question to be left to them, we do not feel disposed to disturb their verdict on this ground.

The next point to consider is, whether there was a delivery of the goods to the defendants. Saunders left the box with the first man he saw amongst those working at the station. He did not take nor ask for a receipt; he did not see any official making an entry or even taking note of it; he does not say that any employee of the defendants, or that even the man to whom he spoke, saw him put the box where he left it; all that he says is this: "The first man I saw I told him I was bringing a case for W. R. Young, and he told me to bring it in and put it there, and I put it where he told me."

Can this be considered proper evidence of delivery? There is no proof that the man spoken to by Saunders was even an employee of the defendants. It would be, in my opinion, a most dangerous doctrine to declare that a box delivered to any man

at a railway station is sufficient delivery to the railway company, and to make the company liable for its loss. *Brown on Carriers*, p. 86, says that there must be either an actual or constructive acceptance by the carrier, or the contract of bailment will not arise.

In *Leigh* v. *Smith*, 1 C. & P. 638, it was held, that it was not sufficient to deliver goods, on the wharf, to one of the crew, but they should be delivered to the captain of the vessel, or some other person in authority on board.

In *Griffin* v. *The Great Western Railway Co.*, 15 U. C. Q. B. 507, a witness swore that he had taken the mare of the plaintiff to the station, when a man assisted him to put it in a car, in doing which the accident happened, it was held that there was not proof of delivery to the defendants.

In *Slim* v. *The Great Northern Railway Co.*, 14 C. B. 647, it was held that where the owner of cattle, knowing the course of business of the company, had permitted them to be delivered at one of the company's stations, without a receipt from the proper officer, although they were proved to be delivered to one in the company's employ, the company was not responsible for the non-delivery of said cattle. That case is pretty much in point, as the plaintiff here knew of the manner in which goods were to be delivered to and accepted by the defendants, his giving a shipping note to his man Saunders proves that he had such knowledge.

But the plaintiff's evidence goes a little further. He says that about a week or ten days after he had sent the box by Saunders, he went himself to the freight shed, that he saw the man and he admitted that he had got the box, but he did not know what he had done with it. He went to see him half a dozen times in the freight shed, spent sometimes half an hour with him, but got no information as to what had been done with the box. Afterwards, the man was no more seen, as he had left the company.

One cannot help being surprised to see an intelligent and business man like the plaintiff, going there and seeing that man so often, without asking his name, or his real position in the company's service. He knew perfectly well that he would depend on this man's admission to prove his delivery of the goods to the defendants. And by not giving that man's name, he

places the defendants in the unfair position of being unable to ascertain and verify the facts stated by him, and unable also to get track of the missing box.

Now let us consider the alleged admission. How could that man admit that he had got the box for the defendants and as their agent, if he made no entry of it in any of the company's books, or took no note or memorandum of it? If he had shipped it to some particular place, some note or memorandum of it should have been taken. And he would likely have shown the entry to the plaintiff, or mentioned it. But no such thing appears. His statement to the plaintiff seems rather strange. How could that man who was handling at that time, not only hundreds, but thousands of cases and boxes every day, remember that particular box, eight or ten days after handling it? Was he the same man to whom Saunders had spoken? Had he seen and noticed the box just lying there, without any body caring about it, or calling his attention to it, after it had been left there? If so, could he remember it without any note or memorandum of it? Saunders had spoken to the first man he saw there. The plaintiff spoke to the man in charge at the freight shed, putting freight in and shipping it. Was it the same man? The man is not identified, nor is the box, except in this way that the plaintiff says that he saw the man and he admitted that he got *the* box. One would imagine that if that man was not stupid, if he was as intelligent a man as we suppose that the defendants would put in charge of their freight shed, he would not have admitted that he had got this particular box, being an ordinary box of merchandize, without the same having been given into his charge, and a note or memorandum had been taken of it at the time.

But whatever may have been the real facts, and admitting them as stated by the plaintiff, there is an important question of law to be considered. Could such admission of an employee of the defendants be received as proper evidence to charge the defendants with negligence, and make them responsible for the loss in question. Admission generally is good evidence, admission of a party is sometimes the best evidence against him; admission of an agent does sometimes bind the principal, as when it is made at the very time of the contract. But it appears to be a well settled doctrine that admission of an agent as to a past transaction

does not bind the principal, even if it is made by letter. *Fairlie* v. *Hastings*, 10 Ves. 123; *Langhorn* v. *Allnutt*, 4 Taunt, 511; *Story on Agency*, 153, 154, 155.

In *The Great Western Railway Company* v. *Willis*, 18 C.B. N. S. 748, Willis had brought some cattle to the company's station, had signed a consignment note and paid the freight. The cattle had been shipped, but too late for the market, and Willis had in consequence lost £17 or £18 by the delay. About a week after, he saw the night inspector of the company, and asked him: "How is it that you did not send my cattle on?" And he said in reply that he had forgotten it. The judge allowed the question to be put, and the jury found for Willis. But the Court held that such evidence was improperly admitted, it not being within the scope of his authority to make admission as to by-gone transactions.

In the present case, there is still much less reason to receive as evidence the statement of the man who said that he had got the box, because instead of being the admission of a clearly recognized official of the company, as the night inspector, the man who is alleged to have so admitted is not identified, his name is not given which makes it more urgent to refuse his statement, as the defendants are thereby prevented from verifying the facts and the statement. We are of opinion that the statement cannot bind the defendants, and should not have been received as evidence. And as it was the only evidence of delivery, there was no case made out by the plaintiff, and he should be non-suited.

Rule absolute with costs.

HENRY v. CANADIAN PACIFIC RAILWAY CO.

Action for non-delivery of goods.—Condition indorsed on shipping bill.—Liability of carrier.

In action brought for the non-delivery of sawn lumber delivered to defendants at P. to be carried by them to B., defendants pleaded a condition indorsed on the shipping bill, as follows: "That the company will not be responsible for any deficiency in weight or measure of grain, in bags or in bulk, nor for loss or deficiency in the weight, number or measure of lumber, coal or iron of any kind carried by the car load."

The evidence shewed that the lumber was loaded at P. and that a portion of it was not delivered at B. There was no evidence as to how the loss occurred.

Held 1. That by the Statute 42 Vic. c. 9, s. 25, s. s. 4, the defendants were precluded from setting up the indorsed condition when a loss is charged as happening through their own negligence.

2. That in the absence of evidence, the non-delivery might be assumed to have arisen from misdelivery to some other person, or from the actual use of the property by the defendants for their own purposes, in which cases the condition would be no protection.

Colin Campbell for plaintiffs.

J. A. M. Aikins for defendants.

[*2nd June, 1884.*]

WALLBRIDGE, C. J. delivered the judgment of the Court:—

The plaintiffs sue the defendants for the non-delivery of a quantity of sawn lumber, delivered by the plaintiffs to the defendants at Portage la Prairie, to be carried by them to Brandon, the verdict is for the plaintiffs for $135.67. The plaintiffs declare first on a count in contract, stating that in consideration of reward plaintiffs delivered to defendants the lumber to be carried from Portage la Prairie to Brandon, and there safely to be delivered by defendants to plaintiffs, and allege as breach non-delivery. The second count alleges the delivery of the same goods to be carried etc., and charges that the defendants took so little and such bad care thereof, and so negligently conducted themselves in the premises, that the part thereof, namely 3,824 feet thereof be-

came lost to the plaintiffs. The proof is, that the plaintiffs loaded the lumber in cars furnished by the defendants, the cars in due time arrived at Brandon, and part of the lumber, 3824 feet did not arrive. The plaintiffs produce a shipping bill, in which it is stated that the goods at the time of shipment were in apparent good order, they prove also that the same did not arrive and the value.

The defendants call no witnesses. By their seventh plea the defendants set up a condition which is written on the back of the shipping bill produced by plaintiff in the following words: "That the company will not be responsible for any deficiency in weight or measure of grain, in bags or in bulk, nor for loss or deficiency in the weight, number or measure of lumber, coal or iron of any kind carried by the car load."

It is proved that the plaintiffs loaded the car, and the carriage was by the car load, but it is not shewn how the loss occurred or if in fact there was a loss at all. It is simply proved that the goods were delivered to be carried, that the defendants received them for that purpose, and that a certain quantity, that is 3824 feet, was not delivered to plaintiffs at Brandon.

The condition set up in the defendants' plea does not exempt them in every case, from non-delivery in pursuance of their contract. If the defendants had used the lumber themselves, or converted it to their own use or delivered it to a stranger, they could not set up that condition as a defence, and if the defendants desire to get the advantage of that condition, as it is an exception to the general obligation safely to carry and deliver, the burden of the proof lies upon them to prove that it is such a loss as is within the terms of the condition, and this stipulation in defendants' favor is to be construed strictly. It was so held in *Robinson* v. *The Great Western Railway* 35 L. J. C. P. 123.

The plaintiffs in my opinion are entitled to recover, as it is not shewn, (and the burden of this is on the defendants), how the loss occurred, and that it occurred in such manner as gave them exemption within the true meaning of the condition. But by Statute 42 Vic. c.9, s. 25 sub-sec. 4, substantially re-enacted by 44 Vic. c. 25, s.74, respecting railways it is enacted, "that the party aggrieved by any neglect or refusal in the premises, shall have an action

therefore against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants? It does not appear to me that this plea is a good plea to the first count and could only be properly addressed in its present form to the second count.

If it were intended to be an answer to the count on contract, there should be in the plea a distinct averment, that the non-delivery complained of arose from a loss from which the condition protected the defendants. But supposing that allegation to be in the plea, does it then afford an answer to the action? In other words are the defendants not precluded by the Statute from setting up the condition when a loss is charged as happening through their negligence? I think they are.

If however, the defendants could shew that the plaintiffs agreed to do the loading, and loaded the lumber so badly, that it was lost through their improper loading, that I think would make out a defence unless it could be shown that by the use of ordinary care, the damage would not have been as extensive as it proved to be. *Hutchinson* v. *Guion*, 5 C. B. N. S. 149, supports this view.

I think however, in this case the plaintiffs are entitled to hold the verdict they have got, on the ground that it is not shewn that there was in fact any real loss of the property by the defendants, from which alone their condition exempts them, the non-delivery in this case may be assumed to have arisen from misdelivery to some other persons or from the actual use of the property by the defendants for their own purposes. The case being one of non-delivery simply, after reasonable time therefor had elapsed.

WISHART v. McMANUS.

Married woman.—Liability on contract.—Separate estate.

In an action brought to recover from the defendant, a married woman, the the balance of an account for goods sold and delivered to her,

Held, That in the present state of the law, debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is without regard to separate estate.

H. M. Howell for plaintiff.

G. Davis for defendant.

[*2nd June, 1884.*]

TAYLOR, J. delivered the judgment of the Court:—

The plaintiffs sue in this action to recover from the defendant, a married woman, the balance of an account for goods sold and delivered to her.

From the evidence at the trial it appeared that in the month of October, 1882, the defendant came to Winnipeg, and applied to the plaintiffs to purchase goods, presenting a certificate or memorandum signed by Mr. Egan, the General Superintendent of the Canadian Pacific Railway Company. This certificate was as follows:—

"Canadian Pacific Railway Company, Western Division, Office of the General Superintendent, Winnipeg, Man., Oct. 23, 1882.

To all concerned:—Mrs. McManus is now boarding twenty-six men who are working for this company at Capell station. They owe her in the vicinity of four hundred dollars ($400). This amount will appear in her favour on the pay rolls of the company, and any order she gives will be accepted by the pay-master for the amount due her on the rolls for October.

(Sd.) John M. Egan, Gen. Supt.

The party who accepts McManus' order will attach this to the order."

The plaintiffs upon the strength of this document supplied the defendant with goods to the amount of $534.99 and she signed an order upon the paymaster of the company in their favour for $400. In due course this order was presented and the company paid on it the sum of $374.35. The remainder of the money had before presentation of the order been attached under garnishing process at the suit of some other creditor. The present action is brought to recover the balance of the account with interest. At the trial a non-suit was moved for and refused and the jury returned a verdict in favour of the plaintiffs for $170.24 leave being reserved to the defendant to move to enter a non-suit.

The defendant accordingly obtained a rule, calling on the plaintiffs to show cause why the verdict should not be set aside, and a non-suit entered, on the ground that the plaintiffs did not show that the defendant was possessed of separate estate at the time the contract sued on was made; that she contracted with reference to that separate estate, and that she was possessed of such separate estate or part thereof at the time of the trial; or why there should not be a new trial on the ground of misdirection and non-direction in this, that the judge should have directed the jury, that if they found that the defendant was not possessed of separate estate at the time of the trial they should find for the defendant.

The subject of the liability of married women and their separate estate has been frequently considered by the courts, and has been the subject of legislation in both England and Ontario. In England the case of *Johnson* v. *Gallagher* 3 D. F. & J. 494 came before the Lord Justices. The result of the suit was that the bill seeking to render the separate property of the married woman liable for certain debts, was dismissed as she had mortgaged it for an amount exceeding its value, but the subject of the liability of such estate was fully discussed. On this there was a difference of opinion between the learned judges. Lord Justice Knight Bruce held, that the plaintiffs had wholly failed to prove a specific or express mortgage or appointment, direction or agreement, or declaration on her part charging or purporting, professing, promising or contracting to charge her separate property, or part of it. The plaintiff's case he considered rested entirely on the fact, that when she bought the goods in question, she was a married woman, having separate property and living

apart from her husband, who, a stranger to the purchase was not liable wholly or partially. Such a state of circumstances, whether the sellers when selling were aware or unaware that she had property settled to her separate use, was in his opinion insufficient to charge her, or it.

Lord Justice Turner reviewed the long list of authorities on the subject of separate estate, and considered the weight of authority to be in favour of the liability. "I have come to the conclusion," he said at p. 514, "that not only the bonds, bills, and promissory notes of married women, but also their general engagements may affect their separate estates, except as the Statute of Frauds may interfere where the separate property is real estate."

The learned Lord Justice further held, that in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to, and upon the faith or credit of that estate, and that whether it was so or not is a case to be judged of by the Court, upon all the circumstances of the case.

He quoted with approval, the language of Lord Langdale in *Tullet* v. *Armstrong* 4 Beav. 319, expressed thus:—"It is perfectly clear, that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so, she may enter into a bond, bill, promissory note or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one on her part that her separate estate, which would be the only means of satisfying the obligation into which she entered should be bound."

V. C. Kindersley, in *Re Leeds Banking Co., Matthewman's case* L. R. 3 Eq. 781, decided in 1866, said at page 787, "I think the principle laid down by Lord Justice Turner is a sound one, and that it is the principle which the Court ought to adopt." This case was followed by V. C. Malins in *Butler* v. *Cumpston*, L. R. 7 Eq. 16. The next case on the subject was *Picard* v. *Hine*, L.R. 5 Ch. App. 274, before the Lord Chancellor and Giffard, L.J. which established Lord Justice Turner's judgment as authority. Lord Hatherly saying, "We both think it very desirable that

the position of a married woman who contracts as if she were a *feme sole* should be placed upon a well understood basis; and we think that that has been done by Lord Justice Turner in his judgment in *Johnson* v. *Gallagher*."

The following year *McHenry* v. *Davies*, L. R. 10 Eq. 88, was decided by Lord Romilly, in which the separate estate of a married woman living abroad under circumstances which led to the belief that she was a *feme sole*, was held liable to make good the amount of a bill of exchange endorsed by her, and a cheque drawn by her upon her London bankers.

Very soon after this the first English Act respecting the separate property of married women, 33 & 34 Vic. c. 93, was passed. That statute declared that the wages and earnings of a married woman should be her separate property—that she might maintain an action for the recovery of these or of any property belonging to her before marriage and which her husband should in writing have agreed should belong to her after marriage as separate property. The Act further provided that the husband should not be liable to be sued for her debts contracted before marriage, "but the wife shall be liable to be sued for, and any separate property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried."

This Act was amended by the 37 & 38 Vic. c. 50 which provided that in the case of marriages after the Act, the husband and wife might be sued jointly for debts contracted before marriage, but the husband should be liable only to the extent of certain assets specified in the Act. Further that where sued jointly, if the husband is found liable for debt or damages or any part thereof the judgment to the extent of the amount for which the husband might be found liable, should be a joint judgment against the husband and wife, "and as to the residue, if any, of such debt or damages the judgment shall be a separate judgment against the wife."

These Acts it will be observed only declare to be separate property, wages and earnings, and property belonging to the wife before marriage, which the husband has agreed in writing shall continue to be separate property, and they deal with the liability of the separate estate only as respects debts contracted before marriage.

The next step was taken by the 45 & 46 Vic. c. 75 of which s. 1, sub-sec. 1, is as follows: "A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of her separate property, on any contract and of suing and being sued either in contract or in *tort*, or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by, or taken against her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding, shall be payable out of her separate property and not otherwise."

Before the passing of this Act, the qnestion, to what extent the separate property is bound came before the Court in *Pike* v. *Fitzgibbon* L. R. 14 Ch. Div. 837. There V. C. Malins held, that where a married woman creates an obligation upon her separate estate, it extends not only to that which she has at the time, but to that which she may in any way acquire, and may have at the time when judgment is recovered. On appeal, however, L. R. 17 Ch. Div. 461, the proper inquiry was decided to be, "what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate, or any part of it, still remains capable of being reached by the judgment and execution of the Court?"

In that case, the question of how far a married woman was, in respect of her separate property, to be treated and dealt with as if a *feme sole*, was considered by Cotton, L. J. He said, "The plaintiff's argument is, that a Court of Equity deals with a married woman who has separate estate as if she were a *feme sole*. Now, is that correct? First of all, there is one clear and absolute distinction. Can a *feme sole*, or can a man be restrained from anticipating, or disposing by way of anticipation, of any property to which he or she is entitled? No. A married woman under coverture can; but how and why? Simply as regards property settled to her separate use, and because equity can modify the incidents of separate estate, which is the creation of equity, and thus the position of a married woman having separate property differs materially from that of a *feme sole*. Is it true that she is regarded in equity as a *feme sole?* She is

regarded as a *feme sole* to a certain extent, but not as a *feme sole* absolutely, and there is the fallacy."

In *King* v. *Lucas*, L. R. 23 Ch. Div. 712, the Court of Appeal held, that while a married woman is treated with respect to her separate estate as a *feme sole*, it must be separate estate which belonged to her at the time of making the contract, and is still remaining at the time when the contract is enforced and judgment obtained.

That is the latest English case I have seen, and it appears that at present the judgment of Lord Justice Turner, in *Johnson* v. *Gallagher*, is the correct exposition of the law in England on this subject

In Ontario the law respecting married women and their property, as modified by statutory enactments, has undergone a great deal of discussion.

The first statute on the subject was 22 Vic. c. 34. That Act dealt only with the possession by a married woman of separate property free from the control and debts of her husband ; her right to an order for protection of her earnings in certain cases ; that her separate estate should be liable for debts incurred or contracts made before marriage ; and limited her husband's lialiability in respect of such. She was also empowered to a certain extent to devise or bequeath her separate property.

The 19th section related to actions against the wife upon contracts made, or debts incurred before marriage, and provided that the husband should be made a party if residing within the Province, that in the declaration bill or statement of the cause of action, it should be alleged that the cause of action accrued before marriage, and that the married woman has separate estate, "and the judgment or decree therein, if against such married woman, shall be to recover of her separate estate only," unless in an action or proceeding, in which the husband was joined, a false plea or answer was put in by him, in which case the costs occasioned by such pleading might be recovered against him.

The general scope and tenor of this Act was held to be to protect and free from liability the property, real and personal, of married women ; not to subject it to fresh liabilities except in the case of her torts and of her debts and contracts before marriage. It conferred upon such property certain qualities in-

cident to separate estate, but it withheld the *jus disponendi*. *Royal Canadian Bank* v. *Mitchell*, 14 Gr. 412; *Kraemer* v. *Glass*, 10 U. C. C. P. 473. Though in *Chamberlain* v. *McDonald*, 14 Gr. 449, V. C. Mowat said he saw great difficulty in holding that a married woman had under the Act no *jus disponendi*, except by will, of her personal property, because under the Statutes he was entitled to "enjoy . . . her personal property . . . free from . . . (her husband's) control . . . in as full and ample manner as if she were *sole* and unmarried."

In 1872 the Ontario Act 35 Vic. c. 16, was passed. That act provided (sec. 2) that "all the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits 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 any such wages, earnings, moneys or property, shall hereafter be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as if she were a *feme sole*." The 9th section, after providing for actions being maintained by a married woman for the recovery of any wages, earnings, money, and property, by that or any other Act declared to be her separate property, concluded with these words, "and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts, as if she were unmarried."

Upon matters arising under this Act (now R. S. O. c. 125), there have been numerous decisions, some of which may be noticed.

In *Steels* v. *Hullman*, 33 U. C. Q. B. 471, the plaintiff declared on a contract, to build a house for the defendant, alleging completion and non-payment, and on the common counts; the defendant pleaded that the making of the contract, and the contracting of the debt was before the Married Woman's Property Act of 1872, and that at that time, she was, and still is, the wife of T. H. To this a replication was filed, that the debt was the separate debt of the defendant, and was contracted for her own benefit, and in respect of her separate estate. On the argument of a demurrer to this replication, the Court of Queen's Bench held, that the new provision (35 Vic. c. 16, s. 9,) "merely suggests

another mode of recovering her separate debt from her separate property." In other words, that the concluding part of section 9 merely relates to matters of procedure and imposes no new liability upon a married woman.

In *McCready* v. *Higgins*, 24 U. C. C. P. 237, the Court held that, in the absence of proof of separate estate, a married woman could no more be proceeded against after, than before the passing of 35 Vic. c. 16, and that, as formerly held in *McGuire* v. *McGuire*, 23 U. C. C. P. 123, the operation of the 9th section was simply to give a remedy at law to her creditor, in addition to the remedy he already had in equity. This ruling of the Court of Common Pleas was approved of, and stated to be correct by Harrison, C. J., in the case of *Wagner* v. *Jefferson*, 37 U. C. Q. B. at page 561.

The next case was one in the Court of Appeal, *Darling* v. *Rice*, 1 Ont. App. R., 43; in disposing of which, C. J. Draper said, "The effect of the concluding portion of the 9th section I take to be, that a married woman may be sued separately from her husband, as if she were unmarried, for her separate debts, contracts and engagements, in a suit at law, as if she were *sole*, whereas before she was only liable in equity, and in respect to a tort, could only have been sued jointly with her husband. It is the procedure which is altered—the principle on which the liability rests is unaffected. That principle I take to be—that to be liable for separate debts, contracts and engagements, the married woman must be shewn to have separate estate, especially where, as in this case, she is not living apart from her husband."

Mr. Justice Moss when dealing with the 9th section, said, "I think the object of this provision was to render it unnecessary any longer to join her husband as a defendant, when a suit was brought upon any separate engagement or contract binding upon her. In my opinion, it should not be construed as extending her power to contract, but as defining the procedure which may be adopted when a suit or proceeding is conducted against her, upon a contract or engagement on which she is liable."

In *Field* v. *McArthur*, 27 U. C. C. P. 15, Mr. Justice Gwynne in delivering judgment, said, "The true principle, as it appears to me, to proceed upon, in actions against a married woman sued separately from her husband, is, to hold that the

plaintiff undertakes to establish that the married woman, so sued, has, in the words of the 9th section of the Act, some separate property for her own use, which is available, by execution, for the plaintiff's demand, and that the demand, if in the nature of contract, arose by reason of, and upon the faith of her having such separate property."

When the question came before Proudfoot, V. C., in *Kerr* v. *Stripp*, 24 Gr. 198, that learned judge said: "I do not think the Act of 1882 has enlarged the liabilities of married women, beyond what they were before, in regard to her separate estate, that she is only liable now in regard to her separate estate, and that a personal order against her must be refused."

The Court of Appeal further considered the question in *Lawson* v. *Laidlaw*, 3 Ont. App. R. 77. The conclusions then arrived at, were thus stated by Mr. Justice Patterson, who delivered the judgment of the Court:

"The personal property enjoyed by a married woman under the Statutes of 1859 and 1872, is her separate property at law, to the same extent, and with the same incidents as property settled to her separate use was, and is, in equity."

"A promissory note made by a married woman for a debt of her husband, is not a contract binding upon her personally either at common law or under the statutes."

"She may charge or convey her separate personal estate as a *feme sole* might do."

"A promissory note or other general engagement derives no efficacy, as a charge or conveyance, from anything in the statutes, and therefore has no effect except in equity."

"When a married woman who has separate property contracts a debt, she is deemed in equity to have contracted it with reference to her separate property, and intending that it shall be paid out of that property."

"Therefore, if she had power to dispose of her property, equity will make it liable for the payment of the debt."

"The property so made liable must be property with reference to which she may be supposed to have contracted; and therefore must be property to which she is entitled when the debt is incurred."

Although in all the cases referred to there has been an uniform current of decisions in the various courts, still there has not been unanimity among the judges of these courts.

In *Wagner* v. *Jefferson*, 37 U. C. Q. B. 551, Mr. Justice Wilson, now Chief Justice of the Queen's Bench Division of the High Court of Justice, at p. 577, thus expresses himself: "So the 9th section seems to make the married woman answerable, whether she has a separate estate or not. She is to be liable not only for her contracts, but for her torts, as if she were unmarried. . . . I am of opinion that the liability of the married woman to suit for torts—and as it appears to follow as a consequence, on her contracts also—is of a personal nature, not depending upon her possession of a separate estate; that the proceeding against her is not to be considered as under the former law in the nature of a proceeding *in rem*, but as an ordinary suit against a person who is competent to contract, and be contracted with. If she has borrowed money or bought goods and refuses to pay her creditor, why should he not have a judgment against her, and make it available as in any other case so soon as his debtor is in the possession of property."

And Hagarty, C. J., although he could not, in *Field* v. *McArthur*, 27 U. C. C. P. 15, see his way to any other conclusion than that of Mr. Justice Gwynne, added "I am not free from doubt, as I find a great and increasing difficulty in arriving at a clear conviction in some of the cases arising on the present position of married women in this Province."

So in *Standard Bank* v. *Boulton*, (Sec. 3, Ont. App. R., at p. 96,) notwithstanding the previous decision of V. C. Proudfoot in *Kerr* v. *Stripp*, 24 Gr. 198, V. C. Blake granted a personal order for the payment of money against a married woman.

Again in *The Consolidated Bank* v. *Henderson*, 29 U. C. C. P. 549, Chief Justice Wilson adhered to the views to which he gave expression in *Wagner* v. *Jefferson*, saying, "The principal purpose of our legislation was, and is, to establish the individuality of the married woman in contemplation of law. It was intended that she should be personally liable upon all her own separate contracts, and for all her own separate contracts, and the statute in my opinion says so."

The next case was *Clarke* v. *Creighton*, 45 U. C. Q. B. 514, in which Mr. Justice Armour, in a characteristic judgment, gave

in his adherence to the opinion enunciated by Chief Justice Wilson and pointed out the difficulties which arise upon any other construction of the Act. Chief Justice Hagarty in this case seems to have forgotten or got rid of the doubts which troubled him when *Wagner* v. *Jefferson* was before the Court, and adhered to the views enunciated by the majority of the judges, and Mr. Justice Cameron concurred with him, feeling himself bound by the decided cases, otherwise he would have agreed with Mr. Justice Armour.

During the same term *Griffin* v. *Patterson*, 45 U. C. Q. B. 536, was decided by the same Court, the three judges taking the same positions as they did in *Clarke* v. *Creighton*.

Berry v. *Zeiss*, 32 U. C. C. P. 231 came before C. J. Wilson on demurrer to a replication. The grounds of demurrer were that the replication did not show that the married woman had at the time of making the notes question any separate property to her own use, or that she made the notes, or that they were received by the plaintiff on the faith, or in respect of her having such separate property, or intending to bind the same; nor did it appear that the notes were made, or arose out of any contract made by her respecting her real estate, or that they were made by her, or in respect of, any debt contracted by her before marriage. After argument the learned judge over-ruled the demurrer, holding "that debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is without regard to separate estate, such as Courts of Equity recognize as that par ticular class of property."

The latest case I have seen is *Hessin* v. *Baine*, 2 Ont. R. 302. In that case Hagarty, C. J. dissented on the ground that the goods sued for had been sold not to the wife, but on the credit of the husband. Mr. Justice Cameron held the plaintiff entitled to recover, because even if the goods were not purchased by her, she had made herself liable as a surety, which she could be, having separate estate, while Mr. Justice Armour took the same broad ground as he had done in *Clarke* v. *Creighton* and *Griffin* v. *Patterson*, fortified as he said in the views then expressed, by the judgment of Wilson, C. J. in *Berry* v. *Zeiss*.

The present case is, so far as I am aware, the first in which

this Court has been called upon to construe the Married Woman's Act of Manitoba, and in doing so I am prepared to construe it in a wide and liberal manner.

In England the Legislature has used language plain and unmistakeable, by saying that damages and costs recovered in an action against a married woman, "shall be payable out of her separate property and not otherwise." No such restrictive words are to be fonnd in the Acts of either Ontario or Manitoba, unless in those section which refer to debts contracted before marriage.

To put upon the Act here the construction put upon the Ontario Act by Chief Justice Wilson and Mr. Justice Armour, and which Mr. Justice Cameron thinks should be put upon it, is not in my judgment to extend the meaning of the statute beyond what the Legislature, as I read the Act, intended and have indeed plainly said. On the contrary, to construe the statute as the majority of the judges have construed it, is to narrow its effect and largely to defeat what I conceive to have been the intention of the Legislature.

In our Act, the various sections of which are, I must say, in a somewhat confused order, the limitation of a married woman's liability to her separate property seems confined to the one case of claims against her on account of debts and obligations incured before marriage. In the case of debts and obligations incurred after marriage, she is plainly placed upon the same footing as a *feme sole*, except that by the concluding clause of section 72 of the Administration of Justice Act, it is provided that "No married woman shall be liable to arrest on mesne or final process."

The 21st section of the Act provides that "A husband shall not be liable, by reason of marriage, for any debt of his wife, contracted by her before her marriage with him; but for such debts she alone and her estate and property shall be liable; nor shall the husband be liable for any debts, liabilities or obligations contracted or incurred by the wife during coverture in her her own name, and by her own act, in, or about, or in respect of, her own separate estate and property; and in all and singular the premises, a married woman may and shall in all courts and proceedings, sue and implead, and may and shall be sued and

impleaded, in her own individual name (without joining the name of her husband), as if she were a *feme sole* and unmarried."

At the time the Act, 38 Vic. c. 25, which originally contained that section (the 22nd in the original Act), was passed, it might have been argued that the provision as to her liability to be sued in her own individual name, as if she were a *feme sole* and unmarried, was only a matter of procedure. The 13th section (the 14th in the original Act) had already provided that "Every married woman married after the 14th of May, 1875, and having separate property, whether real or personal, not settled by antenuptial contract, shall be liable upon any contract made, or debt incurred by her before marriage, to the extent and value of said separate property, in the same manner as if she were *feme sole* and unmarried." The 14th section (15th in the original Act) limited the liability of the husband for such debts of the wife to the extent only of the value or interest he might take in the separate real or personal property of his wife, under any contract or settlement of marriage.

As already said the concluding clause of the 21st section may have been intended to refer only to matters of procedure, though it is difficult to see how such a clause providing that the wife should be sued alone came to be inserted, relating, as the language of the section plainly shows, both to actions for debts incurred before marriage, and to those for debts, liabilities or obligations incurred after marriage. The 17th section) the 18th section of the original Act) had already provided that in the case of actions for debts incurred before marriage the husband should be made a party, if residing in the Province, and it was only in the case of his absence that the wife could be proceeded against alone. There were thus in one and the same Act two inconsistent clauses, by one of which it was enacted that the husband "shall be made a party," and by the other that the married woman "shall be sued and impleaded, in her own individual name, without joining the name of her husband."

The only property which at this time was the separate property of a married woman was, by section 1, in the case of a woman marrying on and after the 14th day of May, 1875, "All her real and personal property whether belonging to her before marriage or acquired by her by inheritance, devise, bequest,

gift or as next of kin to an intestate, or in any other way after marriage; and by section 2, in the case of a woman married before the Act took effect without any marriage contract or settlement, "All her real estate not on the 14th of May, 1875, taken possession of by her husband, by himself or his tenants, and all her personal property not then reduced into the possession of her husband, whether belonging to her before her marriage, or in any way acquired by her after marriage." Also in the case of a married woman deserted by her husband, or living apart from him under certain circumstances, after obtaining, under the provisions of the Act, an order for protection, she was entitled to her own earnings and to those of her minor children.

The only power which a married woman had under the original Act as consolidated, of contracting (beyond effecting an insurance on her own life or on that of her husband) was derived from the 19th section. That section, after providing that the real and personal property mentioned in the first and second sections of the Act, and the rents, issues and profits thereof should be used and enjoyed by her for her separate use; that her receipts should be a sufficient discharge for such rents, issues and profits; that she might by herself alone make any deed or deeds of conveyance, mortgage, demise or demises, proceeded, "and may enter into any contracts whatsoever in respect of such real estate or property, or the management of the same, or the proceeds or issues thereof, and the investment or re-investment of the same, the making of promissory notes or bills of exchange, the drawing of cheques and the doing of all other acts, matters or things requisite or expedient, in or about the management and handling of, and dealing with, all and singular the premises, without any assent or concurrence on the part of her husband, as if she were a *feme sole* and unmarried." The "all and singular the premises," there relate plainly to the real and personal estate mentioned in the first and second sections of the Act. And as these are the only contracts she could then enter into, the "debts, liabilities or obligations contracted or incurred by the wife during coverture in her own name and by her own act in or about or in respect of her own separate estate and property," referred to in the 21st section must mean those which she could contract, under the provisions of the 19th section.

This being the position of the married woman, the Legislature passed the 44 Vic. c. 11, "An Act to amend certain of the Acts forming parts of the Consolidated Statutes of Manitoba." By the 75th section of that Act, "All the wages and personal earnings of a married woman, and any acquisition therefrom, and all proceeds or profits 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 properties shall, after the passing of this Act, be free from debts or dispositions of her husband, and shall be held and enjoyed by such married woman and disposed of without her husband's consent, as freely as if she were a *feme sole*; and no order for protection shall hereafter be necessary in respect of any such earnings or acquisitions; and the possession, whether actual or constructive of the husband, of any personal property of any married woman, shall not render the same liable for his debts." Then the 78th section provides as follows, "A married woman may maintain an action, in her own name, for the recovery of any wages, earnings, money and property, by this or any other Act declared to be her separate property, and shall have in her own name the same remedies against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other goods her separate property, for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; and any married woman may be sued and proceeded against separately from her husband, in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried."

Now while there might be room for argument in Ontario that the concluding clause of the Ontario Statute 35 Vic. c. 16 s. 9, which is the same as the above 78th section, was intended merely to relate to procedure, there is no room for such an argument here. The right to sue a married woman separately from her husband had already been provided for by the concluding part of section 21 of the Married Woman's Act, as contained in the Consolidated Statutes.

The Legislature has not, in any of these sections, by express words, enabled a married woman to contract, except so far as the 17th section enables her to make contracts in connection

with her real estate, but when it has said that she may maintain actions for the recovery of wages, earnings, money and property, and that she may be sued in respect of her separate debts, engagements, contracts or torts, as if she were unmarried, it impliedly enabled her to enter into the contracts, make the engagements, and incur the debts in respect of which it has said she may sue and be sued. The whole object of the Legislature on this subject seems to be to extend the powers of married women in dealing with their property, to enable them to contract, and be contracted with in business transactions, and as a consequence of these extended powers to subject them to the ordinary liabilities, and to give those dealing with them the same remedies against them, as against other contractors and debtors. There is nothing in these sections which limits their liability to the separate estate they possessed at the time of the contract, and which may remain undisposed of, when judgment may be recovered. On the contrary, while the 17th section, which deals with actions against a married woman upon contracts made or debts incurred before marriage, expressly requires that "in the declaration, bill or statement of the cause of action, it shall be alleged * * * * that such married woman has separate estate," and provides that "the judgment or decree thereon, if against such married woman, shall be to recover of her separate estate only," no such requirements or limitations are to be found in the sections added in 1881.

Then the 78th section provides for her being sued in respect of her separate debts, engagements, contracts or torts, all in exactly the same way. Now if it be necessary when suing her upon a contract to prove that she had separate property when she entered into it, that she contracted with the intention of making that separate property liable, and further that the separate property is still available for satisfaction of the claim, why should not the same be necessary if she is sued in tort. In such a case it must alike be necessary for the plaintiff to prove that when the tort was committed she did so intending to render her separate estate liable. A manifest absurdity.

I cannot come to the same conclusion on this subject which has been come to by the majority of the Ontario judges upon the corresponding statutes in that Province. On the contrary,

after careful study of those judgments, and giving due weight to the argument of Mr. Davis in the present case (an argument on which he ought to be complimented), the only conclusion I can come to is, that in the present state of the law, debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is without regard to separate estate.

The verdict should stand and the defendant's rule be discharged with costs.

CLARK v. EVERETT.

Vendor and Purchaser.—Rescission of contract for want of title.—Waiver of rescission.

After a contract had been made for the purchase of 73 3-10 acres the purchaser discovered that the vendor had no title to 5 acres of the land. He then gave notice of rescission and demanded a return of his deposit.

Held, That he was entitled to repayment. Afterwards the vendor agreed that a portion of the deposit should be returned and the purchaser promised to repay it on the vendor "furnishing satisfactory title" to the property. 29 days afterwards the purchaser commenced this action for the return of the deposit. Meanwhile the vendor had used due diligence to perfect his title and succeeded in doing so 7 days after the issue of the writ.

Held, That purchaser had waived his rescission; that there was a new agreement engrafted on the old one by which the purchaser agreed to wait a reasonable time for the perfecting of the title.

A. C. Killam for plaintiff.

W. R. Mulock and *W. E. Perdue* for defendants.

[*4th February, 1884.*]

DUBUC, J. delivered the judgment of the Court:—

By agreement dated the 18th of April, 1882, the plaintiff, as a member of a syndicate, agreed to purchase from defendants 73 3-10 acres of land at Sault Ste. Marie, District of Algoma, Ontario. The price was $9,000, divided into nine shares of

$1,000 each. The plaintiff took one share and paid to Bain & Blanchard, as trustees for the vendors, $600 on account. The plaintiff then went to Sault Ste. Marie, and on the 17th of May, wrote to Bain & Blanchard, that, as defendants did not own the whole of the property sold, as they had no title to 5 acres of the same, he considered himself absolved from the agreement. On the 18th of May, he wrote a similar letter to the defendants, and demanded that the money placed in the hands of Bain & Blanchard by him (subject to the title being satisfactory) be repaid to him. On the 25th of May, Ross, Killam & Haggart, solicitors of the plaintiff, wrote to Bain & Blanchard, notifying them not to pay the money to defendants, and demanding a return of the same. On the 30th of May, the plaintiff met defendant Bentley in Winnipeg, and obtained from him a written permission to receive from Bain & Blanchard $200 out of the $600, promising to return the same, and signed, on receiving the money, a paper in these words: "Winnipeg, May 30th, 1882.—On furnishing satisfactory title to Sault Ste. Marie property, purchased by me and others of H. Bentley et al, I promise to pay him two hundred dollars ($200), the said two hundred dollars to be placed to my credit on the purchase of said property.—Donald Clark."

On the 28th June the writ was issued, and on the 5th July the title was perfected.

The question we have to consider is whether the contract for the purchase of said land was finally rescinded and determined, and the plaintiff entitled to the return of the purchase money paid by him.

In the first place, the agreement does not make time the essence of the contract. The defendants had therefore a reasonable time to complete their title. It appears that they had a perfect title to 65 3-10 acres of said land, and no title to the remaining 5 acres. When the matter was mentioned to E. Carey, solicitor in Bain & Blanchard's office, he said that it was a mistake, but that it would be made all right. But if time was not of the essence of the agreement, it could be made so by reasonable notice. And it is a well settled doctrine that when a purchaser finds that the vendor has no title, he can at once rescind the contract, and is not bound to wait until the vendor has acquired the title to a property not belonging to him.

Weston v. *Savage*, L. R. 10 Ch. Div. 736; *Haggart* v. *Scott*, 1 Russ. & M. 293. And the evidence shows that the plaintiff, by his letters of the 17th and 18th of May, and by his solicitors' letter of the 25th May, had notified the defendants that the contract was rescinded. There is no doubt that if he had stopped there, and had no more dealings with the defendants, we would be bound to consider the contract at an end, and the plaintiff entitled to recover. But the paper, exhibit F, signed by him on the 30th of May, and his conduct on that day, operated, in my opinion, as a complete waiver of the notice of rescission of the contract. In *Cutts* v. *Thodey*, 13 Sim. 205, the Court held, that the rescission of the contract during the time limited to comply with the conditions, had been waived by the defendant's solicitor. Here, the plaintiff went himself to the defendant, obtained his written consent to get the $200, and signed an agreement to return said money if satisfactory title is furnished.

Mr. Killam contended, on the argument, that the contract was rescinded by the letter of the 25th of May, and that the letter of the 30th of May could not revive it. But when the plaintiff, after the notice of rescission, continues to act under the contract, promises to repay the money so obtained by him if title is found satisfactory, when he is perfectly well aware that the title for a small portion of the property is not in defendants, I should say that it is a waiver of the notice of rescission, and more than a waiver; it may be considered as a kind of new agreement ingrafted on the original contract, by which it was certainly revived, if already rescinded. And having so agreed, with his eyes well opened, when he knew that the defendants had not the title in that portion of the property, and that they were taking steps to acquire it and make it all right, as he was told, he may properly be held to have agreed to wait a reasonable time for the perfecting of the title. Under the circumstances, I do not think he was entitled, 29 days afterwards, to declare again the bargain at an end and sue the defendants for the return of the purchase money; and more particularly so when we see that the defendants were taking proper steps and using due diligence to have the title perfected, and had in fact a good title to offer to the plaintiff on the 5th of July, seven days after the issuing of the writ.

I think the rule should be dismissed with costs.

MONTGOMERY v. McDONALD.

Costs.—Superior scale.

Plaintiff sued defendants for goods supplied, amounting to $224. There was no evidence that the articles were made or supplied at an agreed price or to show that the amount claimed was ascertained by the act of the parties.

Held, Plaintiff entitled to superior scale costs. The mere rendering an account with prices stated is not ascertaining the amount by the act of the parties.

Isaac Campbell for plaintiff.

Chester Glass for defendant.

[*30th March, 1883.*]

WALLBRIDGE, C. J.—On 19th December, 1882, plaintiff sued defendants for the following sums:—

August 22.—To eight wheel-barrows	@	$11 . .	$88 00
twelve brick-barrows	@	5 . .	60 00
eight flat-barrows	@	9.50 .	76 00
			$224 00

And claimed interest from 22nd August, 1882.

One of the defendants allowed judgment to go by default, and the other appeared and pleaded to the action. The case came down for trial at the assizes, and on 31st March, 1882, a verdict by consent was entered for $232.14 damages, made up of the above amount, $224, and interest, $8.14.

The plaintiff claims to be entitled to Queen's Bench costs, according to that called "Superior scale," and defendants contend that plaintiff is entitled to County Court costs only, or at most to Queen's Bench costs on the "Inferior scale."

The County Court Act, Con. Stat. Man. c. 34 s. 33 declares, that the Court shall have jurisdiction in all personal actions and in all actions of tort when the debt or damages claimable do not exceed $100, and in sub-section 2 of section 33, further declares, that it shall have jurisdiction of "all personal actions

for claims and demands of debt, account, or breach of contract, or covenant or money demand, when the amount or balance payable does not exceed $250."

This case could therefore with strict propriety have been brought in the County Court and the defendants been subject to County Court costs only.

It has been brought in the Queen's Bench, and one of the defendants by his pleas raised such issues as would have justified the removal of the case into the Queen's Bench under section 39 of the County Court Act. The court was not called upon to try those pleas as verdict was rendered by consent.

Sub-section 2 of section 33 of the County Court Act above referred to contains a proviso that actions of debt, account or breach of contract, covenant or money demand, when the amount claimable exceeds $100, may be brought and prosecuted to judgment in the Court of Queen's Bench, as provided in Rule 10 of the General Rules and Orders of the Court of Queen's Bench made the 10th of February, 1875.

A statutory authority is expressly given to that rule, and it provides, so far as I can interpret it, that costs according to the Inferior scale shall be taxed in actions *ex contractu* (which this is), when the damages claimed or recovered exceed $100, and when the amount is not liquidated, ascertained by the signature of the defendant or act of the parties, and does not exceed $200, but is silent as to cases when the amount exceeds $200, and is under $250 (the County Court jurisdiction). This rule also provides that in actions for the recovery of debt, covenant and contract, when the demand is liquidated or ascertained by the signature of the defendant, or by the act of the parties, and the money is above $100 and under $400, costs shall be taxed on the Inferior scale. And in all other cases the Superior scale shall be allowed.

In this particular case the sum sued for was $224, that is within the County Court jurisdiction, but above the limit ($200) set down in the rule, on which Inferior scale costs shall be taxed, unless the amount be liquidated or ascertained by the signature of the defendant, or by the act of the parties, and it falls under that part of the rule which provides for all other cases.

There is no evidence whatever that these articles were made or supplied at an agreed price, and nothing to shew the amount ascertained by the act of the parties, and it is not pretended there was a writing. The account was rendered as stated in the beginning of this judgment. It would have been equally so rendered whether the articles had been supplied at a price agreeed upon, or upon a *quantum meruit*.

The statute gives validity to rule 10, and the amount recovered exceeds $100 and even $200, and the only question that could arise is, as to whether costs should be taxed on the Inferior or Superior scale. The words in this rule sufficiently resemble the words of the statute defining the jurisdiction of the County Courts in Ontario to make their decisions applicable to the present case. The case of *Wallbridge* v. *Brown*, 18 U. C. Q. B. 158 shews what acts will bring cases within the meaning of "liquidated or ascertained by the act of the parties." This case was lately cited and approved of in *Watson* v. *Severn*, 6 Ont. App. R. 559. The merely rendering an account itself with prices stated, is not ascertaining the amount by the act of the parties. Could the plaintiff have relied upon such rendering of the account, as fixing the price, for proof at the trial? I have no doubt he could not. Then how was the amount liquidated or ascertained, by the act of the parties? I cannot see how. It exceeds $200, the ultimate limit in the rule, and can only fall under that branch of rule 10 which provides for all other cases, and that declares full costs or costs according to the Superior scale shall be taxed.

I am obliged to find therefore that the plaintiff is entitled to Superior scale costs.

ROLSTON v. RED RIVER BRIDGE CO.

Obstruction to navigation.—Liability of Bridge Company.

The defendants by their charter were empowered to erect a toll-bridge over the Red River and it required that the bridge should be provided with a draw or swing so constructed as to allow sufficient space, not less than 80 feet, for the passage of boats, rafts, etc. After the bridge had been constructed the two ends were carried away, leaving the swing portion however uninjured. For the purpose of a temporary bridge pending repairs piles were driven in the bed of the river, but no obstruction was placed under the swing. The plaintiff's raft in descending the river was driven by the current against the piles, broken and lost.

Held, That the public had no right to use any other space than that provided for by the charter.

2. That the Bridge Company were entitled to erect a temporary bridge and for that purpose to drive the piles.

3. Where both parties have equal rights in a navigable river, it must be shewn, in order to maintain an action, that the defendant has exercised his rights in such a manner as to unreasonably impede or delay the plaintiff.

H. M. Howell and *Isaac Campbell* for plaintiffs.

W. R. Mulock and *W. E. Perdue* for defendants.

[*2nd June, 1884.*]

WALLBRIDGE, C. J., delivered the judgment of the Court:—

This action is for unlawfully placing piles and obstructions in the bed of the Red River, and under the bridge across the same, and obstructing the navigation, and the plaintiff attempting to bring a raft of logs through the opening under the bridge left by the defendants after their unlawful obstruction of the navigation, the raft was violently driven (not said against what) by force of the current and carried away and sunk.

The second count alleges that the plaintiff was possessed of a raft of logs and was carefully navigating the same down the Red River, which is a public navigable river, and it was necessary for the plaintiff to bring his said raft down the said river below the point at which the bridge had been built, but which he could have done but for the unlawful conduct of the defend-

ants, but the defendants before the plaintiff reached the said bridge with his raft, unlawfully placed a large number of piles and other obstructions in the bed of the river, and thereby obstructed the navigation of the same, and the plaintiff was unable to safely conduct his raft down the river and past the bridge, and was delayed for a long time and had to pay the wages of men and suffered other pecuniary losses by reason of the obstructions.

The third count is, for that plaintiff was engaged in getting out logs and timber in the woods bordering on the Red River, which is a public navigable river, above the point at which the bridge is built across the river, and bringing the same down to the City of Winnipeg below the bridge, and had before the unlawful obstructions were placed there by the defendants made contracts for the supply of such logs and timber to be delivered at points on said river below the bridge, and by reason of the unlawful conduct of the defendants the plaintiff was prevented from fulfilling his contracts.

The defendants pleaded not guilty, and amongst others, a plea setting up the Statutes 43 Vic. c. 61 and 44 Vic. c. 51, under which they derive their authority to build and maintain this bridge. The words of chapter 51, section 2, are, "The said company are hereby authorized to build, construct, work, maintain and manage a solid and sufficient toll bridge for traffic purposes over the Red River from some point within the limits of the said City of Winnipeg to a point in the opposite bank of the river, and to erect and construct toll houses and toll gates with their dependences and approaches to or upon the said bridge, and also to do and execute all such other matters and things as shall be necessary, useful or advantageous for erecting and constructing, keeping up and maintaining, the said bridge and toll houses and gates, and other dependences, subject to the provisions contained in the seventeenth section of the above recited Act."

By section 4 of this Act it is declared that the said bridge shall be provided with a draw or swing or some such practical arrangement, so constructed as to allow sufficient space, not less than eighty feet, for the passage of steamboats, vessels and rafts, which swing shall at all times be worked at the expense of the company, so as not to hinder or delay unnecessarily the passage of any steamboats, vessels, boats or rafts.

The bridge was first constructed in the winter of the year 1881 and 1882, and ready for traffic before the ice broke up in April, 1882: it was provided with a draw or swing, so as to allow the statutory space of 80 feet and upwards (spoken of as between 80 and 90 feet) for the passage of steamboats, vessels, boats and rafts.

Section 3 of this Act provides that the company shall in the construction, working, maintenance and management of the said bridge across the Red River and in its toll houses, gates, and other dependences, and in the imposition and collection of tolls, and in all other respects, have the same rights, powers and privileges as are conferred upon and enjoyed by the Assiniboine Bridge Company, 43 Vic. c. 61, in respect of the Assiniboine Bridge, and this Act as amended by the Act 44 Vic. c. 51, shall in all respects be taken to apply to the said Red River bridge, as if the same had been originally included in the said Act of incorporation except as in this Act excepted. The Assiniboine Bridge Company in 43 Vic. c. 61 s. 15, is given most ample powers; it is there declared that the company shall have full power and authority to erect, make and sink all such piers, abutments, blocks and erections in the Assiniboine River as may be deemed necessary, not only for the construction of the bridge, but such as may be required, or thought desirable efficiently to protect it from the effects of ice, and ice freshets, or for any other purpose in connection with the said bridge that the company may see fit, and may execute all other things necessary, requisite, useful or convenient for erecting, building, maintaining and supporting the said bridge, etc. Maintaining the said bridge manifestly has reference to repairs, and in the present case applies to repairs of the extensive character rendered necessary by the damage done to the parts east and west of the swing or draw bridge by the effects of the ice in the spring of 1882. The 17th section of this Act, 43 Vic. c. 61, has reference only to the duty of the company to submit to the Governor-in-council plans of the bridge, and to procure their approval.

This declaration attacks the right of the defendants to place piles and obstructions in the bed of the river and obstruct navigation at all. In the spring of 1882, part of the bridge was carried away, and subsequently another part also. The central

or swing span was left untouched, one
or east side, and two on the Winnipeg
swing or contiguous to it, were carried
depth of the water are where the swing
of the bridge was carried away. T
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The statutes authorize the building
bridge over the Red River, but sub
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by ice or freshet, to make a temporary erectio
between piers, either for the purpose of affor
accommodation to the public or for the purpos
piles and obstructions to rebuild the bridge so
The declaration does not charge actionable n
does not state facts from which any obligation
defendants as a matter of duty or law by which
to desist from placing the piles and obstructio
complains in the places where they were so
challenges the defendants having so done as a
The defendants plead that they have done the a
of in pursuance of the powers in the Acts of Pa
quoted, and upon that issue is joined.

The defendants do not new assign, but take is
the plaintiff's plea. These obstructions were pla
last spans were in the summer of 1882. C. J. B
president of the Bridge Company, and no one co
than he could why the piles and obstructions
and he says they were so placed as a means of
bridge across the stretches between the two
Winnipeg side and across the one stretch on th
side, and that when the rebuilding did take place,
the fall of 1882, these piles and obstructions were
for that purpose, and there is in fact no objectio
by laying a temporary way or planking to acc
public in the meantime, but supposing these o
have been put down at first with the intention
temporary bridge, as long as the defendants ke
plans approved by the Government and the statut
I see no objection to the use of those piles for the
temporary bridge. It is not complained of that t
went beyond this restricted use of the river; th
had a right to assume that the acts done by them
those complained of and have so pleaded, the
taken issue and that in my opinion must be found
the only real question is, does either of the acts cit
which the defendants acted, justify what they are
Negligence is not charged, the facts stated in th
do not shew a duty, when read with the statute au

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) rebuild the bridge so carried away.
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t complained of that the defendants
d use of the river; the defendants
the acts done by them lawfully were
have so pleaded, the plaintiff has
opinion must be found against him,
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justify what they are charged with.
the facts stated in the declaration
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building the bridge, and the statute itself affords a complete answer to the plaintiff's charge.

Where both parties have equal rights in a navigable river, it must be shewn in order to maintain an action, that one party has exercised his rights in such a manner as to unreasonably impede or delay the other. *Crandell* v. *Mooney*, 23 U. C. C. P. 212. In the present case the defendants' Acts of incorporation form their justification, and the facts do not shew they have exceeded the authority given to them by those Acts. *Brownlow* v. *Board of Works*, 13 C. B. N. S. 768, is a case very much in point, and I refer to *White* v. *Phillips*, 15 C. B. 245; *Attorney-General* v. *Terry*, L. R. 9 Ch. App. 423.

Non-suit should be entered pursuant to leave.

TAYLOR v. RAINY LAKE LUMBER CO.

(IN CHAMBERS.)

Security for costs pending summons for judgment.

Held, that where a summons was taken out to enter judgment, and during the pendency of such summons, a summons for security for costs was served, that security must be given before the defendants can be called on to show cause to the summons to enter judgment.

Colin H. Campbell, for plaintiff, showed cause to summons for security for costs, and urged that security should only be where there is a defence, and that defendants should be called upon first to answer the application for judgment, and thus determine as to whether there was a defence or not.

A. E. McPhillips, for defendants, in support of summons for security for costs, argued that the defendants were entitled to security, notwithstanding that summons to enter judgment had been previously taken out, and that the plaintiff was bound to give such security before he cauld proceed further. He cited *Le Banque des Travaux Publique* v. [illegible]*lis*, Weekly Notes, No. 10, 1884, p. 64; *Arch. Prac.* 12th Ed. 1414; *Edinburgh & Leith Ry Co.* v. *Dawson*, 7 Dow. 573.

DUBUC, J.—The authorities go to show, that a defendant is entitled to security for costs, even in cases where there is no defence on the merits, because it would not be just to hold otherwise, for instance, a defendant might succeed upon technical grounds, or the plaintiff might be non-suited, and in the event of such happening, the defendant is entitled to tax costs against the plaintiff, and should the plaintiff be a foreigner, and no security given, the defendant would have no recourse for such costs. Take even the present case, the plaintiff might not be successful in the application for final judgment, and perhaps costs would be given against the plaintiff, and should he not be a responsible person, the defendanl might not be able to get such costs as had been incurred. I hold that defendants are entitled to have their summons for security for costs made absolute, and that all proceedings under the summons for final judgment, as all other proceedings, be stayed in the meantime.

CAMERON v. McILROY.

(IN CHAMBERS.)

Power of registrar to take accounts when dispute note filed.—Costs of abortive sale.

Held, That the registrar has power to include in the plaintiff's account costs of an abortive sale, on issuing a decree after dispute note filed, but in case of a contest has no power to adjudicate on the weight of evidence. The proper course is to take a decree with a reference to the master.

G. G. Mills for plaintiff.

H. E. Morphy for defendant.

The plaintiff filed his bill for foreclosure and asked that the costs of an abortive sale under a power be added to his mortgage debt. The defendant filed an ordinary dispute note and the bill was noted *pro confesso*, and there being no subsequent incumbrancers the plaintiff served the defendant with notice of settling the decree and taking the accounts before the registrar.

The defendant's solicitor on the matter coming before the registrar wished to give evidence to show that the plaintiff was not entitled to the costs of the abortive sale. The registrar

being in doubt as to his authority to receive such evidence referred the matter to a Judge.

[*13th March 1884.*]

TAYLOR, J., held that if it were simply a matter of making calculations, or assuming the plaintiff's affidavit proving claim and the facts therein stated to be correct, the registrar would have power to adjudicate on the question of the costs of the abortive sale; but if the defendant wished to give evidence in opposition to the plaintiff, the registrar had no power to receive evidence *pro* and *con* and adjudicate or decide on the weight of evidence. The proper course was to take out the usual decree with a reference, and the plaintiff would be entitled to the extra costs occasioned by the reference if he succeeded.

CAMERON v. McILROY.

(MASTER'S OFFICE.)

Abortive sale.—Costs.

Held, That where a mortgagee had offered property for sale under a power of sale, and the sale proved abortive, he was entitled to the costs, the attempt to sell having been *bona fide*.

G. G. Mills for plaintiff.

H. E. Morphy for defendant.

In a mortgage suit for foreclosure, evidence was given before the Master, that before proceeding to sell under the power of sale, the plaintiff, the mortgagee, had taken the opinion of at least three reliable real estate men as to the value of the property who all agreed that it was worth a very much larger sum than the amount of the plaintiff's claim, and that it would likely sell for such larger sum. The defendant called no witnesses, but cross-examined the plaintiff's witnesses with a view of showing that the real estate market was very much depressed at the time of the attempted sale, and that the plaintiff had not reasonable ground for believing that the property would sell for a fair price.

[*29th March, 1884.*]

The Master *held*: that the property was offered for sale by the plaintiff *bona fide* and under the reasonable belief that it

would sell at a fair price, and at a price in excess of the amount of the plaintiff's claim. That the plaintiff had used due diligence in all matters connected with the sale, and that the costs having been thus properly incurred the plaintiff was now entitled to add them to his mortgage debt. See *Farrer* v. *Lacy, Hartland & Co.*, L. R. 25 Ch. Div. 636.

WOLFF ET AL v. BLACK.
McKINNON ET AL v. BLACK.

(IN CHAMBERS.)

Interpleader—Interest—Money in sheriff's hands.

Held, As between two execution creditors the first is entitled to interest on his judgment out of monies remaining with sheriff pending the trial of an interpleader issue.

In December, 1882, the plaintiffs Wolff *et al* recovered judgment against the defendant, Louisa Black, and placed execution in the sheriff's hands. Shortly afterwards the plaintiffs, McKinnon *et al*, also recovered judgment and placed execution in the same sheriff's hands. The sheriff seized defendant's goods under both executions, and McColl & Co. claimed same under a chattel mortgage. An interpleader issue was directed which was afterwards determined in favor of the execution creditors. Pending the trial of the interpleader, the goods were sold by consent of claimants, and the money remained in the sheriff's hands. After the interpleader issue was determined,

C. P. Wilson for plaintiffs, Wolff *et al* claimed interest on the amount of their judgment up to the time of payment to them out of the moneys in the sheriff's hands, there not being enough to pay both executions in full.

Perdue for McKinnon *et al*, contended that the money had been made from the judgment debtor at the time of sale, and that interest could only be charged on the judgment, as against the judgment debtor, up to that time. The fact of a claimant appearing against the moneys while the same were in *custodia legis* was no reason for compelling the judgment debtor, or those

who represented him as to the fund, to pay the first execution creditor interest on his debt while the litigation was going on.

[*9th April, 1884.*]

TAYLOR J.—*Held*, that Wolff *et al* were entitled to be paid interest upon their judgment out of the moneys in the sheriff's hands up to the time of payment out.

IMPERIAL BANK OF CANADA v. TAYLOR.

(IN CHAMBERS.)

Affidavit used on an application in Chambers—Subsequent examination of deponent.

Held, that where an affidavit had been used, and answered the purpose for which it had been filed, an order to examine the deponent upon it will not be granted.

An affidavit was filed in this suit by one J. R. Sutherland, a claimant, upon the return of an interpleader summons, and an issue was taken without an examination upon the affidavit. After issue had been approved and ready for trial in a suit in which the Imperial Bank were defendants, and J. R. Sutherland & Co. plaintiffs, the defendants, applied by summons in the interpleader suit for an order to examine J. R. Sutherland on his affidavit.

A. E. McPhillips for claimant showed cause. The affidavit having answered the purpose for which the same was brought into court, no order could be made for examination thereon. That if it were an affidavit filed within the Queen's Bench Act, Con. Stat. c. 31, s. 30, it was filed in the suit of *Imperial Bank* v. *Taylor*, and that the interpleader was an entirely distinct suit.

Aikins, Culver & Hamilton (*N. D. Beck*) for plaintiffs.

[*April, 1884.*]

WALLBRIDGE, C. J.—The practice in equity should be followed. There, where an affidavit filed, has answered the purpose for which it was filed, the deponent cannot be examined upon it. This case falls within that rule.

MUNROE v. O'NEIL. (1.)
MUNROE v. O'NEIL. (2.)

Suretyship—Retiring partner a surety for the continuing partner—Merger.

Defendants, W. & O'N., being in partnership, gave a promissory note and an I. O. U. to plaintiff for the amount of the firm's indebtedness. The partnership was dissolved, and an agreement entered into between the partners, that O'N. should pay all liabilities. Plaintiff being aware of this arrangement, took from O'N. his separate promissory note, extending the time for payment.

Held, (Dubuc, J. dissenting,) that W. had become a surety only for the debt, and that he had been released by the giving of time to O'N.

O'N. at the time of giving his separate note, executed a mortgage upon real estate, conditioned to be void upon payment of the note and of any renewal thereof.

Held, that the plaintiff's remedy upon the original note and indebtedness had not merged.

C. A. Durand and *J. Rowe* for plaintiffs.

J. S. Ewart for defendants.

[*4th February, 1884.*]

DUBUC, J. We are asked to set aside the verdict rendered in favor of plaintiff, and enter a verdict for defendant Winter, on three grounds: 1st, On the evidence. 2nd, Because on the dissolution of partnership, defendant O'Neil, became the principal debtor, and defendant Winter, surety only; and the renewal of the note and taking of a mortgage. 3rd, Because the original debt became merged in the mortgage given by O'Neil.

The defendant Winter, contends that, by the arrangement between O'Neil and the plaintiff, a few days after the dissolution of partnership, he understood that the plaintiff was to give up the securities—note and I. O. U. against the firm, and thereby to abandon his claim against him. He swears that he was present when the arrangement was made, that he was no party to it, and that he *understood* the said arrangement to be as claimed by him. He does not even say that he took part in the conversation, or that the plaintiff formally agreed to such arrangement;

he does not state what words of the plaintiff conveyed to him such understanding, but he *understood* so only. The plaintiff, on his part, swears positively that he never so agreed or consented, that he never promised to give up the firm's securities, and in fact, he never gave them up, and he says further, that he was not even asked to return the same. The presumption is, that if he had so agreed, as the conversation in question took place in defendant's store, in the same block where the plaintiff had his place of business, he would naturally have gone and got the said securities. Winter states that he suggested himself to O'Neil to make such arrangement, and he was anxious to see it carried out, so as to be released; from this, one might properly infer that Winter, having that in view, was naturally inclined to take his wishes for the reality, and was led to so understand. If such arrangement had been so formally agreed to, why did not he join in the conversation and express his satisfaction at such a result? So, when one party swears only as to what he *understood* of a transaction in which he took no part, though greatly interested in it, and the other states positively that the matter was not even mentioned, that he never intended to make such transaction, and when we have the fact of his retaining said securities, which, as he says, were not even asked from him, I find no difficulty in declaring on which side is the preponderance of evidence.

As to the question of one partner assigning his interest to his co-partner, and arranging with him to become only his surety for the firm debts, and afterwards claiming to be discharged from the liabilities of the firm by the creditors giving time to the other partner and taking a mortgage from him, the authorities differ pretty widely.

The principal case in which that doctrine was upheld, and which has been largely followed since, is *Oakley* v. *Pasheller*, 4 Cl. & Fin. 207, and 10 Bligh, N. R. 548. In that case, the reason for such doctrine is obvious. The time given extended over a period of several years, and in the meantime. one of the partners had died and had been replaced by another one taken into the firm. The justice and equity of the case required such decision. And one must admit that the doctrine laid down in that case was afterwards followed in many cases which had not the same features.

But in the more recent case of *Swire* v. *Redman*, L. R. 1 Q. B. Div. 536, a quite different principle has been held by the Court. It was there decided that Redman & Holt, two partners, could not change their position with regard to the plaintiff, without his assent, so as to deprive him of his right to treat them as his principal debtors. Redman was not discharged by time given to Holt by means of fresh acceptances.

And that case seems to have a good deal of similarity with the one now occupying our attention. Munroe took a new note from O'Neil, and also a mortgage, but he swears that he took both, not in lieu of the original note, but only as collateral securities, and besides, his stating in his evidence that he never agreed to abandon his claim against the two partners, or to release Winter as a principal debtor, the fact of his retaining the original securities, strongly corroborates his sworn assertion. And that was found at the trial as the correct aud true fact.

The doctrine laid down in *Swire* v. *Redman* was recently followed in the Court of Appeal of Ontario, in *Birkett* v. *McGuire* 7 Ont. App. R. 53. That case was reversed by the Supreme Court, but on quite another ground, on the ground of the appropriation of payments.

The principle adopted in *Oakley* v. *Pasheller*, that a partner, after leaving the firm should be discharged when time is given to the co-partner who continues to deal with the creditor, is certainly a sound, just, and reasonable one to be applied in particular circumstances, as, for instance, when it is proven that the giving of time to the co-partner and principal debtor has altered the position of the parties, that the principal debtor has in the meantime suffered losses, and has not the same means of paying the debt in question, and that the liability of the other partner as surety has been thereby increased. In such case, it is just and reasonable that the consequence of the creditor's action in giving time, should be borne by himself rather than by the surety. But none of these features appear in this case. Whether O'Neil's ability to pay the debt was lessened or not by the short time given to him, we do not know. There is nothing in the evidence to show that Winter's position was affected in the least by the time given to O'Neil.

So, I do not think that a joint debtor, who makes an arrangement with his co-debtor to become surety only, without the

creditor agreeing to it, should be discharged by the sole operation of the law, on a mere technical ground, and I am disposed to follow what appears to be, in my mind, the more equitable view taken in *Swire* v. *Redman* and *Birkett* v. *McGuire*.

The third ground taken in the argument is that of merger. A merger might take place by the consent of the parties, or by the operation of the law. As I have already stated, the evidence shows clearly, I think, that the parties never intended that the original debt should be merged into the mortgage. Was it merged by the operation of the law. I think it to be a well settled principle that, to operate the merger of a simple contract in a specialty, the specialty must be co-extensive with the simple contract debt, and between the same parties. *Boaler* v. *Mayor*, 19 C. B. N. S. 76, *Ansell* v. *Baker*, 15 Ad. & E. N. S. 20. In the latter case it was held that when one of two makers of a joint and several promissory note gives the holder a mortgage to secure the amount, with a covenant to pay it, the other maker is not thereby discharged, for the remedy on the specialty is not co-extensive with the remedy on the note. The same principle can be properly applied to this case. The note was a firm note on which O'Neil & Winter were jointly and severally liable, and the mortgage was given by O'Neil only.

I am sorry to be obliged to differ from my two brother judges, but on the above grounds, I am of opinion the verdict should stand.

TAYLOR, J.—Two actions have been brought by the same plaintiffs against the same defendants. In the one the plaintiffs declare upon a promissory note, made in their favor by the defendants, then trading as co-partners under the firm name of Winter & O'Neil. In the other case the plaintiffs declare upon an I. O. U., given them by the same firm.

The pleas originally filed were, 1, Did not make. 2, Never indebted. 3, Payment before action. 4, Plaintiffs' claim satisfied by delivering a note of the defendant, G. R. O'Neil, and a mortgage made by him. 5, That plaintiffs accepted separate liability of O'Neil in discharge of joint liability. At the trial two pleas were added, by leave of the judge, the one of merger, and the other by the defendant Winter, on equitable grounds, that on the dissolution of partnership of Winter & O'Neil it was

agreed between them that O'Neil should pay the liabilities of the firm, of which the plaintiffs had notice, and that they, with such notice, gave time to O'Neil, whereby Winter was discharged from his liability.

The plaintiffs had a verdict in both cases. In the one for $325.15, and in the other for $342.14.

In each case the defendants obtained a rule calling on the plaintiffs to show cause why the verdict should not be set aside and a verdict entered for the defendants, on the grounds, among others, that the verdict was against law and evidence, and the weight of evidence, and that the various pleas pleaded by the defendants were sustained by the evidence, and why, in any event, the verdict should not be reduced.

The origin of the dealing between the plaintiffs and defendants was a loan of $675, for which an I. O. U. was taken, then subsequently a note was given for $300, part of the amount. The total indebtedness was $675, of which $75 has been repaid. Subsequently the defendants dissolved partnership, O'Neil retaining and carrying on the business. On that dissolution it was agreed between them that O'Neil should assume and pay off the liabilities. The plaintiffs, after the dissolution, took from O'Neil his own promissory note for $600, and a mortgage for the same amount.

The plaintiffs contend that the defendants were both originally principal debtors, and equally liable for the debt in question; that they have never agreed to any change in the relationship of the partners, so that even if there was a giving of time to one of them, that could not operate as a discharge of the other. They rely strongly on the cases of *Swire* v. *Redman*, L. R. 1 Q. B. Div. 536, *Carruthers* v. *Ardagh*, 20 Gr. 579, and *Birkett* v. *McGuire*, 7 Ont App. R. 53.

The latter case has now been reversed by a majority of the judges in the Supreme Court. The case is not yet reported, but I have had an opportunity of reading the judgments delivered. From these it appears that the reversal went entirely upon the ground of the appropriation of payments, Mr. Justice Gwynne saying, "There is no occasion, as it appears to me, for Hutton to have recourse by way of defence to the law applicable to the case of principal and surety, which was insisted upon. He is

clearly, as it appears to me, entitled to a verdict upon the grounds, that by the course of dealing of the plaintiff with McGuire subsequently to the dissolution, it must be held as a matter of fact, as well as of law, from the course of dealing, that the paper of the firm of Hutton & McGuire has been fully paid. The learned Chief Justice of the Court, who was one of the minority of the judges, it is true expressed the opinion that Hutton did not stand in the position of a surety for McGuire to the plaintiff, but the Court has not so decided.

The defendant Winter's contention is, that although he and O'Neil were originally joint debtors, and equally liable as principals, yet upon the arrangement being made at the dissolution of the partnership, that O'Neil should discharge the liabilities of the firm, as between O'Neil and himself, the former became the principal debtor and he a mere surety. He argues that no positive agreement to this change of relationship on the part of the plaintiffs was necessary, but that as soon as they had notice of the change in his position, they were bound to see to, and respect his rights and interests as such surety.

The case cited in support of this proposition is *Oakley* v. *Pasheller*, 4 Cl. & Fin. 207, reported also in 10 Bligh, N. R. 548.

That case was discussed and remarked upon in *Swire* v. *Redman*, and relied upon as an authority for the plaintiffs. The judgment in the latter case was given by Mr. Justice Blackburn, undoubtedly an eminent judge. The effect of his judgment seems to be, that when two persons are originally principal debtors, they cannot, by any arrangement between themselves, unassented to by the creditor, change their position, so that one becomes only a surety, and the creditor be deprived of his right to treat both as principal debtors. To effect such a change, so as to bind the creditor, some assent to the change, or some agreement on his part would be necessary.

Oakley v. *Pasheller* was distinguished as being a case in which the creditor had been a party to the agreement, by which one of the debtors became merely a surety, and for a good consideration agreed to the change.

Mr. Lindley in his work on Partnership, speaking of *Oakley* v. *Pasheller*, page 448, (4th Ed.) says: "The true *ratio decidendi* was, that the creditor had accepted the two as his sole debtors."

Birkett v. *McGuire*, 7 Ont. App. R. 53, was a case in which opinions in favor of the plaintiffs' contention here were delivered by Burton, J. A., and Hagarty, C. J., and concurred in by Morrison, J. A. A contrary opinion was delivered by Patterson, J. A.

Mr. Justice Burton takes the same view of *Oakley* v. *Pasheller* as was taken in *Swire* v. *Redman*. He says: "It is manifest that the case in the House of Lords proceeded upon the grounds there suggested." In the course of his judgment he remarks, "No reply was made by counsel to the inquiry of Lord Lyndhurst during the argument, "Can you cite any authority to the effect, that two original debtors can, by an arrangement between themselves, convert one into a surety only for the principal debtor?" As reported in Bligh the query of Lord Lyndhurst is thus stated: "How will an arrangement between debtors affect a creditor, unless he adopts it? Can the parties alter their situation, with respect to the creditor, without his assent? Can you cite any authority to show that joint debtors, by their own act, can alter their situation after the contract has been concluded?" Counsel did not indeed cite any authority, but as I read the report, he proceeded to meet his Lordship's objections: "If the creditor in effect has notice that one of his debtors is the principal, and the other, by the effect of a transaction between them, is placed in the situation of a surety, or made liable only on the default of the principal, his conduct towards the parties so situated ought to be regarded in equity. He ought not to deal with one of the parties so as to affect the other."

Now, notwithstanding the opinion expressed in *Swire* v. *Redman*, by Mr. Justice Blackburn, and in *Birkett* v. *McGuire* by Mr. Justice Burton, that *Oakley* v. *Pasheller* was decided on the ground of an assent or agreement to the change, on the part of the creditor, there is ample authority that the proposition stated by counsel was accepted by the Court as correct, and that the case was disposed of on that ground.

In *Oakford* v. *European and American Steam Shipping Co.*, 1 Hem. & M. 190, Vice Chancellor Page Wood said, "That was a strong decision and it went upon the footing that the creditor having notice of the agreement was bound to regard it."

In *Wilson* v. *Lloyd*, L. R. 16 Eq. 60, Wilson and Lloyd, two partners, executed a bond to Harvey. They then took one Chatteris into their firm as a partner. A few months after, the partnership was dissolved by Wilson's retirement, Lloyd purchasing his interest, taking upon himself the payment of all partnership debts and liabilities, and indemnifying Wilson against these. Harvey had notice of the deed of dissolution containing these provisions. Two years after, Lloyd and Chatteris failed in business, and made an arrangement with their creditors, under the Bankruptcy Act. Under this arrangement, Harvey, with the other creditors, accepted a composition of 15s. 3d. in the pound, payable by instalments extending over two years. V. C. Bacon found that he accepted this composition, with knowledge that as between themselves Wilson and Lloyd had been constituted principal and surety. He said, with full knowledge of his situation, he entered into a new engagement, "which provides for the payment of less than the whole debt, and gives time for payment of that diminished amount. Can this be done to the prejudice of the plaintiff with this knowledge?" and he added, "If *Oakley* v. *Pasheller* is right, as I have no reason to doubt, it entirely covers this case."

The Oriental Financial Corporation v. *Overend, Gurney & Co.*, L. R. 7 Ch. App. 152, decided, that where bills were taken from parties, the creditors not being aware that some were principals, and others sureties only, knowledge acquired subsequently, would fix upon the creditors the obligation of seeing to the interests of the sureties. On the appeal in this case, L. R. 7 H. L. 360, Lord Cairns said, "After the case of *Oakley* v. *Pasheller*, it is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor, without the consent and knowledge of the surety, that under those circumstances, the rule as to the discharge of the snrety does not apply."

Mr. Justice Patterson, who dissented from the judgment of the other members of the Court of Appeal in *Birkett* v. *McGuire*, (at page 95), expressed the opinion, that there is no reason for treating the time, at which the relation of principal and surety arises, as a necessary factor in the problem of the position of the creditor, who, having dealt with his debtor as a principal, or

with two as joint principals, finds himself afterwards compelled to accord to the supposed principal the right of a surety. "In my view," he says, "the result to the creditor is the same, whether the status of surety existed from the first, or was created at a later period."

I do not think the decision in *Bailey* v. *Griffith*, 40 U. C. Q. B. 418, is such a strong authority in favor of the defendants, for there the learned judge who tried the case, found that there was not only knowledge on the part of the plaintiffs of the change of relationship, but assent thereto. And there is no doubt that in *Birkett* v. *McGuire*, Mr. Justice Patterson came to the conclusion that the same fact existed in that case also. But C. J. Harrison when giving judgment in *Bailey* v. *Griffith*, expressed it as his opinion, (at page 433), "That the weight of authority is unquestionably in favor of the position that, after knowledge of the creation of the relation of principal and surety, even between joint debtors, the creditor without being a party to the change, and without assenting to it, if having knowledge of it, is bound not to act to the prejudice of the equitable rights of the surety."

On the original argument of *Birkett* v. *McGuire*, 31 U. C. C. P., at p. 451, Mr. Justice Cameron, before whom the case was heard, and who decided it in accordance with the view afterwards taken by Patterson, J. A., in the Court of Appeal, said, he was more inclined to follow the decision in *Bailey* v. *Griffith*, than that in *Swire* v. *Redman*.

Jones v. *Dunbar*, 32 U. C. C. P. 136, would seem to limit the creditor's obligation and render consent on his part necessary to affect him. The head note in that case is "Held also, that the fact of two co-debtors changing their position, so as to make one of them, between themselves, a surety, would not affect the creditor without his consent." But it is singular that, in that case, not one of the authorities bearing on this question was cited in the course of the argument, or in the judgment, and the point was never referred to by counsel. The only reference to it is in the judgment, delivered by C. J. Wilson, "Then again, can Higginbotham be called a surety? He was a principal debtor with McLagan when the money was lent to the two as partners, and he cannot change his relation towards the creditor as a principal debtor by turning himself into a surety without his creditor's

consent. As between McLagan and himself he may be indemnified by McLagan, but what has the plaintiff to do with that?"

The case was argued entirely upon, and the rest of the judgment dealt with, the question whether the creditor having failed to come in and prove in a chancery foreclosure suit, on a second mortgage which he held as a security for the debt, the alleged surety was discharged.

The extracts from the evidence which appear in the report, show, that he could not, under the circumstances of the case, successfully claim to be relieved. This was found by the Court, for the learned Chief Justice says, in a passage subsequent to that already quoted, "He is plainly liable to the plaintiff, even if he is to have the rights of a surety."

This case was not referred to in *Birkett* v. *McGuire*, although decided three months before judgment in the latter case was delivered, and I do not think it is entitled to rank as an authority upon the subject.

As to *Carruthers* v. *Ardagh*, 20 Gr. 579, several things may be said. Like *Birkett* v. *McGuire*, it is not an unanimous judgment. The claim of the creditors Peckham and Hoag was in the first instance brought in before the master, under a reference to take the accounts and wind up the affairs of the partnership of Carruthers & Ardagh. The claim was rejected by the master, and on appeal, his finding was affirmed by V. C. Blake. On a rehearing of the Vice Chancellor's order, the Chancellor and V. C. Strong, agreed in reversing it, but V. C. Blake still held to his original judgment. Then, the note in question there, was taken from the one partner before the dissolution of the partnership, and in some former instances, notes of Carruthers alone, who managed the financial part of the business, had been given the same creditors for partnership debts. The course adopted in signing notes for the firm, seems to have been, that each partner, both being illiterate men, signed his own name, and on the occasion of the taking of the note in question, the creditor for two days was looking for Ardagh, but without success, to get his name on the note.

That where a creditor by some binding contract gives time to the principal debtor, however short that time may be, and whether the surety is thereby prejudiced or not, he is discharged,

is now well settled. For a time this was protested against by common law judges, as in *Greenough* v. *McClelland*, 2 E. & E. 424; *Petty* v. *Cook*, L. R. 6 Q. B. 794; and *Polak* v. *Everitt*, L. R. 1 Q. B. Div. 672; but the common law courts have now accepted it in its integrity, see *Croydon Gas Co.* v. *Dickinson*, L. R. 1 C. P. Div. 707; L. R. 2 C. P. Div. 46; *Darling* v. *McLean*, 20 U. C. Q. B. 372; *Mulholland* v. *Broomfield*, 32 U. C. Q. B. 369; *Titus* v. *Durkee*, 12 U. C. C. P. 367; *Grieve* v. *Smith*, 23 U. C. Q. B. 23; although in *Swire* v. *Redman* the Court of Queen's Bench spoke of this right of the surety as something of almost no importance.

If the views expressed and the conclusions drawn from the authorities are correct, the only questions remaining, so far as the defendant Winter is concerned, are: Was such an agreement come to as that between O'Neil and himself, he became a surety merely? and, Had the plaintiffs, at the time the separate note of O'Neil was taken, knowledge of such an agreement?

The only witnesses examined at the trial were the plaintiff Munroe, and the defendant Winter. The agreement that O'Neil should assume the liabilities of the firm, and indemnify Winter against them is proved by the deed of dissolution, and by the published notice of the dissolution, put in and filed at the trial. The defendant swears to an interview at which he, O'Neil and Munroe were present, when some conversation took place about the indebtedness, and he says Munroe agreed to look up the original note and I. O. U., and give them up. This is denied by Munroe, but he admits that O'Neil told him he was getting the whole business, and that Winter was going out of it, and also that before he agreed to give O'Neil further time, he had seen in the newspapers notice of the dissolution, and that O'Neil was assuming the liabilities of the firm.

Munroe does not give a very satisfactory account of how the plaintiffs came to take the note and mortgage from O'Neil. The original note was not then due and the new note postponed the time for payment, so that there was undoubtedly such a giving of time as would discharge a surety.

That the original note and I. O. U. were retained, is no doubt a circumstance in favor of the plaintiffs, but it is to be borne in mind that O'Neil promised Winter to get them up. That he neglected to do so, or was careless in the matter is not so surpris-

ing. He was liable for the amount of them, whether the original documents were given up or not.

After all, the retaining the original note and I. O. U. is only a circumstance, and not conclusive in favor of the plaintiffs. The same thing occurred in *Bailey* v. *Griffith*.

The note taken from O'Neil is dated the 19th of February, 1883, and he gave the plaintiffs a mortgage bearing the same date, upon a parcel of land in the City of Brandon. The mortgage recites as follows:—"Whereas the said mortgagor is indebted to the said mortgagees, in the sum of $600, and has given to the said mortgagees his promissory note, bearing even date herewith, for the said amount, payable two months after the date thereof, and whereas the said mortgagor hath agreed to secure to the said mortgagees the payment of the said note, or any renewal thereof," and the proviso is expressed, "this mortgage to be void on payment of the said promissory note, or any renewal thereof, and all costs, charges, damages and expenses that may lawfully be incurred in respect of the same."

The defendant Winter contends, on the authority of *Loomis* v. *Ballard*, 7 U. C. Q. B. 366, and *McLeod* v. *McKay*, 20 U. C. Q. B. 258, that, even if he is not discharged from liability by the taking the note of O'Neil, and giving of time thereby, he is at all events discharged in consequence of the taking of this mortgage. For O'Neil it is contended, that the simple contract debt became merged in the mortgage, so that he cannot be sued, as he is in this action, upon the note.

I do not think that in this case there is any merger of the simple contract debt. The mortgage is expressed to be given to secure the payment of the note, and of any renewals thereof. *The Gore Bank* v. *McWhirter*, 18 U. C. C. P. 293, is a direct authority that a mortgage so expressed, is collateral only, and not a merger. See also *Gore Bank* v. *Eaton*, 27 U. C. Q. B. 332, in which the same point was decided.

In my opinion, the verdict in each case should stand against the defendant O'Neil, but that in each case a verdict should be entered for the defendant Winter.

WALLBRIDGE, C. J.—I concur in the judgment of my brother Taylor.

ROBINSON v. SCURRY.

Action on replevin bond—Impossibility of fulfilment of condition.

After the determination of a replevin action, brought by S. against R., in which R. was successful. R. distrained the goods in question, for rent due by S., and then sued S. upon the replevin bond, for non-delivery of the goods.

Held, that the defendant could not shield himself on the ground of the impossibility of delivering to the plaintiff that which the plaintiff had himself taken.

A. Howden for plaintiff.

E. C. Goulding for defendants.

[*2nd June, 1884.*]

TAYLOR, J. delivered the judgment of the Court:—

The plaintiff sues upon a replevin bond, given by H. T. Scurry the principal, and W. H. McLean and D. S. Campbell as sureties, to the sheriff of the Eastern Judicial District, and by him assigned to the plaintiff, pursuant to the statute. The pleas are, first, *non est factum*, and second, that the defendants have paid the plaintiff all legal damages he sustained by reason of the issuing of the writ of replevin.

The defence which the defendants seek to make out by the evidence is, that although the return of the goods was adjudged, the plaintiff has got them in his possession, and that it was by the plaintiff's act that they were prevented from returning the goods, according to the condition of the bond. At the trial before the Chief Justice, a verdict was entered for the defendants, against which the plaintiff moves, pursuant to leave reserved, on the ground that the verdict was against law and the weight of evidence, and contrary to the evidence.

From the evidence it appears that the action, in connection with which the bond was, on the 12th of October, 1882, given, came on for trial on the 30th of April, 1883, when a verdict was entered for the defendant. On the same day, the 30th of April, the plaintiff had the goods in question seized under a second distress warrant, for seven month's rent, accrued subsequent to

the period for which the rent was claimed under the first distress warrant. Upon this second seizure, the goods were sold, and the defendants now say they are excused from performing the condition of this bond, because it is the act of the plaintiff which has prevented them from performing it.

The defence thus set up, seems to me, no valid answer to the plaintiff's claim in this action. The agreement into which the defendants have entered, is an unconditional one, and the performance of it is not impossible in its own nature, but impossible, in fact, by reason of the particular circumstances. Now, Mr. Pollock, in his book on contracts, says, p. 376: "It is a rule admitted by all the authorities, and supported by positive decisions, that impossibility of this kind is no excuse for the failure to perform an unconditional contract, whither it exists at the date of the contract, or arises from events which happen afterwards." In support of this, the case of *Atkinson* v. *Ritchie*, 10 East, 530, is cited. It is true there are some exceptions, as when the contract is for personal services, the performance of which depends on the life and health of the party promising, or where the performance of the contract necessarily depends on the existence of some specific thing. See *Hall* v. *Wright*, E. B. & E., at page 793; *Taylor* v *Caldwell*, 3 B. & S. 826.

Boswell v. *Sutherland*, 8 Ont. App. R. 233, was a case where the plaintiff having lent P. a sum of money, for securing the repayment of which, a chattel mortgage was given, the defendant executed a bond, that in default of payment, the goods should be forthcoming for the purpose of seizure and sale, and in an action against the defendant, he pleaded that before the day for payment arrived, the goods had been destroyed by fire, without any default on his part. This plea was on demurrer held bad, because it did not negative default on the part of P. In that case the judges of the Court of Appeal, in their judgment, discuss *Taylor* v. *Caldwell*, and other similar cases.

When reviewing these, the Chief Justice of Ontario said: "The tendency of the more recent authorities, I take to be, to hold a contracting party excused by impossibility of performance occurring after the contract, through no fault of his, and that in cases not falling strictly within the principle of the subject of the contract, ceasing to exist." He there limits the relaxation of

the rule to cases occurring through no fault of the contracting party. It certainly cannot be extended further. Where the performance becomes impossible, by the default of the contractor, there can be no doubt of his liability.

In the present case, I cannot come to any other conclusion than, that the impossibility of performing this contract arose from the fault of the defendants. The plaintiff, it is true, got the goods, but he did not get them in fulfilment of the condition of this bond, nor did he take them without any right, and so prevent the defendants from returning them. Further rent accrued in respect of the premises in which they were, and for the satisfaction of that they were taken. The duty of the defendants was to return the goods, not to return them subject to any obligations they had imposed, or suffered to be imposed on them. Had they stored the goods in a warehouse, or removed them to some other building, would it have been held a compliance with their bond, had they said to the plaintiff, there are the goods, you can get them by paying seven month's warehousing charges, or seven month's rent of the premises where we have had them; and what difference can it make that the plaintiff happens, in this case, to be the person to whom these charges are owing. None that I can see.

In my judgment, the verdict for the defendants should be set aside, and a verdict entered for the plaintiff, for $133.33, pursuant to the leave reserved.

BATEMAN v. MERCHANTS BANK OF CANADA.

I. O. U.—Assignment.—Interpleader.

An I. O. U. was made by McD. & R. in favor of McL., and assigned by him to the plaintiff. Subsequently McD. & R. were served with a garnishee order, in a suit of the present defendants against McL. attaching all monies due by them to A. D. McL.

McD. & R. interpleaded.

Held, upon the evidence, that the assignment was only a contrivance and not a real transaction, and was void as against the defendants.

A. C. Killam, Q, C., for plaintiff.

J. B. McArthur, Q. C., for defendants.

[*2nd June, 1884.*]

DUBUC, J., delivered the judgment of the Court:—

This is an interpleader issue to determine the validity of the assignment of an I. O. U.

The I. O. U. was made by McDonald & Rutley, in favor of A. D. McLean, dated the 15th of July, 1883. The plaintiff says that it was assigned to him by McLean on the 18th of July, and that he paid $275 for it; but the regular assignment in writing was made on the 31st of October.

On the 5th of November McDonald & Rutley were served with a writ of summons for the amount of the I. O. U., at the suit of the plaintiff.

On the 13th of November the same McDonald & Rutley were served with a garnishee order, in the suit of The Merchants Bank, the defendants, against A. D. McLean, attaching all moneys due by them to McLean.

McDonald & Rutley interpleaded under the provisions of the Statute, so as to have it determined to whom they should pay the amount of the I. O. U.

The evidence shows, that at a sheriff's sale held on the 18th of July, the plaintiff bought out McLean's goods. It was on the evening of the same day that, according to his own

statement, the I. O. U. was assigned to him by McLean. The plaintiff afterwards employed McLean to keep the store, and the business went on under the same name of A. D. McLean & Co. Both McDonald and Rutley swear that Bateman mentioned to them, and asked them to give a fresh I. O. U. in his own name and take back the one given to McLean; that he told them McLean was in a hole and he wanted to help him out, it being no benefit to him; and that he had receipted the account in full in the books, showing that there was no debt against them; that he would give them time and they would pay it whenever they were able. A similar conversation took place in presence of McLean. Bateman denies that, saying he offered to return the I. O. U., but in order to get a promissory note, so as to get it discounted. A verdict was found for defendants.

On the argument of the rule to set the verdict aside, counsel for the plaintiff contended that the issue should be found for the plaintiff, as the issue was to try whether McLean had assigned and transferred to Bateman, a certain indebtedness of McDonald & Rutley to him, and that was proven.

At the trial it was shown that McLean had executed a paper, purporting to be an assignment of the indebtedness in question. The paper was produced, and was found to be an assignment in regular form. But was there a good *bona fide* and valid assignment? The real meaning of the interpleader issue is, not whether there was a certain paper purporting to be an assignment, but whether there was a real assignment.

The circumstances surrounding the whole matter tend to show that it was only a contrivance for the purpose of enabling Bateman to collect the amount for McLean, neither party intending that the property or real interest in the said chose in action should pass to Bateman; so it was not a *bona fide* transaction. But supposing that both parties intended that it should be a real assignment, it would still be a contrivance, to hinder delay or defeat the creditors of McLean, and would as such come within the 96th section of chapter 37 of the Con. Stats. of Manitoba, and be null and void against the creditors of the assignor, there being no doubt that Bateman knew at the time that McLean was in insolvent circumstances.

The other point taken in favor of the plaintiff's contention was, that the evidence does not show that the Merchants Bank are creditors of McLean. But it was not necessary to prove that on this issue. The interpleader issue was ordered, because the judge who ordered it was satisfied by the evidence then adduced before him, or by the admission of the parties, that there was a real debt due by McLean to the Merchants Bank; the fact being either proven, admitted, or taken for granted, and formed no part of the issue to be determined herein. The record was prepared by the plaintiff's attorney, and referred only to the validity of the assignment of the indebtedness in question, showing that it was not contemplated at the time, that the Merchants Bank should prove their claim at the trial of this issue. The issue having been prepared by the plaintiff's attorney, and the defendants having accepted it as it was, they were not bound to go beyond the issue and prove *de novo* that they were creditors of McLean.

As to the real merit of the case, Bateman swears, as stated before, that the I. O. U. was assigned to him on the 18th of July, and that he gave a good consideration for it; but the weight of evidence, and circumstances connected with the whole transaction, are against his contentions, beyond any reasonable doubt.

The verdict should stand, and the rule be discharged with costs.

RE GEORGE A. STANBRO.

Extradition.—Evidence of innocence.—Proof of handwriting.—Admissibility of confession.

Held, 1. That evidence to disprove the crime charged is inadmissible.

2. Admissibility and strength of evidence as to handwriting discussed.

3. Admissibility of confessions discussed.

S. Blanchard and *E. V. Bodwell* for the prosecution.

N. F. Hagel for Stanbro.

[*4th August, 1884.*]

TAYLOR, J.—In the early part of the month of July last the prisoner was, as he had for some time before been, the agent of the Northern Pacific Express Company at Hawley, Clay County, in the State of Minnesota, one of the United States of America. On the 10th of July he left that place and came to Winnipeg, and on the 19th a warrant for his arrest, upon a charge of forgery said to have been committed at Hawley, was issued by a magistrate in the State of Minnesota. He is now held in custody here by virtue of a warrant issued by me on the 23rd of July, under the provisions of the Extradition Act, 1877.

The warrant issued in the State of Minnesota has been properly proved before me, and oral evidence has been gone into at considerable length for the purpose of establishing that he is chargeable with the offence imputed to him. There has been no attempt made to show, on the part of the prisoner, that the offence charged is not one which falls within the terms of the Treaty between the United States and England.

Evidence was, however, offered on his behalf to disprove that he had committed the particular act of forgery with which he is charged. This evidence I declined to receive when it was offered, following in so doing the construction which I conceived to have been put upon the provisions of the Statute in that behalf by the Court of Appeal in Ontario, in *Re Phipps*, 8 Ont. App. R. 77.

The opinion I then expressed has since been strengthened by authorities which I have taken occasion to consult. Thus, Mr.

Clark, a recent English writer on the subject of Extradition, says, (at p. 188), "Supposing unexceptionable evidence to be produced as to the facts, it cannot be the duty of the magistrate to receive evidence in contradiction on the part of the prisoner. However strong the contradiction might be, there would be a conflict of evidence on a matter of fact sufficient to go to a jury, and in that case the magistrate has no option but to commit."

The same point has on several occasions been raised before the courts in Ontario. It is true that in *Re Burley*, 1 C. L. J. N. S. 20, it was said to be in the discretion of the magistrate investigating into a charge under the treaty against a person accused of one of the crimes mentioned in it, to receive evidence for the defence, and in *Reg.* v. *Reno*, 4 Ont. Pr. R. 281, that evidence offered to a magistrate by a prisoner on such an examination, by way of answer to a strong *prima facie* case, may perhaps properly be taken. But what object can there be in going into evidence of that nature when the magistrate cannot act upon it, or indeed take any notice of it in arriving at a decision upon the case? Thus in *Re Burley*, it was held that the magistrate cannot weigh conflicting evidence to try whether the prisoner is guilty of the crime charged. And in *Reg.* v. *Reno*, while it was held that such evidence might perhaps properly be taken, it was added that it would not justify the magistrate in discharging the prisoner; as all he has to do is to determine whether the evidence of criminality would, according to the laws of this country, justify the apprehension and committal for trial of the accused if the crime had been committed here.

In dealing with this point, the language used by Draper, C. J., in the case last cited was: "If there is not sufficient evidence of criminality the magistrate ought not to commit; if there is, I think he ought, notwithstanding there is evidence sufficient, if true, to sustain an *alibi* . . . . . It is very easy to point out the danger that contrasting conflicting evidence, or considering the credibility of witnesses, and similar matters, might lead to. It would for many purposes be assuming the functions of a jury, and trying the whole merits of a case upon an enquiry instituted only to ascertain if there is such evidence of criminality as would justify the apprehension and committal—not the conviction—of the accused. The treaty would be waste paper if a magistrate appointed to conduct only a preliminary investigation, should,

after hearing sufficient evidence of criminality, take upon himself to decide that the incriminating evidence was worthless, or was displaced because witnesses on the prisoner's behalf swore to a state of facts inconsistent with the incriminating evidence,—for example, as in the present case swearing to an *alibi*. If the magistrate discharges the accused because he thinks these witnesses are entitled to more credit than those for the prosecution, he goes not only beyond the letter but also, as I think, beyond the true meaning of the Act, which only confers authority on him to enquire whether the evidence of criminality is, according to the laws in force here, sufficient to sustain the charge. If he discharges because the evidence *pro* and *con* is equally strong, and he cannot tell which side is telling the truth, he is, in my humble judgment, equally in error, because he is assuming the functions of the tribunal to which belongs the trial of the prisoner's guilt, instead of limiting himself to the question directed by the Statute."

So in *Reg.* v. *Gould*, 20 U. C. C. P. 154, Mr. Justice Gwynne said, "It cannot be denied that the evidence for the prosecution presents a sufficient *prima facie* case to go to a jury, and if uncontradicted to convict the prisoner, if the jury should be satisfied there was an intent to defraud; and it is sufficient for the present purpose to say that, inasmuch as a *prima facie* case was made out, sufficient to warrant the commitment of the prisoner to stand his trial upon the charge, a jury is the only constitutional tribunal which can determine whether the evidence offered to displace the impression which the *prima facie* case is calculated to make, does or does not satisfactorily displace it."

In the same case, Hagarty, C. J., concluded his judgment with these words:—"I have neither the right nor the desire to put my opinion of the weight or the cogency of the evidence in the place of that of the jury who may be selected to try the prisoner."

In *Re Caldwell* 5 Ont. Pr. R. 217, the present Chief Justice Wilson said, "It appears to me that what the judicial officer in this country has to do, is to determine the *prima facie* criminality of the accused, so as to decide whether the evidence is sufficient to sustain the charge or not."

In the course of a correspondence between the English and French Governments, in 1866, respecting the treaty between

them, the opinion appearing to prevail in France that the English magistrate actually tried the prisoner, the English government said: "The prisoner brought before a magistrate on an extradition warrant would be entitled, indeed, to deny his identity with the person named in the warrant, and would further be entitled to have read in his presence the depositions on which he was charged; but he would not be permitted to controvert the truth of the depositions or to produce before the magistrate exculpatory evidence."

The circumstances and facts which in the present case the prosecution seek to prove, for the purpose of making out the guilt of the prisoner, are the following:—That the prisoner was the agent at Hawley of the Northern Pacific Express Company, and as such, on the 5th or 6th of July, received a money package addressed to one Hulgeson, or Halgeson, and to be delivered to him from the Hawley station; that the money contained in this package was appropriated by the prisoner to his own use; and that in the in-trip and delivery book of the company for Hawley, in his possession as agent, he signed, under the column intended for the signature of the consignee receiving such a package, a signature as that of Hulgeson, with the date of July 7th, the intention being that the book should show that on that date the consignee of this package had received it. The package in question had not been delivered to the Northern Pacific Express Company directly by the consignor, but had been delivered by him to the American Express Co., which carried it from its original starting point to St. Paul, where it was handed over to the Northern Pacific Express Company, to be carried on from that point to its final destination. The way bill which came with the parcel to Hawley has on it, in the column showing the consignor, "Amx," a contraction put there to show that it came to the Northern Pacific Express Company from the American Express Company. In the in-trip or delivery book, under the column on the left hand page of the book, which should show the names of the consignees to whom such packages come addressed, the name of the consignee of this package is entered "Anex," or "Amx" Helgason, it is not easy to say which.

The signature purporting to be that of the person to whom the package was delivered, is "Anex," or "Amx" Hagleson.

The theory of the prosecution is, that the prisoner, who was about this time drinking heavily, when making the entry of the package in his book, mistook the "Amx," referring to the American Express Company, for the christian name of the consignee, and so entered it. The package was, as appears from the way bill, addressed to H. Hulgeson.

That the prisoner was the agent at Hawley of the Express Company is not disputed on his behalf, and there is no doubt that the package in question did come to his hands as such agent. The evidence that the name purporting to be that of the consignee, signed in the book as having received it, was so signed by him, is, first, that of the consignee, who says he did not sign it, and that of Edward James Cattell, the private secretary to the general superintendent of the Express Company. He has, he says, never seen the prisoner write, but it has been his duty to look over and examine statements of accounts sent in by the prisoner from his agency and which purported to come from him as agent. These statements are in the first instance sent to the auditor of the company and by him sent to the office of the general superintendent, in whose absence the witness always looks over them. The prisoner had, he says, no assistant at Hawley. The qualification which this witness professes to have to compare and judge of handwriting was acquired, he says, while he occupied the position of assistant teller in the Corn Exchange National Bank of Philadelphia. While there he gave, he says, special attention to handwriting, and it there came within his duty to criticise handwriting for the purpose of detecting counterfeiting or forgery. He says, after having examined the entries and signatures in the book, that in his opinion the signature is in the handwriting of the prisoner. The question of what is competent evidence in the case of doubtful or disputed handwriting, was very freely discussed in the case of *Doe dem Mudd* v. *Suckermore*, 5 Ad. & E. 703, and there Lord Denman, when saying that the witness must be conversant with handwriting to be entitled to any degree of authority, names, among other classes entitled to be so considered, a banker, as one. In that case the judges were divided in opinion, but some of them seemed to consider witnesses competent to speak of a particular person's handwriting although their opportunities of becoming acquainted with it were very limited. Here the witness

has had occasion, as already mentioned, to examine statements prepared by the prisoner in the discharge of his duty, and that seems the only source from which his knowledge has been derived. In one case, where it was necessary to prove the handwriting of an attesting witness, Park, J., received the evidence of the defendant's attorney, who said he believed he knew the handwriting, for he had seen the same signature to an affidavit used by the plaintiff's counsel at an earlier stage of the cause.—*Smith* v. *Sainsbury*, 5 C. & P. 196. The weight to be attached to the evidence must in every case depend on the opportunities the witness has had of acquiring a knowledge of the writing. In the present case the evidence of this witness cannot be wholly rejected, but it is by no means strong, and standing alone would not in my judgment be sufficient.

The prosecution, however, rely upon certain statements, admissions, or confessions, made by the prisoner himself. The reception of these is objected to on the ground that they were not freely and voluntarily made, but obtained when the prisoner was in custody and after inducements had been held out to him, or at least after such a course of conduct and acquiescence in proposals made by him as might and did naturally raise in his mind the hope of lenient treatment and even of restoration to the employment of the company.

Some of the cases, as to the admissibility of confessions, do not when looked at seem quite consistent. This in all probability arises from the fact that in each case the confession proposed to be given in evidence has to be dealt with in the light of all the circumstances which surround it. As is said by Mr. Taylor, in his work on Evidence, at p. 731, in receiving or rejecting it much must depend "on the age, experience, intelligence and character of the prisoner, and on the circumstances under which the confession was made." It is impossible to import into the printed report of a case all the surrounding circumstances which may, in such a matter, have weighed with the judge.

Several cases were cited by the counsel for the prisoner upon this point. In one of these, *Reg.* v. *Fennell*, L. R. 7 Q. B. Div. 149, the confession was excluded on the ground of an inducement held out, the prosecutor having said to the prisoner: "The inspector tells me you have been making housebreaking implements; if that is so, you had better tell the truth, it may

be better for you." In another case, *Reg.* v. *Mansfield*, 14 Cox, 639, the prisoner, a girl, who was in custody on a charge of arson, said to her mistress, "If you forgive me I will tell you the truth," and her mistress said, "Anne, did you do it?" Upon which the girl made a statement. This was rejected by Williams, J., who said, "The true principle which renders the confession of a prisoner not receivable in evidence seems to be, that if the confession is made either under fear or caused by a threat, or in the hope of ultimate forgiveness or gain, held out by a person in authority, that then it is not admissible. In the present instance the prisoner, while in the custody of a policeman, makes this appeal to her mistress who is standing by. If her mistress did not mean to forgive her the girl was under a complete delusion, for by her silence the mistress acquiesced in the prisoner's appeal for forgiveness. The mistress practically invites the prisoner to continue her statement, and she is consequently induced to do so by the expectation that she will be forgiven. It is not because the law is afraid of having truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth."

In *Reg.* v. *Fennell*, already referred to, Lord Coleridge quotes with approval the rule laid down in *Russell on Crimes*, 5th ed., vol. 3, at p. 441, that "a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence, because under such cirumstances the party may have been influenced to say what is not true."

The duty of a judge, in admitting or rejecting such a confession, was thus stated in *Reg.* v. *Warringham*, 15 Jur. 318, by Parke, B., "You (that is, the counsel for the prosecution,) are bound to satisfy me that the confession which you seek to use in evidence against the prisoner was not obtained from him by improper means."

Littledale, J., in *Reg.* v. *Court*, 7 C. & P. 487, thus expressed it: "The judge should determine each case on its own merits, only bearing in mind that his duty is, to reject such confessions only as would seem to have been wrung from the prisoner under the supposition that it would be best for him to admit that he was guilty of an offence which he really never committed."

Now what were the circumstances under which the confession sought to be used here was made by the prisoner?

He left Hawley on the 10th of July and came to Winnipeg. For some time he seems to have been drinking heavily. On Saturday the 12th, McKenzie a detective here, met him at the Driving Park, and spent some time with him. He did not know at that time who the prisoner was, or that there was any charge against him, Some telegrams had been sent by an official of the Northern Pacific Express Company to the agent of the American Express Company in Winnipeg, and these were shown to the police authorities. On Sunday, about noon, McKenzie saw one of the telegrams, and although the description given did not suit the prisoner accurately, he came to the conclusion that he was the person referred to. That afternoon he saw the prisoner at the hotel where he was staying, and spent about an hour with him. Next morning, Monday, they went out driving together, and while driving round the prisoner drank a good deal. There is no evidence that McKenzie, who drank nothing himself, induced the prisoner to drink. On the contrary, he says he tried to dissuade him from doing so, and cautioned him against the immoderate use of Canadian whiskey. Between eleven and twelve in the forenoon they stopped driving, and after disposing of the conveyance which they had used walked together round the burnt block near the market, and then separated. At this time the prisoner was, as McKenzie describes it, "pretty full of whiskey," and soon after he was arrested by the police on the charge of drunkenness, and locked up. The same evening Hall, the assistant superintendent of the Express Company arrived by train from the south. At the railway station he was met by Russell, the agent here of the American Express Company, and by him introduced to McKenzie, who says he is at the station on the arrival of trains in the city. After this, Hall and Russell went to the police station and there had an interview with the prisoner. At that interview Hall seems to have opened the conversation by saying to the prisoner, "You have got yourself in a bad scrape, haven't you?" To which he replied, he had, and expressed a wish to tell him the whole story. He then went on to attribute the whole trouble to whiskey, admitted that his accounts were short, but not by any means to the extent supposed; spoke of some other money packages, for the disappearance of which he accounted by saying he had carelessly left

them on the table while out of the office, and that on his return they were gone. He, during this conversation, made the confession objected to, and agreed to return to the United States. Hall and Russell then left, to arrange for obtaining a special train to leave about one or two in the morning, Hall having been informed that by leaving then instead of waiting for the morning train he would save a good many hours time, and being anxious to get home at once. Having arranged for this special, Hall returned to the police station bringing with him the prisoner's wife, who there had a conversation with him, after which he decided not to return to the United States unless he received a written guarantee that he would not be prosecuted. This Hall declined to give, saying the law must take its course. Upon this the prisoner refused to return, when Hall said if that was his decision it would end the matter for the night, and he had nothing further to say.

To establish that improper influence was used, or that inducements were held out to the prisoner to confess, an endeavour was made to show that Hall held out to the prisoner the prospect of being restored to some position in the employment of the company, and allowed to make good the shortage in his accounts by appropriating, for that purpose, part of his salary and earnings of his wife. Also, that he was dissuaded from employing counsel, as of no use, and told it would be better for him to go back.

Now, there is no doubt that the prisoner did speak of going back to take a position in the employment of the company, was indeed exceedingly desirous to do so, and to make good his defalcations by part of his salary being applied to that purpose. But while a confession made, as said by Williams, J., "in the hope of ultimate forgiveness or gain," is not admitted in evidence, it surely can only be so where the hope of forgiveness or gain, in the mind of the prisoner, is entertained by him, grounded upon the words or conduct of some one in authority. To exclude a confession, as made in hope of forgiveness or gain, when that hope had no foundation on which to rest, seems to me, wholly unwarranted. Now the evidence here shows no promise or hope of forgiveness or gain held out. It is not as in *Reg.* v. *Mansfield*, where, on the girl saying, "If you forgive me I will tell you the truth," upon which her mistress said

"Anne, did you do it?" and by her making no direct reply to the request for forgiveness, leading the girl most naturally to believe that an answer was asked on the condition under which the girl had said she would tell the truth, on the contrary, the evidence of Hall, and of all the others present at any of the conversations, is, that while the prisoner spoke of going back to take a position in the service of the company, Hall told him distinctly, that if he went back, it must be freely and voluntarily and that the law must take its course. Hall says, "He wanted to know, if he would go back, if we would give him employment and promise not to prosecute him. I replied, that I could not give him any promise whatever. If he did come back, it would have to be with his own free will, and with the understanding that the law would take its course. He made this request several times—wanted me to promise to give him work, and said if I would do so, he would give half his salary and have his wife also work towards making the loss good, and I told him it was no use talking upon that subject, it would have to be on the understanding that the law would have to take its course." Mr. Russell says, "He expressed a desire to go back and work it out with the company, and he asked Mr. Hall if he would work him out in the matter. He said, will you let me go back and work it out, and Mr. Hall said, we will have to let the law take its course." This witness says something may have been said about paying the expenses of the prisoner and his wife, but he does not remember it, and Hall positively denies having made any offer to do so.

That Hall did say to the prisoner it would be better for him to go back, there is no doubt, for he admits having said so, but that, he says, was after he had made a full confession of the transaction.

That there had been no promise of immunity from prosecution is supported by the evidence of Mayor Logan. He was at the police station late that evening, and before the prisoner's wife came, for it was he who asked Hall and Russell to go and bring her. Then he was with the prisoner when they brought her, so he had seen and talked with him before she came. Now he says, "When I went in he said he had changed his mind, that he would not go unless they gave him a guarantee that he would not be prosecuted." Not, that he would not go unless they put

in writing a promise or guarantee, which it is now contended had been already made to him, to induce him to confess, but unless they gave him a guarantee, something he had not yet got, or which up to this time had been refused. It was his wife who would not be satisfied with a verbal guarantee, she wanted a written one.

It was further contended that undue influence was exerted upon the prisoner's wife, or that inducements were held out to her, and that under such circumstances, a confession made by him should be excluded. In support of this, a passage in *Taylor on Evidence*, at p. 743, is cited:—"Where the inducement relates to the charge against the prisoner, and comes from a person in authority, it is not necessary that it should be directly held out to the prisoner himself, but it will equally have the effect of excluding the confession if there be good reason to believe that it has come to his knowledge and has influenced his conduct." The case cited in support of this, is *Reg.* v. *Harding*, 1 Arm. M. & O. 340, where a superior clerk in the post office having said to the wife of a postman, in custody for opening and detaining a letter, "Do not be frightened, I hope nothing will happen your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of this statement.

In the present case there is no evidence of any inducement or promise held out to the prisoner's wife. It does appear that she had, in a somewhat irregular manner, been visited by the chief of police and detective McKenzie, at the hotel where she was staying, and taken by the latter, under orders from his superior, to the police station; but this was before Hall arrived in Winnipeg and he had nothing to do with it. Hall after he arrived saw her, and he admits having said to her, it was his belief that it would be better for all concerned—herself and her husband—if they would go back to the States. He also said to her that in his opinion, the prisoner had better not get counsel. But what Hall said to her cannot possibly have influenced the prisoner in making any statement he did make. She was at the police station and saw her husband, sometime between four and six o'clock on the afternoon of Monday. Then Hall arrived by the evening train, saw her at her hotel and went on to the

police station, where he saw the prisoner. The next that his wife saw of him was about midnight, when Hall brought her to the station, the prisoner having in the meantime made the confession, and agreed to return to the United States. Whatever was said by Hall to the prisoner's wife, there is nothing in the evidence from which any one could have good reason to believe that it came to his knowledge and influenced his conduct.

It is further contended that the prisoner was, at the time of the making of the confession, so under the influence of liquor, or in such a mental condition from the effects of liquor, that no confession or statement then made, should be admitted as evidence against him. From the effects of the liquor drunk that day, he must, at the time of the interview with Hall, have largely recovered. He was drinking in the morning, was arrested about twelve o'clock, and the interview did not take place until nine or ten hours afterwards, during all which period he had not been drinking any thing. He had, however, been drinking heavily for a considerable time before his arrest, and was, as one of the witnesses says, about the time of the interview, "very much broke up." The chief of police thinks he was verging on *delirium tremens*. I do not find that a confession being made by a man while under the influence of liquor, or suffering, as the prisoner was, from the effects of liquor, is any reason for excluding it. Besides, the prisoner seems to have been able to converse rationally at the time. When spoken to about the missing packages, he was able to give some account of them, to explain how he came to use part of the money which he admitted to be missing, in paying off an account against him, for which he had been sharply pressed by a merchant in Hawley, and so on.

The conclusion I have come to, therefore, is, that the confession can be given in evidence.

It is, however, urged that even if admissible, the prisoner has not confessed to, or admitted the commission of any offence which falls within the terms of the Extradition treaty. It is said that all he has admitted is, that his accounts are short, or at the very most, that he has been guilty of embezzlement. It is strongly pressed that he has never admitted the having committed forgery. It is true, it does not appear that during the conversation with him, the word forgery was made use of, McKenzie indeed, who was present during great part at least of

the time, says it was not talked of before him. But I do not know that in order to make a confession a complete admission of having committed an offence, it is necessary that the party accused should make use of the technical words proper to be used in an indictment, or that he should be asked, did you commit such and such a crime, using the exact word which a lawyer would use to designate the particular crime. A man charged with murder might make an ample confession, and yet never say, I did "feloniously, wilfully, and of malice aforethought, kill and murder" such an one.

What has the prisoner admitted here? When Hall had the interview, he said to the prisoner, "You have got yourself in a bad scrape, haven't you?" to which he replied, "I have," and then went on to repeat his troubles. He said, "I want to tell you all about it. I was drinking before I left Hawley, and I have taken some of the funds, but it is nowhere near the amount that has been reported here." Then after being asked about certain packages, Hall said, "On the in-trip and delivery book I find an entry of $131.88, addressed to H. Hugleson, did you take this package?" and he said, "I did." Hall then asked him "why," to which he replied, "I don't know—I must have been drinking, I was actually crazy." Hall then goes on, "I then asked him a question about signing the consignee's name for the package, he says, I did." On cross-examination he says, "He admitted to me that he signed the name of the consignee on the package." On being asked "Did you name the name Hugleson to him?" the witness answered "I did." "What did you call it?" "I called it one Hugleson." The witness also gave this further evidence: "Are not these the words, when you said he had signed someone's name for the package, he said, did I do that, and you said, yes, you did? No. Will you swear that you used Hugleson's name? Yes. When? When he had made his confession; after all this, I says to him, I see entered on the in-trip and delivery book, a package of $131, some cents, addressed to one Hugleson. I says to him, did you take that package? He says, I did, and I asked him why he took the package, and he said he did not know why, he was excited and knew that his accounts were wrong, and had made up his mind to leave. I then asked him if he had signed the name of the consignee for that package and he said, I did."

Mr. Russell, who was present, gives this account of the conversation :—"Mr. Hall said to Stanbro, you have got yourself into a mess, and he said, yes, pretty serious mess. I would like to tell you the whole story. Everything originated in whiskey. Everything was all right till a few weeks ago, or two weeks ago, I forget which he said, then I got drinking and I was short somehow." Then after detailing a conversation about the other packages, the witness proceeded: "and finally Mr. Hall asked him what about this package for Hugleson, and he said, I don't know exactly, I was drunk at the time and I don't remember exactly. And he said, you did not deliver it, and he said, no, I did not deliver it, and he said, why did you sign his name in the book? and he said, I don't know why; I was crazy at the time. I suppose I wanted to settle it up as well as I could. I intended to make it all right."

Now what do these admissions amount to? Clearly to this, that the package in question came to his hands, that he did not deliver it to the consignee, but that he signed the name of the consignee to the receipt for it, as if it had been delivered to and received by him. Under our law, that is forgery, and according to the evidence of Mr. Williamson, a professional gentleman, practising law in the state of Minnesota, it is forgery in Minnesota also.

Mr. Hagel urged, with great force and ability, that before the prisoner can be extradited, the case against him must be established in the clearest manner, and that I must be satisfied that the prisoner, if extradited and put upon his trial, would be convicted without any reasonable doubt. In support of this part of his argument, he relied on the language used by Mr. Justice Caron in the *Eno* case in Quebec, and by Mr. Justice Burton in *Re Phipps* in Ontario.

The former of these learned judges said, "The sending out of the country of fugitives, under constitutional government, is a grave exercise of power, and ought not to be permitted unless the right to do so is established in the clearest manner." Mr. Justice Burton used language to the same effect, saying (8 Ont. App. R. at p. 91,) "The greatest strictness is, and ought to be required to establish the offence for which the accused is confined, and that it ought to be established, beyond all reasonable

doubt, that he has been guilty, not merely of a criminal offence, but of an offence that renders him liable to be extradited under the treaty."

But while clear evidence of the prisoner being guilty of an offence, within the treaty, is undoubtedly necessary, it need only amount to such evidence as will warrant a committal. Indeed the prisoner may never be committed at all, even when extradited. He is not committed here. As was said by Hagarty, C. J., in *Reg.* v *Morton*, 19 U. C. C. P. 9, "All this country is asked to do, is to send the prisoners to the place where they must be face to face with all the witnesses against them, on whose testimony they may or may not be committed for trial." Or, as Mr. Justice John Wilson put it in the same case: "In committing for extradition, we say nothing more than we say every day to our own people, who, having committed an offence in one county, are found in another, Return, meet your accusers face to face, and answer the charges made against you; we confide in your having a fair trial."

To the proposition that I must be satisfied that the prisoner, if put upon his trial, would without any reasonable doubt be convicted, I cannot agree. Mr. Clark, in his work on Extradition, at p. 185, expresses the view I take when he says: "The magistrate investigating a case of demanded extradition is not quite in the same position as if he were deciding on a charge of crime committed within his own jurisdiction. In the latter case he has full discretion. He may and often does discharge a prisoner because, although there is *prima facie* evidence of guilt, the circumstances are so obscure, the intent so doubtful, the testimony so conflicting, that he thinks a jury would not be likely to convict. But, in a case of extradition, he cannot consider these matters. If he find sufficient evidence of guilt to justify a committal, the question of a probability of a conviction is not one for his consideration."

After a careful consideration of the case I must say that there has, in my judgment, been such evidence produced as would, according to the law of Canada, justify the prisoner's committal for trial. Therefore I must issue my warrant for the committal of the prisoner to the nearest convenient prison, there to remain until surrendered to the United States, or discharged according to law.

McLEAN v. SHIELDS.

Document whether bill of exchange or agreement—Acceptance.

Defendants accepted two drafts, in the following words:—"We will keep the sums of $605 and $405.25, from the first estimate of McLean and Moran & Co., as requested above, provided they have done sufficient work to earn that sum."

Held, to be proper bills of exchange.

A. C. Killam, Q. C., and *A. Haggart* for plaintiff.

W. H. Culver for defendant.

[*2nd June, 1884.*]

WALLBRIDGE, C. J., delivered the judgment of the Court:—This action is brought upon two drafts, dated 24th December, 1881, one for $605, and the other for $405.25, drawn by McLean and Moran & Co., on Messrs. Shields & Leacock. The drawers draw upon the drawees, (defendants) requesting them to pay the plaintiffs, on or about the first of February, 1882, these sums respectively, the defendants accept the drafts in the following words: "We will keep the sums of $605, and $405.25, from the first estimate of McLean and Moran & Co., as requested above, provided they have done sufficient work to earn that sum;" signed by Shields & Leacock—(after the word sufficient, in the $405.25 draft, the word "work" is omitted, this, however, does not vary the sense, in other respects the acceptances are alike). The defendants now contend that these instruments are not drafts, not having a certain day of payment, the words being, "to pay on or about the first day of March, 1882," removing these instruments from the place of bills, and constituting them mere agreements. This difficulty is cured by the acceptors having made a day on which the bills would become due, by virtue of their acceptance, and made it incumbent on the plaintiff to shew that the conditions in the acceptance had been complied with before suit—*Langston* v. *Corney*, 4 Camp. 176—and to pay at a different time—*Walker* v. *Atwood*, 11 Mod. 190—when however the day of payment is changed by the acceptor, the holder will lose the benefit of the drawer's name, unless he has consented to it.

A bill of exchange may be accepted payable on a condition if the holder will take it, and it is then not absolutely due until

the condition is satisfied. In this particular case the acceptance is of that character. It is of little consequence whether the bill on its face expresses its due date, as the acceptors with the consent of the holder, have fixed the date when it becomes due, that is when the first estimate of the drawers should be made, *i.e.*, of work which the drawers had then undertaken to perform for the defendants, with this condition only, that the drawers should then have done sufficient work to earn that sum, not that the balance of the account between the acceptors and drawers should show that amount due the drawers, but if the drawers had done sufficient work. By this kind of acceptance the defendants give the plaintiff a first charge on the earnings of the drawers, or, in other words, treated this draft as an equitable assignment of the money to be earned by the drawers, and giving the plaintiffs a first charge for that sum. It seems of little consequence to inquire when the bill on its face becomes due, as the defendants have fixed another, or a time at least in the acceptance, and it is in no other way material than to raise the question whether a bill so drawn is a bill at all, or is put back to the place of an agreement. In my opinion it is a proper bill of exchange, and, if no time had been fixed for payment, the acceptors could have fixed one, which they have done.

It is abundantly proved that the drawers had earned that sum, and that two estimates have been made for sums exceeding the amount of the acceptances, and the defendants called no evidence to shew even that the balance due the drawers was not equal to the drafts. In my construction of the acceptance, it did not matter which way the balance was as between the drawers and acceptors, because the only condition the acceptors annexed to the acceptance was, that the drawers should have done sufficient work to earn that sum, and that it should so appear from the estimates, and not there should be that balance due the drawers; that an acceptance may be conditional, is supported by abundant authority. *Hastie's* case, L. R. 4 Ch. App. 274; *Furdoonjee's* case, L. R. 3 Ch. Div. 264.

Besides this, there is satisfactory evidence that the defendants subsequently and after the bills were due, promised to pay them —this itself would be evidence that the conditions had been complied with.

Verdict for plaintiff stands.

MADDILL v. KELLY.

Verdict of jury—Motion to set aside—Questions of fact.

Held—The Court will not interfere with the finding of a jury, and reverse it, unless the verdict is perverse, or clearly and evidently against the weight of evidence, or when the jury has been misdirected by the judge.

H. M. Howell and *Isaac Campbell* for plaintiffs.

W. R. Mulock and *W. E. Perdue* for defendants.

[*2nd June, 1884.*]

DUBUC, J.—The plaintiffs bring their action to recover the value of a certain quantity of cordwood, which, as they claim, has been taken by the defendants, near Whitemouth, on the C. P. Railway line. The defendants had also some wood about the same locality.

His Lordship then referred to the facts of the case and proceeded:

The real question to determine was, whether the plaintiffs' wood had been taken by the defendants, what quantity was taken, and what was the value of it to be charged to the defendants.

These were mere and pure questions of fact, and as such, were proper questions to be left to the jury, and the jury has found and determined them.

Should the Court interfere with their finding and reverse it? This should be done only when the verdict is perverse, or clearly and evidently against the weight of evidence, or when the jury has been misdirected by the judge.

The defendant's counsel argued that, unless we are fully satisfied that the verdict was properly correct, or if we think that there is something unexplained, the verdict should be set aside and a new trial granted. And a few Ontario cases have been cited in support of such contention; but they are distinguishable from this case, and do not properly apply. New trials were granted in some of those cases, because it was suggested, and it appeared to the Court, that some new evidence might and would

be adduced, which would elucidate the points not satisfactorily explained. There is no such thing here. No suggestion is made that, if a new trial were granted, some new and better evidence would more clearly explain the facts, and show them in a light more favorable to the defendants.

But there are numerous cases where the contrary doctrine has been directly and unequivocally held. On pure questions of facts, when the evidence is conflicting, the Courts, though not satisfied with the verdict, generally refuse to interfere.

In *McLean* v. *Dunn*, 39 U. C. Q. B., 562, Harrison, C. J., said: "Whether the defendants used proper care, was a question of fact on the evidence. If the jury had found in favor of the defendant on the evidence, we would be better satisfied with the verdict. But this, where the evidence is conflicting, is not *per se* a ground for granting a new trial."

In *Hawkins* v. *Alder*, 18 C. B. 640, Jervis, C. J., said:— "Although I must confess that if I had been on the jury, I would have found the other way, I think there ought to be no rule. The jury did not take the same view that I did; but I cannot say they were so entirely wrong as to feel justified in taking the matter out of their hands. There was some evidence on both sides."

The following was held by Lord Chelmsford in *Gray* v. *Turnbull*, L. R. 2 Scotch App. 53:—"An appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. To procure a reversal, it must be shown irresistibly that the judgment complained of, on a matter of fact, is not only wrong, but entirely erroneous." Lord Westbury said, in the same case: "When a question of fact has once been decided by the verdict of a jury, it requires an overwhelming case of error by the jury, or the disregard of some cardinal rule of law, to induce the Court to grant a new trial."

It has also been held in Ontario, that the Court will not interfere with the conclusion of a jury on a question of fact, unless they see good reasons for thinking the verdict unjust and against the weight of evidence. *Creighton* v. *Chambers*, 6 U. C. C. P. 282; *Brown* v. *Malpus*, 7 U. C. C. P. 186; *The Queen* v. *Chubbs*, 14 U. C. C. P. 32.

In the present case, there is no complaint of misdirection of the judge; and after having carefully read the evidence, one can hardly say that the verdict is wrong, or that one would have found differently. The jury have heard the witnesses, and have seen their demeanor; it was a question of fact for them to decide, and they have taken a view of the facts favorable to the plaintiffs' contention. Can we say that they were entirely wrong?

We are of opinion, that the verdict should stand, and the rule be dismissed with costs.

SHOREY v. BAKER.

CITY OF LONDON FIRE INSURANCE COMPANY, GARNISHEES.

Garnishee.—Affidavit.—Debt due.—Action pending.

Held, That the omission to state in terms that "the action is pending," in an affidavit on which a garnishing order is made, is a fatal objection to the order.

The defendant, a merchant, doing business at Rat Portage, had insured his stock and shop with the garnishees, and the shop and stock having been destroyed by fire, the plaintiffs sued the defendant upon an over due promissory note, and on the morning following the fire, issued a garnishing order and served it upon the Winnipeg agent of the garnishees. This order was a printed form and attached only "debts due or owing or accruing due." The affidavit upon which this order was issued was made by one of the plaintiffs and intituled in the above cause, and was one of the printed forms in common use stating that "action was commenced on," etc., and that "judgment would likely be recovered in this action within the next three weeks for the full amount above claimed," and "garnishee is

indebted to the above named defendant in an amount sufficient to satisfy the plaintiff's claim in this action," and "that . . . reside within the jurisdiction," etc.

The defendant on the day following the fire made an assignment of his estate and effects to an assignee, in trust for the benefit of his creditors.

A summons was subsequently taken out upon the application of the defendant and his assignee, calling upon the plaintiffs to show cause why the garnishing order, and the service thereof, should not be set aside on the ground that the affidavit upon which the order issued did not comply with the provisions of the Statute in that behalf, and that it did not (*a*) state that "action is pending;" (*b*) state sufficiently the cause of the action; (*c*) state that the garnishees resided within the jurisdiction of the court. And on the ground that there was no "debt due," etc. at the time of the service of the order; or why the amount attached should not be reduced.

An order was made by Wallbridge, C. J., reducing the amount attached and dismissing the summons except so far as the same applied to the reduction of the amount garnished.

Defendant and his assignee appealed from this order to the full Court.

Mr. Killam, Q. C., for defendant and the assignees. There is no debt due at the time of service of this order. He cited Con. Stat. Man. c. 37, ss. 43 & 44; *Worsley* v. *Wood*, 6 T. R. 710; *Oldman* v. *Bewicke*, 2 H. Bl. 577; *Rob. & Jos. Digest*, 1847; *Drake on Attachments*, 545, 551, 559; *Hunter* v. *Greensill*, L. R. 8 C. P. 24; *Kennett* v. *Westminster Improvement Commissioners*, 11 Ex. 349; as to present proceeding to set aside order, *Hunter* v. *Greensill*, L. R. 8 C. P. 24; *Kennett* v. *Westminster Improvement Commissioners*, 11 Ex. 349; wages not earned cannot be attached, *Boyd* v. *Haynes*, 5 Ont. Pr. R. 15; *Caisse* v. *Tharp*, 5 Ont. Pr. R. 265; *Tait* v. *Corp. of Toronto*, 3 Ont. Pr. R. 181; *Innes* v. *E. J. Co.*, 17 C. B. 351; *Webb* v. *Stenton*, L. R., 11 Q. B. Div. 518; *Booth* v. *Traill*, L. R. 12 Q. B. Div. 8.

Mr. Darby supported the order and cited Con. Stat. of Man. c. 37, ss. 43 & 44: nature of cause of action not sufficiently

shown.—*Kirk* v. *Almond*, 1 Dowl. 318; should be shown as fully as in a declaration.—*Archbold's Practice*, 768; *Racy* v. *Carman*, 3 C. L. J. O. S. 204; as to residing within jurisdiction, gist of affidavit is, will perjury lie if the statements are false.—*Archbold's Practice*, 751; perjury would not lie in this case if garnishee resides out of the jurisdiction.

Mr. G. R. Howard for plaintiffs.—Affidavit shows that action has been commenced, and when judgment will likely be recovered, and the inference must therefore be that "action is pending." The Statute only requires the nature of the cause of action to be shown. (Taylor, J.: The case of *Kirk* v. *Almond*, above cited, is against you on that point.) This printed form has been in common and general use by the profession for a long time, and follows that given in Chitty's Forms. *Drake on Attachment*, 549; Con. Stat. Man., c. 37, ss. 43 & 44, cited. Also Imperial Statute, 17 & 18 Vic. c. 125, ss. 60, 61; *Rule of Court of Q. B. Manitoba*, *Tiffany* v. *Bullen*, 18 U. C. C. P. 91; *re Cowans Estate*, *Rapier* v. *Wright*, L. R. 14 Ch. D. 638.

Held, by the full court, that the appeal must be sustained with costs, on the ground of the insufficiency of the affidavit on which the garnishing order was issued, in not stating in terms that "action is pending." And by TAYLOR, J.—On the ground that even if the order could be upheld, the claim sought to be attached is not a debt such as is covered by the order herein, no matter whether any other indebtedness or not.

THE MANITOBA MORTGAGE AND INVESTMENT CO. LIMITED

v.

THE CANADIAN PACIFIC RAILWAY CO. *et al.*

Mortgage suit — Lands purchased by Railway Company from Mortgagor.

Plaintiffs were mortgagees of land under a mortgage made by defendant McL. After the making of the mortgage, defendant McL. conveyed to defendant R., and R. conveyed to the defendants C. P. R. Co. a strip across the land for their track.

The bill was for foreclosure; for immediate payment by McL., and for possession as against Ross and the C. P. R. Co.

The answer of the C. P. R. Co. set up that they had made an agreement with R. for the purchase of the strip of land, and that they had paid into court the purchase money, and given notice by advertisement as required by the Statute.

Held, that the plaintiffs could not have, as against the railway company, delivery of possession. 2. That the payment into court protected the railway company against the claim of the plaintiffs, and that the rights of the latter were confined to a claim against the compensation paid into court.

Held that, as against the defendant McL., the plaintiffs were entitled to an order for immediate payment, and, as against defendant R., to delivery of possession of the land not embraced in the deed to the railway company.

A. C. Killam, Q.C., for plaintiffs.

J. A. M. Aikins and *G. G. Mills* for defendants, the Canadian Pacific Railway Company.

[*15th August, 1884.*]

TAYLOR, J.—The plaintiffs are mortgagees of section 26, in township 10, range 15, west of the principal meridian, under a mortgage dated the 16th of June, 1882, and made by the defendant McLean. After the making of this mortgage, McLean conveyed to the defendant Ross, and Ross sold, and on the 19th of September, 1882, conveyed to the defendants, the Canadian Pacific Railway Company, a little over twelve acres of the land for their track across the section.

Default having been made in payment of the mortgage, the plaintiffs file their bill against McLean, the original mortgagor, praying immediate payment by him of the amount due, and against Ross and the Canadian Pacific Railway Company, as owners of the equity of redemption, praying delivery forthwith by them of possession of the land. There is also a prayer generally that the plaintiffs may be paid the amount due them, and in default, that the equity of redemption in the land may be foreclosed.

The bill has been taken *pro confesso* against the defendants McLean and Ross. The railway company have answered, setting up that they made an agreement with Ross, the owner of the land, for the purchase of a right of way at $6 an acre; that he has conveyed to them the land so agreed for, and that they paid into court the amount of the purchase money, with six months interest, and have given public notice as required by Statute, calling upon persons having claims to file their claims against the compensation so paid into court. Their contention is, that any claim which the plaintiffs have, cannot be enforced against the land conveyed to the company, but must be against the compensation paid into court, which now stands in place of the land. The plaintiffs, on the other hand, contend that their rights as mortgagees cannot be affected by any agreement made between the company and the owner of the equity of redemption, to which they were not parties, and to which they have never assented. They claim that as to them, and as to liability to satisfy their mortgage, the railway company stand in no different position from that in which an ordinary purchaser of part of the equity of redemption would stand.

So far as the bill prays delivery forthwith of the possession of the land in question, the plaintiffs cannot have, as against the railway company, the relief prayed. That is a relief now given to mortgagees, under a bill on the equity side of the court, as a substitute for the action of ejectment which formerly a mortgagee, whose mortgage was in default, had a right to bring concurrently with his suit for foreclosure, and was so substituted to prevent multiplicity of actions. The plaintiffs cannot have this relief, unless they could maintain an action of ejectment against the railway company. That they could not do this, has been decided on several occasions in Ontario. It was so held in

The Corporation of Welland v. *The Buffalo and Lake Huron Railway Company*, 30 U. C. Q. B., 147; affirmed on appeal, 31 U. C. Q. B., 539. In *McLean* v. *The Great Western Railway Company*, 33 U. C. Q. B., 198, where the company had purchased the right of way from one James McLean, believing him to be the true owner, and had paid him therefor, on ejectment brought by the heir-at-law of Margaret McLean, the real owner, a verdict was at the trial entered for the plaintiff. A rule obtained in Term to set aside the verdict and for a new trial was made absolute. On giving judgment, Wilson, J., (now Chief Justice Wilson, of the Queen's Bench Division,) reviewing various clauses of the Statute as to the taking of lands by railway companies, said: "Upon a consideration of the whole of the different Statutes, I think the proper conclusion to be drawn is, that the plaintiff cannot disturb the company in their possession of the land, but that he is driven to look to them for compensation for the land which they have taken, and of which he apparently is the true owner, although they have paid the full value of it already to the brother of the plaintiff, under the belief that he was the owner as he claimed and represented himself to be, the plaintiff then and still being absent in Australia." *Galt* v. *The Erie and Niagara Railway Company*, 19 U. C. C. P., 357, was a case in which mortgagees, to whom the company had made a mortgage to secure payment of purchase money, were held entitled to maintain ejectment, but Hagarty, C. J., distinguished the case then before the court, in which the mortgage had been given under the special terms of the contract, from the case of lands which a company could take under the compulsory clauses. He said: "When land is entered on and taken by a railway company under the compulsory clauses, the price to be ascertained by arbitration, or assessment by a compensation jury; or when it is paid into court under any of the powers given by the Imperial or Provincial Statutes, it appears that ejectment cannot be maintained by the owners in the event of any difficulty arising, but the compensation must be worked out as the law provides." That an order for delivery of possession cannot be obtained in equity, any more than can ejectment be maintained at law, was decided by the late Chief Justice Spragge, when Chancellor, in *Slater* v. *The Canada Central Railway Company*, 25 Gr. 363, that learned Judge remarking: "I find no instance of ejectment being maintained where

the land taken, was so taken under the compulsory powers of the company." The decree there made was for payment in a month, or, in default, that the land be sold. This was following *Wing* v. *The Tottenham and Hampstead Junction Railway Company*, L. R. 3 Ch. App. 740, in which the Lords Justices decided that the vendor had a lien on the land, and the court could not refuse to give him the same assistance in enforcing it that the court gives to any other unpaid vendor. But, in that case, the company had paid into court the purchase money for only one of two parcels of land which they had taken. In *Slater* v. *The Central Railway Company*, the money does not appear to have been paid into court. In *The Corporation of Welland* v. *The Buffalo and Lake Huron Railway Company*, in which, although the plaintiffs could not maintain ejectment, they were held entitled to proceed against the company for compensation, the land had been taken possession of without any agreement or the payment of money to any one. And in *McLean* v. *The Great Western Railway Company*, the money had been paid to the person who represented himself to be, although he was not, the true owner. *Harty* v. *Appleby*, 19 Gr. 205, in which the company were held entitled to the land only upon paying the mortgagee its value at the time the company became entitled to it, was a case in which the company dealt with the mortgagor and had not paid the money into court under the Statute. So in *Cameron* v. *Wigle*, 24 Gr. 8, the company dealt with a tenant for life, and paid to her directly the full amount of the purchase money. Under such circumstances they were held liable afterwards to make good to the remainder man the amount of his interest in the land.

Here the price or compensation agreed upon between the company and the owner of the land has been paid into court, and the notice calling for claimants against the fund has been published as required by the Statute. That seems to me to distinguish the present case. It is true that the Consolidated Railway Act (Dom. Stat., 42 Vic., c. 9) does not, in section 9, sub-sec. 3, name mortgagors as persons who may contract, sell, or convey, but there are general words used, as well as those which specify certain classes: "All corporations and persons whatsoever . . . seized, possessed of, or interested in any lands." Then, in other sub-sections, the words used are "owner," "proprietor," "parties empowered to convey lands," and the like.

The whole scope of the Act, in dealing with the mode in which lands may be acquired by a railway company, seems to me to be that the company may deal with the person who appears to be the owner and who is entitled to convey, irrespective of whether the lands are incumbered or not. The 30th sub-section says: "If the company has reason to fear any claims or incumbrances . . . the company may . . . pay such compensation into the office of one of the superior courts for the province in which the lands are situated, with the interest thereon for six months." Then the 31st sub-section provides for a notice being published in such form, and for such time, as the Court appoints, calling upon claimants to file their claims against the compensation, "and all such claims shall be received and adjudged upon by the Court, and the said proceedings shall for ever bar all claims to the lands, or any part thereof, including dower as well as all mortgages or incumbrances upon the same."

The 29th sub-section says: "The compensation for any lands which might be taken without the consent of the proprietor, shall stand in the stead of such lands; and any claim to, or incumbrance upon the said lands, or any portion thereof, shall, as against the company, be converted into a claim to the compensation, or to a like proportion thereof, and they shall be responsible accordingly, whenever they have paid such compenation, or any part thereof, to a party not entitled to receive the same, saving always their recourse against such party."

Now, if the company must, before taking any lands and coming to an agreement with the owner as to price, enquire as to incumbrancers and deal with them also, these sub-sections are meaningless and their provisions were not at all required.

That the company having paid the money into court, is what distinguishes the present case from some of those already cited, seems evident from the concluding part of the 29th sub-section, which makes the company continue responsible "whenever they have paid such compensation, or any part thereof, to a party not entitled to receive the same." In each of the cases, *McLean* v. *The Great Western Railway Company*, *Harty* v. *Appleby*, and *Cameron* v. *Wigle*, the money was not paid into court, but "to a party not entitled to receive the same."

Chewett v. *The Great Western Railway Company*, 26 U.C.C.P. 118, was an action for dower in lands taken and paid for by the defendants. The demandant had a verdict at *nisi prius*, but the Court set it aside in Term and entered a verdict for the defendants, holding that her proper remedy was for the recovery of a portion of the money paid by the defendants at the time when they purchased the lands. It is said that the judgments in that case largely turned upon the right of dower being during the lifetime of the husband an inchoate charge, and that, notwithstanding it, the husband is the party having the right to convey. I do not, however, so understand the judgments. It is true Gwynne, J., does say: "It was quite competent for the defendants to deal with the plaintiff's deceased husband, who was the owner in fee of the land, and to agree with him upon the value to be paid for the whole fee-simple estate in the land, discharged of all claims of his wife the present plaintiff to dower; and that the effect of such agreement would be that the value so agreed upon should stand in place and stead of the land; upon which value, in lieu of the land, the wife's claim for dower, in the event of her surviving her husband, would attach." But in an ordinary case of the sale and purchase of real estate between two private individuals, when the wife is not a party to the conveyance for the purpose of barring her dower, her claim, in the event of surviving her husband, is not against the purchase money. Her dower is fixed and ascertained, and is a claim against the land itself, quite irrespective, as to amount and otherwise, of what may have been agreed upon as the price between her deceased husband and the purchaser. It is only by virtue of the Statute that, in the case of purchase by a railway company, it is so limited and fixed. Now, the Statute nowhere gives a husband a right to dispose of the land to the prejudice of his wife's claim for dower, or in any way to bind her, any more than it in express terms, speaks of a mortgagor dealing with the land. The only reference it makes to dower is to place it on the same footing as any other incumbrance, by saying, in section 9, sub-section 31, that the proceedings under that sub-section, "shall forever bar all claims to the lands, or any part thereof, including dower, as well as all mortgages or incumbrances upon the same."

And Galt, J., in giving his judgment, said: "The defendants claim title by conveyance from the different proprietors,

to whom the purchase money appeared to have been paid, and they did not avail themselves of the provisions of the 7th section of 16 Vic. c. 99, by paying the price agreed upon into court, which would have afforded them a full defence to this demand." After quoting the section of the Act which corresponded with Dom. Stat. 42 Vic., c. 9, sec. 9, sub-sec. 29, he proceeded: "It is plain that the intention of the Legislature was, that in all cases the price agreed upon should stand in the place and stead of the lands, and if the company chose, they might pay the money to the person with whom they had made the agreement, in which case, they would remain liable to the true owner or person having claims on the land, if it should turn out that the party conveying was not the true owner, or that other persons had claims on the lands, to pay the amount agreed upon over again, reserving their recourse against their original grantor; or they might avail themselves of the protection afforded by the Statute and pay the money into court." And he concluded by saying, "Upon the express words of the Acts of Parliament, and upon the authority of this case, (*McLean* v. *Great Western Railway Co.*) I am of opinion, that no demand of dower can be sustained against the company, and that the plaintiff's claim should be as against a portion of the money paid by the defendants at the time when they purchased the lands." And Hagarty, C. J., said: "When the company acquired the lands, they bought from persons entitled to convey to them. The plaintiff had then an inchoate right to dower, to ripen into an absolute right, contingent on her surviving her husband. If the company had paid the estimated value into court, under the Statute, I have no doubt that they would have been completely protected against all claims vested or contingent."

That the company, in the present case, made a private bargain with the mortgagor, and did not proceed under the sub-sections which provide for the appointment of arbitrators, and the fixing by their award, of the amount of compensation, makes no difference. The Statute evidently contemplates such a proceeding, only where the company and the owner fail to agree upon a price, or where the owner is absent or unknown. In the case last quoted, Mr. Justice Gwynne said: "The provision for the payment into court was made for the protection of the defendants. * * * * But the fact of the defendants not having availed themselves of this protection, did not alter, prejudice, or affect the power con-

ferred by the Statute upon the defendants, by agreement with the owner in fee, as to the amount to be paid as compensation for the defendants acquiring the land, to convert all claims, including that for dower, into a claim upon the compensation, in lieu of upon the land itself." So in *Cameron* v. *Wigle*, the reference directed was not as to the value of the interest which the remainderman had in the lands taken, but, "An inquiry of what proportion of the compensation money paid to Elizabeth Brooker, was at the time of such payment, properly payable to her in respect of her interest as tenant for life, and what proportion was properly payable to those entitled in remainder, in respect of their interest." And they were declared entitled to an order for payment of the latter amount by the railway company to them.

Holding therefore, as I do, that the defendants had a right to make an agreement with the mortgagor, that the payment of the money into court protects them against the claim of the plaintiffs now put forward, and that the rights of the latter are confined to a claim against the compensation paid into court, the defendants, the railway company, are entitled to have the bill dismissed against them with costs.

As against the defendant McLean, the plaintiffs are entitled to an order for the immediate payment of the amount properly due to them, and as against the defendant Ross, to delivery of possession of the land not embraced in the deed to the railway company, and a decree of foreclosure with directions for the usual accounts and inquiries.

As the amount due the plaintiffs largely exceeds the compensation paid into court, the decree may provide for payment out to the plaintiffs of the amount, after satisfying the costs of the defendants the railway company, in and about paying the money into court and publishing the notice under the Statute, which should be the first charge thereon. Taxation and payment of these costs may be provided for by the decree.

LYNCH v. CLOUGHER.

Order to pay—Validity of assignment—Statute of frauds.

McK. & McQ. being indebted to defendant, gave him an order directed to the mayor and council of the city of W., requesting them to retain $600 from money coming to them, and pay same to defendant. Shortly after McK. gave plaintiff an order on defendant in following terms: "Will you kindly agree to pay Edward Lynch the amount of money due us on order for tanks to corporation after you receive same from the chamberlain, to be paid by him to men for work on same." Defendant indorsed the order as follows: "I will agree to pay the balance of money upon the order you gave me on the city chamberlain, first deducting the amount you owe me, and the balance I will pay over to the said Edward Lynch."

Held, that the acceptance by defendant was valid, and bound the acceptor to pay.

H. M. Howell and *Isaac Campbell* for plaintiff.

Ghent Davis for defendant.

[*2nd June, 1884.*]

DUBUC, J.—The question to be determined in this case is whether the order given by McKinnon & McQuarry to the plaintiff, is a valid assignment of the amount due to them by defendant, and whether the acceptance by the defendant is a binding agreement to pay to the plaintiff.

McKinnon & McQuarrie had a contract to build two tanks for the city of Winnipeg. Being unable to pay their men, they assigned their contract to the defendant, who undertook to complete the tanks, and took the assignment of an order for $600 on the City, payable on the completion of the work.

McKinnon & McQuarrie owed some money to the plaintiff, and gave him also an order on the defendant to be paid out of the balance of the $600. After deducting the amount due by them to the said defendant, the plaintiff was to employ said money in paying the men for work on the said tanks. The plaintiff went to the defendant with his order, and defendant, after having assured him that at least $300 would be available to be paid to him, after deducting what was due him by McKinnon & McQuarrie, indorsed on the back of the order his acceptance

of the same, and agreed to pay the balance of the order to the plaintiff, after deducting the amount due him.

The defendant contends that the document purporting to be an order, is only a letter from McKinnon & McQuarrie to him, requesting him to pay, and that what he wrote on the back of it is only an answer to said letter, and consequently there is no privity of contract between him and the plaintiff.

As to the first point, the document is, no doubt, a request to pay; but it is in the ordinary form of orders and bills of exchange, which are also requests to pay. And as decided in *Farquhar* v. *The City of Toronto*, 12 Gr. 186, such an order is in itself an equitable assignment of the indebtedness from defendant to McKinnon & McQuarrie, even without acceptance. The same doctrine has been held in *Brice* v. *Bannister*, L. R. 3 Q. B. Div. 569.

But the indorsement on the back of the order, though in the form of a letter, was a valid acceptance on the authority of *Walker* v. *Rostron*, 9 M. & W. 411, commented upon by Blackburn, J., in *Griffin* v. *Weatherby*, L. R. 3 Q. B. 758. In his acceptance the defendant does not say to the plaintiff: I will pay you; but this is not necessary to create a liability; the bare word "accepted," with the signature, is generally held sufficient. Here, the order is presented by the plaintiff, in favor of whom it was given; the defendant takes it, writes in his presence, "I will pay the balance to Edward Lynch," and he hands it over to the plaintiff himself. I think such an acceptance is a valid one, and binds the acceptor to pay as he is requested, and as he agrees, to do.

Now the evidence shows that the plaintiff completed one of the tanks which the defendant had agreed to complete, and he pays $260 or $270 to the men working at it. On this ground also, he is entitled to recover for work and labor. The defendant's own figures on a small piece of paper, which has been afterwards pasted on the back of the order for $600, shows that the amount due him by McKinnon & McQuarrie to be deducted from the $600 was $361, leaving a balance of $239 available to the plaintiff on the order given to him. It is true the defendant says he had also to expend some money on the tanks, but he would not have got the $600 (amount of the order) had not the

plaintiff completed the tank No. 2. So the plaintiff's labor was the means by which he obtained that money from the city of Winnipeg.

I think the verdict should stand, and the rule be discharged with costs.

TAYLOR, J.—The plaintiff sues to recover from the defendant $298, under the following circumstances: McKinnon & McQuarrie had a contract with the city of Winnipeg for the construction of two tanks. The plaintiff and some other men were employed by them working upon these. The contractors failing to pay their men, the defendant agreed to give the men fifty cents on the dollar for their time checks, and to secure repayment to him of the amount so paid the men and some money which he had advanced to the contractors, they gave the defendant an order upon the corporation, worded as follows:

"WINNIPEG, June 1st, 1883.

To the Mayor and Council of the city of Winnipeg:

We, the undersigned, respectfully request you to retain in your hands the sum of $600 from the money coming to us for work now progressing on tanks in ward No. 1, and pay over the same to William Clougher, who advanced money to assist in carrying out the excavation of said tanks, and by so doing you will greatly oblige,

Yours respectfully,

(Signed,) McKINNON & McQUARRIE."

Shortly after, the men refusing to work any longer for the contractors, McKinnon asked the plaintiff if he would take an order on the defendant, who had, he said, in his hands $300 or thereabouts, and go and finish tank No. 2. To this the plaintiff agreed, and thereupon McKinnon gave him the following order or letter:

"WINNIPEG, June 21st, 1883.

MR. CLOUGHER:

Will you kindly agree to pay Edward Lynch the amount of money due us on order for tanks to corporation after you receive same from the chamberlain, to be paid by him to men for work on same.

(Signed,) McKINNON & McQUARRIE."

This order the plaintiff took to the defendant, and asked if he would advance money to finish the tank, which he declined to do. The plaintiff then wanted to know the amount due the contractors, but defendant was unable at the time to inform him of this, assigning as his reason that his books were not made up. He said, however, there was between $325 and $300, and plaintiff might rest assured there was $300. The next day plaintiff returned, when the defendant, having made up the amount due himself at $361, set down the figures on the corner of a newspaper, and deducting the $361 from the $600, showed the amount left to be $239. He then indorsed on the order the following memorandum:

"I will agree to pay the balance of money upon the order you gave me on the city chamberlain, first deducting the amount you owe me, and the balance I will pay over to the said Edward Lynch.

(Signed,) WM. CLOUGHER."

The plaintiff says that upon obtaining this from the defendant, he borrowed money, went on and completed tank No. 2, expending about $400 in doing so.

Early in July McKinnon & McQuarrie failed entirely, and on the 11th of July the defendant took an assignment of their contract to construct the tanks, and employed the plaintiff as his foreman in completing tank No. 1. The plaintiff's claim is made up of wages for thirty-one days as defendant's foreman, at $4 a day, $124, and the $239 under the order of 21st June, $363, less $65 paid on account of wages. At the trial before my brother Dubuc, without a jury, a verdict in the plaintiff's favor for the full amount was entered.

The defendant obtained a rule, first, to reduce the verdict to $28 or $59, as the Court should think fit. This part of the rule relates to the item of wages. The defendant does not dispute the number of days the plaintiff worked as his foreman, but he insists that only $3 a day should be allowed. This would make the total amount $93, and deducting the $65 paid, would leave the balance due $28. There is conflicting evidence as to what would be a proper amount. I would myself incline to fix $3 as the proper amount, but the Chief Justice and my brother Dubuc

seem satisfied that the sum allowed at the trial is the proper one, and I am not prepared to dissent from them on this point.

By the remaining part of his rule the defendant claims to have the verdict set aside entirely as to the $239, on the ground that there is no privity of contract between the plaintiff and the defendant, and no evidence upon which the plaintiff's claim can be maintained, and that the claim is founded on an alleged promise to answer for the debt of another, and is, therefore, void under the Statute of Frauds. And also on the ground, that the alleged acceptance is conditional on money being in defendant's hands over and above his own claim, and there is no evidence that any such money did come to his hands. Now, as to the first objection, the Statute does not say that the promise shall be void, but only that no action shall be brought upon it, unless some memorandum or note thereof shall be in writing and signed by the party to be charged. The writing is not necessary to constitute the contract, but merelyto furnish satisfactory proof of it. Mr. Taylor, in his work on Evidence (7 ed.) page 859, says: "It does not signify to whom the memorandum which states the terms of the agreement is addressed." *Gibson* v. *Holland*, L. R. 1 C. P. 1, is an authority fully supporting this statement.

In *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753, it was said by Blackburn, J.: "Ever since the case of *Walker* v. *Rostron*, 9 M. & W. 411, it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does, promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise: and the money becomes a fund received, or to be received, for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder."

In the present case, the order was presented to the defendant by the plaintiff, and the indorsement, undertaking to pay to the

plaintiff, was written and signed by the defendant on his application, and handed back to him by the defendant.

In the case of *Rodick* v. *Gandell*, 1 D. M. & G. 763, cited by the defendant's counsel, Gandell and Brunton, to whom money was owing by a railway company, gave the solicitors of the company authority to receive the money, and requested them, on receipt, to pay it over to the bankers of Gandell and Brunton. This the solicitors promised to do. There was no money in the hands of the solicitors when they did so. The letter contained no order on the company to pay the solicitors, nor any authority to the bankers to demand the money from either the company or the solicitors; it was therefore held not to be an equitable assignment of the moneys owing by the company.

As to the other objection, the defendant's contention is, that though he did receive the $600 from the corporation, yet he had, under the assignment of the contract which he took from McKinnon & McQuarrie, to go on and complete tank No. 1, and in so doing expended a sum which, with the amount due him when the order was accepted, exceeded the amount he received.

Now, as to the justice of this contention, if the defendant, in completing tank No. 1, expended money for the purpose of earning the $600, so did the plaintiff. His claim is for money expended in completing tank No. 2, and unless he had done so the defendant could not have received the money he did.

The present case seems to me governed by *Brice* v. *Bannister*, L. R. 3 Q. B. Div. 569. There the defendant, who was having a vessel built for him by one Gough, accepted an order given by Gough in favor of the plaintiff for £100. Afterwards he had to make large advances to Gough to enable him to complete the vessel, yet he was held liable to pay the amount of the order.

Tooth v. *Hallett*, L. R. 4 Ch. App. 242, was a different case. There, on a building contract, the owner had the right, if the work was not completed by a certain time, to employ some other person to finish it. The contractor gave the plaintiff, who was supplying timber for the work, an order for £200 on the defendant, the owner. When this was presented, defendant said there was nothing then owing to the contractor; that the time for completing the work had expired, and that, if matters did not

mend, he should employ another builder, and in that case there would be nothing at all coming to the contractor. Soon after the contractor executed an assignment for the benefit of his creditors, and the assignee, who had no money of the estate in his hands after receiving notice from the owner that the time had expired, and that he intended enforcing the penalties against the estate, went on and completed the building with his own moneys. The Lords Justices held that, under these circumstances, there was nothing coming to the contractor from that contract.

Here the defendant took from McKinnon & McQuarrie an assignment of their contract, and stepped into their place. No doubt he did so supposing that there was still coming from the corporation sufficient to repay his expenditure, but, unfortunately for him, all except the $600 had been attached under garnishee process. That the contractor went on and completed the work in *Brice* v. *Bannister*, was what the Court held distinguished it from *Tooth* v. *Hallett*, where the contract was, on the contractor's failure to complete in time, put an end to and the work done by another person. The defendant here took McKinnon & McQuarrie's place, and completed the work under and in pursuance of the contract.

In my opinion, by the order of the 1st of June a specific $600 had been appropriated to a particular purpose, and defendant, by his indorsement on the order of the 21st of June, undertook to apply it in a particular way, and he could not afterwards defeat plaintiff's rights. Then he agreed to pay the plaintiff the balance, "first deducting the amount you owe me." He does not say "any amount you may owe me when the money is received." He certainly represented to the plaintiff that the amount to be deducted was the $361, leaving as the balance to be paid over $239. The rule should be discharged with costs.

WATSON v. WHELAN.

Objection to evidence—Motion to set aside verdict.

Held, on motion to set aside a verdict, no objection can be taken to the admissibility of evidence which was not objected to at the trial.

J. D. Cameron for plaintiff.

Chester Glass for defendant.

[*2nd June, 1884.*]

TAYLOR, J., delivered the judgment of the Court:

This was an action brought to recover the amount of a promissory note for $170, given by the defendant to the plaintiff. The defendant has pleaded that the note was given for a balance of purchase money upon a purchase, by the defendant from the plaintiff, of three horses, which were at the time in poor health, and that it was given upon the express understanding that, if one or more of the horses should die, the value of the horse or horses so dying, at the rate of $90 each, should be credited upon the note, or deducted from the face value of it; and that two of the horses died and were lost to the defendant, whereby the note became void and wholly discharged and satisfied. The defendant also set up a counter claim against the plaintiff for $10. On these pleas the plaintiff joined issue.

On the trial which took place before the Chief Justice without a jury, contradictory evidence was given as to the actual bargain between the plaintiff and defendant on the purchase of these horses. The defendant asserted the bargain to have been in accordance with what is set up in his plea, and in this he is corroborated by Jardine. The plaintiff contradicts them flatly, and there is also evidence from one Robinson, who presented the note to Whelan for payment, which goes to show that he, on that occasion, made no such claim to be relieved from payment as he now sets up.

With that state of facts before him, the Chief Justice attached the greater credence to the evidence offered for the defence, and entered a verdict for the defendant, but reserved leave to the plaintiff to move in Term.

The plaintiff obtained a rule calling on the defendant to show cause why the verdict should not be set aside, and a verdict

entered for the plaintiff for the full amount claimed, on the ground that verbal evidence should not have been received to vary the unconditional contract contained in the promissory note sued upon, and that no written evidence of the contract, varying the effect of the promissory note, was given at the trial, and on the ground that the verdict is contrary to law, evidence, and the weight of evidence.

The plaintiff cannot, in my judgment, now object to the evidence which was received at the trial, no objection to it having been taken at the time. Mr. Lush, in his work on Practice, speaking of the improper admission of evidence as a ground for granting a new trial, says, at page 630: "This supposes the evidence so admitted was objected to at the proper time, for it is an invariable rule that, if the party against whom it is offered suffers the examination to proceed, or the document to be read, from whatever cause, he cannot afterwards claim a new trial on this ground."

In *Campbell* v. *Beamish*, 8 U. C. Q. B. 526, evidence having been improperly admitted without any exception taken, it was held that this could not afterwards be urged in moving for a new trial. When no exception was taken at the trial to the reception of parol evidence to prove the understanding on which a note was given, the party was not allowed to argue in Term the technical objection which he had waived. *Davis* v. *McSherry*, 7 U. C. Q. B. 490. So, at a time when interested parties were not competent as witnesses, such a witness having been examined without objection to his being incompetent, the Court held that a new trial could not be granted on the ground of his having been examined. *Doe dem. Sullivan* v. *Read*, 3 U. C. Q. B. 293. Mr. Justice Jones said: "This objection to his interest is too late; it should have been taken at the trial;" and Chief Justice Robinson said: "His evidence was read without exception at the trial."

As to the verdict being against evidence and the weight of evidence, the evidence is conflicting; but the learned judge who tried the cause, who saw and heard the witnesses, believed the account of the transaction given by the defendant and his witness to be the true one. He was in a far better position than I am to form a correct estimate of the witnesses, and of the weight to be given to their testimony. The rule should, I think, be discharged with costs.

BRIMSTONE v. SMITH.

Fraudulent conveyance—Exemption from seizure.

Defendant, J. S., took up a quarter section as a homestead, performed settlement duties, and obtained a patent. He then made a conveyance to J. R., and J. R. conveyed to M. S., the wife of defendant J. S. Subsequently to these conveyances, plaintiff obtained judgments at law against the defendant J. S. The conveyances were without consideration. J. S. had no other property. Within three months after the execution of the conveyances, executions to the amount of $1388.38, against J. S. were placed in the sheriff's hands.

Held, 1. That the conveyances must be set aside, and equitable execution decreed.

2. That it is not necessary that the debts should have become payable before the fraudulent disposal of the property was made.

3. Exemptions from execution under Con. Stat. Man. c. 37, s. 85, ss. 8, as amended by 47 Vic., c. 16, s. 6, discussed.

N. F. Hagel and *Ghent Davis* for plaintiff.

S. C. Biggs and *J. Curran* for defendants.

[*15th September, 1884.*]

SMITH, J.—The facts of the case may be shortly stated as follows:—

In 1872, the defendant Joseph Smith took up, as a homestead, the N. W. quarter of section 13, Township 11, Range 5, east of the first principal Meridian. He performed settlement duties, and obtained a patent. In October, 1882, he and his co-defendant left the land, and entered upon the hotel business in Winnipeg, leasing from the plaintiff "The Toronto House." The bar part of this house was occupied by other parties, whom the defendant Joseph Smith bought out, and entered upon that part on the 5th October, 1882, in pursuance of a clause in the lease, providing for payment of $200 per month, in advance. The rent of the portion originally leased was the same amount, but payable quarterly, in advance; of this rent, $600 fell due on the first day of June, 1883, and $200 on the fifth day of the same month. On the first or second of this month, or perhaps one on one day and the other on the other, two conveyances of

the above quarter section were made—one by the defendant Joseph Smith to James Robinson, and the other by James Robinson to the defendant Margaret Smith and in both, the sum of $2000 is the expressed consideration. Judgments at law were recovered by the plaintiff against the defendant Joseph Smith, in August and September, 1883, in actions for this rent, and writs of execution against the lands of the defendant Joseph Smith were placed in the sheriff's hands in September, 1883. On leaving the land, the defendant Joseph Smith, in the spring of 1882, leased it for one year. By the bill, these deeds are attacked as voluntary, and fraudulent and void as against the plaintiff, and equitable execution is prayed. By her answer, the defendant Margaret Smith alleges that some money of hers was used in paying the Dominion Government for the land, $10 in all, and some for improvements. These amounts seem to have been trifling. In her examination on her answer, she states that, when her husband left Ontario and came to Manitoba, there was no arrangement of any kind between the co-defendants. He left to take up a homestead. He took it up in his own name, adding, "for me and the family of course." Her husband did not sell the farm. She asked him, as he was drinking so hard, to give it over into her name, and he did so. She paid Robinson nothing for the farm, nor gave him any notes, and has paid him nothing since. Her husband and she went to the office of Mr. Biggs together. Robinson was also there, and then both conveyances were executed. There were about forty or forty-five acres broken on the quarter section. Her husband owned no other property. She got her husband to make over the place to her because she thought he would sell it some time.

Mr. Biggs, for the defendant, objected to the answer or examination of the defendant Joseph Smith being used at the hearing, except as against him. Without deciding the point, I think the plaintiff can well rest his case on her testimony. She is the present owner of the land, from her the land must be taken, if at all, and she cannot therefore be prejudiced by using her own evidence. I may say, however, that the examination of the husband impressed me most unfavorably. His story is incredible in itself, at variance with the facts and circumstances, the testimony of his wife, and the ordinary experience of mankind in relation to the purchase and sale of land.

On behalf of the plaintiff it is contended, that the conveyances are voluntary, and that they were intended to, and must necessarily defeat or delay the plaintiff in the recovery of his debt. The defendants urge, that, as the deeds were made before the debt, for which judgment was obtained technically accrued due, they are valid; that the whole quarter section is exempt from seizure under the execution; and that, in any event, only the cultivated portion, forty-five acres, is liable to seizure. To this the plaintiffs reply, that the exemption only extends to land cultivated by the defendant personally, and then, only during its actual cultivation.

I find, on the evidence, that the conveyances were voluntary, and in pursuance of a scheme to vest the land in the wife, in fraud of creditors. As they appear to be voluntary, and especially when it is shewn that within three months after their execution, writs of execution, (including those of the plaintiff) to the total amount of $1388.38, were in the hands of the sheriff, who says that the position of the defendant Joseph Smith is *nulla bona*, it is fair to call upon him to shew he had other sufficient means to satisfy the claims of his creditors when the conveyances were executed. Such evidence is not forthcoming. It is not necessary that the debts in such a case should have become payable before the fraudulent disposal of property was made. *Freeman* v. *Pope*, L. R. 5 Ch. App. 538; *Spirett* v. *Willows*, 11 Jur. (N.S.) 70; *Bank of British North America* v. *Rattenbury*, 7 Gr. 383; *Buckland* v. *Rose*, 7 Gr. 440; *MacKay* v. *Douglas*, L. R. 14 Eq. 106; *Allan* v. *McTavish*, 8 Ont. App. R. 440. The only evidence to establish the transaction is that of the defendants and that is not generally sufficient. *Campbell* v. *Chapman*, 26 Gr. 240; *Bell* v. *Devore*, 96 Ill. 217.

The really important points in this case are those relating to the exemption from execution under Con. Stat., c. 37, s. 85, ss. 8, as amended by 47 Vic., c. 16, s. 6. What the words, "any process of seizure," in the last named Act may mean, is not perhaps of importance, since we are dealing simply with an execution. The sub-section is prefaced by the words, "The following personal and real estate are hereby declared free from seizure, by virtue of all writs of execution issued by any court in this Province." The sub-section reads thus, "The land cultivated by the defendant, provided the extent of the same be not more

than one hundred and sixty acres; in case it be more, the surplus may be sold, subject to any lien or encumbrance thereon."

In the view I take of the case, it becomes unnecessary to consider whether the portion actually cultivated only would be exempt, or the whole one hundred and sixty acres.

In some States of the American Union, the residence of the judgment debtor enjoys a similar immunity from seizure. The decisions there upon the nature and continuance of that immunity are not wholly inapplicable to the exemption claimed here.

In *Smith* v. *Brackett*, 36 Barb. N.Y. 571, this language is used, "The object of the Statute seems to have been to secure a habitation to families, rather from motives of public policy than the protection of the debtor's property against the claims of his creditors." Substitute for the words "habitation to," the following, "means of support for," and the above passage is fully in accord with the policy of the Act of Manitoba. The American authorities seem to indicate that a mere temporary absence, even for a considerable period, coupled with the leasing of the residence, would not destroy the exemption. *Potts* v. *Davenport*, 79 Ill. 455; *Wright* v. *Dunning*, 46 Ill. 271; *Cipperly* v. *Rhodes*, 53 Ill. 346; *Kenley* v. *Hudelson*, 99 Ill. 493; *Bell* v. *Devore*, 96 Ill. 217. But these cases appear to lay down the rule that the intention to return and occupy must clearly be shewn. So, in regard to the exemption under our Act, exigencies might arise, preventing the continuous cultivation by the debtor, and, at the same time, he might shew that he intended to resume cultivation. In such case it would seem harsh to deprive him of the protection thrown around the means of supporting his family. It must be kept well in view, however, that our Statute requires something to be done with the land in order to support the exemption. The labor of the debtor is requisite, not, as in those States I refer to, the mere passive act of residing. It must not be forgotten also, that it is of interest to a community, such as ours, that as much land should be brought and kept under cultivation as possible, and probably the legislature had this larger object in view as well as the mere personal one of providing means of subsistence for the family. I therefore think the debtor should be held more strictly to the very words of the Statute than is done in the cases above cited, and that in each

particular instance of ceasing to cultivate, he must satisfy the Court it occurred for some grave reason and has not continued an unreasonable period.

The evidence discloses that the defendants left the farm in the spring of 1882, leasing it for one year. They came to Winnipeg and started in the hotel business; then kept a boarding house; then a hotel again until after the first of September, 1883. While there is no evidence they cultivated the land during that period or since. The bill was filed in November, 1883, at which time they had been more than a year away, and the lease had expired some months. The defendant Joseph Smith who, alone, in any event could claim the exemption, says nothing about any intention to return. His silence is significant. His wife does say they intended to go back, but points to no fixed period, unless by inference, to the expiration of the lease, and then they did not return.

These facts disclose no exigency reasonably requiring the discontinuance of cultivation, nor its resumption within a reasonable period. Even the intention to resume it does not clearly appear. I must therefore hold that the exemption claimed by the defendants cannot be maintained against the plaintiff's writs of execution.

From the apparent scope and purpose of the Act, it seems the debtor must be cultivating for his own and family's benefit. The lease therefore could not avail him, as the lessee was cultivating for his own benefit and could claim the exemption accordingly. In this case too, the debtor has absolutely conveyed all his interest in the land, by a conveyance, valid and binding on him, even when set aside by this Court as against creditors. On that ground also, I think his claim of exemption fails. This view seems sanctioned by an American case, *Huey's Appeal*, 29 Pa. St. 219.

By the chapter of the Consolidated Statutes, above cited, the land cultivated by the defendant is declared "free from seizure by virtue of all writs of execution." These words, I suppose, mean, from such actual interference by the sheriff as would prejudice the full enjoyment of the exemption. This construction too, whilst giving to the debtor all the advantage contemplated by the Act, does not interfere with the provision in section 83,

"as amended by 44 Vic. c. 11, s. 60; "and under the writ of execution, immediately upon its receipt by the sheriff, shall be bound * * * all or any lands, tenements or hereditaments of the judgment defendant," enumerating every kind of interest therein. Thus the creditor would preserve his rights of seizure and sale, suspended only during the continuance of the exemption, but enforceable immediately upon its discontinuance. I refer to *Smith* v. *Brackett* 36 Barb. N. Y. 575; and *Allen* v. *Cook*, 26 Barb. N.Y. 374. Under the registration of the certificate of judgment, mentioned in the same section, a lien would clearly be established, even though the exemption existed, if, in fact, the exemption could at all prevail against such lien; a point on which I express no opinion.

It was urged, but not strongly, that the land was taken up for the wife. She, however, negatives any such arrangement, and the defendant Joseph Smith could hardly contend, on the facts that such was the case, especially under the provisions of 35 Vic. c. 23, s. 33, ss. 7, requiring his affidavit that the land was taken up for his own use and benefit.

There was also a suggestion that the land was paid for and some improvement made with her money. Whether the greater part of the money was hers may well be doubted, as it is the proceeds of the sale of the increase of stock owned by her. He got the money over eleven years ago, and she appears never to have thought of making a claim for or on account of it. Even if originally her separate property, the mode in which she has allowed her husband to deal with and dispose of it, precludes any claim on her part now. It is true that in equity, a husband who possesses himself of his wife's separate estate, becomes, as a rule, her trustee, but as said by Moss, C. J., in *Butler* v. *Standard Fire Insurance Company*, 4 Ont. App. R. at p. 395, after recognizing and applying this rule: "I also desire to guard against the supposition that these remarks extend to the case of the husband being allowed to employ, in his business and family expenditure, money which had been received from the produce of separate estate." McQueen on *Husband and Wife*, 332. The conveyance must be set aside, and equitable execution decreed.

DUNDEE MORTGAGE AND INVESTMENT CO.

v.

SUTHERLAND *et al.*

(IN CHAMBERS.)

Motion for judgment—Writ served ex juris—Indorsement of particulars.

The defendants were served out of the jurisdiction with the writ prescribed by the C. L. P. Act, 1852, sec. 18, which had indorsed thereon the following particulars of claim:

"To interest upon loan, from plaintiffs to defendants, due to 1st December, 1883 . . . . . $1,088 00
To interest on $1,088, from 1st December, 1883, to 1st April, 1884 . . . . . 36 26
$1,124 26"

On a motion for leave to enter final judgment under 46 and 47 Vic. c. 23, s. 16, and the amending Act, 47 Vic. c. 21, s. 7, an affidavit of service of the writ and indorsements was produced, and other affidavits were filed proving the plaintiff's claim.

A. E. McPhillips, for defendants, showed cause to the summons and urged that the plaintiffs had not complied with the Statute, by serving the defendants "with a statement showing fully the nature and amount of the claim sued for," and that the indorsement on the writ could not be taken in lieu of such statements, and, if it were, the particulars were not sufficient under the C. L. P. Act, 1852.

J. W. E. Darby, for the plaintiffs, supported the summons.

DUBUC, J.—*Held*, that an indorsement of the particulars of claim upon the writ would sufficiently comply with the Statute, but that the particulars as indorsed in this case were not full enough under the C. L. P. Act, 1852, and not "showing fully the nature and amount of the claim sued for," as required by the Statute in that behalf, the summons was discharged. Costs to be costs in the cause.

McMASTER v. CANADA PAPER CO.

Equitable assignment.—Notice.

Held, by the full court, affirming the decision of Taylor, J., that an equitable assignment of a *chose* in action may be made by any words or acts shewing a clear intention to assign; a deed or writing is not necessary.

John H. Wharnock was the debtor of the plaintiffs upon promissory notes, the first dated 30th December, 1879, for $865.27, fell due at six months, and the other for $545.10, dated 10th May, 1880, at four months, the first falling due 3rd July, 1880, and the second 13th September, 1880, the latter payable at Winnipeg, in which city Wharnock carried on business.

Wharnock had made arrangements through his clerk, W. L. Mackenzie, to retire the first of these notes by getting certain of his customers' notes discounted at the Merchants Bank in Winnipeg; the bank refused to discount this paper, and the first of his promissory notes due 3rd July, 1880, went into default. On the 9th July, 1880, Wharnock being in Toronto, called upon the plaintiffs, and then verbally agreed with W. E. Long, who was the book-keeper of the plaintiffs and managed their business at that time there, to give this customers paper to the plaintiffs, which his clerk had failed to get discounted at the Merchants Bank, Winnipeg, and then agreed with Long to send these notes to the plaintiffs, and wrote the following telegram to his clerk in Winnipeg.

To W. L. Mackenzie, Toronto, Ont., July 9, 188.

Mail McMaster & McClung customers paper to cover dishonored note.

Jno. H. Wharnock.

Wharnock delivered this telegram to the plaintiffs' agent, Long, who paid for its transmission and had it sent to W. L. Mackenzie, Winnipeg. Plaintiffs on same day telegraphed W. L. Mackenzie, "Have you mailed notes as instructed by Wharnock, and to what amount. Answer." On that same day Wharnock telegraphed W. L. Mackenzie as follows: "Send customers paper only if it won't prejudice other claims, not otherwise."

This customers paper, at the time of the telegram of 9th July, 1880, had been pledged to the Merchants Bank in Winnipeg, as collateral to the payment of paper, before then discounted for Wharnock, of which Kenny & Luxton's was the only one not paid. This note was subsequently paid by Kenny & Luxton and thus goes out of the question. The "customers paper," described paper, well known to all parties, it was then in the Merchants Bank as collateral.

A. C. Killam, Q.C. and *W. R. Mulock* for plaintiffs.

J. A. M. Aikins and *G. G. Mills* for defendants.

[*9th January, 1884.*]

On the original hearing a decree was made by TAYLOR, J., who delivered the following judgment:

The transaction in Toronto on the 8th of July, 1880, between Wharnock and Long, the book-keeper of the plaintiffs, was, in my opinion, a good equitable assignment to the plaintiffs of, at all events, the promissory notes of P. R. Young, Collins, McCrosson, and Rowe & Co., $150. These notes were not at the time in the hands of Mackenzie, then Wharnock's agent in Winnipeg, but were held by the Merchants Bank as collateral security for a note of Kenny & Luxton, which had been discounted with that bank by Wharnock.

The telegram sent to Mackenzie on the 9th of July being the one which Wharnock had written on the evening of the 8th and left with the bookkeeper to be forwarded next morning, and the telegram from the plaintiffs, sent him on the 10th, gave him notice of the plaintiffs' claim. He was the agent of Wharnock, but there is no doubt from the correspondence between him and the defendants, commencing at all events on the 3rd of July, and the correspondence between the defendants and McArthur, that Mackenzie was attending to the interests of the defendants in connection with Wharnock's indebtedness to them.

The notes were then actually in the hands of the Merchants Bank at Winnipeg, of which McArthur was manager. He had notice of the plaintiffs' claim, for although Mackenzie seems uncertain as to whether he consulted McArthur when he received the telegram, and before replying, there is no doubt he did consult him on the matter. McArthur says he believes Mackenzie con-

sulted him about the answer to be sent to the plaintiffs in reply to their telegram. Now this reply was sent on the 10th of July, so he must have consulted him at once.

The case seems to me to differ from *Malcolm* v. *Scott*, 5 Exch. 601, where it was held, instructions from a principal to his agent could not confer any rights upon a third party, for here the instructions from the principal Wharnock to Mackenzie his agent, were handed to Long, the bookkeeper of the plaintiffs, to be forwarded to his agent. The telegram written by Wharnock on the evening of the 8th, and left with the bookkeeper to be sent next day to Mackenzie, was in fact an order upon Wharnock's agent to send to the plaintiffs certain notes. It is true they are not specified in it, spoken of merely as "customers paper," but Wharnock named the notes to the bookkeeper and spoke of them as notes which had been offered to the Merchants Bank for discount, for the very purpose of obtaining funds, to retire the note also spoken of in the telegram as the "dishonored note" Mackenzie certainly had no doubt or difficulty as to what notes were referred to or intended to be sent.

The notice to McArthur was not merely in the course of casual conversation, as in *Re Ticheners*, 35 Beav. 317, for Mackenzie consulted him expressly on the subject of what reply should be sent to the plaintiffs' demand, and Mr. Killam distinctly claimed the notes as belonging to the plaintiffs, and even spoke of taking up the Kenny & Luxton note, as collateral security, for which the bank held them, in order to get immediate possession of them.

There should be a decree declaring the plaintiffs entitled to the notes of P. R. Young, T. McCrosson, T. Collins, and Rowe & Co., for $150, or to any proceeds of these notes already realized upon them. The plaintiffs are entitled to costs.

The evidence is not sufficiently clear as to the notes of W. M. Young, Lawrence, and Rowe & Co., for $98.80, to warrant the decree including them.

[*14th June, 1884.*]

On the re-hearing before the full court, WALLBRIDGE, C. J., delivered the judgment of the Court:

After referring to the facts of the case, his Lordship proceeded:

The question now is, was what took place with Long a valid equitable assignment of this customers paper; this customers paper is a *chose* in action and not within the 17th section of the Statute of Frauds, not coming within the description of goods, chattels or effects; no question arises in this case as between the parties liable under these notes and the persons claiming them, the question is confined to the rights of the plaintiffs and defendants, rival claimants to the same paper. Wharnock was indebted to the plaintiffs, he had endeavored to get the paper discounted to pay them, and failed, he then verbally agreed to give it to them, having failed to make the proceeds available to them by way of discount, a valid agreement is proved, made by Wharnock with Long, this was prior to the claim set up by defendants.

The telegram to Wharnock's agent, does not appear to me to be of any material consequence in establishing the plaintiffs' title, though it may be of use upon the question of notice to defendants. On the 9th of July no one claimed this customers paper except the Merchants Bank, and their claim is now extinct; they held it only as collateral, and the paper to which it was collateral has been paid. Indeed, they do not now set up a claim, but submit, &c.

The defendants claim that these notes, or "customers paper" as they have been called, were assigned to them by deed on the 26th July, 1880, and it is proved that Wharnock made a general deed of assignment to W. L. Mackenzie on the day following. Mackenzie became the manager of defendant's business in Winnipeg on the 14th July, 1880, and it is sufficient to charge the defendants with notice of this equitable assignment, to show that Mackenzie had notice of it. Now Mackenzie admits he had such notice on 9th July. The title to this "customers paper" was acquired by defendants through Mackenzie, and that after Mackenzie had received the telegram of 9th July. The defendants are, therefore, chargeable with the notice to Mackenzie, aud cannot set up that they are innocent purchasers. A notice given for one purpose may enure to another, or as it is expressed, "you do not inquire whether he learned it in one character or in another," per Wigram, V.C., *Meux* v. *Bell*, 1 Hare 88, and that knowing it for one purpose he knew it for all. It is proved, therefore, that when defendants acquired the rights

they set up, they are chargeable with the notice before given to Mackenzie.

There is, then, but one question—Was the assignment to plaintiffs a valid assignment. An equitable assignment of a *chose* in action may be made by any words or acts shewing a clear intention to assign; a deed or writing is not necessary. *Row* v. *Dawson*, 1 Ves. Senr. 331; *Howell* v. *MacIvers*, 4 T. R. 690. The evidence shows a valid equitable assignment to the plaintiffs through their agent Long, and, in my opinion, the plaintiffs are entitled to the notes or their proceeds now in the hands of the bank. The rehearing should be dismissed with costs, and the decree affirmed.

ARNOLD v. McLAREN.

Certificate of judgment.—Assignment of certificate.—Remedies by issuing writs of execution and registering certificate of judgment.

Bill by the assignee of a registered judgment, for sale of lands. Upon demurrer,—

Held,—1. The judgment having been assigned, it was immaterial that the judgment remained registered in the name of the original creditor.

2. That an assignee of a judgment may file a bill to enforce it.

3. That the issue of execution upon the judgment does not prevent proceedings by bill.

J. B. McArthur, Q.C., for plaintiff.

G. B. Gordon for defendant.

[*31st May, 1884.*]

TAYLOR, J.—The bill alleges that one Edward Lunn, on the 13th day of August, 1883, recovered a judgment at law against the defendant McLaren, which on the 14th day of August he duly assigned to the plaintiff. It further alleges, that on the 24th day of August the plaintiff sued out a writ of execution against the goods of McLaren, which was placed in the hands of the sheriff of the Western Judicial District, and under which the sheriff has made part of the amount payable under the judgment. The bill also alleges that shortly after the 14th day of

August a certificate, under the hand of the prothonotary and under the seal of the court, was obtained, and on the 16th day of August duly registered in the registry office for the County of Minnedosa, and the judgment thereby became a lien and charge as provided by the Statute in that behalf upon all the estate and interest, both legal and equitable, of the defendant McLaren in the lands mentioned in the bill, a large number of lots being described. The plaintiff then claims that he is entitled to a lien upon the lands for the balance remaining unpaid upon the judgment, and to have them sold in default of payment. The bill further claims payment of a small sum, interest upon the promissory note upon which the judgment was recovered, said to have been omitted by mistake in the computation of the interest.

The prayer is that the plaintiff may be declared to have a lien on the lands for the amount of the judgment debt, interest and costs and the costs of this suit, that the defendant McLaren may be ordered to pay the same, and in default that the lands may be sold and the proceeds applied in payment of the said moneys.

Originally the bill was filed with Arnold and Lunn as co-plaintiffs. It appears to have been twice amended, and Lunn now appears upon the record as a defendant. The bill does not, however, show under which of the orders to amend this change or certain other amendments were made.

The defendant McLaren now demurs to the bill for want of equity.

On the argument of the demurrer the objections taken were, First, that although the judgment may have been assigned by Lunn to Arnold, the certificate is not alleged to have been so, and the judgment stands registered not in the name of Arnold, but of Lunn. Second, that the right to register a judgment and proceed in equity to enforce it, depending entirely upon the Statute, the plaintiff's rights are limited to those given by the Statute, and under it the assignee of a judgment cannot maintain a suit, the words of the Statute being "the judgment plaintiff may . . . proceed in equity upon the lien and charge thereby created." Third, that as the Statute gives two remedies to be pursued at the plaintiff's election—one by issuing writs of *fieri facias*, the other by registering a certificate and proceeding

thereon in equity—the plaintiff here, by issuing writs of *fieri facias*, has elected against proceeding upon the certificate, and further that the plaintiff has not shown that any remedy he has under his writ is exhausted. A further objection was taken that the plaintiff cannot claim the amount of interest, said to have been omitted by mistake, in computing the amount for which judgment was signed. On this ground being stated, the counsel for the plaintiff at once conceded that he could not maintain that part of the claim.

Dealing with the first objection, and assumiug for the present that the assignee of a judgment can file a bill, I do not think an assignment of the certificate is necessary. It is not the certificate which is a charge upon the lands, but the judgment. The words of the Statute, after providing that certificates may be recorded, are: "from the time of recording the same, the said judgment shall bind and form a lien and charge on all the estate and interest," &c. As it presents itself to my mind, the certificate bears the same relation to the judgment that in Middlesex and the West Riding of Yorkshire in England, and in Ontario before the passing of the 29 Vic. c. 24, the memorial of a mortgage or deed bore to the mortgage or deed itself.

The second objection is, that only an original judgment plaintiff can proceed in equity to enforce a charge created on the lands of the debtor by registration of the certificate. Throughout, the section of the Statute dealing with this subject (the 83rd) and the one which precedes it, as they originally stood in the Consolidated Statutes, speak of the creditor as "judgment plaintiff" and the debtor as "judgment defendant." By the 46 & 47 Vic. c. 30, ss. 11 and 12, the words "judgment plaintiff," in the 82nd section have been changed to "any person having a judgment against any other person," and the words "judgment defendant" have been changed to "person against whom judgment is recovered." No change has been made in the expression "judgment plaintiff," where it appears near the close of the 83rd section. In Ontario, before the Statute as to registration of judgments was repealed, the expression used (Con. Stat. U. C., c. 89, s. 49) was: "every judgment creditor shall have such and the same remedies in a court of equity against the lands so charged," &c. Under that Act bills to enforce registered judgments were frequently filed

by the assignees of the judgments. See *McDonald* v. *Wright*, 14 Gr. 284. Now, is "judgment creditor" a term any wider than "judgment plaintiff." It seems to me it is not, and therefore, though with some hesitation, I am of opinion that the objection cannot prevail.

The other objection is that the plaintiff, by issuing execution under the judgment and proceeding thereon, has elected his remedy, and cannot now proceed in equity. The same question was raised before me on demurrer, about a year ago, in the case of *Alloway* v. *Little*, but in that case the plaintiff had only placed writs of execution in the sheriff's hands and no proceedings had been taken upon them. I find in my book the following note, showing how I disposed of that case: "Plaintiff has a right, under the Statute, to issue writs of execution and also to register the judgment. The bill does not show that proceedings have been taken under the writs and also to enforce the lien. If plaintiff doing both, Court would stay one or other, but demurrer not the proper course. Demurrer overruled."

I am still of the same opinion. A demurrer for want of equity, is the proper mode of objecting to a bill which does not show that the plaintiff is entitled to the relief prayed, or by which he is seeking to enforce a right properly cognizable in a court of law. But where the plaintiff has a title to relief which he can enforce either at law or in equity, a court of equity does not permit him to harass the defendant with two suits, one at law and the other in equity. In such a case the regular course is to obtain an order calling upon the plaintiff to elect which remedy he will pursue. The court will then make such order staying the one suit or the other upon proper terms.

It is to be observed, too, that here the plaintiff has only issued an execution against goods, and has not sued out any writ against lands. It may be that if an application calling on the plaintiff to elect were made, he could show that he had reasonable grounds for proceeding, in the first place, to enforce his judgment by a writ against the defendant's goods, and that having exhausted these, he should now be permitted to proceed against the lands upon the lien obtained by registering the judgment.

These questions and the question of costs can be dealt with upon the application for such an order, if made. In the meantime, I think the demurrer must be overruled with costs.

WOOD v. WOOD.

Alimony.—Jurisdiction.—Construction of Statutes.

Bill for alimony and maintenance.

Held, upon demurrer—

1. That, although by a strict literal interpretation of Con. Stat., c. 31, s. 6, the Court would have no jurisdiction to decree alimony, yet as to so hold would make other provisions of the Statute meaningless, a more liberal interpretation, one which would give the Court the jurisdiction it was evidently intended should be given, ought to be adopted.

2. That under Con. Stat., c. 31, s. 3, the Court has power to decree alimony.

3. That alimony may be decreed apart from divorce or judicial separation, although not so in England.

4. A single judge has jurisdiction to decree alimony.

H. M. Howell for the demurrer.

G. B. Gordon for plaintiff.

[*14th October, 1884.*]

DUBUC, J.—The plaintiff, who is the wife of the defendant, filed a bill for alimony, and also for maintenance of her child born of her marriage with the defendant.

The defendant demurred to the plaintiff's bill, and alleges several grounds of demurrer, thus stated:

1. Under the present state of the law in this country, no decree for alimony can be made, as there is no court which has jurisdiction to grant it. The provision for alimony to a wife is found in the Con. Stat. Man., c. 31, s. 6, sub-sec. 16. Section 6 states that the Court of Queen's Bench in this Province shall possess and exercise the like powers and jurisdiction, as were possessed and exercised by the Court of Chancery in England, on the 15th of July, 1870, in respect of the matters thereinafter enumerated or referred to; and among those powers and jurisdiction are those mentioned in sub-section 16, viz., "The decreeing of alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by

the law of England to a divorce and alimony as incident thereto, or to any wife whose husband lives separate from her, without any sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights, and alimony, when decreed, shall continue until the further order of the Court."

It appears that the decreeing of alimony does not, in England, belong to the Court of Chancery, but to the Court of Divorce and Matrimonial Causes; and as the defendant's counsel argues, the Court of Chancery in England, having no power or jurisdiction over such matters, our Court has none.

2. Alimony, under the English law, is decreed only when divorce or judicial separation is pronounced; here we have no right to pronounce divorce, therefore, alimony cannot be decreed.

3. The English Statute provides that such matters must be determined by three judges; this demurrer cannot be determined by a single judge.

As to the first ground, if the letter of the Statute is to be interpreted strictly, this Court has no jurisdiction. But in so interpreting it, the provision of the Statute would become a dead letter, a meaningless enactment.

Is the Court absolutely bound to give to the Statute a construction which would make it a nullity and an absurdity? Or is there a way by which we can give it its real, reasonable and intended meaning?

Dwarris, in his *Treatise on Construction of Statutes*, quotes the rules of construction adopted by different writers on the subject.

In *Vatel's rules* we find the following: "Every interpretation that leads to an absurdity ought to be rejected." "To violate the spirit of the law, by pretending to respect the letter, is a fraud no less criminal than an open violation."

In *Puffendorf's rules* we find: "The effects and consequence do very often point out the general meaning of words. If by taking them literally they bear none, or a very absurd signification, to avoid such an inconvenience, we must a little deviate from the received sense of them."

In *Domat's rules* we read the following: "If in any law we find the omission of something essential to it, or which is a necessary result of its provisions, and requisite to give the law its full effect, we may supply what is wanting but not expressed, and extend the law to what it was manifestly intended to embrace, but in its terms does not include."

The American rules of construction contain the following: "A thing within the intention is within the Statute, though not within the letter; and a thing within the letter is not within the Statute, unless within the intention." "Every Legislative Act must have a reasonable construction." "That which is implied in a Statute is as much a part of it as what is expressed." "The presumption must always be in favor of the validity of laws, unless the contrary is clearly demonstrated."

With these rules before us, I think there can be but one manner of interpreting the provisions of the Statute above referred to. It is clear, as clear as can be conceived, that the Legislature intended that this Court should have the power to decree alimony. The only difficulty in section 6 is that by an oversight, the Legislature attributed to the Court of Chancery in England what, in fact, belongs to another Court. The oversight is clear, as is the meaning and intention in regard to alimony. Under the circumstances, it is, I think, the duty of this Court, notwithstanding the oversight, and the words indicating it, to construe the Statute as the Legislature meant and intended it to be construed, and to give effect to its real intention; otherwise it would be declaring the Statute absolutely null and its enactment absurd.

In *Severn v. Severn*, 3 Gr., 431, where a question similar to this one was raised, the Chancellor said: "We must not decline the task because of its difficulty. The Legislature did certainly intend to confer upon this Court some jurisdiction in relation to the matter. The necessity of lodging that power somewhere was indeed apparent."

The decreeing of alimony is a very important enactment—a substantial provision in our laws. Should it be declared a dead letter because of the oversight above referred to? I do not think so.

I may also state that I think this Court is empowered to decree alimony by the 3rd section of the same Act, Con. Stat. Man.,

c. 31, which enacts that the Court of Queen's Bench shall possess and exercise all powers and jurisdiction possessed and exercised by any of Her Majesty's Superior Courts of Law at Westminster, or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or any Court in England having cognizance of property and civil rights.

The second ground is, that under the English law, alimony is declared only where divorce or judicial separation is pronounced; here we have no right to pronounce divorce. The provision of the Statute introducing in general terms the English law in this Province is found in section 4 of the above-mentioned Statute, and is as follows: "The Court of Queen's Bench may and shall decide and determine all matters of controversy relative to property and civil rights, both legal and equitable, according to the laws existing, or established and being in England, as such were, existed and stood on the 15th July, 1870, so far as the same can be made applicable, to matters relating to property and civil rights in this Province."

The introducing of the laws of England in Manitoba does not mean that every Statute must be in force here *in toto*, and not otherwise. The general term law does not mean an entire Statute; every provision of the Statute might be called a law, and a Statute may have several criminal as well as civil provisions, which might be considered as so many laws. The Provincial Legislature could not introduce here laws, which are of the privilege of the Dominion Parliament to enact, such as criminal law or provisions relating to divorce; but what provisions of the English Statutes which are within the power of our Legislature to enact could be, and were, in fact, introduced in the Province, leaving aside the provisions of the same Statutes which properly belonged to the Dominion Parliament to legislate upon. I therefore think that the provisions relating to alimony in the English Statute could be and were introduced here, while the provisions concerning divorce were not.

The third ground is that such matters, by the English Statute, must be determined by three judges, and as a judge sitting alone, I have no jurisdiction to determine this demurrer. In support of said contention, Imperial Statute 20 and 21 Vic., c. 85, s. 10, is quoted. But that section provides that petitions for dissolution or for sentence of nullity of marriage and applications for

new trials of questions or issues before a jury shall be heard and determined by three or more judges; but it says nothing of bills filed for alimony or any other question. And section 17 provides that the Court, or judge, may hear petitions for restitution of conjugal rights or judicial separation and make orders for alimony.

So I think it cannot be questioned that if this Court has power to decree or order alimony, a single judge has the power to do it on proper application being made.

On the above grounds, I am of opinion that the demurrer should be overruled, with costs.

ROBERTSON v. DUMBLE.

Specific performance.—Rescission.—Return of deposit.

Held, that where a contract for the purchase of real estate is rescinded, owing to the default of the purchaser, he cannot recover back his deposit.

This was an application after decree, by the plaintiff, for an order for the repayment of a deposit of $400 paid by him to the defendants on a contract for the purchase of certain lots in Winnipeg. The bill had been filed by the plaintiff (the purchaser) for specific performance of the contract, but was dismissed on the ground that the contract had been properly rescinded by the defendants owing to the refusal of the plaintiff to accept the defendants' title within a reasonable time after same had been tendered. There was no condition in the contract that the deposit should be forfeited in case of default by either party.

G. G. Mills, for plaintiff, cited *Gee* v. *Pearse*, 2 De G. & Sm. 325.

J. H. D. Munson, for defendant, cited *Ex parte Barrell*, L. R. 10 Ch. App. 512; *Depree* v. *Bedborough*, 4 Giff. 479; *Kell* v. *Nokes*, 14 W. R. 908.

[*25th April, 1883.*]

TAYLOR, J.—The judgment of the full Court was, that the plaintiff, the purchaser, made objections to the defendants' title when he ought to have accepted it, and that in consequence of the improper objections taken by him, the defendants the vendors were entitled to give a notice limiting the time for performance and for rescinding the contract thereafter.

The contract was rescinded owing to the default of the purchaser, and he cannot recover back his deposit. There has been no change of the law on this subject since the Judicature Act was passed in England. The only difference since that Act is, that under it the technical difficulty which prevented the Court from ordering, in a proper case, a return of the deposit, and at the same time a dismissal of the bill, no longer prevails.

The case of *Gee* v. *Pearse*, 2 De G. & Sm. 325, is simply one where, under the special circumstances of the case, the Vice-Chancellor did not think it proper to give the vendor his costs, except upon the terms of his returning the deposit.

The defendants submit to the set-off of the $124 30, taxed to the plaintiff under the order of 1st June, 1882. Beyond that the plaintiff is not entitled to what he asks by his notice of motion. The plaintiff must pay the costs of this motion.

STEWART v. TURPIN.

Interim Injunction—Mandatory Injunction.

Held,—That on a motion *ex parte* for an injunction all facts within the knowledge of the applicant and material to the application must be disclosed. A mandatory injunction to restore buildings to their former foundations refused upon motion.

This was a mortgage suit and for an injunction to compel the defendants, who had removed buildings from the land, to restore them to their former foundations. An *ex parte* injunction to restrain further removal had been obtained, and a motion was now made to continue this injunction and for a mandatory injunction to restore the buildings removed.

Evidence upon the motion disclosed some facts not disclosed upon the motion for the *ex parte* injunction. They were:—(*a.*) That the mortgage in the bill was given on 30th Nov., 1883, in substitution for a mortgage of 13th Aug., 1883, necessitated by change of name of town site and consequent alteration of plan; (*b.*) that there were no buildings on the property when the first mortgage was given; (*c.*) that the first mortgage had no insurance clause; and (*d.*) that the buildings were frame not plastered, and rested on blocks on the sod which was not broken.

G. Patterson for plaintiff referred to *Joyce on Injunctions*, 439 and 1044. *Real Estate Loan & Debenture Co.* v. *Burkholder*, not reported, recently decided by Mr. Justice Taylor.

J. A. M. Aikins (*G. G. Mills* with him) for defendant cited *Kerr* on *Injunctions*, 547, 562, and 563; *Joyce* on *Injunctions*, 1265 and 1306; *Daniels' Chancery Practice*, 1517; *Dalglish* v. *Jarvie*, 2 Mac. & G., 238, 240-3; *Hardbottle* v. *Pooley*, 20 L. T. (N. S.) 436; *Clifton* v. *Robinson*, 16 Beav. 355; *Hilton* v. *Lord Granville*, 4 Beav. 131; *Hemphill* v. *McKenna*, 3 Dr. & War. 183; *Atty. Gen.* v. *Mayor of Liverpool*, 1 My. & Cr. 210.

[*9th October, 1884.*]

SMITH, J.—There is no doubt that on a motion *ex parte* for an injunction, all facts within the knowledge of the applicant, and material to the application must be disclosed. Forgetfulness, or even misapprehension of their material nature form no excuse. The rule also appears to embrace such facts, being clearly material

as the applicant could have discovered on enquiry, where the circumstances are such that enquiry was incumbent upon him. The omission to state such facts would be equivalent to suppression.

In this case the plaintiff is the assignee of the mortgage, and it is not shewn, or even suggested, that she knew anything about the matters alleged by defendant. Nor do such matters seem to me really material. The question in the suit is whether the building does or does not form part of the mortgage security. The injunction was granted to keep the building from removal until the decision of that question, and would have been equally proper had all the evidence on which the defendant relies, been before the judge who granted the application.

I do not think I could, consistently with the authorities grant a mandatory injunction to replace the building. If the defendant, or those for whom he is acting, own the building free from the lien of the plaintiff's mortgage it would be unjust to put him to the expense of replacing it; whilst whether he does or does not own it cannot be determined till the hearing.

I continue the injunction till the hearing. I refuse to grant the mandatory injunction asked for.

RE G. A. STANBRO.

Extradition.—Habeas Corpus.—Form of taking evidence.

Where prisoner was charged with an extraditable crime and the evidence was taken down in the narrative form on the judge's notes, and by way of question and answer by a shorthand reporter which were afterwards extended by the reporter but were not read over to the witnesses or signed by them,

Held,—Upon *habeas corpus* that there was no evidence—that is no evidence that the Court could look at—as proof of the alleged crime.

N. F. Hagel and *Ghent Davis* for Stanbro.

S. Blanchard Q. C., J. S. Ewart and *W. R. Mulock contra.*

[*8th October, 1884.*]

WALLBRIDGE, C. J., delivered the judgment of the Court :—

The prisoner was brought before us on a writ of *habeas corpus* on the first day of Trinity Term 1884, and a *certiorari* was moved for on that day directed to the judge, before whom the prisoner had been brought, asking for a return of the evidence on which the prisoner had been committed. It appeared that the prisoner had been employed by the Northern Pacific Express Company, a company in the United States of America, and that he was the agent of this Company at Hawley in the State of Minnesota, that as such agent he had in his possession the books of the company, in which are entered the names of parties to whom parcels or packages were addressed, in the margin of which book was a space for the name of the consignee of the parcel, to be signed by the consignee when he should receive the same. The parcel in question had been addressed to Helver Hulgeson, and his name appears in that book in the margin as having been written by him, being in fact his receipt for the parcel. This Helver Hulgeson on his examination before the judge swore that he had not received this parcel and that the signature shewing his receipt for it was not his handwriting. The prisoner was charged with the crime of forgery in having thus signed the name of the said Helver Hulgeson. He is charged as a fugitive criminal from the State of Minnesota. The crime of forgery is one of the crimes

contained in the Ashburton Treaty and for which a fugitive criminal may be apprehended in this country, and surrendered to the authorities of the country in which the forgery was committed. The prisoner was committed to the common gaol of the Eastern Judicial District of the Province of Manitoba, in the Dominion of Canada, on the fourth day of August last, there to await the warrant of the Secretary of State, of the Dominion of Canada, for his surrender.

The prisoner thereupon applied to the Court of Queen's Bench of Manitoba for a writ of *habeas corpus* whilst so awaiting the expiry of the fifteen days allowed by law, before which he could not be legally surrendered.

On the return of the *habeas corpus* the case was argued at length upon a great number of points, any one of which being determined in his favor entitles him to his discharge, and all of which must be determined against him in order to detain him. It appeared from the return to the writ of *certiorari*, that the evidence taken before the judge when the prisoner was brought before him on the charge of forgery, was taken in the narrative form on the judge's notes, and by way of question and answer by the short-hand reporter, which notes were afterwards extended by the reporter; this formed the evidence on which the prisoner was committed.

The Extradition Act of 40 Vic. c. 25, provides the manner in which the evidence in extradition cases shall be taken, in the following words: "The fugitive shall be brought before a judge, who shall, subject to the provisions of this Act, hear the case in the same manner as near as may be, as if the fugitive were brought before him charged with an indictable offence committed in Canada," which words in my opinion are mandatory. The word "shall" being so declared in the Interpretation Act; and it is also held that words giving jurisdiction, though in form directory are to be strictly followed in the exercise of such jurisdiction. *Taylor* v. *Taylor*, L. R. 1 Ch. Div. 431.

Turning to the Act respecting the duties of justices of the peace out of sessions in relation to persons charged with indictable offences 32 and 33 Vic. c. 30 s. 29 it is therein provided as follows: "In all cases where any person appears or is brought before a justice or justices of the peace charged with any indict-

able offence such justice or justices before he or they commit such accused person to prison for trial, shall in the presence of the accused person, (who shall be at liberty to put questions to any witness produced against him,) take the statement on oath or affirmation of those who know the facts and circumstances of the case, and shall put the same in writing, and such depositions shall be read over to, and signed respectively by the witnesses so examined and shall be signed also by the justice or justices taking the same." This is required to be done before the accused person is committed for trial.

None of these requirements were observed, and the prisoner is in confinement without anything that can be looked upon as evidence supporting the warrant of commitment. *Re Phipps*, 8 Ont. App. R. 110, judgment of Patterson, J. and *re Lee*, 5 Ont. R. 589-90. It has been argued that these requisites in the Statute are only there, not to enable the justice to commit for trial, but for the purpose of preserving testimony in case of the death of the witness, but in my opinion the words of the Act cannot so be read, the words in the Act are "before he commits such accused person for trial," and these words are in my opinion mandatory. On a *habeas corpus* the Court may go behind the commitment, and examine into the facts upon which the prisoner was committed to see if there was jurisdiction in the judge committing, and in thus doing they are obliged to inspect the evidence and to see that there is jurisdiction and in thus referring to the evidence they find that there is no evidence, that is no evidence so taken that they can look at it as proof of an extradition crime upon which the prisoner can be held.

The result is, that the prisoner is discharged.

WARD v. SHORT.

Demurrer.—Multifariousness.—Want of equity.

The bill filed prayed for an account against defendant S., payment of the amount which might be found due the plaintiffs, and in default a sale of certain chattels upon which they claimed a right to possession until payment. It alleged that the defendant S. had given a mortgage to the defendants the I. Bank upon the chattels and prayed an injunction against the Bank, to restrain it from taking possession of, and selling, the chattels.

Held.—The demurrer of the defendants, the I. Bank, for multifariousness and want of equity was allowed.

The bill alleged that defendant Short had obtained a permit to cut timber; that he made an agreement with the plaintiffs to cut logs and timber and the plaintiffs were to leave the same on the shores and in the waters of White Fish Bay, Lake of the Woods, that Short agreed to pay the plaintiffs when the logs were got out in the spring, and further expressly and distinctly agreed (and it was so understood by all parties to the agreement) to allow the plaintiffs to hold possession of the logs until they should be paid whatever might be due to them for their work upon the same; that the plaintiffs in pursuance of such agreement cut logs and timber and left them at the place agreed and at the time agreed whereby defendant Short became indebted to the plaintiffs in the sum of $2546.53 after allowing certain payments on account; that plaintiffs were in possession of the logs, and had a lien thereon for the sum due; that defendant Short had given the Imperial Bank a chattel mortgage on said logs to secure moneys due to the Bank; that Short had never redeemed the chattel mortgage and the Bank threatened to seize and take possession of the logs and dispose of same to an innocent purchaser without notice. The bill prayed for a declaration that the plaintiffs were entitled to a lien on the logs; for a sale in default of payment of amount due, and an injunction against the Imperial Bank restraining the Bank from seizing, or interfering with the logs.

The defendants, the Imperial Bank, demurred for multifariousness and want of equity.

W. H. Culver (*G. G. Mills* with him) in support of demurrer argued, there were two separate and distinct causes of action,

one against Short, and the other against the Imperial Bank, in neither of which is the other interested.

He cited *Crooks* v. *Smith*, 1 Gr. 360; *Cole* v. *Glover*, 16 Gr. 392; *Pearse* v. *Hewitt*, 7 Sim. 471; *Geddes* v. *Morley*, 1 O. S. 675; *Flint* v. *Corby*, 4 Gr. 45; *Gartshore* v. *Gore Bank*, 13 Gr. 187; *Mason* v. *Norris*, 18 Gr. 500; *Hepburn* v. *Patton*, 26 Gr. 597.

J. S. Ewart and *Ghent Davis* in support of bill.

The bill is not multifarious. The Bank is a proper party on account of its second mortgage. It need not have been added until after decree but that is a matter of costs. As to the injunction, if the plaintiffs are entitled to any relief a demurrer for want of equity cannot succeed.

[*24th November, 1884.*]

TAYLOR, J.—I allow the demurrer of the Imperial Bank. On the record as it stands, there are two entirely distinct matters.

1. An account against Short is prayed, payment by him of the amount which may be found due and in default a sale of certain chattels.

2. An injunction against the Bank to restrain it from taking possession of these chattels and selling them.

I question very much if the plaintiffs have a right to file a bill in equity even as against Short. They have all that they say it was agreed they should have, possession of the logs until paid, and there is no suggestion of complicated accounts requiring the interposition of a court of equity.

The plaintiffs could not according to *Hepburn* v. *Patton*, 26 Gr. 597, obtain an injunction against Short to prevent his selling the logs. How then can they have an injunction against the Imperial Bank whose only title is derived under Short?

Mason v. *Norris*, 18 Gr. 500 is also an authority against the plaintiffs.

As to the allegation that the Imperial Bank may, unless restrained, sell the logs to some *bona fide* purchaser for value without notice, if the plaintiffs lien gives them priority over the Bank, without the Bank having actual notice of it, then it will also prevail over any person to whom the Bank may sell. If possession

is sufficient notice of the lien in the one case, it is so in the other also.

If the case is, as put by the plaintiffs, the same as a mortgage suit by prior mortgagees, then they are mortgagees in possession, and a mortgagee in possession could not come to the Court and ask an injunction to restrain a subsequent mortgagee from taking possession. He does not need any such interposition of the Court.

The demurrer is allowed with costs.

HUDSON'S BAY CO. v. RUTTAN.

Vendor and purchaser.—Assignee of purchaser.—Liability for costs.—Registration of cloud on title.

The plaintiffs agreed to sell real estate to defendant R. who registered his contract. Afterwards R. executed a mortgage upon the land to the defendants the O. Bank. The bill was for payment and in default rescission. Prior to the suit the Bank offered to execute a release of their mortgage upon it being tendered by the plaintiffs.

Held,—That the Bank should pay the costs of the suit, the plaintiffs being under no obligation to tender a release for execution.

W. R. Mulock for plaintiffs.

A. C. Killam, Q. C. for defendants, the Ontario Bank.

[*4th October*, 1884.]

TAYLOR, J.—The bill in this case has been taken *pro confesso* against the defendant Ruttan, and the case was heard on bill and answer against the other defendants, the Ontario Bank.

The facts are, that the plaintiffs in 1881 sold the land in question to the defendant Ruttan, when he paid a small part of the

purchase money, the remainder being payable in eight annual instalments with interest. None of the instalments of principal have been paid, but $78.40 has been paid on account of interest. In 1883 Ruttan made a mortgage upon the land to the Ontario Bank which was duly registered by the mortgagees. The prayer of the bill is, that the plaintiffs may be paid the amount now due them for principal and interest, they being ready and willing and offering to do everything on their part which may be necessary, and in default that the sale may be cancelled, and the mortgage declared to be a cloud upon their title. There is also a prayer that the plaintiffs may be paid their costs of suit.

The Bank have answered admitting the sale to Ruttan, and that he has given them a mortgage on the land. They say they have never bound themselves to pay the purchase money, and that they have no objection to the sale being cancelled. They further say that before the commencement of the suit they offered to the plaintiffs to execute any discharge or release of the mortgage which the plaintiffs could fairly ask of them for the purpose of removing any cloud from the plaintiffs title to the lands occasioned by the registration of the mortgage, "as soon as the same should be presented to them by the plaintiffs, such release to be prepared by the plaintiffs at their own expense," and they say they are still ready and willing to do so.

Under these facts the only question argued before me was the question of costs.

The Ontario Bank must in my opinion be looked upon as assignees of the contract with Ruttan, or as sub-purchasers under him. If the plaintiffs failed to carry out the contract on their part, the Bank could file a bill against them to compel specific performance of it. That being the case, they are proper parties to a bill by the vendors to enforce performance of the contract by the purchaser. I do not see how I can hold that the vendors were, before commencing this suit, bound to prepare and tender to them a release or quit claim deed for execution.

It is true that had the plaintiffs executed a conveyance to Ruttan, taking back a mortgage for the unpaid purchase money, the Bank would have stood in the position of second mortgagees, and on a bill filed for foreclosure would have been made parties in the master's office, where, in the event of their failing to prove a

claim, they would have been foreclosed without any liability to pay costs. But that is under the General Orders, which provide that the non-attendance of a subsequent mortgagee is to be treated as a disclaimer, and he is to be thereby foreclosed. Where foreclosure is prayed, the plaintiff takes the land for the debt and costs, and even the original mortgagor is not made to pay costs. The General Orders make no similiar provision as to incumbrancers claiming under a purchaser, where the latter has only an agreement to purchase and the vendor brings a suit for specific performance.

Whether the assignee of the original purchaser is an assignee of the whole contract, or of part only, or has only a qualified interest as a mortgagee from the purchaser, seems to me to make no difference. The vendor is entitled to make him a party to a suit to enforce the contract, and, at all events where, as in the present case, the assignee has placed on the registry the instrument under which he claims, and thereby created a cloud on the vendor's title, to ask costs against him.

The plaintiffs are entitled to the usual decree, providing for their being paid their money, and in default that the contract be rescinded, and for the removal of the cloud created by the registration of the Bank's mortgage, with costs against both defendants.

TAIT v. CALLAWAY.

(IN CHAMBERS.)

Re-hearing.—Notice of setting down.

Held, That two days notice of setting down for re-hearing sufficient.

In this case a decree was pronounced by Taylor, J., on the 2nd of May, 1884. Notice of intention to re-hear under order 165 was served on the 8th of May. The cause was set down for re-hearing on the 3rd of June, being two days before the fifth day of Term, and notice thereof served.

J. Curran, for plaintiffs, moved before the referee to strike the case out of the list for re-hearing, and to set aside the notice of re-hearing, for irregularity, on the ground that under orders 170 and 409 the cause should have been set down, and notice served eight days before the fifth day of Term.

Chester Glass, for defendant, opposed the motion. The only procedure provided for re-hearing the order or decree of a single judge before the full court, is under orders 162 to 170. These are orders drawn up specially by the judges of Manitoba to suit the number of judges here, as there is no separate court of appeal.

Orders 406 to 409 are copied from the Ontario Orders and apply only to proceedings before a single judge. The notice given under order 165 is a notice of re-hearing and was served in this case a month before Term. The plaintiff admits that this is a re-hearing in Term. This being so he cannot rely on order 409, which with the orders preceding it applies only to matters out of Term. Plaintiff can only rely on orders 162 to 167, which treat altogether of re-hearing in Term before the full court. Defendant has followed the law strictly, served his notice under 165, set the cause down under order 167, and paid $40 into court under order 317.

Held, by the referee, dismissing the motion, that the notice was sufficient. The orders specially prepared for procedure in the courts of Manitoba should prevail.

McARTHUR v. MACDONELL.

THE STANDARD INSURANCE CO. AND LEWIS AND KIRBY, GARNISHEES.

[IN CHAMBERS.]

Garnishing order.—Garnishee (a corporation) not within the Province.

Application by defendant to set aside a garnishing order. The debt alleged to be due by the garnishees was in respect of a life insurance policy. The Insurance Company (the garnishees) had no office in the Province. L. & K. acted as its agents in Winnipeg, having power merely to receive applications for insurance. The premiums were payable at Montreal, and the amount insured in case of death was also payable at Montreal.

Held, that as the Insurance Company could not be sued in this Province, the garnishing order should be discharged.

W. E. Perdue for plaintiff.

J. D. Morice for defendant.

[*20th June, 1884.*]

TAYLOR, J.—This is an application to discharge a garnishing order obtained by the plaintiffs, garnishing a sum of money payable by the Standard Insurance Company under a policy of insurance upon the life of the intestate.

Some technical objections to the order were taken, but not pressed upon the argument.

The main objections are, that the debt or liability sought to be attached is not one, payment of which can be enforced by suit in this Province, and also that the claim had been assigned by the administrator before the garnishing order was obtained.

On the first objection the present application must, in my opinion, succeed. The Insurance Company have no office in this Province. Lewis & Kirby act as agents for the company in Winnipeg, merely to receive applications, which are forwarded to the head office of the company, for Canada, in the city of Montreal. They have no power to effect insurances, to issue policies, or to grant receipts for premiums. When an application is accepted it is so at Montreal; the policy is issued there,

the premiums are payable there, and the amount insured is in case of the death of the insured payable at the office of the company in Montreal.

Such being the case the claim is one, payment of which could not be enforced by a suit in the courts of this Province. The contract was not made here, nor is it to be performed here.

The order, so far as it affects the Standard Insurance Company, must be set aside. As to Lewis & Kirby, it should stand. For anything that appears on the papers now before me, they may be indebted to the defendant.

As the application was to discharge the order as to all the garnishees, and has partially succeeded and partially failed, the order now made should be without costs.

UNION BANK v. McDONALD.

(IN CHAMBERS.)

Bills of Exchange Act—Substitutional service of writ—Delay in application to set aside judgment.

Where judgment obtained and execution placed in sheriff's hands, and no application made to set same aside for nearly a year,

Held, that after such delay, the Court would not interfere upon a ground of irregularity.

Held, that the provisions of Con. Stat. Man. c. 31, s. 35, as to substitutional service, do not apply to writs under the Bills of Exchange Act.

Bank of Nova Scotia v. *Lynch*, 1 M. L. R. 180, reviewed.

G. F. Brophy for plaintiffs.

J. W. E. Darby for defendant.

[*21st June, 1884.*]

TAYLOR, J.—This is an application to set aside an order for substitutional service of a writ issued under the Bills of Exchange Act, and all proceedings had thereunder. The order complained of authorized service to be effected upon the defendant by mailing a copy of the writ and order addressed to him

at Chatham, in Ontario, and by posting up copies in the office of the prothonotary. The order gave the defendant twenty days to enter an appearance, and then proceeded to declare that such service should be as effectual, and the plaintiffs should be at liberty to proceed, as if personal service had been effected in this Province.

This order was made, judgment was entered, and execution placed in the sheriff's hands nearly a year ago. The summons to set aside the order and proceedings was taken out a considerable time ago, but by some arrangement between the parties it was never brought on for argument. I do not think that after such delay I should interfere to set aside the order or judgment. The authorities holding that where there is delay in moving, the Court will not interfere to set aside a judgment, even although the proceedings to obtain it were irregular, are numerous. On this, *Ketchum* v. *McDonell*, 2 U. C. Q. B. 378; *Kerr* v. *Bowie*, 3 C. L. J. 150; *Richmond* v. *Proctor*, 3 C. L. J. 202; *McKenzie* v. *McNaughton*, 3 Ont. Pr. R. 35, may be referred to.

As, however, the question of whether an order can be made for substitutional service of a writ issued under the Bills of Exchange Act has been raised, I desire to express my views upon the subject. That Act provides that where the defendant has not obtained leave to appear, "It shall be lawful for the plaintiff, on filing an affidavit of personal service of the writ within the jurisdiction of the court, or an order for leave to proceed as provided for by the Common Law Procedure Act, and a copy of the writ of summons and indorsement thereon . . . . . at once to sign final judgment." Under the Act then, there are two modes by which the plaintiff may proceed to sign final judgment; filing an affidavit of personal service, or filing an order for leave to proceed under the Common Law Procedure Act. The section of the Act which provides for the granting of such an order is the 17th, and it is as follows: "The service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and in case it shall appear to such Court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that

he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such Court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or judge may seem fit."

The Bills of Exchange Act being one which provides a summary and exceptional method of proceeding, one under which the onus of showing some ground for a defence is thrown upon the defendant before he can even appear to the writ, a plaintiff who elects to proceed under that Act, and to take advantage of its provisions, must, in my judgment, proceed in strict conformity with its requirements. The Court has no power to dispense with any of them, or to vary them. The provisions of the Con. Stat. c. 31, s. 35, wide as they are, cannot, I think, be taken as applicable to writs issued under the Bills of Exchange Act, but only to service of the ordinary process of the court.

The case of *The Bank of Nova Scotia* v. *Lynch*, 1 M. L. R. 180, decided by me over a year ago, seems opposed to the views I have here expressed. Unfortunately, that case is not fully or accurately reported. There, on an application to set aside an order which had been made for substitutional service on the wife of the defendant, it appeared that, after the issue of the writ, the defendant was in the sheriff's office on a Saturday afternoon. The sheriff told him that a bailiff was then out with a copy of the writ for the purpose of effecting service, and showed him the original writ which the defendant took and read. The defendant then said he would call on Monday and receive the copy, but, instead of doing so, he left for England by train on the Sunday morning. Now, it might have been argued with great force in that case that the defendant had in fact been personally served, at all events the writ had come to his knowledge, and he was wilfully evading service. I have no recollection of holding, and I do not think I held, that the Con. Stat. c. 31, s. 35, would warrant an order for substitutional service of a writ under the Bills of Exchange Act. If I did so hold I have no hesitation in saying now, that in doing so I erred.

The present summons must be discharged on the ground of the delay, but as the proceedings were irregular I discharge it without costs.

MARTINDALE v. CONKLIN.

(IN CHAMBERS.)

Security for costs.—Real plaintiff a third party.

This action was brought upon a cheque payable to bearer, which had been paid by defendant, but he had neglected to have it delivered up to him on payment, and the same came into other parties hands.

After issue had been joined, a summons for security for costs was taken out, on the ground that the plaintiff was not interested and that a third party was the real plaintiff.

From the examination of the plaintiff it appeared, that he was a clerk in the office of Turner, McKeand & Co. of Winnipeg, and had been asked to have the cheque sued in his name, he had no property, he knew nothing of the suit until about a week before the examination on his declaration, which was after issue joined, and had never seen the cheque sued on until about that time, and should the suit be a successful one against the defendant, it would not be he but Turner, McKeand & Co. who would receive the benefit.

Colin H. Campbell, for plaintiff, showed cause to the summons.

A. E. McPhillips, for defendant, *contra*, cited *Wainwright* v. *Bland*, 2 C. M. & R. 740; 4 Dowl. 547; *Hearsey* v. *Pechell*, 7 Dowl. 437; *Tennant* v. *Brown*, 5 B. & C. 208, 432; *Mason* v. *Jeffrey*, 2 Ch. Ch. R. 15; *Little* v. *Wright*, 16 Gr. 576.

[*11th June, 1884.*]

DUBUC, J.—*Held*, that it was a case in which security should be directed, and that the order would be the usual order for security for costs, to cover all costs of suit incurred, or that may be incurred by the defendant. Costs of the application to be costs in the cause.

STEWART v. TURPIN.

(IN CHAMBERS.)

Practice—Restamping and refiling papers.

G. Paterson for plaintiff—moved on notice for an order to amend the bill of complaint. In the notice of motion it was stated "that upon such motion will be read an abstract of the said property and copies of the said conveyances made by the defendant and the pleadings, affidavits and proceedings already filed in this cause."

G. G. Mills for defendant—objected that there was no material before the Court which could be read on the motion, as it appeared from the notice that the matter proposed to be read was not stamped for the purpose of this motion, and that under the Con. Stat. Man. c. 8 it must be refiled and restamped before it can be used and under the decision of Mr. Justice Taylor in *Graham* v. *North American Contracting Company* papers cannot be stamped after objection taken.

[*1st October*, 1884.]

SMITH, J. *Held*,—That under the wording of section 14 of the Statute Con. Stat. Man. c. 8, "in case another fee or charge is due or payable thereon for any other or further use of the same matter or proceeding," it is not necessary to refile or restamp in equity.

At common law it is and has been necessary to do so and there the Statute applies; but in equity it never has been necessary to restamp or refile.

KING v. LEARY.

(IN CHAMBERS.)

Execution upon judgment obtained under 46 & 47 Vic. c. 23, and Amending Act.

Held,—That execution on a judgment signed under 46 & 47 Vic. c. 23, s. 21 as amended by 47 Vic. c. 21, s. 10 cannot be issued before the expiration of eight days after judgment has been signed.

W. E. Perdue for plaintiff.

J. D. Cameron for defendant.

[*21st October*, 1884.]

SMITH, J.—An application is made in this cause for an order directing the immediate issue of execution. Judgment was signed under the provisions of 46 & 47 Vic. c. 23, and it is contended that under section 21, as amended by 47 Vic. c. 21, s. 10, a judge has power to make such an order.

As I read the section, it authorizes the issue of execution "at the expiration of eight days after judgment has been signed" not before. It is then to issue, "unless otherwise ordered." Evidently there is power to restrain its issue at the conclusion of the statutory period; or to postpone the issue till some further day, but not to anticipate the time fixed by the Act. The word "otherwise" means at variance with, or contrary to the provisions of the Statute, it qualifies the general permission given to issue execution at the end of the period, leaving it discretionary with a judge still further to extend the time.

The words of the section are "execution may be issued unless otherwise ordered." Transpose these words and the meaning becomes still more apparent. "Unless otherwise ordered, execution may be issued." Would there then be any doubt that the issue of execution could not take place before the expiration of the allotted period?

REED v. SMITH.

Tax sale.—Irregularities.—Demurrer for Want of equity.

In a bill to avoid a sale for taxes, plaintiff alleged as objections to the sale:—

That the lands were never assessed according to law.

That the assessment rolls were never returned according to law, or with the certificate or oath required by law.

That no taxes were levied by the council for either 1880 or 1881.

That in the alleged assessment rolls for the years 1880 and 1881, the alleged assessment and the levy alleged and claimed to have been made, were of, and were assumed to be made upon, the north half of the section as one parcel.

That the half section was advertized as one parcel.

That at the sale the land was offered for competition in two parcels of a quarter section each.

That the lands were not advertized in the manner and for the length of time required by law.

On a demurrer for want of equity,

Held,—That the allegations contained in the bill were sufficient in form, and if proved alleged grounds for setting aside the sale.

Held,—That where land was assessed as one parcel, a treasurer when selling has no right to offer it in two or more parcels.

A. C. Killam, Q. C., for plaintiff.

S. C. Biggs for defendant.

[*23rd May, 1884.*

TAYLOR, J.—This is a suit instituted by the owner of the N. W. ¼ of Section 17, Township 3, Range 3 East of the principal meridian, to have it declared that a sale for taxes of 100 acres, part of the ¼ section, is void. The defendant, who is a purchaser from the purchaser at the tax sale, has filed a demurrer for want of equity.

It is objected that the allegations in the earlier part of the bill as to the defects and irregularities relied on as rendering the sale void, are so vague as to be demurrable, while the later allegations which limit the earlier ones do not disclose grounds for avoiding the sale.

The first four paragraphs set out the plaintiffs title,—that the Municipality assumed to sell the land, when one Fitzgerald became the purchaser, that a conveyance was made to Fitzgerald, and that he has conveyed to the defendant. Then follow the objections on which the plaintiff relies for avoiding the sale.

In the 5th paragraph two are stated. The first is, that the lands were never assessed according to law. The second is, that the assessment rolls for 1880 and 1881, were never returned according to law, or with the certificate or oath required by law. These seem to me sufficiently explicit and definite allegations. The Statute has laid down how the assessment has to be made, and how the roll is to be returned.

It may be that irregularities on the part of the assessor about his return of the roll, do not affect a purchaser, but it is most certainly essential that there should have been a valid assessment. As was said by Mr. Justice Wilson in *Cotter* v. *Sutherland*, 18 U. C. C. P., at page 390, "we should require strict proof that the tax has been lawfully made."

The 6th paragraph alleges that no taxes were levied by the council for either 1880 or 1881.

The 7th paragraph says, that in the alleged assessment rolls for these years, the alleged assessment and the levy alleged and claimed to have been made, were of, and were assumed to be made upon the north half of the section as one parcel. Now that does not limit or in any way affect the charges made in the 5th and 6th paragraphs. They charge, no assessment according to law, and no taxes levied. It says, the assessment and levy alleged and relied on were on the half section as one parcel.

The next paragraph alleges that the half section was advertised as one parcel and as for sale on account of unpaid taxes amounting to $28.85.

Then the 9th paragraph says, the lands were not advertised in the manner, or for the length of time required by law. Counsel for the defendant upon this objection referred to *Connor* v. *Douglass*, 15 Gr. 456, but how can I on the argument of this demurrer say if that case is applicable or not. There is no evidence before me what the advertisement here was or how long it was inserted. Assume, as for the purposes of this argu-

ment it must be assumed, that the lands were not properly advertised, then the sale is liable to be set aside.

The 9th paragraph, having stated that the advertising such as it was, was of one parcel, the north half of the section, for unpaid taxes amounting to $28.85, the 10th paragraph says, that at the sale the land was offered for competition in two parcels of a quarter section each, and sold each for $14.50 taxes, and one dollar for expenses.

Several cases were cited as to the assessment of lots as a whole, or according to divisions, but I was referred to no case deciding that where lands have been assessed and advertised for sale as one parcel, they can at the sale be divided and sold as two or more. Whatever may have been the correct mode of assessing this land at first,—whether as one parcel or as two,—I have no doubt that having assessed it as one parcel, the treasurer when selling had no right to offer it in any other way.

What right had he to assume that each quarter section should bear one half of the whole amount, one may be ten times as valuable as the other. Then he by the method he adopted increased the amount of taxes for which he sold. Assume that each quarter section should bear an equal amount of the taxes, the amount to be borne by this quarter section was $14.42½ with 50 cents for expenses, or $14.92½. The amount for which it was sold was $15.50.

In *Yokham* v. *Hall*, 15 Gr. 335 two half lots had been assessed separately, but sold as a whole, and the sale was held invalid by the late Chancellor Vankoughnet.

Had the lot been assessed as a whole, the taxes would have been less than upon two half lots assessed separately, the amount for statute labor being less, and the whole lot having been sold for the total of the taxes assessed on the two halves, the Chancellor held it fatal to the sale. "The amount," he said "of the excess can make no difference, whether it is five shillings or five pounds."

The allegations contained in this bill seem to me quite sufficient in form, and if proved allege grounds for setting aside the sale. That is all that is necessary to decide the question raised by this demurrer.

The demurrer is overruled with costs.

ARMSTRONG v. PORTAGE, WESTBOURNE AND NORTH WESTERN RAILWAY CO.

Corporation— Contract under seal—Hire of servant or employé.

Plaintiff, a civil engineer, was engaged by defendants as provisional engineer at $ 300 per month. The employment commenced on 9th of August 1882, he was dismissed on 16th of December 1883 and paid up to that date: He sued for wrongful dismissal and claimed wages up to 9th of February, the earliest period at which his service could have been terminated by a month's notice.

Held, that as the plaintiff was an important official, his engagement was not binding upon the corporation, not being under its corporate seal.

H. M. Howell for plaintiff.

J. B. McArthur, Q. C., for defendants.

[*25th October, 1884.*]

SMITH J., delivered the judgment of the Court* :—

This case was tried at the assizes at Winnipeg, before Mr. Justice Taylor and a jury. There was a verdict for the plaintiff for $537.50.

The defendant now moves for a new trial on the ground that the judge at the trial should have nonsuited, because no contract binding on the defendants was proved. The plaintiff declares for wrongful dismissal and on the common counts, claiming in his particulars three months salary.

It appears that the plaintiff was a civil engineer, and was, by correspondence with one Brown, who acted for the defendants, engaged as divisional engineer at a salary of $300 per month:— His employment commenced on the 9th day of August, 1882. He was dismissed on the 16th December 1883, and paid till that date by the defendants. For this dismissal he brings this action, claiming by way of damages, wages up to the 9th February; the earliest period at which a month's notice could terminate the current month of his employment. These damages the jury has awarded.

* Wallbridge, C. J., Dubuc, J., and Smith, J.

The defendants resist payment on the ground that there is no contract, under their corporate seal, engaging the services of the plaintiff.

It was not urged on the argument that there was any statutory authority enabling the defendants to contract without seal: but the case was dealt with as the ordinary case of a corporation entering into a parol engagement, and it was contended that the employment of a servant in such a manner was within the exception to the general rule.

It appears from the evidence that the plaintiff's position was a responsible one. He was put in charge of the western division of the defendants line of railway as engineer of that division, and was directed to report to the general manager of the Company.

If the contract had been made out, I think the plaintiff would then have been entitled to reasonable notice before actual dismissal. The cases of *Hiscox* v. *Batchelor*, 15 L. T. N. S. 543., and *Williams* v. *Byrne*, 7 A. & E. 177, seem to establish that position, and the month's notice expiring on the 9th February 1883, appears a reasonable time. It does not follow however that the true measure of damages would be the salary, at the rate agreed on, up till that period. Still I should not be inclined to differ from the jury in its assessment. At that time of year there was little chance for the plaintiff to find employment. The allowance the jury made was certainly not excessive.

Passing on to the main question, that of the binding nature of the contract itself, I must say I fail to see how the Company is bound. It would be useless to attempt to reconcile all the decisions upon the point, whilst, in fact, most are not strictly applicable. It many of the cases such as *Diggle* v. *The London and Blackwall Railway Company*, 5 Ex, 442, which seems opposed to *Henderson* v. *Australian Royal Mail Steam Navigation Company*, 5 E. & B. 409; *The South of Ireland Colliery Company* v. *Waddle*, L. R. 3 C. P. 463, affirmed in appeal, L. R. 4 C. P. 617; *Reuter* v. *The Electric Telegraph Co.*, 6 E. & B. 341 the question was not whether an officer should be appointed under seal; but, whether a specific contract to do a particular work required the seal of the corporation. In some of these cases the individual had in fact undertaken to supply articles to the Company and the contract

was rather one of sale, or manufacture and sale, than of service. In others the bargain was for specific work to be done and paid for when done; but not to discharge the duties of a servant.

Throughout the cases there runs a distinction between trading and other corporations, not always clearly defined or well observed; but sufficiently plain to indicate that this class of corporations is allowed greater latitude than others in dispensing with the use of the corporate seal. It is said that this is necessary in order to enable trading companies to fulfil the objects for which they are incorporated. No doubt, amidst the turmoil and haste of the commercial world in which they strive for existence and profit, it is absolutely necessary that they should act promptly, and, to do so, must often be compelled to forego the use of their seals. They must, in many cases, enter into arrangements and conclude bargains with the utmost speed and at a distance from the head office in order to protect their property, or avert a loss, or gain a profit. Ordinary business engagements of frequent recurrence, where it would be highly inconvenient to require the use of the seal, must also be fairly classed with the transactions last referred to. It is to these exigencies, and contracts arising out of them, that the relaxation of the rule in their favor applies.

But can the employment of a servant at so much a week or a month, to discharge duties as a servant, and not as a special agent, be said to fall within the scope or meaning of the contracts just referred to. I think not. The rule is relaxed in favor of trading corporations, not because they are trading corporations, but from the necessity of the case. Where this necessity does not exist, I assume that there is no distinction between trading and other corporations as to the requirement of all proper formalities. Whether a railway company, a manufacturing company, a loan company or a municipal corporation is hiring a servant each is equally bound by the general rule. This rule is stated in the case of *Austin* v. *Guardians of Bethual Green*, L. R. 9 C. P. 91, by Coleridge C. J. quoting from *Mayor of Ludlow* v. *Charlton* 6 M. & W. 815, as follows, "Wherever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the corporation was created the exception has prevailed: hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing

the common seal are established exceptions." According to this rule the whole question of the validity of the parol contract in this case seems to turn upon the nature of the duties the plaintiff was hired to discharge. It is is clear he could not be called an inferior servant. He was in fact an official of great importance, filling a highly responsible position, not such a servant as is contemplated by the exception I have just referred to.

The case of *Austin* v. *Guardians of Bethnal Green* is precisely in point and has been followed in Ontario. It is a recent case and its authority does not seem to be impugned. There the board of guardians, by parol contract, engaged the plaintiff as clerk of the workhouse at a salary of £52 per annum with board and lodging. He entered into the employment and they dismissed him within the year. His duties were to keep "accounts of a somewhat complicated nature, requiring some amount of skill and capacity." The Court held he could not recover as there was no contract under the corporate seal of the guardians.

This case was expressly followed in Ontario in *Hughes* v. *The Canada Permanent &c., Society*, 39 U. C. Q. B. 221, where it was held that a clerk hired for a year at $800 per annum could not sue for dismissal within the year, there being no contract under the corporate seal of the defendants. It was also followed in the case of *Washburn* v. *The Canada Car Company*, not reported, but referred to in a note page 299 of the former case. These corporations, and certainly the latter, might be termed trading corporations but the decision in the Court of Common Pleas in England was held to apply to them.

The formalities attending the execution of contracts by corporations, have lately received much attention in England. In *Hunt* v. *Wimbledon Local Board*, L. R. 4 C. P. Div. 48, and *Young* v. *Mayor &c., of Royal Leamington Spa*, L. R. 8 App. 517, the question was much discussed. It is true the Statute under consideration in these cases provided that no contract over £50 should be binding on the corporation unless its seal were attached; but there are many expressions, all tending to shew that the courts before which these cases came, considered the common seal necessary in all cases except in a few well established exceptions, like those referred to in *Austin* v. *Guardians of Bethnal Green*. The language of the judgments generally is

wholly against any extension of power to corporations to contract without the usual formalities.

Mr. Justice Burton certainly seems to have gathered that impression from a perusal of the judgment in *Hunt* v. *Wimbledon Local Board*, and so expresses himself in *Silsby* v. *Dunnville*, 8 Ont. App. 524. There he intimates a doubt that many cases holding Municipal corporations liable on contracts lacking the requisite formalities can be considered as longer binding.

The verdict must be set aside and the rule made absolute for a new trial without costs.

ROBERTSON v. McMEANS.

Special jury.—Verdict of nine or more.

Held,—That section 29 of chapter 31, Con. Stat. Man., applies both to special and common juries, and that the verdict of nine or more jurors is, in either case, sufficient.

N. F. Hagel and *Ghent Davis* for plaintiff.
J. S. Ewart for defendant McMeans.
W. R. Mulock for defendant Brydon.

[*25th October, 1884.*]

WALLBRIDGE, C. J., delivered the judgment of the Court *:—

In this case, on the argument, the Court came to the conclusion to grant a new trial, looking at the facts simply, but reserved the point whether the verdict of nine by a special jury was sanctioned by Statute. It is well established that in construing an Act of Parliament the Court aught to assume that the legislature

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* Wallbridge, C. J., Taylor, J., and Smith, J.

knew the existing law. The Statute Con. Stat. Man., c. 31, s. 29, Queen's Bench Act, is in these words: "For the trial of issues of fact in civil cases there shall be empanelled and sworn twelve jurors, but the verdict of nine or more of them shall be sufficient and shall be the verdict of the jury." These words are extensive enough to cover both the verdicts of common, and special jury cases.

By Con. Stat. Man., c. 31, s. 14, (Queen's Bench Act,) it is enacted that "all issues of fact in civil cases, in actions and proceedings at law shall be tried by a jury according to the law and practice in that behalf," unless, &c.

By Con. Stat. Man., c. 36, s. 42, it is enacted that "either plaintiff or defendant in any civil action in the Queen's Bench may of right, have the issues of fact therein joined and the damages tried and assessed by a special jury according to the law and practice in that behalf being and existing in England on the 15th of July 1870."

This section is re-enacted by 46 and 47 Vic. c. 51, s. 84.

The difficulty in this case is raised by reason of the words in the clause allowing special juries "according to the law and practice in England on the 15th of July 1870"; at that time in England undoubtedly the whole twelve jurors should agree.

But it is to be observed that the same words "according to the law and practice in that behalf," are used in reference to common juries as well as in the clause relating to special juries.

The power of rendering a verdict by nine, or more, is not limited by section 29 of chapter 31. It may well be held that the right to give a verdict by nine, applies to special as well as to common juries, for the argument is equally strong, as to either.

If we hold that in common jury cases the twelve must agree, we should render the 29th section wholly inoperative. We can best give effect to section 29 by holding it to apply both to special and common juries.

McCAFFREY v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railway Co—Loss of baggage.—Warehousemen.

Held,—1. A Railway Company is liable for the loss of a passengers ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments &c., even when these are packed with the baggage for which they are liable.

2. When goods remain at the station at which a passenger alights but it does not appear that the Railway Company has charged, or is entitled to charge, for storage the Company is not liable as warehousemen.

J. H. D. Munson for plaintiff.

J. A. M. Aikins for defendants.

(*25th October, 1884.*)

TAYLOR, J., delivered the judgment of the Court (*a*):—

In the month of April 1882, plaintiff's wife purchased from the agent of the Great Western Railway Company, in the city of Toronto, tickets for the conveyance of herself and children, from Toronto to Winnipeg, over certain lines of railway including that of the defendants. At the time of purchasing the tickets, she had her baggage checked, in the usual way, through from Toronto to Winnipeg. She reached Winnipeg on the 24th of April, and on the following day, she and the plaintiff went to the railway station to get her baggage, and there saw the trunk, the loss of which is the subject of this action. Her other trunks had not at this time arrived, and acting, as she says, on the advice of some person at the station, she did not take it away, but left it to await the arrival of the others. A day or two after, the other trunks arrived, and were taken away by the plaintiff and his wife. The trunk which had first arrived, had however, in the meantime disappeared and has never been received by the owner. For the loss of it, the present action is brought.

The declaration as originally framed had four counts. The first against the defendants as common carriers of goods for hire,

(*a*) Wallbridge, C. J., Dubuc, Taylor, JJ.

alleging a contract to carry certain goods, and charging a breach of the contract. The second is in tort, charging that the goods were lost by the negligence of the defendants while in their possession, as common carriers. The third is against the defendants as warehousemen and bailees. The fourth is in trover. Before the trial, a fifth count was added under an order obtained from the Chief Justice, for the loss of the baggage of the plaintiff's wife, a passenger on the defendants' railway.

The defendants pleaded a number of pleas, those to the fourth count being, not guilty, and that the goods in question were not the goods of the plaintiff.

To the added count the defendants pleaded—first, *non assumpsit*; second, that the plaintiff did not cause his wife to become and be a passenger with her luggage as alleged; third, that they are not carriers of passengers and their luggage as alleged; fourth, that the luggage was not the property of the plaintiff or his wife as alleged; fifth, that they did safely and securely carry the said luggage; sixth, that so far as the added count relates to the following goods, setting them out in detail, the plaintiff's wife "as such passenger caused to be transferred to the defendants' line of railway, the articles herein-before mentioned as part of her personal luggage, to be carried as such luggage, and did not give notice to the defendants that her luggage comprised such articles as the articles herein-before mentioned, and which was transferred to them as her personal luggage, that the same were not personal luggage, but freight or extra luggage, and should have been paid for as such by the plaintiff's wife, and the defendants' would not have received them as personal luggage, if they had known what the articles were, and that the same were while on the said passenger train or at the railway station lost or stolen;" and for a seventh plea, that the luggage was taken to be carried under and by virtue of a contract made with another railway company.

At the trial of the action a non-suit was entered. The plaintiff afterwards obtained a rule calling on the defendants to show cause why the non-suit should not be set aside and a new trial had, and the two questions now to be decided in disposing of that rule are, whether the contents of the trunk sued for were, or were not personal luggage and whether the defendants are, or are not liable as warehousemen.

The contents of the trunk as given in evidence by the plaintiff's wife consisted principally of household furnishings, intended for the use of the family when settled in Winnipeg. Among them were window curtains, blankets, sheets, counterpanes, feather pillows, pillowslips, cutlery, books, pictures, parlor ornaments, stereopticon and views. There were also two silk dresses, petticoats, childrens' clothing, two suits of gentleman's clothing, and an opera glass.

In England, it seems now well settled that the personal luggage which a passenger is entitled to have carried with him, in right of his having purchased a ticket for his own conveyance, is limited to such as clothing and such articles as a traveller usually carries with him, for his personal convenience. *Great Northern Railway Co.*, v. *Shepherd*, 8 Ex. at p. 38: or, as it is expressed in *Story on Bailments*, sec. 499, "such articles of necessity or personal convenience, as are usually carried by passengers for their personal use." See also *Hudston* v. *The Midland Railway Co.*, L. R., 4 Q. B. at p. 371.

The question was fully considered in the case of *Macrow* v. *The Great Western Railway Co.*, L. R. 6 Q. B. 612, where the plaintiff having left Canada to settle in England, sued the defendants for a trunk containing sheets, blankets, and quilts, lost while he was travelling with it between Liverpool and London, and the Court held, that the articles being intended for the use of the plaintiff's household when permanently settled, could not be considered as personal or ordinary passenger's luggage, and therefore the company were not liable. Numerous other English cases to the same effect might be cited, specially *Cahill* v. *London and North Western Railway Co.*, 13 C. B. N. S. 819.

The Courts in Ontario have followed the English authorities on this subject. Reference may be made to *Shaw* v. *The Grand Trunk Railway Co.*, 7 U. C. C. P., 493. *Bruty* v. *The Grand Trunk Railway Co.*, 32 U. C. Q. B., 66 and *Lee* v. *The Grand Trunk Railway Co.*, 350.

In the United States a different rule seems at one time to have prevailed, on the ground, that the length of the journey and the requirements of travelling would make articles luggage in that country, which would not be considered such in England.

Thus in *Ouimit* v. *Henshaw*, 35 Vt. R.. 605, a bed, pillows, bedding, and bedquilts, carried by a man, travelling from Canada to the United States, were held to be personal baggage.

More recently, however, the American decisions are in accordance with those in England. Thus baggage was held not to include a trunk containing valuable merchandize. *Pardee* v. *Drew*, 52 Wend. 459; nor samples of merchandize carried to enable the passenger to make bargains, *Hawkins* v. *Hoffman* 6 Hill 586. So silver ware carried in the trunk of a passenger has been held not personal luggage, *Bell* v. *Drew*, 4 E. D. Smith 59 and so a dozen silver tea spoons, a Colt's revolver, or surgical instruments, except the passenger be connected with the medical profession, are not, *Giles* v. *Faunileroy*, 13 Md. 126. The conclusion to be drawn from the American decisions is given in a note in *Redfield's American Railway Cases*, vol. 2 p. 138, in which the question of what particular articles may, or may not, be carried by a passenger as luggage, is considered and it is there said the very word "baggage" or "luggage" as applied to the traveller, implies that it is something which he "bags up," or "lugs along" with him, for his daily comfort and convenience on his journey.

Following then what seems now to be the uniform line of decisions in England, the United States, and Ontario, there can be no doubt that the greater part of the articles contained in the trunk in question did not come within the class of personal luggage, which a passenger is entitled to have carried along with him, in virtue of his having purchased a ticket for his conveyance, and the loss of which, will render the carrier liable. No attempt was made to show on the evidence here, as was attempted in *Cahill* v. *London and North Western Railway Co.*, 10 C. B. N. S 154: 13 C. B. N. S. 818, and in *Lee* v. *The Grand Trunk Railway Co.*, 36 U. C. Q. B. 350, that the company's servants knew, or from the appearance of the trunk must be assumed to have known that its contents were not ordinary personal luggage.

Although the greater part of the contents of this trunk could not come within the class of personal luggage, some of them did so. The silk dresses, petticoats, and children's clothing may fairly be held to do so, and perhaps the opera glass. The two suits of gentleman's clothing do not, under the circumstances of this case, for the trunk was being carried along with the

plaintiff's wife. Women's dresses carried in a man's trunk, have been held clearly not to be personal luggage, for which the carrier would be responsible, *Missisippi P. Railway* v. *Kennedy*, 41 Miss. 671.

The fact that articles which may fairly be considered personal luggage are packed and carried with others of a different character, does not relieve the carrier from liability for the value of the articles, which are personal luggage. It was so held in *Bruty* v. *The Grand Trunk Railway Co.*, 32 U. C. Q. B. 66, and in *Great Northern Railway Co.*, v. *Shepherd*, 8 Ex. 30.

As to the count charging the defendants with liability for this trunk, as warehousemen, we think they are not liable.

The case mainly relied upon by the plaintiff in support of their liability was *Mitchell* v. *Lancashire and Yorkshire Railway Co.*, L. R. 10 Q. B. 256. The plaintiff's counsel, on the argument, referred to that case as one in which Blackburn J., held, that if the defendants could charge storage, then they were bailees for him and liable. He further contended that in the present case, the defendants charged storage upon the other pieces of luggage brought by the plaintiff's wife, so that they clearly came within that case. A reference to the case, however, shows that the language used by the learned judge was, "I think in this case the railway company, in holding these goods, could have charged warehouse rent, and that being so, I think there can be no doubt that *prima facie* there was a liability as bailees for reward."

In that case a quantity of flax having been consigned to the plaintiff at one of the company's stations, a notice was sent him on its arrival requiring him to remove it, and stating that the defendants held it, not as common carriers, but as warehousemen, and subject to the usual warehouse charges. The company clearly put themselves in the position of warehousemen, and gave the plaintiff notice that they intended charging as such for the storage of the flax. Then there was undoubted evidence of such negligence on their part as would render warehousemen liable. The contention of the company on certain words in their notice, that the goods were "at owner's sole risk," amounted, Blackburn J., said, to this, "we are to be paid warehouse rent, and keep them as warehousemen, but we are not to be bound to take any care of them at all."

In fact, the sole question in that case was, whether under the notice as worded the company had any liability at all or not.

In the present case the evidence does not show that defendants charged or were entitled to charge any storage or warehouse rent, for this trunk. As to the payment made on the other trunks, the only evidence is that of the plaintiff himself, and all he said was, in answer to a question, "Did you have to pay anything on that baggage," "Yes, I paid something like $3.00 for extra baggage and storage." Now the plaintiff's wife travelled with herself and six children on two tickets and a half one, and she had with her five trunks for which quantity a charge for extra luggage might well be made. We think before the defendants can be made liable as warehousemen, there should have been clearer evidence that storage was charged by them on luggage or that they are entitled to make such a charge. Besides there is no evidence of negligence on the part of the defendants. The plaintiff's wife came about the time of the great floods, which in the spring of 1882, interrupted railway traffic, the trunk was seen on the platform at the station, with a number of other trunks, and the plaintiff did not then take it away but requested one of the defendants' servants to put it "under the platform out of the drops of wet." Then we learn from Mr. Pearse, a witness called by the plaintiff, and who is in the employment of the company, for tracing lost baggage and freight, that he saw the trunk at Brandon station, and ordered it to be returned to Winnipeg. His belief is, that the trunk was on its return to Winnipeg stolen. He says it could not be delivered to any one, except on a lost check receipt, and there is no such receipt in existence.

The value of the articles which would properly come within the designation of personal luggage is sworn by the plaintiff's wife to be $96.50, and the plaintiff cannot claim to put them higher than his own witness, the only one who gives the values, has done. For this amount the plaintiff should have a verdict. If the parties agree to a verdict for this amonnt being entered, the nonsuit granted at the trial should be set aside without costs. If they do not, as this is a jury case, and we cannot enter a verdict unless agreed to, there must be a new trial without costs.

RE DONORE AND WHEATLANDS.

School districts.—Award of arbitrators.—School house non-existent.

After a division of the Donore school district, an award was made under section 14 of the Manitoba School Act 1881, of the existing school houses, school sites, and other school property and assets within the territories readjusted. After the division but previous to the sitting of the arbitrators, the school house of the district was destroyed by fire.

Held,—That as the school house was not in existence at the time of the arbitration, it was not proper for the arbitrators to charge the new district, within whose limits the building had been, with its value as an asset, and the matter was referred back to the same arbitrators to correct the mistake.

H. M. Howell, for the Donore district had obtained a rule *nisi* to set aside an award made under the circumstances stated in the head note.

J. H. D. Munson for the Wheatland district, showed cause.

The word "existing" in the Act, means "existing" at the date of the readjustment and division, of the old district. The rule in arbitrations, that unless expressly reserved, no matter arising after the submission can be considered, ought to apply in this case. The act which corresponded in this arbitration to the ordinary submission, was the appointment by the new districts of their respective arbitrators, and this must have been before the fire occurred. The new district of Donore in which the school house was left was responsible for its safe keeping, and was properly chargeable with the loss. The same rule which applies as between vendor and purchaser of buildings after contract signed, should apply. The new district of Donore was in the position of a purchaser of the building after the division, and by analogy should be responsible for loss of same by fire.

H. M. Howell supported the rule.

The fact that the building was in the limits of the new district of Donore would not make it a purchaser of same, as no

property in the building or site passed. The building was still the property of the old district. No negligence on the part of the new district of Donore had been shown. The word "existing" in the Act means, that the building must be in existence at the time of the sitting of the arbitrators. The readjustment was not complete till after the award of the arbitrators.

[*25th October, 1884.*]

SMITH J., delivered the judgment of the Court :—*

The award in question purports to be made under the authority of 44 Vic. c. 4, s. 14. It values a school house within one of the districts as an asset, charging that value to the district in which the school house was situated. Before the meeting, and possibly before the appointment of the arbitrators, the school house had been destroyed by fire. It should have been treated as non-existent and no value have been placed on it.

The duty of the arbitrators is, first, to value the assets, then to ascertain the liabilities. Having done this, they apportion the assets, so far as can be done, between the new districts, and, having regard to this apportionment, they determine what share of the total debt of the old district each new district should bear. Here their duty ends. They cannot direct that one district shall pay money to the other, or prescribe the mode in which, or the persons by whom arrears of taxes shall be collected. They can however and should direct what proportion of taxes, when collected, each party should receive, leaving their collection to the general provisions of the law.

The matters referred are therefore referred back to the same arbitrators to make a new award, guiding themselves by the above suggestions.

Rule absolute to refer the matter back to the arbitrators, without costs.

* Wallbridge, C. J., Dubuc, Smith, JJ.

THE GREAT NORTH WESTERN TELEGRAPH CO. v. McLAREN.

Corporation.—Misnomer.—Pleading.—Collateral agreement.

Held,—That misnomer of a plaintiff corporation is not a ground for non-suit. The defendant must object, by application in chambers, to compel the plaintiff to amend.

Held,—That where defendants move for a non-suit upon the ground of misnomer the fact of incorporation of the plaintiff company is admitted.

Semble, that the question whether the plaintiff corporation does, or does not exist, must be raised by plea.

Held.—That where there is a written but unsealed agreement between a corporation and an individual, parol evidence cannot be given of a verbal collateral contract (of the nature of that set out in the pleadings) made at the same time by the corporation.

J. A. M. Aikins for plaintiffs.

Colin Campbell for defendant McLaren.

C. P. Wilson for defendant Whellams.

[*25th October, 1884.*]

SMITH, J., delivered the judgment of the Court (*a*):—

The plaintiffs bring their action upon an agreement signed by the defendants in the words following:—

"We the undersigned jointly, and severally, hereby agree and guarantee the Great North Western Telegraph Company, the sum of one thousand dollars ($1.000), upon condition and in consideration of said Company constructing a telegraph line to, and opening an office in, Rapid City, and having the same in working order four months from date, and not later, it being distinctly understood that they will maintain said office for at least three years. The above amount payable by us so soon as the office is in working order.

Witness, (Signed,) D. L. McLaren.

D. M. Blackwood. (Signed,) C. J. Whellams."

(*a*) Wallbridge, C. J., Dubuc, Smith, JJ.

The defendants deny the agreement. They then allege the agreement was subject to a condition that the plaintiffs should establish, and continue a special rate of 25 cents for all messages not exceeding 10 words, and that this condition should be precedent to their right to recover under the agreement, alleging a breach by not establishing the rate. This is the 3rd plea.

The 4th plea sets up this condition as a separate contract, founded upon the consideration given by the defendants in entering into the agreement, alleges a similar breach, and offers to set off damages. These are all the pleadings it seems necessary to notice.

The case was tried before Mr. Justice Taylor, without a jury, at the assizes last autumn, when he found a verdict for the plaintiffs for $1.080.

It is this verdict which the defendants now move against on grounds,

1. That it is contrary to law and evidence, weight of evidence, &c.

2. That the contract imposed no liability on the defendants.

3. That the plaintiffs are not an incorporated company.

4. That the judge had no power to amend, and amendment, if made, would render the declaration demurrable.

5. That if the amendment be made the plaintiffs cannot maintain an action on the contract.

6. That, as the contract is not binding on plaintiffs, they ought not to be allowed to sue until after the expiry of the three years.

7. That the evidence offered in support of the 3rd and 4th pleas was improperly rejected.

It was established at the trial to the satisfaction of the learned judge, that the contract was that of the defendants, and that the plaintiffs had performed their part of the agreement, within the time stipulated. I see no reason to question the soundness of his opinion on those points.

Under the third plea an instrument under the seal of the plaintiffs, or in writing at least, was the only evidence admissible to vary the terms as the defendants seek to vary them. The

evidence tendered was that of a verbal undertaking. It was rightly rejected.

The fourth plea would raise two very intricate and unsettled points of law, had the plaintiff been a private individual. Then possibly verbal evidence might have been admitted to prove a collateral contract, and if proved, the question of the operation of the Statute of Frauds upon such contract would have presented itself for decision. These points however do not rise.

The plaintiffs are a corporate body incorporated under the Dominion Statute, 43 Vic. c. 66. This Act, by the interpretation Act, is declared to be a public Act, and consequently the courts must take judicial notice of its existence. *Church* v. *Imperial Gas Co.*, 6 A. & E. 846. The learned judge who tried the case states that on the application for a non-suit, the corporate existence of the plaintiffs was not attacked, but the misnomer, by omission of the words, "of Canada." In fact, the Statute established its being beyond all question. The identity of the plaintiffs with the corporation mentioned in the Act was assumed apparently, through the plaintiff's case, and the defendants themselves raised the objection, that the omission of these words, making up the true corporate name, was fatal. Leave was given to amend if necessary.

The real objection taken was misnomer and that was urged as a ground for non-suit. This, for many years, has not been the practice. In *Chitty on Pleading*, 467, the rule is thus laid down, "It was once doubted if a mistake of the plaintiff's christian or surname were not ground of non-suit, but it was afterwards settled that the mistake must have been pleaded in abatement, even in the case of a corporation." Pleas in abatement for this cause were abolished by 3 & 4 Will. 4 c. 42 s. 11, and an application by the defendant in chambers to compel the plaintiff to amend substituted. This was the only remedy open to the defendants, and, had they embraced it, they would clearly have admitted the fact of incorporation. A motion for a non-suit on precisely the same grounds must equally be treated as a like admission.

The defendants urge that if the full name of the plaintiffs had appeared on the record, there would have been a fatal variance. I cannot think so. At the utmost a few words could have been

added to the declaration, stating that they sued upon an instrument in which they were correctly described save by the omission of two words. *Rex* v. *Haugh*, 4 B. & Ad. 655; *Forbes* v. *Marshall*, 11 Ex. 166; *Attorney General* v. *Rye*, 1 Moore, 26; *Doe dem. Chancellor of King's College* v. *Roe* 1 Ont. Ch. R. 111; *Ruitz* v. *R. C. Episcopal Corporation of Sandwich*, 30 U. C. Q. B. 265. This seems also the established rule in the United States of America. *Chitty on Pleading*, 16th American edition, 216 note n.

It is exceedingly doubtful that the question of incorporation rises on the pleadings. There is no plea of *nul tiel* corporation.

In the case of *The Trustees of The Berkeley Street Church* v. *Stevens*, 37 U. C. Q. B. 9, it was held that without plea that fact was not in issue. All the authorities seem to have been cited and reviewed, and they greatly preponderate in favor of the contention that the plea is requisite.

As to the objection that the promise is in the nature of a bonus, I cannot do better than refer to the language of the Chief Justice, on page 19 of the last cited report. "As to the promise being voluntary, we fail to see how that can make any difference, if the plaintiffs on the faith of defendants and other promised subscriptions went on and tore down their church, rebuilt it, and, in that way, did what the defendants wished and desired them to do in consideration of his promise."

The rule must be discharged with costs.

KENNEDY v. AUSTIN.

Proceedings before the Legislature—Taxation of costs—Practice.

Held, that where a solicitor has obtained from the Speaker of the Legislative Assembly authority to act in any matter as a parliamentary agent, he can recover the amount due him for services, without being obliged to observe all the requirements of the English Act.

Hon. J. A. Miller, Q.C., for plaintiff.

H. M. Howell, Q.C., for defendant.

[*25th October, 1884.*]

DUBUC, J. delivered the judgment of the Court:—(*a*)

The plaintiff brought his action for services rendered by him in connection with the charter of the Winnipeg Street Railway Company.

The evidence shows the facts to be as follows:—The plaintiff, who is a barrister of this Court, was employed by the defendant to prepare the charter of the said Street Railway Company, and to have it passed through the Legislature. The defendant was then one of the promoters, and is now the manager of the said Company. The plaintiff prepared the said charter, and, having obtained from the Speaker of the House the proper authority to act as parliamentary agent, had the bill introduced into the House, attended its going through the Private Bill Committee, and took all the necessary steps to procure its passage through the Legislature. At the trial the jury assessed the value of his services, and a verdict was entered accordingly.

This rule calls upon the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered, on the ground that there was no evidence to show that the plaintiff had, one month previous to the commencement of this suit, delivered a bill of account, with items, of his fees, charges, and disbursements as parliamentary agent in respect of the matters sued for herein as required by Statute.

The contention of the defendant's counsel is, that the English law is in force here, and that the Imperial Statute 10 & 11

(*a*) Wallbridge, C. J.; Dubuc, Smith, JJ.

Vic. c. 69, s. 2, providing that parliamentary agents as well as attorneys should deliver a copy of their bills of costs one month before they can sue on them, has not been complied with in this case.

The argument would have some force if there were no provision here in regard to parliamentary agents. The English law is, so far as applicable, in force in this Province; but the enactments of our Legislature supersede it in any matter where special provision is made. It cannot be denied that the Provincial Legislature has full power and jurisdiction over its own proceedings. Rule 70 of the Rules and Orders of the House provides for the practice of parliamentary agents, and under said rule the plaintiff has obtained, from the Speaker of the House, the authority to act in this matter as parliamentary agent. This ought to be considered sufficient to entitle him to recover the amount due him for his services, without being obliged to observe all the requirements of the English Act, which provides that parliamentary agents must first have their bills of costs taxed by the taxing officers of the House—as it is not shown that there is such an officer here—and that the bill be delivered one month before an action is commenced on it.

The verdict should stand and the rule should be discharged with costs.

CHADWICK v. HUNTER.

(IN APPEAL.)

Mechanics' lien—Land out of jurisdiction—Personal remedy only.

Held,—1. Varying the decree made on the hearing, (*a*) that plaintiffs were entitled to a personal order against defendants, Hunter and Short.

2. Where lands are out of the jurisdiction, the Court cannot affect them otherwise than by proceedings *in personam*, and cannot therefore enforce a mechanics' lien by sale of land out of the jurisdiction.

N. F. Hagel and *G. Davis* for plaintiffs.

W. H. Culver and *G. G. Mills* for defendants, the Imperial Bank.

(*a*) Ante 39.

[*25th October, 1884.*]

TAYLOR, J. delivered the judgment of the Court:—(*b*)

This is a suit instituted to enforce a mechanic's lien, the defendants being Hunter and Short, the original debtors, and The Imperial Bank purchasers of the property. The latter answered the bill, while against the two former it has been taken *pro confesso*.

At the hearing the bill was dismissed with costs, on the grounds set out in the judgment reported in 1 M. L. R. 39.

On the rehearing the plaintiffs urged a number of grounds upon which they were entitled to relief, and on behalf of the defendants, The Imperial Bank, numerous additional objections to the plaintiffs' claim were taken. Most of these it is now, owing to subsequent events, unnecessary to consider.

The plaintiffs are entitled to have the decree pronounced at the hearing varied, so far as it dismisses the bill against Hunter and Short, and to have a personal order against them for payment of the amount claimed, $382.70, with interest. This relief was not specifically asked at the original hearing, nor was the attention of the judge who heard this cause called to the fact that the bill contained a prayer for such personal order.

The only relief the plaintiffs could have against the Bank would be for a sale of the property, on default in payment of the money, and this it is not now in the power of the Court to grant.

When the plaintiffs filed their lien on the 31st of August, 1883, the property upon which the materials supplied by the plaintiffs were used in building a saw mill, and against which the lien was registered, was situated within what was known as the territory in dispute between this Province and the Province of Ontario. In the statement of claim registered the land was described as being situate in the County of Varennes, in the Province of Manitoba, or in the District of Algoma, in the Province of Ontario. Since the re-hearing of the cause the question in dispute as to this territory has been the subject of a reference to the Judicial Committee of the Privy Council, and a decision

(*b*) Wallbridge, C. J.; Dubuc, Taylor, JJ.

has been given thereon adverse to the claim of this Province. While the territory was in dispute the Court dealt with property and civil rights within it, because the Government of this Province claimed to exercise, and was *de facto* exercising jurisdiction there, having a County Court office and a Registry office, and granting commissions to magistrates and other officials. Since the decision of the Judicial Committee was given these have all been withdrawn, and the Court must take judicial notice that the Government is now neither exercising nor claiming to exercise any such jurisdiction.

As the property in question, and affected by the lien sought to be enforced in this suit, is in a region now decided not to be within our jurisdiction we have no power to deal with it.

The Court may make a decree respecting lands out of its jurisdiction, yet it will do so only so far as it can enforce its decree *in personam*. Where the lands are out of the jurisdiction the Court cannot affect them directly, or otherwise than by proceedings *in personam*, or, as it was said by Arden, M. R., in *Lord Cranstown* v. *Johnston*, 3 Ves. 170—"This Court cannot act upon the land directly, but acts upon the conscience of the party living here."

Here the only relief the Court can give against the Bank, would be to order a sale of the land on default in payment of the money, and the Court will not make a decree which it could not enforce by an order to deliver possession to the purchaser.

The decree must be varied by giving the plaintiffs an order against the defendants Hunter and Short, for the payment of $382.70, with costs. In other respects the rehearing is dismissed without costs.

PRITCHARD v. HANOVER.

(IN APPEAL.)

Pleading.— Admissions.—Proof of deed by Registrar's certificate.

The bill alleged, as the plaintiff's title to the lands in question, the existence of a patent and certain deeds. The answer, although not expressly admitting the patent and deeds, charged that the latter were procured by fraud and deception; that they were never read over to the grantor; and that the parcels were not those intended by the grantor to be conveyed; and prayed by way of cross-relief that the patent and the deeds set forth in the bill, should be declared to be clouds upon the defendant's title.

Held, affirming the judgment of Wallbridge, C. J., (*a*) that the patent and deeds were admitted by the answer.

Held,—That the production of a deed from the registry office with the usual certificate of the registrar indorsed was sufficient proof of the deed. *Canada Permanent Loan and Savings Co.*, v. *Page* 30 U. C. C. P. 1, approved.

J. S. Ewart and *C. P. Wilson* for the plaintiff.

H. M. Howell and *J. S. Hough* for the defendant.

[*31st October, 1884.*]

TAYLOR J., delivered the judgment of the Court (*b*):—

We are of opinion that the patent and deeds under which the plaintiff derives his title are admitted by the answer and supplemental answer. In the answer the defendant says he believes, and charges the fact to be, that the plaintiff procured Livingstone to make the deeds by fraud and deception. And in another paragraph he says he believes, and charges the fact to be, that the conveyance by Livingstone to the plaintiff was never read over, and the description of the land was never explained to him, except that the plaintiff told him it was a deed of the land east of Main St. Then the supplemental answer concludes by submitting that the defendant is "entitled to a declaration, that

(*a*) ante p. 72.

(*b*) Dubuc, Taylor, Smith, JJ.

the patent to the plaintiff and the deeds set forth in the plaintiff's bill of complaint under which he claims title to the said lands are clouds upon my title."

Even if there were no evidence or admission of a patent having issued to the plaintiff, the deed from Livingstone to him of the 15th of July 1874, was produced from the Registry Office, and counsel for the defendant admitted that such evidence was given as would be sufficient to prove its due execution and registration, if the case of *Canada Permanent Loan and Savings Co.* v. Page, 30 U. C. C. P. 1, is good law. We see no reason to doubt the authority of that case. Now if no patent is proved to have issued both parties have been dealing with unpatented lands, with a mere equitable interest in land, and the plaintiff certainly has a deed from Livingstone long previous in date to that under which the defendant claims to have acquired his title.

The only title set up by the defendant is one which he acquired from Neil Livingstone, years after the latter had conveyed any interest he had to the plaintiff. It is true that in the supplemental answer the defendant modifies an admission made in his original answer, as to Livingstone having been entitled to the land, and sets up that one Andrew Goudré claimed to be entitled to the southernmost portion of the lands, and that the plaintiff has not obtained a title thereto. But he stops there. He does not allege that he has himself derived any title from Goudré. He cannot set up in this way the title of a third person. As between himself and the plaintiff both deriving title under Livingstone, the plaintiff seems entitled to succeed. The description of the land would seem to be such as would enable a surveyor or other competent person to locate it. The registrar says he has been able to do so.

The rehearing should be dismissed with costs, and the original decree affirmed.

GEDDES v. MILLER.

(IN CHAMBERS.)

Defendant appearing in person.—Service.—Filing affidavits on motion.—Reference to Judge.—Costs.

Held, 1. Where a defendant appears in person he is entitled to receive the same notice of proceedings being taken, which a solicitor receives.

2. Where leave was given to file an affidavit in support of a motion but the leave was not expressed in the notice, and the affidavit was not filed when the notice was served, but a copy was served with the notice of motion, *Semble*, sufficient.

3. The referee cannot refer to a judge an application which has lapsed.

4. Where the opposite party does not appear, costs cannot be given to the applicant where not asked for by the notice of motion.

J. B. McArthur, Q. C., for plaintiff.

Hon. J. A. Miller, Q. C., defendant in person.

[*30th October, 1884.*]

TAYLOR, J.—This is a motion on the part of the defendant to discharge an order made by me on the 17th of October instant. The order complained of, was one restoring the bill of complaint which had been dismissed by the referee, on the *ex parte* application of the defendant. The motion originally came before the referee on the 16th of October, he having on the 15th given leave to serve short notice of motion returnable before himself the next day. When brought before me there was on the notice of motion an indorsement in the handwriting of the referee referring the motion to be heard before a judge.

Several objections are relied on by the defendant as entitling him to have the order discharged. The first is, that no notice of the motion was served, that is, that the notice was served after six o'clock on the evening of the 15th of October, so that the service counted as made only on the 16th, the day on which the motion was returnable. The General Order which regulates the time for effecting service is No. 402, and requires service upon solicitors to be made between the hours of ten

o'clock in the forenoon, and four o'clock in the afternoon, except on Saturdays, when the service must be before two o'clock in the afternoon. This order in terms applies only to service upon solicitors, and on that ground, the plaintiff relies on his service as good service even although effected after four oclock.

Possibly service of a notice of motion, or other proceeding, which must be served upon the party personally though he has a solicitor in the cause, may not be governed as to him by this order, but the notice of motion now in question was not one requiring service on the party himself, and not on his solicitor. Here the defendant has no solicitor, but appears in person. For the purpose of this suit he is his own solicitor, and is liable to all the consequences attaching to one who occupies that position: a party appearing in person is presumed to know the practice of the court, and he could not on the plea of being not a solicitor, but only the party appearing in person, secure relief from any blunder fallen into through ignorance of the practice. I do not see why, if all the liabilities of a solicitor attach to a party appearing in person he should not also have the same advantages as to receiving notice of the proceedings being taken. In *Watson* v. *Ham*, 1 Ch. Ch. R. 293 a motion was made to compel a defendant, who had no solicitor, but appeared in person, to attend and be examined at his own expense. He had been served with a subpœna one day requiring him to attend the next. V. C. Spragge refused the motion, saying, "It would seem reasonable to give a party, who has no solicitor, the same time as would be given to a solicitor if he had one."

In the affidavit of Mr. Phippen it is stated, that when on the 15th of October the referee gave leave to serve short notice of motion, "it was within a few minutes of four o'clock in the afternoon, and the referee in granting me such leave must have known that the notice of motion could not be served that afternoon before four o'clock." I do not think weight can be attached to the argument of the plaintiff founded upon this statement. In *Hart* v. *Tulk* 6 Ha., at p. 611, the Lord Chancellor gave the plaintiffs leave to serve the defendants with notice of motion for a receiver, before their appearance, and at the time of serving them with the subpœna to appear. The leave was given on the 5th of February to serve the notice for the 8th the first motion day. Some of the defendants were not served until

the 6th and on the return of the motion, objection was taken of no due service, there having been no leave given to serve short notice. V. C. Wigram allowed the objection although it was urged for the plaintiff that the Lord Chancellor must be taken to have impliedly given leave to serve short notice, because he gave the leave he did on the afternoon of the 5th, when it was impracticable to serve defendants in a distant part of the country until the following day.

Another objection taken is, that the affidavit in support of the motion was not filed when notice was served, and not until the following day. It is said the referee gave leave to file the affidavit next day, this however does not appear on the notice of motion. As a copy of the affidavit was served along with the notice, perhaps the objection could be got over, following the recent case of *Hampden* v. *Wallis*, L. R. 26 Ch. Div. at p. 746, where notwithstanding an order of court which required that on such a motion as there made, a copy of any affidavit intended to be read, should be served with the notice of motion, affidavits which were afterwards filed and copies served were allowed to be read.

The next objection is, that the motion was made before the referee on the 16th of October, and that on that day, he neither made an order, reserved judgment, nor adjourned the motion, but on the next day referred it to a judge, when in fact it had lapsed. I am afraid this objection is a good one. It is not necessary that a reference of a motion to a judge should be made by the referee at once, upon its coming before him, for it may only be after argument, and even after he has reserved judgment and has considered the matter, that he will arrive at the conclusion, that the case is one proper for reference to a judge, but when a motion does come before him, he should deal with it one way or another. Here he, as I understand, simply refused to do anything.

The fourth objection is, that the order though made by a judge purports to have been made by the referee, that is, as I understand, there appears on the margin of the order, the words "In chambers, The Referee." There is nothing in this objection. The General Order 200 says, "all orders made in chambers are to be signed by the referee and further authenticated by the stamp of his office." No doubt the practice has been, and it is exceedingly convenient, to put on chamber orders the name of

the particular judge making the order, or of the referee, but the orders of court nowhere require this to be done. The putting his name on the order is therefore in strictness mere surplusage. Section 22 of chapter 31 Con. Stat. Man., applies only to proceedings before a single judge in court.

It is also objected that the order complained of as drawn up, orders the defendant to pay costs, while none are asked by the notice of motion. No doubt this is irregular. Where the opposite party does not appear, the order granted cannot go beyond the notice of motion.

On the whole, looking at the objections and the irregularities complained of, I think the order must be set aside. As was said by the Master of the Rolls, in *Saloman* v. *Stalman* 4 Beav. 243, a party taking an order upon affidavit of service, takes it subject to every objection that can possibly be made to it. The Court has gone very far in giving effect to objections to such orders, thus in *Moody* v. *Hebberd*, 11 Jur. 941, V. C. Wigram discharged such an order, on the objection taken that the notice of motion was addressed to "John James Fourke, plaintiff's solicitor," instead of to "John Joseph Fourke."

The order of the 17th of October must be discharged, and set aside, with costs, which I fix at $5.00.

PLAXTON v. MONKMAN.

(In Chambers.)

Interpleader issue—Notice of trial.

Held,—That if on an interpleader issue the plaintiff does not give notice of trial, the defendant's proper course is to apply to the Court for an order to bar the plaintiff.

The defendant having served notice of trial of an interpleader issue the plaintiff obtained a summons to set same aside on, among other grounds, that it was not competent for the defendant to give notice of trial in an interpleader issue.

R. Cassidy for plaintiff.

G. B. Gordon for defendant.

[*22nd October*, 1884.]

Taylor, J.—It is provided by *Reg. Gen.* 31 that when a cause is at issue either plaintiff or defendant may give notice of trial,

but as I understand an interpleader issue is not a cause, and is never spoken of as such. If a claimant who is plaintiff in such an issue does not proceed therewith the proper course is to apply to the Court for an order that he may be barred, not for the defendant to enter a record and give notice of trial. The notice of trial served here must therefore be set aside as irregularly given.

THE MERCHANTS BANK v. PETERS.

(IN CHAMBERS.)

Interpleader—Con. Stat. c. 37, s. 65.

Where goods delivered to a common carrier by F. were seized by the sheriff under an execution against P,

Held,—That the carrier could not under Con. Stat. c. 37, s. 65 call upon the execution creditor and sheriff to interplead with F.

W. Bearisto for Canadian Pacific Railway Co.

W. E. Perdue for the Sheriff and Merchants Bank.

N. D. Beck for Farrer.

Certain goods having been delivered to the Railway Company by Farrer to be carried to Toronto, they were seized by the Sheriff of the Eastern Judicial District under an execution in a suit of the Merchants Bank v. Peters. On the return of a summons obtained by the Railway Company under the provisions of Con. Stat. c. 37, s. 65, calling upon the Sheriff, the Bank and Farrer to interplead as to the goods, the Bank abandoned all claim to them, and submitted to be barred. Farrer claimed costs against the Bank.

[*18th October*, 1884.]

TAYLOR, J.—The Statute was intended for the protection of carriers against actions which might be brought or threatened by rival claimants to goods, and does not in my opinion extend to the case of goods in the possession of a carrier seized by an officer of the law under legal process. The Railway Company have improperly brought the parties before the Court and any claim Farrer has for costs can only be against the Company.

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ALIMONY.—*Jurisdiction.—Construction of Statutes.*—Bill for alimony and maintenance. *Held*, upon demurrer—1. That, although by a strict literal interpretation of Con. Stat., c. 31, s. 6, the Court would have no jurisdiction to decree alimony, yet as to so hold would make other provisions of the Statute meaningless, a more liberal interpretation, one which would give the Court the jurisdiction it was evidently intended should be given, ought to be adopted. 2. That under Con. Stat., c. 31, s. 3, the Court has power to decree alimony. 3. That alimony may be decreed apart from divorce or judicial separation, although not so in England. 4. A single judge has jurisdiction to decree alimony. Wood v. Wood 317

APPEAL, NOTICE OF. *See* PRACTICE.

APPEARANCE. *See* PRACTICE.

ARBITRATION.—*Liability of Agent.—Award and contemporaneous memorandum.—Signing award.*—A contract was expressed to be made between "D., of the city of Toronto, of the first part, and H., Superintendent, of the city of Winnipeg, Manitoba, of the second part." It went on to say:—"The said party of the first part, in consideration of the agreement of the said party of the second part hereinafter contained, hereby agrees to build, construct, and set up complete in the city of Winnipeg, gas plant of wrought and cast iron for a Gas Works there, as follows." Then, after a detailed statement of the articles to be supplied, "In consideration of the agreement herein set forth and stipulated to be performed by the party of the first part, the said party of the second part agrees to pay to the said party of the first part the full sum of $12,500, for such iron gas plant as hereinbefore described, to be paid as follows," and then the time and mode of payment are set out. H. appended to his signature the words:—"Superintendent for Building Gas Works at Winnipeg for W. Merrick, of Oswego, N.Y., and others." *Held*, That H. was personally liable upon the contract. An arbitrator enclosed in an envelope his award and a memo. containing an exhaustive review of the cases bearing on the question decided by him; and showing that he had

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taken an erroneous view of the law. The envelope was marked "Doig v. Holley, Award, Arbitrator's fee, $100." On the memo. was indorsed:—"This memo., after perusal by the party taking up the award, is to be given to the opposite solicitor, who, after perusal, is to return it to me. W. L." *Held*, That when the grounds of the arbitrator's decision appear in some contemporaneous document delivered with the award, the Court can look at it, and will entertain an application to set aside the award as founded upon an erroneous view of the law. Upon the argument of a rule to set aside an award, it was objected that the motion paper on which the rule was obtained, making the order of reference a rule of court was not signed by counsel. *Held*, That the objection, if a good one, should be raised by some proceeding to set aside or discharge the rule. It was further objected that there was no evidence proving the execution of the award. The order required that the award should be in writing. *Held*, That it was not necessary that the award should be signed. Doig v. Holley . . . 61

——— ——— *Agreement not to appeal. — Setting aside Award. — "In Equity" inserted in a rule.*—F. & B. agreed to an arbitration. The following was one of the provisions: "It is distinctly agreed that each party hereto shall at once obey the award, and shall not appeal from or move against the same, or in any way resist the same; * * * * and no resort shall be had to any legal or equitable proceedings to resist or alter the same." On an application by rule *nisi* to set aside the award for misconduct of the arbitrators, and on other grounds, *Held*, by the full court, That although, under the provisions of the agreement, the parties were prevented from having the submission made a rule of court under C. L. P. Act, 1854, s. 17, yet, as a bill could have been filed in equity to impeach the award, the rule might be amended by adding, after the style of court, the words "in equity," after which relief could be granted. *Re* Fisher and Brown 116

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ATTACHMENT. *Priorities.—Execution Creditors.*—Three creditors issued writs of summons, prior to the issue of a writ of attachment against the same defendants by another creditor. A fifth issued a writ of summons after the attachment. The three obtained executions first. In settling the priorities, *Held*, 1. Mere irregularities, which might be taken advantage of by the defendant, are not open to third parties. 2. A judgment may be attacked by a third party on the ground that it is signed as against the firm, and that the debt was the private debt of a member of the firm only. 3. The fifth creditor was entitled to share with the attaching creditor, it not being necessary for subsequent creditors to issue attachments. Fischel *v.* Townsend 99

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ATTORNEY AND CLIENT.—*Parliamentary Agency.—Proceedings before the Legislature.—Taxation of Costs.—Practice.—Held*, That where a solicitor has obtained from the Speaker of the Legislative Assembly authority to act in any matter as a parliamentary agent, he can recover the amount due him for services, without being obliged to observe all the requirements of the English Act. Kennedy *v.* Austin 362

BANK.—*Bank and its Branches.*—Plaintiff applied for payment over, by the Bank, of money deposited with it at the branch office at Winnipeg. Previous to the garnishee order being made the money had been paid over by the head office at Toronto under sequestration issued against T. in Ontario. *Held*, following *Irwin* v. *Bank of Montreal*, 38 U. C. Q. B. 375, that a bank and its branches are but one concern, and that the application must therefore be discharged with costs. Bain *v.* Torrance 32

BAPTISM. *See* EVIDENCE.

BILL OF EXCHANGE.—*Doubtful document, whether Bill of Exchange or Agreement.—Acceptance.*—Defendants accepted two drafts, in the following words: "We will keep the sums of $605 and $405.25 from the first estimate of McLean and Moran & Co., as requested above, provided they have done sufficient work to earn that sum." *Held*, To be proper bills of exchange. McLean *v.* Shields 278

BRIDGES. *See* NAVIGATION.

CHEQUE.—*Indorser of Cheque diverted from its original purpose.—Using papers at Trial.*—H. being indebted to the defendant in the sum of $500, procured him to indorse his (H's) cheque for $1,000, upon a bank at N., out of the proceeds of which the debt was to be paid. H. and the defendant went to a bank at W. to get the cash for the cheque. H. alone, went into the manager's room, and, on his return, informed defendant that the cheque had been left with the manager, who would send it for collection to N. H., in fact, retained the cheque, and afterwards transferred it to plaintiff for value. *Held*, That defendant was liable upon the cheque. *Held*, That the examination of a party to an action, taken for the purpose of discovery, may be used at the trial, to contradict the same party, but cannot be put in evidence as an admission. Arnold *v.* Caldwell 81, 115

CLOUD UPON TITLE.—*Parties.—Costs.*—S. conveyed land to the plaintiff, who registered his conveyance. S. afterwards conveyed the same land to Fr., who conveyed to Fo., who conveyed to the defendant. *Held*, That although the registry showed a good title in plaintiff, the defendant's conveyances should be declared to be clouds, and be removed. *Held*, That Fo. and Fr. were not necessary parties. *Held*, That the defendant must pay the costs. Blair *v.* Smith 5

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CONTRACT. *See* SALE OF GOODS.

CORPORATION.—*Calls.—Liability of Shareholders for amount of unpaid stock.*—The defendant signed the following memorandum, which was written upon a page of a book, kept as a minute book of the meetings of various persons who intended forming a company: "We, the undersigned, do hereby agree to pay for the amount of stock after our respective names; and we further agree and bind ourselves to abide by the by-laws, rules, and regulations of the association." The defendant did not sign the petition for letters patent, nor any memorandum of association, but paid $10 on account of his subscription for a share. In an action by the plaintiff, a creditor of the company, for unpaid calls, *Held*, That the defendant was not liable. Allan *v.* Gordon 132

——— *Collateral agreement—Held*, That where there is a written but unsealed agreement between a corporation and an individual, parol evidence cannot be given of a verbal collateral contract (of the nature of that set out in the pleadings) made at the same time by the corporation. Great North Western Telegraph Co. *v.* McLaren 358

——— *Seal. — Hire of servant or employé.* — Plaintiff, a civil engineer, was engaged by defendants as provisional engineer at $300 per month. The employment commenced on 9th of August, 1882; he was dismissed on 16th of December, 1883, and paid up to that date. He sued for wrongful dismissal, and claimed wages up to 9th of February, the earliest period at which his services could have been terminated by a month's notice. *Held*, That as the plaintiff was an important official, his engagement was not binding upon the corporation, not being under its corporate seal. Armstrong *v.* Portage, Westbourne and North Western Railway Co. 344

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COSTS.—*Co-defendant. Costs of Defendant against.*—The bill was filed against Y. and S., to remove from the registry a conveyance from a former owner to Y. as a cloud on the title. Plaintiffs had agreed to sell to S., who declined to complete on account of the registration of the deed sought to be removed. S. allowed the bill to be noted *pro confesso* against him, but appeared at the trial and asked for costs against his co-defendant Y., on the ground that by registering the conveyance to him the suit had been occasioned. *Held*, That the appearance of S. was unnecessary, and he was not entitled to costs. Sutherland *v.* Young 94

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ENTAIL.—*Barring entail.—Enrolment of deed.*—A conveyance barring an entail does not require enrolment, registration being sufficient. Reid *v.* Whiteford 19

EXECUTION.—*Exemptions.—Practice.*—Exemptions from execution under Con. Stat. Man. c. 37, s. 85, sub.-sec. 8, as amended by 47 Vic. c. 16, s. 6, discussed. Brimstone *v.* Smith 302

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EQUITABLE ASSIGNMENT.—*Notice.*—*Held*, by the full court, affirming the decision of Taylor, J., that an equitable assignment of a *chose* in action may be made by any words or acts showing a clear intention to assign; a deed or writing is not necessary. McMaster *v.* Canada Paper Co. 309

——— *Order to pay.— Validity of assignment.— Statute of Frauds.*— McK. & McQ. being indebted to defendant, gave him an order directed to the mayor and council of the city of W., requesting them to retain $600 from money coming to them, and pay same to defendant. Shortly after McK. gave plaintiff an order on defendant in following terms: "Will you kindly agree to pay Edward Lynch the amount of money due us on order for tanks to corporation after you receive same from the chamberlain, to be paid by him to men for work on same." Defendant indorsed the order as follows: "I will agree to pay the balance of money upon the order you gave me on the city chamberlain, first deducting the amount you owe me, and the balance I will pay over to the said Edward Lynch." *Held*, That the acceptance by defendant was valid, and bound the acceptor to pay. Lynch *v.* Clougher 293

———*Registration of patent.—Recitals in patent.*—A half-breed child conveyed all his "right, title, interest, claim, property, and demand both at law and in equity of which he is now in possession, or of which he may hereafter become possessed, of, in and to the said land to which he is, or may become, entitled as heir-at-law of such half-breed in the said Province of Manitoba, wheresoever the same has been, or may hereafter be, allotted." *Held*, A good equitable assignment. Sutherland *v.* Schultz 13

EVIDENCE.—*Commission. Evidence by,—Order to read at the hearing.—Orders to examine made before cause at issue.—Held*, Affirming the order of the referee, that evidence taken abroad under an order may be read at the hearing, although the order does not state that the evidence may be so read. The proper time to obtain a commission (where the bill is not merely for discovery) is after issue. But where, upon notice, orders to take evidence abroad had been made before issue, *Held*, That the depositions would not, on that account, be suppressed; the proper course was to have appealed against the orders. Grisdale *v.* Chubbuck 302

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——————*Title to Land.—Production of original will.—Age.—Certificate of Baptism.—Held*, To prove title to land the original will must be produced and execution proved—probate is not sufficient. *Held*, That a certificate of baptism, signed by the proper official under Con. Stat. c. 16, ss. 1 and 16, was admissible in evidence. Sutherland *v.* Young 38

——————*Registry Act.—Held*, That the production of a deed from the registry office with the usual certificate of the registrar indorsed was sufficient proof of the deed. *Canada Permanent Loan and Savings Co.* v. *Page*, 30 U. C. C. P. 1, approved. Pritchard *v.* Hanover 371

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EXTRADITION.—*Evidence.—Evidence of innocence.—Proof of handwriting.—Admissibility of confession.—Held*, 1. That evidence to disprove the crime charged is inadmissible. 2. Admissibility and strength of evidence as to handwriting discussed. 3. Admissibility of confessions discussed. *Re* George A. Stanbro 263

—————— ——————*Habeas Corpus.—Form of taking evidence.*—Where prisoner was charged with an extraditable crime, and the evidence was taken down in the narrative form on the judge's notes, and by way of question and answer by a shorthand reporter which were afterwards extended by the reporter, but were not read over to the witnesses or signed by them, *Held*, Upon *habeas corpus* that there was no evidence—that is no evidence that the Court could look at—as proof of the alleged crime. *Re* G. A. Stanbro 325

FIXTURES. *See* REPLEVIN.

FOREIGN CORPORATION.—*Banking business.*—A foreign corporation loaned money on mortgage in this Province. The mortgage was executed in the foreign country and the advances made there. The corporation had no licence to do business in Manitoba, *Held*, That the mortgage was valid and vested the land in the corporation. The plaintiff corporation had for its purposes "The investment of capital on the security of real estate, personal property, assets and obligations," and was prohibited from engaging "in the business of banking." The plaintiff corporation made loans to L. & Co., taking notes from which the interest was deducted in advance. D., a member of the firm of L. & Co., made a mortgage to the plaintiff corporation to secure payment of the moneys so advanced, *Held*, That the mortgage was not *ultra vires*. Farmers and Traders' Loan Co. *v.* Conklin 181

FOREIGN JUDGMENT.—*Action on foreign judgment.*—Action upon a judgment obtained in the Province of Quebec. Service of the writ in the original action had been effected by advertisement. Defendant never resided in or carried on business in the Province of Quebec, and had no personal knowledge of the proceedings in the action.

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Held, That the defendant was not bound by the judgment. Plaintiff declared on two promissory notes made by the defendant in favor of the B. W. M. Co., and indorsed by the Company to plaintiff. The notes, when produced, appeared to be indorsed by the Company, but the plaintiff did not obtain title direct from the Company. The Company had become insolvent, and the notes had become vested in D., the official assignee. Subsequently R. was appointed creditors' assignee, who sold the notes to the plaintiff. No assignment from D. to R. was proved. *Held*, That without such proof plaintiff could not recover. Schneider *v.* Woodworth 41

——— ———*Defence which might have been set up in Foreign Court.*—Meyers *v.* Prittie 27

——— ———*Striking out Pleas disposed of in original action.*—Action upon a judgment obtained in Ontario for goods sold and delivered to a firm of which defendant was a member. The defendant defended the original action upon the ground that prior to the sale of the goods the defendant had left the firm, and had so notified the plaintiff. After a verdict had been entered for the plaintiff the defendant moved in Term for a new trial, upon the ground that the verdict was against law and evidence and the weight of evidence, but his motion was refused and judgment was entered for the plaintiff. In the present action the defendant pleaded the same defence. On motion to strike out the pleas, upon the ground that they delayed and embarrassed the plaintiff, *Held*, That the pleas should be struck out, and the plaintiff permitted to sign judgment. Gault *v.* McNabb 35

FRAUD, DEED OBTAINED BY.—*Intoxication.*—*Evidence.*—Plaintiff gave defendant a mortgage and subsequently executed a conveyance to him of the equity of redemption. Plaintiff asserted that the conveyance was obtained from him by fraud and while intoxicated through drink supplied to him by the defendant, at his (defendant's) hotel. *Held*, That the evidence did not establish the fraud charged. *Held*, That though plaintiff was a hard drinker he had not become so incapacitated for business that equity would relieve him from his acts, and the bill must be dismissed with costs. McIlroy *v.* Davis 53

——— *Rescinding sale.*—Defendant H. sold land to defendant C. at $10 an acre; defendant C. sold to plaintiff at $30, representing to him that he was acting as agent for the owner; plaintiff purchased, believing defendant C. to be an agent merely. Plaintiff would have made further enquiries before purchasing had he known that C. was the real owner. C. procured H. to convey direct to plaintiff. The consideration expressed was the higher price. H. was no party to the fraud. *Held*, That the plaintiff was entitled to have the transaction cancelled. *Held*, That as against H. the bill must be dismissed with costs. Hutchinson *v.* Calder 17

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FRAUDULENT ASSIGNMENT.— *I. O. U.— Assignment.— Interpleader.*—An I. O. U. was made by McD. & R. in favor of McL., and assigned by him to the plaintiff. Subsequently McD. & R. were served with a garnishee order, in a suit of the present defendants against McL., attaching all moneys due by them to A. D. McL. McD. and R. interpleaded. *Held*, upon the evidence, that the assignment was only a contrivance and not a real transaction, and was void as against the defendants. Bateman *v.* Merchants' Bank of Canada 260

FRAUDULENT CONVEYANCE.—*Exemption from seizure.*—Defendant, J. S., took up a quarter section as a homestead, performed settlement duties, and obtained a patent. He then made a conveyance to J. R., and J. R. conveyed to M. S., the wife of defendant J. S. Subsequently to these conveyances, plaintiff obtained judgments at law against the defendant J. S. The conveyances were without consideration. J. S. had no other property. Within three months after the execution of the conveyances, executions to the amount of $1,388.38, against J. S., were placed in the sheriff's hands. *Held*, 1. That the conveyances must be set aside, and equitable execution decreed. 2. That it is not necessary that the debts should have become payable before the fraudulent disposal of the property was made. Brimstone *v.* Smith 302

FRAUDULENT PREFERENCE.—*Confessing judgment.*—In pursuance of an agreement made between the defendant McL. (who was then in insolvent circumstances) and certain of his creditors, two documents were executed. By the one, the creditors signing it agreed to release McL. from any liability upon any notes they had received from him then under discount, and to indemnify him by retiring these at maturity, reserving, however, their claims against him in respect of the original consideration for which the notes were given. By the other document the same creditors assigned and transferred all their claims against McL. to the defendant McK., in order that one action might be brought for the aggregate amount of the claims. The amount recovered to be distributed among these creditors *pro rata*. A writ was issued on the 26th of June, and defendant McL. served. An appearance was entered on 28th of June; the same day a declaration was filed and served, and a plea of payment filed for the defendant. The same day defendant McL. was examined, and on the next day an order was made striking out the plea, upon which judgment was signed and execution issued. Upon a bill filed by the plaintiffs who were subsequent creditors, *Held*, That the judgment recovered by McK. against McL., and the execution issued thereon, were fraudulent and void as against the plaintiffs. Bank of Nova Scotia *v.* McKeand. 175

——————— *Confessing judgment.*—In pursuance of an agreement made between the defendant H. (who was then in insolvent circumstances) and certain of his creditors, two documents were executed. By the first the creditors released H. from all liability in respect

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of notes, held for his indebtedness to them, and undertook to indemnify him against the payment of any such notes as might be under discount. By the same instrument the original debts were revived, and became immediately payable. By the second instrument the creditors assigned all their claims to the defendant D., in order that an action might be brought for the recovery of all the claims. It was at the same time verbally agreed that such an action should at once be brought, and that defendant H. should facilitate the obtaining of the judgment. On the day after the execution of these documents, a writ was issued. Service was at once accepted by an attorney for H. Declaration and pleas were filed on the same day. On the day following the defendant was examined on his pleas, and on the next an order was made striking out the pleas, upon which judgment was signed and execution issued. Upon a bill filed by a subsequent judgment creditor, *Held*, That the judgment obtained by D. was void, as against the plaintiffs, as being a fraudulent preference. Union Bank of Lower Canada *v.* Douglass 135

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INJUNCTION, MANDATORY.—*Interim Injunction.—Held*, That on a motion *ex parte* for an injunction, all facts within the knowledge of the applicant and material to the application must be disclosed. A mandatory injunction to restore buildings to their former foundations refused upon motion. Stewart *v.* Turpin 323

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——————— *Interest.—Money in Sheriff's hands.—Held*, As between two execution creditors the first is entitled to interest on his judgment out of moneys remaining with sheriff pending the trial of an interpleader issue. Wolff *et al v.* Black; McKinnon *et al v.* Black . 243

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JUDGMENT, ASSIGNMENT OF.—*Certificate of judgment.—Assignment of certificate.—Remedies by issuing writs of execution and registering certificate of judgment.*—Bill by the assignee of a registered judgment

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for sale of lands. Upon demurrer, *Held*, 1. The judgment having been assigned, it was immaterial that the judgment remained registered in the name of the original creditor. 2. An assignee of a judgment may file a bill to enforce it. 3. The issue of execution upon the judgment does not prevent proceedings by bill. Arnold *v.* McLaren 313

JURISDICTION.—*Where cause of action arose.—Jurisdiction.*—The writ was issued, specially indorsed for money payable on a mortgage of lands in Manitoba, executed by defendant in Ontario, and payable to the mortgagee or his assigns, but not at any particular place. The plaintiff, who was the mortgagee, resided in Manitoba. *Held*, That the act of the defendant, which gave the plaintiff his cause of complaint—the non-payment of the money—occurred within the Province, and that the court had jurisdiction. Bradley *v.* McLeish 103

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JURY, SPECIAL, VERDICT OF.—*Held*, That section 29 of chapter 31, Con. Stat. Man. applies both to special and common juries, and that the verdict of nine or more jurors is, in either case, sufficient. Robertson *v.* McMeans 348

MARRIED WOMEN.—*Liability on contract.—Separate estate.*—In an action brought to recover from the defendant, a married woman, the balance of an account for goods sold and delivered to her, *Held*, That, in the present state of the law, debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is without regard to separate estate. Wishart *v.* McManus 213

MECHANICS' LIEN.—*Assignment.—Affidavit.—Commissioner.—Time for commencement of action.—Held*, 1. An assignee of the mechanic is entitled to a lien, and may make the affidavit necessary for registration. 2. A commissioner to administer oaths has no power to take an affidavit verifying a statement of claim to be filed. 3. The statement of claim read: "The time or period within which the same was to be done or furnished. Between the third day of July, 1882, and 1st day of August, 1883." *Held*, Sufficient. 4. Proceedings must be commenced within 90 days after the completion of the work, and the making good of trifling defects in the work does not extend the time. Kelly *v.* McKenzie 169

———————— *Land out of jurisdiction.—Personal remedy only.—Held*, 1. Varying the decree made on the hearing, that plaintiffs were entitled to a personal order against defendants Hunter and Short. 2. Where lands are out of the jurisdiction, the Court cannot affect them otherwise than by proceeding *in personam*, and cannot therefore enforce a mechanics' lien by sale of land out of the jurisdiction. Chadwick *v.* Hunter 363

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———— ———— *Materials provided.—Time for Registration.*—Materials were supplied from time to time as the building progressed, not under any contract, but as they were required and ordered. *Held*, That each sale was a separate transaction, and the subject of a separate registration. Chadwick *v.* Hunter 39

MERGER. *See* PRINCIPAL AND SURETY.

MISREPRESENTATION. *See* FRAUD.

MORTGAGE. *Railway Company.—Mortgage suit.—Lands purchased by Railway Company from mortgagor.*—Plaintiffs were mortgagees of land under a mortgage made by defendant McL. After the making of the mortgage, defendant McL. conveyed to defendant R., and R. conveyed to the defendants C. P. R. Co. a strip across the land for their track. The bill was for foreclosure; for immediate payment by McL., and for possession as against R. and the C. P. R. Co. The answer of the C. P. R. Co. set up that they had made an agreement with R. for the purchase of the strip of land, and that they had paid into court the purchase money, and given notice by advertisement as required by the statute. *Held*, That the plaintiffs could not have, as against the railway company, delivery of possession. 2. That the payment into court protected the railway company against the claim of the plaintiffs, and that the rights of the latter were confined to a claim against the compensation paid into court. *Held*, That, as against the defendant McL., the plaintiffs were entitled to an order for immediate payment, and, as against defendant R., to delivery of possession of the land not embraced in the deed to the railway company. The Manitoba Mortgage and Investment Company Limited *v.* The Canadian Pacific Railway Co 285

MORTGAGEE.—*Abortive sale, costs.—Held*, That where a mortgagee had offered property for sale under a power of sale, and the sale proved abortive, he was entitled to the costs, the attempt to sell having been *bona fide*. Cameron *v.* McIlroy 242

NAVIGATION. *Obstruction.—Liability of Bridge Company.*—The defendants by their charter were empowered to erect a toll-bridge over the Red River, and it required that the bridge should be provided with a draw or swing so constructed as to allow sufficient space, not less than 80 feet, for the passage of boats, rafts, etc. After the bridge had been constructed the two ends were carried away, leaving the swing portion, however, uninjured. For the purpose of a temporary bridge, pending repairs, piles were driven into the bed of the river, but no obstruction was placed under the swing. The plaintiff's raft in descending the river was driven by the current against the piles, broken and lost. *Held*, That the public had no right to use any other space than that provided for by the charter. 2. That the Bridge Company were entitled to erect a temporary bridge, and, for that purpose, to drive the piles. 3. Where both parties have equal rights in a navig-

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able river, it must be shewn, in order to maintain an action, that the defendant has exercised his rights in such a manner as to unreasonably impede or delay the plaintiff. Rolston *v.* Red River Bridge Co. . . 235

NEW TRIAL.—*Evidence improperly received.—Objection to evidence.—Motion to set aside Verdict.—Held*, On motion to set aside a verdict, no objection can be taken to the admissibility of evidence which was not objected to at the trial. Watson *v.* Whelan 300

———— *Question of fact.—Verdict of Jury.—Motion to set aside.—Held*, The Court will not interfere with the finding of a jury, and reverse it, unless the verdict is perverse, or clearly and evidently against the weight of evidence, or when the jury has been misdirected by the judge. Maddill *v.* Kelly 280

NOTICE. *See* REGISTRY ACT.

PATENT.—*Cancellation.*—S. entered for a homestead and pre-emption, and subsequently by deed conveyed to A., through whom plaintiffs claimed. Before the patent was issued the defendant made application for the same land, alleging that S. had not complied with the requirements necessary to entitle him to the land. Upon the report of the Land Board the Minister of the Interior cancelled the entry of S., and allowed the defendant to be entered for the land. The bill prayed that a patent from the Crown granting the lands to plaintiffs might be issued, and that the entry made by the defendant should be set aside. *Held*, That the Court had no jurisdiction to grant the relief prayed. Crotty *v.* Vrooman 149

PLEADING. *Admission.—Proof of deed by Registrar's certificate.*—The bill alleged, as the plaintiff's title to the lands in question, the existence of a patent and certain deeds. The answer, although not expressly admitting the patent and deeds, charged that the latter were procured by fraud and deception; that they were never read over to the grantor; and that the parcels were not those intended by the grantor to be conveyed; and prayed, by way of cross-relief, that the patent and the deeds set forth in the bill, should be declared to be clouds upon the defendant's title. *Held*, Affirming the judgment of Wallbridge, C. J., that the patent and deeds were admitted by the answer. Pritchard *v.* Hanover 371

PLEADING.—*Cloud upon Title.—Proof of Patent.—Patent as evidence of title.—Held*, 1. That the copy of a patent filed in the registry office and produced by the registrar is not evidence of the patent. 2. Where the bill alleged a patent and asked that certain deeds to the defendant should be set aside as clouds upon title, and the answer prayed, by way of cross-relief, that the patent referred to in the bill might be set aside as a cloud upon the defendant's title, that no proof of the patent was necessary. 4. That a patent from the Crown is *prima facie* evidence of title. If it be desired to set up title through

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a purchaser from the Hudson's Bay Company as against a patent, evidence must be given to bring the case within "The Rupert's Land Act, 1868." (Imp.) Pritchard *v.* Hanover 72

——— *Demurrer.—Pleading.—Indorsement of cheque.*—Action for non-payment of cheques. The second count alleged the drawing of a cheque, payable to O., that the cheque was delivered to O. in payment of debt due O. from the plaintiff, "and the said O. being the lawful holder of the said cheque, and entitled to receive the amount thereof, duly presented," etc. Plea, that the cheque was not delivered to O. in payment of a debt. *Held*, Plea bad. The fourth count alleged the drawing of a cheque payable to the order of the Union Bank of Lower Canada, who presented it, &c. Plea, that the said Bank did not indorse the cheque to the defendants, and refused to indorse it. *Held*, Plea good. Todd *v.* Union Bank of Lower Canada 119

——— *Misnomer. — Corporation. — Collateral agreement.* — *Held*, That misnomer of a plaintiff corporation is not a ground of non-suit. The defendant must object, by application in chambers, to compel the plaintiff to amend. *Held*, That where defendants move for a non-suit upon the ground of misnomer, the fact of incorporation of the plaintiff company is admitted. *Semble*, That the question whether the plaintiff corporation does, or does not, exist, must be raised by plea. The Great North Western Telegraph Co. *v.* McLaren 358

——— ——— *Multifariousness. — Demurrer. — Want of Equity.* — The bill filed prayed for an account against defendant S., payment of the amount which might be found due the plaintiffs, and, in default, a sale of certain chattels upon which they claimed a right to possession until payment. It alleged that the defendant S. had given a mortgage to the defendants the I. Bank upon the chattels, and prayed an injunction against the Bank, to restrain it from taking possession of, and selling, the chattels. *Held*, The demurrer of the defendants, the I. Bank, for multifariousness and want of equity, was allowed. Ward *v.* Short. 328

——— ——— *See* STATUTE OF LIMITATIONS.

PRACTICE.—Affidavit of service must shew that indorsements on writ are on copy served. Bisson *v.* Sinnott 26

——— ——— *Amendment. See* ARBITRATION.

——— ——— *Attachment.—Form of Affidavit.*—Keeler *v.* Hazlewood. . 28

——— ——— *Appeal, time for notice of intention to.*—Glass *v.* McDonald 29

——— ——— *Costs.*—Where the opposite party does not appear, costs cannot be given to the applicant where not asked for by the notice of motion. Geddes *v.* Miller 365

——— ——— *Costs. — Superior scale.* — Plaintiff sued defendants for goods supplied, amounting to $224.—There was no evidence that the articles were made or supplied at an agreed price, or to show that the

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amount claimed was ascertained by the act of the parties. *Held*, Plaintiff entitled to superior scale costs. The mere rendering an account with prices stated is not ascertaining the amount by the act of the parties. Montgomery *v.* McDonald 232

——— *Discovery.—Communication between manager of bank and head office.—Principal and agent.*—The manager of a branch bank at W., having its head office at M., laid an information against plaintiff, who subsequently brought an action against the bank for malicious arrest. On an examination of the manager, *Held*, 1. That he ought to have answered the following questions: "When did you first communicate with them (defendants) about it?" "How did you first communicate, by letter or telegraph?" 2. That he was right in refusing to answer the following question: "Did you from time to time communicate the facts previously stated in your examination as they occurred?" McLean *v.* Merchants Bank 178

——— *Dismissal for want of prosecution —Non production by defendant.—Undertaking as to damages.*—On a motion to dismiss the bill for want of prosecution, it was objected that one of the defendants had not obeyed an order to produce. *Held*, That mere default on the part of a defendant to obey an order to produce does not preclude him from moving to dismiss, unless the plaintiff has been taking active steps to enforce the production. On appeal, the recital in the order of the material used will govern in case of dispute. The referee in chambers has no jurisdiction to order a reference as to damages caused by the issue of an injunction. Toronto Land Co. *v.* Scott 105

——— *Dispute Note.—Power of registrar to take accounts when dispute note filed.—Costs of abortive sale.—Held*, That the registrar has power to include in the plaintiff's account costs of an abortive sale, on issuing a decree after dispute note filed; but, in case of a contest, has no power to adjudicate on the weight of evidence. The proper course is to take a decree with a reference to the master. Cameron *v.* McIlroy 241

——— *Election petition.—Setting aside service.*—Motion to set aside the service of an election petition upon the grounds: 1. That the copy served was not signed by the petitioner, and did not show that the original was signed. 2. That the copy of the recognizance served did not show that the original was under seal, and, if the original was under seal, the copy served is not a true copy. 3. That there was no style of cause in the petition. Refused with costs. La Verandrye election 11

——— *Examination on affidavit.—Examination of defendant on application to sign judgment.*—Upon an application under 46 and 47 Vic., c. 23, s. 16, one defendant made an affidavit of merits, and the presiding judge in chambers made an order for the examination of two other defendants. *Held*, Affirming order of Dubuc, J., that the examination of these defendants was in the discretion of the judge, and the appeal should be dismissed with costs. Imperial Bank *v.* Adamson . 96

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——— ——— *Examination.—Affidavit used on an application in chambers.—Subsequent examination of deponent.—Held*, That where an affidavit had been used, and answered the purpose for which it had been filed, an order to examine the deponent upon it will not be granted. Imperial Bank of Canada *v.* Taylor 244

——— *Examination on affidavit, in deponent's district.*—Imperial Bank *v.* Angus 98

——— ——— *Execution upon judgment obtained under 46 and 47 Vic. c. 23 and amending Act. Held*, That execution on a judgment signed under 46 and 47 Vic., c. 23, s. 21, as amended by 47 Vic., c. 21, s. 10, cannot be issued before the expiration of eight days after judgment has been signed. King *v.* Leary 340

——— ——— *Filing affidavit.—Defendant appearing in person.—Service.—Filing affidavits on motion.—Reference to Judge.—Costs.—Held*, 1. Where a defendant appears in person he is entitled to receive the same notice of proceedings being taken, which a solicitor receives. 2. Where leave was given to file an affidavit in support of a motion, but the leave was not expressed in the notice, and the affidavit was not filed when the notice was served, but a copy was served with the notice of motion, *Semble*, sufficient. Geddes *v.* Miller 365

——— *Further directions.—What can be read.—Revocation of agent's authority.—Collection by agent.—Security.—Held*, That on further directions, a defendant may, on the question of costs, read his answer, although it cannot, where replication has been filed, be read as evidence upon the questions in dispute expect by consent. Only the decree and master's report, with any intermediate orders or certificates, can be made use of for that purpose. In a suit for an account, by principal against agent, the decree on further directions contained a declaration that the agency of the defendant was revoked, *Held*, That the decree must be varied, as the plaintiff had power to revoke the authority independently of any decree, and had already revoked it. The decree further declared that the plaintiff should have the exclusive right to the collection of moneys and debts, *Held*, The decree must be varied, as the moneys and debts were the plaintiff's own moneys, and he had a right to collect them without any such declaration. The defendant claimed to be entitled to a commission of twenty per cent, upon any moneys which might afterwards be received by the plaintiff. The decree directed the plaintiff to give security that he would pay over to the defendant what the defendant might be entitled to receive. *Held*, The decree must be varied, as if defendant had a right to the commission, he could take such steps as he might be advised to obtain an account and payment. Vivian *v.* Scoble 192

——— ——— *Garnishing order. — Garnishee.—Affidavit.—Debt due.—"Action pending."—Held*, That the omission to state in terms that

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"the action is pending," in an affidavit on which a garnishing order is made, is a fatal objection to the order. Shorey *v.* Baker 282

——— *Garnishing Order.—Suit in equity.—Power to garnish.—Held*, Affirming the order of the referee, that under Con. Stat. c. 37, s. 78, the Court has power to issue garnishing or attaching orders in equity suits. Cameron *v.* McIlroy 198

——— *Garnishing Order.—Garnishee (a corporation) not within the Province.*—Application by defendant to set aside a garnishing order. The debt alleged to be due by the garnishees was in respect of a life insurance policy. The Insurance Company (the garnishees) had no office in the Province. L. & K. acted as its agents in Winnipeg, having power merely to receive applications for insurance. The premiums were payable at Montreal, and the amount insured in case of death was also payable at Montreal. *Held*, That as the Insurance Company could not be sued in this Province, the garnishing order should be discharged. McArthur *v.* Macdonell 334

——— *Indorsement on writ of particulars of claim, Sufficiency of.*—Dundee Mortgage and Investment Co. *v.* Sutherland 308

——— *Leave to appear.—Bill of Exchange Act, 18 and 19 Vic., c. 67.—Striking out appearance.—Held*, That the Imperial Act 18 and 19 Vic., c. 67, is in force in Manitoba. *Held*, A judge may grant leave to defendant to appear to a writ, either *ex parte* or upon summons. *Held*, That where an order is granted *ex parte*, no application under the statute of 1883 for leave to sign final judgment, setting aside the appearance, will be entertained, but an application to rescind the *ex parte* order may be made to any judge. This was an appeal heard by the full Court in Michaelmas term, 1883, from an order of a single judge. Action brought under Imperial Bill of Exchange Act, 18 and 19 Vic. c. 67. Defendant obtained summons for leave to appear on the ground that plaintiffs were not *bona fide* holders. An order was made dismissing the summons. Defendant appealed. Canadian Bank of Commerce *v.* Adamson 3

——— *Master's office.—Jurisdiction of master.—Principal and agent.—Drunkenness.*—In a suit between principal and agent, upon the footing of an agreement by which the agent was to receive a commission of 20 per cent. on all sales of real estate, the decree directed the master to take certain accounts, and ordered the agent to pay into court any balance found due by him, "less the defendant's commission of 20 per cent." *Held*, That the master had no jurisdiction to set aside the agreement. Vivian *v.* Scoble 125

——— *Master's report.—Issue of execution before confirmation.—Held*, That under the usual mortgage decree, plaintiff has a right to issue execution immediately after the making of master's report and before its confirmation. Cameron *v.* McIlroy 197

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——— ——— *New hearing.—Application for a new hearing.—Additional evidence.*—Cause heard and decree in plaintiff's favor made on 27th March, 1883, when defendant, though absent, appeared by counsel. Cause re-heard by the full Court in Easter Term, 1883, and judgment affirming decree given 4th February, 1884. On 6th February, 1884, defendant presented a petition, praying that the decree might be set aside, and that he might be allowed to adduce evidence in his own behalf, and that the suit might be set down again for hearing and examination of witnesses, on the ground that defendant was absent from Manitoba, and never made aware of the date of hearing. *Held*, That application must be dismissed with costs. Archibald *v.* Goldstein . . 146

——— ——— *Notice of trial.—Interpleader.—Held*, That if, on an interpleader issue, the plaintiff does not give notice of trial, the defendant's proper course is to apply to the Court for an order to bar the plaintiff. Plaxton *v.* Monkman 369

——— ——— *Particulars of Plaintiff's residence.—Order for, should not be granted ex parte.* Martel *v.* Dubord. 174

——— ——— *Production.—Set off.—Production of books not belonging to defendants.*—Defendants pleaded a set off, the items of which were contained in the books of the N. W. L. Co. Defendants were shareholders in the Company, and originally the sole owners of the stock. Plaintiff obtained an order to examine the defendant Carman on his pleas, and gave him notice to produce the book containing the items of the set off, upon such examination. Production was refused. *Held*, reversing the order of Dubuc, J., that Carman could not be compelled to produce the books. Bradbury *v.* Moffat. 92

——— ——— *Referee.*—The referee cannot refer to a judge an application which has lapsed. Geddes *v.* Miller. 365

——— ——— *Re-hearing.—Notice of setting down.—Held*, That two days' notice of setting down for re-hearing sufficient. Tait *v.* Calloway 333

——— ——— *Remanet.—Notice of Trial.*—A record was entered for the Spring Assizes in Winnipeg in 1883, and made a remanet. At the Autumn Assizes it was placed on the docket by the prothonotary. No one appeared for the plaintiff, but defendant's counsel insisted upon a verdict being given in his favor. *Held*, That a new notice of trial was necessary, and the verdict was set aside with costs. Robinson *v.* Hutchins. 122

——— ——— *Security for costs.—Plaintiff resident out of Jurisdiction, but owner of real estate within the Province.—Held*, That the ownership of unincumbered real estate within the Province is not sufficient answer to an application for security for costs. A mortgage to an officer of the Court upon such real estate may be sufficient security. Caston *v.* Scott 117

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——— *Security for costs.—Security for costs pending summons for judgment.—Held*, That where a summons was taken out to enter judgment, and during the pendency of such summons, a summons for security for costs was served, that security must be given before the defendants can be called on to show cause to the summons to enter judgment. Taylor *v.* Rainy Lake Lumber Co. 240

——— *Security for costs.—Nominal plaintiff.* Martindale *v.* Conklin. 338

——— *Service of writ substitutionally under Bills of Exchange Act.*—Bank of Nova Scotia *v.* Lynch 180
Union Bank *v.* McDonald. 335

——— *Service, substitutional.—Bills of Exchange Act—Substitutional service of writ—Delay in application to set aside judgment.*—Where judgment obtained and execution placed in sheriff's hands, and no application made to set same aside for nearly a year, *Held*, that after such delay, the Court would not interfere upon a ground of irregularity. *Held*, that the provisions of Con. Stat. Man. c. 31, s. 35, as to substitutional service, do not apply to writs under the Bills of Exchange Act. Bank of Nova Scotia *v.* Lynch, 1 M. L. R. 180, reviewed. Union Bank *v.* McDonald 335

——— *Setting aside judgment.—Delay.*—The writ was issued on 23rd June, 1883. Judgment was signed 10th July, and execution issued 16th July, 1883. On 3rd March, 1884, defendant applied to set aside the judgment, on the ground of irregularity, and on the merits. *Held*, application refused. Tait *v.* Calloway 102

——— *Stamps.—Re-filing and re-stamping.—Common law and Equity.*—Stewart *v.* Turpin 339

——— *Staying proceedings pending re-hearing.* — Chadwick *v.* Hunter 109

——— *Summons.—Writ ex juris.—Indorsement on.*—Imperial Bank of Canada *v.* Prittie 31

——— *Time.—Christmas and three following days.*—Fortier *v.* Gregory 25

——— *Writ of summons—Application to sign judgment where served ex juris.*—Western Canada Loan Co. *v.* Sutherland 201

——— *See* EXECUTION, EXEMPTIONS.

PREFERENCE. *See* FRAUDULENT PREFERENCE.

PRINCIPAL AND AGENT.—*Diligence.—Held*, That the agent, in employing the services of an auctioneer, should have used diligence to make a reasonable bargain for his remuneration. The auctioneer having retained, out of the moneys received by him, an excessive fee, the agent was charged with the excess. Vivian *v.* Scoble 125

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——————— *Purchase by agent in his own name.—Statute of Frauds.*—Plaintiff, desirous of purchasing property from one T., employed defendant as his agent to negotiate the purchase. Defendant purchased the property, using his own money, and took the conveyance to himself. *Held*, affirming decree that defendant was trustee for plaintiff, and that the Statute of Frauds was no protection. Archibald *v.* Goldstein . . 8. 45

——————— *See* ARBITRATION.

PRINCIPAL AND SURETY.—*Suretyship.—Retiring partner a surety for the continuing partner.—Merger.*—Defendants, W. & O'N., being in partnership, gave a promissory note and an I. O. U. to plaintiff for the amount of the firm's indebtedness. The partnership was dissolved, and an agreement entered into between the partners, that O'N. should pay all liabilities. Plaintiff being aware of this arrangement, took from O'N. his separate promissory note, extending the time for payment. *Held*, (Dubuc, J., dissenting,) that W. had become a surety only for the debt, and that he had been released by the giving of time to O'N. O'N., at the time of giving his separate note, executed a mortgage upon real estate, conditioned to be void upon payment of the note and of any renewal thereof. *Held*, That the plaintiff's remedy upon the original note and indebtedness had not merged. Munroe *v.* O'Neil 245

RAILWAY COMPANY.—*Baggage.—Warehousemen.—Held*, 1. A Railway Company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, &c., even when these are packed with the baggage for which they are liable. 2. When goods remain at the station at which a passenger alights, but it does not appear that the Railway Company has charged, or is entitled to charge, for storage, the Company is not liable as warehousemen. McCaffrey *v.* The Canadian Pacific Railway Company 350

——————— *Loss of goods.—Action for non-delivery of goods.—Condition indorsed on shipping bill.—Liability of carrier.*—In action brought for the non-delivery of sawn lumber delivered to defendants at P. to be carried by them to B., defendants pleaded a condition indorsed on the shipping bill, as follows: "That the company will not be responsible for any deficiency in weight or measure of grain, in bags or in bulk, nor for loss or deficiency in the weight, number or measure of lumber, coal or iron of any kind carried by the car load." The evidence showed that the lumber was loaded at P., and that a portion of it was not delivered at B. There was no evidence as to how the loss occurred. *Held*, 1. That by the Statute 42 Vic. c. 9, s. 25, s. s. 4, the defendants were precluded from setting up the indorsed condition when a loss is charged as happening through their own negligence. 2. That, in the absence of evidence, the non-delivery might be assumed to have arisen from misdelivery to some other person, or from the actual use of the property by the defendants for their own purposes, in which cases the condition would be no protection. Henry *v.* Canadian Pacific Railway Co. 210

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——— *Liability of Railway Company as carriers.*—Plaintiff delivered certain goods to the Grand Trunk Railway for carriage to Winnipeg. Defendants, in the course of transit, received the goods and were paid freight charges over their line. Defendants delivered the goods at Winnipeg to a cartage company to be delivered to plaintiff, but some of them were not so delivered. *Held*, Defendants liable. Roach *v.* Canadian Pacific Railway Co. 158

——— *Loss of goods.—Delivery of goods to carrier.—Admission by agent.*—Plaintiff sent by S. a box of goods to defendants' station at W.. to be carried to Y. at P. S. saw several men working at defendants' freight shed, and told one of them he had brought a box for Y.; the man told him "to bring it in and put it there," and S. put it where he was told. He got no receipt. The box was lost. Plaintiff then went to the station at W. and saw the man already referred to, who admitted that he got the box, but could not say what he had done with it. *Held*, That whether the goods were to be carried at the risk of the consignor or of the consignee was a question for the jury, and the Court would not disturb their verdict. *Held*, That the admission of the man, whom plaintiff saw, was not admissible as evidence against the defendants, and as it was the only evidence of delivery, the plaintiff should be non-suited. Young *v.* Canadian Pacific Railway Co. 205

——— *Negligence.—Railway Crossing.—Cattle guards.—Accident.—Liability of Company.—Contributory negligence.*—Action for the value of a cow, killed by defendants' locomotive. A boy was in charge of the cow, but it ran away and got on the track through the cattle guards being full of snow. *Held*, Defendants liable. Phillips *v.* Canadian Pacific Railway Co. 110

REGISTRY ACT.—*Actual notice.*—H. J. B., on 24th December, 1873, conveyed a parcel of land to D., and, on the 24th of September, 1874, conveyed the same piece of land to M. D.'s conveyance was registered on 11th May, 1875, and M.'s on 25th September, 1874. M. was the solicitor for H. J. B. on the sale to D., and, on the 5th of May, 1874, made the usual affidavit of the execution of the deed to D. *Held*, That M. had actual notice of D.'s deed at the date of the affidavit of execution. That such notice would be assumed to have continued until the date of M.'s deed. That it would be no use for M. to say that it did not; and that his deed must be postponed to D.'s. *Held*, That under the Registry Act then in force, (36 Vic. c. 18,) priority of registration did not apply to conveyances registered before the issue of the patent. Agnew *v.* Morphy 49

——— *Held*, To a perfect registration it is essential that all the requirements of the Registry Act should be complied with. *Quære*, Whether unpatented lands can be sold for taxes. Farmers & Traders' Loan Co. *v.* Conklin 181

REPLEVIN.—*Action on bond.—Impossibility of fulfilment of condition.*—After the determination of a replevin action, brought by S. against R., in

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which R. was successful, R. distrained the goods in question, for rent due by S., and then sued S. upon the replevin bond, for non-delivery of the goods. *Held*, That the defendant could not shield himself on the ground of the impossibility of delivering to the plaintiff that which the plaintiff had himself taken. Robinson *v.* Scurry 257

——— ——— *Goods affixed to realty.*—A writ was issued to recover certain machinery in a planing mill. Plaintiffs claimed the goods as vendors, under a hire and sale receipt. Defendants claimed property as part of the realty under a mortgage from the purchaser under the same receipt. On motion to set aside the writ, *Held*, 1. That replevin would lie. 2. Upon the affidavits filed, that the machinery was personalty. Waterous Engine Works Co. *v.* Henry 36

SALE OF GOODS.—*Partial delivery.—Refusal to accept excusing further delivery.*—Defendant ordered goods (some manufactured and some to be manufactured) from plaintiff. Defendant contended that the agreement was, that the goods were to be shipped not later than the 6th of October, while plaintiff and his witnesses swore to the 20th of October as the date agreed upon. On the 16th of October defendant wrote, cancelling the order. This letter was received by the plaintiff on the 19th of October, and on that day he shipped a portion of the goods. In an action for the price of the goods shipped, *Held*, That even if the plaintiff's contention as to the date were upheld, yet that the defendant was not bound to accept a portion of the goods, and that the letter of the 16th of October did not excuse a complete performance. McPhail *v.* Clements 165

SCHOOLS.—*School districts.—Award of arbitrators.—School house non-existent.*—After a division of the Donore school district, an award was made under section 14 of the Manitoba School Act, 1881, of the existing school houses, school sites, and other school property and assets within the territories readjusted. After the division, but previous to the sitting of the arbitrators, the school house of the district was destroyed by fire. *Held*, That as the school house was not in existence at the time of the arbitration, it was not proper for the arbitrators to charge the new district, within whose limits the building had been, with its value as an asset; and the matter was referred back to the same arbitrators to correct the mistake. *Re* Donore and Wheatlands 356

SETTING ASIDE JUDGMENT. *See* PRACTICE.

SHERIFF AND DEPUTY SHERIFF. *See* GARNISHING ORDERS.

SPECIFIC PERFORMANCE. *See* VENDOR AND PURCHASER.

STATUTE OF FRAUDS. *See* PRINCIPAL AND AGENT.

STATUTE OF LIMITATIONS.—*Action on promissory note.—Statute of limitations.—"Beyond the seas."*—Declaration on three promissory notes made by defendant in 1871. Plea (*inter alia*) "that the alleged causes of action did not accrue within six years before this suit." Re-

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plication, "that, at the time when the said causes of action did accrue to the plaintiff, he, the defendant, was in the United States of America beyond the seas, within the meaning of the statute in that case made and provided; and the plaintiff commenced this suit within six years next after the defendant first returned from parts beyond the seas after the accruing of the said causes of action." Rejoinder, "that the said cause of action accrued to the plaintiff at the city of Buffalo, and, at that time, and for a long time thereafter, both the plaintiff and defendant were permanent residents of the said city in the State of New York, one of the United States of America, beyond the seas, within the meaning of the statute in that case made and provided; and that the plaintiff is still a resident beyond the seas as aforesaid, and the defendant avers that the said cause of action did not accrue within six years before this suit." Demurrer, "that the rejoinder is bad in substance." Allowed. Kasson *v.* Holley 1

SURETY. *See* PRINCIPAL AND SURETY.

TAX SALE.—*Irregularities.—Demurrer for want of equity.*—In a bill to avoid a sale for taxes, plaintiff alleged as objections to the sale:—That the lands were never assessed according to law. That the assessment rolls were never returned according to law, or with the certificate or oath required by law. That no taxes were levied by the council for either 1880 or 1881. That, in the alleged assessment rolls for the years 1880 and 1881, the alleged assessment and the levy alleged and claimed to have been made, were of, and were assumed to be made upon, the north half of the section as one parcel. That the half section was advertized as one parcel. That, at the sale, the land was offered for competition in two parcels of a quarter section each. That the lands were not advertized in the manner and for the length of time required by law. On a demurrer for want of equity, *Held*, That the allegations contained in the bill were sufficient in form, and, if proved, alleged grounds for setting aside the sale. *Held*, That where land was assessed as one parcel, a treasurer, when selling, has no right to offer it in two or more parcels. Reed *v.* Smith 141

——— *Irregularities.—Non-resident lands.*—On a bill to set aside a sale for taxes, *Held*, 1. That when, at a public meeting, the ratepayers had determined to raise $300, for the erection of a school house, the trustees had no power to increase the amount. 2. That there is no power to assess unoccupied or non-resident lands under 36 Vic. c. 22. 3. That the absence of a warrant from a justice of the peace to the secretary-treasurer, and of a return by the latter to the trustees, are each fatal to the validity of the sale. 4. That the fact that the *Gazette* was not published in three consecutive weeks prior to the sale, was no sufficient excuse for non-compliance with the statute. 5. That the requirements of statutes working forfeitures are to receive a strict construction. Gemmel *v.* Sinclair 85

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——— *Held*, That where, on a tax sale, the deed was dated on the 15th of October, 1881, and a suit was begun on the 14th of October, 1882, the suit was begun "within one year from the execution of the deed," as provided by the Statute. That where the advertisement published had no proper description of the lands mentioned in it, and the reason why the taxes had not been collected was not stated, *Held*, A fatal objection. That where a sale took place on the 3rd of March, and an advertisement appeared on the 15th, 22nd and 28th of February, it was not advertised "at least three weeks in succession," as required by the Statute. A tax deed recited that "G., then treasurer, &c.," sold the lands, and proceeded "Now know ye that I, G., treasurer, in pursuance of such Act, do hereby grant," &c. The testatum clause was: "In witness whereof I, G., have hereunto set my hand and affixed the seal of the municipality, this," &c. It was signed, "G., treasurer of municipality of S. and S.," and the seal of the municipality was affixed. G. was not the treasurer who sold, but his successor. *Semble*, The deed was invalid. Farmers' and Traders' Loan Co. *v.* Conklin 181

TIME. *See* PRACTICE.

VENDOR AND PURCHASER.—*Costs.—Assignee of purchaser.—Liability for costs.—Registration of cloud on title.*—The plaintiffs agreed to sell real estate to defendant R., who registered his contract. Afterwards R. executed a mortgage upon the land to the defendants, the O. Bank. The bill was for payment, and, in default, rescission. Prior to the suit the bank offered to execute a release of their mortgage upon it being tendered by the plaintiffs. *Held*, That the Bank should pay the costs of the suit, the plaintiffs being under no obligation to tender a release for execution. Hudson's Bay Co. *v.* Ruttan 330

——— *Fraud.—Rescinding sale.*—Defendant H. sold land to C., at $10 an acre; defendant C. sold to plaintiff at $30, representing to him that he was acting as agent for the owner; plaintiff purchased, believing defendant C. to be an agent merely. Plaintiff would have made further enquiries before purchasing had he known that C. was the real owner. C. procured H. to convey directly to plaintiff. The consideration expressed was the higher price. H. was no party to the fraud. *Held*, Reversing the decision of Taylor, J., that to the rescission of a contract "there must be a false representation knowingly made, that is, a concurrence of fraudulent intent and false representation"; that the contract having been entered into deliberately, the plaintiff's statements should have been corroborated; and, where the evidence is contradictory, the court ought to be satisfied that the plaintiff's account is strictly true, and that the evidence in the present case was insufficient, and the bill must be dismissed with costs. Hutchinson *v.* Calder 46

——— *Registration of patent.—Recitals in patent.—Held*, That a vendor is bound to register the patent through which he claims title.

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Held, That a recital, in a patent two years old, of a death intestate, is not sufficient evidence of the fact, as between vendor and purchaser. Sutherland *v.* Schultz 13

——— *Rescission of contract for want of title.—Waiver of rescission.*—After a contract had been made for the purchase of $73\frac{3}{10}$ acres, the purchaser discovered that the vendor had no title to 5 acres of the land. He then gave notice of rescission, and demanded a return of his deposit. *Held*, That he was entitled to repayment. Afterwards the vendor agreed that a portion of the deposit should be returned, and the purchaser promised to repay it on the vendor "furnishing satisfactory title" to the property. Twenty-nine days afterwards the purchaser commenced this action for the return of the deposit. Meanwhile the vendor had used due diligence to perfect his title, and succeeded in doing so seven days after the issue of the writ. *Held*, That purchaser had waived his rescission; that there was a new agreement engrafted on the old one, by which the purchaser agreed to wait a reasonable time for the perfecting of the title. Clark *v.* Everett 229

——— *Return of deposit.—Specific performance.—Rescission.*—*Held*, That where a contract for the purchase of real estate is rescinded, owing to the default of the purchaser, he cannot recover back his deposit. Robertson *v.* Dumble 321

——— *Specific performance.—Damages.—Date of assessing damages.*—In an action by a purchaser, for specific performance of a contract respecting lands, intended to be held by him for sale, where damages have been decreed, instead of specific performance, on account of the sale, by the vendor, of the lands to a third party, the date of the breach of the contract is the period at which the value of the land in question is to be estimated for the purpose of assessing the damages. Boultbee *v.* Shore 22

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