THE TERRITORIES LAW REPORTS

VOL. I.

(CITED 1 TERR. L. R.)

CONTAINING

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

INCLUDING

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

EDITOR:

N. D. BECK, Q.C.

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

TORONTO
THE CARSWELL CO., LIMITED.
30 ADELAIDE ST. EAST,
1900.

PRINTED BY
THE CARSWELL CO., LIMITED,
30 ADELAIDE ST. EAST,
TORONTO.

PREFATORY NOTE.

These Reports, "The Territories Law Reports," published under the authority of the Law Society of the North-West Territories, include, in revised form, all the cases reported by W. C. Hamilton, Q.C., which were published by the North-West Government under the title of "The North-West Territories Reports." That series is now discontinued.

The several memoranda, prefixed to the first volume of the present series, have been compiled in the belief that they will be found to be of value, not merely to the student of history, but also to the advocate in his practice. The latter, for instance, may have occasion to revert to the law of descent, enacted by 38 Vic. c. 49 (1875); which remained in force until "The Territories Real Property Act" (1886); or to the Ordinance of 1884, introducing retrospectively the laws of England as they stood on the 15th July, 1870. The citation of this latter Ordinance, with special reference to the date of its enactment, is of common occurrence, and it is perhaps not unlikely that the question will some day be submitted for adjudication, whether this Ordinance, in so far as it assumed to have a retrospective effect, was not *ultra vires* in view of the enactments of the Parliament of Canada, embracing the period from the 15th July, 1870, to the Ordinance of 1884. It is hoped that, from considerations such as these, the memoranda will be appreciated.

The system of placing at the foot of the page the references to the reports of cases cited has made practicable the noting of all the Reports in which the cases appear. This, it is believed, will be found of great convenience, especially, under present conditions, in the Territories.

N. D. BECK,
Editor.

TABLE OF CASES REPORTED IN THIS VOLUME

TABLE OF CASES CITED IN THIS VOLUME.

ADDENDA ET CORRIGENDA.

Vol. I., Terr. L. R.

Queen v. *Riel* (No. 2) p. 23: add as a note: "Application to the Judicial Committee of the Privy Council for leave to appeal refused," 55 L. J. P. C. 28; 10 Ap. Cas. 675; 54 L. T. 339; 16 Cox C. C. 48. *Re Claxton*, p. 282; strike out the words "otherwise than" in the last line but one of p. 282.

Rules of Court: add as a date p. xlviii. "20th July, 1900."

THE JUDICIARY OF THE NORTH-WEST TERRITORIES

STIPENDIARY MAGISTRATES.

Under 36 Vic. c. 35 (1875):—

MATTHEW RYAN, Esq., was appointed on the 1st January, 1876.

LIEUT.-COL. JAMES FARQUHARSON MACLEOD, C.M.G., was appointed on the 1st January, 1876.

LIEUT.-COL. HUGH RICHARDSON was appointed on the 22nd July, 1876.

Under 38 Vic. c. 49 (1875):—

MATTHEW RYAN, Esq., was appointed on the 7th October, 1876.

LIEUT.-COL. HUGH RICHARDSON was appointed on the 7th October, 1876.

LIEUT.-COL. JAMES FARQUHARSON MACLEOD, C.M.G., was appointed on the 19th June, 1880, with precedence from 7th October, 1876. Mr. Macleod had, in the interval indicated by the dates mentioned, been an ex-officio Stipendiary Magistrate by reason of being Commissioner of the North-West Mounted Police.

MR. RYAN having resigned,

CHARLES BORROMÉE ROULEAU, Esq., was appointed on the 28th September, 1883.

JEREMIAH TRAVIS, Esq., was appointed on the 30th July, 1885.

On the 18th December, 1885, by Ordinance No. 5 of 1885, the said Stipendiary Magistrates were constituted

JUDGES OF THE HIGH COURT OF JUSTICE.

The Offices of Stipendiary Magistrate and Judge of the High Court of Justice ceased to exist on the coming into effect of "The North-West Territories Act, 1886," i.e., the 18th February, 1887. On that day, there were appointed the following

JUDGES OF THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

The Honorable Hugh Richardson, with rank and precedence before the other Judges of the said Court.

The Honorable James Farquharson Macleod, C.M.G.

The Honorable Charles Borromée Rouleau.

The Honorable Edward Ludlow Wetmore.

The Honorable Thomas Horace McGuire was appointed on the 25th April, 1887.

The Honorable James Farquharson Macleod, C.M.G., having died on the 5th September, 1894,

The Honorable David Lynch Scott was appointed on the 28th September, 1894.

MEMORANDUM OF STATUTES, ORDINANCES AND ORDERS-IN-COUNCIL bearing upon the legislative powers of the North-West Territories and the administration of justice up to the constitution and organization of the Supreme Court of the North-West Territories.

1867.

March 29. "The British North America Act, 1867," intituled "An Act for the Union of Canada, Nova Scotia, and New Brunswick and the government thereof, and for purposes connected therewith." (30-31 Vic. c. 3, Imp.) This Act provided by s. 146 for the admission by Imperial Order-in-Council of Rupert's Land and the North-Western Territory into the Federal Union.

1868.

July 31. "The Rupert's Land Act, 1868," intituled "An Act for enabling Her Majesty to accept a surrender upon terms of the lands, privileges and rights of The Governor & Company of Adventurers of England trading into Hudson's Bay, and for admitting the same into the Dominion of Canada." (31-32 Vic. c. 105, Imp.) This is printed with the Statutes of Canada, 1869.

1869.

June 22. "An Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada." (32-33 Vic. c. 3, Dom.)

This Act provided that all the laws in force in Rupert's Land and the North-Western Territory at the time of their admission into the Union, should, so far as they were consistent with "The British North America Act, 1867," with the terms and conditions of such admission approved of by

the Queen under the 146th section thereof, and with this Act remain in force until altered by the Parliament of Canada, or by the Lieutenant-Governor under the authority of this Act.

1870.

May 12. "An Act to amend and continue the Act 32 & 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba." (33 Vic. c. 3, Dom.) This Act continued the Act 32-33 Vic. c. 3, Dom.

June 23. Imperial Order-in-Council under s. 146 of the British North America Act, 1867, providing for the admission of Rupert's Land and the North-West Territory into the Dominion of Canada. This Order is printed with the Statutes of Canada 1872.

July 15. The said Order took effect.

1871.

April 14. "An Act to make further provision for the Government of the North-West Territories." (34 Vic. c. 16, Dom.) This Act repeated the clause of the Act of 1869 providing that the existing laws should continue in force.

April 14. "An Act to continue for a limited time the Acts therein mentioned." (34 Vic. c. 29, Dom.) This Act continued 32-33 Vic. c. 3, as amended, to 1st January, 1872, and from thence to the end of the then next ensuing session, without prejudice, however, to the provisions of chapter 16.

June 29. "The British North America Act, 1871," intituled "An Act respecting the establishment of Provinces in the Dominion of Canada." (34-35 Vic. c. 28, Imp.) This Act confirms the Dominion Acts 32-33 Vic. c. 3, and 33 Vic. c. 3.

1873.

May 3. "An Act to amend the Act intituled 'An Act to make further provisions for the Government of the North-West Territories.'" (36 Vic. c. 5, Dom.)

May 23. "An Act further to amend the Act to make further provision for the Government of the North-West Territories." (36 Vic. c. 34.) This Act took effect on the 1st November, 1873.

May 23. "An Act respecting the administration of Justice and for the establishment of a Police Force in the North-West Territories." (36 Vic. c. 35, Dom.) This Act provided for the appointment of Stipendiary Magistrates. These Magistrates were given jurisdiction to try summarily and without the intervention of a jury, certain classes of criminal cases. Other criminal cases, in which the maximum punishment did not exceed seven years, might be tried also summarily, and without the intervention of a grand or petty jury, by the Chief Justice, or any Judge of the Court of Queen's Bench of the Province of Manitoba, or any two Stipendiary Magistrates sitting together as a Court. Where the punishment was imprisonment in the penitentiary or death, provision was made for the transmission of the accused to Manitoba for trial by the Court of Queen's Bench of that Province according to the laws of criminal procedure in force there.

1874.

May 26. "An Act to amend 'An Act respecting the administration of Justice and for the establishment of a Police Force in the North-West Territories.'" (37 Vic. c. 22, Dom.) This Act provided that the Commissioner of the North-West Mounted Police should have all the powers of a Stipendiary Magistrate.

1875.

April 8. "The North-West Territories Act, 1875," intituled "An Act to amend and consolidate the laws respecting the North-West Territories." (38 Vic. c. 49, Dom.) This Act was to come into force by proclamation of the Governor-in-Council.

Section 6 was as follows: "All laws and ordinances now in force in the North-West Territories, and not repealed

by or inconsistent with this Act, shall remain in force until it is otherwise ordered by the Parliament of Canada, by the Governor-in-Council, or by the Lieutenant-Governor and Council under the authority of this Act."

Section 7 authorized the Lieutenant-Governor, by and with the advice of the Council of the Territories, to pass Ordinances relating to, *inter alia*, "(3) the administration of justice in the Territories, including maintenance and organization of Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts, but the appointment of any judges of the said Courts shall be made by the Governor-General in Council."

The Act dealt at length with the following subjects,—"Government and Legislation"; "Election of Members of Council or Assembly"; "Descent of Real Estate"; "Other Provisions as to Real Estate"; "Wills"; "As to Married Women"; "Registration of Deeds"; "Administration of Justice"; Administration of Civil Justice"; and "Prohibition of Intoxicants." Under the Title "Administration of Justice," provision was made by

Section 55 for the appointment of a Sheriff.

Section 56 for the disposal of the North-West Mounted Police in aid of the administration of civil and criminal justice.

Section 57 for the appointment of justices of the Peace.

Section 58 for the establishing by Ordinance of Judicial Districts.

Section 59 for Courts in these words, "A Court or Courts of Civil and Criminal jurisdiction shall be held in the said Territories, and in every Judicial District thereof when formed under such names, at such periods and at such places as the Lieutenant-Governor may from time to time order."

Section 60 for the appointment of a clerk for every such Court.

Section 61 for the appointment of one or more, not exceeding three, Magistrates.

Section 62 was in these words: "Every Stipendiary Magistrate shall have jurisdiction throughout the North-West Territories, as hereinafter mentioned, and shall also have jurisdiction, and may exercise within the North-West Territories the magisterial, judicial, and other functions appertaining to any Justice of the Peace, or any two Justices of the Peace, under any laws or ordinances which may from time to time be in force in the North-West Territories."

Section 63 directed that every Stipendiary Magistrate should preside over such Courts in the Territories as should from time to time be assigned to him by the Lieutenant-Governor.

Section 64 provided that the Chief Justice, or any Judge of the Court of Queen's Bench of Manitoba, with any one of the Stipendiary Magistrates, as an associate, should have power to hold a Court under section 59, and to try all criminal charges; in some cases, without, and in others, with, a jury; a jury in some cases "not exceeding six in number," and in others "not exceeding eight in number." It provided also that no grand jury should be called in the Territories.

Section 65 provided that a person convicted of any offence punishable with death might appeal to the Court of Queen's Bench of Manitoba.

Under the title "Administration of Civil Justice," section 71 provided that every Stipendiary Magistrate of the Territories, and the Chief Justice, and any Judge of the Court of Queen's Bench of Manitoba, or any one of them, should respectively have power, jurisdiction and authority to hear and determine civil cases within the Territories; and at a Court held under section 59.

Section 73 gave an appeal in certain cases to the Court of Queen's Bench of Manitoba.

1876.

October 7. The Act 38 Vic. c. 49, Dom., was brought into effect by Order-in-Council. This Order is printed with the Statutes of Canada, 1877.

1877.

April 28. "The North-West Territories Act, 1877," intituled "An Act to amend 'The North-West Territories Act, 1875,'" (40 Vic. c. 7, Dom.)

Section 3 substituted for section 7 of the Act of 1875, a new section of which sub-section 1 is as follows:—

"7. The Lieutenant-Governor in Council, by and with the advice and consent of the Legislative Assembly, as the case may be, shall have such powers to make ordinances for the Government of the North-West Territories as the Governor in Council may from time to time confer upon him; provided, always, that such powers shall not at any time be in excess of those conferred by the 92nd section of the 'British North America Act, 1867,' upon the Legislatures of the several Provinces of the Dominion,"—and subject to certain other restrictions.

Section 6 repealed sections 59 and 60 of the Act of 1875.

Section 7 repealed sections 62, 63, and 64 of the Act of 1875, and substituted new sections in their stead, to the following effect:

Section 62; the new section, was almost identical with the former one.

Section 63; every Stipendiary Magistrate was given power to try in a summary manner, and without the intervention of a jury, in addition to any other charge which he might by law have the power so to try, certain classes of criminal cases.

Section 64 gave to every Stipendiary Magistrate power to try all other criminal cases, in some events summarily and without the intervention of a jury, in others, in conjunction with one, or in some cases, two, Justices of the Peace, with the intervention of a jury of six.

Section 71 of the Act of 1875 was also repealed; a new section was substituted giving every Stipendiary Magistrate power to try civil cases, in some cases, with, in others, without a jury.

May 11. An Order-in-Council was passed (printed with the Statutes of Canada of 1877) the latter portion of which reads as follows:—

And whereas, by the third section of the said Act, it is further enacted that "the Lieutenant-Governor, by and with the advice of the Legislative Assembly, as the case may be, shall have such powers to make Ordinances for the Government of the North-West Territories as the Governor in Council may, from time to time, confer upon him; provided always that such powers shall not at any time be in excess of those conferred by the ninety-second section of "The British North America Act, 1867, upon the Legislatures of the several provinces of the Dominion."

Now, in pursuance of the powers of the said statute, conferred, His Excellency by and with the advice of the Privy Council, has been pleased further to order, and it is hereby ordered that the Lieutenant-Governor in Council shall be, and he is hereby empowered to make Ordinances in relation to the following subjects, that is to say:—

1. The establishment and tenure of territorial offices and the appointment and payment of territorial officers.

2. The establishment, maintenance and management of prisons in and for the North-West Territories.

3. The establishment of municipal institutions in the Territories, in accordance with the provisions of the "North-West Territories Acts, 1875 and 1877."

4. The issue of shop, auctioneer and other licenses in order to the raising of a revenue for territorial and municipal purposes.

5. The solemnization of marriage in the Territories.

6. The administration of justice, including the constitution, organization and maintenance of territorial Courts of civil jurisdiction.

7. The imposition of punishment by fine, penalty or imprisonment for enforcing any territorial ordinance.

8. Property and civil rights in the Territories, subject to any legislation by the Parliament of Canada upon these subjects, and—

9. Generally on matters of a merely local or private nature in the Territories.

1878.

The first Ordinances passed by the Lieutenant-Governor in Council were passed during this year. A list of the Ordinances passed in this and succeeding years till 1887 will be found in chapter 1 of the Revised Ordinances of 1888 in conjunction with the list of unrepealed ordinances prefixed thereto.

August 2. Ordinance No. 4 of 1878, "The Administration of Civil Justice Ordinance, 1878," intituled "An Ordinance respecting the Administration of Civil Justice."

Section 1 formed the following Judicial Districts:—

(1) The Saskatchewan District;

(2) The Bow River District;

(3) The Qu'Appelle District.

provision being made that the Lieutenant-Governor might divide any one or more of the Judicial Districts into two or more divisions.

Section 2 provided that Courts of Civil Jurisdiction should be held in every Judicial District and in every division thereof; that such Courts should be Courts of record, styled District Courts; and where divisions were created the words "Division No. ," with the appropriate number in each case should be added after the word "Court."

Section 3 provided that the Stipendiary Magistrate resident in the Judicial District should preside over the several Courts in such district.

Section 4 was as follows:—

"Subject to the provisions of 'The North-West Territories Acts, 1875 and 1877,' and any amendments thereto at any time or times, or any other Act of Parliament of Canada

made or passed, the said Courts shall respectively have jurisdiction over all matters of civil law and equity, all matters of wills and intestacy, and shall possess such powers in relation to local jurisdiction as in the Province of Ontario are vested and distributed among the several courts of law and equity, and the Surrogate Courts."

1879.

September 26. Ordinance No. 7 amended Ordinance No. 4 of 1878.

1880.

May 7. "The North-West Territories Act, 1880," intituled "An Act to amend and consolidate the several Acts relating to the North-West Territories (43 Vic. c. 25, Dom.) With some changes not now of sufficient importance to the present subject to note, this Act was substantially a re-enactment of the Act of 1875 as amended by the Act of 1877.

1882.

May 17. "An Act to remove certain doubts as to the effect of 'The North-West Territories Act, 1880,' and to amend the same." (45 Vic. c. 28, Dom.) This Act declared that the Act of 1880 should not be construed as a new law, but as a revision, consolidation and amendment of 38 Vic. c. 49, and 40 Vic. c. 7.

1883.

June 26. An Order-in-Council was passed (printed with the Statutes of Canada, 1884), the latter portion of which reads as follows:—

And whereas, by the ninth section of the said Act, it is further enacted that "The Lieutenant-Governor in Council, or the Lieutenant-Governor by and with the advice and consent of the Legislative Assembly, as the case may be, shall have such powers to make Ordinances for the government of the North-West Territories as the Governor in Council may from time to time confer upon him; provided, always, that

such powers shall not at any time be in excess of those conferred by the ninety-second and ninety-third sections of 'The British North America Act, 1867,' upon the Legislatures of the several provinces of the Dominion."

Now, in pursuance of the said powers by the said statute conferred, His Excellency, by and with the advice of the Privy Council, has been pleased to further order, and it is hereby ordered, that the Lieutenant-Governor in Council, or the Lieutenant-Governor, by and with the advice and consent of the Legislative Assembly, as the case may be, shall be, and he is hereby empowered to make Ordinances in relation to the following subjects, that is to say:—

1. The establishment and tenure of territorial officers, and the appointment and payment of territorial officers.

2. The establishment, maintenance, and management of prisons in the North-West Territories.

3. Municipal Institutions in the Territories, subject to any legislation by the Parliament of Canada heretofore or hereafter enacted.

4. The issue of shop, auctioneer and other licenses, except licenses for the sale of intoxicating liquors, in order to the raising of a revenue for territorial or municipal purposes.

5. The solemnization of marriage in the Territories.

6. The administration of justice, including the constitution, organization and maintenance of territorial courts of civil jurisdiction.

7. The imposition of punishment by fine, penalty or imprisonment for enforcing any territorial ordinances.

8. Property and civil rights in the Territories—subject to any legislation by the Parliament of Canada on these subjects.

9. Generally all matters of a merely local or private nature in the Territories.

October 4. Ordinance No. 3 of 1883. This amended the Administration of Civil Justice Ordinance, 1878. It constituted four judicial districts, to be called "The (number) Judicial District," and substituted a provision for a name instead of a number to designate divisions.

1884.

April 19. "An Act to amend 'The North-West Territories Act, 1880.'" (47 Vic. c. 23, Dom.) This Act remodelled the provisions of the Act of 1880 relating to the trial of Civil Cases and Appeals to the Court of Queen's Bench of Manitoba.

August 6. Ordinance No. 3 of 1884. "The Administration of Civil Justice Ordinance, 1884," intituled "An Ordinance to amend and consolidate as amended the Ordinances respecting the administration of Civil Justice in the North-West Territories." This Ordinance constituted three Judicial Districts, viz., "The Assinaboia Judicial District"; "The Alberta Judicial District"; "The Saskatchewan Judicial District," with a provision for the division thereof to be made by the Lieutenant-Governor.

August 6. Ordinance No. 26 of 1884, "An Ordinance respecting property and civil rights." This Ordinance enacted that:—

"1. In all matters of controversy relative to property and civil rights in the Territories, the laws of England, as they stood on the fifteenth day of July, A.D., 1870, are hereby declared to have been in force since such date, and shall govern and form the rule for decision of the same in the Territories, except in so far as the same have been since such date, or may be hereafter repealed, altered, varied, modified, or affected by any Act of the Imperial Parliament, made directly applicable to the North-West Territories, or the Parliament of Canada, or by Ordinance of the Lieutenant-Governor in Council."

November 1. The Lieutenant-Governor divided the Judicial Districts as follows:—

The Assinaboia Judicial District, into "The Regina Division," and "The Medicine Hat Division."

The Alberta Judicial District into "The Calgary Division," and "The Fort Macleod Division."

The Saskatchewan Judicial District into "The Edmonton Division," "The Battleford Division," and "The Prince Albert Division."

1885.

December 18. Ordinance No. 5 of 1885, intituled "An Ordinance to amend Ordinance No. 3 of 1884, known as 'The Administration of Justice Ordinance, 1884.'" It provided that "The Stipendiary Magistrates appointed under the North-West Territories Act, 1880, and amendments thereto, shall be and form a Court of Civil Jurisdiction to be styled "The High Court of Justice," and the word "Judge" whenever it occurs in this Ordinance shall mean such Stipendiary Magistrates." It contained substituted provisions for the division of the Territories into Judicial Districts; declared that the Divisions into which the Judicial Districts were then divided should be judicial districts until altered by the Lieutenant-Governor; and provided that Courts of civil jurisdiction should be held in every Judicial District, each such Court being a Court of Record, and should be styled "High Court of Justice, District."

1886.

June 2. "An Act further to amend the law respecting the North-West Territories." (49 Vic. c. 25, Dom.) This Act was to take effect by proclamation of the Governor in Council, with power to the Lieutenant-Governor in Council to make Ordinances pursuant to it at any time after the passing of the Act.

The Act established "The Supreme Court of the North-West Territories," with five puisne Judges, and provided for the division of the Territories by proclamation of the Governor in Council, into Judicial Districts. This Act, and the Acts which it amended are consolidated as chapter 50 of the Revised Statutes of Canada, 1886, intituled "An Act respecting the North-West Territories," and to be cited as "The North-West Territories Act."

June 2. "An Act respecting Real Property in the Territories." (49 Vic. c. 26, Dom.) This Act established the Torrens System of registration. It repealed, *inter alia*, the parts of the Act 43 Vic. c. 25, relating to descent, and dealt with those relating to married women.

Ordinance No. 2 of 1886, "The administration of Civil Justice Ordinance, 1886," intituled "An Ordinance respecting the administration of Justice." This regulated the procedure of the "Supreme Court of the North-West Territories."

July 7. By an Order-in-Council bearing this date under the authority of the ninth section of the North-West Territories Act, 1880 (43 Vic. c. 25), the Lieutenant-Governor in Council of the North-West Territories, or the Lieutenant-Governor, by and with the advice and consent of the Legislative Assembly of the North-West Territories, as the case might be, was empowered, in addition to the powers already conferred on the Lieutenant-Governor in Council, as by and with such advice and consent, to make ordinances in relation to the following subjects, that is to say:—

1. Direct taxation, within the Territory, in order to the raising of a revenue for territorial (including municipal) purposes.

2. The incorporation of companies with territorial objects, with the following exceptions,—

(*a*) Such companies as cannot be incorporated by a Provincial Legislature.

(*b*) Railway, tramway, steamboat, canal transportation, telegraph and telephone companies.

(*c*) Insurance companies.

This order is printed with the Statutes of Canada, 1888.

1887.

February 18. By Order-in-Council dated the 21st January, 1887 (printed with the Statutes of Canada, 1887), the Act of 1886 was brought into effect on this date.

February 18. By Order-in-Council dated this day (printed with the Statutes of Canada of 1887), the Territories were divided into five Judicial Districts:—

(1) The Judicial District of Eastern Assinaboia.
(2) The Judicial District of Western Assinaboia.
(3) The Judicial District of Southern Alberta.
(4) The Judicial District of Northern Alberta.
(5) The Judicial District of Saskatchewan.

Ordinance No. 2 of 1886 was amended by Ordinance No. 3 of 1887, and is consolidated as "The Judicature Ordinance." R. O. (1888) c. 58.

MEMORANDUM OF IMPERIAL AND DOMINION STATUTES and ORDERS IN-COUNCIL relating to the North-West Territories since the constitution of the Supreme Court of the North-West Territories.

1887.

50-51 Vic. c. 28, relating to appeals to the Court of Queen's Bench for Manitoba.

1888.

51 Vic. c. 19, relating to the Legislative Assembly and intoxicating liquors.

1891.

54-55 Vic. c. 22, relating to (1) the Legislative Assembly and declaring its powers in substitution of the Orders-in-Council in that behalf, (2) administration of civil and criminal justice, (3) intoxicating liquors, (4) roads, (5) English and French languages, (6) wills.

An Imperial Order-in-Council relating to appeals from the Supreme Court of the North-West Territories to the Privy Council was passed the 30th July, 1891, in the following terms (published with the Statutes of Canada, 1892):—

Whereas, by an Act of the Parliament of Canada passed in the 49th year of Her Majesty's reign, chapter 25, intituled "An Act further to amend the law respecting the North-West Territories," a Supreme Court of record of original and appellate jurisdiction was constituted and established in and for the North-West Territories, called "The Supreme Court of the North-West Territories";

And whereas by chapter 50 of the Revised Statutes of Canada, intituled "The North-West Territories Act," the said Court was continued under the name aforesaid, but no provision has yet been made for the prosecution and regulation of appeals to Her Majesty in Council from the said Court;

And whereas it is expedient that provision should be made by this Order to enable parties to appeal from the decisions of the said Court to Her Majesty in Council, it is hereby ordered, by the Queen's Most Excellent Majesty, by and with the advice of her Privy Council, as follows:—

1. Any person or persons may appeal to Her Majesty, her heirs and successors, in her or their Privy Council, from any final judgment, decree, order, or sentence of the said Supreme Court of the North-West Territories in such manner, within such time, and under and subject to such rules, regulations and limitations as are hereinafter mentioned, that is to say:—

In case any such judgment, decree, order or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of three hundred pounds sterling (£300), or in case such judgment, decree, order or sentence shall involve, directly or indirectly, any claim, demand or question to or respecting property or any civil right amounting to or of the value of three hundred pounds sterling (£300), the person or persons feeling aggrieved by any such judgment, decree, order or sentence may, within fourteen days next after the same shall have been pronounced, made or given, apply to the said Court by motion or petition for leave to appeal therefrom to Her Majesty, her heirs and successors, in her or their Privy Council;

In case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any such sum of money or perform any duty, the said Court may either direct that the judgment, decree, order or sentence appealed from shall be carried into execution, or that the execution thereof shall be suspended pending the said appeal, as to the said

Court may appear to be most consistent with real and substantial justice;

And in case the said Court shall direct such judgment, decree, order or sentence to be carried into execution, the person or persons in whose favour the same shall be given shall, before the execution thereof, enter into good and sufficient security to be approved by the said Court, for the due performance of such order as Her Majesty, her heirs and successors, shall think fit to make upon such appeal;

In all cases security shall also be given by the party or parties appellant in a bond or mortgage or personal recognizance not exceeding the value of five hundred pounds sterling (£500) for the prosecution of the appeal, and the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council, to the party or parties respondent; and if such last-mentioned security shall be entered into within three months from the date of such motion or petition for leave to appeal, then and not otherwise the said Court shall admit the appeal, and the party or parties appellant shall be at liberty to prefer and prosecute his, her or their appeal to Her Majesty, her heirs and successors, in her or their Privy Council, in such manner and under such rules as are or may be observed in appeals made to Her Majesty from Her Majesty's colonies and plantations abroad.

2. It shall be lawful for the said Supreme Court, at its discretion, on the motion or petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the said Supreme Court, to grant permission to such party to appeal against the same to Her Majesty, her heirs and successors, in her or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

3. Nothing herein contained doth or shall extend or be construed to extend to take away or abridge the undoubted right and authority of Her Majesty, her heirs and successors, upon the humble petition of any person or per-

sons aggrieved by any judgment or determination of the said Court, at any time to admit his, her or their appeal therefrom, upon such terms as Her Majesty, her heirs or successors, shall think fit, and to reverse, correct or vary such judgment or determination in such manner as to Her Majesty, her heirs and successors shall seem meet.

4. In all cases of appeal admitted by the said Court, or by Her Majesty, her heirs or successors, the said Court shall certify and transmit to Her Majesty, her heirs or successors, in her or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed so far as the same have relation to the matter of appeal, such copies to be certified under the seal of the said Court, and the said Court shall also certify and transmit to Her Majesty, her heirs and successors, in her or their Privy Council, a copy of the reasons given by the judges of such Courts, or by any of such judges, for or against the judgment or determination appealed against, where such reasons shall have been given in writing, and where such reasons shall have been given orally, then a statement in writing of the reasons given by the judges of such Court, or by any of such judges, for or against the judgment or determination appealed against.

5. The said Court shall, in all cases of appeal to Her Majesty, her heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as Her Majesty, her heirs and successors, shall think fit to make in the premises in such manner as any original judgment, decree or decretal order, or other order or rule of the said Court should or might have been executed.

1892.

The Imperial Parliament passed 20th day of May, 1892, the Act, 55 Vic. c. 6, intituled, "An Act to provide for the recognition in the United Kingdom of Probates and Letters of Administration granted in British possessions" (published with the Statutes of Canada, 1892). Rule 590 of the Judicature Ordinance (C. O. 1898, c. 21) was passed in view of this Act.

1894.

57-58 Vic. c. 17, relating to the Legislative Assembly and its powers and to the administration of civil and criminal justice.

By proclamation (noted in the Statutes of Canada, 1895, p. lviii.) of the 1st August, 1894, the words, "or for the price of any intoxicating liquor or intoxicant" in the 9th and 10th lines of s.-s. 4 of s. 88, c. 50 of the R. S. C., and the words "or any intoxicating liquor or intoxicant" in the last line of the said sub-section were repealed. This was in pursuance of 57-58 Vic. c. 17, s. 10.

1895.

58-59 Vic. c. 31, relating to the Legislative Assembly and its powers.

1896-1897.

60-61 Vic. c. 28, relating to the Legislative Assembly and its powers; the administration of civil and criminal justice and roads.

1898.

61 Vic. c. 5, relating to the Legislative Assembly and to the sittings of the Court in banc.

61 Vic. c. 6, "The Yukon Territory Act," severing the Yukon Territory from the North-West Territories.

CONSOLIDATED RULES

OF THE

SUPREME COURT

OF THE

NORTH-WEST TERRITORIES.

APPEAL BOOKS, APPEALS AND MOTIONS, ETC.

1. Unless otherwise ordered by a Judge, on every application for new trial, appeal or motion in the nature of appeal in this Court, the party moving or appealing shall, except in cases of appeals from judgments or orders made in interlocutory applications or in proceedings at Chambers, file with the Registrar a printed copy of the statement of claim and defence and other pleadings (if any), of the Judge's notes on trial, of the judgment delivered and of the notice of the motion intended to be made in the cause; and in cases of appeals from judgments or orders made in interlocutory applications or in proceedings at Chambers, the party appealing shall file with the Registrar a printed copy of the documents, evidence and other material used before the Judge, of the judgment delivered and of the notice of appeal.

2. Such printed copy shall be known as the appeal book, shall be entitled in the original style of cause, and unless otherwise ordered by a Judge, shall be filed at least thirty days before the opening of the sittings whereat the

motion is to be made or the appeal heard, and shall be certified by the clerk of the Court in which the proceedings were had, under the seal of such Court, in the following form:

In the Supreme Court of the North-West Territories, Judicial District of

I, the undersigned Clerk of the Supreme Court of the North-West Territories in and for the Judicial District of . hereby certify to the Registrar of the Supreme Court of the said Territories that the aforegoing document is a true copy of the Statement of Claim and Defence and the pleadings in this cause, the Judge's Notes taken on the trial as furnished me by the Judge, the judgment delivered and notice of motion to the Court filed with me, that the action was commenced in this Court on [*or in case of appeals from judgments or orders made in Interlocutory Applications or Proceedings at Chambers*, that the aforegoing document is a true copy of the documents, evidence and other material used before the Judge on an application, *shortly stating the nature of the application*, of the judgment delivered thereon and of the notice of appeal filed with me;] That this Appeal Book has been approved by the advocates [*or*, settled by the Court, *as the case may be*]: that the filed the said notice on A.D. [*and if security has been ordered, add*:—and that the security required by the order hereon of the day of , A.D. , for such motion, (*or* appeal, *as the case may be*) has been deposited with me].

Dated the day of A.D.

3. The appellant or applicant shall, unless otherwise ordered by a Judge, at the time of so filing the appeal book, deposit ten copies thereof with the registrar for the use of the Judges.

4. The appeal book in draft form shall, before printing, be submitted to the advocate for the respondent, who shall, if he approves thereof, return the same within four days to the advocate for the appellant, marked "Approved"; but if the said advocates cannot agree on the contents of the appeal book, the same shall be settled by a Judge on application by the advocate for the appellants upon notice to the opposite side.

5. The appeal book, and copies for the Judges, shall be printed on only one side of the paper, and they shall also be

printed on paper of good quality and in demy-quarto form, with small pica type, leaded, and every tenth line of each page shall be numbered in the margin, the numbering to be from the top of each page and not from the beginning of the book, and the size of the book shall be 11 inches in height and 8½ inches in width, and they shall be bound so that the printed matter shall be on the left hand side.

6. The registrar shall not file the book, or receive the copies, thereof, without the leave of a Judge, if the preceding rule has not been complied with.

7. If the proof has not been carefully corrected, the Court may disallow the cost of printing, or may decline to hear the appeal or motion and make such order as to postponement and payment of costs as may seem just. And in cases where, by order of a Judge, the filing and depositing of a printed book and copies is dispensed with, and the appellant is allowed to file and deposit a written book and copies, or a book and copies written with a type-writer, if in the opinion of the Court the writing is illegible, or so slovenly or carelessly done as not to be reasonably legible or comprehended, the Court may disallow the cost of such book and copies, or of any part thereof, or may decline to hear the appeal, and may make such order as to postponement and payment of costs as may seem just.

8. The appellant shall, not less than twenty days before the sittings of the Court whereat the motion is to be made or the appeal heard, deliver to the opposite party two printed copies of such appeal book.

FACTUMS.

9. In all matters in which an appeal book is now required by the Rules of the Court to be filed with the registrar, the parties appellant and respondent, shall, at least five days before the opening of the sittings at which the same is to be dealt with, deposit with the registrar, or cause to be received by him by mail, a factum or statement of his points of argument before the Court, and four copies thereof for the use of the Court.

10. The factum shall contain a concise statement of the facts and of the points of law intended to be relied on and of the arguments and authorities to be urged and cited at the hearing, arranged under appropriate heads.

11. The factum and copies may be printed or may be typewritten so as to be plainly legible, and on one side only of the paper, the size of the paper to be not less than 11 inches in height and 8½ inches in width, and to be bound so as to have the reading matter on the left hand side.

12. The factum and copies first received from either party by the registrar shall be kept under seal, and shall not be communicated to the other party until after receipt of the factum of such other party.

13. The registrar shall not accept any factum or copy which is not in substantial accordance with these rules.

14. So soon as the factums of both parties shall have been received by the registrar each party shall at the request of the other deliver to him one copy of his said factum.

15. In default of compliance by either party with these rules as to factums, the Court in Banc may, when the matter comes before it, refuse to hear the party so in default, or may impose such terms upon him as it may deem just.

It shall be the duty of the registrar on the opening of the Court to report to it any such default.

16. On application by either party to a Judge an order may, in his discretion, be made dispensing with the delivery of factums by either or both parties, or varying the time for such delivery to the registrar.

17. A factum shall not contain irrelevant matter nor reproduce matter which should appear in the appeal book where a reference to it will reasonably suffice. The penalty of a breach of this rule shall be non-allowance, on taxation of costs, for such irrelevant or other prohibited matter.

18. While it is required that the factum shall contain in brief all the facts, points of arguments and authorities to be relied upon by the party delivering it, the Court may in its discretion and upon such terms (if any) as it deems just, permit counsel to use arguments, raise points of law and cite authorities not mentioned in the factum.

19. In any case intended to be brought before the Court, in which, in the opinion of either side of the parties interested, it is considered necessary that any original papers or documents on file in the clerk's office should be in the Court, on an *ex parte* order of a Judge, directing him to do so, the clerk shall transmit the same, either by express or registered post, to the registrar.

20. All appeals, motions for new trials, applications in the nature of appeals, matters referred to the Court by a Judge, and special matters for argument before the Court, shall before the opening of the Court on the first day of each term be entered or inscribed by the registrar on a list to be kept by him, such entries in the case of appeals, motions for new trials, and applications in the nature of appeals, to be so made in the order in which the appeal books are filed; in other cases in the order in which application is made, to enter or inscribe them, and the causes so inscribed will be taken up after common motions in the order in which they are so entered, unless otherwise ordered by the Court.

21. The foregoing Rules shall not apply to common motions.

22. The first day of the sittings of the Court shall be a common motion day; common motions may, however, be heard at any other time during the sittings by leave of the Court.

RECOGNIZANCES ON APPLICATIONS TO QUASH CONVICTIONS.

23. No motion to quash any conviction, order, or other proceeding by or before a Justice or Justices of the Peace and brought before the Supreme Court of the North-West

Territories, or any Judge thereof, by *certiorari*, shall be entertained by such Court or Judge, unless the defendant is shown to have entered into a recognizance in $200, with one or more sufficient sureties, before a Justice of the Peace, and deposited the same with the registrar or clerk of the Court, as the case may be, or to have made a deposit with the said registrar or clerk of $100, in either case, with a condition to prosecute such motion and writ of *certiorari*, at his own costs and charges, with effect and without any wilful or affected delay, and if ordered to do so, to pay to the person in whose favor the conviction, order or other proceeding is affirmed his full costs and charges, to be taxed according to the course of this Court, where such conviction, order or proceeding is affirmed.

CONTROVERTED MUNICIPAL ELECTIONS.

24. Proceedings in the nature of *quo warranto* under the Municipal Ordinance shall be by *ex parte* application to the Judge usually exercising jurisdiction in the judicial district in which the municipality is situate, for leave to issue a writ, which writ shall be issued by the clerk of the Court of the said judicial district, and when issued shall be in the form hereunder provided.

25. The affidavits, application, and all other proceedings, except where otherwise provided, shall be intituled

In the Supreme Court of the North-West Territories, Judicial District of .....

In the matter of a Controverted Election. The Queen on the relation of A. B. Relator against C. D. Respondent.

26. The application shall be accompanied by a statement in writing, showing the relator's name in full, his occupation and residence; the interest which he has in the election as candidate or voter, and specifically under distinct heads separately numbered, all such grounds of objection as he intends to urge against the validity of the election complained against, and in favour of the validity of the election of the relator or another or other persons when he claims that he or they have been duly elected.

27. Before making the application the applicant shall file with the clerk of the Court the recognizance, the affidavits and other material upon which the application to the Judge is to be made.

28. On the return of the writ, if the respondent appears and files a statement as required by the writ, all preliminary objections to the issue of the writ shall be heard and disposed of, but the Judge shall not be bound to give judgment instanter, but may adjourn the case to a fixed date for delivery of judgment.

29. Immediately after the delivery of judgment on preliminary objections, if it be decided that the matter is to proceed farther, the Judge shall appoint a time and place when and where such further proceedings are to be held, and the manner in which evidence is to be taken, whether by affidavit or *viva voce*.

30. In the conduct and disposition of all matters respecting controverted elections not hereby provided for, the powers and procedure in matters in the Supreme Court adapted to the circumstances shall apply.

31. Fees to clerks, sheriffs, and advocates for services in controverted election matters, shall be those provided for similar services by the tariff (Rule Number 102) on its higher scale.

32. Disobedience to any writ or order shall be and be dealt with as contempt of Court.

33. The forms hereunder shall be the forms to be used in controverted election matters, but such forms may be varied to suit each particular case.

FORMS:

WRIT OF SUMMONS IN THE NATURE OF A QUO WARRANTO.

In the Supreme Court of the North-West Territories.

Judicial District of In the matter of a controverted election. The Queen on the relation of A. B., Relator, against C. D., Respondent.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

To the above named respondent

You are commanded to be and appear before the Honourable Mr. Justice in Chambers at on the day of A.D. at a proceeding instituted against you by the above named Relator, A. B. on the grounds filed with the Clerk of this Court, and annexed to this summons to try the validity of your election as *(and if the relator alleges that he himself or some other person has been duly elected,* and also to try the validity of the alleged election of as such).

And take notice that in default of your so appearing before the said Judge and then filing an answer in writing to the said statement, the relator may proceed in the said matter, and judgment may be given therein in your absence and without further notice to you.

Issued at the day of A. D., 18 .

.....Clerk of the Court.

WRIT TO REMOVE A PERSON WHOSE ELECTION HAS BEEN DECLARED INVALID.

In the Supreme Court of the North-West Territories.

Judicial District of

In the matter of a controverted election.

The Queen on the relation of A. B., Relator, against C. D., Respondent.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

To the Municipal Council of the Municipality of

Whereas such proceedings have been had in this matter under the provisions of "The Municipal Ordinance" in that behalf before the Honourable Mr. Justice that the election of the above named C. D. as has been adjudged invalid. *You are commanded forthwith to remove the said C. D. from the said office of and to order a new election to be held to fill the vacancy occasioned by the removal of the said C. D. from the said office and how you shall have executed this writ make return thereof together with this writ, to our said Court immediately after the execution thereof.

Issued at the day of A.D. 18 .

.....Clerk of the Court.

*In case the Judge has determined that another person was duly elected, the form of the writ shall be the same as the preceding form down to the * and shall then proceed as follows:—*

And it has been determined that E. F. was duly elected as instead of the said C. D.

You are commanded forthwith to remove the said C. D. from the said office of and to admit the said E. F. to the said office in the stead of the said C. D.

And how you shall have executed this writ make return thereof together with this writ to our said Court immediately after the execution thereof.

Issued at the day of A. D. 18

.....Clerk of the Court.

WRIT TO SHERIFF TO REMOVE AND FOR A NEW ELECTION IN CASE ELECTION OF ALL THE MEMBERS IS ADJUDGED INVALID.

In the Supreme Court of the North-West Territories.

Judicial District of

In the matter of a controverted election.

Victoria by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

To the Sheriff of the Judicial District of

Whereas such proceedings have been had under the provisions of "The Municipal Ordinance" in that behalf before the Honourable Mr. Justice that the election lately held of A. B., as Mayor, and of C. D., E. F., G. H., and I. J., *naming all members of the Council* as Councillors of the Municipality of in your district, the same persons being all the members of the Municipal Council of the said Municipality has been adjudged invalid. *

You are commanded forthwith to remove the said A. B. from the office of Mayor, and to remove the said C. D., E. F., G. H. and I. J., from their respective offices of Councillors of the said Municipality, and to cause an election to be held according to law, to fill the vacancies caused by the said several removals. And how you shall have executed this writ make return thereof together with this writ, to this Court, immediately after the execution thereof.

Issued at the day of A.D. 18 .

.....Clerk of the Court.

*In case other persons are adjudged elected, follow the preceding form to * and then proceed:*—and it has been adjudged that L. M. was duly elected as Mayor of the said Municipality instead of the said A. B. and that M. N., O. K., G. T., and S. M., were duly elected as

Councillors instead of the said C. D., E. F., G. H., and I. J. You are commanded forthwith to remove the said A. B. from the said office of Mayor, and to admit the said L. M. to the said office in his stead and to remove the said C. D., E. F., G. H., and I. J., from the said offices of Councillors and to admit the said M. N., O. K., G. T. and S M. to the said offices in their stead. And how you shall have executed this writ, make return thereof, together with this writ, to this Court, immediately upon the execution thereof.

Issued at the day of A. D. 18 .

.....Clerk of the Court.

*In case other persons are adjudged elected in place of some of the members removed, but not all, proceed as in the first form of writ to Sheriff to * and then proceed:*—and it has been adjudged that L. M. was duly elected as Mayor of the said Municipality instead of the said A. B. and that M. N. was duly elected as Councillor of the said Municipality, instead of the said C. D. You are commanded forthwith to remove the said A. B. from the said office of Mayor and to admit the said M. N. to the said office in his stead and remove the said C. D., E. F., G. H., and I. J., from the said offices of Councillors, and to admit the said M. N. to the office of Councillor in the stead of C. D. and to cause an election to be held according to law, to fill the vacancies caused by the removal of the said E. F., G. H., and I. J., from the said offices of Councillors.

And how you shall have executed this writ make return thereof together with this writ, to this Court, immediately after the execution thereof.

Issued at the day of A. D. 18 .

.....Clerk of the Court.

EXECUTION FOR COSTS.

In the Supreme Court of the North-West Territories.

Judicial District of

In the matter of a controverted election.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

To the Sheriff of the Judicial District of

You are commanded that of the goods *or* lands *as the case may be* of in your district, you cause to be made dollars and cents, which lately, by the order of the Honourable Mr. Justice were ordered to be paid to for his costs in respect of certain proceedings had under the clauses of "The Municipal Ordinance" relating to controverted elections. And

that you have the said money and in what manner you shall have executed this writ make appeals to the Court at , together with this writ immediately after the execution thereof.

Issued at the day of A. D. 18 .

.....Clerk of the Court.

CASES STATED UNDER SECTION 900 OF "THE CRIMINAL CODE."

34. An application to a Justice of the Peace to state and sign a case under sub-section 2 of said section 900 shall be in writing and be delivered to such Justice or left with some person for him at his place of abode within four days after the making of the conviction order, determination or other proceeding questioned. Such application shall state the grounds upon which the proceeding is questioned, and whether the appeal is to be to the Court in Banc or to a Judge, and in the latter case naming the Judge.

35. Within four days after such application has been so delivered or left for him the Justice shall state and sign and deliver to the appellant, a case setting forth the facts of the case and the grounds on which the proceeding is questioned, stating:

(*a*) The substance of the information or complaint.

(*b*) The names of the prosecutor (or complainant) and defendant.

(*c*) The date of the proceeding questioned.

(*d*) A copy of the evidence (if any) in full as taken before the J. P.

(*e*) The substance of the conviction, order, determination or other proceeding questioned.

(*f*) The grounds on which the same is questioned.

(*g*) The grounds upon which the Justice supports the proceeding questioned if the Justice sees fit to state any.

36. But the Justice shall not deliver said case until after the appellant shall have entered into a recognizance and paid the fees as provided by sub-section (4) of said section 900.

37. In the event of the Justice declining or refusing to state a case, the appellant may apply to the Court in Banc for a Rule as provided by sub-section 6 of said section.

(*a*) Or the appellant may in such event apply to a Judge sitting in Chambers in the judicial district, in which the Justice resides, upon affidavit of the facts, for a summons calling upon the Justice and the respondent to show cause why such case should not be stated, and such Judge may on the return thereof make such order with or without payment of costs, as to him seems meet, and the Justice being served with such order shall state a case accordingly upon the appellant entering into such recognizance and paying the fees to the Justice as provided in said sub-section 4.

38. Within twenty days after the delivery to the appellant of a case stated by a Justice, the appellant shall file the same or cause it to be filed.

(*a*) With the registrar of the Court in Banc, or

(*b*) *If he desires the matter to be heard and determined by a Judge in Chambers* with the clerk of the Court of the judicial district in which the Justice resides, provided that upon sufficient cause for the delay being shown the Court or Judge, as the case may be, may hear and determine the matter although the case was not delivered within said twenty days.

39. When the case stated has been delivered to the registrar the same shall be heard at the next sittings of the Court in Banc, which shall sit not sooner than fourteen days after the delivery of the case stated to the registrar, and the appellant shall give to the respondent fourteen days' notice in writing of the time and place of hearing the appeal.

40. When the case has been delivered to the clerk of the Court, the appellant shall within five days after such delivery apply to the Judge in Chambers to fix a time and place for the hearing of the appeal, and the Judge shall thereupon

appoint a time and place for such hearing, and a copy of such appointment shall be served upon the respondent, or as the Judge may direct.

41. The Judge shall have power, if he thinks fit, to cause the case to be sent back for amendment and thereupon the same shall be forthwith amended in accordance with any directions given by the Judge and transmitted when amended to the clerk of the Court aforesaid and judgment shall thereafter be given.

42. An order of a Judge to whom a case stated has been transmitted under section 900 shall have the same effect as a Rule absolute made by the Court under sub-section 7 of section 900, and the provisions of sub-section 10 of said section shall apply where the decision is that of a Judge in the same way as in case of a decision by the Court, and any order of the Judge may be enforced by process issued out of the Court in and for the judicial district aforesaid.

43. In so far as these rules do not expressly make provision, whenever a case stated is brought before a Judge as hereinbefore provided, the provisions of said section 900 as to such a case when before the Court shall, *mutatis mutandis*, be applicable to the proceedings on a case before the Judge and the recognizance in such case shall be conditioned to prosecute the appeal without delay, and to submit to the judgment of the Judge and to pay such costs as are by him awarded.

44. A Justice when delivering a case stated to the appellant shall enclose the same in an envelope sealed and marked on the outside with a statement of what it contains, and shall transmit the recognizance to the clerk of the proper Court if the appeal is to a Judge, or to the registrar at Regina if the appeal is to the Court in Banc.

45. Slight deviation from strict compliance with these Rules shall not invalidate any proceeding or thing if the Court or Judge sees fit to allow the same, either with or without requiring the same to be corrected.

RULES AND ORDERS UNDER "THE WINDING-UP ACT."

PETITION TO WIND UP COMPANY.

46. Every petition for the winding up of any company by the Court, and all notices, affidavits and other proceedings under such petition shall be intituled "In the Matter of the Winding-up Act," and of the company, naming the company, to which such petition relates.

47. A copy of such petition endorsed with, or accompanied by, the notice of the application for the winding up order required by the eighth section of said Act, shall be served at the principal or last known principal office or place of business of the company, if any such can be found, upon any member, officer or servant of the company there; or in case no such member, officer or servant can, after due diligence, be found there, then in the manner provided for service on a corporation of ordinary process or in such other manner as the Court or a Judge shall direct.

48. The notice of the application shall mention the affidavits and other material upon which the applicant intends to rely in support of the application, and copies of such affidavits and other material, or of any portion thereof, shall be furnished by the advocate of the petitioner, or by the petitioner if he shall present the same in person, to the advocate or any officer of the company requiring the same, within twenty-four hours after the demand therefor.

49. Every contributory or creditor of the company shall be entitled to be furnished by the advocate for the petitioner, or by the petitioner if he shall present the petition in person, with copies of the petition, affidavits, and material aforesaid, or of any portion thereof required, within twenty-four hours after the same shall have been by him demanded, on paying at the rate of ten cents per folio of one hundred words for each such copy.

50. Upon every such petition and upon every copy thereof served, there shall be endorsed the name or firm and place of business of the advocate or advocates by whom such petition is being presented; and when such advocate or advocates is or are agents for another or other advocate or advocates, then there shall be further endorsed on such petition and copies the name or firm and place of business of the principal advocate or advocates.

51. Every party presenting such petition in person shall cause to be endorsed or written upon every such petition and copy his name and address, and also when his place of residence is not in the place where the clerk's office is kept, another address in the place where the clerk's office is kept to be called his address for service, at which address notices, orders, summonses, warrants, and other documents, proceedings and written communications may be left for him.

52. Every such petition, and the affidavits and other material intended to be used in support thereof, shall, on or before the day of service of notice of the application for a winding up order, be filed in the office of the clerk of the Court of the judicial district in which the head office of the company is situate, and unless so filed such petition, affidavits or material shall not be read or used upon the application without special leave of the Court or a Judge.

53. Such petition shall be presented before the presiding Judge in Chambers, and the application may then be heard and determined by him, or adjourned to another day or time to be heard in Chambers or before the Court, as he or any other Judge, before whom the same shall come in Chambers, shall direct.

LIQUIDATORS.

54. If the petitioner shall desire to have a liquidator appointed upon the first presentation of the petition without any adjournment, or to have a provisional liquidator then appointed, he shall in the notice of his application mention the name of the liquidator or provisional liquidator

sought to be appointed, and he shall also in such case as soon as possible after the filing of his petition, apply to a Judge for directions as to the mode of service of notice of the application for the appointment of a liquidator or provisional liquidator and the parties to be served with such notice.

55. If it shall appear to the Judge in Chambers, upon the first presentation of the petition that all proper parties have had sufficient notice, the Judge may then make the order for winding up the company with the appointment of a liquidator; if not, the application shall be then adjourned for such time as the Judge shall think proper, and notice of the name of the party sought to be appointed liquidator and of the time to which the application is adjourned shall be given to such or such other parties, and in such manner as to the Judge shall seem proper pursuant to the 20th section of said Act.

56. To enable the Judge to determine what shall be the most satisfactory method of giving notice of the application to appoint a liquidator, and the parties to whom such notice should be given, the petitioner shall, in applying to a Judge for directions respecting such service, furnish to the Judge the best evidence obtainable by him, on reasonable inquiry, to the satisfaction of the Judge, as to the numbers of the creditors, contributories and shareholders respectively, and their places of residence, and the Judge may require such further evidence on these or other points to be furnished as he shall think important for the purpose.

57. The notice of the application for the appointment of a liquidator shall show that the application is to be for the appointment of a person (giving his name, address, and occupation) therein named, or such other person as the Court or Judge shall think fit to appoint, and upon the application the Court or Judge may appoint the person named in the notice, or any other person with or without further notice to any person, as may seem proper.

58. The application for the appointment of a liquidator shall be accompanied by satisfactory evidence of the qualifications and character of the party sought to be appointed as liquidator and of his fitness for the office.

59. A provisional liquidator may be appointed at any time after the filing of the petition and before the first appointment of a liquidator, and either before or after the application for winding up the company shall have first been made in Chambers. Such appointment may be made with or without notice, as to the Judge from whom the appointment is asked shall seem proper, and such provisional liquidator shall not be required to give security unless such shall be specially ordered upon or after his appointment.

60. The liquidator shall, on each occasion, of passing his account, and also whenever the Court or a Judge shall so require, satisfy the Court or Judge that his sureties are living and resident in the North-West Territories, and have not become insolvent; and in default thereof he may be required to enter into fresh security within such time as shall be directed.

61. In case of the death, removal or resignation of a liquidator, another or others shall be appointed in his stead, as in the case of a first appointment, and the proceedings for the purpose may be taken by such party interested as may be authorized by the Court or a Judge to take the same.

62. The liquidator shall, with all convenient speed, after he is appointed, proceed to make up, continue, complete and rectify the books of account of the company, and shall provide and keep such books of account as shall be necessary, or as the Court or a Judge may direct for the purpose aforesaid, and for showing the debts and credits of the company, including a ledger, which shall contain the separate accounts of the contributories, and in which every contributory shall be debited from time to time with the amount payable by him in respect of any call to be made under said Act.

63. The accounts of the liquidator shall be filed in the office of the clerk of the Court, at such time as may from

time to time be required by the Court or a Judge, and such accounts shall, whenever required by the Court or a Judge, and upon notice to such parties (if any) as the Court or a Judge shall direct, be passed and verified in the same manner as receivers' accounts.

PROCEEDINGS UNDER WINDING UP ORDER.

64. Within ten days after the issue of the winding up order, or such further time as the Court or a Judge shall direct, an appointment shall be obtained from a Judge to proceed with the winding up of the company, and notice thereof served upon all persons who may have appeared upon the hearing of the petition, and upon such other persons (if any) as the Judge shall direct; in default of the petitioner so proceeding to obtain such appointment, the Court or a Judge may, if it shall seem proper, give the carriage and prosecution of the winding up to any other person interested.

This rule shall apply to cases in which winding up orders have already been made under said Act, in respect of which the period of ten days fixed for taking out the appointment shall be computed from the time when these rules take effect and come into operation.

65. At the time thus appointed, a time or times shall, if the Judge think fit, be fixed for the proof of debts, for the list of contributories to be brought in, for the liquidator to file his accounts, and directions may be given as to the advertisements to be issued for all or any of such purposes, and generally as to the proceedings and the parties to attend thereon. The proceedings under the order shall be continued by adjournment, and, when necessary, by further appointment, and any such direction as aforesaid may be given, added to or varied, at any subsequent time, as may be found necessary.

PROOF OF DEBTS.

66. For the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to

come in and prove their debts or claims, an advertisement shall be issued at such time as the Judge shall direct. Such advertisements shall fix a time for the creditors to send in their names and addresses, and the particulars of their debts or claims, the nature and amount of the security (if any) held by them respectively, with the valuation thereof on oath, required by the 62nd section of the said Act, and the names and addresses of their solicitors (if any) to the liquidator, and appoint a day for adjudicating thereon.

67. The creditors need not attend the adjudication or prove their debts or claims unless they are required to do so by notice from the liquidator or from any creditor, contributory, shareholder, or member of the company; but upon such notice being given they are to come in and prove their debts or claims at the time therein specified, or such other time as the Court or Judge may allow.

68. The liquidator shall investigate the debts and claims sent in to him, and ascertain, so far as he is able, which of such debts and claims are justly due from the company; and he shall make out and leave with the clerk of the Court a list of all the debts and claims sent to him, distinguishing which of the debts and claims or parts of debts and claims so claimed, are in his opinion justly due and proper to be allowed without further evidence, and which of them in his opinion ought to be proved by the creditors; and he shall make and file with the said clerk, prior to the time appointed for adjudication, an affidavit setting forth which of the debts and claims in his opinion are justly due and proper to be allowed without further evidence, and stating his belief that such debts and claims are justly due and proper to be allowed and the reasons for such belief.

69. At the time appointed for adjudicating upon the debts or claims, or at any adjournment thereof, the Judge may either allow the debts and claims upon the affidavit of the liquidator, or may require the same, or any of them, to be proved by the claimants, and adjourn the adjudication thereon to a time to be then fixed.

70. The liquidator shall give notice to the creditors whose debts or claims have not been allowed upon the affidavit, that they are required to come in and prove the same by a day to be therein named, being not less than four days after such notice, and to attend at a time to be therein named, being the time appointed by the advertisement or by adjournment, or other appointment, as the case may be, for adjudicating upon such debts or claims.

71. The value of such debts and claims as are made admissible to proof by the nineteenth section of said Act shall, so far as is possible, be estimated according to the value thereof at the commencement of the proceedings for winding up the company.

72. Such creditors as come in and prove their debts or claims pursuant to notice may be allowed their costs of proof, and in any case a creditor seeking to prove a claim may be ordered to pay costs.

73. The liquidator shall deposit with the clerk of the Court the papers to be transmitted to the Court under the sixty-seventh section of said Act. Notice of the time and place fixed for hearing and determining the contestation shall be served upon the opposite party, and such other parties as the Judge shall direct, at least four days before the day so fixed.

74. If by examination of the books, accounts or papers of the company, or by any other means, the liquidator is led to believe that any person is a creditor of, or has a claim against, the company, for which such party is entitled to rank upon the assets of the company, and such party shall not have sent in to the liquidator notice of his claim, the liquidator shall mention such claim and the probable amount thereof, according to the best information he shall have been able to obtain, in the affidavit required by Rule No. 58, with the address, or supposed address, of such person, if the liquidator shall be able to give the same.

75. On the making of any dividend, except one declared as a final dividend, unless the Court or a Judge shall otherwise order, there shall be reserved for each such person shown in such affidavit to be supposed to be a creditor of, or to have a claim against, the company as aforesaid, and not to have sent to the liquidator notice of his claim, an amount proportionate to his said claim, and a copy of the dividend sheet, showing the amount so reserved, shall be mailed to such person, as well as to the creditors whose claims shall have been duly allowed. Any amounts retained may, by leave of the Court or a Judge, upon the declaration of a subsequent dividend, be included in the sum divided among those whose claims shall have been duly allowed, without any further reservation for any person not having given such notice.

76. Any person giving notice, after the declaration of a dividend, of a claim to rank as one of the creditors of, or as having a claim against, the company, shall be compelled to make proof of his claim before the Court or a Judge. Such proof shall, unless otherwise ordered, be made at the expense of the party making such claim. Any such party for whom a sum has been so reserved as aforesaid, and whose claim shall have been allowed, shall be collocated upon the next dividend sheet, after the allowance of his claim for the proper amounts of previous dividend so reserved, proportionately to the amount at which his claim shall have been allowed.

LIST OF CONTRIBUTORIES.

77. The liquidator shall, with all convenient speed, after his appointment, or such time as the Court or a Judge shall direct, make out and leave with the clerk of the Court a list of the contributories of the company. Such list shall be verified by the affidavit of the liquidator, and shall, so far as is practicable, state the respective addresses of, and the number of shares or extent of interest to be attributed to each such contributory, and distinguish the several classes of contributories, and such list may, from time to time, by leave of the Court or a Judge, be varied or added to by the liquidator.

78. Upon such list of contributories being so left, the liquidator shall obtain an appointment to settle the same, and shall give notice in writing of such appointment to every person included in such list, and stating in what character, and for what number of shares or interest, such person is included in the list; and in case any variation or addition to such list shall at any time be made by the liquidator, a similar notice in writing shall be given to every person to whom such variation or addition applies.

All such notices shall be served four days before the date appointed to settle such list, or such variation or addition.

CALLS.

79. Every application to the Court or a Judge to make any call on the contributories, or any of them, shall be made upon order *nisi* or summons, stating the proposed amount of such call; such order *nisi* or summons shall be served four days at least before the day appointed for making the call, on every contributory proposed to be included in such call; and upon the copy so served on each contributory shall be written or printed a memorandum specifying the amount which such contributory will be required to pay, upon the basis of the call proposed.

80. An order for a call may be made so as to direct payment not merely of the amount of the call, but also of the amounts or balances payable by the respective contributories, or by such of them as may seem proper, and the time and place of payment; provided that no contributory shall be thus ordered to pay a larger sum than specified in the memorandum upon the order *nisi* or summons, without notice to him or his solicitor that a larger sum is to be paid by him; but the Court or Judge may, upon such notice as may seem just, or, if the party appear, then without further notice, cause the memorandum to be amended so as to increase the amount or otherwise, and may direct the liquidator or other party having the conduct of the summons or order *nisi*, to pay any additional costs to be thus incurred, and may make such other terms or conditions as may seem proper.

81. If the Court or Judge shall so direct, notice of the intended call may be given by advertisement, and no further notice of the application need then be given to any contributory, unless the Court or a Judge shall so order.

82. Where notice of the intended call is given by advertisement, no notice need be given of the particular amount to be required of each contributory; and in any case the memorandum specified in Rule No. 69 may be dispensed with.

83. Unless for special reasons it shall seem just and proper, where the memorandum specified in Rule No. 69 is not served either by advertisement or otherwise, the order shall specify merely the amount of the call to be made, and shall not direct payment of specific sums by the respective contributories.

84. A copy of an order for a call shall be forthwith served upon each of the contributories included in such call; and upon each contributory so included not directed by the order itself to pay a specific sum in respect of such call, there shall be served, with the order, a notice from the liquidator, or other party having the conduct of the proceedings for a call, specifying the amount or balance due from such contributory, (having regard to the provisions of the said Act and any amendments thereof), in respect of such call; but an order for a call need not be advertised, unless for any special reason the Court or Judge shall so direct.

85. At the time of the making of an order for a call, if the order shall not specify the particular sum payable by each contributory included in the call, or if the Court or a Judge shall otherwise deem it proper, the further proceedings relating thereto shall be adjourned to a time subsequent to the day appointed for the payment thereof, and afterwards from time to time so long as may be necessary. At the time appointed by any such adjournment, or upon a summons to enforce payment of the call, duly served, and upon proof of the service of the order and notice of the amount due, required by the Rule No. 74, and non-payment thereof, an

order may be made for such of the contributories who have made default, or for such of them against whom it shall be thought proper to make such order, to pay the sum which by such former order and notice they were respectively required to pay, or any less sum which may appear to be due from them respectively; and any order may be made that shall seem just and proper for payment by such contributories or any of them, of the costs of such adjournment or further application and order, or of any portion thereof.

86. In any case in which the liquidator or other party having the conduct of an application for or in respect of a call at any stage, shall have adopted a more expensive method of enforcing such calls than he might under these rules have adopted, in any respect, such liquidator or other party may be ordered to pay the additional costs so incurred, if the same shall not be ordered to be paid by, or if so ordered shall not have been realized from, any contributory or party.

87. Any contributory may deposit with the clerk of the Court a receipt or acknowledgment of the bank into which an amount is payable by him in respect of a call, or of the proper officer of the Court, where the same is payable into Court, or of the party authorized by the order to receive such payment, which receipt or acknowledgment shall show the amount so paid in respect of such call.

88. Where a contributory is, by the order for a call or by a subsequent order, directed to pay a specific amount in respect of a call, then at the expiration of the time for payment, if no such receipt shall have been so deposited with the clerk of the Court, or if the receipt or acknowledgment deposited shall not show the proper amount to have been paid, executions may without further order be issued by the clerk of the Court, for realizing the amount so ordered, or the deficiency (if any) appearing by such receipt or acknowledgment, and with this may be included any sum for taxed costs where the same can be conveniently included according to the usual practice.

PROCEEDINGS BEFORE A JUDGE.

89. Any application to a Judge for any purpose under the winding up order shall be made to him in Chambers, unless the Court or a Judge shall in the particular matter otherwise direct. All such applications in Chambers shall, unless the case be a proper one for an *ex parte* order, be made upon summons or appointment of the Judge in writing; but the Court or a Judge may require any application to be made upon petition. An order shall be drawn up in every case unless otherwise directed.

90. Every application for the sanction of the Court or a Judge to a compromise or other arrangement with any contributory or other person indebted or liable to the company, or with creditors or persons claiming to be creditors of the company, shall be supported by the affidavit of the liquidator that he believes that the proposed compromise will be beneficial to the company and the reasons for such belief, and showing (where the state of the affairs of such contributory or other person is one of such reasons), that the liquidator has investigated the affairs of such contributory or other persons, and the result of such investigation. The facts supporting such reasons for the liquidator's belief shall, as far as conveniently practicable, be proved, and upon the application such further evidence may be required as may to the Court or Judge appear proper.

91. The sanction of the Court or Judge under the last preceding rule shall be testified by a memorandum signed by the clerk on the agreement of compromise or arrangement, unless any party shall desire to appeal from the decision of the Court or Judge, in which case an order shall be drawn up and issued for that purpose.

ORDERS.

92. All orders made in Chambers shall be signed by the Judge, as orders made in actions at law, and all orders before being delivered out, shall be entered at length in a book to be

kept for that pupose by the clerk of the Court, unless in cases of urgency the Court or a Judge shall otherwise direct, in which case the order shall as soon as possible be left with the clerk to be entered, or a duplicate order shall be issued, as may be directed.

ADVERTISEMENTS.

93. Where an advertisement is required for any purpose, the same is to be published only in such newspaper or other publication, and for such number of times, as may be specially provided by these Rules, or by order of the Court or a Judge.

ADMISSION OF DOCUMENTS.

94. Any party to any proceeding in Court or in Chambers, under said Act, may, by notice in writing in the form required in suits at law, or to the like effect, with such changes as the nature of the circumstances may require, call on any other party thereto competent to admit the same, to admit any document, saving all just exceptions, or to admit that a copy of a document duly registered or filed in any land titles office, or filed under any Ordinance respecting mortgages and sales of personal property, or respecting lien or receipt notes or orders for chattels, duly certified by the registrar or officer in charge of the office where the same is registered or filed, or his deputy, to be a true copy of the original document so registered or filed, is a true copy of such original document and sufficient evidence of the due execution of the original, and that the same was registered or filed in the office stated in such certificate at the time therein stated. In case of any refusal or neglect so to admit, the costs of proving such document, or the registration or filing of the same, shall be paid by the party so neglecting or refusing, unless a Judge shall be of opinion that the refusal to admit was reasonable; and no costs of proving any document, or the registration or filing thereof, where any portion of the rule is applicable, shall be allowed, unless such notice shall have been given, except in cases

where the omission to give such notice has been in the opinion of the taxing master (subject to appeal), a saving of expense.

REGISTER AND FILE OF PROCEEDINGS.

95. The clerk of the Court shall attend before the Court or Judge upon such proceeding, and shall keep a register of all proceedings in Chambers or in Court in each matter under this Act; except on an appeal or other matter before the full Court, when the registrar of the Court, or some one appointed by him or the Court, shall attend and keep a register of such proceeding with, and in the manner as, in other matters before the full Court.

96. All documents or proceedings required to be deposited or filed in Court, shall be deposited or filed with the clerk of the Court in whose office the petition has been filed, except on appeals to the full Court, when documents and proceedings connected therewith shall be filed with the registrar.

97. All orders, exhibits, admissions, memorandums and all other documents relating to the winding up of any company, not required by these orders or the usual practice, or the special direction of the Court or a Judge, to be filed in Court, shall be filed and kept by the liquidator in his own office, and shall be produced in Court or before a Judge, and otherwise, as may be required. Upon the termination of the winding up proceedings, all such documents, and all minute and account books referring to the company's affairs shall be deposited with the clerk, unless or until it shall be otherwise ordered by the Court or a Judge.

98. Every contributory of the company, and every creditor thereof, whose debt or claim has been allowed, shall be entitled at all reasonable times to inspect such documents as are filed or deposited with the liquidator, clerk of the Court, or registrar, in reference to proceedings under said Act, free of charge, and to take copies thereof, or extracts

therefrom at his own expense, not removing the same from the office where the same are filed or deposited, or to be furnished with any such copies or extracts on paying therefor at a rate not exceeding five cents per folio of one hundred words.

PROVISIONAL LIQUIDATOR.

99. All rules relating to liquidators shall, so far as the same are applicable, and subject to the directions of the Court or a Judge in each case, apply to provisional liquidators.

ATTENDANCE AND APPEARANCE OF PARTIES.

100. Every person for the time being on the list of contributories left by the liquidator with the clerk of the Court, and every person having a debt or claim against the company, allowed by the Judge, shall be at liberty, at his own expense, to attend the proceedings in reference to the winding up of the company, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the Court or Judge before whom any proceeding is taken shall be of opinion that the attendance of any such person upon any such proceeding has occasioned any additional costs which ought not to be borne by the funds of the company, such person may be directed to pay such costs or a gross sum in lieu thereof; and such person shall not be entitled to attend any further proceedings until he shall have paid the same, and the liquidator shall have the right to take for collection of the same any proceedings which might be taken for the collection of any costs awarded by any order of the Court or Judge.

101. The Court or Judge may from time to time appoint any one or more of the contributories or creditors, as he thinks fit, to represent before him, at the expense of the company or otherwise as shall seem proper, all or any class of the contributories or creditors, upon any question as to a compromise with any of the contributories or creditors,

or persons so appointed. In case more than one person shall be so appointed, they shall unite in employing the same advocate to represent them.

102. No contributory or creditor shall be entitled to attend any proceedings at the Chambers of the Judge, unless and until he has entered in a book to be kept for that purpose by the clerk of the Court, his name and address, and the name and address of his advocate (if any), and upon any change of his address, or of his advocate, his new address, and the name and address of his new advocate.

SERVICE OF SUMMONS, NOTICES, ETC.

103. Services upon contributories or creditors shall be effected, except when personal or other service is specifically required, by sending the notice, or a copy of the summons or order or other proceeding, through the post, in a prepaid registered letter, addressed to the advocate of the party to be served (if any), or otherwise to the party himself at the address entered or last entered pursuant to the last preceding rule; or if no such entry has been made, then if a contributory, to his last known address or place of abode, and if a creditor to the address given by him pursuant to the foregoing Rule No. 56; and such notice, or copy of summons, order or other proceeding, shall be considered as served, at the time the same ought to be delivered in the due course of delivery by the post-office, and notwithstanding the same may be returned by the post-office; the Judge shall not be obliged to receive proof on oath of such time, but may act on his own knowledge of the course of the mails, or such information as he may think reliable.

104. No service under these rules shall be deemed invalid by reason that the Christian name, or any of the Christian names, of the person upon whom service is sought to be made, has been omitted or designated by initial letters, in the list of contributories or creditors, or in the summons, order, notice or other document wherein the name of such contributory or creditor is contained, provided the Court or Judge is satisfied that such service is in other respects sufficient.

ADVOCATE OF LIQUIDATOR.

105. The advocate of the liquidator shall conduct all such proceedings as are ordinarily conducted by advocates of the Court; and where the attendance of his advocate is required on any proceeding in Court or Chambers the liquidators need not attend in person, except in cases where his presence is necessary in addition to that of his advocate, or the Court or Judge shall direct him to attend.

FORMS.

106. Until other forms are directed, the forms in use in winding up proceedings in England, with such variations as may be necessary to adapt them to the practice under these orders and the said Act, and as the circumstances of each case may require, may be used.

COSTS.

107. The fees allowed to advocates, counsel, clerks, sheriffs, and the registrar, in proceedings under said Act shall so far as applicable and unless otherwise directed by the Court or a Judge, be those authorized under the tariff (Rule No. 102) in the highest scale.

108. Where an order is made in Court or in Chambers for payment of any costs, unless otherwise directed, the same shall be taxed by the clerk, subject to appeal from such taxation as in ordinary proceedings in the Supreme Court.

COMPUTATION OF TIME.

109. In the computation of time, under these rules, or under any notice, summons or order, made or given under the provisions hereof, unless otherwise specially mentioned, the same shall be reckoned exclusively of the first day and inclusively of the last day.

POWER OF JUDGE.

110. The power of the Court, or of a Judge in Chambers, to enlarge or abridge the time for doing any such act,

or taking any proceeding, to adjourn or review any proceeding and to give any direction as to the course of proceeding, is unaffected by these rules.

GENERAL DIRECTIONS.

111. The general practice of the Court, including the course of proceeding and practice in Judge's Chambers, shall in cases not provided for by said Act and amendments thereto, or these orders, and so far as the same are applicable and not inconsistent with the said Acts or these orders, apply to all proceedings for winding up a company.

TARIFF.

112. Advocates, the registrar, clerks, sheriffs and other officers, shall respectively be entitled to receive and take the fees prescribed by the following tariff:—

ADVOCATE'S FEES.

INSTRUCTIONS.

	Higher Scale.	Lower Scale.
1. To sue in undefended cases	$3 00	$1 50
2. To sue in defended cases	4 00	2 00
3. To defend	4 00	2 00
4. For pleadings, or petition, to be allowed only once to the same party	1 50	75
5. For counter-claim, when such claim could not heretofore form the subject of a set-off	2 00	1 00
6. For reply to such counter-claim	2 00	1 00
7. To amend any pleading when such amendment proper	2 00	1 00
8. For special case	2 00	1 00
9. To add parties by order of Court or Judge.	2 00	1 00
10. To add parties in consequence of death, marriage, assignment, etc	1 00	50
11. To defend added parties	2 00	1 00

	Higher Scale.	Lower Scale.
12. For brief	$2 00	$1 00
13. To counsel in special matters, when the counsel is not the advocate in the cause.	2 00	1 00
14. For special affidavits, when allowed by clerk	1 00	50
15. For such other important step or proceeding in the suit, as the clerk, or a Judge, is satisfied warrants such charges	2 00	1 00

WRITS.

16. All writs except subpœnas, including indorsements and attendances on clerk and sheriff	2 00	1 00
17. Renewing writs, including attendances on clerk and sheriff	1 50	75
18. Subpœnas ad testificandum	1 00	50
19. Subpœnas duces tecum	1 25	75
20. If writ over four folios, per folio additional	20	10
21. For each copy of writ, including indorsements	1 00	50
22. If over four folios, per folio additional	10	10
23. Service of each copy of writ, when taxable to the advocate	1 00	50
24. For every mile necessarily travelled in effecting such service	10	10
25. For service out of the jurisdiction, such allowance as the clerk or a Judge shall think fit		

DRAWING PLEADINGS, ETC.

26. Statement of claim, or defence, when no counter-claim	2 00	1 00
27. For every folio above five, in addition	20	20
28. Statement of defence and counterclaim	3 00	1 50
29. For every folio above ten, in addition	20	20
30. Reply and other pleadings for or on behalf of a plaintiff or defendant, except joinder of issue	2 00	1 00

	Higher scale.	Lower Scale.
31. For every folio above five, in addition	$ 20	$ 20
32. Joinder of issue	50	25
33. Appearance, including attendance to enter.	1 00	50
34. Petitions, issues for trial of fact by consent or order, special cases, interrogatories and answers thereto, bills of costs and all other original documents required in any suit or proceeding, including engrossing, per folio	20	20
COPIES.		
35. Of pleadings, briefs and other documents, where no provision made and such copies necessary, per folio	10	10
36. Of special and common orders of Court...	75	50
37. If over four folios, per folio in addition ..	10	10
38. Of summons or order of a Judge	50	25
39. If over three folios, per folio in addition..	10	10
NOTICES.		
40. Notice by defendant to third party under third party procedure	1 00	50
41. All other notices and demands	50	25
42. If over three folios, per folio additional....	20	20
PERUSALS.		
43. Of each pleading or petition	1 00	50
44. Of special case or issue of fact, taxable to advocate of any party except the advocate by whom it is prepared	2 00	1 00
45. Of interrogatories or cross-interrogafories..	1 00	50
46. Of affidavits and rights of party adverse in interest or produced on any application, where they exceed twenty folios, and perusal necessary, per folio over twenty folios (not in any case to exceed $5.00)..	50	25

ATTENDANCES NOT OTHERWISE PROVIDED FOR.

	Higher Scale.	Lower Scale.
47. Necessary attendance consequent upon service of notice to produce or admit, or inspection of documents when produced, including making admissions.....	$1 00	$ 50
48. For summons in Chambers	1 00	50
49. Attending on return of summons before Judge (to be increased in the discretion of a Judge to $2.00)	1 00	50
50. A consultation or conference with counsel in special and important matters, in the discretion of a clerk or Judge	2 00	1 00
51. Advocate attending Court on trial of cause when not himself counsel or partner of counsel	2 00	1 00
52. To hear judgment when not given at the close of the argument	2 00	1 00
53. On taxation of costs	1 00	50
For every hour after the first	1 00	50
54. To obtain, or give, undertaking to appear when service of summons accepted by advocate	1 00	50
55. Attendance on warrant or appointment before Judge, clerk, or examiner, per hour.	1 00	50
56. Attendance in special matters or on examination of witnesses, per hour	2 00	1 00
57. Attendance to file or serve	50	25
58. Every other necessary attendance	50	25

BRIEFS.

59. For drawing brief not exceeding five folios	2 00	1 00
For every additional folio of original and necessary matter	20	20
60. Copies of documents, per folio	10	10
61. Copy of brief for second counsel, when fee taxed to him, per folio	10	10

AFFIDAVITS.

	Higher Scale.	Lower Scale.
62. Drawing affidavits, per folio	$ 20	$ 20
63. Engrossing same, per folio	10	10
64. Copies when necessary, per folio	10	10
65. Common affidavits of service, and of non-appearance, including attending to swear	1 00	50
66. Commissioner or other officer administering oath, for each oath	25	25
67. Commissioner or other officer administering oath, for each exhibit	10	10
68. Advocate for preparing each exhibit	10	10

JUDGMENTS, RULES, ORDERS, ETC.

69. Fee on every judgment or order	1 00	50
70. Fee on every certified copy of pleadings when necessary	1 00	50
71. Fee on judgment in lien cases, or mortgage cases for foreclosure or sale	1 00	1 00
72. Drawing judgment or order or minutes thereof, when prepared by the advocate, per folio	20	20

LETTERS.

73. Letter to each defendant before suit, only one letter to be allowed to any defendants who are partners where suit relates to the partnership matters	50	50
74. Common letters, including necessary agency letters	50	25

As between advocate and client the clerk may increase the fee for special and important letters to an amount not exceeding $5.00.

75. Postage,—the amount expended therefor.

COUNSEL FEES.

76. Fee on motion of course or in matters not special	2 00	1 00

	Higher Scale.	Lower Scale.
77. Fee on special applications and motions to a Judge in Chambers, to be increased in the discretion of a Judge	$5 00	$3 00
78. Fee on argument, or supporting or opposing application to the Court, special case, motion for new trial or appeal	10 00	5 00
To be increased in the discretion of a Judge.		
79. Fee with brief at trial, summary or otherwise, or in arbitration	10 00	5 00
To be increased in the discretion of a Judge, provided that not more than one counsel fee shall be allowed in any case not of a special nature, and not more than two in any case		
80. Fee attending upon reference to clerk or other person, or upon examination of witnesses, or when taking evidence under order or commission, where attendance necessary	5 00	3 00
To be increased in the discretion of a Judge in special and important cases.		
81. On settling pleadings, issues of fact, interrogatories, special cases, or petitions, or advising on evidence, in the discretion of a Judge, not exceeding	5 00	3 00

SALES BY ORDER OF THE COURT.

82. Drawing advertisement	2 00	1 00
If over five folios, for each folio additional	20	20
83. Copies, per folio	10	10
84. Each necessary attendance on printer	50	25
85. Revising proof	1 00	50
86. Attending to settle advertisement	1 00	50
87. Attending to make arrangements with auctioneer	1 00	50
88. Fee on conducting sale, when held where advocate resides	5 00	3 00

	Higher Scale.	Lower Scale.
If advocate engaged for more than three hours, for each additional hour	$1 00	$ 50
89. Fee on conducting sale elsewhere, when advocate attends with approval of Judge, in addition to necessary travelling and hotel expenses, for each day necessarily absent in attending such sale	10 00	5 00
90. Preparing conveyance or mortgage, including duplicate when necessary	4 00	4 00
If over ten folios, per folio additional	30	30

NON-CONTENTIOUS PROBATE MATTERS.

91. Drawing all necessary papers and proofs to lead grant and obtaining order for probate, guardianship, or letters of administration, in ordinary cases and taking out same:

(*a*) When the property devolving is $200 and under	$ 6 00
(*b*) Over $200 and under $500	8 00
(*c*) Over $500 and under $1,000	10 00
(*d*) Over $1,000 and under $2,000	15 00
(*d*) Over $2,000	25 00

In all other matters the regular tariff shall apply.

MISCELLANEOUS.

92. WHEN IT HAS BEEN PROVED to the satisfaction of a Judge that proceedings have been taken by advocates to expedite proceedings, save costs, or in compromising actions, an allowance is to be made in the discretion of such Judge.

93. THE LOWER SCALE OF COSTS in the foregoing tariff shall apply to all cases in which the amount claimed, or the value of the property in dispute, or the value or amount of the plaintiff's interest therein, as the case may be, does not exceed two hundred dollars; and the higher scale shall apply in all other cases, except as is hereinafter otherwise provided.

94. IN ACTIONS FOR THE RECOVERY OF LAND, the Judge shall in each case prescribe the scale to be applied.

95. IF THE PLAINTIFF IN ANY ACTION CLAIMS MORE than two hundred dollars, and upon the trial or other determination of such action shall be found entitled only to a sum or value less than two hundred dollars, he shall not be entitled to costs in the higher scale, except where the amount of his claim has been reduced below two hundred dollars by set-off or counter-claim: and unless a Judge shall otherwise order, the defendant shall be entitled to tax his costs of defence and so much thereof as exceeds the taxable costs of defence which would have been incurred had the proceedings been had under the lower scale shall, on entering judgment, be set-off and allowed by the clerk against the plaintiff's costs to be taxed, or against such costs and the amount of the judgment, if it be necessary; and, if the amount of the costs be set-off exceeds the amount of the plaintiff's judgment and taxed costs, the defendant shall be entitled to judgment for the excess against the plaintiff: but where a defendant in any such action becomes entitled to tax costs against the plaintiff, such defendant shall be entitled to costs in the higher scale.

96. IF THE PLAINTIFF'S CLAIM IN ANY ACTION DOES NOT EXCEED two hundred dollars in amount or value, and the defendant by his counter-claim claims from the plaintiff a sum or value exceeding two hundred dollars, the action shall thereafter proceed under the higher scale, but such defendant shall not be entitled to costs in the higher scale unless he has shown he is entitled in respect of such counter-claim to an amount or value exceeding two hundred dollars.

97. THE COURT OR JUDGE MAY, in their or his discretion, direct that the costs of any party or parties shall be taxed either in the higher or lower scale as against any other party or parties, or that a lump sum shall be paid to any party in lieu of costs, and may adjust the costs as between all or any of the parties by way of deduction or set-off, and may direct that no costs shall be taxed or allowed to any party or parties who would otherwise be entitled thereto.

98. IN ALL CASES clerk's and sheriff's fees, or service fees allowed by a Judge, to be added.

N.B.—A FOLIO shall consist of one hundred words or figures. This provision shall also apply to sheriff's and clerk's fees.

MATTERS BEFORE THE COURT IN BANC.

99.	All necessary disbursements properly vouched for.	
100.	Notice of application	$5 00
101.	Each copy, per folio of 100 words	10
102.	Settling appeal book	5 00
103.	Copies of all documents to be filed with the registrar, except those prepared by the clerk, per folio	10
104.	When appeal books are authorized by a Judge in typewriting, an original and five copies to be provided, for each of which on taxation five cents per folio is to be taxable.	
105.	Drafting and engrossing factum, per folio of original matter	20
106.	If printed, the actual amount paid printer	
107.	Superintending printing, including all attendances	2 00
108.	If typewritten, six cents per folio (to be allowed on one copy only)	
109.	Transmitting or delivering factum to registrar, including all postage and attendances	1 00
110.	Counsel fee (including brief and all charges in connection therewith) in the discretion of the Court .	
111.	For all services not hereinbefore provided for, the same fees as are authorized by the tariff of advocates' fees for similar services.	

MATTERS OF CERTIORARI AND APPEALS FROM CONVICTIONS.

112.	Taking instructions	$2 00
113.	Attending to bespeak, and for copy of depositions and conviction, or minute of judgment	50

114. Notice of appeal and copy $1 00
115. Preparing recognizance, including all attendances and affidavits in connection therewith..... 3 00
116. If appellant deposit in lieu of security all attendances 2 00
117. Attending to set down appeal 50
118. Respondent's advocate attending to see if appeal entered for trial 50
119. Respondent's advocate examining recognizance and papers filed 1 00
120. Every other and ordinary necessary attendance.. 50
121. Every necessary notice, including copy 50
122. Counsel fee on hearing 10 00
123. Attending to hear judgment, when reserved 50
124. Affidavit of disbursements, including copy and service 1 00
125. Each necessary copy of subpœna 50
126. All allowance to witnesses, the same fees and charges as allowed in civil cases.
127. Necessary disbursements paid to proper officers and postage, the same as allowed in civil cases.

N.B.—The Judge may, in his discretion, allow an increased fee to counsel in a proper case.

REGISTRAR'S FEES.

128. On receiving appeal books and inscribing cause and attending Court on hearing $5 00
129. Instead of the last mentioned fee, on inscribing any cause or matter referred to the Court by a Judge and attending the Court on argument, (if so directed by the Judge) 2 00
130. For receiving and filing factums received from each side and forwarding copies to Judges..... 1 00
131. Postage paid .....
132. Entering and registering every judgment, decree or order up to five folios 2 00
For each additional folio of 100 words 20

133. Every writ or other process, rule or order..... $2 00
134. Every filing 10
135. Every certificate, with or without seal of Court .. 1 00
136. Copies of proceedings, per folio of 100 words 10
137. Every search 25
138. Every oath administered 25
139. Every motion or argument not otherwise provided for 2 00
140. Every taxation of costs per hour or fraction of an hour 2 00
141. Certifying appeal book to the Supreme Court of Canada or the Judicial Committee of the Privy Council 5 00

CLERK'S FEES.

GENERAL.

	Over $200	Not exceeding $200
142. Receiving and entering in docket every claim for suit and preparing and issuing summons or other original process, including filings	$3 00	$2 00
143. Each copy of claim when not provided by party applying for process	60	40
If over two folios, per folio additional ...	10	10
144. Entering any appearance, and filing	2 00	1 00
145. Entering and recording every final judgment or verdict (including necessary filings)	3 00	2 00
If exceeding five folios, for each additional folio	20	20
146. Every other judgment or order of the Court	75	50
If exceeding five folios, for each additional folio	20	20
147. Examining bond and affidavits thereon for security for costs	1 00	50
148. Taxation of costs, except when a lump sum allowed	1 50	1 00
Every hour after the first hour	1 50	1 00

	Over $200.	Not exceeding $200.
149. Preparing special jury list for striking jury panel	$3 00	$2 00
150. Every original subpœna	1 50	1 00
151. Every filing not otherwise provided for	10	10
152. Every Rule Nisi	75	50
153. Every Judge's order, garnishee summons, writ of replevin or attachment	1 00	75
154. Every execution or other final process	2 00	1 50
If over three folios, per folio additional	20	20
155. Every renewal of writ	75	50
156. Every search	25	25
157. Every search by person not a party to suit.	50	50
158. Examining every affidavit necessary for the issue of process	1 00	75
159. Every commission or exemplification of judgment	2 00	1 00
If over five folios, per folio	10	10
160. Setting down cause or motion for trial or argument	1 00	75
161. Taking accounts under Judge's order or order of Court, or reference, or examination of witnesses, per hour	1 50	1 00
162. Every appointment	30	20
163. Swearing every witness or juror	25	25
164. Every certificate, with or without seal of Court	1 00	1 00
165. Certifying appeal book	5 00	5 00
166. Copies of evidence or papers filed, per folio	10	10
167. Amending writ or other proceeding on file, including search	75	50
168. Necessary postage disbursed		
169. On money being paid out of Court not exceeding $100	50	
Over $100 and not exceeding $500	1 00	
Over $500	2 00	
170. Every certificate of naturalization	1 00	

In cases for recovery of land, or where title to land is in question, and actions for specific performance or to enforce

liens, or actions other than money demands not sounding in damages, the higher scale is to apply; in sheriff's interpleader the amount of the plaintiff's claim or judgment, and in other interpleaders the value of the property involved shall govern.

IN GARNISHEE PROCEEDINGS the scale of fees chargeable to be ascertained by the amount of the primary creditor's claim or judgment.

ALLOWANCE FOR OTHER SERVICES to be specially fixed by a Judge, taking the general tariff of clerk's fees as guide.

EXAMINERS other than the clerk shall be entitled to the same fees as such as the clerk.

IN PROBATE MATTERS.

171. On every grant of probate, letters of administration or guardianship, including filing of record all papers, preparing probate or letters, presenting to the Judge, and getting signed and recording same.

(*a*) When property devolving is $500 and under $5 00

(*b*) When property devolving is over $500 and not exceeding $1,000 ..... 7 50

(*c*) When property devolving is over $1,000 and not exceeding $5,000 ..... 10 00

(*d*) When property devolving is over $5,000 .... 20 00

172. Searches and certificates, each 50

173. Exemplification of probate or letters of administration, per folio 20

174. For services not herein provided for specially, the same fee as is provided for similar services by the preceding clerk's tariff.

IN MATTERS OF CERTIORARI AND APPEALS FROM CONVICTIONS.

175. Receiving, filing, and entering in a proper docket, each notice of appeal and all subsequent proceedings from any judgment on conviction by one or more Justices of the Peace, when an appeal to the Judge is given by law (to be paid in the first instance by the party appealing) 2 00

176. When appeal called on, reading the conviction, notice of appeal and recognizance and all other services at the trial of such appeal case, including the receiving and recording the judgment (to be paid in advance by the appellant when he enters the appeal) $2 00
177. Issuing every subpœna 1 00
178. Issuing process to enforce the order or judgment of the Court 2 00
179. Certified copies of depositions, examinations, convictions, judgments and other papers when required (to be paid by the party applying), per folio of 100 words 10
180. Every search 25
181. Every certificate of judgment on appeal when necessary 1 00
182. Taxing costs 1 00

SHERIFF'S FEES.

	Over $200	Not exceeding $200
183. For receiving, entering and endorsing every summons, writ and other process and every order or other document requiring service	$ 50	$ 25
184. Every return of all processes and writs, except subpœna	25	25
185. Every affidavit of service, exclusive of fee paid Commissioner, Notary or J. P.	25	25
186. Paid oath	25	25
187. Fee on every service except subpœna	50	25
188. For service of summons on each juror, and service of subpœna on each person named therein	50	25
189. Every warrant to execute any process, when given to a bailiff	50	50
190. For every arrest under warrant, bond required to be taken to the sheriff for securing goods attached, indemnity, or other purposes	2 00	2 00

	Over $200.	Not exceeding $200.
191. For assignment of replevin bond.....	$2 00	$2 00
192. For executing every writ of possession or restitution	4 00	2 00
193. For delivering goods replevied to a plaintiff	4 00	2 00
194. For every search not being by a party to the cause or his advocate	25	25
195. For every certificate when required	50	50
And for every certificate when required under seal, including search	1 00	1 00
196. For seizing estate or effects under attachment or execution	2 00	1 00
197. For notice of sale of goods	75	50
198. Each copy, not exceeding seven	10	10
199. For notice of sale of lands	1 00	1 00
200. Each copy, not exceeding three	25	25
201. For every notice of postponement, including copies	50	25
202. For every schedule of goods taken in execution or seized under attachment, including copy for party whose goods are taken or seized (when not exceeding five folios)....	1 00	1 00
Every folio over five	20	20
203. For making every affidavit (other than ot service), besides fee paid out for oath..	50	50
204. For mileage for every mile necessarily travelled and sworn to in serving and executing summonses, writs and other processes and papers of every description, from the place where the same are severally received or the sheriff's office (which ever is nearest) to the place of service or execution as aforesaid, and return	12	12
205. For poundage on executions and attachments in the nature of execution, when the sum realized shall not exceed $400,		

	Over $200.	Not exceeding $200.
five per cent.; when the sum realized is over $400 and does not exceed $4,000, five per cent. for $400, two and a half per cent. for the balance up to $4,000; and when the sum realized is over $4,000, five per cent. for $400, two and a half per cent. from $400 to $4,000, and one and a quarter per cent for the balance.		
206. Besides such sums as may be actually disbursed for advertising in such cases required by law, and such sums for care and removal of property seized or taken, as may be approved (in each case) by a Judge.		
207. When the goods to be sold consist of a merchant's stock, and where in the opinion of a Judge it was necessary for the sheriff to employ the assistance of an expert in making an inventory and valuation, such sum may be allowed as is actually and reasonably disbursed for such assistance and as may be approved in each case by a Judge.		
208. Posting necessary notices, and attending printer, each	$ 50	$ 25
209. For bringing up prisoner on attachment or habeas corpus, besides travel at 12 cents per mile, and disbursements and keep of prisoner, $2.00.		
210. Postage when necessary.		

IN CASES FOR RECOVERY OF LAND or when title to land is in question, and actions for specific performance or to enforce liens, or actions other than money demands not sounding in damages, the higher scale is to apply, and in interpleaders other than the sheriff's the value of the property shall govern.

IN GARNISHEE PROCEEDINGS the scale of fees chargeable to be ascertained by the amount of the primary creditors claim or judgment.

FEES TO JUSTICES, ADVOCATES, REGISTRAR AND CLERK. UNDER SECTION 900 OF THE CRIMINAL CODE.

211.	To the Justice for preparing and stating a case when not exceeding ten folios of 100 words each	$1 00
	For each folio in excess of ten folios	05
212.	To the registrar or clerk of the Court (as the case may be) for receiving, filing and entering a case, and attending on the argument and judgment	2 00
213.	To the registrar or clerk on every process or order	50
214.	To the advocate on argument	2 00
	To be increased by the Court or the Judge (as the case may be) to a sum not exceeding $10.00	
215.	Affidavit of service (including attendance and fee to commissioner)	50
216.	All necessary affidavits (except affidavit of service.) This fee to include attendance to have sworn and commissioner's fee	1 00
	If over five folios, for each additional folio	15
217.	Advocate attending Court or Judge for rule or summons	1 00
218.	Advocate for drawing rule or summons	50
219.	Advocate copy of rule or summons	25
220.	Advocate attending to serve rule, summons, order or other document	25
221.	Advocate counsel fee on return of rule or summons	2 00
	To be increased by Court or Judge to a sum not over	5 00
222.	Advocate drawing rule absolute or order	1 00
	If exceeding five folios, each additional folio of 100 words	15

223. When service of any process or paper made through the sheriff's office, mileage to be allowed one way, per mile ..... $ 20
224. Advocate fee on each rule, summons or order.. 1 00
225. Fee on each rule, summons or order, to registrar or clerk 50

Affidavits may be sworn before any Judge, Notary Public or Justice of the Peace.

RECOGNIZANCE.

226. Drawing and completing recognizance and delivering to Justice, including all attendances and oath 1 00

113. THE AFOREGOING RULES AND TARIFF WILL COME INTO FORCE and take effect upon the first day of October next, from which time all Rules and Tariffs now existing relating to the same matters shall be rescinded.

(Signed) HUGH RICHARDSON, J.
" CHAS. B. ROULEAU, J.
" E. L. WETMORE, J.
" T. H. MCGUIRE, J.
" D. L. SCOTT, J.

DECEMBER TERM, 1900.

CERTIORARI.

1. Every application for a writ of *certiorari*, at the instance of any person other than the Attorney-General on behalf of the Crown, shall be made to a Judge for a summons, or to the Court for an order *nisi*, to show cause why the writ should not issue.

2. Such summons or order *nisi* shall be served upon the justice, or one of the justices, who made the conviction or order, and upon such person or persons as the Judge or Court shall upon such application direct.

3. Where from any cause the Court or Judge is on such application of opinion that the validity of the conviction or order can be dealt with on the return of the summons or order *nisi*, the summons or order *nisi* shall also be to show cause why the conviction or order should not be quashed; but in this case the private prosecutor shall be one of the persons to be served, and the Judge or Court may in such case dispense with the giving of security required by rule 23.

4. No such application can be made or allowed after the expiration of six months from the date of the conviction or order, but no notice to the justices or private prosecutor prior to such application shall be necessary.

CONTROVERTED ELECTIONS.

1. The Judges hereunder named are assigned to try Election Petitions under the Dominion Controverted Elections Act in the Electoral Districts specified:

A. Eastern Assiniboia.—The HONORABLE MR. JUSTICE MCGUIRE and the HONORABLE MR. JUSTICE SCOTT.

B. Western Assiniboia.—The HONORABLE MR. JUSTICE ROULEAU and the HONORABLE MR. JUSTICE WETMORE.

C. Alberta.—The HONORABLE MR. JUSTICE RICHARDSON and the HONORABLE MR. JUSTICE WETMORE.

D. Saskatchewan.—The HONORABLE MR. JUSTICE RICHARDSON and the HONORABLE MR. JUSTICE ROULEAU.

2. Applications and matters which may be made to or heard by a single Judge, may be made to or heard by the Judge resident in the Electoral District where the election was held.

(Signed) HUGH RICHARDSON.
" CHAS. B. ROULEAU.
" E. L. WETMORE.
" T. H. MCGUIRE.
" D. L. SCOTT.

8th December, 1900.

AMENDMENT OF RULES OF COURT.

DECEMBER TERM, 1901.

In item 129 of the Tariff of Registrars' fees authorized by the existing Rules of Court, between the words "cause" and "or" the following words are hereby inserted, "special case."

Sgd. HUGH RICHARDSON, J.
Sgd. E. L. WETMORE, J.
Sgd. J. H. MCGUIRE, J.
Sgd. D. L. SCOTT, J.

4th December, 1901.

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

NORTH-WEST TERRITORIES.

STEELE v. RAMSAY—BRATT CLAIMANT.

Appeal—Objections to regularity—Value of subject-matter—Fraudulent Conveyance—Insolvency—Bona fides of grantee.

An objection on the ground of irregularity in the proceedings leading up to an appeal cannot be taken on the argument of the appeal.

In determining the value of the subject-matter in dispute, upon which the right of appeal is made to depend, the proper course is to look at the judgment as to the extent that it affects the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal. *Macfarlane* v. *Leclaire*[1] followed.

In an action attacking a conveyance as fraudulent against creditors, the evidence showing that there was an actual sale from the debtor to the claimant, and that even if there was any fraudulent intent on the part of the former, the latter bought *bona fide*, the conveyance was held valid.

[*Court of Q. B. Manitoba in banc, May 18th, 1885.*

Statement. This was an interpleader issue tried before a Stipendiary Magistrate of the North-West Territories. Judgment was given for the execution creditor. The claimant appealed, under the statute in that behalf, to the Court of Queen's Bench for the Province of Manitoba in banc.

The facts and the points involved appear in the judgment.

J. S. Ewart, Q.C., for the claimant, the appellant.

J. B. McArthur, Q.C., for the execution creditor, the respondent.

NOTE: This report is taken from 3 Man. R. 305 by permission of the Benchers of the Law Society of Manitoba.

Judgment.

Taylor, J.

[*May 18th, 1885.*]

The judgment of the Court (DUBUC, TAYLOR and SMITH, JJ.) was delivered by TAYLOR, J.:—

This was an appeal by the claimant in an interpleader issue from the District Court of the first Judicial District in the North-West Territories. Two objections were taken to the appeal being heard, the first that the proceedings leading up to the appeal were irregular. The second that the amount in dispute was under that as to which an appeal is allowed. The Court heard the appeal subject to these. The amount of the plaintiff's judgment was less than the appealable amount but the value of the goods exceeded it.

Further consideration confirms me in the opinion expressed by the Court at the time of the argument, that the first objection is not open to the respondent at the hearing of the appeal, but should have been taken by some proceeding to strike out the case from the list, or to quash the appeal.

The second objection seems answered by the decision of the Privy Council in *Macfarlane* v. *Leclaire*,[1] which was, that in determining the question of the value of the subject matter in dispute upon which the right of appeal depends, the proper course is to look at the judgment as to the extent that it affects the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal.

Dealing with the merits of the case it appears that Ramsay carried on business as a livery stable keeper at Regina, and owned the property in question, which was sold to Bratt. In May he left Regina for his farm near Moose Jaw. He had about a month before borrowed money from a man named Jelly to pay off some claims against him, and had given Jelly a mortgage for $1,500. On account he had paid $494, leaving due $1,006. When Bratt, the claimant, purchased for $1,500, he paid this $1,006 to Jelly in cash. Of this $1,500, part was represented by a note which Jelly had given to Jackson for Ramsay's indebtedness to him, and the payment of this note made up part of the $1,006. The amount of the $1,500 over and above the $1,006 paid Jelly

[1] 15 Moore P. C. 181; 8 Jur. N. S. 267; 10 W. R. 324.

Judgment.

Taylor, J.

was to be paid by Bratt after he could sell the goods. Bratt seems not to have been a resident of Regina, but a man who had come up from Ontario with stock, and who bought out Ramsay as a speculation.

The evidence of Ramsay's insolvency is not by any means clearly established, or at all events it is not shown that the fact of his being heavily involved was known. Jackson, who was a creditor, did not know at the time of the sale that he was in much difficulty. He was surprised at his leaving the country when he left his farm at Moose Jaw and returned to Ontario, for he had, he says, "No reason to believe he was insolvent then." He did not, he says, tell the claimant that Ramsay was in difficulties. A witness for the execution creditor says he knew Ramsay was in some difficulty, but not insolvent.

Then the sale seems to have been at a fair price. Jelly says he thinks $1,500 a fair price, as property was low then and buying then risky. Another witness, it is true, puts the buildings at $884. They said the lots were sold for $100, but there was then due on the land $584 and some arrears of interest at 8 per cent. He admits that he would not buy at his figures, though he says, because of no use to me. Still he admits that the price of lots in Regina had declined. There seems to have been no concealment about the sale. The deed of the land and the bill of sale of the chattel property are both witnessed by Lindsay, who was himself a creditor of Ramsay. He had, he says, no suspicion that defendant was about leaving when the deeds were executed.

Taking the whole case, I am of opinion that there was an actual sale by Ramsay to Bratt, and that if there existed any intention on the part of Ramsay to defraud his creditors, Bratt, the claimant, purchased *bona fide*, and without a knowledge that Ramsay was insolvent, or had any fraudulent intent in the sale. The only evidence of his knowing that Ramsay owed anyone beyond the Jelly mortgage is that of Steel, the execution creditor, who, speaking on the 29th April, says, Bratt, the claimant, knew that day defendant owed me.

The appeal should, I think, be allowed.

THE QUEEN v. CONNOR.

Criminal law—Procedure in Territories—Foundation of charge—Grand jury—Coroner's inquest—Applicability of Imperial laws.

In the Territories it is not necessary in order to put an accused upon his trial on a criminal charge that the charge should be based upon either an indictment by a grand jury or a Coroner's inquest. The applicability of the laws of England to the Territories discussed.

[*Court of Q. B. Manitoba in banc, June 29th, 1885.*

Statement. This was an appeal from the North-West Territories by a prisoner, who had been convicted of murder, to the Court of Queen's Bench for the Province of Manitoba in banc, under the statute in that behalf. The conviction was sought to be quashed on grounds of irregularity in the procedure, the principal objection being that there was no preliminary investigation by a grand jury or a coroner.

J. S. Ewart, Q.C., and *T. C. Johnstone* (of the North-West Bar) appeared for the prisoner.

There are only two methods known to the common law by which a subject may be put upon his trial for murder, viz. 1, by the presentment of a grand jury, and 2, by a coroner's inquisition which is sometimes called an indictment. It is contended that the common law of England was introduced into the Territories by the migration thither of subjects of the British Crown; and by the Hudson's Bay charter; or if it be held that that part of the Territories where the crime is alleged to have been committed was acquired by cession from the French, then, it is contended that the common law of England is nevertheless in force, and that by virtue of Imperial legislation.

The statute 43 Geo. III. c. 138 (1803), declares that "all offences, committed within any of the Indian Territories or parts of America, not within the limits of either of the said Provinces of Lower or Upper Canada, or any civil government of the United States of America, shall be, and be deemed to be, offences of the same nature, and shall be tried

NOTE: This report is taken from 2 Man. R. 235 by permission of the Benchers of the Law Society of Manitoba.

in the same manner, and subject to the same punishment, as if the same had been committed within the Provinces of Lower or Upper Canada." Provision is then made for the committal of prisoners to Lower or Upper Canada for trial. Argument.

The Act of 1 & 2 Geo. IV. c. 66 (1821), extended the Act of 1803 to the territory granted to the H. B. Co., and thus the common law is in force whether the locality in the present case is inside or outside of Rupert's Land.

The next statute is 22 & 23 Vic. c. 26 (1859), whereby various provisions are made for the appointment of justices, &c.

The B. N. A. Act of 1867 provides for the admission of Rupert's Land and the Territories upon certain terms. These terms and the Imperial Order-in-Council are bound up with the Dominion statutes of 1872 at p. 62.

The various Canadian statutes with reference to the Territories are 32 & 33 Vic. c. 3 (1869); 33 Vic. c. 3 (1870); 34 Vic. c. 16 (1871); 36 Vic. c. 34 (1873); 36 Vic. c. 35 (1873); 38 Vic. c. 49 (1875); 40 Vic. c. 7 (1877); and 43 Vic. c. 25 (1880). Under the statute of 1873 a stipendiary magistrate was enabled to try summarily any offence the penalty for which did not exceed seven years. Prisoners in other cases were to be sent to Manitoba for trial "according to the laws of criminal procedure in force" there.

Under the statute of 1875 a Judge of the Manitoba Court of Queen's Bench, sitting with a stipendiary magistrate had power to try offences punishable with death, and it is specially provided that no grand jury shall be called in the North-West Territories.

The Act of 1877 gives power to a stipendiary magistrate and two justices to try a charge of murder in a summary way, but expressly provides that there is to be no grand jury summoned in the Territories

The Act of 1880 repeals all prior Acts, and it differs from the former Acts in three special features: (1) The clause providing that there is to be no grand jury is left out; (2) the statute 32 & 33 Vic. c. 30, which specially provides

Argument.

for a coroner's inquest as a means of putting offenders on trial, is specially introduced into the North-West, and (3) the direction that the trial is to be summary is omitted from the new Act.

It appears, therefore, that the common law requisite of a preliminary investigation was in force in the North-West previous to its incorporation into the Dominion; that the Dominion statutes provided at one period that no grand jury should be called, but that this is now repealed; and that the institution of a coroner's inquest has never been in any way interfered with, but, on the contrary, has been specially introduced into the North-West by the Act of 1880. The common law is left, therefore, by the Dominion statutes where it was originally with the exception that the coroner's inquest has been especially recognized.

B. B. Osler, Q.C. (of the Ontario Bar), and *J. A. M. Aikins*, Q.C., for the Crown.

It may be admitted that either by occupancy or by Imperial statutes the common law of England was introduced into the Territories. *Berry* v. *United States*,[1] and *Clinton* v. *Englebrecht*,[2] are authorities for this position. It is clear, however, that the institutions of grand juries and coroner's inquest could not be introduced except as part of a Court erected for the purpose of administering the criminal law. No Court existed until that erected by Canadian legislation, and the same legislation provided that there should be no grand jury, nor could there be any grand jury until the division of the North-West into districts or divisions, and it would be impossible to draw a proper grand jury from the whole of the North-West. A jury from part of the Territory would be illegal. There is no provision, moreover, as to the mode of calling a grand jury.

The repeal of the provision as to there being no grand jury, has no significance, because it was a part only of a section and the other part of the section was being repealed.

[1] 2 Colorado 186. [2] 13 Wall. 434.

A strong argument against the idea that it was the intention of Parliament, inferentially, to provide for a grand jury, is the fact that while a number of the sections of the Procedure Act are introduced, every clause relating to indictments, including the forms, are left out. Argument.

A coroner's inquest was, no doubt, known to the common law as a means of accusation, but it has fallen into disuse, and is in many cases unworkable, as in cases of decomposition.

The repeal of the Acts providing that there is to be no grand jury, would not now revive the system, if it ever existed. 46 Vic. c. 1 (1883).

J. S. Ewart, Q.C., in reply—If the argument as to the non-introduction of various clauses of the Procedure Act is valid, it may be answered by pointing out that various clauses of the Act relating to the duties of justices are unworkable unless there is a grand jury. Sections 4, 5, 6, 36, and 52 may be referred to for this purpose; and the forms given for bail and recognizances for witnesses expressly mention a bill of indictment to be found by a grand jury. Sections 1, 2, 4, 58, 59, 60, 62, 63 and 65 of the Procedure Act also presuppose the existence of a grand jury. These two Acts are introduced into the Territories for use there, for the first time by the Act of 1880.

A coroner's inquest is not unworkable in case a body cannot be found or is decomposed. In such case a special commission can be issued, *Boys on Coroners*, p. 122. Nor can it be said that a coroner's inquest is in any way obsolete for it is expressly provided for by the statute of 1869.

[*June 29th, 1885.*]

WALLBRIDGE, C. J.—The prisoner, John Connor, was tried at Regina, in the North-West Territories, on the 1st day of May, 1885, upon the charge of having on the 6th of April, 1885, feloniously and of malice aforethought, killed and murdered one Mulaski.

The trial took place before Hugh Richardson, Esquire, one of Her Majesty's stipendiary magistrates, in and for the

Judgment.

Wallbridge, C.J.

said Territories, and Henry Le Jeune and Henry Fisher, two of Her Majesty's Justices of the Peace in and for the said Territories, with the intervention of a jury of six.

The North-West Territories Act, 1880, 43 Vic. c. 25, s. 76, enacts that each stipendiary magistrate shall have power to hear and determine any charge, against any person, for any criminal offence, alleged to have been committed in the North-West Territories.

Section 77 of that Act enacts as follows: "A person convicted of any offence punishable by death, may appeal to the Court of Queen's Bench of Manitoba, which shall have jurisdiction to confirm the conviction or to order a new trial."

Under this section the prisoner has appealed to this Court.

We have carefully examined and considered the facts and are of opinion that the jury was fully warranted and sustained in their verdict of "guilty."

The authority of this Court is limited upon this appeal either to confirm the conviction or to order a new trial.

The British North America Act, 1867, section 91, under the head "Distribution of Legislative Powers," enacts, "that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects, next hereinafter enumerated, that is to say." And number twenty-seven of the enumeration is, "The Criminal Law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

In the North-West Territories Act of 1880, under sub-sections 1, 2, 3, & 4 of section 76, the classes of cases are enumerated which the stipendiary magistrate may try, sitting alone. These sub-sections include many cases which could only have been tried in England and in Ontario, by bill first found by a grand jury, and subsequently before the Court with a *petit* jury. And in respect to the crimes enumerated in those four sub-sections, it is declared, that the trial shall take place in a summary way, and with the intervention of a jury.

Judgment.

Wallbridge, C.J.

Sub-section 5 then enacts that "In all other criminal cases the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge against any person or persons for any crime."

Sub-section 8 enacts that "when any person is convicted of a capital offence, and is sentenced to death, the stipendiary magistrate shall forward to the Minister of Justice, full notes of the evidence with his report upon the case."

It is perfectly clear that the Parliament of Canada has conferred on the stipendiary magistrate with a justice of the peace, and with the intervention of a jury of six, the power of trying a person for a capital offence.

The only difference between the two classes of cases is this; in the cases enumerated in the first four sub-sections to section 76, the trial shall take place before the stipendiary magistrate alone, and in the cases following within sub-section five of that section, the trial shall take place before the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six. Sub-section 6 of section 76 provides the Courts shall be open and public Courts; 7, the stipendiary magistrate shall take full notes of the evidence, and the prisoner shall be admitted to make full answer and defence by counsel; sub-section 9 provides for the summoning of jurors; 10 gives the right to challenge; 11, the Crown may challenge; then there are provisions made for cases where the jurors summoned are exhausted by challenge or otherwise; 13, for failure in attendance of witnesses; 14, for the arrest of witnesses who fail to attend; 15, returns to the Lieutenant-Governor provided for; and section 77 provides for the appeal to the Court of Queen's Bench for Manitoba, before referred to.

The statute may be fairly read as providing for summary trials in certain cases by a stipendiary magistrate without a jury, and in certain other cases by a stipendiary magistrate with a justice of the peace, and a jury of six.

The statute 32 & 33 Vic. c. 32, entitled "An Act respecting the prompt and summary administration of criminal justice in certain cases," is an Act of similar purport to the

Judgment.

Wallbridge, C.J.

Act now under consideration, and many of the cases now tried under that Act were formerly proceeded with and tried by the presentment of a bill before a grand jury; and under that Act no mention is made of dispensing with a grand jury, but a procedure is given by which the crimes enumerated are to be tried; that procedure being followed, the case is lawfully disposed of without a bill first having been submitted to a grand jury.

Under the North-West Territories Act of 1880, the procedure is also laid down, and in my opinion contains all that the law requires to be observed. This Act makes provision as to who shall be judges, namely, the stipendiary magistrate and a justice of the peace, and provides for summoning a jury of six, and the mode of summoning them and by whom; the power of compelling the attendance of witnesses; the right of the prisoner to be heard by counsel; and makes no provision for summoning a grand jury, or their qualification.

No complaint is made that the requirements of that Act have not been observed.

It is urged however that the charge upon which the prisoner has been tried was not found by a grand jury, before it was submitted to the jury provided for in sub-section 5 of section 76, 43 Vic. c. 25.

To this I say that the North-West Territories Act, 1880, whilst it provides for the trial, who shall preside, and the number of the jury for such trial, does not provide, either for a grand jury, for their qualification, nor any means for securing their attendance.

Whilst the Act provides for the trial of capital offences, it also introduces certain sections of the Act for procedure in criminal cases, and declares that those sections shall apply and be in force in the North-West Territories, it studiously however omits from that schedule all those clauses affecting procedure, which apply to indictments, such as — first the preliminary requirements of certain indictments, secondly the averments for want of which indictments shall not be held insufficient by such and other omissions indicating that the trial by indictment was not contemplated by the Act.

Judgment.

Wallbridge, C.J.

Without the aid of these sections an indictment would require to be drawn up in the old form, now obsolete, both in England, and in Canada. It is perfectly allowable to construe one section of a statute by reference to another, or even by the heading under which the sections occur. *Hammersmith & City Railway Co.* v. *Brand*,[3] *Laurie* v. *Rathbun*.[4]

It was seriously discussed in Ontario to abolish grand juries. In the North-West Territories none ever existed.

The North-West Territories Act 1875, and the North-West Territories Act 1877, both provide that the Lieutenant-Governor in Council, or the Lieutenant-Governor with the advice and consent of the Legislative Assembly, as the case may be, may from time to time make any ordinance in respect to the mode of calling juries, and when, and by whom, and how many may be summoned or taken, and in respect of all matters relating to the same, and concludes: "but no grand jury shall be called in the North-West Territories." This section was repealed by 43 Vic. c. 25, s. 95, and s. 76, sub-section 9, this latter provides another method of summoning jurors, namely, by the stipendiary magistrate for the trial of criminal charges.

The section, however, omits the words "but no grand jury shall be called in the North-West Territories." It is to be remarked that the statutes of 1875 and 1877 provide for the calling juries generally, and to avoid the possibility of those words being construed into calling a grand jury, the clause was added: "But no grand jury shall be called in the North-West Territories," and whilst this is omitted in the statute of 1880, the jury in sub-section 9, is called for trial, and this is in no sense applicable to a grand jury.

It is argued from such omission that a common law right to a grand jury arises; and that the prisoner has the right to be put on his trial by means of a bill found by a grand jury. I can find no authority for this assumption. British subjects going to an uninhabitated country are said to take the Common Law of England with them. Although

[3] L. R. 4 H. L. 171.

[4] 38 U.C.Q.B. 255.

Judgment.

Wallbridge, C.J.

the grand jury may exist at common law, it is an institution, and not the law itself. I can find it nowhere laid down, that this institution more than any other institution existing from time immemorial accompanies the subject, but I find it laid down that such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony, which state is applicable to the present position of the North-West Territories, or at least they have been so treated by the Parliament of Canada.

The same reason which dispenses with the finding a true bill by a grand jury dispenses also with it before a coroner's jury.

The British North America Act, 1867, gave exclusive power to the Dominion Legislature to legislate as to the matters enumerated in the subjects mentioned in No. 27 of that enumeration, and that number expressly mentions as such matters, both criminal law, and the procedure in criminal matters. They have so legislated by passing the North-West Territories Act of 1880, and have provided a procedure omitting grand juries, and we must assume that they have done so advisedly.

In my opinion a new trial should be refused, and the conviction confirmed.

TAYLOR, J.—The prisoner was on the first day of May, 1885, tried for the crime of murder, before a stipendiary magistrate and a justice of the peace, at Regina, in the North-West Territories. Upon the trial he was found guilty, and sentence of death was passed upon him. He now appeals from that conviction to this Court under the provisions of Dom. Stat. 43 Vic. c. 25, s. 77.

In the notice of appeal which was served, three grounds of appeal are stated. But the principal ground argued by counsel on his behalf was, that the proceedings were irregular, inasmuch as there was no preliminary inquiry before a magistrate, and no indictment found by a grand jury or coroner's inquisition accusing him of the crime.

It is not contended on the part of the Crown that there was an indictment found by a grand jury, or any coroner's

Judgment.
Taylor, J.

inquisition accusing him of the crime, but it is urged that the Dominion Legislature having by statute provided a method of procedure for the trial of offences committed within the North-West Territories, which was followed in the present case, neither of these was necessary.

It may be, as urged by the prisoner's counsel, that he was entitled by the common law of England, to be put upon his trial only on an indictment found by a grand jury, or on the inquisition or finding of a coroner's jury. But the question comes up whether in the circumstances of the North-West Territories that common law right can be considered as in force there.

In the *Commentaries on the Laws of England* by *Broom & Hadley*, it is said at p. 119 "Generally speaking, if an uninhabited country be discovered and occupied by English subjects, all English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with many and great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony." There can be no doubt that at the time of its occupation by English subjects the country now known as the North-West Territories would fall within the description of an uninhabited country.

For many years there was no Court established there. There was no Court of *Oyer and Terminer* and General Gaol Delivery, as incident to the proceedings in which a grand jury can be considered proper and necessary. There was no municipal organization. There is none such as yet. There are not, so far as appears before us, any counties or similar organization from the body of which a grand jury can be taken. None of the older Acts, the 43 Geo. III. c. 138, 1 & 2 Geo. IV. c. 66, or any other Acts respecting the administration of justice in the North-West Territories or the country now known as such, provide for the erection of Courts there. They all provide for the trial of persons, charged with serious crimes, in Upper or Lower Canada, or in this Province.

Judgment.
Taylor, J.

In 1875, the Dom. Stat. 38 Vic. c. 49, was passed. Up to that time there had been no provision for the holding of Courts or for trial by jury in the North-West Territories.

Then that Act was passed, and by the 59th section it was, under the power given by the Imperial Act, 31 & 32 Vic. c. 105, s. 5, provided that, "A court or courts of civil and criminal jurisdiction shall be held in the said Territories and in every judicial district thereof when formed, under such names, at such periods, and at such places as the Lieutenant-Governor may from time to time order."

The 61st section provides for the appointment of a stipendiary magistrate or stipendiary magistrates, and the 62nd and 63rd sections define the jurisdiction of these magistrates.

The 64th section provides that the Chief Justice or any Judge of the Court of Queen's Bench for the Province of Manitoba with one stipendiary magistrate as an associate, shall have power and authority to hold a Court under section 59, to hear and determine any charge preferred against any person for any offence alleged to have been committed within the North-West Territories. In any case in which the maximum punishment for the offence does not exceed five years imprisonment, in a summary way, and without the intervention of a jury. In any case in which the maximum punishment for such offence exceeds five years imprisonment, but is not punishable with death, in a summary way without a jury, if the prisoner assents thereto, or if the accused demands a jury, then with the intervention of a jury not exceeding six in number. In any case in which the punishment for the offence is death, the trial was to be with the intervention of a jury, not to exceed eight in number.

The 5th sub-section of that section 64, is in these words: "The Lieutenant-Governor and Council or Assembly, as the case may be, may from time to time, make any ordinance in respect to the mode of calling juries, and when and by whom and how they may be summoned or taken, and in respect of all matters relating to the same; but no grand jury shall be called in the North-West Territories."

Judgment.
Taylor, J.

In 1877, by Dom. Stat. 40 Vic. c. 7, several sections of the 38th Vic. c. 49, were repealed, including that 64th section, and another section was substituted for it. The amended section makes no provision for the Chief Justice or a Judge of the Court of Queen's Bench for Manitoba, sitting with a stipendiary magistrate as an associate, but trials are to take place before the stipendiary magistrate alone in certain cases, before the magistrate and a justice of the peace in certain other cases, and where the punishment for the crime is death, then before the stipendiary magistrate and two justices of the peace. In all cases to be tried by a jury the number of jurors is limited to six. The sub-section which stood as number 5, of section 64, in the Act of 1875, appears in this amended section, as sub-section 9. It is exactly the same as the original sub-section 5, except, that the words, "The Lieutenant-Governor and Council or Assembly," are in the amended sub-section altered to "The Lieutenant-Governor in Council, or the Lieutenant-Governor, by and with the advice and consent of the Legislative Assembly."

In 1880 these former Acts were repealed, and a new Act passed, the Dom. Stat. 43 Vic. c. 25.

The 76th section of that Act defines the jurisdiction, functions, and powers of the stipendiary magistrate. The first four sub-sections relate to certain specified crimes, and then follow these words, "The charge shall be tried in a summary way and without the intervention of a jury." Sub-section 5 says, "In all other criminal cases the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge against any person or persons for any crime."

The sub-section which appeared as sub-section 9, of section 64 as amended by the Act of 1877, does not appear in this Act. It contains no provision for the making of ordinances in respect to the mode of calling jurors. Provision is, however, made for summoning of jurors. Sub-section 9 provides that "Persons required as jurors for a trial, shall be summoned by a stipendiary magistrate from among such male persons as he may think suitable in that behalf, and

Judgment. Taylor, J.

the jury required on such trial shall be called from among the persons so summoned as such jurors, and sworn by the stipendiary magistrate who presides at the trial."

The counsel for the prisoner argue that the statute of 1875, having enacted "but no grand jury shall be called in the North-West Territory," establishes that at the time of the passing of that Act there was a necessity for a grand jury there, and that the proviso in these words was intended to put an end to, or abolish it; and that this Act having been repealed and the Act of 1880 passed without any such proviso, the right to, and necessity for, a grand jury was revived, the law standing then as it did before the Act of 1875 was passed.

But the object of the Act of 1875 and the exact wording of the sub-section must be considered. Up to that time no Courts for trial of serious offences existed in the North-West Territories and there was no jury system, either grand or *petit*, as an incident to these Courts. The Dominion Legislature was for the first time creating Courts and providing for trial by jury. They then gave the Lieutenant-Governor and the constituted authorities in the North-West Territories power to make ordinances for regulating the calling of juries, and the words "but no grand jury shall be called in the North-West Territories," were inserted not for the purpose of abolishing an already existing grand jury system, but as a limitation upon the powers of the Lieutenant-Governor. They were inserted not to abolish something already existing, but to prevent the calling into existence as a part of the system then established something which did not before exist, or at all events was in abeyance.

There can be no doubt, I think, of the power of the Dominion Legislature to abolish the mode of procedure by grand jury in any Province in which it now exists. If so, surely they had power to say that the mode of procedure shall not begin to be used in a part of the Dominion, where it has not been used hitherto.

The right of a criminal to be tried by a jury of twelve, stands, I conceive, on just the same footing as his right to

have an indictment found against him by a grand jury before he is tried, yet here we find the Legislature providing that the jury shall consist of six only. Judgment. Taylor, J.

That the words "but no grand jury shall be called in the North-West Territories," are not found in the Act of 1880, does not furnish an argument in favor of a grand jury being necessary now. In the former Act power was being given to the Lieutenant-Governor to deal with the question of calling jurors, and such words might well be inserted to limit his powers. In the Act of 1880, he is given no such power, the only power is given to the stipendiary magistrate, and he is given power only to summon jurors for a trial. That of itself excepts the power of calling a grand jury. That could never be called for the trial. A grand jury is called to inquire of all offences in general in the county, determinable by the Court into which they are returned.

As to the necessity, in the absence of a finding by a grand jury, of a coroner's inquisition accusing the particular person put on his trial, it may be that such an inquisition would be a good substitute for an indictment, and something upon which a prisoner could be arraigned. Such a proceeding however seems obsolete. I find nothing in the Acts relating to the North-West Territories which in any way indicates an intention to introduce such a mode of proceeding there.

The argument founded upon the interpretation clause of the 32nd & 33rd Vic. c. 29, and which is in force in the Territories saying that "indictment" shall be understood to include "inquisition," and "finding of the indictment" shall include "the taking of an inquisition," is not a strong one. The word inquisition does not necessarily mean a coroner's inquisition, or the finding of a coroner's jury. *Hawkins*, in his work on the *Pleas of the Crown*, when treating of grand juries and indictments says, an indictment is an accusation at the suit of the King by the oaths of twelve men of the same county wherein the offence was committed returned to inquire of all offences in general in the county. "When

Judgment.
Taylor, J.

such accusation is found by a grand jury without any bill brought before them and afterwards reduced to a formed indictment it is called a presentment. And when it is found by jurors returned to inquire of that particular offence only, which is indicted, it is called an inquisition."

That numerous clauses of the procedure Act, especially those which refer to formal proceedings by indictment and other matters incidental thereto, were not introduced into the Territories when other parts of the Act were, furnishes a strong argument that the Legislature never intended to introduce there the formal machinery and modes of dealing with crime in use in the older Provinces.

Against this it is urged that the Act 32 & 33 Vic. c. 30, respecting the duties of justices of the peace out of sessions, in relation to persons charged with indictable offences, was introduced in its entirety, and that Act in the forms appended contains references to grand juries, and provides for prosecutors being bound over to appear before the grand jury. But these forms were framed for the older Provinces where such institutions are found. It was not necessary to change these forms when the Act was introduced, for they are not imperative.

All that the Act says is, that "The several forms in the schedule to this Act contained or forms to the like effect shall be good, valid and sufficient in law." All that the Act itself requires to be done is to bind over the prosecutor and witnesses to appear at the next Court of competent jurisdiction, at which the accused is to be tried, "then and there to prosecute or prosecute and give evidence." So in regard to bail of the accused, it is to be bail conditioned for his appearance at the time and place for trial, and that he will then surrender and take his trial.

In my judgment the Dominion Legislature, has, as it had full power to do, by the 43rd Vic. c. 25, enacted a complete method and system for dealing with and trying in a simple and untechnical manner offences committed in the North-West Territories.

This has been followed in the present case, and under it the prisoner has been regularly charged, tried and sentenced. Judgment. Taylor, J.

No argument for a new trial was founded upon the insufficiency of the evidence to convict the prisoner, but being a capital case I have carefully read it, and in my judgment, upon the evidence he was properly convicted. The appeal should in my judgment be dismissed and the conviction confirmed.

DUBUC, J., delivered an oral judgment, in which he concurred in the judgments read by the other members of the Court.

THE QUEEN v. RIEL (No. 1.).

Criminal law—Appeal—Appellate powers of Manitoba Court—Habeas corpus—Presence of prisoner—Production of record.

The Court of Queen's Bench for Manitoba has no power to send a *habeas corpus* beyond the limits of Manitoba, and the North-West Territories Acts have not extended its power in this respect.

That Court will hear an appeal in the absence of the prisoner.

Upon such an appeal the original papers should be produced; but if the prisoner cannot procure them the Court will act on sworn or certified copies.

[*Court of Q. B. Manitoba in banc, September 2nd, 1885.*

Statement. This was an appeal from the North-West Territories by a prisoner, who had been convicted of high treason, to the Court of Queen's Bench for the Province of Manitoba in banc under the statute in that behalf. By an arrangement, counsel for the Crown and the prisoner appeared in Court. The stipendiary magistrate had sent to the clerk of the Court certain papers which he certified to be "a true record," together with copies of the exhibits put in at the trial certified as true copies.

J. S. Ewart, Q.C., and *F. X. Lemieux* and *Charles Fitzpatrick* (the two latter of the Quebec Bar), for the prisoner.

The statute 43 Vic. c. 25, s. 77, is as follows:—"A person, convicted of any offence punishable by death, may appeal to the Court of Queen's Bench in Manitoba, which shall have jurisdiction to confirm the conviction, or to order a new trial; and the mode of such appeal, and all particulars relating thereto, shall be determined from time to time by ordinance of the Lieutenant-Governor in Council."

No procedure has been provided, and there is therefore no means of procuring either the papers or the attendance of the prisoner, who is entitled to argue his case in person. In *Reg.* v. *Whalen*,[1] the Court of Error and Appeal refused to proceed with an appeal until the papers were properly brought before it.

NOTE: This report is taken from 2 Man. R. 302 by permission of the Benchers of the Law Society of Manitoba.

[1]28 U. C. Q. B. 108.

C. Robinson, Q.C., and *B. B. Osler*, Q.C. (both of the Ontario Bar), and *J. A. M. Aikins*, Q.C., for the Crown. All the requisite papers are before the Court, and the prisoner's counsel must elect whether they will proceed or not. The Crown makes no objection to the regularity of the appeal. Argument.

[*September 2nd, 1885.*]

The judgment of the Court (WALLBRIDGE, C.J., TAYLOR and KILLAM, JJ.) was delivered by WALLBRIDGE, C.J.:—

The statute gives the prisoner the right to appeal, and is silent as to his presence or absence.

The North-West Territories are outside the limits of Manitoba.

This Court has no power to send a *habeas corpus* beyond its own limits, and the statute has made no provision in this respect.

By the statute 43 Vic. c. 25, s. 77, power is given to a person convicted, to appeal to the Court of Queen's Bench in Manitoba, which Court shall have power to confirm the conviction, or to order a new trial. This extent of the power of this Court is wholly statutory. This statute, in effect, directs the prisoner to make this appeal, not merely by appearing by counsel, but by placing the Court in such a position that the Court can hear the appeal. This section also enacts that the mode of the appeal, and all particulars relating thereto, shall be determined from time to time by ordinance of the Lieutenant-Governor in Council, *i.e.*, of the North-West Territories.

No such regulations have been made, and this Court has no power to compel the making of them.

The appellant desires to know upon what proceedings his appeal is to be heard. We are of opinion that the original papers should be before us.

If the prisoner has applied for them and they have been refused to him, the court will receive as sufficient, sworn copies, or copies properly certified.

The prisoner does not show that he has made any effort to get these papers, or that they have been refused to him.

Judgment.

Wallbridge, C.J.

Counsel for the Crown say they are ready to go on now, and argue the appeal upon the papers already transmitted by the stipendiary magistrate before whom the prisoner was tried.

Counsel for the prisoner decline to concur in this mode.

We are of opinion that the original papers, *i.e.*, the proceedings and evidence taken and had on the trial, should be transmitted to this Court. If it be shown that these have been demanded and cannot be had, then the Court will receive verified copies of them.

It is the duty of the person appealing to supply this Court with the necessary papers upon which the appeal is to be heard, or do all in his power for that purpose. The statute before cited has given the prisoner the right to appeal to this Court, which has no power to send its process outside the limits of the province. We are, therefore, of opinion that we cannot send a *habeas corpus* to bring the prisoner before us; nevertheless, we are by law obliged to hear his appeal.

Counsel for the prisoner have given the stipendiary magistrate notice of their intention to appeal, and he has sent to this Court certain papers, which upon inspection appear to be copies, but are certified to as a true and correct record of the proceedings at the trial of Louis Riel upon the charges set forth therein; and after evidence and address of counsel, he concludes as follows: "Certified a true record," and he annexes thereto copies of the exhibits. Again is appended a certificate—"Certified true copies."

If the prisoner desires time to procure the original papers the Court will adjourn for a sufficient length of time to enable him to get them.

———

THE QUEEN v. RIEL (No. 2).

1. In the North-West Territories a stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, have power to try a prisoner charged with treason. The Dominion Act, 43 Vic. c. 25 is not *ultra vires*.
2. The information in such case (if any information be necessary) may be taken before the stipendiary magistrate alone. An objection to the information would not be waived by pleading to the charge after objection taken.
3. At the trial in such case the evidence may be taken by a shorthand reporter.
4. A finding of "guilty" will not be set aside upon appeal if there be any evidence to support the verdict.
5. To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated, but plenary powers of legislation. Insanity as a defence in criminal cases, discussed.

[*Court of Q. B. Manitoba in banc, September 9th, 1885.*

Statement.

This was an appeal from the North-West Territories to the Court of Queen's Bench for the Province of Manitoba in banc, under the statute in that behalf, by a prisoner who had been convicted of high treason.

J. S. Ewart, Q.C., *F. X. Lemieux* and *Charles Fitzpatrick* (the two latter of the Quebec Bar), for the prisoner.

C. Robinson, Q.C., and *B. B. Osler*, Q.C. (both of the Ontario Bar), and *J. A. M. Aikins*, Q.C., for the Crown.

[*September 9th, 1885.*]

WALLBRIDGE, C.J.—The prisoner was tried before Hugh Richardson, Esquire, a stipendiary magistrate in and for the North-West Territories, in Canada, upon a charge of high treason. The trial took place on the twentieth day of July, A.D. 1885, at Regina, in that Territory, under the Dominion Act 43 Vic. c. 25, known as "The North-West Territories Act, 1880."

Section 1 of the Act declares, that the territories known as Rupert's Land and the North-West Territory (excepting the Provinces of Manitoba and Keewatin), shall continue to be styled and known as "The North-West Territories."

NOTE: This report is taken from 2 Man. R. 321, by permission of the Benchers of the Law Society of Manitoba.

Judgment.

Wallbridge, C.J.

Manitoba was erected into a separate Province by the Dominion Act 33 Vic. c. 3, (12th May, 1870,) intituled "An Act to amend and continue the Act 32 & 33 Vic. c. 3, and to establish and provide for the government of the Province of Manitoba." Since which time Manitoba has formed a distinct Province, with regularly organized Government, separate Legislature and Courts. By an Imperial Act passed in 34 & 35 Vic. c. 28, cited as "The British North America Act, 1871," the Act 33 Vic. c. 3, providing for the government of the Province of Manitoba, was declared valid and effectual, from the day of its having received the Royal assent.

The North-West Territories Act, 1880, before referred to, under the head "Administration of Justice," section 74, empowers the Governor to appoint, under the Great Seal, one or more fit and proper persons, barristers-at-law or advocates of five years standing, in any of the Provinces, to be and act as Stipendiary Magistrates within the North-West Territories. And by section 76, each stipendiary magistrate shall have magisterial and other functions appertaining to any justice of the peace, or any two justices of the peace; and one stipendiary magistrate is by that section, and the four following sub-sections, given power to try certain crimes therein mentioned, in a summary way, without the intervention of a jury. For crimes thus enumerated, the prisoner can be punished only by fine or by fine and imprisonment, or by being sentenced to a term in the penitentiary. Sub-section 5 of section 76, however, under which this prisoner was tried, is in the following words:—

"In all other criminal cases, the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge against any person or persons, for any crime."

Sub-section 10 of the said section is in these words:—

"Any person arraigned for treason or felony may challenge peremptorily, and without cause, not more than six persons." And by sub-section 11, "The Crown may peremptorily challenge not more than four jurors."

Judgment.

Wallbridge, C.J.

If any doubt were entertained whether this Act was intended to extend to the crime of treason, this section would explain it; as by it an alteration is made in the number of peremptory challenges allowed to the Crown, reducing them to four.

By section 77 of that Act, it is enacted, that "Any person convicted of any offence punishable by death, may appeal to the Court of Queen's Bench of Manitoba, which shall have jurisdiction to confirm the conviction or to order a new trial, and the mode of such appeal, and all particulars relating thereto, shall be determined from time to time by ordinance of the Lieutenant-Governor in Council."

This prisoner was arraigned, and pleaded not guilty, and was tried before the said Hugh Richardson, Esquire, a stipendiary Magistrate, and Henry Le Jeune, Esquire, a justice of the peace, with the intervention of a jury of six jurymen.

The case was tried upon the plea of not guilty to the charge. The prisoner was defended by able counsel, and all evidence called which he desired. No complaint is now made as to unfairness, haste, or want of opportunity of having all the evidence heard which he desired to have heard. The jury returned a verdict of guilty, and recommended the prisoner to mercy. Upon this state of circumstances, the case came before the Court of Queen's Bench for Manitoba, by way of appeal, under section 77 of the North-West Territories Act, hereinbefore mentioned. It will be observed that the power of this Court upon appeal is limited to the disposition of the case in two ways, viz.: either, in the words of the statute, "to confirm the conviction, or to order a new trial." We can dispose of it only in one of these two ways.

Upon the argument before this Court no attempt was, or could be, made to show that the prisoner was innocent of the crime charged; in fact, the evidence as to guilt is all one way. The witnesses called upon the defence were so called upon the plea of insanity. The whole evidence was laid before us, and upon examining that evidence I think counsel very properly declined to argue the question of the guilt or innocence of the prisoner.

Judgment.

Wallbridge, C.J.

The argument before us was confined to the constitutionality of the Court in the North-West Territory, and to the question of the insanity of the prisoner. As to the question of constitutionality, or jurisdiction, in my opinion the Court before which the prisoner was tried does sustain its jurisdiction, under and by the Imperial Act 31 & 32 Vic. c. 105, s. 5, being The Rupert's Land Act, 1868, by which power is given to the Parliament of Canada to make, ordain and establish laws, institutions and ordinances, and to constitute such Courts and officers as may be necessary for the peace, order, and good government of Her Majesty's subjects therein, meaning Rupert's Land, being the country embraced within that Territory within which this crime was committed. This statute alone confers upon the Dominion Parliament the power both to make laws and establish Courts. Secondly, by the Dominion Act 32 & 33 Vic. c. 3, intituled "An Act for the temporary government of Rupert's Land, and the North-West Territories, when united with Canada," passed in pursuance of section 146 of the British North America Act, 1867, by which both Rupert's Land and the North-West Territory were declared to be comprehended under the one designation of "The North-West Territories," ample power is given to make, ordain, and establish laws, institutions and ordinances for the peace, order and good government of Her Majesty's subjects therein; and section 6 of that Act confirms the officers and functionaries in their offices, and in all the powers and duties as before then exercised. This Act, if *ultra vires* of the Dominion Parliament, at that time, was validated by the Imperial Act 34 & 35 Vic. c. 28, intituled "An Act respecting the establishment of Provinces in the Dominion of Canada," in which the 32 & 33 Vic. c. 3, is in express words made valid, and is declared "to be, and be deemed to have been, valid and effectual for all purposes whatsoever, from the date at which it received the assent (22nd of June, 1869), in the Queen's name, of the Governor-General of the Dominion of Canada." In my judgment, under both these Acts the Courts in the North-West Territories are legally established, and whether the power were a

Judgment.

Wallbridge, C.J.

delegated power or a plenary power, appears to me indifferent. The question is asked, could the Dominion Parliament legislate on the subject of treason? That question does not arise, because the Imperial Act validates the Dominion Act, and thus the Act has the full force of an Imperial Act.

The Imperial Act has, by express words, made the Dominion Act "valid and effectual for all purposes whatever from its date," and it thus became in effect an Imperial Act, and has all the effect and force which the Imperial Parliament could give it.

The Dominion Parliament thus had power to make the enactment called "The North-West Territories Act of 1880," and the prisoner was tried and convicted in accordance with the provisions of this latter Act. Of the regularity of those proceedings no complaint is made except upon one point, which is that the information or charge upon which the prisoner was tried does not show that the information was taken before the stipendiary magistrate and a justice of the peace, and it is contended that this objection is fatal to the form of the information. By section 76 of the N. W. T. Act, the stipendiary magistrate is declared to have the magisterial and other functions of a justice, or any two justices of the peace. An information could not only have been laid before him, as it in fact was, but could have been laid before, and taken by, a single justice of the peace. But if what is meant by the objection is, that the charge, for that is the word used in that sub-section of the statute under which the prisoner was tried, should show on its face that this charge was tried before a stipendiary magistrate and a justice, then it is answered by the fact that he was so tried before the stipendiary magistrate and Henry Le Jeune, a justice of the peace.

The fifth sub-section of the statute thus having been complied with as to the form of the charge, the law is, that inferior Courts must show their jurisdiction on the face of their proceedings; but the contrary is the law in the case of superior Courts. A Court having jurisdiction to try a man for high treason and felonies punishable with death, cannot

Judgment.
Wallbridge, C.J.

be called an inferior Court; and this Court has all the incidents appertaining to a superior Court, and is the only Court in the North-West Territories.

The Court constituted under the N. W. T. Act of 1880, being a superior Court, need not show jurisdiction on the face of its proceedings. The authorities cited to maintain the position were of inferior jurisdictions and are not applicable.

On the 7th May, 1880, the Dominion Government, by the N. W. T. Act, constituted the Court of Queen Bench of Manitoba a Court of Appeal in respect to offences punishable with death.

It is the prisoner, however, who appeals to us, not the Crown, and he can hardly be heard to object to the jurisdiction to which he appeals.

It is further urged that the stipendiary magistrate did not take, or cause to be taken, in writing, full notes of the evidence and other proceedings upon the trial.

It is true, the evidence produced to us appears to have been taken by a short-hand writer; whether the stipendiary magistrate took, or caused to be taken, other notes after the trial, in pursuance of sub-section 7 of section 76 of the Act, does not appear.

It is the prisoner, for it is his appeal, who furnishes this Court with the evidence upon which the appeal is heard, and the Crown does not object to it.

Unless expressly required by statute, the judge who tries a criminal case is not bound to take down the evidence, and when he is required to do so, it is in order that it may be forwarded to the Minister of Justice. Sub-section five, under which the trial took place, says nothing about the evidence, but simply that the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge, against any person or persons, for any crime.

It is sub-section seven which directs the stipendiary magistrate to take or cause to be taken, in writing, full notes

Judgment.

Wallbridge, C.J.

of the evidence and other proceedings thereat; and sub-section eight enacts, that when a person is convicted of a capital offence, and is sentenced to death, the stipendiary magistrate shall forward to the Minister of Justice full notes of the evidence, with his report upon the case.

Suppose the notes of the evidence were taken by a short-hand reporter, and afterwards extended by him, does not the stipendiary magistrate, in the words of the statute, "cause to be taken in writing full notes of the evidence?"

I am of opinion that, *for the trial*, the stipendiary magistrate is not bound to take down the evidence, but he is bound to do so to forward the same to the Minister of Justice.

In my opinion there is no departure from the directions of the statute. He does cause them to be taken. The directions, first to take them by short-hand, and then to extend them by writing, is all one direction, or causing to be taken. This seems to me a reasonable compliance with the requirements of sub-section seven. Is it not too rigid a reading of the statute to say that the writing must be done whilst the trial progresses? Sub-section eight does not say a copy shall be sent to the Minister of Justice, but "full notes of the evidence shall be sent to the Minister of Justice."

Suppose the notes of the evidence were burned by accident—would the prisoner be denied his appeal?

The Crown has not objected to the evidence as furnished by the prisoner. The exception is purely technical, and in my opinion is not a valid one.

A good deal has been said about the jury being composed of six only. There is no law which says that a jury shall invariably consist of twelve, or of any particular number. In Manitoba, in civil cases, the jury is composed of twelve, but nine can find a verdict. In the North-West Territories Act, the Act itself declares that the jury shall consist of six, and this was the number of the jury in this instance. Would the stipendiary magistrate have been justified in impanelling twelve, when the statute directs him to impanel six only?

Judgment.

Wallbridge, C.J.

It was further complained that this power of life and death was too great to be entrusted to a stipendiary magistrate.

What are the safeguards?

The stipendiary magistrate must be a barrister of at least five years standing. There must be associated with him a justice of the peace, and a jury of six. The Court must be an open public Court. The prisoner is allowed to make full answer and defence by counsel.

Section 77 permits him to appeal to the Court of Queen's Bench in Manitoba, when the evidence is produced, and he is again heard by counsel, and three judges re-consider his case. Again, the evidence taken by the stipendiary magistrate, or that caused to be taken by him, must, before the sentence is carried into effect, be forwarded to the Minister of Justice; and sub-section eight requires the stipendiary magistrate to postpone the execution, from time to time, until such report is received, and the pleasure of the Governor thereon is communicated to the Lieutenant-Governor. Thus, before sentence is carried out, the prisoner is heard twice in Court, through counsel, and his case must have been considered in Council, and the pleasure of the Governor thereon communicated to the Lieutenant-Governor.

It seems to me the law is not open to the charge of unduly or hastily confiding the power in the tribunals before which the prisoner has been heard. The sentence, when the prisoner appeals, cannot be carried into effect until his case has been three times heard, in the manner above stated.

Counsel then rest the prisoner's case upon the ground of insanity, and it is upon that latter point only that the prisoner called witnesses.

The jury by their finding have negatived this ground, and the prisoner can only ask, before us, for a new trial, we we have no other power of which he can avail himself. The rule at law in civil cases is, that the evidence against the verdict must greatly preponderate before a verdict will be set aside; and in criminal cases in Ontario, while the law (now repealed) allowed applications for new trials, the rule was

more stringent — a verdict in a criminal case would not be set aside if there was evidence to go to the jury, and the Judge would not express any opinion upon it if there was evidence to go to the jury, if their verdict could not be declared wrong. I have carefully read the evidence, and it appears to me that the jury could not reasonably have come to any other conclusion than the verdict of guilty; there is not only evidence to support the verdict, but it vastly preponderates.

Judgment. Wallbridge, C.J.

It is said the prisoner labored under the insane delusion that he was a prophet, and that he had a mission to fulfil. When did this mania first seize him, or when did it manifest itself? Shortly before he came to Saskatchewan he had been teaching school in Montana. It was not this mania that impelled him to commence the work which ended in the charge at Batoche. The original idea was not his—did not originate with him. It is argued, however, that his demeanor changed in March, just before the outbreak. Before then he had been holding meetings, addressing audiences, and acting as a sane person. His correspondence with General (now Sir Frederick) Middleton betokens no sign of either weakness of intellect or of delusions. Take the definition of this disease, as given by the experts, and how does his conduct comport therewith. The maniac imagines his delusions real, they are fixed and determinate, the bare contradiction causes irritability.

The first witness called by the prisoner, the Rev. Father Alexis André, in his cross-examination says as follows:—

Q. Will you please state what the prisoner asked of the Federal Government.

A. I had two interviews with the prisoner on that subject.

Q. The prisoner claimed a certain indemnity from the Federal Government. Didn't he?

A. When the prisoner made his claim, I was there with another gentleman, and he asked $100,000. We thought that was exorbitant, and the prisoner said, "Wait a little, I will take at once $35,000 cash."

Judgment.

Wallbridge, C.J.

Q. Is it not true the prisoner told you he himself was the half-breed question?

A. He did not say so in express terms, but he conveyed that idea. He said, "If I am satisfied the half-breeds will be."

The witness continues: I must explain this. This objection was made to him, that even if the Government granted him the $35,000, the half-breed question would remain the same; and he said, in answer to that, "If I am satisfied, the half-breeds will be."

Q. Is it not a fact he told you he would even accept a less sum than the $35,000?

A. Yes; he said, "Use all the influence you can, you may not get all that, but get all you can, and if you get less, we will see."

This was the cross-examination of a witness called by the prisoner.

To General Middleton, after prisoner's arrest, he speaks of his desire to negotiate for a money consideration.

In my opinion, this shows he was willing and quite capable of parting with this supposed delusion, if he got the $35,000.

A delusion must be fixed, acted upon, and believed in as real, overcome and dominate in the mind of the insane person. An insanity which can be put on or off at the will of the insane person, according to the medical testimony, is not insanity at all in the sense of mania.

Dr. Roy testified to his having been confined in the Beauport Asylum at Quebec, from which he was discharged in January, 1878. His evidence was so unsatisfactory, the answers not readily given, and his account of prisoner's insanity was given with so much hesitation, that I think the jury were justified in not placing any great reliance upon it.

Dr. Clarke, of the Toronto Asylum, as an expert, was not sufficiently positive to enable any one to form a definite opinion upon the question of the sanity of the prisoner.

Dr. Wallace, of the Hamilton Asylum; Dr. Jukes, the medical officer, who attended the prisoner from his arrival at

Judgment.

Wallbridge C.J.

Regina; General Middleton, and Captain Young—these all failed to find insanity in his conduct or conversation. Neither could the Rev. Mr. Pitblado, who had a good opportunity of conversing with him.

In my opinion, the evidence against his insanity very greatly preponderates. Besides, it is not every degree of insanity or mania that will justify his being acquitted on that ground. The rule in that respect is most satisfactorily laid down in the *Macnaghten* case.[1] Notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing some supposed grievances or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law.

I think the evidence upon the question of insanity shows that the prisoner did know that he was acting illegally, and that he was responsible for his acts.

In my opinion, a new trial should be refused, and the conviction confirmed.

TAYLOR, J.—This is an appeal brought under the provisions of section 77 of the North-West Territories Act, 1880, Dom. Stat. 43 Vic. c. 25, by Louis Riel, from a judgment rendered against him at Regina, in the North-West Territories.

On the 20th day of July last the appellant was charged before Hugh Richardson, Esq., Stipendiary Magistrate, and Henry Le Jeune, Esq., a Justice of the Peace, sitting as a Court under the provisions of section 76 of the above-mentioned statute, with the crime of treason. After a plea by the appellant to the jurisdiction of the Court, and a demurrer to the sufficiency in law of the charge or indictment, had both been overruled, the appellant pleaded not guilty. The trial was then, upon his application, adjourned for some days to procure the attendance of witnesses on his behalf. On

[1] 10 Cl. & F. 200; 8 Scott N. R. 595; 1 Car. & K. 130.

Judgment.
Taylor, J.

the 28th of July the trial was proceeded with, and a large number of witnesses were called and examined. At the trial the appellant was defended by three gentlemen of high standing at the bar of the Province of Quebec. Judging from the arguments addressed to this Court by two of these gentlemen on the present appeal, I have no hesitation in speaking of them as learned, able and zealous, fully competent to render to the appellant all the assistance in the power of counsel to afford him. On the 1st of August, the case having been left to the jury, they returned a verdict of guilty, and thereupon sentence of death was pronounced. From that he brings his appeal.

It was not urged before this Court, as it was on the trial at Regina, that the appellant should have been sent for trial to the Province of Ontario, or to the Province of British Columbia, instead of his being brought to trial before a stipendiary magistrate and a justice of the peace in the North-West Territories.

This point not having been argued, it is unnecessary to consider whether the Imperial Acts 43 Geo. III. c. 138; 1 & 2 Geo. IV. c. 66, and 22 & 23 Vic. c. 26, are, or are not now in force. Only a passing allusion was made to them by counsel. The first of them was repealed by the Statute Law Revision Act, 1872 (35 & 36 Vic. c. 63), and part of the second was repealed by the Statute Law Revision Act, 1874 (37 & 38 Vic. c. 35). At all events, the Imperial Government has never, under the authority of these, appointed in the North-West Territories justices of the peace, nor established Courts, while under other statutes hereafter referred to, wholly different provision has been made for dealing with crime in those Territories, so that they must be treated as obsolete if not repealed.

It was contended by the appellant's counsel that the Imperial statutes relating to treason, the 25 Edw. III. c. 2; 7 Wm. III. c. 3; 36 Geo. III. c. 7, and 57 Geo. III. c. 6, which define what is treason, and provide the mode in which it is to be tried, including the qualification of jurors, their number,

and the method of choosing them, are in force in the North-West Territories. And it was argued, that in legislating for the North-West Territories, the people of which are not represented in the Dominion Parliament, that Parliament exercises only a delegated power, which must be strictly construed, and cannot be exercised to deprive the people there of rights secured to them as British subjects by Magna Charta, or in any way alter these old statutes to their prejudice. Now of this argument against any change being made in rights and privileges secured by old charters and statutes, a great deal too much may be made.

Judgment. Taylor, J.

That these rights and privileges, wrested by the people from tyrannical sovereigns many centuries ago, were and are valuable, there can be no question. Were the sovereign at the present day endeavouring to deprive the people of any of these, for the purposes of oppression, it would speedily be found that the love of liberty is as strong in the hearts of British subjects to-day as it was in the hearts of their forefathers, and they would do their utmost to uphold and defend rights and privileges purchased by the blood of their ancestors. But it is a very different thing when the legislature, composed of representatives of the people, chosen by them to express their will, deem it expedient to make a change in the law, even though that change may be the surrender of some of these old rights and privileges.

That the Dominion Parliament represents the people of the North-West Territories cannot, I think, be successfully disputed. It may be, that the inhabitants of these Territories are not represented in parliament by members sitting there chosen directly by them, but these Territories form part of the Dominion of Canada, the people in them are citizens of Canada, not, as it was put by counsel, neighbours, just in the same way as all the people of this Dominion are part and parcel of the Great British Empire. The people of these Territories are represented by the Dominion Parliament, just as the inhabitants of all the colonies are represented by the House of Commons of England. Legislation for these Territories by the Dominion Parliament, must indeed precede their being directly represented there. Before

Judgment. Taylor, J.

they can be so, the number of representatives they are to have, the qualification of electors, and other matters must be provided for by the Dominion Parliament itself or by Local Legislatures created by that Parliament.

The question then is, what powers of legislation with reference to the North-West Territories have been conferred upon the Dominion Parliament by Imperial authority. In the exercise of that authority, whatever it may be, it is not exercising a delegated authority.

To found an argument as to Parliament exercising a delegated authority, upon the language used by American writers, or upon judicial decisions in the United States, appears to me to be wholly fallacious. In the States of the American Union the theory is, that the sovereign power is vested in the people, and they, by the Constitution of the State, establishing a legislature, delegate to that body certain powers, a limited portion of the sovereign power which is vested in the people. The people, however, still retain certain common law rights, the authority to deal with which they have not delegated to the legislative body. Hence the language used by Bronson, J., in *Taylor* v. *Porter*.[2] "Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government it can only exercise such powers as have been delegated to it." It is in the light of this theory that the language of Mr. Justice Story in *Wilkinson* v. *Leland*[3] must be read, and by which it must be construed. The case of the British Parliament is quite different, "in which," as Blackstone says (*Blackstone*, Christian's Ed., Vol. I., p. 147), "the legislative power and (of course) the supreme and absolute authority of the State, is vested by our constitution." And again, at p. 160, he says, "It hath sovereign and uncontrollable authority in the making, conferring, enlarging, restraining, abrogating, repealing, revising and expounding of laws, concerning matters of all possible denominations * * * * this being the place where that absolute despotic power

[2] 4 Hill, p. 144. [3] 2 Peters, 627.

which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms." Judgment. Taylor, J.

To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated but plenary powers of legislation, though it cannot do anything beyond the limits which circumscribe these powers. When acting within them, as was said by Lord Selborne in *The Queen* v. *Burah*,[4] speaking of the Indian Council, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature as those of that parliament itself. That the Dominion Parliament has plenary powers of legislation in respect of all matters entrusted to it was held by the Supreme Court in *Valin* v. *Langlois*,[5] and *City of Fredericton* v. *The Queen*.[6] So also, the Judicial Committee of the Privy Council have held, in *Hodge* v. *The Queen*,[7] that the Local Legislatures when legislating upon matters within section 92 of the British North America Act, possess authority as plenary and as ample, within the limits prescribed by that section, as the Imperial Parliament in the plentitude of its power possessed and could bestow.

The power of the Dominion Parliament to legislate for the North-West Territories seems to me to be derived in this wise, and to extend thus far. By section 146 of the British North America Act it was provided, that it should be lawful for Her Majesty, with the advice of Her Privy Council, "on address from the Houses of the Parliaments of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order-in-Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

[4] 3 App. Ca. 889. [5] 3 S. C. R. 1. [6] 3 S. C. R. 505.
[7] 9 App. Ca. 117; 53 L. J. P. C. 1; 50 L. T. 301.

Judgment.
Taylor, J.

In 1867, the Dominion Parliament presented an address praying that Her Majesty would be pleased to unite Rupert's Land and the North-Western Territory with the Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government. The address also stated, that in the event of Her Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada would be ready to provide that the legal rights of any corporation, company or individual within the same should be respected and placed under the protection of Courts of competent jurisdiction.

The following year, 1868, the Rupert's Land Act, 31 & 32 Vic. c. 105, was passed by the Imperial Parliament. For the purposes of the Act the term Rupert's Land is declared to include the whole of the lands and territories held, or claimed to be held, by the Governor and Company of Adventurers of England trading into Hudson's Bay. The Act then provides for a surrender by the Hudson's Bay Company to Her Majesty of all their lands, rights, privileges, &c., within Rupert's Land, and provides that the surrender shall be null and void unless within a month after its acceptance Her Majesty shall, by Order-in-Council, under the provisions of section 146 of the British North America Act, admit Rupert's Land into the Dominion. The fifth section provides that it shall be competent for Her Majesty, by any Order-in-Council, to declare that Rupert's Land shall be admitted into and become part of the Dominion of Canada; "and thereupon it shall be lawful for the Parliament of Canada, from the date aforesaid, to make, ordain, and establish within the land and territory so admitted as aforesaid, institutions, and ordinances, and to constitute such courts and officers as may be necessary for the peace, order, and good government of Her Majesty's subjects and others therein."

In 1869, a second address was presented, embodying certain resolutions and terms of agreement come to between Canada and the Hudson's Bay Company, and praying that Her Majesty would be pleased to unite Rupert's Land on the

terms and conditions expressed in the foregoing resolutions, and also to unite the North-Western Territory with the Dominion of Canada, as prayed for, by and on the terms and conditions contained in the first address. Judgment. Taylor, J.

The same year the Dominion Parliament passed an Act, 32 & 33 Vic. c. 3, for the temporary government of Rupert's Land and the North-Western Territory, when united with Canada, which was to continue in force until the end of the next session of Parliament.

The following year, 1870, another Act was passed, 33 Vic. c. 3, which amended and continued the former Act, and which formed out of the North-West Territory this Province of Manitoba. The last section of this Act re-enacted, extended, and continued in force the 32 & 33 Vic. c. 3 until the 1st day of January, 1871, and until the end of the session of Parliament then next ensuing.

On the 23rd of June, 1870, Her Majesty by Order-in-Council, after reciting the addresses presented by the Parliament of Canada, ordered and declared "that from and after the 15th day of July, 1870, the North-Western Territory shall be admitted into, and become part of, the Dominion of Canada, upon the terms and conditions set forth in the first hereinbefore recited address, and that the Parliament of Canada shall, from the day aforesaid, have full power and authority to legislate for the future welfare and good government of the said territory."

By virtue of that Order-in-Council and of the 31 & 32 Vic. c. 105, it seems to me, that on the 15th of July, 1870, the Parliament of Canada became entitled to legislate and to make, ordain and establish within the North-West Territories all such laws, institutions, and ordinances, civil and criminal, and to establish such Courts, civil and criminal, as might be necessary for peace, order, and good government therein. The language used is even wider than is used in the 91st section of the British North America Act, which defines the legislative authority of the Parliament of Canada, extending by sub-section 27 to the criminal law; while there

Judgment.
Taylor, J.

is not as there the restriction, "except the constitution of Courts of criminal jurisdiction," but on the contrary express authority to constitute Courts without any limitation.

That by that Order-in-Council and Act the authority thereby given extends over that part of the North-West Territory where the events occurred out of which the charge against the appellant arose, there can be no doubt. By the terms of the agreement between Canada and the Hudson's Bay Company, the latter were to retain certain lands, and in a schedule annexed to the Order-in-Council the exact localities are mentioned. In the Saskatchewan District the names Edmonton, Fort Pitt, Carlton House, and other places appear.

It is true that in 1871, another Act was passed by the Imperial Parliament, the 34 & 35 Vic. c. 28, spoken of by Mr. Fitzpatrick as "The Doubts-Removing Act," but I cannot come to the conclusion which he seeks to draw from that fact, and from its confirming two Acts of the Canadian Parliament, that the former Act, 31 & 32 Vic. c. 105, did not give the Dominion Parliament full power to legislate for the North-West Territory. The former Act provided for the admission of Rupert's Land and the North-Western Territory into the Dominion, but was silent as to the division of the Territory so admitted, into Provinces, or as to their representation in parliament. That it was doubts on these matters which the Act was intended to remove is shown by the preamble. It is in these words, "Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament; and it is expedient to remove such doubts and to vest such powers in the said Parliament." The second and third sections then provide for the establishment of Provinces, for, in certain cases, the alteration of their limits, and for their representation in Parliament. The fourth section, in general terms, says, "the Parliament of Canada may from time to time make provision for the administration, peace, order, and good government, of any territory, not for

the time being included in any Province"; a power which Parliament already had in the most ample manner. Then follows a confirmation of the Canadian Acts 32 & 33 Vic. c. 3, and 33 Vic. c. 3. That the Act should contain such a confirmation is easily accounted for. The Imperial Act 31 & 32 Vic. c. 105, s. 5, provided that it should be competent for Her Majesty, by Order-in-Council, "to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted," &c., and "thereupon it shall be lawful for the Parliament of Canada, from the date aforesaid," to make laws, &c.

The Order-in-Council was made on the 23rd of June, 1870, and the date therein mentioned was the 15th of July, 1870. Now, a reference to the two Canadian Acts shows, that the 32 & 33 Vic. c. 3, was assented to on the 22nd of June, 1869, and the 33 Vic. c. 3, on the 12th May, 1870. So, in fact, they were both passed before the time arrived at which the Parliament of Canada had the right to legislate respecting the North-West. But they had been acted upon, and the Province of Manitoba actually organized, therefore they were confirmed and declared valid from the date at which they received the assent of the Governor-General.

Acting under the authority given in the most ample manner by these Acts of the Imperial Parliament, and, as it seems to me, in the exercise not of a delegated authority, but of plenary powers of legislation, the Dominion Parliament enacted the North-West Territories Act, 1880 (43 Vic. c. 25) which provides, among other things, for the trial of offences committed in these Territories in the manner there pointed out.

The appointment of stipendiary magistrates, who must be barristers-at-law or advocates of five years' standing, is provided for by the 74th section.

By the 76th section, each stipendiary magistrate shall have power to hear and determine any charge against any person for any criminal offence alleged to have been committed within certain specified territorial limits. These words are quite wide enough to include the crime of treason. The various sub-sections of section 76 provide for the mode

Judgment. Taylor, J.

of trial in certain classes of offences. Those specified in the first four sub-sections are to be tried by the stipendiary magistrate in a summary way without the intervention of a jury. Then the 5th sub-section says "In all other criminal cases the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge against any person or persons for any crime." Again the words are quite wide enough to cover the crime of treason.

Counsel for the appellant contended that from the word treason being used in the 10th sub-section, and no where else in the Act, it must be inferred that the Act did not intend to deal with the crime of treason, except in the matter of challenging jurors, which is dealt with in that sub-section. The suggestion made by Mr. Robinson is, however, the more reasonable one, namely, that treason is there named advisedly, to put beyond doubt, there being only 36 jurors summoned, that a prisoner charged with that particular crime should not be entitled to exercise the old common law right, which a prisoner charged with treason had, of challenging, peremptorily and without cause, thirty-five jurors.

The question must next be considered, whether the proceedings against the appellant have been conducted according to the requirements of this Act.

The record before the Court shows that the trial took place before a stipendiary magistrate and a justice of the peace, with a jury of six elected and sworn after the appellant had exercised his right of challenging several jurors.

Two objections to the regularity of the proceedings are, however, raised. The first of these is, that the information upon which the appellant was charged was exhibited before the stipendiary magistrate alone, and not before the stipendiary magistrate and a justice of the peace. An inspection of the document shows the fact to be so. But is it necessary that the information should be exhibited before both?

The powers and jurisdiction of stipendiary magistrates are set out in section 76 of the North-West Territories Act, 1880.

Judgment.
Taylor, J.

The first part of the section says, each stipendiary magistrate shall have the magisterial and other functions appertaining to any justice of the peace, or any two justices of the peace, under any laws or ordinances which may from time to time be in force in the North-West Territories. That is a distinct proposition. By the schedule annexed to the Act one of the laws in force there is the 32 & 33 Vic. c. 30. Under the 1st section of that Act it is clear that a charge or complaint that any person has committed, or is suspected to have committed treason, may be exhibited before one justice of the peace, and a warrant for his apprehension issued by such justice.

Section 76 then goes on further, that each stipendiary magistrate "shall also have power to hear and determine any charge against any person for any criminal offence," &c. In all other criminal cases than those specified in the first four sub-sections he and a justice of the peace, with the intervention of a jury of six, may try the charge. It is only when the charge comes to be tried that the presence of a justice of the peace along with him is necessary. To hold that the words "try any charge" include the exhibiting of the information, or that it must be so, before both a stipendiary magistrate and a justice of the peace, seems to me to involve the holding also, that for the purpose of exhibiting the information there is also necessary the intervention of a jury of six. Now the jury cannot be called into existence until the charge has been made, the accused arraigned upon it, and he has pleaded to it.

The case of *Reg.* v. *Russell*[s] was cited in support of this objection, but, as I read that case, it is a direct authority against it. An information was exhibited under the Act for the General Regulation of the Customs, before a single justice, and was dismissed by the justices before whom the charge was brought for trial, on the ground that it should have been exhibited before two justices, in conformity with section 82 of the Act for the Prevention of Smuggling. That section provided that all penalties and forfeitures incurred or

[s] 13 Q. B. 237; 3 New Sess. Ca. 368; 18 L. J. M. C. 106; 13 Jur. 259.

Judgment.
Taylor, J.

imposed by any Act relating to the customs should and might be "sued for, prosecuted, and recovered by action of debt, bill, plaint, or information in any of Her Majesty's Courts of Record," &c., "or by information before any two or more of Her Majesty's Justices of the Peace," &c. A rule calling on the justices to show cause why a mandamus should not issue commanding them to proceed to adjudicate upon the information, was obtained. Upon the return of the rule, counsel for the justices contended, that the provision that the penalty may be "sued for," by information, must refer to the commencement of the proceeding, in like manner as in the provision that it may be "sued for" by action. But the Court made the rule for a mandamus absolute, Lord Denman, C.J., who delivered the judgment of the Court, saying, "The 82nd section of the Act does not necessarily mean that the information must be laid before two justices, but only that it must be heard before two justices."

The next objection is, that at the trial full notes of the evidence and proceedings thereat, in writing, were not taken, as required by the statute, section 76, sub-section 7. What was actually done, as it is admitted on both sides, was, that the evidence and a record of the proceedings were taken down at the time by stenographers appointed by the magistrate, and they afterwards extended their notes.

The objection cannot be, that the magistrate did not himself take notes of the evidence and proceedings, for the statute says he shall "take, or cause to be taken," full notes, &c. It must be that the notes were taken by stenographic signs or symbols.

No doubt, enactments regulating the procedure in Courts seem usually to be imperative, and not merely directory. *Maxwell on Statutes*, 456; *Taylor* v. *Taylor*.[9] But the force of the objection depends upon what is meant by the word "writing." In proceeding to consider it, I am not conscious of being in any way prejudiced, from the circumstances that I am myself a stenographer. The statute does not specify

[9] 45 L. J. Ch. 373; 1 Ch. D. 426; Affid. 45 L. T. Ch. 848; 3 C. L. D. 145.

Judgment.

Taylor, J.

any method or form of writing, as that which is to be adopted. "Writing" is, in the Imperial Dictionary, said to be "The act or act of forming letters or characters, on paper, parchment, wood, stone, the inner bark of certain trees, or other material, for the purpose of recording the ideas which characters and words express, or of communicating them to others by visible signs." In the same work, "to write," is defined thus, "To produce, form or make by tracing, legible characters expressive of ideas." Is not stenographic writing the production of "legible characters expressive of ideas?" The word is formed from two Greek words "stenos" and "grapho," and means simply "close writing." If the objection is a good one, it must go the length of insisting that the notes must be taken down in ordinary English characters, in words at full length. If any contractions or abbreviations were made, the objection would have quite as much force as it has to the method adopted in this case.

Re Stanbro [10] was an entirely different case. It was one under the Extradition Act, and the evidence was taken in shorthand, as is usual on a trial. The Court held, that the reporter's notes extended, which were produced before it, on the argument on the return of a writ of *habeas corpus* obtained by the prisoner, could not be looked at, and that there was really no evidence. But the Court so held, because the provisions of the 32 & 33 Vic. c. 30, s. 39, were applicable to the mode in which the evidence should be taken in extradition proceedings. That section requires the depositions to be put in writing, read over to the witness, signed by him, and also signed by the justice taking the same. The depositions in the case in question had not been read over to the witnesses, nor signed by them; nor were they signed by the Judge who took them, so that clearly the requirements of the Act had not been complied with.

In addition to the objections already dealt with, it was argued that the appellant is entitled to a new trial, on the ground that the evidence adduced proved his insanity, and that the jury should have so found, and therefore rendered a verdict of not guilty.

[10] 1 Man. R. 325.

Judgment.
Taylor, J.

The section of the statute which gives an appeal, says, in general terms, that any person convicted may appeal, without saying upon what grounds; so there can be no doubt the one thus taken is open to the appellant. The question, however, arises, how should the Court deal with an appeal upon matters of evidence? We have no precedents in our own Court, but the decisions in Ontario during the time when the Act respecting new trials and appeals, and writs of error in criminal cases, in Upper Canada (Con. Stat. U. C. c. 113) was in force there, may be referred to as guides. By the first section of that Act, any person convicted of any treason, felony, or misdemeanour, might apply for a new trial upon any point of law, or question of fact, in as ample a manner as in a civil action.

The decisions under the Act are uniform and consistent, and a few of them may be referred to.

The earliest case upon the point, and perhaps the leading case, is *Reg.* v. *Chubbs*,[11] in which the prisoner had been convicted of a capital offence. In giving judgment, Wilson, J., said, "In passing the Act, giving the right to the accused to move for, and the Court to grant, a new trial, I do not see that it was intended to give Courts the power to say that a verdict is wrong, because the jury arrived at conclusions which there was evidence to warrant, although from the same state of facts, other and different conclusions might fairly have been drawn, and a contrary verdict honestly given." Richards, C.J., before whom the case had been tried, said, "If I had been on the jury, I do not think I should have arrived at the same conclusions, but as the law casts upon them the responsibility of deciding how far they will give credit to the witnesses brought before them, I do not think we are justified in reversing their decision, unless we can be *certain* that it is wrong."

In *Reg.* v. *Greenwood*,[12] a case in which the prisoner had been convicted of murder, Hagarty, J., said, "I consider that I discharge my duty as a Judge before whom it is sought to obtain a new trial on the ground of the alleged weakness of

[11] 14 U. C. C. P. 32. [12] 23 U. C. Q. B. 255.

Judgment.
Taylor, J.

the evidence, or of its weight in either scale, in declaring my opinion that there was evidence proper to be submitted to the jury; that a number of material facts and circumstances were alleged properly before them—links as it were in a chain of circumstantial evidence—which it was their especial duty and province to examine carefully, to test their weight and adaptability each to the other * * * To adopt any other view of the law, would be simply to transfer the conclusion of every prisoner's guilt or innocence from the jury to the judges."

Reg. v. *Hamilton*[13] was also a case in which the prisoner had been convicted of murder. Richards, C.J., who delivered the judgment of the Court, said, "We are not justified in setting aside the verdict, unless we can say the jury were wrong in the conclusion they have arrived at. It is not sufficient that we would not have pronounced the same verdict; before we interfere we must be *satisfied* they have arrived at an erroneous conclusions". So, in *Reg.* v. *Seddons*,[14] it was said, "The verdict is not perverse, nor against law and evidence; and although it may be somewhat against the Judge's charge, that is no reason for interfering, if there be evidence to sustain the finding, because the jury are to judge of the sufficiency and weight of the evidence."

In *Reg.* v. *Slavin*,[15] the law on the subject was thus stated, "We do not profess to have scanned the evidence with the view of saying whether the jury might or might not, fairly considering it, have rendered a verdict of acquittal. We have already declared on several occasions that this is not our province under the statute. It is sufficient for us to say that there was evidence which warranted their finding."

The learned counsel for the appellant have argued with great force and ability that the overwhelming weight of the evidence is to establish his insanity. Under the authorities cited, all that my duty requires me to do is to see if there is any evidence to support the finding of the jury, which implies the appellant's sanity. I have, however, read carefully the

[13] 16 U. C. C. P. 340. [14] 16 U. C. C. P. 389. [15] 17 U. C. C. P. 205.

Judgment.
Taylor, J.

evidence, not merely that of the experts, and what bears specially upon this point, but the general evidence. It seemed to me proper to do so, because it is only after acquiring a knowledge of the appellant's conduct and actions throughout, that the value of the expert evidence can be properly estimated.

After a critical examination of the evidence, I find it impossible to come to any other conclusion than that at which the jury arrived. The appellant is, beyond all doubt, a man of inordinate vanity, excitable, irritable, and impatient of contradiction. He seems to have at times acted in an extraordinary manner; to have said many strange things, and to have entertained, or at least professed to entertain, absurd views on religious and political subjects. But it all stops far short of establishing such unsoundness of mind as would render him irresponsible, not accountable for his actions. His course of conduct indeed shows, in many ways, that the whole of his apparently extraordinary conduct, his claims to divine inspiration, and the prophetic character, was only part of a cunningly devised scheme to gain, and hold, influence and power over the simple-minded people around him, and to secure personal immunity in the event of his ever being called to account for his actions. He seems to have had in view, while professing to champion the interests of the Metis, the securing of pecuniary advantage for himself. This is evident from, among other circumstances, the conversation detailed by the Rev. Mr. André. That gentleman, after he had spoken of the appellant claiming that he should receive from the Government $100,000, but would be willing to take at once $35,000 cash, was asked, "Is it not true that the prisoner told you that he himself was the half-breed question." His reply is, "He did not say so in express terms, but he conveyed that idea. He said, if I am satisfied, the half-breeds will be. I must explain this. This objection was made to him, that even if the Government granted him $35,000, the half-breed question would remain the same, and he said in answer to that, 'if I am satisfied, the half-breeds will be.'"

He also says, that the priests met and put the question, "is it possible to allow Riel to continue in his religious

duties," and they unanimously decided that on this question he was not responsible—that he was completely a fool on this question—that he could not suffer any contradiction. "On the questions of religion and politics we considered that he was completely a fool." There is nothing in all that which would justify the conclusion that the man so spoken of was not responsible in the eye of the law for his actions. Many people are impatient of contradition, or of authority being exercised over them, yet they cannot on that account secure protection from the consequences of their acts as being of unsound mind.

Judgment.
Taylor, J.

The Rev. Mr. Fourmond, who was one of the clergy who met for the purpose spoken of by the Rev. Mr. André, shows that the conclusion they came to, was come to, because they thought it the more charitable one. Rather than say he was a great criminal, they would say he was insane. The views the appellant professed respecting the Trinity, the Holy Spirit, the Virgin Mary, the authority of the clergy, and other matters were what shocked these gentlemen. But heresy is not insanity, at least in the legal and medical sense of the term.

The most positive evidence as to insanity is given by Mr. Roy, the Medical Superintendent of Beauport Asylum, in which appellant resided for nineteen months about ten years ago. But his evidence is given in such an unsatisfactory way, so vaguely, and with such an evident effort to avoid answering plain and direct questions, as to render it to my mind exceedingly unreliable. The other medical witness who speaks to his insanity is Dr. Clark, of the Toronto Asylum. He says, "The prisoner is certainly of insane mind," but he qualifies that opinion by prefacing it with the statement, "assuming that he was not a malingerer." And even he says, "I think he was quite capable of distinguishing right from wrong." Against the evidence of these gentlemen there is that of Dr. Wallace, of the Hamilton Asylum, and Dr. Jukes, the senior surgeon of the Mounted Police Force, both of whom are quite positive in giving opinions of the appellant's sanity.

Judgment.

Taylor, J.

It was contended that the very fact that he, a man who had seen the world, could ever hope to succeed in a rebellion, and contend successfully with the force of the Dominion, backed as that would be, in case of need, by all the power of England, was in itself conclusive proof of insanity. But the evidence of several witnesses, specially Captain Young, shows that he never had any idea of entering seriously into such a contest. The appellant told that witness that he was not so foolish as to imagine that he could wage war against Canada and Britain. His plan, as he detailed it, was to try and capture at Duck Lake, Major Crozier and his force of police, and then, holding them as hostages, compel the government to accede to his demands. What these were he had already told the Rev. Mr. André—$100,000, or in cash $35,000, and if he could not get even that, then as much as he could. Having failed to capture Major Crozier, he hoped to draw into a snare General Middleton and a small force, in order to hold them as hostages for a like purpose. The fighting which actually took place was not the means by which he had hoped to secure his ends. The Rev. Mr. Pitblado gives evidence similar to that of Captain Young.

Certainly the evidence entirely fails to relieve the appellant from responsibility for his conduct, if the rule laid down by the Judges in reply to a question put to them by the House of Lords, in *Macnaghten's Case*,[1] be the sound one. That rule was thus expressed, "Notwithstanding the party accused did the Act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we mean, the law of the land." This has, I believe, ever since it was laid down, been regarded as the sound and correct rule of law on this subject.

In my judgment a new trial must be refused, and the conviction affirmed.

Judgment.
Killam, J.

KILLAM, J.—I concur fully in the conclusions of my brother judges and in the reasons supporting the same, with the exception, perhaps, of holding somewhat different opinions from some of those expressed by the Chief Justice as to the effect of the sub-section of the 76th section of the North-West Territories Act, requiring full notes of the evidence to be taken upon the trial, and as to the form of the charge in question. Were it not for the importance of the case, and that a mere formal concurrence in the judgments of the other members of the Court might appear to arise to some extent from some disinclination to consider fully and to discuss the important questions that have been raised, I should rather have felt inclined to say merely that I agree with the opinions which those judgments express.

What I shall add has been written after having had a general idea of the views of my brother judges, but principally before I had an opportunity of perusing the full expression of their views, and with a desire to present some views upon which they might not touch, rather than with the idea that their opinions required to be differently expressed.

I need not recapitulate the facts of the case or the proceedings taken, and I will refer to the statutes less fully than if I were delivering the sole judgment of the Court.

The prisoner first pleaded to the jurisdiction of the Court before which he was arraigned, and to this plea counsel for the Crown demurred. The decision of the Court allowing the demurrer forms one of the grounds of this appeal. The judgment on this demurrer appears to have been based upon the decision of this Court in Easter Term last, in the case of *Regina* v. *Connor*,[16] in which the prisoner appealed against a conviction for murder by a Court constituted exactly as in the present instance. I was not present upon the hearing of the appeal in that case, and judge of the points raised only from the report in the Manitoba Law Reports. From that report it does not appear that the jurisdiction of the Court was so much objected to as the mode in which the prisoner was

[16] *Ante* p. 4.

Judgment.
Killam, J.

charged with the offence, it being contended that he should be tried only upon an indictment found by a grand jury or, a charge made upon a coroner's inquest. It seems, notwithstanding that decision, still to be open to the prisoner to question the power of Parliament to establish the Court for the trial of the offence charged against him. I mean that the point is not yet *res judicata* so far as this Court is concerned. Even if it were so, in the event of any new argument of importance being adduced by the present or any other appellant, it would be quite competent for this Court, though not for the Court below, to reconsider the decision.

The authority of the Parliament of Canada to institute such a Court, and particularly to do so for the trial of a person upon a charge of high treason, is now denied; and it is also contended for the prisoner that the statute was not intended to provide for the trial of a charge of that nature. It has been argued that the powers of the Canadian Parliament are delegated to it by the Imperial Parliament, and that they must be considered to have been given, subject to the rights guaranteed to British subjects by the Common Law of England, Magna Charta, the Bill of Rights, and many statutes enacted by the Imperial Parliament, among which rights are claimed to be the right of a party accused of crime to a trial by a jury of twelve of his peers, who must all agree in their verdict before he can be convicted, and the right of a party accused of high treason to certain safe-guards provided in connection with the procedure upon his trial. It is also argued that high treason is a crime *sui generis*; that it is an offence against the sovereign authority of the state; and that it must be presumed, notwithstanding the provisions of the British North America Acts and the other Acts giving the Parliament of Canada authority in the North-West Territories, that the Imperial Parliament still reserved the right to make laws respecting high treason and the mode of trial for that offence; and also that the provisions of the Act 43 Vic. c. 25, s. 76, are inconsistent with enactments of the Imperial Parliament, and therefore inoperative. There can be no doubt that the Imperial Parliament has full power to

Judgment.
Killam, J.

legislate away any of the rights claimed within Great Britain and Ireland. Its position is not in any way analogous to that of the Legislatures, either State or Federal, under the Constitution of the United States, and the American authorities cited by counsel for the prisoner can have no application. There is no power under the British Constitution to question the authority of Parliament. It may yet have to be considered whether it has so effectually given up its powers of legislation in regard to the internal affairs of Canada, by the British North America Acts and some other statutes, that it cannot resume them; whether, in case of a conflict between the Parliament of Canada and the Imperial Parliament, the Courts of Canada are bound by the enactments of the one or the other; but these are questions which need not now be decided. It is true that the Parliament of Canada is the creature of statute, and that its powers cannot be greater than the statute expressly or impliedly bestow upon it, but there has been no attempt by the Imperial Parliament to take away or to encroach upon the powers given to the Parliament of Canada, and we have nothing to do at present with speculations upon the effect of such an attempt. The British North America Act, 1867, begins with the recital that the Provinces of Canada, Nova Scotia and New Brunswick "have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom." By section 9 the executive government and authority of and over Canada are declared to be vested in the Queen. Under section 17 there is "one Parliament" for Canada, consisting of the Queen, an Upper House—styled the Senate—and the House of Commons. By section 18 the privileges, immunities and powers of the Senate and House of Commons are to be such as are from time to time defined by the Parliament, but so as not to exceed those of the British House of Commons at the passing of the Act.

It thus appears that the Parliament of Canada is not, within its legislative powers, placed in an inferior position to that of Britain. The Sovereign forms an integral part of

Judgment.
Killam, J.

the Canadian as of the British Parliament, the Executive authority is vested in the Queen. So far as relates to her internal affairs, Canada stands in a position of equal dignity and importance with the United Kingdom, and, except in so far as the action of the Sovereign may be indirectly controlled by the Imperial Parliament, Canada stands in this respect rather in the position of a sister kingdom than in that of a dependency.

It is principally by the 91st section that the legislative authority of the Canadian Parliament is defined; and under this section it can "make laws for the peace, order and good government of Canada," in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces. By a portion of section 146 provision is made for the admission by Order in Council of Rupert's Land and the North-West Territories upon addresses from the Canadian Houses of Parliament, and under this provision and under the Rupert's Land Act, 31 & 32 Vic. c. 105, and the British North America Act, 1871, 34 & 35 Vic. c. 28, the North-West Territories have been added to the Dominion. By these two latter Acts the jurisdiction and powers of the Parliament of Canada are enlarged, both as to the territory over which they may be exercised and the subjects upon which laws may be enacted. There are no Provincial Legislatures (except in Manitoba) to share in the legislation, and there is no qualification of or exception from the power of legislation upon all matters and subjects relating to the "peace, order and good government" of Her Majesty's subjects and others in these added territories. Over these Territories and with the addition of these subjects of legislation the Parliament of Canada is in the same position as it was over the Dominion when first formed, and in respect of the subjects of legislation committed to it by the British North America Act, 1867. The American theory of constitutional government is that the legislatures are composed of delegates from the people, and that certain rights and powers only are committed to them, and that the people have retained to themselves certain rights necessary to the

free enjoyment of life and liberty which the legislatures have been given no power to interfere with, and it is now attempted to apply the term "delegated" to the bestowal by the Imperial upon the Dominion Parliament of the powers of legislation conferred by the Confederation and other Acts, and in this way to introduce the same theory into the consideration of our constitution. The principle of the British Constitution is, however, that the people of the State, the three estates of the realm, composed of the Sovereign, the Lords, and the Commons, are all assembled in Parliament, and that the enactments of Parliament are those of the whole nation, and not of delegates from the people. From this necessarily follows the complete supremacy of Parliament, its powers to legislate away the rights guaranteed by Magna Charta, the Bill of Rights, or any enactments of Parliament or charters of the Sovereign. As is said by Lord Campbell in *Logan* v. *Burslem*,[17] "As to what has been said as to a law not being binding if it be contrary to reason, that can receive no countenance from any Court of justice whatever. A Court of justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable, and all, therefore, that we can do is to try and find out what the Legislature intended."

Judgment. Killam, J.

As this Dominion was intended to be formed "with a Constitution similar in principle to that of the United Kingdom," having a Parliament not of an inferior character, but of the dignity and importance to which I have referred, there can be no doubt that, in this respect, it stands in the same position as the Imperial Parliament with regard to the subject matters upon which it may legislate. That this is so has been determined by judicial decision. Mr. Justice Willes, in *Phillips* v. *Eyre*,[18] says, "A confirmed Act of the local Legislature, whether in a settled or conquered colony has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament." In the *Goodhue Will Case*,[19] Draper,

[17] 4 Moo. P. C. 204, 300; 7 Jur. 1. [18] L. R. 6 Q. B. 1, at p. 20; 10 B. & S. 1004; 40 L. J. Q. B. 28, 22 L. J. 869. [19] 19 Grant Chy. 382.

Judgment.
Killam, J.

C.J., having reference to an Act of the Provincial Legislature of Ontario, says, "As in England it is a settled principle that the Legislature is the supreme power, so in this Province I apprehend that, within the limits mapped out by the authority which gave us our present constitution, the legislature is the supreme power." This view of the position of the Provincial Legislatures is upheld by the Privy Council in *Hodge* v. *The Queen*.[7] In *Valin* v. *Langlois*,[15] Ritchie, C.J., says, "I think that the British North America Act vests in the Dominion Parliament plenary power of legislation, in no way limited or circumscribed, and as large and of the same nature and extent as the Parliament of Great Britain, by whom the power to legislate was conferred, itself had. The Parliament of Great Britain clearly intended to divest itself of all legislative power over this subject matter, and it is equally clear that what it divested itself of, it conferred wholly and exclusively upon the Parliament of the Dominion." And this doctrine of a delegation of powers cannot be more aptly met than in the judgment of the Privy Council in *Regina* v. *Burah*,[4] referred to by my brother Taylor. The following remarks of Lord Selborne are so applicable that I must repeat them. He says (p. 904), "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament, which created it, and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation, as large and of the same nature as those of Parliament itself."

I take it that the plenary powers of legislation conferred upon the Parliament of Canada include the right to alter or repeal prior Acts of the Imperial Parliament upon subjects upon which the Canadian Parliament is given power to legislate, so far as the internal government of Canada is concerned. The powers which the Imperial Parliament alone could formerly exercise upon these subjects in our North-

Judgment.
Killam, J.

West, whether by making laws entirely new, or by repeal or amendment of existing laws, our Parliament can now exercise. Nor do I think that the Imperial Act, 28 & 29 Vic. c. 63, is inconsistent with that view. Under section 2 of that Act, "Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, Order or Regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." This is not in any sense an Act of Interpretation of Imperial Statutes, which is to be considered as part of and to be read with Acts of the Imperial Parliament, and if it is repugnant to the British North America Act, 1867, and if by the latter Act powers are given to the Parliament of Canada without the limitation imposed by the former Act, the British North America Act, as being the later one, must prevail. But even without this view, I cannot think that the repugnancy referred to is such as would be involved by an amendment or repeal of an Act of the Imperial Parliament upon a subject upon which plenary powers of legislation were subsequently given to the Parliament of Canada. There could only be considered to be repugnancy within the meaning of the Act if it appeared by the Imperial Act that it was to remain in force notwithstanding any subsequent action of the Colonial Legislature, or if it were enacted after the plenary powers of legislation were granted, and were thus shown to be intended to override any Act which the Colonial Legislature had passed or might thereafter pass. It will be observed also that it is only an Act of Parliament "extending to the Colony" to which reference is made in the section cited; and by the first section of the Act, in construing the Act, "An Act of Parliament or any provision thereof," is only to be said to "extend to any colony when it is made applicable to the colony by the express words or necessary intendment of any Act of Parliament." And by section 3, "No Colonial law

Judgment.
Killam, J.

shall be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, Order, or Regulation as aforesaid." Thus, it was evidently not the intention to exclude the Colonial Legislatures from making laws inconsistent with those which may have been enacted by the British Parliament for Britain or the United Kingdom particularly, and which may be in force in the colony solely by virtue of the principle that the British subjects settling therein carried with them the laws of Britain, or that by conquest the laws of Britain came in force. By the fifth section of this same Act, "Every Colonial Legislature shall have and be deemed at all times to have had full power within its jurisdiction to establish Courts of judicature, and to abolish and re-constitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein." It must surely, then, not have been intended that such a Legislature should be limited in its establishment of these Courts, and in its regulation of the procedure therein, to Courts constituted as those of England, and a procedure similar to that which Parliament has thought proper to establish for English Courts, or to a jury system which can be traced back to the early ages of English history, or even to trial by jury at all.

Nor can I see any reason to suppose that it was not intended that the Parliament of Canada should not have power to legislate regarding the crime of treason in Canada. It certainly seems to be given when power is given to make laws for the peace, order and good government of Canada. Even jurisdiction to declare what shall be and what shall not be acts of treason, when committed within Canada, against the person of the Sovereign herself, might safely be committed to the Parliament of Canada when the Sovereign is a part of Parliament, and has also power of disallowance of Acts, even after they have been assented to in Her name by the Governor-General. The propriety or impropriety of providing for the selection of a jury by a stipendiary magistrate appointed by the Crown to hold office during pleasure,

Judgment.
Killam, J.

of reducing to so small a number the peremptory challenges, and other provisions relating to the constitution of the Court and the mode of procedure to which objection has been made, is for Parliament and not for the Courts to decide. We can only decide whether Parliament has, as I think it clearly appears that it has, even without the Rupert's Land Act, full power to constitute Courts and to determine their method of procedure. With the provision in the Rupert's Land Act, authorizing the Parliament of Canada "to constitute such Courts and officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others" in the North-West Territories, it does not appear that there can be any doubt that such Courts are to be constituted with power to try a charge of high treason, as well as any other charge.

That the Canadian Parliament intended that the Court constituted under the North-West Territories Act of 1880, section 76, sub-section 5 and following sub-sections, should have power to hear and try a charge of treason, there can be no doubt. After provision is made for the trial of certain charges in a summary way, without a jury, the provision in sub-section 5 is that "*In all other criminal cases* (which must include a case of high treason) the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try *any* charge against any person or persons for *any* crime" (which must include the crime of treason).

Sub-section 10 provides that "any person arraigned for *treason* or felony may challenge peremptorily and without cause not more than six jurors." It was remarked that this is the only mention of treason in the Act, but it was the only occasion for its being specially mentioned. In view of the peculiar right of challenge in a case of treason, under the law of England, it was important to place it beyond doubt, by special mention, that in a case of treason as in any other case the number of peremptory challenges was to be limited to six. The wording of the sub-section may not be strictly correct, as not recognizing that treason is a felony, but the sub-section is not on that account of any less importance as

Judgment. Killam, J.

showing the intention to give to the Court jurisdiction over charge of treason.

I cannot agree with the argument of counsel for the Crown, that an objection to the information is not open on this appeal, on account of the prisoner having pleaded to the charge. He demurred to the charge, and his demurrer being overruled he was obliged to plead. There is no indictment, and I do not think that an objection to the charge need be by a formal demurrer. In fact, it appears that the proceedings may be of the most informal character. Under section 77, "a person convicted of an offence punishable by death" has a right to appeal to this Court, which has jurisdiction "to confirm the conviction or to order a new trial." There can be no appeal until there has been a conviction, and I cannot see that the prisoner should be prevented from making any point that he may raise in any way before the Court below the subject of appeal. If a new trial should in any case be granted on the ground of a defect in the charge, it would undoubtedly be allowed to the prisoner to withdraw his plea when he should be again brought up for trial, if this were considered necessary in order to give effect to the objection. Indeed, it appears to me that this would not be necessary, for I am of opinion that, upon a new trial, everything must be begun *de novo*, and the prisoner asked to plead again. There is no Court continuing all the time before which he has pleaded; there must be a new Court established for the trial of each charge, and the proceedings upon the first trial cannot be incorporated with those upon the second.

In my opinion, it is not necessary that a "charge," within the meaning of sub-section 5, should be made on oath before the Court having the jurisdiction to try the charge. By section 76, the stipendiary magistrate is given the "magisterial and other functions of a justice of the peace," and power to "hear and determine any charge against any person" in the manner set out in the various sub-sections of the section. I take it that the "charge" referred to in the 5th sub-section is one laid before him by information, as before a justice of the peace, to procure the committal of a

party for trial. The charge having been so made he has to summon the jury and procure the attendance of a justice of the peace, and before the Court so constituted the charge is to be tried. This is what has been done in the present instance. Judgment. Killam, J.

The remaining objection of law to the conviction is to the method of taking the notes of the evidence. I cannot agree in the view that the clause requiring full notes of the evidence and other proceedings to be taken upon the trial is directory merely. Whether the notes are to be taken merely for transmission to the Minister of Justice, as required by the 8th sub-section, or with a view also to use upon the appeal allowed, it is equally important that they be taken. If it is only with a view to their transmission to the Minister, as the 8th sub-section also provides for the postponement of the execution of a sentence of death until the pleasure of the Governor has been communicated to the Lieutenant-Governor, it is an important part of the procedure at the trial that the notes of evidence be taken in order that the action of the Executive may be based upon the real facts proved; almost, if not quite, as important as that the evidence should be laid properly before the jury itself. I should not hesitate to adjudge illegal a conviction of a capital offence shown to have been obtained upon a trial so conducted that these facts could not be properly laid before the Executive by the notes of evidence, for which the statute provides, taken down during the progress of the trial.

It appears by the certificate of the magistrate that the only full notes of the evidence taken at the trial were taken by "short-hand reporters" appointed by the magistrate. Although it is not so stated, I think that we may assume that these notes were taken in what is known as short-hand. *Omnia praesumuntur rite esse acta* is a maxim applicable as well in criminal as in civil matters, and if we cannot make such an assumption we must assume them to have been in the ordinary form of writing, or at least in such form of writing as would satisfy the statute. The statutory provision is, that "full notes" are to be taken "in writing." The very definitions of the words "writing," and "to

Judgment. Killam, J.

write," are sufficient to show that the methods of recording language covered by the word "stenography," come within the term "writing." The very derivation of the word "stenography" shows it to mean a mode or modes of writing. "Stenography" is a generic term which embraces every system of short-hand, whether based upon alphabetic, phonetic, or hieroglyphic principles. There are advantages and disadvantages both in stenography and in ordinary writing for the purpose of reporting the evidence given orally in a Court of justice. The magistrate is not obliged to takes the notes himself; he is authorized by the statute to cause it to be done by another or others. It has not been the practice so far as I know, in any Court in Canada to take down *verbatim* question and answer in ordinary writing, and that could not be presumed to be required. If it is not, but the notes are taken in narrative form, their accuracy depends largely on the ability of the reporter hurriedly to apprehend the effect of question and answer and throw them together so as properly to set down the idea of the witness. Any system by which question and answer are given *verbatim* is certainly more likely to be accurate than this method, notwithstanding the chances of error suggested by Mr. Ewart. The short-hand system of the reporter may be something which himself alone can understand, it may be a system which is known to many, and it may be that his notes can be read by many. I think that we are not entitled to assume, for the purpose of holding the conviction illegal, that in the present instance it was a system understood by the reporter alone, even if that assumption should properly lead to that conclusion.

The use of short-hand reporters in the Courts had been in vogue for a considerable time in more than one of the Provinces when the North-West Territories Act of 1880 was passed; and when Parliament provided only for the taking of the notes "in writing," without any further limitation of such a general word, it may be well understood to have had in view a class or method of writing which was in such general use. I have felt the more satisfied in coming to this conclusion, as it has not been suggested that the prisoner has

Judgment.
Killam, J.

been put under any disadvantage by the system adopted for reporting the evidence and proceedings, or that the report of the evidence or proceedings is in any respect inaccurate.

The question of insanity is raised upon this appeal as a question of fact only. No objection has been made to the charge of the magistrate to the jury. The principles laid down by the Courts of Upper Canada, under the Act which authorized the granting of new trials in criminal cases, and which have been referred to by my brother Taylor, appear to me to be those which should govern this Court in hearing and determining appeals from convictions in the North-West Territories upon questions of fact, except that it is hardly accurate to say that the Court will not undertake to determine on what side is the weight of evidence, but only if there is evidence to go to the jury. This hardly applies in a case like the present. The presumption of law is that the prisoner is, and was, sane. The burden of proof of insanity, is upon the defence. *Macnaghten's Case*,[1] *Regina* v. *Stokes*,[20] *Regina* v. *Layton*.[21] Without evidence to go to the jury, the prisoner cannot be acquitted upon the plea of insanity. If there is in such a case to be any appeal after a conviction, it must be on the ground that the evidence is so overwhelming in favor of the insanity of the prisoner that the Court will feel that there has been a miscarriage of justice—that a poor, deluded, irresponsible being has been adjudged guilty of that of which he could not be guilty if he were deprived of the power to reason upon the act complained of, to determine by reason if it was right or wrong.

Certainly, a new trial should not be granted if the evidence were such that the jury could reasonably convict or acquit. Mr. Lemieux laid great stress upon the fact that the jury accompanied their verdict with a recommendation to mercy, as showing that they thought the prisoner insane. I cannot see that any importance can be attached to this. I have read very carefully the report of the charge of the magistrate, and it appears to have been so clearly put that the jury could have no doubt of their duty in case they

[20] 3 C. & K. 185. [21] 4 Cox C. C. 149.

Judgment.
Killam, J.

thought the prisoner insane when he committed the acts in question. They could not have listened to that charge without understanding fully that to bring in a verdict of guilty was to declare emphatically their disbelief in the insanity of the prisoner. The recommendation may be accounted for in many ways not connected at all with the question of the sanity of the prisoner.

The stipendiary magistrate adopts, in his charge to the jury, the test laid down in *Macnaghten's Case*,[1] Although this rule was laid down by the leading judges of England, at the time, to the House of Lords, it was not so done in any particular case which was before that tribunal for adjudication, and it could hardly be considered as a decision absolutely binding upon any Court. I should consider this Court fully justified in departing from it, if good ground was shown therefor, or, if, even without argument of counsel against it, it appeared to the Court itself to be improper as applied to the facts of a particular case. In the present instance, counsel for the prisoner do not attempt to impugn the propriety of the rule, and in my opinion they could not successfully do so. It has never, so far as I can find, been overruled, though it may to some extent have been questioned. This rule is, that "notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he acted contrary to law."

Mr. Justice Maule, on the same occasion, puts it thus: "To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong."

The argument for the insanity of the prisoner is based to a certain extent on the idea that he was in such a state of mind that he did not know that the acts he was committing were wrong; that he fancied himself inspired of Heaven, and acting under the direction of Heaven, and in a holy cause.

Judgment.
Killam, J.

It would be exceedingly dangerous to admit the validity of such an argument for adjudging an accused person insane, particularly where the offence charged is of such a nature as that of which this prisoner is convicted. A man who leads an armed insurrection does so from a desire for murder, rapine, robbery, or for personal gain or advantage of some kind, or he does so in the belief that he has a righteous cause, grievances which he is entitled to take up arms to have redressed. In the latter case, if sincere, he believes it to be right to do so, that the law of God permits, nay even calls upon him, to do so; and to adjudge a man insane on that ground, would be to open the door to an acquittal in every case in which a man with an honest belief in his wrongs, and that they were sufficiently grievous to warrant any means to secure their redress, should take up arms against the constituted authorities of the land. His action was exceedingly rash and foolhardy, but he reasoned that he could achieve a sufficient success to extort something from the Government, whether for himself or his followers. His actions were based on reason and not on insane delusion.

It is true that there were some medical opinions that the prisoner was insane, based upon an account of his actions and his previous history, but the jury were not bound to accept such opinions. The jury had to listen to the grounds for these opinions, and to form their own judgment upon them. In my opinion, the evidence was such that the jury would not have been justified in any verdict other than that which they gave; but even if it be admitted that they might reasonably have found in favor of the insanity of the prisoner, it cannot be said that they could not reasonably find him sane.

I hesitate to add anything to the remarks of my brother Taylor upon the evidence on the question of insanity. I have read over very carefully all the evidence that was laid before the jury, and I could say nothing that would more fully express the opinions I have formed from its perusal than what is expressed by him. I agree with him also in

Judgment.
Killam, J.

saying that the prisoner has been ably and zealously defended, and that nothing that could assist his case appears to have been left untouched. If I could see any reason to believe that the jury, whether from passion or prejudice, or otherwise, had decided against the weight of the evidence upon the prisoner's insanity, I should desire to find that the Court could so interpret the statute as to be justified in causing the case to be laid before another jury for their consideration, as the only feelings we can have towards a fellow creature who has been deprived of the reason which places us above the brutes, are sincere pity and a desire to have some attempt made to restore him to the full enjoyment of a sound mind.

The prisoner is evidently a man of more than ordinary intelligence, who could have been of great service to those of his race in this country; and if he were insane, the greatest service that could be rendered to the country would be, that he should, if possible, be restored to that condition of mind which would enable him to use his mental powers and his education to assist in promoting the interests of that important class in the community to which he belongs. It is with the deepest regret that I recognize that the acts charged were committed without any such justification, and that this Court cannot in any way be justified in interfering.

In my judgment, the conviction must be affirmed.

Conviction affirmed.

THE CANADIAN PACIFIC RAILWAY CO. v. THE TOWN OF CALGARY.

Tax sale—Injunction—Appeal to Court of Revision—Estoppel.

An injunction may be granted to restrain a tax sale. The limits of such jurisdiction discussed.

It is not necessary that exemption from taxation should be raised before the Court of Revision, and a party, wrongfully assessed by reason of exemption, is not estopped by appealing to the Court of Revision.

[*Court of Q. B. Manitoba in banc, December 17th, 1887.*

Statement.

This was an appeal by the plaintiffs to the Court of Queen's Bench for the Province of Manitoba in banc, under the statute in the behalf, from the judgment of a Judge of the High Court of Justice of the North-West Territories allowing a demurrer to a claim for an injunction to restrain the sale of the plaintiff's lands for taxes. As the right of appeal to the Manitoba Court is now abolished, the parts of the judgment relating thereto are omitted.

J. S. Ewart, Q.C., and *J. Stewart Tupper*, for the plaintiffs, the appellants.

Ghent Davis and *E. P. Davis*, for the defendants, the respondents.

[*December 17th, 1887.*]

The judgment of the Court (TAYLOR, C.J., and KILLAM, J.; WALLBRIDGE, C.J., having died after the argument) was delivered by KILLAM, J.:—

This Court has several times granted injunctions to restrain sales of land for taxes; and it appears proper that this should be done where a sufficient equitable ground for such relief is shown. The principles upon which such injunctions are issued are quite as applicable in the North-West Territories as in this Province. No case of the kind has

NOTE: This report is taken from 5 Man. R. 37, by permission of the Benchers of the Law Society of Manitoba.

Judgment.
Killam, J.

come before the Court *in banc*, and I can find none reported as having come before the Courts of the Province of Ontario, from whose statutes both our Municipal Act and the Municipal Ordinance of the North-West Territories are so largely derived. Suits of this nature have, however, been very common in the United States, and in many of the States such injunctions are very freely granted, though in many others and in the Supreme Court of the United States a much more limited view of the jurisdiction is taken. The proper limits of the jurisdiction seem to be most correctly stated in the Courts of the State of New York and in the Supreme Court of the United States.

In *Dows* v. *The City of Chicago*,[1] Field, J., says: "There must be some threatened injury of this kind distinguishing it from a common trespass and bringing the case under some recognized head of equity jurisdiction, before the protective remedy of injunction can be invoked. . . . It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a Court of Equity can be invoked." Similar language is used in *Hannewinkle* v. *Georgetown*;[2] *Heywood* v. *The City of Buffalo*;[3] *The Susquehanna Bank* v. *The Supervisors of Broome County*.[4] While in the *State Railroad Tax Cases*,[5] the Supreme Court appeared inclined to extend this jurisdiction more widely in the case of municipal than in that of State taxes, yet the same principles were applied by that Court to cases of municipal taxes in *The Union Pacific R. Co.* v. *Cheyenne*;[6] and *The City of Milwaukee* v. *Koeffler*.[7]

In *Heywood* v. *The City of Buffalo*;[3] it was held that if the tax be illegal and void on the face of the records showing the assessment, and evidence of extrinsic facts be necessary to show the tax to be illegally imposed, then there is not such a cloud on title as calls for the interposition of a Court of Equity.

[1] 11 Wall. 108. [2] 14 N. Y. 534. [3] 2 Otto 615. [4] 116 U. S. 219.
[5] 15 Wall. 547. [6] 25 N. Y. 312. [7] 113 U. S. 516.

Judgment.
Killam, J.

For the purposes of this case we are not required to go farther than the most limited view taken by these Courts, but we are of opinion that within the limits thus laid down the jurisdiction can properly be exercised.

If in assigning the reason first given by the learned Stipendiary Magistrate for allowing the demurrer, he meant to express the opinion that any objection to this assessment on the ground of exemption must be made to the Court of Revision, and that the decision rendered by that Court, or upon appeal from it, would be final upon this point, we cannot agree with him. The contrary view appears necessarily to follow upon the cases of *Charleton* v. *Alway*;[8] *Bristol Overseers* v. *Wait*;[9] and *Marshall* v. *Pitman*.[10] The principle of these cases was thus applied under the similar Municipal Act of Ontario, in *The Municipality of Berlin* v. *Grange*;[11] *The Township of London* v. *The G. W. R. Co.*;[12] and *McCarrall* v. *Watkins*,[13] and this application was approved in the Supreme Court of Canada by Richards, C.J., in *Nicholls* v. *Cumming*.[14]

Appeal allowed.

[8]11 A. & E. 993; 3 P. & D. 818; 9 L. J. Q. B. 237. [9]1 A. & E. 264; 3 N. & M. 359; 3 L. J. M. C. 71. [10]2 M. & Scott, 745; 9 Bing. 595; 2 L. J. M. C. 33. [11]1 U. C. E. & A. 279. [12]17 U. C. Q. B. 262. [13]19 U. C. Q. B. 248. [14]1 S. C. R. 411.

BRITTLEBANK v. GRAY-JONES — GRAY-JONES CLAIMANT.

Married woman—Separate estate—N. W. T. Act—Interpleader.

The claimant was married in England. By her marriage settlement, there were settled upon her, to her separate use, certain moneys over which she was given a power of appointment; she exercised the power by appointing a part to her own separate use. This was paid or sent to her in the Territories. With it she bought farm-stock, which was used on her farm; but it was found as a fact that it was the husband who carried on the farming operations. In the absence of evidence that the husband had constituted himself a trustee for the wife,

Held, that the farm stock had become the husband's property, notwithstanding the settlement or the provisions of the N. W. T. Act.

[*Court of Q. B. Manitoba in banc, December 17th, 1887.*

Statement. This was an interpeader issue tried before a Stipendiary Magistrate of the North-West Territories. Judgment was given in favor of the execution creditor; the claimant appealed, under the statute on that behalf, to the Court of Queen's Bench of Manitoba, in banc.

The appeal was argued on the 15th February, 1887.

J. S. Ewart, Q.C., for the claimant.

Apart altogether from statute, but under equitable doctrines, goods purchased with money, part of separate estate, are separate estate: *Gore* v. *Knight*,[1] *Jarman* v. *Woolloton*,[2] *Darkin* v. *Darkin*,[3] *Fitzgibbon* v. *Pike*;[4] *Duncan* v. *Cashin*.[5] It is not necessary that there should be a trustee, *Ex p. Sibeth*.[6] Even if husband in possession, there is a presumption against a gift to him: *Gamber* v. *Gamber*,[7] *Keeny* v. *Good*,[8] *Newlands* v. *Paynter*,[9] *Rich* v. *Cockell*,[10] *Parker* v. *Brooke*.[11] Equitable interests may be relied on in interpleader proceedings: *Shingler* v. *Holt*,[12] *Duncan* v. *Cashin*,[5] *Ex p. Sibeth*.[6]

[1]2 Vern. 535; Pre. Ch. 255; 1 Ir. Eq. R. 464. [2]3 T. R. 618; 1 R. R. 780. [3]17 Beav. 578; 23 L. J. Ch. 890; 2 W. R. 135. [4]5 L. R. Ir. 487. [5]L. R. 10 C. P. 554; 44 L. J. C. P. 225; 32 L. T. 497; 23 W. R. 561. [6]14 Q. B. D. 417; 54 L. J. Q. B. 322; 33 W. R. 556. [7]18 Penn. St. 363. [8]21 Penn. St. 349. [9]4 My. & Cr. 408; 10 Sim. 377. [10]9 Ves. 369; 7 R. R. 227. [11]9 Ves. 583. [12]7 H. & N. 65; 30 L. J. Ex. 322; 7 Jur. N. S. 866; 4 L. T. 76; 9 W. R. 871.

Argument.

Again, under N.-W. T. Act, 43 Vic. c. 25, ss. 57-62, a married woman may have separate real estate; she may own a farm and hence necessarily stock for it: *Ashworth* v. *Outram*,[13] *Lovell* v. *Newton*.[14] The onus is on the plaintiff to show that the chattels are not part of the separate estate: *Gore* v. *Knight*.[1]

W. H. Culver, for the execution creditor.

The statute will be construed strictly: *Wishart* v. *McManus*,[15] *Kramer* v. *Glass*.[16] By the marriage the goods became the property of the husband: Snell's Eq. 344. Goods purchased with the wife's money become the property of the husband: *Carne* v. *Brice*.[17] If the wife purchases chattels with her separate money and hands them over to her husband without any agreement, they are his: *Shuley* v. *Shuley*.[18] To hold the husband a trustee there must be clear proof of an agreement: *Re Whittaker, Whittaker* v. *Whittaker*,[19] *Hopkins* v. *Hopkins*,[20] *Woodward* v. *Woodward*.[21] If cattle bought to enable husband to carry on farm they are liable for his debts: *Lett* v. *Commercial Bank*,[22] *Haslinton* v. *Gill*.[23] As to separate trading: see *Campbell* v. *Cole*,[24] *Murray* v. *McCallum*,[25] *Harrison* v. *Douglas*,[26] *Laporte* v. *Costick*,[27] *Lumley* v. *Timms*,[28] *Meakin* v. *Samson*,[29] *Irwin* v. *Maughan*,[30] *Foulds* v. *Curtelett*.[31]

[*December 17th, 1887.*]

The judgment of the Court (TAYLOR, C.J., and KILLAM, J.; WALLBRIDGE, C.J., having died after the argument) was delivered by—

TAYLOR, C.J.—The appeal in this case from the North-West Territories was argued, and judgment reserved, only a few days before the 49 Vic. c. 25, Dom. came into force by

[13] 5 Ch. D. 923; 46 L. J. Ch. 687; 37 L. T. 85; 25 W. R. 896. [14] 4 C. P. D. 7; 39 L. T. 609; 27 W. R. 366. [15] 1 Man. R. 213; [16] 10 U. C. C. P. 475. [17] 7 M. & W. 183; 10 L. J. Ex. 28; 8 D. P. C. 884; [18] 9 Page, N. Y. 363. [19] 21 Ch. D. 657; 51 L. J. Ch. 737; 46 L. T. 802; 30 W. R. 787. [20] 7 O. R. 224. [21] 9 Jur. N. S. 882; 3 DeG. J. & S. 672; 8 L. T. 749; 11 W. R. 1007. [22] 24 U. C. Q. B. 558. [23] [illegible] 3 C. R. 620 n; 1 R. R. 783. [24] 7 O. R. 127. [25] 8 O. Ap. R. 277. [26] 40 U. C. Q. B. 410. [27] 31 L. T. 434; 23 W. R. 131. [28] 28 L. T. 608; 21 W. R. 494. [29] 28 U. C. C. P. 355. [30] 26 U. C. C. P. 455. [31] 21 U. C. C. P. 368.

Judgment.
Taylor, C.J.

virtue of a proclamation of the Governor-in-Council. In several cases, also appeals from the North-West Territories, heard in Easter Term, the question of the jurisdiction of this Court to hear appeals brought before, but not disposed of at the time of that Act being brought into force, was argued at considerable length. These cases were heard subject to the objection that the Court had no jurisdiction, judgment upon that point, as well upon others, being reserved. Since then the 50 and 51 Vic. c. 28, Dom. has been passed for the purpose of removing any doubt as to the jurisdiction of this Court to hear such appeals.

This was an interpleader issue, the question to be decided being, the ownership of certain cattle and farm stock. These were seized under an execution issued by the plaintiffs, upon a judgment against the defendant, and the wife of the latter claimed them as her separate property. The issue was tried in a summary way by Stipendiary Magistrate Richardson, and decided in favour of the execution creditor. From his finding the personal representative of the claimant, who has died, appeals.

The claimant, who was married in England, had certain moneys secured by marriage settlement, to her separate use. Over these moneys she had a power of appointment which she exercised by appointing part of the fund to herself to her separate use. Under this appointment the money was paid over to her by the trustees, and she brought it, or had it sent to the North-West Territories. In 1883 she bought land there, upon which she went to live in the spring of 1884.

About that time a man was sent to Ontario to purchase, with money of the claimant, and he did purchase, some horses, cows and pigs.

One horse had been bought before, and cattle were bought afterwards, with funds supplied by the claimant.

In May, 1884, the husband, who had up to that time been carrying on business in Winnipeg, came to live on the farm.

Judgment. Taylor, C.J.

The magistrate finds that he was the farmer, and carried on the farming operations, the horses, cattle and stock being used for the purposes of the farm.

The laws in force in the North-West Territories, seem to be the laws which existed in England on the 15th day of July, 1870, except so far as these have been varied, or added to, by statutes passed by the Dominion Parliament, or by Ordinances made by the Lieutenant-Governor, under the authority of Dominion Statutes, 32 and 33 Vic. c. 3, s. 5; 34 Vic. c. 16, s. 4; 38 Vic. c. 49, s. 6; 43 Vic. c. 25, ss. 8 and 9; and Order-in-Council of 26th June, 1883.

The Imperial Act, 33 and 34 Vic. c. 93, is not in force there, having been passed only on the 9th August, 1870. The rights of married women as to separate property are governed by the provisions of 43 Vic. c. 25, ss. 57 to 62, Dom., which are the same as those of the earlier Act, 38 Vic. c. 49, ss. 48 to 53, Dom. Under these Acts it would seem to be only the real estate of a married woman, the rents, issues and profits of that real estate, also her wages and personal earnings, any acquisitions therefrom, and all proceeds and profits from any occupation or trade carried on by her separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, money or property, which are separate property, free from the debts or disposition of her husband.

The reference to personal property in the 58th section, and to chattels in the 62nd section, cannot be taken as extending the provisions of the Act to personal property generally.

In those sections the reference is plainly to personal property or chattels for carrying on a separate trade or business, or in which wages or earnings have been invested. In construing such a statute, which is a departure from the Common Law, it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give. *Kraemer* v. *Glass*.[16]

Judgment.
Taylor, C.J.

The claimant here, having money settled to her separate use, executed a power of appointment in her own favour, and received the money from the trustees.

It was after that no longer under the protection of the settlement. She then brought it to the North-West Territories, investing it in cattle and farm stock, which at once, upon being purchased by her, became by force of the marriage, the property of her husband. *Milner* v. *Milnes*,[32] *Carne* v. *Brice*.[17]

The cases cited, to the effect that the husband will, in equity, be regarded as a trustee for his wife of her separate estate, which may be found in his possession, do not seem to apply.

The property here had ceased to be separate property, properly speaking. Besides, there is nothing in the evidence to show that the husband had constituted himself a trustee for her.

In the recent case of *In re Whittaker, Whittaker* v. *Whittaker*,[19] it was said by Bacon, V.C., at p. 662, "there must be some proof furnished of a clear and unequivocal determination and intention of the husband to constitute himself a trustee." In *Darkin* v. *Darkin*,[3] there was produced a book in which the husband acknowledged that the dividends and the interest were received for the benefit of the wife, and so, as Lord Romilly said, there was evidence in writing of a trust.

The appeal should in my judgment be dismissed with costs. This conclusion may be come to without any feeling of regret, such as exists in many cases, that the property of the wife is being taken to pay the debt of the husband, for here there is not a particle of equity in favour of the wife's claim. The judgment, under which the goods were seized, was one recovered for the price of lumber supplied to the husband for the purpose of building a house upon land, which was under the statute, the wife's separate estate.

Appeal dismissed with costs.

[32] 3 T. R. 631.

BRITTLEBANK v. GRAY-JONES.—THOMPSON & NELSON, CLAIMANTS.

Execution—Notice—Seizure—Custodia legis — Abandonment — Security — Interpleader.

Goods were seized under execution by the Sheriff, who left them in possession of the judgment debtor's wife, who claimed to be the owner, upon her agreeing to hold them for him. Some months after the Sheriff, under the same writ, took the goods, which were then in the possession of the claimants, Thompson & Nelson. They claimed to have bought from one Hodgson, who claimed to have bought from the wife after the original seizure.

Held, in view of "The Administration of Civil Justice Ordinance, 1884," sec. 83,† that there was no abandonment by the Sheriff; that he was right in resuming actual possession, and that, therefore, the execution prevailed over the claimants' title.

[*Court of Q. B. Manitoba in banc, December 17th, 1887.*

Statement.

This was an interpleader issue tried before a Stipendiary Magistrate of the North-West Territories. Judgment was given in favour of the execution creditor. The claimants appealed, under the provisions of the statute in that behalf, to the Court of Queen's Bench for the Province of Manitoba in banc.

The appeal was argued on the 16th February, 1887.

J. S. Ewart, Q.C., for the claimants.

The sheriff states he did not receive any notice of claim from the defendant's wife. After seizure he left the goods not in the possession of the claimants, but in that of the defendant and his wife on the promise of a bond. We contend this was a withdrawal of possession. The stock was purchased with moneys subject to the marriage settlement, and was taken to the farm on which the defendant's wife lived. Hodgson bought from the wife and the claimants from him, and he was then in possession. There was an abandonment of the seizure; they were not in the custody of law when either Hodgson or the claimants acquired title. The claimants assert a right as *bona fide* purchasers without

† See "The Judicature Ordinance" C. O. (1898), Rule 447, which is practically in the same words.

Argument. notice. *The Delta*,[1] *Houstoun* v. *Sligo*.[2] The Mercantile Law Amendment Act, 19-20 Vic. c. 97, s. 1. *Young* v. *Short*,[3] Churchill on Sheriffs, 211; *Blades* v. *Arundale*,[4] *Robertson* v. *Fortune*,[5] *Hart* v. *Reynolds*.[6] The criterion seems to be whether trespass would lie: *Foster* v. *Glass*.[7] The marital rights of the husband cannot be set up against the claimants: *Shingler* v. *Holt*.[8] It being shown that the wife had separate property, the presumption is that what was acquired therewith is also separate property: *Gore* v. *Knight*.[9] Though in the husband's possession the presumption is there is no gift: *Newlands* v. *Paynter*,[10] *Rich* v. *Cockell*,[11] *Parker* v. *Brooke*.[12]

W. H. Culver, for the execution creditors.

"The Administration of Civil Justice Ordinance, 1884" (Ord. 3, 1884), s. 83, prevents what took place being an abandonment. The sheriff shows that the defendant's wife promised to hold for him. Section 37 takes the case back to the law under the Statute of Frauds. It is shown that the execution was received the 14th November, 1885. The Mercantile Law Amendment Act is not applicable. The claimants admit they knew of the execution. The form of the issue shows the onus is on the claimant: Atkinson on Sheriffs, 182; Churchill on Sheriffs, 257; *Messenger* v. *Clark*;[13] Schouler on Husband and Wife, s. 247; McQueen on Husband and Wife, 19.

[*December 17th, 1887.*]

The judgment of the Court (TAYLOR, C.J., and KILLAM, J; WALLBRIDGE, C.J., having died after the argument) was delivered by—

TAYLOR, C.J.—This was an interpleader issue as to a part of the same cattle and farm stock, which were litigated over in the case just disposed of.

[1]45 L. J. P. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46. [2]29 Ch. D. 448; 52 L. T. 96. [3]3 Man. R. 302. [4]1 M. & S. 711; 14 R. R. 555. [5]9 U. C. C. P. 427. [6]13 U. C. C. P. 501. [7]26 U. C. Q. B. 277. [8]7 H. & N. 65; 30 L. J. Ex. 322; 7 Jur. N. S. 866; 4 L. T. 76; 9 W. R. 871. [9]2 Vern. 535; Pre. Ch. 255; 1 Ir. Eq. R. 464. [10]4 My. & Cr. 408; 10 Sim. 377. [11]9 Ves. 369; 7 R. R. 227. [12]9 Ves. 583. [13]5 Ex. 388; 19 L. J. Ex. 306; 14 Jur. 748.

Judgment.
Taylor, C.J.

The cattle and other stock were seized by the sheriff on the 8th of January, 1885. After the seizure, the sheriff left them in possession of the judgment debtor and his wife, who claimed to be the owner of them, they agreeing to find security. Upon their failure to do so, the sheriff allowed them still to remain, the wife, the claimant, agreeing to hold them for him. In October, 1885, he heard that they were being removed, and on the 12th of that month he directed a bailiff to again seize them, which he did.

They were then in the possession of the claimants, who allege that they bought them from one Hodgson, who had bought them from the wife. The finding of the Stipendiary Magistrate was adverse to the claimant, who now appeals.

It was contended that the cattle and stock were not at the time of the sale to Hodgson in the custody of the law, as the sheriff had, by leaving them as he did, abandoned the seizure. I do not see how it can be said there was an abandonment by the sheriff, in view of the N.-W. Ordinance of 1884, No. 3, cl. 83.

That clause, which follows those providing for interpleader proceedings, says, "Pending the adjudication of any such claim, the sheriff or other officer may, upon proper security being given him, by bond or otherwise, for the forthcoming and delivery to him of the property taken, or the value thereof when demanded, permit the claimant to retain possession of the same, until there shall be final adjudication in respect of the same; but in every such case it shall be competent for the said sheriff or other officer, at any time he shall see fit, to resume the actual and absolute possession and custody of the said property, notwithstanding such bond or security."

The sheriff acted strictly in accordance with this clause. What security is to be taken is not prescribed. He may permit the property to remain in possession of the claimant on security being given "by bond or otherwise," and here the security he took was the undertaking of the claimant to hold the goods for him. He did so at his own risk of the security being defective, and then when he heard the goods were

Judgment.
Taylor, C.J.

being removed, he again took actual possession of them, as the Ordinance permitted him to do.

By clause 37 of the Ordinance, "Goods, chattels, personal property, and lands and interests therein shall be bound by the delivery of process against the same to the officer charged with the execution thereof to be executed." This agrees with the 29 Car. 2, c. 3, s. 16.

It was argued for the execution creditor, that the Ordinance having been passed by the North-West Council, the Imperial Act 19 & 20 Vic. c. 97, s. 1, cannot be now in force in the North-West Territories.

I do not know that it is important to consider whether it is so or not. That Act only provides that no writ shall prejudice the title acquired by any person *bona fide*, and for valuable consideration before the actual seizure thereof, provided such person had not at the time he acquired such title notice that the writ or any other writ by virtue of which the goods might be seized, had been delivered to, and remained unexecuted in the hands of the sheriff.

The claimants can never claim the benefit of that statute, for not only did they buy after the cattle had been seized, but the claimant Thompson, when examined, said he knew when he bought that Brittlebank had this judgment and execution. Nor can the claimants shelter themselves behind any title acquired by Hodgson, as purchaser *bona fide*, and for valuable consideration, for whether Hodgson knew of the judgment or execution, or not, which is not shown by the evidence, it appears from an exhibit proved at the trial that he bought after the cattle had been seized.

Having held in the other case that these cattle were liable to be seized for the debt of the husband, and the claimant having failed to show such a title to them as would defeat the execution, the appeal should be dismissed with costs.

Appeal dismissed with costs.

THE QUEEN v. O'KELL.

Certiorari—Findings of fact—Scienter—Mens rea.

The applicant was convicted, under the N. W. T. Act, s. 95, for having in his possession intoxicating liquor without the special permission in writing of the Lieutenant-Governor. On a motion for a certiorari to quash the conviction:—

Held. (1) Following *Barber* v. *Nottingham & Grantham Ry. Co.*,[1] and *R.* v. *Grant*,[2] that where the charge is one, which, if true, is within the Magistrate's jurisdiction, the findings of fact by him are conclusive.

(2) That, as the Statute does not express knowledge by the accused of the intoxicating character of the liquor, to be an essential element of the offence, first, it was not necessary for the prosecution to allege or prove it; secondly, that it was necessary for the accused to prove not merely that he had no such knowledge, but that he had been misled without fault or carelessness on his part.

[*Court in banc, June 11th, 1887.*

T. C. Johnstone, on the 9th June, 1887, moved on notice for a rule calling on Justices of the Peace to shew cause why a writ of *certiorari* should not issue for the return of a certain conviction. Argument.

D. L. Scott, Q.C., appeared *contra*, and the matter was argued on the motion for the rule.

The facts with the grounds upon which the motion was made and the points raised in argument appear in the judgment.

[*June 11th, 1887.*]

ROULEAU, J., not having been present at the argument, took no part in the judgment. The judgment of the remainder of the Court (RICHARDSON, MACLEOD, WETMORE, and MCGUIRE, JJ.) was delivered by

MCGUIRE, J.—Arthur O'Kell applies for a Writ of Certiorari to return a conviction made by Messrs. Jarvis and Norman, two Justices of the Peace, dated May 29th, 1887, whereby the defendant was convicted for that he, the said Arthur O'Kell, within the space of twelve months last past, to wit, on the 23rd May, 1887, at the house known as the

Judgment. McGuire, J.

"Canteen," near the North-West Mounted Police Barracks, near Regina, had in his possession a quantity of intoxicating liquor, without the special permission in writing of the Lieutenant-Governor of the North-West Territories contrary to the form of the statute in such case made and provided, in order that the same be quashed upon the grounds:—

(1) That there was no evidence that the liquor found in his possession was intoxicating within the meaning of the statute;

(2) That if the said liquor was in fact intoxicating, there was no evidence that the applicant knew it; but on the contrary, there was evidence that he did not know it.

As to the first ground, we are of opinion after hearing counsel for O'Kell, and for the convicting Justices, and reading the depositions, that there was evidence that the liquors in question were intoxicating. The testimony of Dr. Jukes was that they contained from 3.9 to 8.1 per cent. of proof spirit or about one-half these quantities of pure alcohol, and that ordinary fermented malt liquor beer usually contains only from 4 to 6 per cent. of proof spirits. He also said that the liquors tested by him were all intoxicating, if taken in sufficient quantities, a qualifying remark that applies to all intoxicants.

There was also the evidence of Constable Frederick Smith, that one of the three kinds of liquor found in the applicant's possession, had, in fact, intoxicated him.

There was therefore, not only some, but also substantial, evidence before the Justices on which to base the conclusion they arrived at. Whether that conclusion was right or not is not a matter which, on this application we can review, the law is clear that where the charge is one that if true is within the Magistrate's jurisdiction, the finding of the facts by him is conclusive and is not open to review here. *Barber* v. *Nottingham & Grantham Ry. Co.*,[1] *Reg.* v. *Grant*.[2] We are

[1]15 C. B. N. S. 726; 33 L. J. C. P. 193; 10 Jur. N. S. 260; 9 L. T. 829; 12 W. R. 376. [2]14 Q. B. 43; 4 New Sess. Cas. 13; 19 L. J. M. C. 59; 13 Jur. 1026.

Judgment. McGuire, J.

not, however, to be understood as suggesting that even if we were trying the case on the merits we would feel bound to arrive at the same conclusion the Magistrate did, or that in any case where there may be any, even slight, evidence of the presence of alcohol, a conviction should be sustained.

As to the second ground relied on by the applicant, two questions arise. Is ignorance of fact a defence in a case of this kind? and, if it is: is there evidence on which the magistrates could come to the conclusion that the facts did not support the applicant's contention?

The section under which the applicant is charged, does not require that the offender shall "knowingly" have intoxicating liquor in his possession, and it is not, therefore, necessary for the prosecution to allege or prove a scienter. (See Bishop on Statutory Crimes, s. 1022.) Neither was it sufficient for the applicant to prove that he had no knowledge of the intoxicating quality of the liquors in question. He should have gone further and shown that he was misled, without fault or carelessness on his part. (See Bishop on Statutory Crimes, s. 1022. Bishop on Criminal Law, ss. 301-310. *Lovell's Case*, Cro. Car. 538; 1 Hale 42-43.) A party must not shut his eyes to the character of the liquor he is selling; he must exercise a reasonable degree of care in ascertaining whether the liquor is intoxicating or not. Moreover the onus is upon him to show that after careful investigation and inquiry, he honestly believed that the liquors in question were not intoxicating. Did defendant O'Kell produce such testimony, and if so was the evidence on this point all one way? If the evidence was conflicting, or if it did not satisfy the magistrates, we are not here to review the decision arrived at. The magistrates were the judges on that point. They had before them the evidence of Constable Smith that on the 21st, 22nd, and 23rd of May, he had been served by the applicant, in person, with liquor similar to some tested by Dr. Jukes, and subsequently found in applicant's possession, and that the liquor so served intoxicated him. Was the applicant unaware that this man was being intoxicated by the liquor so given him and drunk in the applicant's presence and on his prem-

Judgment.
McGuire, J.

ises? If he was, can it be said that he could not by reasonable investigation have ascertained what effect it produced on Smith? It was also in evidence that the liquor in applicant's possession had nearly if not quite as much alcohol in it as in ordinary beer. Ought not the applicant, a dealer in such things, to have been able, had he exercised that care required of him, to ascertain whether the liquor so sold by him was in fact intoxicating or not? All this was evidence for the magistrate in arriving at a conclusion as to whether the applicant had established his innocence. It was for the magistrate to be satisfied on this point, and if the evidence as a whole did not convince him that the defence of innocence had been established, this Court does not feel justified in reversing their finding.

The Court is against the applicant upon both grounds, and therefore refuses his application.

Motion dismissed.

Distinguished 1 Same Vol. 186

DICKIE v. DUNN.

Sale of specific chattel—Implied warranty of title—Evidence.

The defendant sold to the plaintiff a mare, then, as was assumed in the absence of evidence to the contrary, in the defendant's possession.

Held, following *Raphael* v. *Burt*,[1] and *Brown* v. *Cockburn*,[2] and distinguishing *Morley* v. *Attenborough*,[3] that the sale being one of a specific article, and there being no evidence that the vendor did not intend to assert ownership, but only to transfer such interest as he might have, there was an implied warranty of title.

The defendant having arranged with the plaintiff that a third party should hold the mare pending settlement of the dispute about the title, and having, upon inspecting the adverse claimant's alleged title, authorized the custodian to give her up to the claimant,

Held, sufficient evidence, by way of admission, on which the trial Judge could reasonably find a breach of the warranty.

[*Court in banc, June 11th, 1887.*

Statement.

This was an appeal by the defendant from a judgment of RICHARDSON, J., in favor of the plaintiff.

The facts and the points involved appear in the judgment.

T. C. Johnstone, for the defendant, the appellant.

D. L. Scott, Q.C., for the plaintiff, the respondent.

[*June 11th, 1887.*]

ROULEAU, J., not having been present at the argument, took no part in the judgment. The judgment of the remainder of the Court (RICHARDSON, MACLEOD, WETMORE and MCGUIRE, JJ.) was delivered by—

WETMORE, J.—The statement of claim in this case alleged that the defendant by warranting that he had the lawful right and title to sell and dispose of a certain mare, sold the same to the plaintiff. The breach assigned was that he had not title, and that the plaintiff was obliged to deliver up the mare to the person who had the lawful title, and lost her and claimed damages from the defendant.

[1] 1 Cab. & E. 325. [2] 37 U. C. Q. B. 592. [3] 3 Ex. 500; 18 L. J. Ex. 148; 13 Jur. 282.

Judgment. Wetmore, J.

The statement also contained other counts which, in the view we take of the case, are not material.

It appeared on the trial before my brother Richardson, that the plaintiff bought this mare from the defendant on the 17th April, 1886, and paid him $135 in cash for her. Then he took her away and brought her back and left her with the defendant until the 10th May following, under an arrangement whereby the defendant was to stable and feed her at the rate of $2 per week, the plaintiff during this time occasionally using the animal. On the 10th May, this mare was seized and taken from the defendant's stable by one McKinnon, who claimed to do so under a mortgage. It did not appear by whom this mortgage was made, or to whom, or when or where it was made. McKinnon took the mare to the stable of one McKinnet. Subsequently the defendant and McKinnon were at McKinnet's stable, when defendant told McKinnet that he was to hold and keep the mare until they were both present, and consented to either one taking her. After the mare was seized, the plaintiff met the defendant, who told him that the mare had been seized, and requested him to go to his office and meet his lawyer who would advise whether the seizure was valid or not. The plaintiff went there and met Stevenson (whom it seems to be admitted was the legal adviser of the defendant, and acted as his agent in this matter.) Stevenson asked McKinnon to produce his mortgage, and when he produced it objected to it, as it was not a certified copy, and advised the defendant to take the mare into his possession. The defendant called in a constable, who requested McKinnon to surrender the animal, which he refused to do. The defendant then told the plaintiff that it had been arranged that the mare was to remain in McKinnet's stable until the title to her was settled. Afterwards the plaintiff, defendant, Stevenson and McKinnon met; McKinnon produced what he claimed to be a certified copy of a mortgage by which he was entitled to the mare. It does not appear that anything else was done or anything said on that occasion, but on the very same evening, the defendant and Stevenson being together, one of them gave directions for McKinnet to give up the possession of the mare to

McKinnon, which was done, and McKinnon took the mare away the next morning. The defendant called no witnesses. The learned Judge gave judgment for the plaintiff, and from this judgment the defendant appeals. Judgment. Wetmore, J.

The defendant contends, in the first place, that as there was no express warranty by him of title to this property, the judgment ought to have been for the defendant. This raises the question whether a warranty of title will be implied on a sale of a specific chattel in the possession of the vendor at the time of sale. (There was no direct evidence whether or not the mare was in the defendant's possession at the time of sale, but in the absence of such evidence it will be presumed that she was.) This question is one which has been very much discussed in both English and American Courts. There is no doubt that under the civil law there is such a warranty, and the great weight of the American authorities is in the same direction. In England, however, the question seems to have been somewhat unsettled, until the late case of *Raphael* v. *Burt*,[1] in which it was held that there was an implied warranty of title on the sale of certain United States bonds, which had been originally stolen from American holders. The leading case for the contention of the defendant is *Morley* v. *Attenborough*.[3] That very able Judge, Baron Park, in delivering judgment in that case, certainly propounds the broad general principle, that there is no implied warranty on the sale of a specific chattel, but it was not necessary for the decision of that case to propound any such doctrine. The defendant in that case was a pawnbroker; the article sold, and with respect to which the action was brought, was one pawned with him, and in delivering judgment the learned Judge states 3 Ex p. 512, "It appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it." That seems to us to contain all that it was necessary to decide for the purpose of that case. In another part of his judgment the learned Baron is reported 3 Ex p. 512 as follows: "We do not suppose that there would be any doubt if the articles

Judgment. Wetmore, J.

are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title." In *Eichholz* v. *Bannister*,[4] this doctrine was held to be good law. We fail to distinguish any difference in principle between the case of a man, selling property over a counter in a shop, and selling it in a stable, or on the street, It seems to us that he just as much sells "as his own" in the one case as in the other, unless, to use the language of Mr. Benjamin, "it be shown by the facts and circumstances of the sale, that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." In this case before the Court, there was no evidence of any such facts and circumstances. Although the general principle laid down by Baron Park has been quoted with approval by several very eminent judges, we prefer to adopt the reasoning and views of the Court in *Brown* v. *Cockburn*,[2] as expressed by Chief Justice Harrison, from page 602 to 607, and to adopt the principle laid down in *Raphael* v. *Birt*,[1] before referred to. We are of opinion, therefore, that there was an implied warranty of title on the sale of the mare in question.

The next question is whether there was any evidence of title in McKinnon and out of the defendant at the time he sold to the plaintiff, so as to enable the plaintiff to maintain the action. We think there was evidence which warranted the learned Judge in finding that the defendant admitted the right of McKinnon to take the mare away, and therefore his title to her. We are not prepared to say, nor is it necessary for the purposes of this case, to decide whether or not the defendant might not have shown by evidence that as a matter of fact McKinnon had no title. It is sufficient that he did not attempt to do so. It has been urged that the mortgage in question was made in Manitoba and was not

[1] 17 C. B. N. S. 708; 34 L. J. C. P. 105; 11 Jur. N. S. 15; 12 L. T. 76; 13 W. R. 96.

Judgment.
Wetmore, J.

registered in the North-West Territories. There is no evidence of that. It is true that the plaintiff testified "that Stevenson told him" that a mortgage made out in Manitoba did not hold in the North-West Territories against a *bona fide* purchaser, but that does not amount to evidence either, that this particular mortgage was *made* in Manitoba, or was not registered in the North-West Territories. He further testifies on cross-examination that he had *heard* that the chattel mortgage was not registered in the North-West Territories, and not valid against a *bona fide* purchaser. This is hearsay, and proves nothing, and does not establish that the mortgage was not so registered, especially in the teeth of the defendant's arrangement, that the mare was to remain in McKinnet's stable until the title to her was settled, and then on inspection of McKinnon's title, authorizing McKinnet to give her up. The judgment of His Lordship Mr. Justice Richardson will be affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

WALTERS ET AL. v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Common carriers—Termination of transit—Warehousemen—Conditions—Negligence — Railway Act — Discharge of goods — Judicature Ordinance.

The defendant company between the 30th April and the 4th May received goods at Winnipeg from the plaintiffs for carriage. The goods were addressed to the plaintiffs, in some instances, "Prince Albert," in others, "Prince Albert, *via* Qu'Appelle," in others, "Prince Albert, Qu'Appelle," in others, "Duck Lake, Qu'Appelle," in others "C/o George Hanwell, Qu'Appelle." Of the places named, only Qu'Appelle was a station on the company's line. The goods were destroyed by fire about noon, on the 13th May. They had arrived at Qu'Appelle from day to day between the 5th and noon of the 12th May, and were apparently on the same days put in the company's freight sheds. The plaintiff's agent at Qu'Appelle was aware each day of the arrival of the goods.

Held, following *Mayer* v. *G. T. R.*,[1] that the company's duties as common carriers had ceased before the fire, and that they were liable, if at all, only as warehousemen.

The shipping note was endorsed *inter alia* with conditions to the following effect.

No. 3. That the company should not be liable for damages occasioned by fire.

No. 5. That the defendants should not be liable for any goods left until called for or to order, and warehoused for the convenience of the owner, consignor or consignee, and that delivery should be considered complete and the responsibility of the company should terminate when the goods were placed in its sheds or warehouse (if there be convenience for receiving the same) at their final destination, or when the goods should have arrived at the place to be reached on the company's railway, and that the warehousing of all goods should be at the owner's risk and expense.

No. 10. That all goods addressed to consignees at points beyond the places where the company had stations, and respecting which no directions were received at those stations, should be forwarded to their destination by public carrier or otherwise as opportunity offered, without any claim for delay against the company for want of opportunity to forward them, or they might, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there were such convenience for receiving them) pending communication with the consignees at the risk of the owners as to damage thereto from any cause whatsoever; but delivery should be considered complete, and all its responsibility should cease when such other carrier should have received notice that the company was prepared to hand him the goods for further conveyance; and that the company should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by it, if such loss, misdelivery, damage or detention, occurred after the goods arrived at said stations or places on its line nearest to the points or places they were consigned to or beyond its said limits.

[1] 31 U. C. C. P. 248

Per RICHARDSON, J.—The goods having reached Qu'Appelle, conditions 3 and 5 applied and protected the company.

Per WETMORE, J.—The Consolidated Railway Act, 1879, s. 25, ss. 4,† did not prevent an agreement being made that when the goods should reach the point on the company's railway to which they were to be carried, a certain act or dealing with the goods by the company should constitute a discharge of the goods within the meaning of the statute, and that thereupon the character of the company should be changed from that of common carriers to that of warehousemen, and that conditions 5 and 10 constituted such an agreement.

Per MCGUIRE, J.—Independently of the conditions, the company was not liable even as warehousemen; the company in this capacity being bound to use only ordinary care, and there was no evidence of negligence.

Held, per CURIAM.—That the Consolidated Railway Act, 1879, s. 27, s.-s. 1,‡ applies to an action charging the company with negligence as warehousemen, and therefore, the action not having been commenced within six months, was barred.

Per WETMORE and MCGUIRE, JJ.—The Consolidated Railway Act, 1879, s. 25, ss. 4,† applies only to receiving, transporting and discharging.

It being contended that the jury having found that the company had not performed its contract by delivery of the goods, the Court could not find that the character of the defendant company had been changed from that of common carriers to that of warehousemen, on the ground that the effect would be to draw an inference of fact inconsistent with the finding of the jury, which is not permissible under Judicature Ordinance, 1886, s. 331.§

Per WETMORE, J.—The section refers to inferences of fact inconsistent with the findings of the jury, when such finding is within the province of the jury.

[*Court in banc December 7th, 1887.*

Statement.

This was an appeal by the plaintiffs from the judgment of RICHARDSON, J., in favor of the defendants. The appeal was argued on the 8th and 9th June, 1887, when judgment was reserved. The facts and the points involved appear in the judgment.

T. C. Johnstone and *F. Beverly Robertson*, for the plaintiffs, the appellants.

J. A. M. Aikins, Q.C., *J. Secord* and *W. H. Culver*, for the defendants, the respondents.

[*December 7th, 1887.*]

RICHARDSON, J.—In this action the plaintiffs seek to recover damages for the non-delivery of certain goods of the

† "The Railway Act" (1888), 51 Vic. c. 29, s. 246, s.-s. 3, is in the same terms. ‡ "The Railway Act" (1888), 51 V. c. 29, s. 287, s.-s. 1, is practically the same terms, except that the limitation first mentioned is "one year." §The Judicature Ordinance, Con. Ord. (1898), c. 21. Rule 507 is in the same terms.

Judgment. Richardson, J.

plaintiffs' received by the defendants at Winnipeg, as common carriers, charging that the goods were on the 13th May, 1883, destroyed by fire through the negligence of the defendants by:

(1) Not using proper precautions against the dangerous escape of cinders, sparks, &c., from the chimney or ash-box of a locomotive, which, in passing a warehouse, wherein the plaintiffs' goods were placed alongside the line of railway at Qu'Appelle station, emitted cinders, sparks, &c., by reason of which the warehouse and plaintiffs' goods were set on fire and burnt:

(2) Allowing dried grass, shavings, and inflammable matter to accumulate and remain beneath the warehouse and plaintiffs' goods, which became ignited, and set fire to and destroyed said warehouse and goods.

The plaintiffs further claimed to recover $4,200, on the ground that an adjustment of their loss at this sum had, after the loss and before suit, been arrived at and agreed to be paid by defendants.

The defendants not only denied liability to the plaintiffs in any manner, but set up that as more than six months had elapsed after the loss was sustained and before suit, the plaintiffs could not recover. The action was commenced the 25th March, 1885, and tried at Regina the 13th December, 1886, a jury being empanelled to decide the questions of fact. The burning of the goods in question was not denied at the trial, and some evidence was adduced to show that underneath the warehouse, in which the goods were when burnt, and which was not enclosed at one end, some shavings and rubbish had collected on the ground, but that the fire, which consumed the warehouse, was communicated to it from this rubbish, was not established. The space between the warehouse and the ground was several feet. There was proof that shortly before the fire occurred a locomotive had passed, but nothing to indicate that either its management

was careless, or that the machine was in any wise defective in its working parts. Judgment. Richardson, J.

There was evidence that on the 30th April and 4th May, 1883, and on some intermediate days, the defendants received certain goods of the plaintiffs' for carriage in the usual way; the terms and conditions upon which they were received being endorsed upon the back of both the request notes given to the defendants at time of shipment, and the shipping bill given to the plaintiffs, filed at the trial. These formed the contract between the parties, and this contract, as I interpret it, was that the defendants should transport the goods in question from Winnipeg to Qu'Appelle and there deliver them to the plaintiffs, if ready to take delivery, on arrival, or within a reasonable time, but if not, that the defendants might warehouse them, when they would remain wholly at the plaintiffs' own risk.

There was no question but that all the plaintiffs' goods were carried to Qu'Appelle and there placed in defendants' warehouse, and there was evidence that the last of them, "a few packages," arrived at or near noon of the 12th May, 1883; also, that the fire, which consumed them, occurred about or shortly after noon of the 13th May; that, for receiving these goods and sending them on to their destination beyond the line of railway, one Hanwell was plaintiffs' agent; that he was aware of the arrival of all the goods and had requested that they should remain in defendants' warehouse, he not being ready to forward them; also, that Hanwell himself received delivery of some other goods, which arrived in the same car with the plaintiffs' last shipment on 12th May. It was thus apparent that a reasonable time for taking delivery of this shipment was allowed to the plaintiffs.

At the close of the plaintiffs' case their right to recover was challenged in point of law, and the objection then raised was reserved, and subject to such reservation, some questions were put to the jury by the Judge and answered, as appears by the record. It then appears that, after argument upon the whole case, the Judge ordered that the defendants should have judgment, from which the plaintiffs now appeal.

Judgment. Richardson, J.

The question now before the Court is in effect: Was this judgment right, or, if not, what judgment should now be given? The Court have been favoured with most elaborate arguments by learned counsel on both sides.

In my opinion, following *Mayer* v. *G. T. R.*,[1] the defendants' duties, as carriers of the goods in question, ceased before the fire, and the only character in which they could be held liable, if at all, is that of warehousemen. Holding the goods, therefore, as warehousemen, at the time they were destroyed, do the special terms and conditions, on which the defendants received them, apply in their favour?

No. 3 of the conditions says: "Nor will the company be liable for damages occasioned by fire."

No. 5: "Nor will the company be liable for loss or damage done to goods left until called for, and warehoused for the convenience of the parties to whom they are consigned and in all cases herein not otherwise provided" (and I am not aware of any other provision in the present case) "the delivery of the goods shall be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's warehouse at the place to be reached on the company's railway. The warehousing of all goods shall be at the owner's risk and expense."

These conditions, 3 and 5, were, to my mind, intended when the contract was made, to apply to a state of things which, in the contemplation of the parties, might arise after the goods reached Qu'Appelle. And as there has been no attempt to prove any other agreement, the plaintiffs are bound thereby, it being evident that the goods were warehoused at Qu'Appelle station for the convenience of the plaintiffs, the parties to whom the same were consigned. The plaintiffs' case has thus failed. I take no notice of the adjustment alleged in the plaintiffs' statement of claim. There was no evidence to support it, and in the argument it seems to have been abandoned. Neither do I think it necessary here to refer to the objection that the action should have been brought within six months, beyond expressing my entire concurrence in the views on that head expressed

by my brothers Wetmore and McGuire, whose written judgments in this case I have had the privilege of perusing. Judgment. Richardson, J.

In my opinion the appeal should be dismissed with costs.

WETMORE, J.—This action was commenced in the High Court of Justice by summons issued on the 25th March, 1885. The plaintiffs claimed compensation for the loss of certain goods of the plaintiffs', which were destroyed by fire, while in defendants' warehouse at Qu'Appelle. [His Lordship here stated the pleadings fully.]

At the trial before my brother Richardson it appeared in evidence that the goods in question were shipped by the defendants' railway at Winnipeg addressed to the plaintiffs, some of them "Prince Albert," others of them "Prince Albert, Qu'Appelle," others "Prince Albert via Qu'Appelle," others "Duck Lake, Qu'Appelle," and some of them to the care of "George Hanwell, Qu'Appelle." Hanwell resided at Qu'Appelle at the time the goods were lost, and Walters, one of the plaintiffs, swore that he did the forwarding at Qu'Appelle for him, and Hanwell, who was examined under a commission issued in this cause, swore that he acted as the plaintiffs' agent in receiving and forwarding their freight, and that the manner in which such freight was forwarded was that the plaintiffs sent freighters to Qu'Appelle, and notified him (Hanwell) when to expect them. This evidence was uncontradicted. Prince Albert and Duck Lake are situated at a distance from the defendants' railway, and it was not disputed that Qu'Appelle was the station on such railway to which goods for those points were usually carried by rail and from thence forwarded by freighters; or that Qu'Appelle was the station on the line of railway nearest to Prince Albert and Duck Lake. It also appeared in evidence that the first consignment of the goods in question had arrived at Qu'Appelle from one to two weeks prior to the occurrence of the fire by which they were destroyed, and that the last consignment arrived on the 12th of May, the day before the fire occurred, in a car with goods for other persons. There was no evidence to show the description or value of the goods which arrived on the 12th of May, or of those which

Judgment. Wetmore, J.

had arrived previously. All the goods, however, prior to the time of the fire had been unloaded from the cars and placed in the defendants' freight shed or warehouse. On the 13th of May a fire occurred, by which this warehouse and all the goods in it were destroyed. The fire was first noticed underneath the platform of the warehouse. A short time before the fire broke out an engine had passed over the line on the track which ran alongside of the warehouse. It also appeared that a portion of this platform had not been boarded up at the side or end, that the weather previously had been very dry, that high winds prevailed, that large quantities of straw, dry hay, shavings and other rubbish of an inflammable nature had been blown about by the winds, and some of the witnesses swore that a quantity of this inflammable material had accumulated under this platform. This was, however, contradicted by the defendants' witnesses.

The shipping notes, under which the goods in question were received and carried by the defendants, were put in evidence, by which it was agreed that they were to be received and transported subject to certain terms endorsed upon such shipping notes, some of which terms I will have occasion to refer to hereafter.

In answer to questions put to them by the learned Judge the jury found:—

(1st.) That the defendants received the goods for carriage to Qu'Appelle.

(2nd.) That they so carried the said goods.

(3rd.) That they were not delivered to the defendants, because they were burned.

(4th.) That they did not know positively what originated the fire, but they believed it to have originated by a spark from one of the defendants' engines in passing.

(5th.) That the defendants were guilty of negligence in not boarding in their building and platform to the ground to prevent the gathering of rubbish under the same.

Judgment.
Wetmore, J.

The jury did not find, nor was it left to them to find whether or not, in consequence of such neglect, rubbish had actually accumulated under the platform, or, if it had, whether it contributed to the loss.

The plaintiffs' statement of claim was framed under section 13 of Ordinance No. 3 of 1884, which provides that: "The clerk, on receiving from any person * * * a plain statement in writing of his complaint or cause of action, or particulars of his claim in the form of an account, and, in case of a trespass or wrong complained of, with the amount of damages claimed against any other person, * * * shall file the same in his office and issue a summons." A copy of the statement of claim was, under the practice, served on the defendants with a copy of the summons. The statement of claim served the same purpose as the declaration under the practice of the Courts at Westminster. It was urged on behalf of the plaintiffs that this statement should not be governed by nice distinctions as to the form of the action or the cause of action set out in it; that it was merely a history of the transactions or matters on which the right to relief was founded, and that, if it disclosed a state of facts which, if supported by the evidence, would entitle the plaintiffs to recover, they should recover accordingly, whether the right was founded on a breach of contract or on a tort, or on both. I am rather disposed to concur with this contention, but it is not necessary to decide that for the purposes of the case. I will however, assume it to be good law. It was then urged, on behalf of the plaintiffs, that the statement of claim, the evidence, and the findings of the jury, disclosed a state of facts which entitled the plaintiffs to recover from the defendants for breach of contract as common carriers in not delivering the goods, and that such right to recover was not barred by the limitation provided by section 27 of the Consolidated Railway Act, 1879. Assuming that the evidence did disclose the state of facts represented for the plaintiffs, I am inclined to concur, also, in this view of the law, although possibly it may not be necessary to decide that point either for the purposes of this case. The defendants' obligation or

Judgment.
Wetmore, J.

contract as common carriers, unless limited by some special agreement with the plaintiffs, or by some notice, condition or declaration which they might lawfully make or give, was to carry and safely deliver the goods at all risks, save only "the act of God or the Queen's enemies." In that case they were insurers of the goods, and if they failed to deliver they would have committed a breach of their contract, and would be liable therefor, and that whether such failure was brought about by their own negligence or wrongful act in managing their railway, or by the negligence or wrongful act of another person, or by accident. A suit instituted to recover for such a breach would not, in my opinion, be a suit instituted for "indemnity for any damage or injury sustained by reason of the railway," because the neglect or wrongful act of the defendants *in the construction, maintenance, use or management of the railway* would not be the gist of the action. The gist of the action would be the breach of contract before stated. The question then arises: Do the facts proved in evidence in this case bear out the contention on the part of the plaintiffs? I think they do not. While the ordinary liability of a common carrier is as before stated, it is quite clear that such liability could, at common law, be limited by special contract, even as against the carrier's gross negligence, or that of his servants. (See Angell on Carriers (5th Ed.) section 275, note (a), and the cases there cited.) The power so to limit this liability still exists, except in so far as it is prevented or controlled by some statutory enactment. Condition No. 5, endorsed on the shipping note, and which the plaintiffs agreed to, provided that the defendants would not be liable for "any goods left until called for or to order, and warehoused for the convenience of the parties to whom they belong, or by or to whom they are consigned, and in all cases when herein not otherwise provided, the delivery of the goods shall be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's sheds or warehouse (if there be convenience for receiving the same) at their final destination, or when the goods shall have arrived at the place to be

Judgment.
Wetmore, J.

reached on the said company's railway. The warehousing of all goods will be at the owner's risk and expense," and condition No. 10 endorsed on the shipping note, and also agreed to by the plaintiffs, provided "That all goods addressed to consignees at points beyond the places at which the company have stations, and respecting which no direction to the company shall have been received at these stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them, or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same), pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all the responsibility of the said company shall cease, when such other carrier shall have received notice that the said company is prepared to hand him the said goods for further conveyance, and it is expressly declared and agreed that the said Canadian were no conditions on the shipping notes, which in any loss, mis-delivery, damage or detention that may happen to goods sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to or beyond their said limits." There were no conditions on the shipping notes, which in any way altered these conditions cited, in so far as they affected these goods. If the operation of these conditions is not affected by any statutory provisions, and if the finding of the jury that the defendants received the goods for carriage to Qu'Appelle is correct, the discharge of them was complete and the responsibilities of the defendants in respect thereto as common carriers terminated when they were placed in the warehouse at Qu'Appelle, and they would only be liable in case of loss or damage, if liable at all, as warehousemen. It might possibly be urged that some of these goods at any

Judgment. Wetmore, J.

rate were addressed to consignees "at points beyond the places at which the company have stations," and so would be embraced by the provisions of the 10th condition above set out. I am of opinion, however, that the 5th condition would embrace them, because it was established in evidence, and not disputed, that the course adopted in forwarding the plaintiffs' goods from Qu'Appelle was that they sent their own freighters and took them away. I think it fair to assume that the defendants' servants and agents had knowledge of this course, and therefore it might be fairly inferred that this was a case in which instructions had been received at the station not to forward these goods by public carrier. But supposing these goods were embraced by this 10th condition, the plaintiffs had agreed thereby that when the goods had arrived at the station they might be warehoused there and that they would be at their, the plaintiffs', risk. Under this agreement the goods were so warehoused, and from that time, as under the 5th condition, if any liability attached to the defendants for loss or damage, it would be as warehousemen and not as carriers. It was urged, however, that these conditions did not relieve the defendants, and that their liability as common carriers continued because the loss was occasioned by the negligence of the defendants, and therefore they came within the provisions of sub-section 4 of section 25 of the Consolidated Railway Act, 1879. Assuming that the loss was occasioned by the negligence of the defendants, it will be necessary to examine this sub-section of that Act and the preceding sub-sections to ascertain what the duties of the defendants are in respect to goods offered to them for transportation, and to what extent they are limited respecting notices, conditions or declarations relating to such goods. Sub-section 2 provides that trains shall be started and run at regular hours, and that sufficient accommodation shall be provided for "the transportation of all such passengers and goods as are, within a reasonable time previous thereto, offered for transportation at the place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging way-passengers and goods from the trains." Sub-section 3 provides

Judgment.
Wetmore, J.

"that such passengers and goods shall be taken, transported and discharged at, from and to such places, on the due payment of the toll, freight or fare legally authorized therefor." That is, such goods are to be taken, transported and discharged at, from and to such places as are mentioned in the preceding sub-section, namely, at, from and to the place of starting, at, from and to the junctions of other railways, and at, from and to the usual stopping places established for receiving and discharging way-passengers and goods from the trains. These two sub-sections prescribe the statutory duties upon the defendants for receiving, transporting and discharging goods, and it will be noticed that there is no duty cast upon the defendants to carry or forward goods to points beyond their line of railway — they are merely thereby bound to receive goods at a point on their line of railway, and carry them to another point on their line of railway and there discharge them. Then sub-section 4 provides "that the party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company." That is, the party aggrieved by any neglect or refusal (so far as goods are concerned) in taking such goods at such a point on the line of railway, and transporting them to another and discharging them there shall have an action therefor against the company, and as the sub-section goes on to say, "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." That is, if in the receiving of goods, for instance, and the transportation thereof from one point of the before stated line of railway to another, and the discharging them at such last mentioned point, the goods are damaged or lost through the negligence or refusal of the company or its servants, or any other damage is occasioned by such neglect or refusal, the company shall not be relieved by any notice, condition or declaration. And so, in the *Grand Trunk Railway Co.* v. *Vogel*,[2] the Supreme Court of Canada held that when the property in question in that suit

[2]11 S. C. R. 612.

Judgment.
Wetmore, J.

was damaged while in course of transportation, through the negligence of the defendants' servants, the defendants, under sub-section 4 of section 25 of The Consolidated Railway Act, 1879, were not relieved from liability by a condition in the shipping note, which, without that sub-section, would have relieved them. But I can see nothing in this sub-section of the Act, or in the *Grand Trunk Railway Co.* v. *Vogel*,[2] which would cut down or in any way limit the effect of an agreement by which the shippers have agreed that when the goods shipped by the defendants' line of railway have reached the point on such line to which they were to be carried, a certain act or dealing with the goods by the company should be equivalent to a discharge of the goods within the meaning of the statute, and that, thereupon, the character of the defendants should be changed from that of common carriers to that of warehousemen. And I think that is exactly what the plaintiffs have done in this case by agreeing to the conditions endorsed on the shipping notes hereinbefore set out. They, in substance, agreed that when these goods reached Qu'Appelle station, and were placed in the defendants' freight sheds or warehouse, it would be equivalent to a discharge of the goods by the defendants as common carriers, and that from that time they should hold them as warehousemen at the plaintiffs' risk. I am of opinion, therefore, that when the goods in question were destroyed by the fire the defendants had fulfilled their contract as common carriers, and that they held such goods as warehousemen. Now, warehousemen are not insurers of the property in their custody. If loss or damage occurs to any such property, it is necessary to aver and prove negligence in order to render them liable. In other words the *negligence or wrongful act or omission that occasioned the negligence is the gist of the action.* The next question that arises is, was the negligence or wrongful act or omission which occasioned the damage, committed or omitted in and about the "construction, maintenance, use or management of the railway." If it was, I think, under the great weight of authority and the fair reading of the section, it would be a

Judgment.
Wetmore, J.

suit instituted "for indemnity for damage or injury sustained by reason of the railway," within the meaning and intention of section 27, sub-section 1 of the "Consolidated Railway Act, 1879." The only negligence on the part of the defendants that the jury have found is their omission to board in their building and platform to the ground, to prevent the gathering of the rubbish under the same. Assuming that the rubbish, in consequence of such omission, gathered under this building and platform, and that this contributed to the loss, (if it did not, of course the defendants are not liable), but assuming that it did, by section 17 of the defendants' charter, as set out in 44 Vic. c. 1, Statutes of 1881, page 20, The Consolidated Railway Act, 1879, as far as the same is applicable and subject to certain exceptions which do not affect the point in question, is incorporated with such charter. By sub-section 16 of section 5 of that Act, the expression "the railway," means "the railway and the works by the special Act authorized to be constructed." Among the powers given to the company, they have, by section 7, sub-section 8 of the same Act, conferred on them the power "to erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, and from time to time to alter, repair or enlarge the same." It will hardly be disputed that this gave the defendants the power to erect and maintain the freight shed in which the goods in question were stored at the time of the fire, and the platform about it. The omission to board in this building and platform, must therefore, have occurred in the course of either the construction, maintenance, use or management of such building and platform, and was, therefore, occasioned by "reason of the railway." I am, therefore, of opinion that the limitation provided by section 27, sub-section 1 of the Consolidated Railway Act, 1879, applies, and that this suit was instituted too late, but I am further of opinion that the plaintiffs are estopped by the conditions of the agreement, which I have before set out, from recovering in this suit. They have chosen to agree that when the goods are warehoused they shall be at their risk. It was quite open to them to make such an agreement, and it would not

Judgment. Wetmore, J.

be affected by sub-section 4 of section 25 of The Consolidated Railway Act, 1879, because that part of the agreement was not intended to operate until after the goods had been taken, transported, and discharged, within the meaning of that sub-section. It was, however, urged that, under section 231 of The Judicature Ordinance, 1886, the Court had no power to draw inferences of fact inconsistent with the finding of the jury. And that, as the jury had found that the defendants had not performed their contract by delivery of the goods, the Court could not find that the character of the defendants had been changed from that of common carriers to that of warehousemen. That section of the Ordinance, however, must mean that no inferences of fact inconsistent with the finding of the jury can be drawn when such finding is within the province of the jury. If a question of law has been submitted to them, or a question which should have been decided by the Judge and the jury have found contrary to law this Court is not bound by such finding; or if a question has been submitted to them which should not have been submitted, the Court is not bound by the finding. Now, the question here was not so much whether the goods had been delivered, but whether they had been discharged within the meaning of sub-sections 3 and 4 of section 25 of "The Consolidated Railway Act, 1879;" and as there was undisputed testimony that the goods had been warehoused, this question depended entirely on the construction to be given to the statute and to a written agreement between the parties. This was a matter entirely for the Judge, and not for the jury. I may just add that taking the whole evidence on the point together, I have very serious doubts whether there was any evidence to leave to a jury that the negligence of the defendants which they found, contributed to the loss. However, I do not put my judgment on that ground, but on the other grounds which I have discussed. I am of opinion that the judgment of His Lordship, Mr. Justice Richardson, should be affirmed and this appeal dismissed with costs.

Judgment.

McGuire, J.

McGUIRE, J.—In this action the plaintiffs appeal from the judgment of Mr. Justice Richardson, before whom the same was tried at Regina at the sittings of the High Court of Justice, in December, 1886, with a jury, the verdict being for the defendants. The plaintiffs claimed compensation for the loss of goods delivered by them to the defendants, to be carried from Winnipeg to QuAppelle, and which were burned in the defendants' freight shed at Qu'Appelle on the 13th of May, 1883.

The statement of claim may be condensed as follows:—That the defendants, being a duly incorporated railway company, and carrying on its business as common carriers by virtue of the statutes in that behalf, received at Winnipeg, as such common carriers, goods of the plaintiffs to be carried to Qu'Appelle and to be delivered to the plaintiffs, and all things happened to entitle the plaintiffs to have the said goods safely carried and delivered; that the defendants carried said goods to Qu'Appelle, and there deposited them in the defendants' warehouse, part of their railway, to be there kept by the defendants for the plaintiffs for reward in that behalf; that in addition to the said line of railway and warehouse, defendants had an engine which under their management was driven near the said warehouse, and through the negligence or improper conduct of the defendants in the management (1) of the engine, or (2) of their railway, engine and warehouse, or (3) of their railway and warehouse, a fire started and destroyed the plaintiffs' goods, and the defendants did not deliver the same to the plaintiffs; that when they demanded indemnity from the defendants, the latter promised to pay them the value of the said goods, but did not do so.

The defendants pleaded not guilty by statute; that the goods were delivered; denial of breach of contract; denial of the contract; that special conditions of contract exempted them from liability, and denied all negligence and obligation generally.

At the trial certain questions were put to the jury and answered as follows:—(See judgment of Richardson, J., *supra.*)

Judgment.
McGuire, J.

Richardson, J., reserved judgment till a subsequent day, when he delivered judgment for the defendants. From this judgment the plaintiffs appeal.

The appeal was argued before the Court in banc in June last and judgment reserved till the present sittings.

It will be observed that the defendants are sued as a railway company duly incorporated, and that they are described as common carriers under the statutes in that behalf, which must mean their special Act and the general railway Act. The statement of claim seems to me to be aimed at the defendants as wrongdoers in respect of certain alleged negligence or improper conduct, rather than as carriers who have failed to fully discharge their duty as such, for it is admitted that they carried the goods and then deposited them in their warehouse, erected by them for the purpose of storing goods, and that they so deposited them "to be there kept for the plaintiffs for reward in that behalf," which must mean for reward as warehousemen. No complaint is made as to anything done or omitted to be done by the defendants up to this time, but apparently all was done as plaintiffs thought it ought to be done. But at this point the difficulty arises. The defendants are charged with negligence or misconduct in the management of their warehouse, or engine, or railway, some or all of them, whereby the plaintiffs suffered the loss of their goods. On the argument before this Court the plaintiffs' counsel contended that the statement of claim also charged the defendants with breach of their duty as common carriers in not delivering the goods, and this independently of the mode of loss or of the negligence alleged. I am by no means satisfied that the plaintiffs' counsel is right in this contention, but granting that he is, in the view I have taken of the whole case, it will not affect the result. I think that the liability of the defendants *as carriers* had ceased before the loss occurred. The evidence for the defence, and it is not contradicted, is that the goods began to arrive at Qu'Appelle about the 5th of May, and some came each day thereafter until the last arrived, at about noon on Saturday the 12th

Judgment. McGuire, J.

day of May. The fire occurred about noon on the following day. I think a reasonable time had elapsed to allow the plaintiffs to remove their goods. The jury have answered that they think Hanwell (plaintiffs' agent) had not sufficient notice which, taken in connection with the question, probably meant that sufficient time did not elapse after notice to permit him to remove the goods. It was held by Burton, J., *Vineburgh* v. *The Grand Trunk Railway Co.*,[3] that the question as to whether a reasonable time had elapsed was "a matter of law which ought not to have been submitted to the jury at all," and where the jury had given an answer similar to the one in this case, he disregarded it and held that a reasonable time had elapsed. Apart from this, I think that, even as a matter of fact, their answer is clearly against the evidence. Car 914, which contained the last instalment of the plaintiffs' goods, contained also some belonging to Hanwell and McManus, and they found time to take their goods away on that Saturday afternoon. No reason is offered by the plaintiffs why they could not also have removed the comparatively small quantity which came on that day for them. As to the goods which arrived on previous days, it can hardly be seriously contended that ample time was not given for their removal. The true reason is, in all probability, that disclosed in Hanwell's testimony, that the freighters who were to carry the goods from Qu'Appelle to Duck Lake and Prince Albert had not yet arrived, owing to bad roads, and did not, in fact, arrive until after the fire, and it was for plaintiffs' convenience that the goods should remain stored in defendants' freight shed until they should be ready to remove them. The question of how long the liability as insurer of goods rests upon the carrier has been frequently considered in the Courts, both of England and Canada and the United States. *Bourne* v. *Gatliffe*,[4] it was held that a plea which alleged that goods carried by ship from Belfast to London, and landed safely there on public and proper wharf, to remain until called for by the owner, was a good defence to an action where the goods were burned on the wharf, and that the

[3] 13 O. A. R. 93. [4] 11 Cl. & F. 45; 8 Scott, N. R. 604; 7 Man. G. 850.

Judgment. McGuire, J.

carriers' liability, *qua* carriers, had ceased. See also *In re Webb*.[5] In *Shepherd* v. *Bristol & Exeter Ry. Co.*,[6] cattle arrived on Sunday about noon, and because police regulations forbade driving them through the streets on that day, the company's servants and a servant of the plaintiffs put them in a pen. When the owner came for them on the following morning two were found dead. Here it was held that the liability of the defendants as carriers ceased when they put the cattle in the pen. Bramwell, B, in his judgment, said: "Had the defendants anything to do after two o'clock on Sunday? It seems to me that the cattle had arrived, were taken out of the trucks safely, the plaintiffs' servant was there, and, had it not been Sunday, would at once have driven them off." *Garside* v. *Trent Navigation Co.*,[7] and *Wise* v. *Great Western Ry.*[8] were cited in that case. In *Garside* v. *Trent Navigation Co.*,[7] the contract was to carry goods from A to B, to be forwarded to C, very much like this case, except that here the defendants had nothing to with the forwarding to Prince Albert. The defendants did carry the goods from A to B and deposited them in the warehouse, but before they had an opportunity of forwarding them the goods were burned; held that the defendants were not liable as carriers. In *Wise* v. *Great Western Ry.*,[8] the defendants carried a horse, but on its arrival there was no one to receive it, and it was forgotten for 24 hours and suffered injury in consequence, yet the defendants were held not to be liable, and that, too, independently of their having given notice of its arrival. See also *Gill* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*[9] In *Chapman* v. *The Great Western Railway*,[10] goods arrived on 24th and 25th, and were burned on the 27th, and the defendants were held not to be liable. Coleridge, J., in giving judgment, said: "Plaintiff cannot, for his own convenience, prolong the heavier liability of the carriers beyond a reasonable time." In *Mitchell* v. *The Lancashire &*

[2] Moore, 500; 8 Taunt. 443; 20 R. R. 520. [3] 37 L. J. Ex. 113; L. R. 3 Ex. 189; 18 L. T. 528; 16 W. R. 982. [4] T. R. 584; 2 R. R. 468. [5] 1 H. & N. 63; 25 L. J. Ex. 258; 4 W. R. 551. [6] 42 L. J. Q. B. 186; 28 L. T. 587; 21 W. R. 525. [10] 49 L. J. Q. B. 420; 5 Q. B. D. 278; 42 L. T. 252; 28 W. R. 566; 44 J. P. 363.

Judgment. McGuire, J.

Yorkshire Ry. Co.[11] the defendants were held liable as warehousemen for negligence, but not as carriers. In his judgment, Blackburn, J., said: "When the goods arrived at their destination the company complied with their duty when they gave notice, and then they ceased to be carriers, and incurred from that time a liability as warehousemen."

In Smith on Negligence, it is laid down that the carriers' liability as such ends when the *transitus* is complete. As to when that occurs, reference is made to *In re McLaren, Ex p. Cooper.*[12] See also *In re Mills, Ex p. Gouda.*[13]

In the United States similar decisions have been given. In *Thomas* v. *B. & Prov. R. R.*,[14] cited in *Bowie* v. *The Buff., Brantford & Goderich R. R.*,[15] it was held that where goods carried on a railway are deposited in a railway company's warehouse, the company's liability, while the goods are there, is only that of paid depositaries. In Redfield on Railways, another American case is given: *Narway Plains Co.* v. *The Boston & Maine R. R.*,[16] where Shaw, C.J., held that the mere landing and putting of the goods in their warehouse ends the liability of the carriers as such. It is a delivery by the company as carriers to themselves as warehousemen. In Ontario an early case will be found, *McKay* v. *Lockhart*,[17] where it was held that where goods were landed from a ship at the port of destination, and notice of arrival given, the liability of the carrier ceased. *Inman* v. *The Buff. & Lake Huron Ry. Co.*[18] was a case in many respects like the present one. Goods were shipped from Buffalo to Caledonia for the plaintiffs, who lived at Port Dover, 18 miles from the railway station. Draper, C.J., held that the defendants had a right to deliver at Caledonia immediately after arrival, and that being the terminus of the transit their duty was fulfilled by placing the goods in a safe place, and whatever the responsibility of the company after that might be, it was not that of common carriers. Plaintiff had no right, he said, to continue the defendants' responsibility by delaying for *a single hour after notice.*

[11] 44 L. J. Q. B. 107; L. R. 10 Q. B. 256; 33 L. T. 161; 23 W. R. 853. [12] 48 L. J. Bk. 49; 11 Ch. D. 68; 40 L. T. 105; 27 W. R. 518. [13] 10 W. R. 981. [14] 10 Metcalfe, 472. [15] 7 U. C. C. P. 191. [16] 1 Gray, 263. [17] 4 O. S. 407. [18] 7 U. C. C. P. 325.

Judgment.
McGuire, J.

In *Vineburgh* v. *The Grand Trunk Railway*,[3] the plaintiff left his trunk, which arrived in the evening, in the baggage room, and when he called for it next morning it was gone. Held, that the defendants were not liable. *Hodgkinson* v. *The London & N. W. R. Co.*[19] is there cited. Baggage, which arrived at 4.25 p.m., was called for at 6 o'clock of the same day, but could not be found. Held, that the defendants' responsibility as carriers had ceased when an opportunity was afforded the plaintiff of taking delivery of her property.

In several of the foregoing cases it will be observed that the liability of the carriers was held to have ceased without any notice of arrival having been given to the consignees; in the other cases such notice had been given. In the present case I think notice had been given. Plaintiffs' agent, Hanwell, saw the goods arriving from day to day, which fact would have relieved the defendants from any liability they might otherwise have been under to give notice, but there is evidence of express notice, for Warner, the station agent, swears, and his evidence is not contradicted, that he repeatedly notified Hanwell, as plaintiffs' agent, to remove the goods, as they were in his way. It is true, plaintiffs seek to deny that Hanwell was their agent, and the jury have found in their favour on this point, but, I think, contrary to the evidence. Hanwell himself says he was such agent; Warner says that Hanwell was plaintiffs' agent to receive their goods at Qu'Appelle, and Mr. Walters, one of the plaintiffs, in answer to a question as to some of the goods being consigned in care of Hanwell, said, "Yes, he did the forwarding at Qu'Appelle for me;" and, lastly, it is proved that some of the goods in question were consigned in care of Hanwell. I think the agency was, therefore, clearly established. Plaintiffs' counsel, on the argument, suggested that Hanwell was agent, if at all, only to *forward*, not to secure these goods. Even if this were true, it would not affect the case. I think, moreover, that not only was notice given, but that a reasonable time for removal had elapsed after notice and before the fire, although it would appear from *Inman* v. *The Buff. &*

[19]14 Q. B. D. 228; 32 W. R. 662.

Judgment.
McGuire, J.

Lake Huron R. R.[18] above cited, that it is not necessary to go that far. Draper, C.J., in his judgment in that case, said: "I cannot bring myself to the conclusion that the delivery is incomplete until the consignee has received the notice or until he has had a reasonable time to send for the goods after its receipt. Such an extension of the defendant's liability *qua* common carriers is not warranted by any authority I have seen, and it appears to me the reason of the thing is against it." Similar views will be found in some of the other cases referred to. But if the defendants are not liable as carriers, are they liable as warehousemen? I do not think so, even independently of any conditions endorsed on the shipping bills. The defendants, as warehousemen, were only bound to use ordinary care, and the evidence does not satisfy me that they failed in this respect. The jury, it is true, did find that the defendants were guilty of negligence in not boarding up the end of the platform to prevent the accumulation thereunder of inflammable rubbish, but they do not say that the negligence in any way contributed to the loss. There is, in fact, no evidence that the fire caught from the shavings, straw, etc., which some of the witnesses said had gathered under the freight shed. No one saw that rubbish on fire. One witness who looked under the building and saw the fire on the bottom of the shed or platform, said that he saw no fire on the ground. One of plaintiffs' witnesses said that, from all he saw, the fire might have come from the top of the platform, which was several feet above the ground, while two of the defendant's witnesses say that the ground beneath the building was wet and muddy. The burden of proof was on the plaintiffs to establish negligence causing the fire. I do not think they have offered any evidence of such negligence in respect of the management of the warehouse, and the question ought not, therefore, to have been left to the jury. As to negligence in the management of the engine, no attempt was made to offer any evidence. The jury are uncertain as to whether the fire caught from the engine at all. But even if the defendants had been guilty of negligence in the management of their engine, or in allowing combustible matter to accumulate on their premises, whereby the loss

Judgment.
McGuire, J.

arose, the action is one which should have been commenced within six months. *McCallum* v. *The Grand Trunk Ry. Co.*,[20] affirmed on appeal, is a case exactly in point. In *May* v. *The Ont. & Quebec Ry. Co.*,[21] Wilson, J., in his judgment said that the words "done in pursuance," &c., at the end of section 27, c. 9, 42 Vic., should be read as meaning "in the course and prosecution of their business as a railway company constituted in pursuance," &c.; and Morrison, J., in *McCallum* v. *The Grand Trunk Ry. Co.*,[20] interpreted the phrase "by reason of the railway," to mean "sustained upon the railway by reason of the use made of it." Reading section 27, therefore, in the light of these interpretations, I think it would extend to the present case even if such negligence had been established.

The defendants also rely on certain conditions endorsed on their shipping bills, and set out in the judgments of my brothers Richardson and Wetmore, which, if the plaintiffs are bound thereby, would certainly relieve them from the responsibility for the loss in this case. As to whether the plaintiffs were so bound or not, I shall express no opinion, as in the view I take of the case I think the defendants are not liable, independently of any such conditions. I may, however, observe, since the point was taken by plaintiffs' counsel on the argument, that I do not think the defendants would have been prevented from availing themselves of the protection of those conditions by sub-section (4) of section 25 of 42 Vic. c. 9, on the ground that the loss arose through their negligence, because I concur in the opinion expressed in *Scarlett* v. *Great Western Ry. Co.*,[22] that sub-section (4) applies only to the cases mentioned in the preceding portions of section 25 and do not apply to anything subsequent to the safe discharge from the train of the goods. *Vogel* v. *Grand Trunk Ry. Co.*[2] was a case where the horse was injured during the transit.

As to the allegations in the statement of claim that defendants had promised to pay plaintiffs for their loss, I think that it was not established, and the jury have not

[20] 10 O. R. 70. [22] 41 U. C. Q. B. 211.

found that any such agreement was proved, and this branch of the case was practically and, I think, properly abandoned by the plaintiffs' counsel on the argument. Judgment. McGuire, J.

I think, therefore, that the appeal should be dismissed with costs to be paid by the plaintiffs.

MACLEOD and ROULEAU, JJ., concurred.

Appeal dismissed with costs.

ANGUS ET AL. v. THE BOARD OF SCHOOL TRUSTEES OF THE SCHOOL DISTRICT OF CALGARY.

C. P. R. Lands—Exemption from taxation—Sale—Proper authority to assess.

Lands vested in the Canadian Pacific Railway Company subject to a provision that the same should "until they are sold or occupied, be free from taxation for 20 years," were by the company agreed to be sold and conveyed to the appellants as trustees, who were to sell them, accounting for an interest in the proceeds to the company. At the date of the assessment of the lands, the consideration owing by the trustees to the company had been paid.

Held, that the lands had ceased to be exempt from taxation.

Held also, WETMORE and MCGUIRE, JJ., *dissenting*, that in view of the Ordinances relating to municipalities, and to schools, the lands being situated partly within and partly without the municipality, the school district was authorized to assess, and need not make a demand upon the municipality to do so.

[*Court in banc, December 9th, 1887.*

This was an appeal from a judgment of Mr. Justice Rouleau, dismissing an appeal, brought under section 110 of the School Ordinance of 1885, from a decision of the Court of Revision holding certain lands, set out in the assessment roll of the Calgary School District for the year 1886, liable to taxation. The lands in question were vested, under 44

NOTE: An appeal from this judgment to the Supreme Court of Canada was quashed, 16 S. C. R. 716, on the ground that the proceedings had not originated in a Superior Court. The appeal was brought before the passing of 51 Vic. c. 37 (1888), which amended s. 24 of the Sup. and Ex. Courts Act by adding § (*i*), "and also by leave of the Court or a Judge thereof from the decision of the S. C. of the N. W. T., although the matter may not have originated in a Superior Court."

Statement. Vic. c. 1, in the Canadian Pacific Railway Company. Section 16 of the schedule to that Act provides that the lands of the Canadian Pacific Railway Company shall, "until they are sold or occupied, be free from taxation for twenty years." The company had agreed for the sale and conveyance of the lands to the appellants, to be sold by them as trustees of the town site of the town of Calgary, with an interest in the proceeds reserved to the company. The lands assessed are situate within the municipality of the town of Calgary; but the school district embraces, besides these lands, lands outside the municipality.

The grounds of appeal as stated for the Court were:—

(1) That the lands for which the appellants are assessed are exempt from taxation under the provisions of chapter one of the statutes of the Dominion of Canada, passed in the 44th year of Her Majesty's reign, the same being owned by the Canadian Pacific Railway Company, unsold and unoccupied, and being in the North-West Territories of Canada.

(2) That the appellants were not assessed for said lands by the assessor for the said school board, and the said Court of Revision had no power to substitute the names of the appellants for those who were assessed by said assessor.

(3) No notice of assessment was given to the appellants as provided by the Ordinance in that behalf, the notice having been given to the parties originally assessed.

(4) If liable to be assessed at all, the appellants should not have been assessed for more than one-half of the property, or one-half of the assessable value thereof, as the one-half of the said land is exempt from taxation under said Act of Parliament—the same being the lands of the Canadian Pacific Railway Company unsold and unoccupied, and being in the North-West Territories of Canada.

(5) That the said Board of Trustees had no power or authority to make any assessment for school purposes, the land so assessed being within the municipality of Calgary. Statement.

The appeal was argued on the 7th December, 1887.

J. A. Lougheed, for appellants.

J. Secord, for respondents.

[*December 9th, 1887.*]

RICHARDSON, J.—The main question submitted for the decision of this Court is whether or not the lands set out in the assessment roll of 1886, made at the instance of the board of school trustees, are liable to assessment for taxes. This depends upon whether or not the lands, which it is admitted formed part of those vested in the Canadian Pacific Railway Company by 44 Vic. c. 1, s. 16 of schedule, have been sold or occupied.

That the exemption set up has ceased, I entertain, from perusal of the evidence before the lower tribunal, no doubt whatever, and on that ground the appeal here, I hold, fails.

But the assessment, as made, is objected to, because, as the appellants contend, the provisions of the law in that behalf have not been complied with, the proper notice of assessment not having been given the parties assessed.

On looking at the notice put in, the assessment roll, or rather what by the parties interested is made a substitute, and the evidence, one discovers that the lands were put down on this roll originally as "C. N. W. L. Co.'s," and at the top of the notice, which was delivered, this company is named. But it appears that the appellants are also named as parties assessed for lands "in schedule attached," that the company, as also appellants, appeared and were represented by the same parties before the Court of Revision, when, on objection made to the name of party assessed, the Court ordered the change as it appears now on the roll. And then followed objections as to the lands being exempt and the mode of assessment for those lands as not being authorized

Judgment. Richardson,J.

by the school law. The Court of Revision having dismissed the appeal, these appellants, under the provisions of section 110 of the School Ordinance, 1885, appealed to Mr. Justice Rouleau, from whose decision dismissing the appeal they now appeal to this Court. As to the question of notice—in my opinion the law was substantially complied with. The parties interested were before the Court, were heard, as counsel admitted, on the argument on all the points raised and, as it was they who appealed to Mr. Justice Rouleau under section 110, on that part they have no legal merit.

The other objection or ground of appeal, when analyzed, is this: Assuming the land in question is assessable under the law, because the trustees have not strictly followed the law in their proceedings to assess, the assessment made is void and the appellants are thus enabled to escape payment of their share of taxation, necessary for the support of the Calgary school for 1886.

Reliance is placed by the appellants for this ground of objection upon section 92 of the School Ordinance, 1885, which they urge has not been followed and should have been adhered to.

Their contention is that, inasmuch as the lands of appellants, named on the school assessment, are comprised within the municipality of the town of Calgary (erected 17th Nov., 1884), and also within the school district in question, which includes lands outside the boundaries of the municipality, it was imperative upon the school trustees to assess appellants for these lands, under section 92, and through the machinery provided by the Municipal Ordinance, 1885. This section 92 seems to me capable of bearing an interpretation opposite to that contended for by the appellant's counsel. But in my opinion it is not necessary here to construe this section 92, for the reason that is apparent from perusal of Ordinance No. 1 of 1886, passed 21st of October of that year. While there was a municipality of the town of Calgary, there was no legal machinery in existence in that municipality for complying with this section 92, had the school trustees attempted to avail themselves of the powers thereby given them, and it will thus be

apparent that if appellants' lands could only be reached as contended for by their counsel the result would be, their lands would escape taxation for school purposes entirely in the year 1886; a state of affairs certainly never contemplated by the North-West Council in framing the law, whose manifest intention, as I gather from the Ordinance itself, was that all lands and property within a school district should, when not exempt by law, bear an aliquot share of the taxation necessary to support the school in the district.

Now, an Ordinance has (like a statute) to be construed so that the main effects intended by the enacting powers can, under the ordinary rules of construction of statutes, be attained if possible, and as it is one of the duties imposed by the school law, section 48, sub-section 4, upon trustees to levy such taxation on the real and personal property within the district, in the manner thereinafter provided, as may be necessary for school purposes, it follows that, as these trustees could not avail themselves of section 92, no other course was open to them than to act as they did, by following the imperative directions of section 93, and, under its provisions, assess all the property of the school district.

I think the appeal should be dismissed with costs.

MACLEOD and ROULEAU, JJ., concurred.

WETMORE, J.—I agree with my learned brethren that the lands in question are liable to be assessed and are liable to taxation for school purposes. Under the agreement in evidence, made between the parties therein described as The Railway Company, the Land Company, the Corporation and the Trustees, the Canadian Pacific Railway Company have agreed that the trustees, the appellants in this case, are entitled to demand and receive from them conveyances of these and other lands upon a certain consideration being paid. It appears in evidence that, so far as these lands in question are concerned, the consideration has been paid, and the appellants are in a position to demand and receive a conveyance thereof. This to my mind is a sale of these lands, and they are, therefore, no longer exempted from

Judgment. Wetmore, J.

taxation, under the 16th clause of the agreement set out in 44 Vic. c. 1. This clause provides that the lands of the Canadian Pacific Railway Company shall, "until they are either sold or occupied, &c., be free from taxation for twenty years." It will be observed that this exemption only applies until the lands are sold, not until they are conveyed. A sale is one thing, a conveyance is quite another. I think these lands have been virtually sold. *Quoad* the railway company and the trustees, the trustees are the owners, the company cannot convey to any other person or corporation, and the trustees can enforce a conveyance to them and they are and have been dealing with these lands in all respects as if a conveyance had been made to them, that is, they have been and are offering them for sale, and dealing with them in a like manner. No question has been raised under the notice of appeal that, if these lands are liable to be assessed, they have not been assessed against the proper parties. But it was urged, that, if the appellants are liable to be assessed in respect of these lands, they should only be assessed in respect to a portion or undivided portion thereof, because, under the terms of the trust deed or agreement, if the appellants re-sell any portion of their lands they are to pay a portion of the proceeds of such sale, after making certain deductions, to the railway company, and therefore the railway company has retained an interest to that extent in these lands. I cannot agree with this view. The simple question is: Has the company sold these lands? If they have, it is immaterial upon what terms they have sold, or what conditions they have attached, or what reservations they have made with respect to such lands. If they have sold them for a price, to be managed for the joint benefit of themelves and some other corporations, it is none the less a sale, and a sale, too, not of an undivided portion of the lands so sold, but of the whole thereof. I think the appellants, therefore, are liable to be assessed and taxed in respect to the full value of these lands in the school district.

I very much regret, however, that I am unable to agree with the majority of my learned brethren, that this assessment has been made by the proper authority. I think that

Judgment.
Wetmore, J.

the municipality of Calgary only had the authority to make this assessment, and that the board of school trustees had no such authority. The school district in question is situated partly within and partly without the municipality of Calgary, and the lands, upon which the appellants have been assessed, are situated in that part of the school district which lies within the limits of the municipality. Ordinance No. 2, of 1885, which I will for convenience call "the Municipality Ordinance," and Ordinance No. 3, of 1885, which I will call "the School Ordinance," were passed on the same day, the 18th December, 1885; as it were, the same breath which gave life to the one, gave life to the other. Under such circumstances, I think it must be assumed that it was not the intention of the legislative body that one Ordinance should conflict with the other, and, in my judgment, if the language used in these Ordinances will permit it, I think the Courts are bound to so construe them, as to give full effect to both of them, and not so to construe either one of them or any part of one of them, as to render a portion of the other Ordinance entirely nugatory.

Reading these Ordinances in that light, section 93 of the School Ordinance is a general section, giving powers to the trustees to assess, and will be applicable in all cases except where other and special provisions are made. But, where other and special provisions are made, the assessment must be made under such provisions. Now, I think sections 88, 91 and 92 of the School Ordinance and section 127 of the Municipality Ordinance do make other and special provisions for the assessment and taxation of property and persons in the cases in those sections provided for. Under section 88 of the School Ordinance, "the trustees *shall* * * * * make a demand on the council of the municipality for the sum required for school purposes for the current year," and when such demand is made under section 127 of the Municipality Ordinance, the amount required "*shall* be assessed, and the same *shall* be collected as other rates by the municipality." Now, while section 127 of the Municipality Ordinance provides that the trustees *may* demand, in the case therein provided for, that the amount for which the school

Judgment.
Wetmore, J.

district is liable for school purposes shall be imposed; and while the words therein used, so far as the trustees are concerned, are optional, section 88 of the School Ordinance provides that they *shall* make the demand on the municipal council. By that section the duty of the trustees in this respect is imperative and, when the demand is made on the municipality under section 127 of the Municipality Ordinance, it is imperative on the municipal authorities to assess and collect the same. In that case, therefore, I cannot see that it can be held that it is optional with the trustees, either themselves to assess under section 93 of the School Ordinance and strike the rate upon that assessment and collect the same, as provided in subsequent sections of that ordinance, or to make the request on the municipal council under section 88 of that Ordinance, because, as I have endeavored to point out, it is imperative on the trustees to demand of the municipality the amount required, and therefore it is imperative on the municipality to assess and collect such amount, and it is quite evident that it was never intended that both bodies should assess and collect this amount. The case, therefore, provided for in section 88 is one not intended to be covered by the provision of section 93 of the School Ordinance. The case provided for in section 88 is, where the school district is situated wholly within the boundaries or limits of a municipality. Section 91 of the School Ordinance provides for the case where a school district is situated within two or more municipal corporations, that is (as I think the terms "municipality" and "municipal corporation," as read in the Ordinance, are convertible terms and mean the same thing), if the district is situated partly in one municipality and partly in another, or where a portion of the district may be in a third or fourth municipality. In that case this section provides in substance that the trustees shall determine what proportion of the amount required for school purposes in the district shall be raised within each municipality, and that they shall, thereupon, make a demand upon each such municipality to raise the amount so required from it, and the municipality then, under section 127 of the Municipality Ordinance, is bound to raise it. And when the

Judgment.
Wetmore, J.

demand is made by the trustees under section 91 of the School Ordinance, section 93 and the other sections in that Ordinance, relating to the striking of the rate and collecting it will not apply; and so this is another case which has been excepted from the operation of section 93, but in this case the trustees may, under the sub-section of section 91, under circumstances, that is, if a difficulty arises "in arriving at a proper assessment of the different portions of the school district," make the assessment as provided for in section 93 and proceed to strike the rate and collect it as provided in the subsequent sections of the School Ordinance. Section 92 of this Ordinance covers other cases: First, a case where the school district is wholly outside of any municipality. In that case the trustees *shall* make the assessment, and I think they are to make it as provided in section 93, and they *shall* strike the rate and collect it as provided in the subsequent sections of the School Ordinance. Another case, provided for in section 92, is, where a portion of the school district is within a municipality and another portion without. I think in that case the section provides that so far as that portion which is without the municipality, the trustees shall make the assessment on the property in that portion of such district, that is so without the municipality, and that they shall do it as provided in section 93, and that they shall strike the rate and collect the same in respect to such property, as provided in the subsequent sections of that Ordinance, first determining how much is to be raised on that portion of the district, but so far as that portion of the district which is situated within the municipality is concerned, they shall, under section 127 of the Municipality Ordinance, determine how much is to be raised on that portion and demand the municipality to raise it. This last-mentioned section provides not only that the trustees may demand that the amount may be raised by the municipality, when the whole district is within the municipality, but they may, when any portion of it is within the district, demand that the amount for which such portion is liable shall be raised by the municipality. And to hold that the trustees could in that case assess under section 93 of the School

Judgment. Wetmore, J.

Ordinance would, I think, render that part of section 127 of the Municipality Ordinance entirely nugatory. It is urged, however, that it is optional with the trustees in this case to assess the whole district themselves under section 93 of the School Ordinance, or to request the municipality to assess for that portion within the municipality. I do not think that this is a correct reading of the Ordinance. Wherever section 93 is applicable, unless otherwise provided, it is imperative, and not only that, but when it is acted on, the trustees must under sections 112 and 113 of the same Ordinance strike the rating on such assessment, and under section 114 collect it. If this be imperative, they cannot also have the option of demanding the municipality to assess and collect the amount, and so raise the required sum twice, or have a double assessment. It was also urged that the sub-section of section 91 is general and gave the trustees power to assess in case of any difficulty. I cannot read that provision in that way. I think the power there given to the trustees is confined to the case mentioned in section 91, namely, where the district is within two or more municipalities. But it has been urged that the trustees may make this assessment merely for their own information, and to enable them to apportion the amount to be raised on each portion of the district. I cannot subscribe to this doctrine either. It must be assumed that in making this assessment the trustees were claiming to do something that the Ordinance required them to do; the assessment is intended to be made with a view of imposing the tax on the property assessed. And when the amount is to be raised by the municipality under the section 127 referred to, the municipality is required to assess for such amounts, that is, prepare the assessments; the section provides that the amounts "shall be assessed and the sum shall be collected as other rates by the municipality." Then, as I have before stated, when the power exists to assess under section 93 of the School Ordinance, the rating under sections 112 and 113 must be struck on that assessment, and on the whole of it and not on part of it, and collected under section 114 and subsequent sections. This would be entirely inconsistent with the same amounts being raised by the

municipality in the case in question by another and different system of assessment. It is quite true that, as a consequence of this reading of these Ordinances, a school rate may in some cases be raised by unequal rates; that is, the trustees may assess the portion of the district assessable by them upon a different valuation from that upon which the municipal authorities have assessed the portion assessable by them. But we cannot help that, if the legislative body has seen fit to make such a provision, and it will be seen that this same difficulty is equally liable to occur when the amount is apportioned between two or more municipalities under section 91. I cannot see that Ordinance No. 1 of 1886 affects the question at all. That Ordinance did not abolish the Municipality; *it* continued to exist, it merely declared that no council existed. If the municipality existed, the portion of the school district was within it, and must be dealt with for assessment purposes as being within it. If it has happened that the machinery to carry out the law has been taken away, none has been supplied in its place. That would be a *casus omissus*, which this Court cannot rectify, as it has no legislative powers. Judging of the intention of the legislative body by the language used in these Ordinances, and that is the only way to get at such intention, as it has always been considered a dangerous task to interpret a statute from a knowledge of what happened to be in the mind of the legislators at the time the enactment was being passed, because the statute is to be interpreted and acted by the general public, and the general public has not the legislator at its elbow, if I may use that expression, to state what his intention was, and therefore the general public can only interpret the statute by the language used. Looking at the language used, therefore, it would seem to me that the legislative body intended that the ratepayer in a municipality was not to be harassed by two sets of tax-raisers and tax-collectors, one for school purposes and another for municipal purposes, but that, as the machinery was available or assumed to be available in the municipality for collecting both taxes, they should be raised by one set of officers and at the

Judgment. Wetmore, J.

Judgment. Wetmore, J.

same time. I think this appeal should be allowed and the assessment against the appellants set aside.

McGUIRE, J.—I think that an appeal lay to this Court from the judgment pronounced by Rouleau, J., because, as I read section 110 of the School Ordinance, 1885, the appeal from the Court of Revision became an action in the High Court (as successors to the District Court), and that having so become, it was subject to the ordinary procedure and incidents of an ordinary action including the right of appeal to the Court in banc.

As to the objections numbered 1 and 4, I think that the appellants must fail, because I think the evidence shows that the lands in question had been sold and so withdrawn from the exemption claimed.

As to the 2nd objection, I think the Court of Revision had under section 109 very large powers and that they have not excedeed them.

As to the third ground of objection I think that the appellants did have notice, as their names were set out in the notice served on Mr. Ramsay, and he admits that he was agent for the appellants and he being present at the Court of Revision, where the appellants' names were substituted upon the roll instead of the land company, he had *ipso facto* notice, and the trustees, the appellants, therefore had such notice. Besides that, they have appealed from that decision and not only appeared to object to the jurisdiction, but also to go into the merits.

As to the 5th and last ground of appeal, I find very great difficulty in construing section 92, which is the one which applies to this case. The language is ambiguous, to say the least. The Ordinance had four states of fact to deal with:

(1) Where the school district lay wholly within a municipality;
(2) Where it lay wholly without a municipality;
(3) Where it lay within two or more municipalities;
(4) Where it lay partly within one municipality, the residue not being within a municipality.

Judgment.
McGuire, J.

Section 88 provides for the first case.
Sections 92 and 93 provide for the second case.
Section 91 provides for the third case.
Section 92 provides for the fourth case.

This is the fourth case:—Now, that section means either (a) that the trustees of the school section have in cases (2) and (4) an alternative either to assess the whole district themselves, just as if it were under (3), or to assess themselves so much of the district as lies without the municipality, and to call upon the municipality for a sum proportioned to the value of that portion of the district within such municipality, or (b) that they have no alternative but that, when the district lies wholly without the municipality, then, they assess the whole, and, if only part lies without, then they are to assess only such part, the section being read as if the words "as the case may be" were inserted after the word "districts" in the fifth line, and demand from the municipality a sum proportioned to the value of the lands so within such municipality. It will be observed that the section is imperative. The word employed is "shall," not "may," which seems to me would have been the word used, had an option or alternative been given to the trustees.

It is true that no provision is expressly made in the School Ordinance for calling upon a municipality to pay over a sum of money, where part of the district is within such municipality and the residue not within any municipality, as here; but the same objection applies, whichever way the section is read, because if it be read as giving to the trustees an alternative, then, should they take the alternative of themselves assessing only the portion outside of the municipality, they would be at once met with the same difficulty.

In the absence, however, of any express and particular provision for case (4), section 91 may be followed, *mutatis mutandis*, and again by reference to the Municipal Ordinance section 127, which the trustees are, like ordinary persons and other corporations, entitled to avail themselves of, express provision is made for the present case. If the alter-

Judgment.
McGuire, J.

native construction were adopted, then it might happen that in the part of the district lying within the municipality, there might be a double assessment by two separate bodies, one for school purposes, the other for municipal purposes with all that is thereby implied, with two collectors levying perhaps at different times and perhaps on different persons.

Such an occurrence is actually contemplated in case (3) by sub-section (1) of section 91, and provision has accordingly by that sub-section been made.

But it is only in the case of a difficulty, as to arriving at a proper assessment, arising, that such option is given by that sub-section, yet if the alternative reading of section 92 is to be taken, the trustees would have an unlimited option, whether there were, or were not, any such difficulty as referred to in section 91, sub-section 1. Further, it seems to me that section 127 of the Municipal Ordinance 1885 contemplates such an interpretation as I have placed upon section 92, rather than that an option was given to the trustees, whereby it would happen, that in the case mentioned in section 127, the municipality might not be called upon at all, if the trustees exercised this option by assessing the whole district.

I confess that the section (92) is by no means of satisfactory construction, and I have adopted my interpretation of it with much hesitation and with all deference to the contrary interpretation adopted by the majority of my learned brethren.

In my opinion the respondents had no jurisdiction to assess so much of the School District as was within the municipality of Calgary and the appeal herein should be allowed.

Appeal dismissed with costs.

KEOHAN v. COOK.

Summary Convictions Act—Appeal—Notice—Address.

A notice of appeal from a conviction under "The Summary Convictions Act," C. S. C. c. 178, was addressed to the convicting magistrate only, and was served upon him only. The notice contained no intimation that it was served on the magistrate for the prosecutor or complainant, nor did it appear that the magistrate was otherwise notified to that effect.

Held, the notice of appeal was insufficient.

[*Court in banc, December 8th, 1887.*

Statement.

This was an appeal from a conviction heard before WETMORE, J., at Calgary. The notice of appeal was addressed "to W. M. Herchmer of the town of Calgary in the North-West Territories of Canada." A preliminary objection was taken on the ground that the notice of appeal was insufficient, inasmuch as it was addressed only to the convicting magistrate, and not to the prosecutor or complainant. The evidence as to service was that the notice was served only on the magistrate, and no evidence was given of any intimation to him that it was served upon him for the prosecutor or the complainant.

J. A. Lougheed, for the respondent.

The notice of appeal, which is a condition precedent to the right of appeal, is insufficient, inasmuch as it is not addressed to the prosecutor or complainant. "The Summary Convictions Act," C. S. C. c. 178, s. 77, and sched. R. *Curtis* v. *Buss*,[1] Paley on Convictions, 6th Ed., 367; *R.* v. *JJ. Lancashire*,[2] *In re Meyers & Wonnacott*,[3] *In re JJ. York & Peel, Ex p. Mason*,[4] Clarke's Criminal Law, 547.

H. Bleecker, for the appellant, referred to *Ex p. Doherty*.[5]

[1] 47 L. J. M. C. 35; 8 Q. B. D. 13; 37 L. T. 533; 26 W. R. 210. [2] 8 E. & B. 563; 27 L. J. M. C. 161; 4 Jur. N. S. 375; 6 W. R. 74. [3] 23 U. C. Q. B. 611. [4] 13 U. C. C. P. 159. [5] 6 C. L. T. 547; 25 S. C. N. B. 38.

Argument.

WETMORE, J., reserved the question for the opinion of the Court in banc, before whom the matter was argued on the 8th December, 1887, by

T. C. Johnstone, for the appellant.

J. A. Lougheed, for the respondent.

[*December 8th, 1887.*]

The Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE and MCGUIRE, JJ.) sustained the preliminary objection, holding the notice insufficient on the ground taken.

Preliminary objection sustained.

BLUNT v. MARSH ET AL.

Transfer absolute in form—Security—Parol evidence.

The plaintiff executed a transfer absolute in form to the defendants. The plaintiff alleged that the transfer was executed to secure the defendants against their liability as endorsers of a promissory note for him; that he made default in payment at maturity, and that eventually the whole amount had been paid, partly by the plaintiff, and partly by the proceeds of the sale of a portion of the property transferred, and claimed an account, and re-conveyance. The defendants alleged that the transfer was intended to operate according to its terms, *i.e.*, an absolute conveyance. The trial Judge found the facts in favor of the plaintiff upon evidence, which, beyond the transfer and the notes, was wholly parol.

Held, that the plaintiff was entitled to judgment declaring the transfer though absolute in form to be a mere security, and directing an account, and the re-conveyance of the residue of the property.

[*Court in banc, June 6th, 1888.*

This was an appeal by the defendants from the judgment of ROULEAU, J., declaring a transfer absolute in form to be a mere security.

The facts appear in the judgment. The appeal was argued on the 5th June, 1888, by

J. A. Lougheed, for the defendants, the appellants.

J. B. Smith, for the plaintiff, the respondent.

[*June 8th, 1888.*] Judgment.

Richardson, J.

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

RICHARDSON, J.—This action was brought to compel defendants to reconvey certain town lots in the town of Calgary, which, plaintiff alleges were transferred to defendants as collateral security and to secure them against the endorsement of a promissory note for $1,600, plaintiff alleging that the greater part of the note had been paid, that the transfer of the lots, although absolute in form, was merely given as security and was, in fact, a mortgage only. The defendants, in answer, deny all the allegations in the statement of claim, and allege that the transfer was intended to be absolute and was not intended to operate as a mortgage.

My brother Rouleau in delivering judgment in the Court below, says:

"This action is instituted by the plaintiff for the reconveyance of certain town lots which he alleges to have been transferred to the defendants for their endorsation on a certain promissory note. He alleges also that the greater part of the said promissory note was paid, and that the defendants sold with his consent some of the town lots to pay themselves the balance due them.

"The first question to ascertain is this: Is the deed of transfer produced in this cause an absolute sale or only a transfer as security for a loan of money? The facts of the case are clear. If the defendants had not endorsed the plaintiff's note no such transfer would have been made, therefore there is no doubt that the transfer was given to secure the defendants in case the plaintiff would fail to meet the said note, and consequently must be treated the same way as a mortgage. The principle of law upon which I base my judgment is this: Every transaction that resolves itself into a security is a mortgage. Barron on Chattel Mortgages, p. 8, says as follows: 'An instrument absolute on its face may yet be shown to be a conditional conveyance, and parol evidence will be received to show what was the intention of the parties; and all the circumstances in connection

Judgment. Richardson, J.

with the instrument will be looked at in determining this. * * * * Parol evidence will be received, not that the instrument may thereby be contradicted, but for the purpose of raising an equity paramount to its terms.' All these questions and the principle above enumerated have been clearly decided in *Bullen* v. *Renwick*,[1] and I may add that that case is absolutely *ad rem*. The same principle of law is upheld in the case of *Le Targe* v. *De Tuyll*.[2] I refer also to *Bernard* v. *Walker*.[3]

"Under these circumstances it is hereby ordered that the defendants render to the plaintiff an account of and pay back all moneys received as the proceeds of the sales of the lots, deducting from those moneys all sums still due to the defendants on the promissory note, commission and interest, and also the defendants are ordered to deliver up the transfer of said lands, the same being cancelled, and to execute a transfer to plaintiff of such lands so conveyed to them, as have not yet been sold."

After reading the evidence adduced at the trial we see no reason why the judgment should be disturbed, and we therefore are of the opinion that the judgment of the Court below should be affirmed and this appeal dismissed with costs.

Appeal dismissed with costs.

[1] 8 Grant Ch. R. 342; 9 Grant Ch. R. 202. [3] 3 Grant Ch. R. 595.
[2] 2 U. C. E. & A. 121.

GALT ET. AL. v. SMITH.

Equitable assignment—Order—Address of order—Specific fund.

The Dominion Government was indebted to Bull, for transport services rendered during the N. W. Rebellion. On the 25th July, W., a Government Transport Officer, notified Bull by letter to put in his account, certified, to the H. B. Co., Winnipeg, "where it will be paid."

Bull, being indebted to the plaintiffs, wired them 1st August, "Will send order on transport account, payable in Winnipeg." Bull also wrote to the plaintiffs 4th August, enclosing a copy of W.'s letter, and an order reading "4th August. To the H. B. Co., Winnipeg. Please pay Messrs. G. F. & J. Galt or order amount of my account."

This order was presented to the company, but payment was refused for the reason assigned that the Government had stopped payment of transport accounts.

Subsequently Bull made a general assignment for the benefit of his creditors to the defendant, to whom the Government eventually paid the amount of Bull's claim. The plaintiff sought to recover the amount from the defendant, as money had and received to their use.

Held, per CURIAM. That the order *per se* did not constitute an equitable assignment.

Held, MCGUIRE, J., *dissenting*. That the order in conjunction with the other documents, could not operate as an equitable assignment, because the evidence did not shew that the company either were debtors to Bull or held a specific fund to which he was entitled.

Per MCGUIRE, J. The several documents taken together constituted a good equitable assignment, for they shewed clearly Bull intended to assign to the plaintiffs the debt owing to him by the Government and the order, though addressed to the company, in whose hands there was no fund belonging to Bull, was virtually addressed to the Government, the company being considered merely the Government's paymaster.

[*Court in banc, September 11th, 1888.*

Statement.

This was an appeal by the plaintiffs from the judgment of RICHARDSON, J. The facts and the points involved appear in the judgments.

The appeal was argued on the 5th June, 1888.

J. Secord and *W. J. Tupper*, for the plaintiffs, the appellants.

D. L. Scott, Q.C., and *W. C. Hamilton*, for the defendants, the respondents.

Judgment.

Richardson, J.

[*September 11th, 1888.*]

RICHARDSON, J.—In disposing of this case by holding that as the plaintiffs at the trial failed to show that when the order of 4th of August, 1885, was given, the Hudson's Bay Co. were indebted to Bull, or that they held any fund out of which the amount of the order was to be paid, I formed the opinion that the utmost the plaintiffs had shown was a request or order by Bull to the Hudson's Bay Co., to pay certain earnings of Bull—if that company held them—to the plaintiffs, and that an equitable assignment, the establishment of which alone gave plaintiffs any right to recover, was not made out, thus following *Percival* v. *Dunn*.[1] Since the hearing in appeal the foundation for the judgment in that case *Rodick* v. *Gandell*[2] has become available. In that case Lord Truro in giving the judgment of the Court lays down "That an agreement between a debtor and his creditor that the debt owing shall be paid out of a specific fund coming to the debtors, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will operate as an equitable assignment of such debt or funds."

The facts in that case briefly, were, a railway company owed defendant who largely owed his bankers, the bankers having pressed defendant for payment or security, defendant by letter to the solicitors of the company authorized them to receive the money due him from the company and pay it to the bankers, which the solicitors by letter agreed to do on receiving it.

In another case, *Bell* v. *L. & N. W. Ry. Co.*,[3] a railway contractor gave his bankers to whom he was indebted a letter directing the railway company to pass the cheques which might become due to him "to his account with the bank," in both cases it was held that the facts did not establish an equitable assignment.

[1]29 Ch. D. 128; 54 L. J. Ch. 570; 52 L. T. 320. [2]1 De G. M. & G. 763; 12 Beav. 325; 19 L. J. Ch. 113; 13 Jur. 1087. [3]15 Beav. 548.

Judgment.
Richardson, J.

In this case Bull on the 4th August, 1885, wrote plaintiffs: "You will see by the enclosed letter that I am to receive balance of my transport money in Winnipeg, $620. I enclose order for you to draw on the Hudson's Bay Co., and credit my account." The letter enclosed was from White, shown to be in the Government service, to Bull, dated 23rd July, 1885, telling Bull to go to Qu'Appelle, have his account arranged and certified by Major Bell—also proved to be a Government officer—for payment by the Hudson's Bay Co., Winnipeg. There was no proof that Bull complied with White's directions or that any account was certified by Bell, the order enclosed was of 4th August, 1885, to the Hudson's Bay Co., "Please pay Messrs. G. F. & J. Galt or order amount of my account, Thomas Bull." Now, to hold that Bull's letter and the order constituted an agreement that a debt owing Galt should be paid out of a particular fund coming to the debtor from the Hudson's Bay Co., which there clearly was not, and which under the authority above referred to would be necessary, I cannot; neither can I hold that the evidence established that the Hudson's Bay Co. either owed Bull money or held funds belonging to him upon which the order could operate. I therefore think this appeal should be dismissed with costs.

WETMORE, J.—This is an appeal from a judgment of the Honourable Mr. Justice Richardson. The plaintiffs claim to be equitable assignees of certain sums of money which were owing to one Thomas Bull by the Dominion Government, or of so much thereof as amounted to Bull's indebtedness to the plaintiffs. The material facts of the case are as follows:—Bull, holding claims against the Government for transport services rendered during the rebellion, received from a Mr. White, a transport officer, a letter in the following words:

"Qu'Appelle, 25th July, 1885.

"T. Bull, Esq., Post Master, Pense.

"Dear Sir,—I wired you yesterday that I had arranged that you should be paid the contract price, $8 for horse

Judgment.
Wetmore, J.

teams and $6 for ox teams. Mr. Bedson, chief transport officer, telegraphed Major Bell to arrange matters with you upon these terms. You had better come here at once and have your account put in and certified by Major Bell as correct and it will be sent down to Hudson's Bay Co., Winnipeg, where it will be paid. This is what has been done in the cases of other contractors such as Gillespie, Ross, Corbett and others.

"Yours truly,

"W. WHITE, T. O."

Bull being indebted to the plaintiffs wired them as follows:

"Pense, 1st August, 1885.

"To Messrs. G. F. & J. Galt, Winnipeg. Will send order on transport account payable in Winnipeg.

"THOMAS BULL."

Bull then wrote and forwarded to the plaintiffs the following letter:

"Pense, 4th August, 1885.

"Messrs. G. F. & J. Galt, Winnipeg.

"Gentlemen,—You will see by enclosed letter that I am to receive the balance of my transport money in Winnipeg, amounting to $620. I enclose order for you to draw on Hudson's Bay and credit my account. I went to Qu'Appelle but found Major Bell away; have since sent him my account and requested him to certify and forward to Winnipeg for payment. I have had a good deal of trouble in this matter and if you would arrange to have it paid at once it would much oblige,

"Yours truly,

"THOMAS BULL."

"Please keep letter from W. White, T. O., till matter is settled, and oblige, T. B."

Bull enclosed with this letter the letter from White hereinbefore set out and also the following order:

"Pense, 4th August, 1885. Judgment.

"To the Hudson's Bay Co., Winnipeg. Wetmore. J.

"Please pay to Messrs. G. F. & J. Galt or order amount of my account.

"THOMAS BULL."

This order was presented for payment to the Hudson's Bay Co., but payment was refused for the reason assigned that the Government had stopped payment of the transport account a few days before, and the matter stood over until the Claims Commissioners sat at Winnipeg in October and November, 1885. The Claims Commissioners refused to pay and plaintiffs did not get the money. It is contended for the plaintiffs that the letters and documents I have set out constituted the equitable assignment claimed by the plaintiffs. There were others letters put in by the plaintiffs written by Bull to them subsequently to the 4th August; these letters were received in evidence subject to objection by the defendant. Assuming these letters to be admissable in evidence, I do not think they carry the plaintiffs' contention a step further than the documents I have already set out; indeed, looking at the general tenor of these letters it seems to me that Bull in them rather seems to look upon the plaintiffs as agents for the collection of these moneys than as assignees of the fund or of any part thereof. In the view I take of the case I do not consider it necessary to set these letters out or to refer to them further. *There is no evidence that these moneys ever came to the hands or possession of the Hudson's Bay Co.* On the 12th March, 1886, Bull assigned to the defendant certain property including "all debts and claims owing to him by or from any person or persons and all moneys belonging to him and all other personal estate and effects of or belonging, due or owing to him of every nature and kind soever and wheresoever situate." The defendant, it is alleged, received these moneys due for transport services after such assignment to him, but it is not alleged nor is it proved in evidence from whom he received them. The plaintiffs brought action to recover

Judgment. Wetmore, J.

these moneys, and the learned Judge after hearing the evidence gave judgment for the defendant, and the plaintiffs appeal. I think Lord Truro lays down correctly the principles to be deduced from the authorities as to what constitutes an equitable assignment. In *Rodick* v. *Gandell*,[2] he says "An agreement betwen a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor will create a valid equitable charge upon such fund."

Referring to the cases cited for the appellants at the argument; in *Gorringe* v. *The Irwell India Rubber and Gutta Percha Works*,[4] there was an agreement between the debtor and creditor to hold a certain fund coming to the debtor for the creditor's claim, that is, the debtor stated in writing addressed to the creditor in express and clear words that he *held* the fund for his creditor, and not only that, but he stated that he held it in pursuance of an arrangement made, and the creditor accepted such writing—there was a clear appropriation of the fund by agreement.

In *Burn* v. *Carvalho* [5] the debtor promised the creditor that he would direct, and by subsequent letter to his agent did direct, such agent to deliver over certain goods for the creditor, *which such agent held* for his principal.

In *Row* v. *Dawson* [6] there was an order made by the debtor upon a person *holding a fund* for him to pay the creditor a certain amount out of such fund. In *Yeates* v. *Groves* [7] there was in substance a similar order. In *Ex parte South*,[8] and in *Brice* v. *Bannister* [9] there were similar orders *upon persons holding a fund.* In *Wright* v. *Ward* [10] there was an agreement and a direction to the person holding the fund.

Now, does this case under consideration come within either of the rules laid down by Lord Truro? In the first

[2]34 Ch. D. 128; 56 L. J. Ch. 85; 55 L. T. 572; 35 W. R. 86. [4]4 Myl. & Cr. 690; 7 Sim. 139; 9 L. J. Ch. 55; s. c. at law, 4 B. & Ad. 383. [6]1 Ves. Sr. 331. [7]1 Ves. Jr. 280. [8]3 Swanst. 392. [9]47 L. J. Q. B. 722; 3 Q. B. D. 569; 38 L. T. 739; 26 W. R. 670. [10]4 Russ. 215.

Judgment.
Wetmore, J.

place does it come within the definition of "an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor?" I think it does not. The Hudson's Bay Co. owed no money to Bull, and held no fund belonging to him or out of which he was to be paid; as I gather from the evidence the company was merely the agent of the Government to pay claims that had been passed; they had no fund in their hands to pay any claims, but when claims were passed or allowed they advanced the money and charged the Government. The Hudson's Bay Co. was, if anything, merely an agent of the Government to pay claims when they were allowed. There is not a particle of evidence that the company held one dollar coming to Bull. Then was there any agreement between a debtor and a creditor that the debt owing should be paid out of a specific fund? I cannot spell that out from the documents in evidence. Take the letter of the 4th August, 1885, from Bull to plaintiffs, and that is the writing upon which the whole question whether or not there was such an agreement must hinge, the other writings are merely of use in so far as they throw light upon the construction to be put upon that letter; because there cannot be a pretence under the circumstances of this case that the order on the Hudson's Bay Co., if it stood by itself, could create an equitable assignment. Now what does the letter do? It merely amounts in substance to a statement that from information received, namely, from Mr. White's letter he (Bull) is to receive the balance of his transport money at Winnipeg, amounting to $620, that the Hudson's Bay Co. is to pay it, and he gives an order to the Hudson's Bay Co. to pay it to the plaintiffs, and to the plaintiffs to credit it when paid. He virtually says, I expect the company will pay this amount, *if they do*, I want you to get it for me and credit me with it, but there are no words by which he transfers the fund or any part thereof to the plaintiffs in the event of the company not honoring the order or holding the moneys. If the Hudson's Bay Co. had at the time the moneys in question in their pos-

Judgment. Wetmore, J.

session, or if they subsequently came to their possession, *possibly* the order and the letter might amount to an equitable assignment, but there is no evidence that the company then had the money or that they ever had it, or that the defendant received it from the company, and there are no words such as those used in *Gorringe* v. *The Irwell India Rubber and Gutta Percha Works*,[4] stating that he (Bull) *held* the *fund* or any portion thereof at the plaintiffs' disposal, or that he held or appropriated the fund, no matter where it might be, for the plaintiffs. I can find no words expressing an intention to assign the claim. I think the letter of 4th August will bear no larger construction than I have put on it, and therefore the case does not fall within the rule laid down by Lord Truro, and lastly referred to by me; on the contrary, I think that it falls directly within the *ratio decidendi* of *Percival* v. *Dunn*,[1] and *Rodick* v. *Gandell*.[2]

In my opinion the judgment of my brother Richardson should be affirmed and this appeal dismissed with costs.

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

MCGUIRE, J.—Plaintiffs claim from defendant certain moneys as received by him which they allege were so received for their use. Their case is, briefly, this. That being creditors of one Thomas Bull, to whom the Dominion Government was indebted for transport services, Bull agreed to assign to plaintiffs, in payment of his indebtedness to them, the moneys so due to him from the Government; that he did so assign the same and that subsequently the defendant obtained these moneys from the Government, and ought to be compelled to repay them to the plaintiffs.

In support of their contention the plaintiffs put in a telegram from Bull to them, dated August 1st, 1885, as follows: "Will send order on transport account payable in Winnipeg," and a letter from Bull to them dated August 4th, as follows:

"Pense, 4th August, 1885.

"Messrs. G. F. & J. Galt, Winnipeg. Gentlemen,—You will see by enclosed letter that I am to receive the balance of

my transport money in Winnipeg, amounting to $620. I enclose order for you to draw on Hudson's Bay, and credit my account. I went to Qu'Appelle but found Major Bell away, have since sent him my account and requested him to certify and forward to Winnipeg for payment. I have had a good deal of trouble in this matter, and if you would arrange to have it paid at once it would much oblige. Judgment. McGuire, J.

"Yours truly,

"THOMAS BULL."

"Please keep letter from W. White, T. O., till matter is settled and oblige, T. B."

An order, "B," addressed to the Hudson's Bay Co. at Winnipeg of same date, and a letter, "C," from Transport Officer White to Bull and enclosed with the order "B" in the letter "A."

The main question for consideration is, did these documents amount to an equitable assignment to the plaintiffs of the money due by the Government to Bull or of any part of it, or did they constitute a charge or lien upon it in favour of the plaintiffs? It is objected by the defendant that they do not amount to either an assignment or charge. 1st, because the order does not specify any *fund* out of which the plaintiffs are to be paid, and, 2nd, that the order is addressed, not to the debtor of Bull, but to the Hudson's Bay Co., who were not in any way indebted to him and had no fund of his in their hands, nor so far as appears ever had any such fund or ever were in possession of the transport money coming to Bull. *Watson* v. *The Duke of Wellington*,[11] *Burn* v. *Carvalho*.[5] If the plaintiffs' case rested on the order alone it is quite clear they could not succeed, *Percival* v. *Dunn*.[1] But this must be read in connection with the telegram which preceded it and the letters accompanying it; reading these and giving to the words their natural signification, what meaning are we to draw from them as to the intention of Bull? What was the arrangement entered into between Bull and the plaintiffs as evidenced by those writings? First,

[11] 1 Russ. & M. 602; 8 L. J. O. S. Ch. 159.

Judgment. McGuire, J.

that Bull had agreed to give them an order on his "transport account," "payable in Winnipeg." Following that up, his letter "A" shows what "transport account" means, that it "amounts to $620"—that they are to get that money from the Hudson's Bay Co., and to "credit his account" with it. The order on the Hudson's Bay Co. being enclosed, and referred to in the letter,—the meaning of the order is explained by the letter, so that, as I take it, the words "my account" must mean "the balance of his transport money, amounting to $620." And if the phrase "transport money" requires explanation, that is furnished by the letter from White, the transport officer, and it also explains why the order was addressed to the Hudson's Bay Co. at Winnipeg. The oral evidence of Bull at the trial shows that the transport services were rendered by him "during the rebellion" "under contract with General Laurie, in command of the troops at Swift Current."

I think there is no great difficulty in ascertaining the effect of these various documents to be that on August 1st Bull had promised to give an order on his transport account against the Government, in favour of the plaintiffs; that the account referred to was the then balance of his transport money amounting to $620; that he did give such order; that the plaintiffs were to present it to the Hudson's Bay Co. at Winnipeg, who Bull understood to be the paymaster *quoad* this matter, of his debtor the Dominion Government, and that they were to apply the money, when got, to the credit of a debt which Bull owed the plaintiffs. I think there was an existing fund at the dates of the telegram and letter, and that it is therein referred to and described sufficiently to be recognized without danger of mistake. Can there be any doubt that "my account" in the order means his claim against the Government for transport service and not any private account between him and the company? Can it be read as if Bull were asking the company to advance him their own money, for they did not owe him anything? I think it cannot be taken to be a request for a loan, or that the company would in a friendly way liquidate for him his indebt-

edness to Galt & Co. If it is read to mean his claim against the Government for transport services, then there is a fund referred to out of which the debt is to be paid, and it is an existing fund whether finally settled or not as to its amount. Judgment. McGuire, J.

As to the second objection that the order was not addressed to the debtor of Bull but to the Hudson Bay Co., who owed him nothing, and never had any such funds as the order contemplates—as to this, too, I think the defendant must fail. The question for a Court of Equity to consider in these cases is not the form of the words used by the parties and the strict construction to be placed thereon, but rather what was the agreement made between the parties, what did they intend to do, and did they express that intention in intelligible language and carry out that intention in an intelligible way? The language used is after all merely the evidence of the agreement between the parties, not the agreement itself, and it is to be construed as the parties and ordinary intelligent persons familiar with the facts would understand it, in case of doubt construing it most strongly against the grantor.

Language whether oral or written is the vehicle of ideas between man and man; the medium by which the business affairs of the community are carried on, and a Court, appointed to interpret and adjudicate upon the business transaction of litigants submitted to it, must have regard to the interpretation which they may fairly and reasonably place upon the language employed. In *Chowne* v. *Bayliss*,[12] the Master of the Rolls in giving judgment said: "It is to be observed that no formal instrument is required for the purpose, all that is wanted is that the documents should express the intention of the assignor thereby to make the assignment." In *Row* v. *Dawson* [6] it is said that "though the law does not admit as assignment of a chose in action, this Court does, and any words will do, no particular words being necessary." And in *Gorringe* v. *The Irwell I. R. & G. P. Works*,[4]

[12] 31 Beav. 351; 31 L. J. Ch. 757; 8 Jur. N. S. 628; 8 L. T. 739; 11 W. R. 5.

Judgment. McGuire, J.

Lord Cotton said: "the form of the words is immaterial so long as it shows an intention that he is to have the benefit of the chose in action."

Now, if it be essential to an equitable assignment that there should be an order, and if we are to read the order in this case alone, the plaintiffs have not shown a good equitable assignment. In *Rodick* v. *Gandell*[2] the order was addressed to the *solicitors* of certain railway companies indebted to the giver of the order, there was no evidence that he supposed the solicitors were the persons to whom he was to look as the paymasters of his debtors, and Lord Truro, in his judgment states that he believed that the giver of the order did not, in fact, so suppose. He says that the order in that case "was a mere authority to receive, which might or might not be acted upon; it was not directed to the railway companies nor to any officer or representative of the company in any sense to make it available against the companies." And in another place he distinguishes this case from *Row* v. *Dawson*,[6] as in that case the order "was in substance directed to the debtor," and this case differs materially in the fact that "the order to P. & W. was not an order upon the debtor or upon a person by whom the debt assigned would be paid." From this may we not fairly infer that had the solicitors P. & W. been persons "by whom the debt would have been paid," he would have come to a very different conclusion? So that it seems that the order need not always be addressed to the debtor. In *Row* v. *Dawson*[6] the order was addressed to Swinburn, the Deputy of Horace Walpole, the debtor, and was held to be a good equitable assignment. It was as follows: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson £400, and to Cowdery £200, value received." In *Rodick* v. *Gandell*[2] Lord Truro came to the conclusion that no assignment of the claim against the railway companies was ever intended, that the giver of the order "never intended to give, and the bank never understood that they were to acquire any title, right or interest in the railway debts beyond what actually came into the hands of P. & W."

Judgment. McGuire, J.

This conclusion he arrives at from the fact that the railway projects not having gone on, there was no existing body or fund which could be looked to for payment, and from the further fact that owing to the unsettled condition of Gandell's claim, requiring negotiation, arrangement and compromise, it would have been embarrassing and have caused expense and delay to have assigned the claim to the bank, so that while *Rodick* v. *Gandell*[2] appears to be a strong case against the plaintiffs in this case, it is, I think, readily distinguishable from this; for whereas in the Rodick case, the persons to whom the order was addressed were not even persons who would have had the payment of the railway companies' debts, in the present case it was believed by Bull that the Hudson's Bay Co. were the very persons to pay the claims for transport services, and such belief was not unreasonably arrived at when we read Bull's evidence that he had a short time before been paid by them the amount of a similar claim, and by looking at Transport Officer White's letter in which he expressly directs him to apply to the Hudson's Bay Co. at Winnipeg, where it would be paid, and if we were allowed to look at Beeston's reply to Galt when the order was presented, it would appear that had it been a few days earlier it might have been honoured, as he said that the Government had stopped payment of transport money only a few days previously. Another distinction is that, in the case before Lord Truro, as he finds, and it is on that finding largely that he rests his opinion, there was no intention on either side that there was to be an assignment of the debts due by the railway companies, whereas, in this case, there cannot be the least doubt that Bull intended to assign to Galt & Co. the $620 referred to in the letter, and that they, Galt & Co., so understood it. If it be replied that there must be not only the intention and agreement to assign existing in the minds of the parties, but that there must be something more, an agreement to give the requisite direction to give effect to that agreement and a performance of the agreement to give such directions, and that while Bull agreed by his telegram to give an order on the transport account (which must mean a proper, apt and sufficient order), he failed to carry out his agree-

Judgment. McGuire, J.

ment to give the necessary directions. Then I would refer to the language of the Master of the Rolls in giving judgment in *Rodick* v. *Gandell*,[2] where he said, "If in this case Gandell and B. had agreed to assign to the bank the debts due to themselves from the railway companies and to give the companies the necessary directions for that purpose, the case of *Burn* v. *Carvalho*[5] would have been authority for considering the transaction as a good equitable assignment notwithstanding a failure in the promised directions to the railway companies." Further, it is clear that Bull supposed he was addressing his order to the very persons who would pay his transport claims, and who were the authorized paymasters for the Government of such claims. The very nature of the debt — due by the Government of Canada — rendered it necessary that the order should be addressed to some individual representing the Government. He might have thought that the Minister of Militia and Defence would be the party to address it to. But would not the same objection as here have applied in that case? The Minister of Militia had not then and never had any money applicable to the payment of Bull's claims. Had Bull addressed it to the Finance Minister, or to the Prime Minister, or, in fact, to any person else, the same objection might have been raised. But supposing that there had been some proper person to whom to have addressed the order, and that Bull, with the best intentions of honestly carrying out the promise in his telegram, had mistakenly addressed it to a wrong party, would that be a fatal error or one which a Court of Equity would be helpless to remedy? Could not a Court of Equity on a proper case brought compel Bull to give a proper order, or rectify the defective order given?

But was it necessary that there should be an order at all to the debtor? Would not an agreement between Bull and Galt that the transport account should be assigned to the latter or charged with the payment of Bull's indebtedness to Galt & Co. be sufficient? In *Gorringe* v. *Irwell*[4] there was merely a letter from the debtor to the creditor stating that they held at the creditor's disposal a certain debt due to them.

Judgment.
McGuire, J.

There was no order to the debtor at all, and even the notice to him was held not to be material as against the assignor. Lord Cotton said, "Where there is a contract for value between the owner of a chose in action and another person who has a claim on him that such person shall have the benefit of the chose in action, that constitutes a good charge on the chose in action." Apply that to the present case. Bull was the owner of a chose in action; there was between him and plaintiffs a "contract for valuable consideration," viz.: his indebtedness to plaintiffs of $679.93, and the contract was that "another person" (the plaintiffs) should have the benefit of the chose in action, and consequently there were all the elements, in Lord Cotton's judgment, to constitute a good charge on the chose in action. It must be borne in mind too that the Court of Chancery in England has gradually changed its view on the subject of equitable assignments, and that the Gorringe case is a very recent one; *Rodick* v. *Gandell*[2] was decided some 35 years ago. *Lambe* v. *Orton*[13] was decided some six years later. In the judgment of the Court in *Lambe* v. *Orton*[13] the following passage appears: "The tendency of the Court formerly was against the sufficiency of such an assignment, but later decisions are the other way. If a person even without consideration gives a direction that property to which he is entitled be given to another and that is acted upon by all it is good. If a person entitled to property does an act expressive of his intention that another person shall have it, and directs that it shall be paid to such other person, I think that this amounts to an assignment." Apply that here, Bull is a "person entitled to property;" he does an act expressive of his intention that another person (plaintiffs) shall have it, and directs (see order) that it shall be paid to that person. Even taking for granted that the order is directed to the wrong person, there is still a direction sufficient to satisfy the above definition. In *Chowne* v. *Bayliss*[12] it is laid down that "all that is wanted is that the document should express the intention of the assignor thereby to make the assignment." Is there not

[12] 1 Dr. & Sm. 125; 29 L. J. Ch. 319; 1 L. T. 394; 8 W. R. 202.

Judgment. McGuire, J.

expressed in the documents in this case "the intention thereby to make the assignment?"

In an Ontario case, *Brown* v. *Johnston*,[14] Mr. Justice Burton after citing a number of cases says, "the principle to be deduced from all these cases does not appear to go beyond this, that an agreement between a debtor and a creditor that the debt shall be paid out of a specific fund, &c.," is an equitable assignment.

I think that the telegram promising to give plaintiffs an order on the transport account, and the order which followed directing the whole of it to be paid to the plaintiffs as explained and interpreted by the letters accompanying it, bring the present case clearly within the conditions requisite to constitute a good equitable assignment as against the assignor. The defendant here stands in the place of the assignor Bull. *Burland* v. *Moffatt*.[15] And whatever would bind Bull will bind the defendant, who, on the authorities, is to be deemed as the representative, not of the creditors, as an assignee in insolvency would be, but of Bull.

But did Bull intend to assign all his claims against the Government or only the particular claim referred to in his letter? The burden of proof rests on the plaintiffs, and as to succeed they are compelled to have recourse to this letter, I think they must take the order as limited thereby; the letter shows that Bull had in contemplation then only a claim of $620. The defendant received two claims, one of $610, the other of $141. I think the former is the one referred to by Bull. I think that their title is limited to this claim.

It was urged by the defendant that the plaintiffs had not proved that defendant had ever received the claims alleged to have been assigned. I think that the statement of defence must be taken to admit the receipt of the two sums mentioned in the statement of claim. The second paragraph of the defence is bad under our Civil Justice ordinance. (See sections 82, 84, 86 and 87 and Archbald's Q. B. Practice.)

[14]12 A. R. 190. [15]11 S. C. R. 76.

Judgment.
McGuire, J.

Under that paragraph the defendant might have sought to justify in two ways, either by showing that he never received the money at all, or that, although he did receive it it was not the plaintiffs' money, he did not receive it to the use of the plaintiffs. But the third paragraph admits the receipt of the money and sets up the defence that it was not received to the use of the plaintiffs. The case of *Byrd* v. *Nunn* [16] is authority for the conclusion that in such case the two paragraphs must be read together and that the defendant will be confined to proving his second paragraph, on the grounds set up in the third paragraph. Archibold lays down that under the Judicature Act the plea of "never indebted" is not available. The case of *Burland* v. *Moffatt* [15] is an authority for deciding that the fact of the assignee for benefit of creditors actually getting possession of the property in dispute does not affect the right of the prior assignee, who may recover back possession thereof.

I think that the verdict should be set aside and a verdict given in favour of the plaintiffs for $610, and interest and costs.

Appeal dismissed with costs.

[15] 47 L. J. Ch. 1; 7 Ch. D. 284; 37 L. T. 585; 26 W. R. 101.

QUEEN v. MOWAT ET AL.

Crown—Breach of contract by servant—Sureties—Discharge.

The defendants were sued as sureties for the performance of a contract to deliver hay to the N. W. M. Police. The defendants claimed they were relieved from liability because the police authorities failed to carry out their part of the contract in material particulars, viz. (1) By using a quantity of the hay before it had been inspected by a Board of Officers as provided by the contract; (2) By allowing a portion to be carried off by some of the constables, and another portion to be destroyed by cattle before the hay was weighed or measured, as provided by the contract; (3) By measuring instead of weighing the hay, as provided by the contract; the result by weighing being much in favor of the defendant's principal.

Held, that the third objection afforded a good defence.

Held, also, that the Crown was responsible for breaches of contract resulting from the acts or omissions of its servants, though not for their torts.

Queen v. *McFarlane*,[1] and the *Windsor & Annapolis R. Co.* v. *The Queen*,[2] considered.

[*Court in banc, September 11th, 1888.*

Statement. This was an appeal by the Crown from the judgment of RICHARDSON, J., dismissing the action. The appeal was argued on the 5th June, 1888. The facts and the points involved appear in the judgment.

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

T. C. Johnstone, for the defendants, the respondents.

[*September 11th, 1888.*]

RICHARDSON, J.—In the contract, for performance of which by Lytle, defendants became sureties, special provision is made for ascertaining definitely the quantities brought in and delivered. This provision became a material condition of the contract *quoad* the sureties who were thus entitled to its strict performance. Between the 20th August and 8th October hay was brought in, some stacked and other quantities used with the knowledge and approval of those in authority, without the proper means named in the contract being taken for defining the number of tons so used and

[1] 7 S. C. R. 217. [2] 55 L. J. P. C. 41; 11 App. Ca. 607; 55 L. T. 271; 51 J. P. 260.

stacked, and it appears that during a portion of this period, and while the user was going on and stacks being built, the scales were in order. As affecting the sureties, this was an omission on the part of the Crown to do something which was the sureties' consideration for entering on their responsibility. This being material appears from the difficulty in arriving at the quantity. While between Lytle and the Government this might be properly arrived at by guess, it is not what the sureties bargained for when they signed the bond sued on, and this departure from the condition was not communicated to the sureties. Judgment Richardson, J.

In *Lawes* v. *Maughan* [3] Mr. Justice Denman says, "The cases establish this proposition, that if the bargain between the principal debtor and the creditor is altered, if there is a different relation established between them as regards their position to one another, then it will not do to say, You have not shown exactly in what way the surety would be damnified by it; but if there be an alteration of the relation between the parties in a material particular, that is sufficient to discharge the surety." The contract as entered into here was that the quantities of hay to be delivered by Lytle should be ascertained in a particular way, and it is clearly shown that as to a portion of the hay, which was delivered under the contract, this condition was not observed.

The defendants here are entitled to a strict compliance by plaintiff with the terms on which they became Lytle's sureties, and it is not difficult to determine whether or not the facts shown at the hearing would be likely to operate to the detriment of the sureties; and I cannot imagine that these defendants, if they had been asked to undertake suretyship for Lytle on the terms that, for any portions of the hay contracted for and bought in by Lytle, plaintiffs should be allowed to use without weight or measure at their own pleasure, plaintiffs crediting Lytle on the contract just what they thought fit, would have consented to become sureties.

[3] 1 Cab. & E. 340.

Judgment.
Richardson,J.

In my opinion the deviation disclosed a material alteration of the terms of the contract likely to prejudice the position of the sureties, and on that principle plaintiffs' action was properly dismissed.

WETMORE, J.—An agreement under seal dated 26th July, 1886, was entered into between Lawrence W. Herchmer, Commissioner of the North-West Mounted Police, for the Right Honorable the President of the Privy Council or The Honorable the Minister comptrolling the said North-West Mounted Police of the first part, and George L. Lytle of the second part, whereby Lytle agreed to furnish and deliver at the barracks of the Mounted Police, Battleford, 600 tons of upland hay at the rate of fourteen dollars and seventy cents a ton, to be paid upon completion of the contract. The hay was to be delivered in instalments at times specified in the agreement, the last instalment to be delivered before the first day of February, 1887. It was to be subject to acceptance or rejection by a board of officers of the North-West Mounted Police to be appointed from time to time by the officer in command at Battleford, and was to be received and paid for in accordance with the weights as shewn on the weigh scales at the police barracks, Battleford, provided that the same were in the good order, and if the scales were not in good order, the hay was to be measured after having stood for thirty days in the stacks, and five hundred and twelve cubic feet was to be allowed for each ton. The defendants Daniel Mowat and John A. Kerr, by their bond bearing even date with this agreement, became bound to the Right Honorable the President of the Privy Council of Canada, or the Honorable the Minister comptrolling the North-West Mounted Police, in the sum of $8,820 as sureties that Lytle would in all respects well and faithfully perform and carry out all the terms of the above recited agreement. Lytle put in a portion of the hay under this agreement, but he fell a long way short of putting in the whole 600 tons. It was claimed on behalf of the plaintiff that he only put in 397¼ tons; it was also alleged for the plaintiff that all this hay was weighed in the scales referred to, except two stacks

Judgment.
Wetmore, J.

which was measured, and a quantity, used by the men of the force and destroyed by cattle, out of these two stacks before they were measured, and allowed at fifteen tons by the police authorities. These two stacks were measured as specified in the agreement, that is, 512 cubic feet were allowed for each ton. In this way these stacks were allowed by the authorities at 104 tons and a quarter. Lytle claimed that he delivered and the police force accepted more than 397¼ tons. He claimed that the men had used, or cattle destroyed, 25 tons of hay without weighing or measuring it, or 10 tons more than he had been allowed. He claimed that from the loads put into them, there should have been from 160 to 170 tons in the two stacks measured, and that from a test applied by weighing a portion of one of these stacks and calculating the quantity of the whole therefrom, a result of 46 tons was shewn over the quantity arrived at by the measurement; and Major Cotton swears in cross-examination, "I know Lytle told me and I never doubted the actual weight exceeded that by measurement;" and the witness Stearnes, who weighed the portion of the stacks alluded to with Lytle, swears on cross-examination, "the scales were in order that day; Lytle did then ask to be allowed to weigh; a small piece was cut off by Lytle by permission and weighed as a test; 3 or 4 tons were weighed; the result of this test if applied to the whole would be in Lytle's favor." The evidence is not very clear as to when a board of officers was appointed as provided in the contract, but there is no evidence of a board having inspected any hay until the 8th October, when they inspected and passed the two stacks of hay referred to. Up to this time these two stacks had not been accepted; on the contrary, the police authorities refused to accept them before. Major Cotton states, "Before my arrival some (meaning some hay) had been accepted and used, some more had been delivered, but not accepted. * * * The hay not accepted was in two stacks in a corral; this I took over on report of board of officers." And Colonel Herchmer, the Commissioner, stated that he was at Battleford on the 19th or 20th Sep-

Judgment. Wetmore, J.

tember, and that while he was there hay was being put into the stacks; that he "refused to accept it, but did afterwards." Apart from the hay used by the men and allowed at 15 tons, between 44 and 45 tons were accepted, so far as appears in evidence, without any inspection by a board of officers. It appears that the scales were out of order, but when they became out of order, or how long they remained so, does not appear. Major Cotton stated that they were out of order when the stacks in question were measured, but he is evidently mistaken on that point. It is established, however, by the evidence of Superintendent McDonell, that when Lytle commenced the stacks the scales were out of order, and it is further established by the evidence of the Commissioner and Superintendent McDonell that they were put in order about the time the commissioner was at Battleford, and it is clearly established by Inspector Stearnes that they were in order on 8th October, when the stacks were measured.

It is claimed, among other grounds, that the defendants are relieved from liability because the contract for the performance of which they became sureties was without their consent varied or departed from in these respects: First, by the men using and cattle having been allowed to destroy part of the hay before it was inspected by the board or weighed or measured; Second, in using a quantity of the hay without inspection by a board; Third, in ascertaining the quantities of the two stacks by measurement, the scales at the time being in good order. The law as to the effect of an alteration of the terms of the original agreement upon the liability of a surety appears to be pretty well settled. A leading case on this subject is *Whitcher* v. *Hall*.[4] The doctrine applicable to this question is stated in Chitty on Contracts (11th ed., by Russell), 498, as follows: "Any alteration, however *bona fide*, by the creditor and the principal, without the assent of the surety, of the terms of the original agreement, so far as they relate to the subject matter in respect of which the surety became responsible for the principal, will

[4] 8 D. & R. 22; 5 B. & C. 269; 4 L. J. O. S. K. B. 167; 29 R. R. 244.

exonerate the surety, unless it be self evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety; and when the alteration is not of this character, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration." The present Chief Justice of Canada in delivering the judgment of the Court in *Peters* v. *Bryson*,[5] lays down the laws as follows: "Sureties have ever been held peculiarly entitled to the protection of the broad rule that the law will not make, nor permit to be made, for parties a contract other than that which they had made for themselves, and, where there has been a deviation from the agreement for the performance of which they became bound, allows them to say in the language of Lord Kenyon in *Campbell* v. *French*,[6] 'This is not my contract; *non haec in federa veni*; do not impose on me other conditions than those I have imposed on myself by the contract I have entered into.'" In *Peters* v. *Bryson*[5] judgment was given against the surety, but only on the ground that the guarantee was a specialty, and that it was not a defence at law that it had been varied by a parol agreement, but the party in such case must seek his remedy in a Court of Equity. As this Court is a Court of Law and Equity, and can, under sub-section 3 of section 6 of "The Judicature Ordinance, 1886," grant equitable relief, that judgment will not apply in this case. In *Driscoll* v. *Barker*[7] the defendant Barker agreed to build a house for the plaintiff and to finish it by a certain date; the plaintiff agreed to pay Barker $400 on the 15th August following the date of the contract and to make other payments as the work progressed, no payment after the $400 to exceed the amount of the work done. The other defendants became parties to the agreement as sureties for Barker. Barker failed to finish the house by the date agreed on, and the action was brought against him and his sureties. The sureties pleaded in sub-

Judgment.
Wetmore, J.

[5] 11 Allen (N.B.) 492. [6] 6 T. R. 200; 2 H. Bl. 163; 3 R. R. 154.
[7] 2 Pugs. & Burb. (N.B.) 407.

Judgment. Wetmore, J.

stance that after the $400 had been paid under the agreement to Barker, the plaintiff, without the knowledge and consent of the sureties, made payments to Barker on account of the building from time to time faster than the work progressed and in excess of the value of the work done at the time of such payments, and that by so making such payments the plaintiff materially and prejudicially altered their position as sureties and discharged them from liability. The plaintiff demurred to this plea, but the Court held the plea good. In *Holme* v. *Brunskill*[8] it was held that any alteration in the form of the agreement between principals discharges the surety, unless it is self evident that the alteration cannot prejudice the surety. Now, then, were the alleged alterations or deviations alterations of, or deviations from the contract? and if they were, was it, or was it not, self evident that the alteration could not prejudice the surety? As to the first objection, I cannot bring my mind to the conclusion that there was a departure from the contract at all. I can find nothing in the contract which made it incumbent on the commanding officer at Battleford to appoint a board of officers at any particular time. It would have been, in my opinion, quite sufficient to have appointed a board when Lytle announced he was prepared to deliver, or required a board to be appointed, and there is not a particle of evidence that Lytle gave notice that he was prepared to deliver or required a board before the 8th October, and I will not assume that he did. The hay then was lying in these stacks, at the time the men took and the cattle destroyed some of it, at Lytle's risk; the property was Lytle's. Unless the police authorities or those acting on behalf of Her Majesty waived the inspection by a board and accepted the hay, it remained Lytle's property until it was inspected and passed, or the inspection was waived. But not only that, but up to the time it was inspected and taken over on the report of a board, the commissioner and those in authority in the police force had refused to accept it. I cannot under-

[8] 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.

Judgment.
Wetmore, J.

stand how, under these circumstances, the taking of a portion of this hay by these men, or the fact that cattle broke in and destroyed a portion of it, can be construed into an acceptance of this property by the Queen, or by any person whose act would be held to bind her, or how this can be in any way construed into an alteration of, or deviation from the contract, or relieve the sureties. The fact that an allowance was afterwards made for this hay does not affect the question; that was a mere indulgence and one that strictly the police authorities could not allow as against Her Majesty, that is, they could not, by a subsequent act as against the Queen, convert what was a trespass by the men and cattle into an acceptance under the agreement. As to the second objection, I understand this objection to apply to hay which was weighed and used, but does not appear, so far as the evidence goes, to have been inspected by a board. I know cases can be found which seem to lay down the doctrine that any deviation from, or alteration of the contract guaranteed without the consent of the surety, even if altered for his benefit, will relieve the surety from liability, on the ground that it is not then his contract, and Chief Justice Ritchie in *Peters* v. *Bryson*[5] quotes from some of these cases with approval, especially referring to the Lord Chancellor's remarks in *Blest* v. *Brown*,[9] and Baron Alderson's remarks in *Stewart* v. *McKean*.[10] But Cotton, L.J., in *Holme* v. *Brunskill*,[8] before referred to, lays down the rule in these words: "The true rule, in my opinion, is that, if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that, if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet if it is not self evident that the alteration is unsubstantial or one which cannot be prejudicial to the surety, the Court will not in an action against the surety go into an enquiry as to the

[9] 3 Giff. 450; 8 Jur. N. S. 187; 5 L. T. 663, affirmed 8 Jur. N. S. 692; 6 L. T. 620; 10 W. R. 569. [10] 10 Ex. 675; 3 C. L. R. 460; 24 L. J. Ex. 145; 3 W. R. 216.

Judgment. Wetmore, J.

effect of the alteration." Now, here is a reasonable and fair rule which I am prepared to adopt. Then how could the acceptance of this hay without the inspection of a board by any possibility prejudice the sureties, the defendants in this case? I think it self evident it could not. The board was not to be appointed for the purpose of weighing the hay. It was merely appointed for the purpose of passing on its quality. If inferior hay was received and weighed and allowed at the contract price, that could not prejudice the defendants, and that is the only possible effect the omission to appoint a board in respect to this hay could have. I am therefore of opinion that the second objection cannot prevail. But I think that the third objection is fatal to the plaintiff's right to recover. Here is an important variation from the contract and one exceedingly prejudicial to the defendants. Applying the test of the measurement of a portion of these stacks made by Lytle and Inspector Stearnes, there is a difference of 46 tons between the weight by measurement and what it would likely come to if weighed, or a difference of over $676. It may suggest itself, however, that this might be remedied by allowing this difference as delivered. I can find no case which warrants any such course. In fact, the authorities are the other way. The defendants guaranteed the performance of a contract, by which the hay was to be weighed if the scales were in good order. The scales were in good order, the quantity of hay was ascertained by a method not warranted by the agreement. Under the circumstances and under the principle of the cases referred to, the defendants had a right to say, that it is not the contract we guaranteed, we are relieved from liability, and this Court cannot restore that liability by now making an allowance. It cannot be doubted for a moment that Lytle was a party to this arrangement. He consented to the hay being measured at first. It is true that after he found the quantity did not come up to his expectation he protested and wanted it weighed, but, nevertheless, he allowed the property to pass, and it is now most unquestionably in the parties of the first part to the original

Judgment.
Wetmore, J.

agreement. It is quite true that the agreement provides that if the scales were not in good order the hay was to be measured. It is quite possible that if during the time the scales were out of order Lytle had called for a board, and a board had passed the hay, and so the title thereto had passed to the parties of the first part of the agreement, and Lytle had stacked the hay so passed, and continued from time to time putting hay passed in like manner in the stacks while the scales were so out of order, it might not have been necessary when the time arrived for measuring to take the stack to pieces and weigh the hay, even although the scales had in the meanwhile been repaired and put in good order. But Lytle did not pursue this course. It would not, however, have been in accordance with the contract, after the scales had been put in good order, to continue putting hay into the stacks without weighing. And it seems to me quite clear that when the property in the hay did pass, the quantity being unascertained at that time, it became necessary under the agreement as against the sureties to ascertain the quantities by the scales, if they were in good order. As stated before, it is clear they were then in good order, and I think it is no answer to set up that it would have involved a great deal of labour to weigh the hay; that was a contingency which they might have provided for in the agreement, but which they did not do, or they might have obtained the sureties' consent to the alteration. It was urged that these matters of defence could not be set up as against the Queen, as Her Majesty cannot be prejudiced by the default of Her officers; and *The Queen* v. *McFarlane*[1] was cited in support of that proposition. I do not think that case bears out the contention. That was a Petition of Right filed to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work. In this case the Crown seeks to recover damages from subjects for an alleged breach of an agreement. It would seem to me a strange doctrine to propound, in view of the principle upon which sureties are relieved from liability, that, if a person guarantees the performance of a contract made by another person

Judgment. Wetmore, J.

with the Crown, and possibly gives the guarantee on the strength of certain provisions in the contract which he knows will insure a fair working out of the contract, or protect him, and which may possibly have been inserted by his procurement, the servants of the Crown who have in charge the working out of the contract, may entirely overlook or disregard these provisions, work the contract out in a way not contemplated by the agreement and directly contrary to such provisions, and that the surety would nevertheless continue liable; in other words that the surety cannot say, as he could in case the contract had been with a subject, "That is not the contract the performance of which I guaranteed."

I may just add that it occurred to me there might possibly be a doubt whether the matters of defence to which I have referred and on which I have based my judgment are open to the defendants under the pleadings. As, however, no such objection as this was taken at the argument or, as I can find, before the trial Judge, I have not given this point any serious attention. I have assumed that the learned counsel on both sides are satisfied that these defences are available under the sixth paragraph of the statement of defence.

I am of opinion that the judgment of my brother Richardson should be affirmed and the appeal dismissed with costs.

McGUIRE, J.—The facts in this case have already been sufficiently set out in the judgments of my learned brethren.

The defendants became sureties for the performance by Lytle of the terms of his contract for supplying hay to the police at Battleford, which contract is referred to in the bond on which the defendants are sued.

Several grounds of defence have been relied upon, but I shall only refer to three.

First, the defendant's claim that the police accepted and used a quantity of the hay delivered by Lytle without the

Judgment.
McGuire, J.

same having been inspected by a board of officers as mentioned in Lytle's contract. I do not think that the neglect or omission to appoint such a board was such a non-performance of the contract as prevents the plaintiff succeeding here. It was a provision which could only be for the protection of the Government. If the hay delivered and accepted during that period was such as the board ought to have accepted, then its non-existence did not in any way affect the defendants or Lytle, whereas, if the hay was such as the board would have rejected, then surely the fact that it was not rejected was clearly of advantage to both Lytle and his sureties. This is quite obvious, and does not depend on any testimony as to the effect of such omission.

As to second objection that before either inspection or ascertainment of the quantity of hay delivered, a portion of it was carried off by some of the constables and another portion was destroyed by cattle, which it is said the police allowed to break into it; it is not contended, at any rate it is not proved, that the acts of the constables, any more than those of the cattle were authorised by the police authorities — they were, in fact, trespassers, and for such torts I do not think that Her Majesty can be held responsible. *The Queen* v. *McFarlane*.[1]

As to the third objection, that after the scales were in order and when, according to the contract, it became necessary that the quantity of hay should be ascertained by weight, two stacks were inspected by a board of officers and accepted, but were measured instead of being weighed, whereby the contractor Lytle and his sureties were materially prejudiced; I think the evidence supports the defendants as to the facts. The police authorities clearly failed to carry out the contract in a material particular, and to the prejudice of the defendants. It was urged by the plaintiff's counsel that the Crown cannot be held responsible for any wrongful acts of its servants, and the case of *The Queen* v. *McFarlane*[1] was cited as authority for that contention. For torts committed by Her servants, I quite agree that she cannot be held responsible, but for tortious breaches of contract

Judgment. McGuire, J.

the law is the other way. In *The Windsor and Annapolis Railway Co.* v. *The Queen*,[2] it was decided that whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for unliquidated damages resulting from breach of contract by the Crown, whether by omissions or positive acts of servants of the Crown. In the present case there was an omission by the servants of the Crown to weigh the hay and a positive act, the taking of the hay by measurement contrary to the express terms of the contract. The Crown having failed to perform its part of the contract cannot, I think, look to the sureties, because the other party to that contract has not carried out his part thereof. Were this an action against Lytle, the effect of not having weighed the hay would be different, but as against the sureties of Lytle I do not think it will do to say that credit may be given for a larger quantity of hay than was shown by the measurement, even were it possible now to ascertain its quantity by weight, which it certainly is not, and there is no satisfactory evidence as to what it would have come to had it been weighed.

I think this appeal should be dismissed and the judgment herein affirmed with costs.

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

Appeal dismissed with costs.

QUIRK v. THOMPSON.

Chattel mortgage—Description—Date of renewal.

Goods were described in a chattel mortgage, as follows:—"All and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise, now being in the store of the said mortgagors on, etc."

Held, ROULEAU, J., *dissenting*. That the description was sufficient.†

The mortgage was filed August 12th, 1886, at 4.10 p.m.; a renewal was filed August 12th, 1887, at 11.49 a.m.

Held, ROULEAU, J., *dissenting*. That the renewal was filed within one year from the filing of the mortgage.†

[*Court in banc, December 7th, 1888.*

Statement.

This was an appeal by the plaintiff from the judgment of ROULEAU, J., dismissing the action. The appeal was argued on the 5th June, 1888. The facts and the points involved appear in the judgment.

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

J. A. Lougheed, for the defendants, the respondents.

[*December 7th, 1888.*]

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

MCGUIRE, J.—In this case the plaintiff, Quirk, appeals from the judgment of Rouleau, J. The form of the interpleader issue here is different from that usually employed.

The question in dispute seems thereby to be narrowed down, practically, to whether the plaintiff, Quirk, had, at the date of the seizure, title as against the execution creditors, Thompson, Codville & Co., to the goods mentioned in the chattel mortgage given by Kirkpatrick & Holmes, dated 12th August, 1886.

The execution, filing and refiling of the mortgage were admitted.

†Affirmed 18 S. C. R. 695.

Judgment. McGuire, J.

The grounds on which the respondents relied in the Court below were: 1. That the goods are not sufficiently described in the mortgage, and 2. That the mortgage was not refiled in time.

As to the first objection, the goods are described as being "all" of the goods, chattels, &c., used in the mortgagors' business as general merchants, and then being in a certain store of the mortgagors', in a certain place; it covers all, without exception, of the goods of the description given, in that store. We think that the description is sufficient, and this view is supported by the language employed by Ritchie, C.J. and Henry, J., in *McCall* v. *Wolff*,[1] at pp. 133 and 138, and by several decisions in the Ontario Courts, among others *Harris* v. *Commercial Bank*.[2]

As to the second objection, we think the mortgage was filed in time. It was filed on August 12th, 1886, at 4.10 p.m., and refiled August 12th, 1887, at 11.49 a.m.

The learned Judge in the Court below seems to have relied on the judgment of Dartnell, Co.J., in *Stewart* v. *Brock*.[3] We have examined that judgment and find that the learned County Court Judge there relied on a dictum of Burns, J., in *Armstrong* v. *Ausman*,[4] that the year is to be computed from the earliest moment in the day on which the mortgage was filed. In that case the opinion so expressed by Burns, J., was an *orbiter dictum* not necessary to the decision of the question before him, as there the filing was on the 15th May, in one year, and the refiling was on the 14th of the following May. Draper, C.J., in the same case did not express an opinion as to whether the year is to be computed from the earliest moment of the day of filing or from the hour and minute of filing.

We think that the fair interpretation of such expressions as "from" or "after" the doing of the act, as the filing of the mortgage here, is that the time is to be computed either from the termination of the day on which the act is done

[1] 13 S. C. R. 117. [2] 16 U. C. Q. B. 437. [3] 19 C. L. J. N. S. 289. [4] 11 U. C. Q. B. 498.

Judgment.
McGuire, J.

or at earliest from the exact moment of the day when it was done. In Archbold's Q. B. Practice, Vol. II., p. 1435, it is said, "When time 'from,' or 'after,' or 'within' a certain time of a particular period is allowed to a party to do any act, the first was to be reckoned exclusively. So where time is to be computed 'from,' or 'after,' or 'within' a certain time of an act done, the day upon which the act is done is in general to be reckoned exclusively, and this whether the party affected is privy to the act or not."

It is unnecessary in this case to decide which of these starting points is to be taken, as, if we adopt the view most favourable to the respondents, namely, to compute the year from the hour of 4.10 p.m., on the 12th August, 1886, a year from that time would not expire until 4.10 p.m., on the 12th day of August, 1887, since in every year there must be a full 12th day of August, and it is necessary that the portion of the 12th of August, 1886, shall be supplemented by so much of the following 12th of August as to make up a full day in order to complete a year. For example, a week from Monday at noon does not expire till noon of the following Monday, and so for a "month," "year" or other period of time.

Now, in this case, the refiling was at 11.49 a.m. We therefore think the refiling was within a year from the filing as required by the Ordinance.

We think the appeal should be allowed with costs and judgment be entered for the plaintiff in the interpleader issue with costs.

ROULEAU, J., remained of the same opinion as at the trial.

Appeal allowed with costs.

CUZNER v. CALGARY.

Municipal Ordinance — Municipality — Sidewalk—Liability for accumulation of ice.

The Municipal Ordinance gives municipalities in the Territories, jurisdiction over roads, casts upon them the duty of maintaining them, authorizes them to abate nuisances, and affords them means for raising money for corporate purposes.

Held, therefore, that where a municipality had constructed a sidewalk upon one of the roads within its limits, upon which snow and ice had accumulated, which it had not removed within a reasonable time, in consequence of which the plaintiff slipped and fell and was injured, the municipality was liable.

[*Court in banc, December 7th, 1888.*

Statement.

This was an action brought by a married woman and her husband against the municipality of the town of Calgary to recover damages by reason of the female plaintiff slipping and injuring herself on a sidewalk on one of the public streets of the town, whereon snow and ice had accumulated.

The defence contained a denial that the defendants were the owners of the street; a denial of the alleged duty of the defendants to remove the snow and ice, and an allegation of contributory negligence on the part of the female plaintiff.

The case was tried at Calgary before ROULEAU, J., with a jury. Counsel for the defendants offered no evidence, and moved for a nonsuit on the grounds that there was no proper evidence: (1) of incorporation, (2) of the defendants' ownership of the street, (3) of the duty of defendants to keep the sidewalk in repair, (4) of the defendants' knowledge that the sidewalk was out of repair, (5) of negligence, (6) of the alleged non-repair being the cause of the accident; and that the evidence showed contributory negligence on the part of the female plaintiff.

The learned Judge refused to enter a nonsuit, and left the case to the jury, who gave a verdict for the plaintiffs with $2,500 damages, and judgment was entered accordingly.

From this judgment the plaintiffs appealed on the grounds taken at the trial on the motion for nonsuit and on the ground of excessive damages. The appeal was argued on the 4th December, 1888. Statement.

E. P. Davis, for the defendants, the appellants.

J. A. Lougheed, for the plaintiffs, the respondents.

[*December 7th, 1888.*]

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

RICHARDSON, J.—The female plaintiff in this case seeks to recover damages sustained by her, consequent, as alleged, upon the municipal corporation of Calgary allowing snow to accumulate upon a sidewalk in the town.

We are of opinion that the Municipal Ordinance, No. 2, of 1885, with the amendments thereto, extended to the Corporation of the town of Calgary.

The defendants by their pleading have admitted they were a municipal corporation. Such a corporation could only be created in the North-West Territories in one of three ways;

1. By Act of Parliament.

2. By Ordinance of the North-West Council, or

3. By Royal Charter.

This Court will judicially notice there is no Act of Parliament creating any such corporation as defendants.

The town clerk of defendants has testified he never saw letters of incorporation, and if any such existed he is the proper custodian.

We therefore assume that there are none, so the town is not incorporated by royal charter.

The defendants' counsel urged in appeal that the town may have been incorporated under an Ordinance passed prior to No. 2 of 1885; but that Ordinance, No. 2, of 1885, repealed any such previous Ordinance and, therefore, while the town of Calgary existed as a corporation by virtue of the

Judgment. Richardson, J.

old Ordinance, it had none of the powers or duties provided for by Ordinance No. 2, of 1885, as they had not been expressly extended to the defendants by that Ordinance, and that the powers and duties provided by the old Ordinance are repealed.

The effect of this would be that if the Ordinance of 1885 repealed the pre-existing Ordinances, and did not continue the corporation created by them, the corporation must have passed out of existence, inasmuch as "the creature of a statute cannot exist when the statute creating it is dead." But by the pleadings defendant has admitted the corporation exists. Therefore, to follow the legitimate conclusion of this reasoning we must hold that it was created under the powers contained in the Ordinance of 1885, this being as stated before the only existing means under the evidence on the record by which the corporation could be created.

We do not, however, wish to put our judgment on this narrow ground. We think the words "are incorporated" in sub-section 1 of section 1 of Ordinance No. 2, of 1885, mean and must be read as "are already incorporated," so that the sub-section reads as follows, "Municipality" shall mean any locality, the inhabitants of which are already incorporated or continued or become so under this Ordinance.

It was urged that because the words in this sub-section 1 are to be found in the first Ordinance made in the North-West Territories and before any municipal corporation existed, we are prevented from putting the construction on them which we have done. Assuming there was nothing to which those words would apply, when that first Ordinance was passed, we are not driven to any such conclusion. In fact, we must avoid holding that the legislature carried forward meaningless words. It is only necessary to have recourse to the language of a repealed statute for the purpose of construing a repealing statute when the words of it are ambiguous. If within the four corners of the Act to be construed, applying it to the subject matter, we can give effect to the words used we must do so. It is evident what the words, "become so" in that sub-section 1 have reference to,

viz.: "Corporations created under the Ordinance by the Lieutenant-Governor." What the words "are continued" mean is not necessary here to decide. The words "are incorporated," however, cannot have reference to any corporations specially created by the Ordinance, because there are none such. It can, therefore, only have reference to corporations existing prior to its passing. Judgment. Richardson, J.

We think, also, that under clause 34 of section 2 of Ordinance No. 6, of 1887, we must hold that the provisions of the Ordinance of 1885 apply to the body corporate of the town of Calgary.

We think the town of Calgary had cast upon it the duty of keeping the sidewalk in question so clear of snow as to be not dangerous to persons using it. Section No. 225 of Ordinance No. 2, of 1885, gives them jurisdiction over all township lines and roads.

Then sub-section 3 of section 109 casts on them the duty of maintaining roads and bridges and building the same, and sub-section 5, the abatement of nuisances.

The Ordinance gives them the means of raising money by assessment for corporate purposes.

As a matter of fact, the defendants made this very sidewalk in question, and the authorities, holding a corporation liable for its omission in removing nuisances of the sort, are so numerous as to admit of no doubt.

The question as to whether or not the snowbank was dangerous, as also whether or not the corporation had reasonable time to remove it, was a proper question for the jury, and we think there was quite sufficient evidence to warrant the jury in deciding as they have done in this case.

The only remaining question now is, Was there contributory negligence? We do not think there was any evidence of such to leave to the jury.

The question of excessive damages was not pressed before us.

We think this appeal should be dismissed with costs.

Appeal dismissed with costs.

QUEEN v. FARRELL.

Criminal law—Forgery—Corroborative evidence.

The prisoner was charged in the first Count with forging the name of a Superintendent of the N. W. M. Police to a requisition for transport, and in the second, with uttering the same knowing it to be forged.

Held, that the Superintendent was not "a person interested, or supposed to be interested," within the meaning of the Criminal Procedure Act, R. S. C. c. 174, s. 218,† and that therefore, his evidence did not require corroboration.

[*Court in banc, December 9th, 1888.*

Statement.

The prisoner was tried at Calgary before WETMORE, J., and a Justice of the Peace, with the intervention of a jury, on a charge containing counts for forging the name of Sevère Gagnon, Superintendent N.-W. M. P., to a requisition for transport of persons on the Canadian Pacific Railway, and uttering the same knowing it to be forged.

Mr. Gagnon gave evidence to the effect that he had not signed the requisition in question nor authorized any one to sign it, and that the signature "Sev. Gagnon" was forged. There was also evidence to the effect that the prisoner had been a member of the N.-W. M. P. Force, but had been discharged; that when arrested there were found on his person a number of blank forms similar to the requisition in question; that the prisoner was in the employ of the Canadian Pacific Railway Company and claimed to have power to issue passes on the railway, and that the requisition in question came from the prisoner's possession.

† "The evidence of any person interested or supposed to be interested in respect of any deed, writing, instrument, or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the 'Act respecting Forgery' shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution." See now Criminal Code, s. 684, which requires corroboration of the evidence of a single witness irrespective of interest.—Ed.

Statement.

The learned Judge charged the jury that if they believed the testimony of Mr. Gagnon they must find the requisition to have been forged. The jury found the prisoner guilty generally on the whole charge; the verdict was entered accordingly and the prisoner was sentenced to six months' imprisonment. Sentence was respited and the following questions submitted for the opinion of the Court in banc:

(1) Was the evidence of Superintendent Gagnon sufficient to establish that the document in question was forged, or did his evidence require to be corroborated under the provisions of s. 218, c. 174, R. S. C. (†)?

(2) Was the evidence sufficient to warrant the jury in finding the document in question was forged?

(3) If the last question is found in favor of the prisoner, should the conviction be sustained as to the second count of the charge?

Before the Court in banc.

D. L. Scott, Q.C., appeared for the Crown; the prisoner was not represented.

[*December 9th, 1888.*]

The Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE, and MCGUIRE, JJ.) held that Superintendent Gagnon was not "interested" within the meaning of the Act, and that therefore his evidence did not require corroboration; that the evidence was sufficient to sustain the conviction on either count, and that therefore the conviction was right and should be sustained.

Conviction sustained.

QUEEN v. MATHEWSON.

Criminal law—N. W. T. Act—Conviction—Distress—Imprisonment.
N. W. T. Act—Conviction—Distress—Imprisonment.

A statute provided that in case of non-payment of the penalty and costs immediately after conviction, the Justice might, in his discretion levy the same by distress and sale, or might commit the person who was so convicted and made default, to any common gaol for a term not exceeding six months, with or without hard labor, unless the said penalty and costs should be sooner paid. N. W. T. Act, s. 99.

A conviction under this statute ordered that the penalty and costs be levied by distress, and that *in default of sufficient distress*, the defendant be imprisoned for one month.

Held, that the imposition of imprisonment in default of distress was authorized by the Summary Convictions Act, R. S. C. c. 178, s. 67.†

[*Court in banc, June 7th, 1889.*

Statement. The defendant was convicted for an offence under section 95 of the N.-W. T. Act prohibiting *inter alia* the sale of intoxicating liquor in the Territories, except by special permission in writing of the Lieutenant-Governor, under a penalty therein fixed. Section 99 of the same Act (partially set out in the head note) contained provisions respecting the recovery of such penalties.

The conviction adjudged that the penalty and costs be levied by distress, and in default of sufficient distress that the defendant should be imprisoned for one month.

The defendant appealed and the appeal was heard before WETMORE, J., who submitted the question of the validity of the conviction to the Court in banc, before which it was argued on the 5th June, 1888.

D. L. Scott, Q.C., for the Crown, cited *Regina* v. *Sullivan*,[1] *Regina* v. *Brady*,[2] *Ex parte Goodine*.[3]

T. C. Johnstone, contra, cited *Arnott* v. *Bradley*.[4]

†Cf. Crim. Code, s. 872. [1]24 S. C. N. B. 149. [2]12 O. R. 358. [3]25 S. C. N. B. 151. [4]23 U. C. C. P. 1.

[*June 7th, 1889.*]

Judgment.
McGuire, J.

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

MCGUIRE, J.:—Section 99 provides two remedies for enforcing payment.

1. By distress and sale.

2. Imprisonment up to 6 months.

Suppose the Justice exercises his discretion to enforce payment by distress, then what happens if there is no sufficient distress? Section 99 provides no further remedy in case no sufficient distress is found, but when that appears, section 67 of chapter 178, R. S. C.† must be looked at, which provides that in such case the Justice may commit for a period not exceeding three months.

In the case under consideration the Justice chose the alternative of enforcing payment by distress, and directed that in default of sufficient distress the defendant should be imprisoned for one month.

We think he had power to so order under section 67 of chapter 178, R. S. C.,† and that the conviction is good.

Conviction sustained.

QUEEN v. CLIVE.

QUEEN v. HOLDSWORTH.

Prairie fire ordinance—Railway engine—Escape of fire.

An ordinance of the Territories prohibited the kindling and placing of fire "in the open air in any part of the Territories," except for certain purposes. The defendants, who were respectively fireman and engineer on a freight train, were severally convicted of a breach of the ordinance upon evidence to the effect that sparks from the fire which they had kindled in the locomotive engine had kindled a fire on the adjacent prairie, there being, as the magistrate found, no evidence of improper construction of the engine, or of negligence on the part of the defendants.

Held, that these facts afforded no evidence of the defendants kindling a fire "in the open air."

[*Court in banc, June 7th, 1889.*

Statement. The defendant in the first case was an engineer and in the second a fireman of the Canadian Pacific Railway. They were each severally convicted before Justices of the Peace of a breach of Ordinance No. 17 of 1887, prohibiting the kindling or placing of fire in the open air in any part of the Territories, except for certain purposes, on evidence to the effect that sparks from the fire which they had kindled in a locomotive engine had kindled a fire on the adjacent prairie, there being, as the Justices found, no evidence of improper construction of the engine, or negligence on the part of the defendants.

Writs of *certiorari* were obtained on behalf of the defendants and returns were made thereto by the convicting justices. Rules were taken out to show cause why the convictions should not be quashed. These rules were argued together on the 5th June, 1889.

D. L. Scott, Q.C., and *R. Dundas Strong* shewed cause.

J. A. M. Aikins, Q.C., and *J. Secord* supported the Rules.

[*June 7th, 1889.*]

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

Judgment.
McGuire, J.

McGUIRE, J.—In these two cases motions were made on behalf of the defendants, Charles Clive and John E. Holdsworth, to quash two convictions brought up by writs of *certiorari* and made by Asa M. McLean and Joseph P. Beauchamp, Esquires, two Justices of the Peace, whereby the said Clive and Holdsworth were convicted of a breach of Ordinance No. 17 of 1887, commonly known as the Prairie Fire Ordinance.

From the information and depositions it appears that the defendants were respectively fireman and engineer on an engine and freight train of the Canadian Pacific Railway Company, and the proceedings and evidence in each case being the same, it was for convenience agreed that both should be argued together.

The Magistrates set out in writing their findings on questions of fact, from which it appears that they found:

(1) That the usual and best known appliances under which engines could be successfully operated for preventing the emission of sparks were in use on the engine in question, and

(2) That it was not shown that the cause of the fire was due to any act performed by the defendants for the purpose of kindling fire, neither had it been shown that the fire was caused by negligence or wantonness on the part of the defendants.

The counsel for the defendants in moving for the writs of *certiorari* had taken a number of technical objections to the convictions, but it was agreed that the Court should disregard them and give judgment on the merits.

The question whether the mere act of the defendants in running an engine, in which they had kindled or placed fire, even without any negligence or wantonness on their part, or any intention to kindle or place a fire on the prairie, itself would be a breach of the Ordinance, was very fully argued by the counsel on both sides, but, in the view we have taken of the case on another point, we prefer to express no opinion on this branch of the matter.

Judgment.
McGuire, J.

The Ordinance prohibits the kindling or placing of fire "in the open air." There is no evidence of any kindling or placing of fire by the defendants elsewhere than in the engine, and that was, in our opinion, not in the "open air."

We therefore think the defendants were not guilty of any breach of the Ordinance.

We order that the convictions in both cases be quashed.

Convictions quashed.

QUEEN v. HAMILTON.

Criminal law — N. W. T. Act—Imprisonment—Certiorari—Return of conviction—Amendment of conviction.

Defendant was convicted under a statute which authorized, in default of payment of the penalty and costs (1) distress, or (2) 6 months' imprisonment.

The magistrate's minute directed 6 months' imprisonment, unless the fine and costs should be sooner paid. The magistrate filed with the proper officer a formal conviction which directed distress, and in default of distress 6 months' imprisonment. This conviction being obviously bad, inasmuch as (besides not according with the minute) three months is the limit for imprisonment for default of distress (Summary Convictions Act, s. 67, *Reg.* v. *Matheweson*,[1]) upon the issue of a *certiorari* the magistrate filed a new formal conviction, which accorded with the minute, except that there were added the words "(unless) the costs of conveying the defendant to the guard room are sooner paid."

Held, following *Reg.* v. *Matheweson*,[1] that the first formal conviction was bad.

Held, also, that the second formal conviction was also bad, inasmuch as the statute under which the conviction was made did not authorize the imposing of the costs of conveying to gaol; the words to that effect in the forms to the Summary Convictions Act being intended to be used only when expressly made applicable. *Reg.* v. *Wright*,[2] followed.

Semble, per RICHARDSON, J.: The Summary Convictions Act, s. 85 (as remodelled by 51 Vic. c. 45, s. 9), directing that the convicting magistrate shall transmit the conviction to the proper officer "before the time when an appeal * * * may be heard, there to be kept by the proper officer among the records of the Court," and the magistrate having complied with this provision, by filing the first formal conviction, the second could not be considered.

[1]Ante p. 169. [2]14 O. R. 668.

[*Court in banc, June 7th, 1889.*

Statement.

The defendant was charged before a Justice of the Peace under section 95 of the N.-W. T. Act with having intoxicating liquor in his possession, without the special permission in writing of the Lieutenant-Governor. The Justice found the defendant guilty, and at the conclusion of the case made a minute to the effect that he found the defendant guilty and adjudged that he should pay a certain fine and certain costs, and in default of payment forthwith should be imprisoned for a term of six months at hard labor unless the fine and costs should be sooner paid. A formal conviction was drawn up by the justice, which, by its terms, adjudged that the fine and costs should be levied by distress, and that in default of sufficient distress the defendant should be imprisoned for six months. This formal conviction was returned to the clerk of the Supreme Court for the district in which the offence was alleged to have been committed.

A writ of *certiorari* having been issued to return the proceedings, this formal conviction was taken off the files of the Court and handed to the justice to be returned in answer to the writ of *certiorari*. The justice returned not only this formal conviction but also a new formal conviction according with his minute of conviction, except that it included the words, "the costs of conveying the defendant to the guard-room."

A motion to quash the conviction was argued on the 3rd June, 1889.

T. C. Johnstone, for the motion.

D. L. Scott, Q.C., contra.

[*June 7th, 1889.*]

WETMORE, J.—The defendant was convicted by Frank Norman, Esquire, a Justice of the Peace of the Territories, on the 25th July last for having in his possession intoxicating liquor without the special permission in writing of the Lieutenant-Governor. The conviction was made under section 99 of the North-West Territories Act. The Magistrate

Judgment. Wetmore, J.

after hearing the testimony made a minute of conviction against the defendant, whereby he found him guilty of the offence charged and adjudged that he should pay a fine of $200 and costs, in default of payment to be imprisoned for a term of six months with hard labour unless the fine and costs were paid immediately. A formal conviction was then drawn up and filed with the clerk of the Supreme Court of the judicial district of Eastern Assiniboia, within which district the alleged offence was committed. By this conviction the Justice adjudged that the defendant should forfeit and pay the sum of two hundred dollars and $5.75 for costs, and that if the said several sums were not paid, the same should be levied by distress and sale of the defendant's goods, and in default of sufficient distress that the defendant should be imprisoned for six months with hard labour. This conviction was admitted by the counsel for the prosecution to be bad, as it clearly was under the decision made by this Court in *The Queen* v. *Mathewson* [1] in awarding six months' imprisonment in default of distress. After the issuing of the writ of *certiorari* in this case, however, and shortly before the return thereto, as stated by the counsel for the prosecution, the Magistrate made a new conviction in accordance with the minute of conviction, adjudging the defendant to pay the same penalty and costs as in the first conviction, and that if the said several sums were not paid forthwith the defendant should be imprisoned for six months unless the said sums and the costs of conveying the defendant to the guard-room were sooner paid. It was urged for the defendant that this conviction is also bad in that it adjudges that the defendant be kept imprisoned for the term unless, among other things, the costs of conveying him to the guard-room are sooner paid. This conviction follows the form J 2, prescribed in the forms appended to the Summary Convictions Act, R. S. C. c. 178, and provided for in section 55 of that Act, and which is the form of conviction provided for in cases where imprisonment is awarded in the first instance on default of payment of the penalty and costs. We can find no provision in the body of this Act providing for or relating to the issue of a warrant of imprisonment in a case

Judgment.
Wetmore, J.

where imprisonment is awarded in the first instance in default of payment of the penalty and costs. Except in cases of a conviction for an offence under "The Larceny Act," or "The Act respecting Malicious Injuries to Property," or "The Act respecting the Protection of the Property of Seamen in the Navy," in which cases provisions for the commitment are contained in section 68 of the Act, and in cases when the defendant at the time of the imprisonment awarded is undergoing imprisonment upon a conviction for another offence, in which cases provision is made for delivery of the warrant of commitment to the gaoler. In all other cases where imprisonment is awarded in the first instance for default, the authority to commit is only to be found in the form of conviction and the form of warrant O 1 in the Appendix to the Act. In cases where a distress is awarded in default of payment or when no mode of enforcing the penalty is provided, the body of the Act contains a number of provisions relating to enforcing the penalty, namely, for the issuing a warrant of distress, and the issuing a warrant of commitment upon default of sufficient distress. These provisions are found in sections 62 to 67, both inclusive. Section 66 provides that in that case on a return of "no goods and chattels" whereon to levy, the Justice may issue his warrant of commitment requiring the constable to convey the defaulter to the gaol and the keeper to receive and imprison him for the time directed unless "the sum or sums adjudged to be paid and all costs and charges of the distress and also the costs and charges of the commitment and conveying of the defendant to prison, if such Justice thinks fit so to order * * * are sooner paid." In that case the power to award the cost of conveying the defendant to gaol appears to be discretionary with the magistrate, he may direct the payment of them or not as he sees fit. The forms of conviction and warrant provided for these cases are in keeping with this discretionary power; the form of conviction is J 1; the words "and of the commitment and conveying of the said A. B. to the said gaol," are in brackets, thus indicating that they are to be inserted or left out accordingly as the Justice in his discretion directs that they shall be paid or not. The form of the

Judgment. Wetmore, J.

warrant of commitment provided for in these cases N 5 is similar, the same or similar words are in brackets, and the form of this warrant is in accordance with the provisions of section 66. When, however, imprisonment is awarded in the first instance in default, there is nothing to be found in the body of the Act, or elsewhere, expressly vesting in the Justice a discretionary power to award the costs of conveying the defendant to gaol. In looking at the form of conviction provided for in that case, J 2, it will be seen that the words "and the costs and charges of conveying the said A. B. to the said common gaol" are not in brackets, but upon looking at the form of commitment applicable to such case, O 1, we find that the words "and costs and charges of carrying him to the said common gaol amounting to the further sum of ," are in brackets. Now, these words must be in brackets for some purpose, and the only conceivable purpose for so putting them in brackets is that in some cases they are to be inserted in the warrant and in other cases they are not. When then are they to be inserted? The Magistrate has no discretion as in the other cases mentioned to insert them or not. The only conclusion to arrive at is that they are to be inserted when the substantive Act, which creates the offence and the punishment, authorizes it, otherwise they are not to be inserted. That being so, the words in the form of conviction J 2, authorizing imprisonment unless the costs and charges of conveying the defendant to gaol are paid, can only be inserted when the substantive Act authorizes such imprisonment. In construing a statute such as the Summary Convictions Act, we are in cases of doubt bound to give the construction most favourable to the liberty of the subject. Now the substantive Act, section 99 of the North-West Territories Act, does not authorize imprisonment for these costs. We are therefore of opinion that the second conviction is also bad. We have not lost sight of the fact that the effect of the conclusion we have arrived at is to render the form J 2 misleading. We very much regret that this is the case. While, however,a consideration of this sort would induce us if possible to avoid giving the statute such a construction as to produce that effect, nevertheless, if on

principle we have to give that construction it cannot be avoided. We have no doubt upon the matter and our view is entirely borne out by the judgment of the Queen's Bench Division, of Ontario, in *Regina* v. *Wright*.[2]

Judgment. Wetmore, J.

Both of the convictions returned to the writ of *certiorari* will therefore be quashed.

RICHARDSON, MACLEOD, ROULEAU, and MCGUIRE, JJ., concurred.

RICHARDSON, J., added:—By 51 Vic. c. 45, s. 9, Statutes of Canada, the imperative duty is cast upon every justice before whom any person is summarily tried to transmit the conviction or order to the Court to which the appeal is "herein" given, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer of the Court.

By section 7, the Court to which the right of appeal is given is thus defined, "to a Judge of the Supreme Court of the said Territories sitting without a jury at the place where the cause of the information or complaint arose, or the nearest place thereto where a Court is appointed to be held."

The information in this matter shows that the cause of it arose at Moosomin; it therefore became the Magistrate's bounden duty to return the conviction he made to the Court at Moosomin; the clerk of the Supreme Court for Eastern Assiniboia at Moosomin, being by section 102 of the North-West Territories Act declared the proper officer for such purposes.

The conviction in this matter was made 25th July, 1888, the Magistrate made his return on the 26th July, 1888, to the Court at Moosomin, and it was placed on record in the clerk's office on that day.

In obedience to a *certiorari* issued on 26th November, 1888, the Magistrate returns to the registrar the *certiorari* with a written statement:—"I beg to return the enclosed

Judgment. writ; all the documents are in the hands of the clerk of the
Richardson, J. Court (Mr. Neff) at Moosomin."

The Magistrate thus obeyed the writ to my mind, and identified the first conviction as the one he made. All the Court then required of him was to put in more formal shape what he had already done; this he does and adds another conviction, which I doubt much if he could do legally, and therefore for this reason and on the grounds already stated by my brother Wetmore both convictions returned to the writ of *certiorari* must be quashed.

Conviction quashed.

QUEEN v. LAIRD.

Criminal law—Summary Convictions Act—Dismissal—Costs—Unauthorized items—Amendment.

A Justice's order dismissing an information under "The Summary Convictions Act," ordering the informant to pay as costs a sum which included items for "rent of hall," "counsel fee," "compensation for wages," and "railway fare."

Held, that none of these items could legally be charged as costs, and that, therefore, the order was bad, so far as it awarded any costs.

Held, also, that the Court could not amend the order by deducting the illegal items; though it could amend by striking out *in toto* all that part of the order relating to costs.

Regina v. *Dunning*,[1] considered.

[*Court in banc, June 7th, 1889.*

Statement.

The defendant was charged on two separate informations before Justices of the Peace with breaches of section 95 of the N.-W. T. Act, in the one case with having in his possession, and in the other with selling intoxicating liquor without the special permission in writing of the Lieutenant-Governor. The Justices dismissed both charges, and ordered the complainant to pay certain costs. The proceedings having been returned to the Court on two several writs of *certiorari* motions to quash the orders were argued together on the 6th June, 1889; the contention being that the orders were bad because they ordered the payment of costs which he could not legally be charged with.

W. White, for the motion.

T. C. Johnstone, contra.

[*June 7th, 1889.*]

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

WETMORE, J.—Two orders dismissing informations before Justices with the proceedings upon which the same were based, were returned to two several writs of *certiorari*

[1] 14 O. R. 52.

Judgment. Wetmore, J.

issued out of this Court. The objections made to these orders in the application to quash are the same in each case, namely, that the Justices dismissed the informations with costs and included in such costs items not authorized by law. The objectionable items are as follows: The Justices hired a hall in which to try the matters of the information, the charge for which appears to have been $1, and they divided this charge in the two cases, charging the prosecutor fifty cents in respect thereof in each case. They allowed the defendant a counsel fee of $37.00 in both cases, and divided this allowance in like manner, charging the prosecutor $18.50 in each case. They allowed an amount of $14.80 to the defendant as a compensation for wages lost, and divided that in like manner, charging the prosecutor with $7.40 in each case. They allowed the defendant $10.50 for railway fare, and divided that in like manner, charging prosecutor with $5.25 in each case.

The learned counsel for the Magistrates and the defendant attempted to justify these charges by referring to section 6 of chapter 45 of 51 Vic. (Dom. Stat, 1888). Sections 58 and 59 of the Summary Convictions Act are the general sections under which Justices are authorized to award costs in cases of conviction and in cases of dismissal. Section 6 of chapter 45 of 51 Vic., provides an additional subsection to section 59 of the principal Act, and provides that the costs to be awarded under sections 58 and 59 "shall be such as are payable according to the tariff or tariffs of fees prescribed by the law of the Province in which the prosecution takes place upon similar proceedings by and before Justices against the law of that Province, and if no such fees are prescribed then the tariff applicable shall be the tariff of fees prescribed as to civil cases." The expression "Province" includes the North-West Territories. (See Interpretation Act, Section 7, sub-section 13.) Ordinance No. 6 of 1878 "respecting fees in summary trials," was in force at the time these orders of dismissal in question were made, and it was contended that as this Ordinance only prescribes fees to the Justices, constables, and witnesses, and as The Summary Convictions Act contemplates that

Judgment.
Wetmore, J.

parties may appear at the hearing of the matter by counsel (see section 35, 42 and 49) and the Ordinance provides no fee for their attendance, a counsel fee may be allowed by the Justices under the tariff of fees prescribed by the Judicature Ordinance. As to the charge for the use of room, it was urged that as under section 33 of the Summary Convictions Act, the Court was an open Court, a public place had to be hired, and as to the charges for loss of wages and railway fare, they were merely in the nature of witness fees. As to the charge for the hire of the room, that is not warranted either by the Ordinance No. 6 of 1878, or by the tariff of fees prescribed by the Judicature Ordinance, 1886, or by the Judicature Ordinance in the Revised Ordinances. This charge therefore is not authorized by section 6 of 51 Vic. c. 45. Neither are charges for loss of wages and railway fare *eo nomine* authorized by either of the Ordinances, and we cannot conceive how loss of wages and railway fare can be considered as convertible terms, for the allowance of one dollar for each day's attendance and ten cents a mile for each mile travelled allowed to the witness, and prescribed by Ordinance No. 6 of 1878. But if they could be so considered there is now allowance to a party by either the Ordinance No. 6 of 1878 or the Judicature Ordinance. The defendant was not and could not be a witness; this charge, therefore, is not authorized. We think the counsel fee was not authorized. The Local Legislature of the Territories had prescribed fees to be taken in cases of summary convictions it is true, but these fees were limited to fees to be taken by certain officers and persons. But it was only when no fees (the language of the section is when "no such fees") are prescribed, resort was to be had to the tariff prescribed for civil cases. The orders are therefore bad in awarding these costs.

Mr. Johnstone applied to us to amend the order by deducting the unauthorized items, striking out the sum mentioned in the orders and inserting the correct sum. We can find no authority to make such an amendment. Section 87 of the Summary Convictions Act cited by Mr. Johnstone does not authorize it. That section does not authorize an

Judgment. Wetmore, J.

amendment at all, it provides that "No conviction or order * * * shall in being removed by *certiorari* be held invalid for any irregularity, informality, or insufficiency," subject to certain provisions. Armour, J., in *Regina* v. *Dunning*,[1] also cited for the defendant, did not hold that the conviction in that case could be amended by striking out the erroneous part and substituting something else. He held that the erroneous part could be quashed because it was "quite severable from the rest of the conviction," without otherwise interfering with it. We refrain from expressing any opinion as to whether we concur with Armour, J., in this power to quash or strike out the part of a conviction which was then under his consideration. It is to be borne in mind that these are "orders of dismissal" and not convictions; the awarding of costs in them is not an adjudication of guilt or an adjudication of punishment, and the principle, which has been stated to govern the striking out of an objectionable part of a conviction which awarded costs, does not apply. We see nothing to prevent us striking out or quashing such an objectionable part of an order of dismissal as that before us. That part of the order which dismisses the information is good. That part which awards costs is bad and can be severed from the rest of the order without otherwise interfering with it. Of course that part of the order which awards a distress and in default of distress, imprisonment to enforce payment of these costs is also bad. All that part of the said orders after the words "dismiss the same," where they first appear therein and down to and including the word "paid" where it lastly appears therein will be quashed, the remaining part of the order is affirmed. We make no order as to costs.

Conviction partially affirmed and partially quashed.

STIMSON ET AL. v. SMITH.

Detinue—Buildings—Chattels appurtenant to real estate—Estoppel.

The defendant gave a chattel mortgage to the plaintiffs on certain buildings, and also a certain ferry, and "the ferry boat with cables, pulley and other machinery used therewith."

Held (1), that detinue or replevin would not lie for the buildings, at least where the defendant was in possession of the land on which they stood; nor for the ferry boats or attachments, as they were appurtenant to the ferry, which was an easement arising in respect of land.

(2) That there was no estoppel by the mortgage, in such sense as to make detinue or replevin an appropriate remedy for property of the character in question.

[*Court in banc, June 7th, 1889.*

Statement.

The plaintiffs sued the defendant for wrongfully and unlawfully taking the goods and chattels of the plaintiffs, consisting of some log buildings and a ferry boat with cables, pulley, and other machinery used therewith, and unlawfully detaining the same, and claimed a return of the goods and chattels and damages for their detention. The statement of defence denied the taking and detention and the plaintiffs' property in the goods and chattels, and averred that the alleged goods and chattels were not goods and chattels but were real estate, and therefore not the subject of an action of replevin, and that they were all improvements upon Dominion lands, and submitted that the Dominion Lands Act was a bar to the plaintiffs' action. The plaintiffs, in their reply, joined issue and alleged that the defendant had by deed mortgaged the said goods and chattels as such to one who had assigned the mortgage to one of the plaintiffs, and that the defendant was thereby estopped from denying that they were goods and chattels.

The case was tried at Calgary before WETMORE, J., who gave judgment dismissing the action.

From this judgment the plaintiffs appealed. The appeal was argued on the 5th June, 1889.

D. L. Scott, Q.C., and *J. B. Smith*, for the plaintiffs, the appellants.

E. P. Davis, for the defendant, the respondent.

Judgment.

Richardson, J.

[*June 7th, 1889.*]

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

RICHARDSON, J.—The plaintiffs here sue for the recovery of one log building used as a hotel, one and a half stories high, about 24 by 26 in dimensions, with log kitchen, log bar-room, about 16 by 20 in dimensions, and log dining-room, all attached; a log stable on posts about 50 by 25 in dimensions with hen house attached; and a log coal shed, and a ferry boat with cables, pulley and other machinery used therewith, all at High River Crossing in Alberta and unlawfully detained, &c., claiming not only recovery of these as goods and chattels, but damages for detention.

The defendant *inter alia* sets up in defence that the alleged goods and chattels are not nor are any of them goods and chattels, but real estate, and are not subject to replevin.

To this defence the plaintiffs join issue.

And the real issue, which the Judge who presided had to dispose of, was whether or not the buildings described in the plaintiffs' statement of claim, as also the ferry with its appurtenant rights as disclosed in the evidence, were goods and chattels in such a sense that they could be the subject of an action for detaining the same.

It appears clear from the evidence throughout that the plaintiffs' object was not to obtain a delivery of the property in question to them as the result of detinue would do, but to turn the defendant out of his possession.

This, the trial Judge held not to be effected under the pleadings, and it is from his finding that this appeal is made.

The question before the Court is, Was the Judge right in so finding? And, if not, what should upon the evidence in the case as presented before him have been the proper judgment?

During the exhaustive argument before this Court great stress was laid by plaintiffs' counsel upon the doctrine of estoppel, and that, because the property described in the statement of claim was included in a chattel mortgage given

by defendant, held by plaintiff Lane as assignee of the mortgagee, the defendant was precluded from asserting in this suit they were not chattels but real estate. The Court, however, from careful examination of the mortgage cannot arrive at the conclusion that in this case there was any estoppel. Judgment. Richardson J.

In this respect the trial Judge was, in the opinion of this Court, right.

As to the ferry boat with cables, pulley and other machinery used therewith, the Court is of opinion that if these pass under the words "ferry, &c.," used in the mortgage, they can only pass as appurtenant to the ferry which is in the opinion of the Court an easement arising in respect of the land and not recoverable by this form of action.

Whatever relief the plaintiffs may be entitled to must be sought in some other form of action which this Court will not deprive the plaintiffs of.

The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

TURRIFF v. McHUGH.

Sale of goods—Implied warranty of title—Knowledge.

If, where a specific article is sold, there is knowledge on the purchaser's part of a defect in the vendor's title, there is no implied warranty of title as against such defect.
Dickie v. *Dunn*,[1] distinguished.

[*Court in banc, June 7th, 1889.*

Statement. This was an appeal by the plaintiff from the judgment of WETMORE, J., dismissing the action.

The facts and points involved appear in the judgment. The appeal was argued on the 5th June, 1889.

T. C. Johnstone, for the plaintiff, the appellant.

W. White, for the defendant, the respondent.

[*June 7th, 1889.*]

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

ROULEAU, J.—The statement of claim in this case alleged that the defendant in the month of October, A.D. 1885, by warranting that he had lawful right and title to sell a certain dark bay horse about six years old, with black mane and tail and one white foot, and a little white on another foot, branded (R) on the right hip, sold the same to the plaintiff for the sum of $125, which sum the plaintiff then paid the defendant as the price thereof; that the defendant had not the lawful right and title to sell or dispose of the said horse; that the plaintiff was in consequence afterwards obliged to deliver up the said horse to Frederick S. Rounsaville, who had the lawful right and title thereto, and lost the said horse, and the said sum, which he had paid as the price thereof.

The said statement of claim was met by the following statement of defence. That the defendant did not warrant that he had the right and title to sell the horse mentioned, but, on the contrary, the plaintiff well knew the circumstances

[1] Ante p. 83.

Judgment.
Rouleau, J.

connected with the purchase and possession of said horse by the defendant, and dealt with the defendant with knowledge thereof. In referring to the evidence adduced in this case, we find that the defendant was a dealer in horses, and that the plaintiff, wanting to purchase a horse, went to the defendant and purchased one. If the facts of the case were barely those, there is no doubt, as Mr. Justice Wetmore stated in his judgment, that the case of *Dickie* v. *Dunn*,[1] decided by this Court, would apply, and that there was an implied warranty of title and the plaintiff entitled to recover, but there is ample evidence in the case to show that the plaintiff was perfectly aware himself that there was a cloud upon the title to the horse, that both plaintiff and defendant knew it, and that the plaintiff purchased with a full knowledge of such cloud. And to show that such is the case, we have only to refer to the evidence of Joseph Galloway, who is a disinterested witness and who swears as follows:

"I remember the horse called the Tommy horse referred to." (That is the horse admitted by all parties to be the horse described in plaintiff's statement of claim.) "When I first saw the Tommy horse it was in the fall of 1884. Some Indians brought him to Carlyle. * * * I went down; I was trying to make a deal for this Tommy horse. These Indians and I could not deal. Mr. Turriff was down there, he was also trying to deal with them. I heard what took place between Turriff and the Indians. He tried to deal with them. He mentioned flour. I don't know what else. They were talking only a few minutes when he offered flour in a trade for the Tommy horse. * * * I asked Turriff if it would be really safe to deal for that horse. He said, if the proper owner came I would have to be the loser, so I dropped it," &c. According to the above evidence there is no doubt in our minds that the plaintiff had a knowledge that there was a cloud on the title and a suspicion that it was stolen property. The duty of the plaintiff in such a case as this was to get a warranty from defendant. In the case of *Dickie* v. *Dunn*[1] the Court only applies the rule of law that a sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title. But

Judgment. Rouleau, J.

when the facts and circumstances show that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold, and more especially when the purchaser is proven to have full knowledge of all the circumstances and does not exact any warranty from the vendor, we are of opinion that he has no right to complain if the chattel is afterwards taken away from him by the real owner of it. The subject is fully examined and the history of the changes in the law is treated in Benjamin on Sales, book 4, part 2, chapter 1, section 2, which deals in particular with the cases of *Morley* v. *Attenborough*,[2] and *Eicholz* v. *Bannister*.[3]

We perfectly agree with Mr. Justice Wetmore when he states that "When a person is found in possession of property with all the indicia of ownership and an innocent person comes along and finds this state of things, and knows of nothing wrong or suspicious behind it, and the person so in possession agrees to sell and the other person agrees to purchase such property, if it turns out that the seller had no title, the law should compel the seller to make the purchase good; in other words, in such case it should be held that there was an implied warranty of title. But why should the law hold any such doctrine in favour of a person who, knowing of the defect of title, is willing to purchase with such defect?"

The cases of *Cundy* v. *Lindsay*[4] and *Raphael* v. *Burt*,[5] besides the cases already referred to, seem to us to warrant the doctrine hereinbefore enunciated by the learned Judge. We are therefore of opinion that in such a case as this there is no implied warranty of title, and that the judgment of Mr. Justice Wetmore should be affirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

[2]3 Ex. 500; 18 L. J. Ex. 148; 13 Jur. 282. [3]17 C. B. N S. 708; 34 L. J. C. P. 105; 11 Jur. N. S. 15; 12 L. T. 76; 13 W. R. 96. [4]44 L. J. Q. B. 481; 3 Ap. Ca. 459; 38 L. T. 573; 26 W. R. 406; 14 Cox C. C. 93. [5]1 Cab. & E. 325.

THE QUEEN v. SMITH.

Certiorari—Jurisdiction of Single Judge.

Held, following *Regina* v. *Beemer*,[1] that a single Judge has no jurisdiction to hear and determine a motion to quash a conviction upon a writ of *certiorari*; and that such writs must be issued from the office of the Registrar and be made returnable before the Court *in banc*.†

[*Court in banc December 3rd, 1889.*

Statement.

The defendant was convicted of gambling in contravention of s. 5,‡ c. 38, R. O. (1888).

A writ of *certiorari* was issued from the office of the Clerk of the Court for the Judicial District of Southern Alberta, returnable before the Honorable Mr. Justice Macleod, the Judge usually exercising jurisdiction in that Judicial District.

Upon the argument before him of the question of the validity of the conviction the learned Judge reserved for the opinion of the Court *in banc* the question whether or not the section of the Ordinance under which the conviction was made was *ultra vires* of the legislative powers of the Legislative Assembly of the Territories.

The question reserved was argued on the 3rd December, 1889.

C. F. P. Conybeare, for the Crown; the defendant was not represented.

†But see now the new section substituted for s. 52 of the N. W. T. Act by 54-55 Vic. (1891) c. 22, s. 7.

‡Subsequently held to be *ultra vires*, *Queen* v. *Keefe*, *infra*, p. 289. The whole Ordinance was afterwards repealed by Ord. No. 40, 1898, s. 3.

[1]15 O. R. 266.

Judgment.

Richardson, J.

[*December 3rd, 1889.*]

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

RICHARDSON, J.—This was a reference by MACLEOD, J., for the opinion of the Court *in banc* in June term.

A motion was made before him to quash the conviction of Peter Smith for violation of s. 5 of c. 38 of the Revised Ordinances (1888). The conviction was brought before him by writ of *certiorari* issued out of the Court in the Judicial District of Southern Alberta, and made returnable before himself, and the question submitted by him was whether or not section 5, under the provisions of which the conviction was made, is *ultra vires* of the legislative powers of the North-West Territories.

Upon looking at the North-West Territories Act and particularly at the case of *Regina* v. *Beemer*,[1] which we adopt as sound law, we arrive at the conclusion that a single Judge sitting in Court in the North-West Territories has not jurisdiction to hear and determine a motion to quash a conviction of a Justice of the Peace upon *certiorari*, and that a writ of *certiorari* for the purpose of moving to quash a conviction must issue from the Registrar's Office and be returnable before the Court *in banc*.

Having arrived at this conclusion, it appears to us that the writ was improvidently issued, and that the single Judge was not properly seized of the subject matter, *i.e.*, the motion to quash. This Court is therefore not seized of the matter and cannot authoritatively express any opinion on the question submitted.

THE QUEEN v. PETRIE.

Certiorari—Conviction—Recognizance—Sufficiency of sureties—Proof of discharging rule nisi—Leave for new rule.

A rule of Court † required that no motion to quash a conviction should be entertained unless the defendant were shown to have entered into and deposited a recognizance in $300.00 with one or more sufficient sureties, or to have made a deposit of $200.00. On a motion to make absolute a rule *nisi* to quash a certain conviction, a recognizance had been entered into and deposited but without an affidavit of justification of the sureties or other evidence of their sufficiency.

Held, following *Regina* v. *Richardson*,[1] that the rule of Court had not been complied with and that therefore the rule *nisi* must be discharged.

But $200.00 having been deposited a day or two before the return day of the rule *nisi*, with the view of complying with the rule of Court.

Held, that the ends of justice would be served by allowing the applicant to take a new rule *nisi* in the terms of the one discharged; and this privilege was accordingly granted.

[*Court in banc December 3rd, 1889.*

J. Secord, on the 3rd December, 1889, moved absolute a rule *nisi* to quash a conviction returned to the Court in pursuance of a writ of *certiorari*. Argument.

T. C. Johnstone, contra, objected that there was no evidence of the sufficiency of the sureties, and that therefore the Rule of Court on that behalf had not been complied with. He cited *Regina* v. *Richardson*.[1]

[*December 3rd, 1889.*]

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

WETMORE, J.—A rule *nisi* to quash the conviction against the defendant was granted last term returnable this term. The motion was made on the first day of this term

†See Rule 23 of 1st October, 1900, which, differing in some respects, agrees with the rule in question so far as this decision affects it.

[1] 17 O. R. 729.

Judgment. Wetmore, J.

to make this rule absolute. With a view of complying with the Rule of Court made under the provisions of the 90th section of The Summary Convictions Act,‡ a recognizance with two sureties was filed on the 28th May last and before the motion for the rule *nisi* was made. No affidavit of justification was filed by or on behalf of the sureties and our attention was called to this fact only on the motion to make the rule absolute, when the case of *Regina* v. *Richardson*[1] was referred to. We are of opinion that when the motion for the rule *nisi* was made the defendant was not, in the words of the rule of Court and the section of the Act, "*shewn* to have entered into a recognizance in $300 with one or more sufficient sureties" and therefore that the rule *nisi* was improvidently granted and must be discharged. On the Saturday, before the opening of the term and before the motion was made to make the rule absolute, a deposit of $200 in cash was made with a view of complying with the rule of Court. Under these circumstances we are of opinion that the ends of justice would be served by allowing the defendant, if he desires to do so, to take out a new rule *nisi*, in the terms of the one discharged, which may be set down for argument this term, if the Justices to be served, or any person for them duly authorized to do so, consent to accept service of such rule and it be so set down; otherwise the rule must be made returnable next term. We think we are warranted by the case of *Rex* v. *The Inhabitants of Abergele*[2] in taking this course.

Rule discharged with leave to take a new Rule.

‡ Crim. Code. s. 892.

[1] 5 A. & E. 795; 1 N. & P. 235; 2 H. & W. 375.

BESTWICK v. BELL.

Conviction—Justice's summary order—Appeal—Recognizance—Time of filing.

It is too late to file the recognizance required by s. 77 of the Summary Convictions Act,† on an appeal from a summary conviction or order where the defendant has not remained in custody, after the appellant has entered upon his case.

[*Court in banc, December 6th, 1889.*

Statement.

A Justice of the Peace having on a complaint for non-payment of wages made an order for payment by the defendant, he appealed from the order. Upon the appeal coming on, the appellant proved his notice of appeal and then called the Justice, who produced the recognizance from his own custody. The presiding Judge thereupon reserved for the opinion of the Court the question: "Was the recognizance in this case filed in time, or in other words could the Judge receive the recognizance after the opening of the case on the part of the appellant?"

The question was argued on December 4th, 1889.

T. C. Johnstone, for appellant.

R. D. Strong, for respondent.

[*December 6th, 1889.*]

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

ROULEAU, J.—One Patrick Bestwick made a complaint against one W. R. Bell for non-payment of wages under s. 4 of c. 36 of the Revised Ordinances. Bell was ordered to pay and appealed.

The learned Judge before whom the appeal was taken reserved this question:

Was the recognizance in this case filed in time, or in other words could the Judge receive the recognizance after the opening of the case on the part of the appellant.

†See Crim. Code, s. 880.

Judgment.
Rouleau, J.

The facts of the case are these: After the appellant had proven his notice of appeal, the learned Judge remarked to him that he had no jurisdiction to hear the said appeal as there was no recognizance filed. Upon this the appellant put the Justice of the Peace under oath, and the J. P. took the recognizance from his pocket and produced it.

Section 77 of the Summary Convictions Act † enacts that "Every right of Appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say:"

(*a*) Mentions the time within which an appeal can be made.

(*b*) "The appellant shall give to the respondent, or the convicting justice for him, a notice in writing (R) of such appeal within ten days after such conviction or order."

(*c*) "The appellant shall either remain in custody until the holding of the Court to which the appeal is given, or shall enter into a recognizance with two sufficient sureties before a justice conditioned personally to appear at the said Court and to try such appeal and to abide the judgment of the Court thereupon, etc."

It is clear therefore that the jurisdiction of the Judge to hear the appeal is determined by the two above conditions, which are conditions precedent to the right of appeal.

Paley on Convictions, 6th ed. p. 373, says, "The entering into a recognizance for the payment of costs and for the due prosecution of the appeal is generally a condition precedent to the right of being heard at Sessions and formerly the invalidity of the recognizance prevented the exercise of such right, although it was drawn up and enrolled by the Justice, and the appellant has no control over it." In *Hall* v. *Wingfield*,[1] it was decided that the recognizance must be enrolled because until then it is not a perfect record.

In England the law has been amended in that connection by the General Quarter Sessions Procedure Act, 12 & 13 Vic.

[1] Hob. pp. 195, 248.

c. 45, s. 8. That statute empowers the Court, in cases where the recognizance is in any way invalid, to allow the substitution of a new and sufficient recognizance, but our statute does not give our Courts such power. Judgment. Rouleau, J.

In *Regina* v. *Crouch*,[2] at page 439, RICHARDS, J., says: "If as a matter of fact the notice of appeal had not been given in time, or the recognizance entered into, or other matter required to be done before the appellant could proceed with his appeal, the objection could probably be taken at any time, for it would show that the Court had no jurisdiction to try the appeal."

In the case of *Kent* v. *Olds*,[3] it was distinctly decided that an application to take the appellant's recognigance in Court could not be entertained, on the ground that although the recognizance need not be entered into within ten days it must be entered into and filed before the sittings of the Court in which the appeal is made. It was also decided in *Re Myers & Wonnacott*,[4] that a failure to comply with these conditions will not be waived by the respondent asking for a postponement after the appellant has proved his notice of appeal on the first day of the Court.

In view of all the above authorities this Court cannot come to any other conclusion than that after the Court is opened for the hearing of the appeal, it is then too late for the appellant to file his recognizance; and RICHARDSON, J., is so advised.

Judgment accordingly.

[2] 35 U. C. Q. B. 433. [3] 7 U. C. L. J. 21. [4] 23 U. C. Q. B. 611.

THE QUEEN v. TEBO.

Malicious injury to property—Conviction—Penalty—Amount of injury done—Damages—Compensation—Costs—Illegal items — Amendment — Defects on face of conviction—Excessive imprisonment.

One of the sections of the Act respecting Malicious Injuries to Property enacted that an offender should on summary conviction be liable to a penalty not exceeding $100.00 over and above the amount of injury done or to three months imprisonment.†

A conviction thereunder adjudged the defendant "to forfeit and pay the sum of $5.00 as a penalty, together with $50.00 for the amount of injury done as compensation in that behalf."

Held, that it was not the intention of the section in question that there should be two separate penalties, but that one penalty should be fixed by first ascertaining the amount of damages, and then adding to that amount such sum not exceeding $100.00 as the justice should deem proper; and that it was therefore beyond the jurisdiction of the justice to award a sum "as compensation."

Held, also, that the words "as compensation in that behalf" could not be struck out as surplusage under the power of amendment given by section 80 of the Summary Convictions Act, and the $50.00 be treated as part of the penalty, inasmuch as the effect of such an amendment would be to punish the offender, not according to the conviction of the magistrate, but according to the conviction as amended by the Court, which was not the intention of that provision.‡

The conviction also adjudged the payment of a sum for costs which comprised several items, which exceeded the amounts allowed therefor by the tariff fixed by The Summary Convictions Act as amended by 52 Vic. (1889) c. 45, s. 2,§ or were not mentioned in the tariff.

Held, that the conviction was therefore bad, and that it could not be amended by striking out the charges improperly made.

The conviction also adjudged in default of payment, imprisonment for three months.

Held, that section 68 of the Summary Convictions Act ‖ applied, and that, inasmuch as the penalty imposed together with the costs did not exceed $25.00, two months was the maximum term of imprisonment which could be imposed.

It being contended that the Court had no power on appeal to quash a conviction for defects or errors appearing on the face of the conviction.

Held, that the Court had such power; *McLennan* v. *McKinnon*[1] on this point not followed.

† R. S. C. c. 168, s. 45. See now Crim. Code, s. 501.

‡ But see now 53 V. (1890) c. 37, s. 26, substituting a new section. Crim. Code, s. 883.

‖ See now Crim. Code, s. 872.

§ See Crim. Code, s. 871.

[1] 1 O. R. 219, p. 238.

[*Court in banc, December 6th, 1889.*

Statement. In an appeal from a summary conviction heard before RICHARDSON, J., several questions were reserved for the opinion of the Court. The facts and the questions arising upon them appear in the judgments.

The matter was argued on the 5th December, 1889.

T. C. Johnstone, for the appellant.

D. La Scott, Q.C., for the Crown.

[*December 6th, 1889.*]

MCGUIRE, J.—This is a question of law referred to this Court by Mr. Justice Richardson.

The defendant Tebo was convicted by two Justices of the Peace in a summary way under R. S. C. c. 168, s. 45,† for having maliciously shot a dog of the complainant Fysh. The conviction adjudged "the said Michael Tebo * * * to forfeit and pay the sum of five dollars as a penalty together with fifty dollars for the amount of injury done as compensation in that behalf" (not stating to whom the compensation was to be paid) "and also to pay to Fysh * * the sum of $19.75 for his costs * * and if the several sums be not paid forthwith we adjudge the said Michael Tebo to be imprisoned in the common gaol at Regina for three months unless the said several sums and all costs and charges of the commitment and conveying of the said Michael Tebo to the said place of imprisonment shall be sooner paid."

The defendant Tebo appealed from this conviction, and the appeal was heard before Mr. Justice Richardson when the following objections to the conviction were raised.

(1.) The conviction is bad because it awards three months imprisonment in default of payment of the several sums mentioned.

(2.) Costs in excess of those authorised by law are imposed.

(3) The sum of fifty dollars is awarded "as compensation" which is not warranted by the Statute.

Judgment.
McGuire, J.

By the section mentioned, the Justice of the Peace, having found the defendant guilty, may impose

(1) A penalty not exceeding $100 over and above the amount of injury done or

(2) Imprisonment up to 3 months.

The Justices might have ascertained the amount of injury done and, over and above that amount imposed a penalty not exceeding $100. There is no authority given by sec. 45 to order payment of any sum "as compensation" to the party aggrieved or any one else, but the Justices manifestly thought that they had power to award the amount of injury "as compensation" and have accordingly so adjudged. I think that the conviction is bad in that respect and in excess of their authority. Sec. 45† and secs. 24, 25, 26 and 27††, where the expression "over and above the amount of injury done, is used, do not mean that the penalty "over and above, etc.," is to go to the Crown and the sum assessed as "the amount of injury done" is to go to the party aggrieved. It is not intended that there shall be two penalties, but that the amount of the whole penalty shall be arrived at by ascertaining the damages and then adding thereto such sum, not exceeding $100, as the Justice may deem proper. By section 59‡‡ of the same Act provision is made whereby the Justice may award a sum not exceeding $20 in the cases there mentioned, as "compensation" to be paid in the case of private property to the person aggrieved. If the Legislature had intended the "amount of injury done" mentioned in section 45 to be ascertained and paid as compensation to the aggrieved person, it is fair to expect it would have so stated. Why the Justice should fix the penalty by first ascertaining the amount of damage done may be explained by reference to section 55 of Chapter 178 R. S. C. §§ which authorized the Justice for a first offence to discharge the offender from his conviction upon his paying the aggrieved person the damages and costs, or either, as ascertained by the Justice.

†† See Crim. Code, ss. 508, 509, 510, 507. ‡‡ See Crim. Code, s. 511. §§ See Crim. Code, s. 861.

Judgment. McGuire, J.

But it has been urged that the words "as compensation in that behalf" may be regarded as surplusage and may be struck out under the power of amendment given by section 80 of The Summary Convictions Act, and the $50 treated as part of the penalty. I do not think that section 80 gives such power, for if the appeal be dismissed or the conviction confirmed, sec. 77 sub.-sec. (*d*), in the form substituted by 51 Vic. (1888) c. 45, s. 8, as well as the corresponding subsec. as it stood before 51 Vic., directs that the Court shall order and adjudge the appellant to be punished *according to the conviction* not according to the conviction *as amended on appeal*. See judgment of Mr. Justice Armour in *McLellan* v. *McKinnon* [1], and in *Regina* v. *Dunning* [2].

As to the objection that the costs awarded are in excess of those authorized by law it is clear that that is so. The conviction was made on the 11th of May 1889 and the offence is charged as having been committed on the 10th of May, The Act 52 Vic. cap. 45, was assented to on 2nd May, 1889. By section 2 thereof The Summary Convictions Act is amended by adding section 61 A, after section 61, declaring that the fees mentioned in the schedule W and *no others* shall be the fees so to be taken in proceedings before Justices. On looking at the bill of costs made up by the Justices in this case we find:—"Services of summons on Tebo and on seven witnesses" each charged at 50 cents, whereas the Tariff W allows only 25 cents; "Attendance in Court under the heading "Police Costs," which presumably is for the attendance of the constable, is charged at $2.00, whereas the maximum allowance by the Tariff is $1.50; the Justices charge for "Information" $1.00; "Summons and copy" 25 cents, whereas the Tariff allows only 50 cents for both information and summons and 10 cents for copy. It appears that seven original subpœnas were issued and charged for at 25 cents each whereas at most only two (one on each side) could be charged for and then only 10 cents each. The Justices allow themselves $2.00 for hearing and determining, whereas the Tariff allows but 50 cents, the second

[2] 14 O. R. 54.

Judgment. McGuire, J.

or associate Justice not being allowed anything, and in this case one Justice could have heard and determined it. Then the sum of $6.00 is allowed for six witnesses which is not authorized by the Tariff at all. By the conviction the sum of all these costs $19.75 is ordered to be paid and in default of payment of that and the other sums the defendant is to be imprisoned for three months. There are other defects in the conviction to which we need not advert. Clearly the Justices had no authority to impose these costs.

I do not think, as I have already said, that the Appeal Court can amend a conviction by striking out the erroneous matter. If it sustain the conviction, it must order the appellant "to be punished according to the conviction," that is, to compel him to pay a sum far in excess of what would be lawful even if properly found guilty of the offence charged.

As to the objection that the imprisonment imposed is excessive, section 68 of The Summary Convictions Act must apply here and as the Justice is not otherwise specially directed the provisions of that section must govern. Now the penalty imposed by the Justices was only $5 and that, with the costs even as fixed by the Justices, did not exceed $25, and consequently the maximum imprisonment that could be imposed was two months.

For all these reasons I think that Mr. Justice Richardson should be advised that the appeal should be allowed and the conviction quashed.

WETMORE, J.—I concur in the judgment of my brother McGuire that the conviction in this case is bad for awarding compensation.

I think the amendment asked for by Mr. Scott ought not to be allowed, nor is it such an amendment as is contemplated by section 80 of The Summary Convictions Act, because, if the words sought to be struck out are expunged, and the $50 treated as penalty, we would possibly make the Justices inflict a punishment never contemplated by them

Judgment.
Wetmore, J.

at all. If the Justices were aware that it was not in their power to award compensation, but that they could only impose a penalty which must be applied as penalties usually are applied, and not paid to the prosecutor, they might not have imposed a fine of $55. That is, if we make the amendment asked for, we would exercise the discretion the magistrate ought to have exercised.

Mr. Scott also contended that the appellate tribunal created by section 76 of The Summary Convictions Act, as amended by section 7 of 51 Victoria (1888), cap. 45 * had no jurisdiction to quash a conviction for defects or errors apparent on the face of the conviction, but that such tribunal has only power to adjudicate on the guilt or innocence of the party appellant and the judgment of ARMOUR, J., in *McLellan* v. *McKinnon* [1], was relied on for such contention. I do not agree with Mr. Justice Armour's judgment on this point. The power to appeal from convictions and orders made by Justices of the Peace to the Quarter Sessions was given in England by Act of Parliament, and has been exercised there for many years. A similar right of appeal was created, I believe, in some of the older provinces of what now constitutes Canada, when the machinery of Quarter sessions was in vogue before Confederation. At any rate such right of appeal was given at the Second Session of Parliament held after Confederation. It was given to the Quarter Sessions in Provinces where there were Quarter Sessions; and in Provinces where there were no Quarter Sessions the right of appeal was given to the County Court Judge where there were County Court Judges, and where there were none, to the Supreme Court or to a Judge of the Supreme Court. These provisions giving a right of appeal were no doubt originally taken from the Imperial Statute, and the right has been enjoyed throughout Canada for many years. The English reports, as well as the Canadian reports before 1882, when Mr. Justice Armour's judgment was delivered, and also since, are full of cases where convictions have been quashed by appellate

* See Crim. Code, s. 879.

Judgment.
Wetmore, J.

tribunals of this nature exercising similar powers, for defects appearing on the face of the conviction; moreover unreported cases, which may be numbered by the hundreds, have been heard by Judges and Quarter Sessions, as the case may be, in every part of Canada, where convictions have been quashed for such defects. I think it was too late when Mr. Justice Armour's judgment was delivered, or now, to attack a practice which had been in existence for so many years. Moreover I cannot read the Act so as to limit the right of appeal as he contends it is limited. I may just add that in section 78 of The Summary Convictions Act it is provided that if a jury is not demanded "the Court shall try and be the absolute Judge as well of the "fact as of the law *in respect to such conviction or decision.*" This provision was contained in section 66 of The Summary Convictions Act of 1869. This in my opinion gives the Court power to deal with and consider the law as it affects the whole conviction, as well the validity of the conviction, as the admissability of testimony and whether the evidence proves the offence charged. If a jury is demanded the Court must, to an equal extent, be the Judge of the law; the jurors could not be the Judges of the law under any circumstances. If this appellate jurisdiction cannot be exercised in the way I claim it can, if a party appeals and is found guilty he can never get rid of a conviction defective on its face, because the remedy by *certiorari*, is taken away, where the party appeals, by sec. 84 ** of the Summary Convictions Act. I cannot believe that the Legislature ever contemplated putting a person in that position. I think that my brother Richardson should be advised that the conviction is bad and ought to be quashed.

RICHARDSON, MACLEOD, and ROULEAU, JJ., concurred.

Conviction quashed.

** See Crim. Code, s. 887.

McEWEN v. THE N. W. COAL AND NAVIGATION CO.

Practice—Pleading—Striking out — Embarrassing — Reasonable cause of action—Amendment—New cause of action—Limitation of actions—Railway Act.

Section 125 of the Judicature Ordinance R. O. (1888) c. 58,† can be invoked only (1) when the whole pleading, and not merely "matter in the pleading" within s. 103,‡ is attacked; and (2) when the pleading discloses not merely no cause of action or answer but one not reasonable, that is, not fairly open to argument as a point of law, or when the action or defence is shown by the pleadings to be frivolous or vexatious.

If it is fairly open to argument whether a pleading discloses a good cause of action or answer, the question involved should be raised as a point of law by the pleadings under s. 123.§

On the pleadings set out below, it was objected that the amended statement of claim set up a new cause of action, which had become barred by provisions of the Railway Act.

Held, that a new cause of action was not set up in the amended statement of claim.

[*Court in banc, December 7th, 1889.*

Statement.

The original statement of claim was in substance as follows:—

The defendants carried on a general railroad and coal mining business. The plaintiff, being in defendants' employ as yardmaster under the control and directions of superior officers, while in the discharge of his duties and in obedience to the directions of his superior officers, was on the 7th February, 1888 permanently injured and rendered unfit for work, by falling from the defendants' yard engine on to the track of the defendants' railway, the tender thereof running over his leg and through the negligence and default of the defendants in not properly equipping the engine with hand-rails and foot-boards, and also in not having the frogs of the defendants' railroad yard properly and securely blocked.

The action was commenced on the 1st August, 1888, and came on for trial on the 17th November, 1888. At

† Jud. Ord. C. O. 1898, c. 21, r. 171. ‡ Jud. Ord. C. O. 1898, c. 21, r. 127. § Jud. Ord. C. O. 1898, c. 21, r. 149.

Statement.

the trial the plaintiff obtained leave to amend his statement of claim as he might be advised; the trial being postponed.

The plaintiffs filed an amended statement of claim on the 27th November, 1888.

The amended statement of claim was in substance as follows:—

1. On and prior to the 7th February, 1888, the defendants were the owners of and operated a line of railway in the Territories, having its eastern terminus at Dunmore.

2. The plaintiff on that date and for some months prior thereto was in the employment of the defendants as yardmaster of the yard of the defendants' railway at Dunmore, and in the ordinary course of his employment as such yardmaster it became and was his duty to act as switchman in such yard, and to make up and distribute trains therein, and to perform the necessary coupling and uncoupling of cars therefor.

3. The defendants usually kept in the yard a locomotive engine for the purpose of switching and shunting cars therein, to make up and distribute trains, and it was usual and necessary for the plaintiff while engaged in the ordinary course of his duty as such switchman to ride upon the locomotive engine or the tender thereof for the purpose of coupling and uncoupling the cars.

4. Owing to the negligence and omission of the defendants the engine used by them for such switching and shunting was not furnished with foot-boards and hand-rails, with which engines and tenders engaged in such work are usually supplied to enable switchmen, while employed as such, to safely ride thereon and cling thereto, and the engine of the defendants was thereby defective for the said work, and by reason of such defects the danger and risk to the plaintiff while engaged in the said employment were materially increased.

5. Prior to the said date, and while the plaintiff was engaged in said employment he complained to the defendants of the absence of such hand-rails and foot-boards, and

Statement.

of the increased danger and risk he thereby incurred, and the defendants through their superintendent of the railway thereupon promised and represented that such hand-rails and foot-boards would be provided.

6. Relying upon the defendants' promise to provide the hand-rails and foot-boards the plaintiff continued in his said employment with the defendants, and continued to perform the duties thereof.

7. On the said date, after the said promise and representation, and while the plaintiff was relying thereon, and before the hand-rails and foot-boards were provided, he was, in the due course of his employment as switchman, riding upon the tender of the defendants' locomotive engaged in switching and shunting in their yard, and by reason of the neglect and omission of the defendants in not providing the foot-boards and hand-rails he fell from the tender upon the track of the defendants' said railway, and the tender ran upon him and injured him, and he thereby became permanently maimed and disabled.

8. While the plaintiff was engaged in said employment with the defendants, it became and was the duty of the defendants to take reasonable care of the plaintiff and their other servants working in their yard, and in the exercise of such care to securely and properly block the switch frogs therein, but the defendants neglected and omitted to securely and properly block such switch frogs, and by reason of such omission and neglect the plaintiff on the said date, while lawfully engaged in the performance of his duty arising out of said employment was caught in a switch frog in said yard, and while so caught and unable to extricate himself therefrom a locomotive engine and tender of the defendants, in their yard, ran upon him and injured him, and he thereby became permanently maimed and disabled.

The defendants moved before MACLEOD, J., to strike out paragraphs 4, 5, 6, 7 and 8 of the amended statement of claim, on the ground that the same were separately and

Statement.

collectively demurrable and embarrassing, and tended to prejudice the fair trial of the issues and that the said paragraphs separately and collectively, and also in conjunction with the first three paragraphs, raised a new cause of action against the defendants by reason of their railway after the period fixed by law for bringing or raising, such causes of action had expired. ||

MACLEOD, J., struck out the whole amended statement of claim. The plaintiff appealed.

The appeal was argued on the 3rd December, 1889.

D. L. Scott, Q.C., and *W. C. Hamilton*, for the plaintiff the appellant.

J. A. M. Aikins, Q.C., and *C. F. P. Connybeare* for the defendants, the respondents.

[*December 7th, 1889.*]

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

MCGUIRE, J.—This is an appeal from the order of Mr. Justice Macleod striking out a statement of claim.

The action is one brought by the plaintiff, an employee of the defendant Company, to recover damages for an injury sustained by him while in their service as yardmaster. The action was commenced on the 1st August, 1888, and came on for trial on the 17th November, 1888; but plaintiff finding that he would not likely succeed on his statement of claim asked leave to amend which was granted on the condition, among others, that the trial be postponed. The order granting leave to amend allows him to amend as he may be advised.

He subsequently filed the statement of claim which is now under consideration. The defendants moved on notice to strike out the 4th, 5th, 6th, 7th and 8th paragraphs of this statement on the grounds "that the same are separately and

|| The Con. Ry. Act, 1879, s. 27, s.-s. 1; The Ry. Act, 51 Vic. (1888) c. 29, s. 287, s.-s. 1, assented to 22nd May, 1888. See ante, p. 89.

Judgment.
McGuire, J.

collectively demurrable and embarrassing and tend to prejudice the fair trial of the issues herein, and that the said paragraphs separately and collectively and also in conjunction with the first three paragraphs of the said amended statement of claim raise a new cause of action or causes of action against the defendants by reason of their railway after the period fixed by law for bringing or raising such causes of section had expired."

After argument Mr. Justice Macleod made an order striking out the "plaintiffs amended statement of claim." It will be noticed that this order is wider than the notice of motion contemplated, as that asked that only the 4th, 5th, 6th, 7th and 8th paragraphs should be struck out. This is the order here appealed from.

It was objected by the plaintiff on the argument before Mr. Justice Macleod that the defendant could not by motion have these paragraphs struck out on the grounds mentioned, but that they should have raised these grounds by a pleading as points of law to be disposed of by the Judge pursuant to the provisions of section 123 of the Judicature Ordinance.§ If the plaintiff was right in that contention then the order here was wrong. His contention on that point I do not think can prevail as to the motion so far as it rests on the ground that these paragraphs are embarrassing and tend to prejudice the fair trial of the action, as these are grounds for proceeding under section 103‡ rather than under section 123. But so far as the ground is relied on that the said paragraphs are "demurrable," by which I can only understand that it is meant that they disclose *no cause of action*, it seems to me that the procedure under section 103 was never intended to take the place of demurrers under the old practice. Section 103 is obviously directed against any matter in a pleading which is unnecessary or scandalous or tends to embarrass or delay the fair trial of the action. But defendants appeal to section 125† and say that under that section they can ask the paragraphs in question to be struck out as showing "no reasonable

Judgment. McGuire, J.

cause of action." Now it seems to me there are two objections to that. First, that section is in terms one to be used when the *whole pleading* is to be struck out, not certain paragraphs of it, as asked for by the notice of motion in this case; and it seems to me, from the form of the notice of motion, that the defendants were not proceeding under section 125 at all but under section 103.

Secondly: section 125 deals with an application based on the ground that the statement of claim discloses "no reasonable cause of action." Now that phrase is another thing altogether from "no cause of action." See per LINDLEY, L. J., in *Dadswell* v. *Jacobs*.[1] FIELD, J., in *Parsons* v. *Burton*,[2] says, "Applications under r. 4 of Order XXV (our section 125) are not intended to "take the place of demurrers where there is *any question of law to be argued*, but are only intended to get rid of frivolous actions. The defendants can raise the point of law by his pleading under r. 2 of the same order" (our section 123). *In Glass* v. *Grant*,[3] BOYD, C., said: "As a general rule a Judge should be chary as to striking out defences on summary application unless so plainly frivolous or indefensible as to invite it. Where a matter is doubtful or difficult, it is better to leave the party to demur." In that case the learned Chancellor said that he would have held the pleading bad on demurrer yet declined to strike it out from the record, but gave the plaintiff leave to demur. In *Magarth* v. *Reichel*,[4] FRY, J., said that the power to strike out should be exercised with great caution.

It is to be noted that the defendants attack only certain paragraphs which are not separate and distinct from the paragraphs not attacked, and, while it might be true that certain paragraphs, part of a connected statement of a single cause of action, might not in themselves disclose any or a reasonable cause of action, no application could be allowed to strike them out on that ground. Now it

[1] 34 C. D. 278, at p. 284; 56 L. J. Ch. 233; 55 L. T. 857; 35 W. R. 261. [2] Bittleston's Prac. Cas. 169; W. N. (83) 215. [3] 12 O. P. R. 480. [4] 57 L. T. 850.

Judgment.
McGuire, J.

seems to me that there is an important distinction between "*no cause of action*" and "*no reasonable cause of action*;" the word "reasonable" must, I think, mean something, and in my opinion it means a cause of action, which may or may not turn out to be a good cause of action, but which is at least reasonable or probable—one which is not clearly bad but where there is, in the language of FRY, J., above quoted, "*any question of law to be argued.*" Will it be said that this is a case where there is no question of law to be argued? The learned Counsel for the defendants, Mr. Aikins, has practically answered that in the negative in the very lengthy and able argument, which he addressed to this Court and by the formidable array of authorities from England, Ontario, and Manitoba, where he marshalled before us. To my mind the authorities by no means leave the question beyond the pale of fair argument. I do not wish to express any opinion as to what judgment I would feel called upon to render if the questions were raised under section 123. I may mention that the summary method of virtually demurring to a pleading adopted by the defendants here, instead of proceeding under section 123 to raise by their pleadings points of law, is decidedly objectionable as not giving the other side fair notice of the points of law to be argued. To say simply that the pleading is "demurrable" is vague and indefinite. Therefore I think that the motion ought not to have succeeded on the ground that the paragraphs named of the statement of claim were demurrable. Nor do I think that the application should have succeeded on the ground that these paragraphs were embarrassing. "Embarrassing" means that a matter is pleaded which the party has no right to use: *Heugh* v. *Chamberlain*.[5] Nor do I think it should have succeeded on the ground that those sections tended to prejudice "the fair trial of the issues" as there were no issues in this action at the time of that motion, no statement of defence having then been filed in answer to the amended statement.

[5] 25 W. R. 742.

Judgment.
McGuire, J

It is likely that the defendants meant to use the word "action" and not "issues" as the former is the word used in section 103. But reading it even in that way I do not think that section 103 was ever intended to be the procedure by which a defendant could get the relief which is obviously sought here. That section is intended where there is "matter" in a pleading which may tend to prejudice, etc. I have not seen pointed out the "matter" in this statement of claim, which will tend to prejudice a fair trial of this action. A defendant can raise by his pleading points of law and have them disposed of at or after trial or before it by order of the Judge or by consent.

I may mention that this summary method of attacking a pleading is one which may prejudice the party, whose pleading is so attacked, in his right of appeal not only to this Court but to a higher tribunal should that be necessary or desired by him.

It is urged by the defendants that the paragraphs in question, read with the three preceding it, raise a new cause of action. Now, even if this objection could be successfully and properly raised in this way, paragraph 8 certainly discloses no new cause of action not substantially set out in the first statement of claim. Nor do I think that any other matter set out in the amended statement of claim, and not in the first, raises any new cause of action.

It is urged that the order made by Mr. Justice Macleod was one in his discretion and ought not to be interfered with by this Court. While a Court of Appeal will not ordinarily interfere with the discretion of a Judge, yet it is clear that it has jurisdiction and would do so, where serious injustice might result from his decision: *Golding* v. *The Wharton Salt Works Co.*[6] In view also of the fact that the Order here strikes out the whole statement of claim, whereas the motion attacked only certain paragraphs, I have less hesitation in declaring that the order striking out the plaintiff's statement of claim should be set aside.

[6] 1 Q. B. D. 374; 34 L. T. 474; 24 W. R. 423.

I therefore think that the appeal should be allowed, the order of Mr. Justice Macleod set aside, and the motion in the Court below dismissed with costs; the respondents to pay the costs of this appeal. Judgment. McGuire, J.

Appeal allowed with costs.

THE QUEEN v. NAN-E-QUIS-A-KA.

Crown case reserved—N. W. T. Act—Indian marriage—Evidence of—Wife's evidence—Applicability of English law.

The North-West Territories Act, R. S. C. c. 50, s. 11,† provides that, with some limitations, the laws of England, as the same existed on the 15th July, 1870, should be in force in the Territories in so far as the same are applicable to the Territories.

Held, that the laws of England relating to the forms and ceremonies of marriage are not applicable to the Territories—certainly *quoad* the Indian population and probably in any case.

On the trial of a prisoner, an Indian, on a criminal charge, the evidence of two Indian women M. and K. was tendered for the defence. M. stated "that she was the wife of the prisoner; that he had two wives, and that K. was his other wife; that she M., was his first wife; that she and the prisoner got married Indian fashion; that he promised to keep her all her life and she promised to stay with him, and that was the way the Indians got married; that he married the other woman last winter; that he and the other woman lived with each other and that he took her for a wife, that was all about it.

The trial Judge, WETMORE, J., rejected the evidence of M. and admitted that of K.

Held, affirming the decision of WETMORE, J., that the evidence quoted was sufficient evidence of a legally binding marriage between M. and the prisoner for the purpose of excluding the evidence of M. as being neither a competent‡ nor a compellable witness against the prisoner on a criminal charge.

† Quoted in full in the judgment. This provision was consolidated from 49 Vic. (1886) c. 25, s. 3, which is in exactly the same terms, except that the words "subject to the provisions of this Act," and "are not hereafter repealed" are substituted for "subject to the provisions of the next proceeding section" and "may not hereafter be repealed" respectively. Section 2 of 49 Vic. c. 25, above referred to appears as sub-section 1 of section 112 of R. S. C. c. 50 with the insertion of the words "subject to the provisions of this Act." See also Ord. No. 26 of 1884 quoted p. XVII., *supra*, and Prefatory note. Ed.

‡ See now The Canada Evidence Act, 1893, 56 Vic. c. 31, s. 4.

Statement.

[*Court in banc, December 7th, 1889.*

This was a Crown case reserved.

The prisoner, an Indian, was tried before WETMORE, J., on a charge of committing an assault upon one Vivian Maleterre and thereby occasioning actual bodily harm. The prisoner tendered the evidence of two Indian women, Maggie and Keewasens, both of whom he called his wives and both of whom were in fact called and sworn. The evidence of Maggie was confined to the question of the relationship between the prisoner and the two women. On this evidence—quoted in the head-note—the learned judge rejected the evidence of Maggie further than as above mentioned and admitted that of Keewasens. The prisoner was convicted and sentenced. The learned judge reserved for the opinion of the Court in banc the question whether or not he was right in rejecting the evidence of Maggie and respited the execution of the sentence of the Court meanwhile.

The question was argued on the 3rd December, 1889.

W. White appeared for the Crown; the prisoner was not represented.

[*December 7th, 1889.*]

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

WETMORE, J.—The question raised by this case is of considerable importance in regard to the administration of the criminal law as it affects the aboriginal inhabitants of these Territories.

The evidence of the witness Maggie was, as appears by the case, tendered by the prisoner as that of his wife, and she stated on examination that she was his first wife. It appeared therefore that by mutual consent the relation of husband and wife existed between these parties. The woman further stated that she and the prisoner got married Indian fashion; he promised to keep her all her life, and she promised to stay with him, and that that was the way Indians got married. If mere consent coupled with Indian custom is sufficient to establish a legal and binding marriage

quoad the Indians in this Territory, it has been estabished by the facts I have recited. The first question which arises is: Would such a marriage if contracted before the laws of England were introduced into this Territory be recognized as a legal marriage? I am of opinion that it would. In the case of *Connolly* v. *Woolrich*,[1] Mr. Justice Monk in a very able and exhaustive judgment deals with the subject of a marriage according to Indian custom of a Christian white man with an Indian woman. The marriage in question in that case was contracted in the year 1803 in Athabasca which country for the purposes of the case Mr. Justice Monk assumed to be included within the Territories embraced by the charter of the Hudson's Bay Company. He says at page 214: "The charter did introduce the English law, but did not at the same time make it applicable generally or indiscriminately; it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and did exist." I adopt this view of the law in so far as the marriage customs and laws of the Indians are concerned as among themselves without, however recognizing as valid any law or custom authorizing polygamy. I will quote some extracts from Mr. Justice Monk's judgment at page 243 where he makes some citations from Bishop on Marriage and other authorities.

Judgment.

Wetmore, J.

"It is plain that among the savage tribes on this continent marriage is merely a natural contract and that neither law, custom nor religion has affixed to it any conditions or limitations or forms other than what nature has itself prescribed." Bishop on Marriage, Vol. 1, s. 223.

"In a state of nature," says Lord Stowell, "the contract of present marriage alone, without form or ceremony superadded, constitutes of itself complete marriage." *Vide Lindo* v. *Belisario*.[2] Bishop Vol. 1, s. 19.

"If practically a man and woman recognize each other as in substance husband and wife, though they attempt to restrict the operation of the law upon their relation, the law

[1](1867) 11 Lower Can. Jur. 197; 3 U. C. L. J. 14; 1 Lower Can. L. J. 253. [2]1 Hagg. Cons. Rep. 216, 220; 4 Eng. Ec. 367, 374. [Vide] Ruling Cases, Vol. XVII., *tit.* Marriage, pp. 10 *et seq.*

Judgment. Wetmore, J.

should hold them—public policy requires this, the peace of the community requires it, the good order of society demands it—to be married persons, unless some statute has rendered the observance of some form of marriage necessary." Bishop Vol. 1, s. 227.

"Wherever marriage is governed by no statute consent constitutes marriage and that consent is shewn by their living together." Bishop Vol. 1, ss. 229 and 230.

"But whenever the matter is not governed by any doctrine then to be mentioned, no particular form for expressing the consent is necessary, nothing more is needed than that, in language which is mutually understood, or in any mode declaratory of intention, the parties accept of each other as husband and wife." Fraser Dom. Rel. 145. Bishop Vol. 1, s. 225.

The case of *Connolly* v. *Woolrich*[1] was decided in 1867 and Monk, J., held the marriage of the white man with the Indian woman so contracted according to Indian custom to be a good valid and legal marriage, although the husband and wife had removed to Lower Canada and the husband had afterwards there married a white woman according to the rites of the Roman Catholic Church. This case was carried to the Court of Appeal in Lower Canada and the judgment was affirmed. In my opinion that judgment was generally a sound exposition of the law, in so far as it affected the marriage there under consideration, in view of the circumstances under which it was contracted and the citations made in the judgment which I quoted. If a marriage between a white Christian man and an Indian woman, contracted under the circumstances under which the marriage considered in that case was contracted was a valid marriage, then *a fortiori* a marriage contracted in these Territories by Indians by mutual consent and according to Indian custom before the 15th July, 1870, provided that neither of the parties had a husband or wife, as the case might be, living would be a valid marriage. But it is provided by the North-West Territories Act, section 11 that "subject to the provisions of this Act the laws of England relating to civil and criminal

matters, as the same existed on the 15th day of July in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories *in so far as the same are applicable to the Territories* and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada or by any Ordinance of the Lieutenant-Governor in Council."

In the first place are the laws of England respecting the solemnization of marriage applicable to these Territories *quoad* the Indian population? I have great doubts if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached without the greatest inconvenience. I am satisfied however that these laws are not applicable to the Territories *quoad* the Indians. The Indians are for the most part unchristianized; they yet adhere to their own peculiar marriage custom and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them. I know of no Act of the Parliament of the United Kingdom or of Canada, except as hereinafter stated, which affects in any way these customs or usages. The Ordinance respecting Marriage, chapter 29 Revised Ordinances (1888) does not in my opinion affect the question. The conclusion I have arrived at is that a marriage between Indians by mutual consent and according to Indian custom since 15th July, 1870, is a valid marriage, providing that neither of the parties had a husband or wife, as the case might be, living at the time; at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence.

The Indian Act, R. S. C. c. 43, and the amending Act 50-51 Vic. (1887) c. 33 recognize the relation of husband

Judgment. Wetmore, J.

and wife among the Indians. Section 9 of the Indian Act refers to "any illegitimate child." Section 12 mentions "Any Indian woman who marries an Indian" and "her husband." Section 13 mentions "the widow of an Indian." Section 20 refers to the property of a deceased Indian in certain cases devolving on his "widow;" and the "widow" of an Indian is repeatedly mentioned in this section. Section 88 referring to an Indian uses the expression "a married man, his wife and minor unmarried children." References of a like description will be found in sections 90 and 93 sub. secs. 2, 3 and 4, and section 9 of the amending Act of 1887. In view of what the intention of Parliament was in passing these acts, whom they were intended to embrace and the general purview, I cannot conceive that these references were intended only to Indians married according to Christian rites. No doubt there are many such Indians, especially in the East, but I think these expressions were intended to apply to all Indians, Pagans and Christians alike. If so they amount to a statutory recognition of these marriages according to Indian custom in the Territories. I think therefore that the evidence of Maggie was properly rejected and that the judgment given on the trial of the prisoner should be affirmed. The reason of the doctrine which holds that, as a general rule, a wife is not competent or compellable to testify for or against her husband or a husband for or against his wife, when either is charged with an indictable offence, is obvious; and I do not desire to be construed as holding more than is necessary for the purpose of this case, and that is, that, such a binding and legal marriage has been established as to make this rule of law as to evidence applicable.

The order of the Court is that the judgment given on the trial be affirmed and that execution thereof be made and that a certicate as provided by R. S. C. c. 174, s. 262,§ be prepared and forwarded to the Clerk of the Court for the Judicial District of Eastern Assiniboia.

Conviction affirmed.

§ See Crim. Code, s. 746, s.-s. 3.

MARTIN v. REILLY.

Agreement conditional on consent of third party—Time for fulfilment of condition—Reasonable time—Judge's charge.

Where an agreement is made subject to the consent of a third party, it must be looked upon as a conditional agreement, dependent upon such consent being given within a reasonable time; in default of which the agreement must be taken not to have become effective.

Held, on the evidence that, assuming there was evidence of such a conditional agreement, the date at which it was alleged the consent of the third party was obtained could not, under the circumstances, be reasonably found by the jury to be within a reasonable time after the making of the agreement; and that therefore the charge of the learned trial Judge to the effect that there was no evidence of an agreement was not objectionable—at all events, per RICHARDSON, J., as no substantial wrong or miscarriage of justice was occasioned thereby.

[*Court in banc, December 7th, 1889.*

Statement.

This case was tried at Calgary before ROULEAU, J., with a jury. The action was brought to recover the sum of $1,250.00, being the balance of the amount found due by the defendant to the plaintiff by the award of arbitrators appointed to settle the differences between the plaintiff and the defendant as former partners. The defence was that there being owing, by the plaintiff and the defendant, as partners, to Mrs. Reilly, the defendant's wife, the sum of $2,500, the defendant had, since the award, paid her that amount and that the plaintiff was liable to the defendant for $1,250—one-half thereof.

The finding of the jury was as follows: "We find the claim of Mrs. Reilly is a moral claim and not a legal one, and therefore find a verdict for plaintiff, $1,250." On this verdict the learned trial judge directed judgment to be entered for the plaintiff for the amount claimed.

The other facts and the points involved appear in the judgment. The defendant appealed to the Court *in banc*.

The appeal was argued on the 4th December, 1889.

T. C. Johnstone, for appellant.

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

Judgment.

Wetmore, J.

[*December 7th, 1889.*]

WETMORE, J.—The plaintiff and defendant carried on business as hotelkeepers at Calgary under the name of Reilly & Martin under an agreement dated 6th October, 1884. This agreement originally contemplated a partnership for seven months, but it was continued after the expiration of that time down to 31st October, 1888, when it was dissolved. On the 8th October, 1884, an agreement was made in writing between the partners that Mrs. Reilly the wife of the defendant Reilly was "to have the superintendence of all matters appertaining (to), and the furnishing and keeping in order of, the dining-room and all other departments (of the hotel) apart from the billiard hall and office and (to) have the use of, and free access to, the safe in building for the storage of her papers and valuables, and to have the free keep of her pony and her own board free and the sum of three dollars a week as pin-money." This agreement was signed by the plaintiff and defendant and as between them would be binding on each party; but it is important to note that it was entered into with the consent of Mrs. Reilly, because it appears from the testimony that she objected to certain words that appeared to have been in this memorandum as originally drafted. What these words were, however, does not appear in the appeal book; but, whatever they were, they were struck out, the words "pin-money" inserted and then she "consented to it"; and this was done, she says, before the agreement was signed. No further agreement respecting the partnership was made between the partners; but according to the evidence of the defendant the partnership after the expiration of the seven months went on as before; and from that I assume it went on under the terms of the original agreement, and Mr. Reilly swears that nothing was said to Mrs. Reilly. Differences having arisen between the partners, and the plaintiff desiring to withdraw from the partnership, a reference to arbitration was made pursuant to the terms of the partnership agreement to settle the differences, claims and disagreements of the partners. The arbitrators chosen made an award. For the purpose of giving judgment on this

Judgment.
Wetmore, J

appeal it is not necessary to set out the whole award. It is necessary only to state that the arbitrators awarded, among other things, that the defendant should pay to the plaintiff $5,279.91 exclusive of the value of the real estate. The defendant failing to pay this amount, the plaintiff brought this action for the purpose among other thing of recovering it. The defendant admitted his *prima facie* liability, but he claimed that the firm of Reilly & Martin owed Mrs. Reilly a sum of $2,500 for her services in superintending the hotel and for work done in and about that business; that he had after the award paid her that sum; and he claimed to charge the plaintiff with $1,250 one-half thereof and to set it off against the plaintiff's claim. At the trial the only matter contested was whether the plaintiff was liable to be charged with this $1,250. In the view I take of the case it is not necessary to give any further abstract of the case or to refer to what transpired before the arbitration, except as a matter of course to refer to the evidence as it bears upon my decision. The case was tried before Mr. Justice Rouleau and a jury at Calgary on the 26th June last. Mrs. Reilly entered upon the performance of the services contemplated by the agreement of 8th October, 1884, and continued in the performance thereof; and there is no pretence that she was not paid the money or had not received the privileges which the agreement provided that she should receive, and it is clear to me that, if Mrs. Reilly after the seven months expired continued to perform these services without any further agreement than that contained in the memorandum of 8th October, 1884, all she would be entitled to receive would be what that memorandum provided for. It was claimed by the learned counsel for the defendant in the argument before this Court that a further and new agreement or understanding was entered into between the parties or rather that there was evidence to go to the jury of such a new agreement; and he relied on the following testimony:—Mrs. Reilly swears in substance that some time after the seven months had expired the plaintiff promised to pay an allowance besides the pin money *if Mr. Reilly would consent* and that she got Reilly to consent to pay her. The plaintiff denies that he had made

Judgment. Wetmore, J.

any such promise to Mrs. Reilly. He says he never promised to pay Mrs. Reilly any further sum except what *we* agreed upon. He says also he might have told her that he would consider a further sum if Reilly consented to it. But assuming that Mrs. O'Reilly's statement is correct, let us examine when the promise by the plaintiff was made and when and under what circumstances the defendant consented to the payment. Mrs. Reilly mentions specifically only one occasion on which the promise she relies on was made by the plaintiff, and it does not appear that he made any such promise on any other occasion, and she swears that that occasion was more than three years before the date on which the trial took place; that is, the promise if any, was made before the 26th June, 1886, or more than two years and four months before the dissolution of the partnership. The consent of the defendant to her being paid was not obtained until after the dissolution. She does not state how long after; but, as the defendant paid her the $2,500 by cheques and she receipted for it, it is fair to assume that the date of the cheques for the amount and of her receipt was the date of his consent, and they were dated the 29th November, 1888—nearly one month after the dissolution and nineteen days after the date of the award. The learned Judge charged the jury that, in order to enable Mrs. Reilly to exact payment from the firm of the amount in question, she must show a bargain or an agreement to pay her and that no such agreement was proved. Exception was taken to this charge that there was evidence to go to the jury of such an agreement. I think the learned Judge was entirely right and that there was no evidence of any such agreement. The alleged promise by the plaintiff was a conditional promise dependent on Reilly's consent, and in my opinion it was not a continuing promise and he was never asked to renew it. Reilly's consent, in order to make the promise binding, should have been obtained within a reasonable time after the promise was made. It is fair to assume either that Mrs. Reilly did not ask her husband for his consent, because she knew he would not give it, or that she had asked him to consent and he refused. In fact the plaintiff swears that Mr. Reilly told him, if she ever got paid,

it would be through him, as Reilly swore he never would pay her; and this is not contradicted. It would be unreasonable to hold a person, situated as the plaintiff was, to a promise of that kind for all time; and if, after a reasonable time had passed, Reilly had not consented, I think the promise lapsed unless something transpired which would seem to keep it alive. What would amount to a reasonable time might under some circumstances be a question for the jury, but I think that where, as in this case, over two years and five months had elapsed since the promise was given before the consent of the defendant was obtained; that then the partnership had been dissolved nearly a month; and that the plaintiff and defendant had been for some time at difference, the promise must, as a question of law, be taken to have expired long before the consent was obtained; and that there was no question of the reasonableness of the time to leave to a jury. It cannot affect the legal question, but for the purpose of showing in what light Mrs. Reilly looked upon the matter, it is important to note that, as late as May, 1888, nearly two years after the alleged promise, Mrs. Reilly presented an account which was paid, and in it she only charged at the rate of $3 per week. She never at that time alluded to further pay and it appears when she presented this account she was offended and it is likely at the least, if she considered the promise a continuous one, she would have then in some way alluded to it. The view I have taken if correct disposes of this appeal, for there really was then nothing to leave to the jury and the appeal should be dismissed with costs.

Judgment. Wetmore, J

RICHARDSON, J.—Concurring as I do in the judgment of my Brother Wetmore just read, I may premise that the dispute between the parties here relates to the sum of $2,500 alleged to have been paid by Reilly to his wife for services rendered by her to the parties Martin and Reilly while co-partners as hotel-keepers, and the right of Reilly to set off against Martin's otherwise admitted claim in this action one-half of this sum—$1,250.

Judgment.
Richardson, J.

The case was tried with a jury before ROULEAU, J., their finding being: "We find the claim of Mrs. Reilly is a moral claim and not a legal one and therefore find a verdict for plaintiff $1,250." Upon which the Court gave judgment in favor of Martin the plaintiff.

From this judgment Reilly appeals on eight stated grounds one of which I here notice:

(1) That the verdict and judgment thereon are against law and evidence and the weight of evidence.

Now was the finding of the jury unsupported by evidence or the weight of evidence? because if clearly so then it must be evident that the judgment given upon it is not right.

To arrive at this what evidence had the jury?

Mrs. Reilly in her evidence states: "I performed the services forming the $2,500 claim. Martin promised to pay me if Reilly would consent. When the firm was dissolved I got Reilly to consent to pay me. It is more than three years ago that Martin told me he would pay me. Made no arrangement with Reilly. Am his wife."

It appears that the partnership was dissolved on October 31, 1888.

James Reilly the defendant in his evidence states after proving the fact of payment of the $2,500 to Mrs. Reilly: "I am not benefited commercially one farthing by it. Had conversation about that claim with Mrs. Reilly the result being I told Lougheed & McCarthy to do what they liked in the interest of Mrs. Reilly. The letter was sent by them to the firm. Money was paid after I received the letter. For all I know it might be the same day that I got the letter. I know by the books there was a large debit against me. Told the Arbitrators to credit me with a certain sum for Mrs. Reilly as an off-set to plaintiff's claim. I thought it was a matter of expediency to do so."

On the other side Martin, the plaintiff, states with regard to this claim: "I first heard of this claim when it was presented to the Arbitrators. In May, 1888, I paid Mrs. Reilly the account Ex. "E." She never made any further

claim to me for services. Never promised to pay Mrs. Reilly any further sum except what we agreed upon. Might have told her that I would consider further sum, if Reilly consented to it." Judgment. Richardson, J.

The evidence thus before the jury was—of Mrs. Reilly, that Martin promised to pay conditionally, and contra of Martin that he not only did not promise but, until after dissolution, never heard of any claim beyond what he paid her in May, 1888; and there is not a tittle of evidence to show that, at any time during the three years the partnership lasted after the statement asserted by Mrs. Reilly was made, any claim was made by Mrs. Reilly or that Reilly ever consented to such a claim. Assuming there was evidence *pro* and *con* for the jury on the question, the view that their finding against the claim is against evidence or the weight of evidence, cannot I think be entertained.

It may be well here to observe that throughout the case nothing is shown whereby I can find that any substantial wrong or miscarriage has been occasioned in the trial. And then, even assuming the learned Judge did mis-direct the jury as complained of, in the absence of any substantial wrong or miscarriage having been thereby occasioned in the trial, a new trial should not be granted and I think the appeal should be dismissed with costs.

MACLEOD, ROULEAU and MCGUIRE, JJ., concurred.

Appeal dismissed with costs.

EMERSON ET AL. v. BANNERMAN.

Bill of sale—Affidavit of bona fides—Fraudulent assignment—Preferential assignment—Construction of statutes.

The Bills of Sale Ordinance† makes necessary an affidavit "that the sale is * * * not for the purpose of holding or enabling the bargainee to hold the goods * * * against *any* creditors of the bargainor."

Held, that the use of the words "*the* creditors" instead of "*any* creditors" in the affidavit of bona fides did not invalidate the Bill of Sale.

The same Ordinance makes necessary an affidavit "of a witness thereto of the due execution thereof."

Held, that, as attestation is not made essential to the validity of a Bill of Sale, it is not necessary to call the attesting witness to prove the execution thereof.

Held, also, on the evidence that inasmuch as the trial Judge could reasonably find, as he had, that there was no fraudulent intent on the part of the bargainee, the Bill of Sale could not be held void as being made with intent to defraud creditors of the bargainor, and that inasmuch as the trial Judge could reasonably find, as he had, that the bargainee was not in fact a creditor of, but a bona fide purchaser from, the bargainor the Bill of Sale could not be held void as being made with intent to give, or as having the effect of giving, a preference to one creditor over another, and that therefore the Bill of Sale was not void under the Ordinance respecting preferential assignments.‡

Judgment of ROULEAU, J., on all points affirmed.

Affirmed 19 S. C. R. 1.

[*Court in banc, June 9th, 1890.*

Statement.

This was an appeal from the judgment of ROULEAU, J., on an Interpleader issue tried before him at Calgary without a jury. The plaintiffs in the issue were execution creditors of one A. C. Sparrow; the defendant held a bill of sale from the execution debtor of a stack of oats, which was the subject of the issue. The learned Judge gave judgment in favor of the defendant. The plaintiffs appealed to the Court *in banc*.

The appeal was argued on the 2nd June, 1890.

The facts and points involved appear in the judgments.

E. P. Davis, for the plaintiffs, the appellants.

P. McCarthy, Q.C., for the defendant the respondent.

† R. O. (1888) c. 47, s. 5. In the present Ordinance C. O. (1898) c. 43, s. 9, the words are "*the* creditors."

‡ R. O. (1888) c. 49, s. 1, now C. O. (1898) c. 42, s. 1.

[*June 9th, 1890.*] Judgment.

McGuire, J.

McGUIRE, J.—This is an appeal from a judgment of Rouleau, J., on an interpleader issue tried by him without a jury.

One Angus C. Sparrow had, prior to some time in 1886, been in some business at Calgary and, becoming financially involved and unable to pay his debts in full, he in or about that year gave up his business, the nature of which does not appear. He had been a customer of the respondent who was a merchant at Calgary, but, on Sparrow giving up his business in town, the respondent, who said he heard that Mrs. Sparrow was now carrying on the business, decided he would make a "change" and thereafter gave credit not to Angus C. Sparrow but to Mrs. Sparrow, his wife. This credit was for goods got sometimes by Angus C. Sparrow, sometimes by Mrs. Sparrow and sometimes by "Mooney" whether a servant or not does not appear. On 24th September, 1889, the account of Bannerman against Mrs. Sparrow as appeared from his books amounted to $136. On that day Angus C. Sparrow called at Bannerman's store and asked him to advance him $300 on a stack of oats. This Bannerman refused to do unless he would pay the account of Mrs. Sparrow. He said "he required that amount ($300) and that if Bannerman would advance $400 he would pay the $136, Mrs. Sparrow's account." Bannerman agreed to this, gave his note for $400 and took a bill of sale of the stack of oats which was duly registered. Subsequently to this the stack of oats was seized by the Sheriff under executions of the appellants respectively against Angus C. Sparrow. The interpleader issue was to try the right of Bannerman to the stack under the bill of sale.

The appellants raise three objections to that instrument.

1. That it was void under R. O. (1888) c. 47, s. 5, because the affidavit of *bona fides* uses the words "the creditors" instead of "any creditors" as employed in section 5.

2. That the bill of sale was not proven because there was a subscribing witness who was not called or his absence

Judgment. McGuire, J.

accounted for and that the only evidence of it was taken subject to objection.

3. That it was void under R. O. (1888) c. 49.

The learned Judge found against the appellants on all these points. They now appeal on the same grounds.

As to the first objection I agree with the trial Judge that the words "the creditors" being used instead of "any creditors" is not fatal. It was strongly urged that the Legislature in altering the words "the creditors" (used in the ordinance of 1881) to "any creditors" evidenced an intention to change the *meaning* of the sentence as well as its phraseology and that we must therefore take it that, in the view of the Legislature, there is a material difference between the meaning of the two words "any" and "the" as used here; but as laid down by Hagarty, C.J., in *Molsons Bank* v. *Halter*,[1] "it is a well known principle in construing statutes not to impute to the Legislature the intention of altering existing laws unless the language used admits of no other reasonable interpretation." I submit, moreover, that a change in the language is only *prima facie* evidence of such intent and that this may be rebutted by various circumstances apparent in reading the Ordinance; as, for example, if the word substituted is meaningless or evidently a typographic error. Other internal evidence may also be considered. If it is contended that the intention was to make a material as distinguished from a mere grammatical alteration it is fair to expect such an intention to be carried out in other corresponding parts of this Ordinance. Now there are three sections which deal with the contents of an affidavit of *bona fides*; section 3 deals with ordinary chattel mortgages, section 4 with mortgages for future advances or endorsements of promissory notes and section 5 (the one under consideration) with bills of sale. In all three cases the object of requiring an affidavit of *bona fides* is in every way precisely the same; but, as we find that in sections 3 and 4 the words "the creditors" are used, this to my mind is evidence that the change to "any" in section 5 was not inten-

[1] 16 O. A. R. 323; affirmed 18 S. C. R. 88.

Judgment.
McGuire, J.

tional or with any purpose in view so as to make the affidavit more precise and severe, because we are not lightly to attribute inconsistency to the legislative mind. So that unless we assume that "any" got into the section through an error of the printer we are warranted I think, in assuming that "the creditors" was in the minds of the legislature equivalent to and interchangeable with "any creditors," since they themselves have used in the same Ordinance both expressions where it is incontestable that they meant precisely the same thing. Had the change occurred in section 3 and not in sections 4 and 5, it might be urged that it was a case of an intentional change which by oversight was not carried out in the succeeding sections, but here the change, if any, is in the latest of the three sections. There is perhaps not much weight in such a suggestion but it is at least a circumstance to be considered in ascertaining whether the change was material and deliberate or not.

Now this use of "the creditors" *twice* and of "any creditors" *once* to attain exactly the same end not only rebuts the *prima facie* evidence which the mere change affords of an *intentional* change in the section but does more; it is evidence that the Legislature deemed the two expressions to mean the same thing; so that even if we were of opinion that there is some substantial and material difference, are we to set up our opinion in opposition to the manifest intention of the Legislature? If they say that "the creditors" means "any creditors" are we to say it does not? If they say that "the creditors" is sufficient are we to say it is not? The Legislature has not seen fit to prescribe a "form" of such affidavit but only describes what the affidavit shall assert. Had it given a certain form of words to be employed the argument that no departure from the exact words is permissible would be stronger; but even there the Legislature has taken the precaution to provide that "slight deviations therefrom, not affecting the substance or calculated to mislead shall not vitiate them." (Interpretation Ord. R. O. (1888) c. 1, s. 8, s.-s. 32.) §

§ Now C. O. (1898) c. 1, s. 8, s.-s. 39.

Judgment.
McGuire, J

But is there apart from the argument that the Legislature has treated the expressions as synonymous, any ground for holding that there is a material difference such as would vitiate the affidavit. It is argued properly that, if language other than that prescribed is used, the person using it does so at his peril and that it is not so much a question of the extent of the departure from the prescribed language as a question whether it opens the door to a deponent being thereby enabled to take such an affidavit under a state of facts which would prevent him from taking it if the prescribed language had been used; that it is not a question: would he not have taken the affidavit in either form? but, is it not *possible* that he might not have done so? It was argued that "the creditors" means "all the creditors," and that a deponent, not overscrupulous but anxious only to avoid a prosecution for perjury, might so construe it and, if he knew the intention was to defraud only *some* and not *all* the creditors, might swear to an affidavit containing "the creditors" where he would not do so if "any creditors" had been used. If the answer "yes" to this question would be fatal to the affidavit then *Mason* v. *Thomas*,[2] was wrongly decided. There the statute required that the deponent should swear that the instrument was not intended to enable him to hold "*the goods* mentioned therein, etc.," but the affidavit instead of "goods" used the words "estate and effects." Now this expression includes more than "goods." Draper, C.J., in giving judgment said "The words used are the most comprehensive and where realty and debts and choses in action are assigned as well as goods and chattels they seem to us to comply with and fulfil the objects of the Legislature." Now, as it would seem, the instrument in that case assigned realty, debts and choses as well as goods. It might be argued that a deponent knowing that the intention was to protect only the "goods" could not have taken an affidavit denying an intention to protect "goods" but he might have felt able to deny an intention to protect the "estate and effects" i.e., lands, debts, and choses in action and goods, all taken to-

[2] 23 U. C. Q. B. 307.

gether, since, by hypothesis, the fraudulent intent existed only as to the goods; so that, by departing from the language of the statute, he enabled himself to make an affidavit which he would not otherwise have dared to make. This is the line of argument taken here. It is said "the creditors" means or may mean "all the creditors" and that where the intent was to defraud only *some*, a bargainee might stretch his conscience enough to deny an intent to defraud "*all* the creditors." As I have said the same reasoning, if adopted in *Mason* v. *Thomas*,[2] would have brought about an opposite decision. I am not prepared, however to say *Mason* v. *Thomas* was wrongly decided. In *Farlinger* v. *McDonald*,[3] the affidavit used the words "him * * the said mortgagor" instead of them * * * the said mortgagors." A hypercritic might contend that the deponent might possibly have a secret reservation in his mind enabling him to swear that the intent was not to defraud the credtors of "him * * the said mortgagor" whereas he might not have been willing to say the same as to the "creditors of them * * the said mortgagors." Manifestly "the creditors of "A" may be persons quite different from the "creditors of A. and B." But will it be said that this case too was wrongly decided? In *Fraser* v. *The Bank of Toronto*,[4] it was conceded that the Legislature might have thought that the words "the creditors of said mortgagors" would include the creditors of any or either of them. In *Mathers* v. *Lynch*,[5] the words "the liability of the mortgagor" were used instead of "for the mortgagor." Taken strictly the former phrase meant the liability not of the *deponent* for the mortgagor but the liability of another man, viz.: the mortgagor himself. Was there not here a *possibility* of a dishonest deponent prevaricating? Yet here Wilson, J., said: "The desire no doubt is to sustain the mortgage if it can be reasonably done, but this cannot be done * * in case there should be an irreconcilable and material difference between the two expressions. We think this equivalent language may be received instead of the plainer language of the statute."

Judgment. McGuire, J.

[2] 15 U. C. Q. B. 238. [4] 19 U. C. Q. B. 381. [5] 28 U. C. Q. B. 363.

Judgment.
McGuire, J.

The learned Counsel endeavored to show by syllogistic illustrations that the use of the words "the creditors" entirely changed the meaning of the affidavit, overlooking the fact that in cases of universal negatives the logicians say that both subject and predicate are distributed. I do not know that Mr. Bannerman is a logician, or if so, to what school he belongs; whether to an ancient or a modern school; whether he is to be classed as an Aristotelian, an Epicurean, or a Heraclitic-Protagorean; whether his mind is of the Rhetorico-Sophistical, or Spenozistic-Metaphysical, or simply Transcendental-Æsthetic order; or is he, like many in these Territories, a lover of Bacon? The evidence does not enlighten us on any of these points nor do I think the omission material. The power of being able to "divide a hair 'twixt South and South-West side," may be interesting to sophistical rhetoricians who have leisure and taste for such subtleties. I do not think we should avoid a bill of sale by reason of the possibilities suggested here.

As to the second objection—that the bill of sale was not proved, because, there being in fact a subscribing witness, he was not called or his absence accounted for, and in such case no other evidence could be admitted, I agree with the holding of the learned Judge that the Ordinance does not prescribe that there shall be an *attesting* witness, and consequently it is not necessary to call the witness thereto.

As to the third ground of appeal the learned Judge sitting as a jury, has found as a fact that Bannerman was not a creditor of A. C. Sparrow. There was evidence on which he might reasonably come to that conclusion. Bannerman swore that he had given credit to Mrs. Sparrow and his books supported him in that statement. True, the nature of the goods mentioned in the account, and the use to which they were put would have raised a *prima facie* liability in A. C. Sparrow to pay for them, since they were principally supplies used for the support of himself and his family; but Bannerman at the commencement of the account had in effect said: "You are insolvent, you have gone out of business; I understand Mrs. Sparrow is carrying on the business; for

Judgment.
McGuire, J.

these and it may be other proper reasons I chose not to credit you A. C. Sparrow, but I will credit Mrs. Sparrow and I shall charge the items in my book accordingly."

It may well be that Bannerman could not recover as against her owing to her having no separate estate, but could he say that his contract was with A. C. Sparrow when he had himself deliberately elected to contract with Mrs. Sparrow? This was a question of fact. Whether we would have arrived on the evidence at the same conclusion is not the question. If there is evidence on which a jury might fairly have come to the conclusion they did come to, a Court of Appeal will not ordinarily review their finding of the facts.

Section 1 of chapter 49 Revised Ordinances (1888) is divisible into two parts, the first dealing with transactions between the debtor and anyone else done with *intent to defeat*, &c., creditors; the second with transactions between the debtor and a creditor (or creditors) with intent to *prefer* such creditor (or creditors) to his other creditors, or which have the *effect* of giving such creditor such a preference. *Molsons Bank* v. *Halter*.[1] To avoid a transaction under the first part the fraudulent intent must be mutual and not confined to the debtor. The learned Judge has negatived the fact of a fraudulent intent on the part of Bannerman; so that the first part does not affect this instrument. The second part applies only to transactions between the debtor and one or more creditors, and as Bannerman has been found not to have been a creditor, then the second part does not apply to him. The learned Judge has further found as a fact that the sale was *bona fide* and made in the ordinary course of trade or calling to an innocent purchaser. There was evidence on which he might so find.

The appeal will be dismissed with costs to be paid by the appellants to the respondent.

WETMORE, J.—I agree that there was evidence in this case which would warrant the trial Judge in finding that Bannerman was not a creditor of A. C. Sparrow and I have nothing to add to the judgment of my brother McGuire as

Judgment. Wetmore, J.

regards that point. It was conceded by the learned Counsel for the appellants that it was necessary for him, in order to establish that the bill of sale was void as against the defendants under R. O. (1888) c. 49, to prove that Bannerman was a creditor of A. C. Sparow.

As to the point that the bill of sale was not duly proved because the subscribing witness to it was not called, I have always understood the terms "attesting witness" and "subscribing witness" to be synonymous, as Burns, J., in *Armstrong* v. *Ausman*[6] states them to be. The document in question in that case was a chattel mortgage; the language of the Ontario Act, requiring the conveyance to be accompanied by an affidavit "of a witness thereto," is the same as the language of our Ordinance. In that case there was no subscribing witness to the mortgage. The majority of the Court held that it was not necessary that the person making the affidavit should be a subscribing witness; that it would be sufficient if it were made by a person who witnessed the execution, although he did not subscribe to it. If that is good law, attestation is not requisite to the validity of a bill of sale executed under the Ordinance and therefore it was not necessary to call the subscribing witness to prove the bill of sale in question in this case; it could be proved *aliunde*. I think to lay down a rule contrary to this decision would in many cases be creative of great difficulty and inconvenience in proving instruments of this nature and I am therefore prepared to follow that case.

I have great doubts of the validity of the affidavit of *bona fides* made by the plaintiff. This question turns upon the language of section 5 of chapter 47 of the Revised Ordinances (1888) which provides that the conveyance shall be accompanied by "an affidavit of the bargainee * * that the sale is * * * not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against *any* creditors of the bargainor." The first Ordinance I can find on the subject is No. 5 of 1881. Section 3 of that Ordinance is the section corresponding to section 5 of chapter

[6] 11 U. C. Q. B. 505.

47 above referred to. The language of the two sections, as far as the provisions which I have included in the quotation marks are concerned, is the same word for word, except that in section 3 of the Ordinance of 1881 the word occurring immediately before the word "creditors" is "the" instead of "any." Ordinance No. 5 of 1881 and amending Ordinances were amended and consolidated by Ordinance No. 7 of 1887 and in section 5 of that Ordinance the change of the word "the" to "any" occurs for the first time. This last mentioned Ordinance and also No. 5 of 1881 were repealed by the Revised Ordinances and chapter 47 substituted therefor; and the change referred to, made by the Ordinance of 1887, was retained. If section 5 of chapter 47 stood alone I would have no hesitation in arriving at the conclusion that this affidavit is bad as not being in accordance with the provisons of the section; however if I was satisfied that the change of the word "the" to "any" was deliberately made by the Legislature I would have no hesitation in deciding that the affidavit is bad, notwithstanding the fact that no change was made in the language of provisions of a similar nature relating to mortgages in sections 3 and 4. I can perceive a wide difference between a bargainee swearing "*that the sale is not for the purpose of holding or enabling him to hold the goods against the creditors of the bargainor*" and his swearing "*that the sale is not for the purpose of holding or enabling him to hold the goods against any creditors of the bargainor.*" If it was the intention to hold the goods against *all* the creditors of the bargainor, he could not swear to the second form upon any possible construction of it. He might however, be induced to swear to the first form if the intention was not to defeat *all* the creditors but to defeat one or more of them, but not including all. For instance, we will assume A to be a person of small means, who is indebted, but able and willing as a rule to pay his debts; he purchases a horse from B on credit or partly on credit; he discovers afterwards that B has, as he believes, taken him in; he thinks he has sold him a worthless horse or one nearly so; he has taken no warranty of soundness however and B can force him to pay as soon as he recovers a judgment if he can find property to satisfy it.

Judgment.
Wetmore, J

Judgment.
Wetmore, J.

A makes up his mind he will not pay B; he goes to friend C and induces him to take a bill of sale on all his property liable to seizure. I can readily understand how he might induce C to make affidavit that the sale is not for the purpose of holding or enabling him to hold the goods against *the* creditors of A. He might reason as follows: I do not make this bill of sale to you to enable you to hold the goods against my creditors but only against one of them. I do not say his reasoning would be correct but, to say the least, it has *some* degree of plausibility. It must be remembered that persons, who contemplate perpetrating a fraud, are as a rule as astute in endeavouring to evade the requirements of a statute passed to prevent their doing so, as the statute ought to be in endeavouring to prevent them. I can therefore see a substantial reason for the change. I do not think that the maxim *omne majus continet in se minus* is applicable. *Fraser* v. *The Bank of Toronto*,[6] and *Taylor et al* v. *Ainslie*,[7] do not to my mind show it to be so. We must bear in mind what the Courts in those cases had before them; the affidavits there in question followed the words of the act, and in view of that fact they held that the *Legislature, not the Court*, assumed that the maxim would under the circumstances be applied in cases arising under that Act. They did not pretend to lay down the general rule that the word "the" included "any."

However with all this there is the fact that this same chapter 47 R. O. (1888) in ss. 3 and 4 provides for cases of mortgages of chattels and that it is provided therein that an affidavit shall be made by the mortgagee negativing the fact that the sale is made to hold the goods against creditors and in both sections the words "the creditors" are used. If the change from "the" to "any" was made in section 5 of Ordinance No. 7 of 1887 with the deliberate intention of narrowing the chances of perpetrating frauds, it is difficult to understand why the change should have not been made in sections 3 and 4. Sections corresponding to 3 and 4 were in Ordinance No. 5 of 1881 and were carried forward to No. 7

[7] 19 U. C. C. P. 78.

of 1887 without any change in this respect. The mere fact that a later statute uses language varying from that of a former statute on the same subject does not always indicate a change of intention on the part of the Legislature. (See cases collected in Maxwell on Statutes (2nd ed.) p. 391.) I have inspected the cases there cited and they bear out the doctrine they were cited in support of. I must confess however that in all these cases something appears to have been omitted in the later statute which was in the older enactment; and it seems to have been held that the prior enactments would have been open to the same construction if the words in question had been omitted. I cannot find a case just like this where the language of the older enactment was struck out and something else substituted. Judgment. Wetmore, J.

However in view of the fact that the words "the creditors" were the words used in the Ordinance of 1881 both in the sections relating to mortgages and the one relating to absolute assignments; that the same words are carried forward in the Ordinance of 1887 and in the Revised Ordinances so far as mortgages are concerned; that these are the words used in similar enactments in other Provinces of Canada, at any rate in Ontario and Manitoba; and especially in view of the fact that my learned brethren have unanimously arrived at the conclusion that there was no intention on the part of the Legislature to make a change, I have, with very great hesitation, arrived at the conclusion that the reason why the change was made in section 5 of Ordinance No. 7 of 1887 was that the person, who copied this Ordinance, committed a clerical error which was not detected and it has been since carried forward without being detected and the Legislature therefore had no intention to make any change. I think I can find authority for arriving at this conclusion by the remarks of Kelly, C.B., at the end of his judgment in the *Queen* v. *Beattie*.[8] I therefore, but as stated before with very great hesitation, concur that the appeal should be dismissed.

RICHARDSON, MACLEOD and ROULEAU, JJ., concurred with MCGUIRE, J.

Appeal dismissed with costs.

[8] L. R. 1 C. C. R. 251.

MOORE v. MARTIN.†

Practice—Writ of Summons—Defendant described within actually without jurisdiction—Regularity—Service ex juris — Order — Amendment — Concurrent writ—Power of Judge—English forms.

A writ of summons was issued in the form of a writ for service within the jurisdiction, in which the time for appearance was that fixed in such cases, and in which the defendant was stated to be a resident of the judicial district wherein the writ was issued. It appeared that the defendant was not in fact at the time within the Territories, but that, for portions of each of several years previous, he had resided within the said judicial district.

Held, per Curiam, following *Fry* v. *Moore*,[1] that the writ was not irregular.

Subsequently an order was made giving the plaintiff leave to serve the said writ on the defendant out of the jurisdiction and extending the time therein fixed for appearance; but the order did not expressly amend or authorize the amendment of the writ.

Held, WETMORE, J. dissenting, against the objection that a concurrent writ for service *ex juris* should have been issued, or that the original writ should have been amended that the Judge's order should be looked upon as involving an exercise of the powers given by E. M. R. 1037 (‡) and also as a constructive amendment of the writ.

Held, WETMORE, J. doubting, that none of the British forms of writs of summons are introduced into the Territorial practice.

Semble, Wetmore, J., dissenting, that the one form provided by the Judicature Ordinance is adaptable even to the case of foreign defendants *ex juris*., inasmuch as it is in effect a notice not a command.

Held, Wetmore, J. expressing no opinion, that on an application for leave to serve a writ out of the jurisdiction the plaintiff need show only a prima facie case within the provisions of the Ordinance.

[*Court in banc, June 10th, 1890.*

Statement. This was an appeal by the defendant from an order of ROULEAU, J., dismissing a motion to set aside the writ of summons and the same Judge's order allowing the service of the writ out of the jurisdiction.

The appeal was argued on the 5th June, 1890.

P. McCarthy, Q.C., for the defendant the appellant.

E. P. Davis, for the plaintiff the respondent.

† An appeal to the S. C. of C. was quashed on the ground that the decision appealed from was not a final judgment: Martin v. Moore, 18 S. C. R. 634. ‡ Jud. Ord. C. O. (1898) c. 21, r. 538.

[1] 23 Q. B. D. 395; 58 L. J. Q. B. 382; 61 L. T. 545; 37 W. R. 565.

[*June 10th, 1890.*] Judgment. Richardson, J.

RICHARDSON, J.—Defendant appeals from the order of Rouleau, J. (25th November, 1889), discharging a motion for defendant to have the Writ of Summons issued in this suit (26th December, 1888), set aside for irregularity, as also the Judge's own order allowing service of this writ out of the jurisdiction.

The grounds for this motion were:

(1) Writ issued without leave first had.

(2) Writ irregular in form.

(3) Writ not a concurrent writ.

(4) Order made on insufficient material.

The writ, as appears by the records, was the ordinary one, and by the statement of claim filed both parties were stated to be residents in the Judicial District of Northern Alberta. It issued 26th December, 1888.

The cause of action is stated to be within the cognizance of that Court.

From the material in this Court it appears that, though defendant was not then in the North-West Territories, yet for portions of each year for several years the defendant resided in Northern Alberta, and it may have been plaintiff's intention to keep this writ for service when defendant next came to the District, or to serve his agent if it should be discovered that he had one in the district.

The writ was therefore as was held in *Fry* v. *Moore*[1] regular on its face.

It then appears that on the 18th January, 1889, over three weeks after issue of the writ the plaintiff applied for and obtained a Judge's order authorizing service of this writ out of the jurisdiction and extending the time for defendant to appear to sixty days from service.

Defendant complained that this order was irregular.

By his own affidavit, 23rd March, 1889, he admits receiving the writ on the 15th February, 1889, and notice was served, on 12th April, 1889, on an application to set aside the

Judgment.
Richardson, J.

writ to be made on 16th April, 1889, the very last of the sixty days named in the order. The notice refers to this order and it may fairly be assumed that defendant got the order as well as the writ.

At this stage we have a plaintiff suing, and a defendant appearing and asking the Judge to set aside the writ and all other proceedings, and if not the writ, the other proceedings, for irregularity; the irregularity complained of being in effect that the order did not direct the issue of a new or concurrent writ in which the sixty days would appear, or the amendment of the writ already issued—a technical irregularity. It was not even questioned that defendant knew he was sued and for what he was sued. The proceedings shew that the defendant was in the North-West Territories and examined on his affidavit on August 20th, 1889.

The Judge after hearing the application with reference to this part of the case, no doubt being guided by English Marginal Rule 1037,‡ both sides being before him, dealt with the matter in the exercise of the jurisdiction thus vested in him as he then thought most fitting, which was that he refused to set aside for the irregularity but extended the time for defendant to appear. With regard to this rule 1037, in *Dawson* v. *Beeson*,[2] Jessell, M.R., said: "Nothing can be more distinct and valuable than rule 1037 which enables the Court to do justice without regard to technicalities." Lord Cotton: "I am not myself inclined to allow a party to take advantage of technical objections when he has not been deprived of the opportunity of defending himelf."

The defendant then sets up that, upon the facts as disclosed before the Judge, his order for service *ex juris* should have been set aside on the ground that the plaintiff's cause of action (if any) did not arise within the jurisdiction. It was, I think, never intended that more than a *prima facie* case of a cause of action within some of the sub-sections of section 29 of the Judicature Ordinance should be made out on the application to the Judge for leave to serve out of the

[2] 22 C. D. 504; 52 L. J. Ch. 563; 48 L. T. 407; 31 W. R. 537.

Judgment.
Richardson, J.

jurisdiction. It will be noticed that section 30 requires only that the affidavit shall state "that in the *belief* of the deponent the plaintiff has a good cause of action," and that it shall be made sufficiently to appear to the Judge that the case is a proper one for service out of the jurisdiction. It does not limit the mode of so making it appear to the affidavit. It does not require that it shall so appear upon oath even of the belief of some person. It may "appear" from the part of the affidavit which shows the grounds on which the application is made, or from a perusal of the proposed statement of claim, or in any other way which will satisfy the Judge's mind as to its being a case proper for service out of the jurisdiction. Therefore, as far as the existence of a cause of action is concerned, all that is required is an affidavit of the belief of the deponent that the plaintiff "has a good cause of action," and then whether it is such a case as is proper for service out of the jurisdiction, which doubtless means, among other things, that it is one that can properly be tried here; if that "sufficiently appear" to the Judge, he has authority to grant the order for leave. From a perusal of the matter before the Judge, I think it was shown that the plaintiff had a probable cause of action in the jurisdiction, and that on the merits the order was one which, if drawn up properly, the Judge was authorized to make. Therefore it seems to me that it is not open to raise an issue as to there being an *absolute and indisputable* cause of action within the provisions of section 29. If he could, and if the order must be set aside, should the Judge, after hearing all that could be said or shewn *pro* and *con*, be of opinion that there is really no such cause of action disclosed, then a defendant resident out of the Territories may, in every case where he denies the plaintiffs entire cause of action, have the whole merits of the case tried and virtually disposed of (except perhaps as to the extent of the relief due the plaintiff) on an interlocutory application, without the defendant admitting an intention of submitting himself even for an instant to the jurisdiction of the Court. Therefore I think we ought not to set aside the Judge's finding on that point

Judgment. Richardson, J.

as to the existence of a proper case for service, seeing that an affidavit, as required by section 30, and other material was before him, on which he might properly exercise his discretion of granting leave for service out of the jurisdiction.

It follows also that the defendant did more than he should have done in the exercise of his right of moving against the order in question. In his notice of motion he moves on the ground that "in view of all the circumstances of the case the Judge should not have granted the order." These words are wide enough to admit every tittle of evidence which the parties could have adduced at the trial; and that the defendant interpreted them as liberally is apparent from the material referred to in the notice of motion. Looking at the affidavit of the defendant and the exhibits therein referred to, and the affidavits of Messrs. McCarthy, Barber and Lougheed, the examination and cross-examination of the defendant and the examination of the plaintiff, to all of which the defendant was a consenting party, and the most of which was at his express instance, it would seem that he left little if anything to be heard on a trial which he did not put forth on that motion. It may be said that, so far as any matters were tendered by him to the Judge, which were not proper to be admitted on such a motion, the plaintiff might have objected to their being considered, but the reply to that is that the defendant chose to offer these matters and to raise questions for the decision of the Judge, which should have not been raised, if he was there only to object to the irregularity of the writ and order. Has he not by his own conduct submitted himself to the jurisdiction of the Court in asking practically for judgment on the merits, or, as he puts it, on "all the circumstances of the case"? but whether he has done so or not it is not now necessary to decide in the view I take on this appeal; and I express no opinion thereon. But leaving that question aside for the present I think the order was right, at any rate, as far as it went.

But it is said that the writ stating that the defendant should appear in ten days, notwithstanding the order said sixty days, was in that respect irregular and inconsistent with

the order. Had the order required the writ to be amended and "sixty" substituted for "ten" would not that have anticipated this objection? Where the defendant is to be served in another Judicial District the Ordinance expressly provides that the time for appearance shall be twenty days, and by implication the Clerk should vary the Form of Writ of Summons given in the appendix by changing "ten" to "twenty." Instead of itself fixing the time for appearance in cases of service out of the Territories the Ordinance delegates to the Judge the duty of fixing the time. Strictly therefore if the order is obtained after the issue of the writ the Clerk should be directed to amend it in accordance with the order. That was not done, but what was practically equivalent thereto was done, the order itself was served with the writ on the defendant. Did the inconsistency between the writ and the order mislead or embarrass him? Did he consider that the writ was the superior and more authoritative document and that unless he set it aside he was thereby required to appear in ten days instead of sixty as in the order? Did he fear judgment might be signed at the end of ten days? We know, of course, that he actually ran no such danger, but how did it affect his mind? how did he understand the writ and order taken together? His actions shew that he interpreted the combined documents just as if the actual amendment had been made in the writ, instead of the constructive amendment, by service of the order. He was bound to know the law giving the Judge paramount authority over the time to be allowed for appearance; he was informed by the copy of order served on him that the Judge had exercised that authority; and, most important thing of all, he recognized the authority of the Judge, and that the time was fixed at sixty days, by taking the full sixty days to make the first move in the matter. Can he be allowed to take the full advantage, as he undoubtedly did, of the benefits of the order, and then seek to escape the onerous part? Ought he not to have acted promptly instead of waiting till the last grain of sand was passing down the hour glass? I think so, and that he ought not to be heard to complain of the slight

Judgment.
Richardson, J.

Judgment. Richardson, J.

irregularity or oversight in not changing the word "ten" to "sixty"—an oversight which he could not say had misled or prejudiced him, since he evidently understood the order as in effect making the necessary amendment, and acted and relied on its having done so. The spirit, if not the letter of sub-section 32 of section 8 of the Interpretation Ordinance should be applied, and slight deviations from prescribed forms or practice, not affecting the substance or calculated to mislead, and which could not and did not mislead, ought not to prevail to the prejudice of the party innocently making such deviations, and to the advantage of a party who has not the faintest trace of merit in his favor. But it is then argued that even amending the writ would not do, that a concurrent writ should have been issued by leave of the Judge, and the sixty days inserted therein. It is not necessary to decide on this application the doubtful point whether by implication the Ordinance of 1886 § in effect required the order for leave to serve the writ to be obtained before the issue of the writ, so that the Clerk might issue it with the proper number of days filled in; although it may well be contended that as the Ordinance, as amended in 1887, provided that the writ in "every action * * * shall be issued by the Clerk upon a præcipe, &c.," and nowhere says that an order shall be required giving leave to issue it; that as section 28 was subsequently changed so as to require the order for service to issue before the writ, and section 17 by adding a sub-section to the effect that, in cases where the defendant resides out of the jurisdiction, the writ should be returnable in such number of days as the Judge shall order—amendments which evidence an intention that the Clerk should have the order to enable him to insert the proper number of days—the Legislature thereby implied that, but for such amendments the order need not be obtained before the writ issued, since otherwise such amendments would have been unnecessary except perhaps to make the matter more clear.

It was urged that from the use, in section 15 of the Ordinance then in force, of the words "except in the cases in

§ R. O. (1888) came into force 1st March, 1889.

Judgment.
Richardson, J

which a different form is hereinafter provided," ‖ and there being no such different form in that Ordinance provided, section 442 †† introduced the English form of writ for service out of the jurisdiction. I think that is not so; that section 442 limits the introduction of English forms to "all other matters," that is, matters other than the matters expressly dealt with and provided for in our appendix. Now a writ of summons is a matter so provided for. Again our form of writ seems advisedly framed to meet all the cases, in which ten different forms of writ, supplemented by a notice of writ in cases of foreigners out of the jurisdiction, are provided in England. Our writ is, in form, a notice itself, and may be served on a foreigner. If the English form of writ were introduced in some cases, then a writ which is essentially different from our common writ would be used; one in which the defendant is "commanded" to appear, whereas in the ordinary writ here he is simply "notified" that he has been sued. I think the English forms of writ are not introduced here. I think, I say, that it is not necessary to decide that point here, since in this case the defendant was described in the præcipe as residing *in* the Judicial District, and the writ was therefore regularly issued. The evidence shews that it was not unreasonable to so describe him—there is here no evidence that this description was fraudulently inserted. Now when the plaintiff found that he might have to wait too long if he delayed service until the defendant returned to the District, it seems to me he properly applied for leave to serve it in England. Was he required to abandon the writ issued and commence *de novo* or, as is suggested, must he issue a concurrent writ? I do not think he was bound to do either. He had properly commenced his action; the next step was the service of the writ. I see no necessity for requiring him to abandon the writ issued, nor do I think that a concurrent writ was necessary or appropriate; a concurrent writ:—concurrent to what? For as there was only one defendant and

‖ See Jud. Ord. C. O. 1898, c. 21, r. 1.
†† See Jud. Ord. C. O. 1898, c. 21, r. 535.

Judgment. Richardson, J.

the intention now was to serve him in England, had such a concurrent writ issued the original would have been practically useless. I do not mean to say that it might not have been issued, if the plaintiff desired to have the double chance of serving it here or in England, as occasion might offer. I think therefore that the strictly proper procedure was to have ordered the amendment of the writ; but I also think that the annexing of the order to it was substantially and in effect such an amendment, and that, as the defendant was guilty of great laches and has suffered absolutely no damage by the irregularity, and there is not a particle of merit in his application, we will, in view of the principle laid down by Lord Cotton in *Dawson* v. *Beeson*,[2] as already cited, be acting in the interests of justice in dismissing the appeal with costs.

MACLEOD, ROULEAU and MCGUIRE, JJ., concurred.

WETMORE, J.—I regret that I am unable to concur in the judgment of my learned brethren in this case. The defendant sets up three objections which it is necessary for me to consider in the view I take:

(1) He seeks to set aside the writ of summons.

(2) He seeks to set aside the order of the Judge;

(*a*) Because it directs the writ of summons, which had been already issued, and which was a writ for service within the jurisdiction, to be served without the Territories.

(*b*) Because, as I understand the point raised, if the plaintiff has a cause of action, (a fact which the defendant neither admits or denies) when the facts are known it is not a cause of action with respect to which the Judge had authority to make an order for service *ex juris* under Section 27 of The Judicature Ordinance, 1886.

The statement of claim was filed and the writ of summons issued on the 26th December, 1888, the Judge's order was made on the 18th January, 1889. These proceedings were therefore taken or claimed to be taken under The Judica-

ture Ordinance, 1886, and not under The Judicature Ordinance Chapter 58 of the Revised Ordinances which did not take effect until 1st March, 1889.

The statement of claim filed alleged that the plaintiff resided near the town of Calgary in the Judicial District of Northern Alberta and that the defendant resided at Sheep Creek in the said judicial district. On this statement of claim the Clerk issued the ordinary writ of summons for service within the judicial district requiring the defendant to appear within ten days from the date of service. That is the only writ of summons issued; and it is to that writ that the order of the learned Judge, which is objected to, refers. That part however is quite regular; the clerk did just exactly what section 15 of The Judicature Ordinance, 1886 (which I will hereafter call "the Ordinance") directed him to do; therefore so far as that point is concerned, I concur in the judgment of the majority of the Court and have nothing to add.

But in my judgment the order of the learned Judge granting leave to serve that writ of summons *ex juris* is bad and should be set aside. I am very much impressed with the point urged by Mr. McCarthy that the writ for service *ex juris* should be in the form of the writ for service out of the jurisdiction, provided by the English rules, varied to comply with the requirement of section 442 of the Ordinance to make it applicable to proceedings in this Court; because it may be that no other construction of the Ordinance will give effect to the words in section 15 as substituted by section 2 of Ordinance No. 3 of 1887—"except in the cases where a different form is hereinafter provided." It may be however that Mr. Davis' contention is correct that if this is so, the form of writ of summons in the appendix to the Ordinance, inserting the term for appearance specified in the Judge's order giving leave to issue a writ instead of ten days, would be a proper form varied to make it applicable to proceedings in this Court; and I think there is a very great deal in the suggestion that the form of writ in the

Judgment. Wetmore, J.

appendix to the Ordinance is one for use in the Clerk's office and must therefore under section 442 be subject to variations to suit the circumstances. It is not necessary for me to express any decided opinion on that point however, because I am of opinion that the writ, in the form of that which the leave was given to serve, was not in the proper form; that is, as the Judge had by his order directed that the defendant should have sixty days to appear, he should not have ordered a writ to be served upon him *ex juris* whereby he was commanded to appear in ten days. I use the word "commanded" advisedly. A distinction has been attempted to be drawn between the English writs of summons both for service within and beyond the jurisdiction and the writ of summons under the Ordinance; the one has been designated as a command, the other as a notification and request. I am unable to discover the distinction. It is true the summons under the Ordinance "notifies" the defendant that an action has been entered against him by the plaintiff; but it "commands" him to appear if he intends to dispute the claim.

To return however to the point under consideration: section 2 of Ordinance No. 3 of 1887, which repeals section 15 of the Ordinance and substitutes a new section in lieu thereof, provides that *every action* shall be commenced by a writ of summons in the form given in the appendix "except in cases where a different form is hereinafter provided." I propose to deal with the case as if the words I have placed in quotation marks were not in the section. The section then goes on to prescribe that the writ shall be issued by the Clerk upon receiving from the plaintiff or his advocate a præcipe therefor, in which shall be set forth the names of the parties to the action and their places of residence, etc. Now the Ordinance or the amendment of 1887 never contemplated that the form of 1887 should never be varied. In fact such a construction would be entirely at variance with section 442 which provides that the forms in the appendix shall be used * * * with such variations as the circumstances may require. Then there are other sections in

the Ordinance, which clearly point out that the Legislature contemplated that this form not only should, but *must*, be varied under certain circumstances. It must be borne in mind that the power of the Court to bring within its jurisdiction persons who are resident without it, is not inherent in the Court; it was not inherent in the Courts at Westminster. It is an extraordinary power given by virtue of the Statute in England; by virtue of the Ordinance here. When therefore the Courts undertake to exercise that power, in my judgment they must strictly follow the legislative authority. Now I can find no authority in the Ordinance by which a person outside of the Territories can be brought into Court by a Judge's order. The process, by which the Legislature contemplated he should be brought into Court, was the writ of summons; it must have contemplated, I think, that that writ should specify within what time he should appear. It seems to me the Legislature would be open to the charge of incongruity in its language, if we were to hold that it contemplated that the person should be solemnly commanded by process under the seal of the Court to appear within ten days when, as a matter of fact, he was to have sixty; and in my judgment we should so read the Ordinance as not to lead to that result, provided that it is capable of being so read. If not capable of such a construction, however we cannot help it. I am of the opinion that the Ordinance can be readily construed so as to avoid such incongruity. I will now proceed to construe the Ordinance affecting the point raised as it strikes my mind.

Section 17 of the Ordinance as amended by section 4 of Ordinance No. 3 of 1887 provides that when the defendant resides in the judicial district whence the writ of summons issued, the writ shall be returnable in ten days from the service upon the defendant; and when he resides in a judicial district other than that in which the writ issued, the writ shall be returnable in twenty days from the service thereof; and there the provisions of that section stop. Now I would call attention to the fact

Judgment. Wetmore, J.

that here is a case at once where the Legislature contemplated that the form of the writ of summons in the appendix to the Ordinance must be changed, namely; where the defendant resides in the Territories but out of the judicial district from whence the writ issued; then the time for appearance is to be changed from ten days to twenty days. I will now proceed to work the matter out. A plaintiff wishes to bring an action, he files his præcipe shewing that the defendant resides within the judicial district, the clerk wants nothing more in order to give the time which he shall state in the writ for appearance; under section 17 he gives it as ten days; that is clear. Again a suit is about to be brought, the plaintiff files his præcipe shewing that the defendant resides in the Territories, but without the judicial district, the clerk's duties are equally clear; under section 17 he gives the time for appearance as twenty days. But take the next case, a suit is about to be brought, the plaintiff files his præcipe shewing that the defendant resides out of the Territories, what is the clerk to do? What time for appearance shall he fill in? This is the clerk's duty and section 17 does not provide for the case. There is nothing in the Ordinance specially providing for it in my judgment; that is, there is nothing in the Ordiance which especially provides what the clerk's duties in this case are. Section 27 however contemplates that a writ may be issued in such a case under certain circumstances or for certain causes of action. It may be contended that section 29 provides for it because it provides that the order, giving leave to effect service of such a writ out of the jurisdiction, shall limit the time for appearance and therefore by implication that is a direction to the Clerk to fill in the time for appearance in the writ. That is a very inartistic method of providing for this in my judgment, nevertheless I would have no hesitation in adopting this view if I did not think the Legislature intended to bring this about in a more clear and artistic manner. But supposing we are driven to rely upon this order for leave to serve as the authority to the clerk to fill

Judgment.
Wetmore, J.

in the time for appearance, it is clear that the clerk could not fill in the time for appearance, until he got the order, or in other words that the order must be obtained before the writ was issued and that the clerk cannot issue the writ without it. That seems to me a clear indication that the writ for service *ex juris* cannot be issued without some order of a judge. If that is so then it seems to me that an order which directs that a writ regularly issued for service within the jurisdiction may be served without the jurisdiction is a bad order. But I go further. I think there is no express provision in the Ordinance for the *guiding of the clerk* as respects the issuing of such a writ. What must we do in that case?

Section 456 provides that, when no other provision is made by the Ordinance, the procedure and practice existing in England on the first day of January, 1885, shall (adapted to the circumstances of the Territories) be followed as nearly as may be. We therefore must look to the English practice in existence at that date. We find that Order 2, rule 4 of the English Rules of 1883 provides that "no writ of summons for service out of the jurisdiction * * * * * shall be issued without leave of the Court or a Judge." Why should we not hold that this provision of the rule was intended by the Legislature to apply here. There is no express provision for or against it in the Ordinance; it cannot be said to be unadapted to the circumstances of the Territories. It affords a means of working out artistically and without any incongruity the provisions of the law relating to the issuing of writs for service *ex juris*, and therefore in my judgment the Legislature intended that that Rule should form part of the practice. I therefore think the order complained of is bad, because it directed a writ to be served out of the jurisdiction, which was issued for service within it, and which could not under the practice be regularly served without.

It has been suggested however that, assuming the order to be bad, it is merely an irregularity, and

Judgment. Wetmore, J.

that the defendant has by his conduct waived it. Now I do not hold that this is more than an irregularity, or that it was a nullity, or that defendant could not by any conduct waive it. I express no opinion upon that point. I simply hold that, if the defendant could waive it, he has not done so in my judgment. I would just beg leave in this connection, and before going further, to state that Mr. Davis, the learned Counsel for the plaintiff, who seems to be a very astute lawyer and a gentleman not likely to let a point escape him in the interest of his client, did not venture to put forward any such proposition. But how is it claimed this waiver has been effected? It is set up that he has done so by practically asking the learned Judge and the Court to consider the merits of the claim. I do not think he has done so. He comes to Court and says the order is bad, because the Judge has directed or given leave for a writ to be served on him which ought not to have been served on him; and, secondly, because there are only certain specified cases in which an order for service *ex juris* can be made, and, although it appears *prima facie* from the affidavit on which the order was made that the cause of action comes within one of the specified cases, as a matter of fact when the facts are all brought out it is not; the facts were not all before the Judge, and now the facts are brought out the order ought not to have been made and should be set aside. The defendant does not admit or deny his liability, he simply states this is not a case in which an order ought to have been made. I cannot appreciate how it can be held that a person, attacking an order and saying that it is bad, has by the assertion of one of the objections to its validity waived his objections to it. Again it is suggested that the defendant has waived his objections to this order by his laches in waiting until the last moment for appearance before he attacked it. The learned Judge saw fit to give sixty days for the defendant to appear; why? I presume because he was of opinion that he ought reasonably to have that time to correspond with his advocates on this side of

the water and decide what action he would take. If that was necessary, why should he not come in at the last moment and object to the procedure against him? But apart from this, no fresh step was taken by the plaintiff in the case, before the defendant applied to have the proceeding set aside; in fact the plaintiff could not take a fresh step until the time for appearance had expired. But apart from this I do not think that a person, who is without the jurisdiction of the Court and is sought to be brought in by an extraordinary procedure, can be held to waive a mistake of this sort by mere delay; that is, if the defendant had lain by and allowed judgment to go against him, he could even then have come in and said:—you have no jurisdiction over me at all; I am resident out of your jurisdiction; you have ordered an unauthorized process to be served on me which you had no right to do; the process was unauthorized in form; it was issued upon a cause of action in which you had no right to issue it and I have done nothing on my part which can be construed as a recognition of your right to bring me before you and I protest. *Fry* v. *Moore*,[1] which has been referred to, I think is authority for my position. That case is in some respects similar to this, but different in others. The defendant in that case was out of the jurisdiction; a writ was issued for service within; the Court held that writ valid, but an order for substituted service was made; a substituted service within the jurisdiction, mark, and the writ was served under such order; still the Court held the order bad and I have no doubt would have set it aside, although the application was made after judgment, had not the defendant recognized the validity of the proceeding by making two applications to the indulgence of the Court to have the judgment set aside and to be allowed to come in and defend. In this case, however, the defendant from the very start attempts to hold the Court at arm's length and insists that he has not been properly brought before it. But it is said that the Judge's order is equivalent to an order to amend the writ. I cannot view it in that light; it says

Judgment.
Wetmore, J.

Judgment. Wetmore, J.

nothing about an amendment, and I think if on such an order the clerk had amended the process he would have done wrong. The persons who obtained the order did not view it in the light of an order to amend, because they never did amend. I think after treating the order just as it appears to me; namely, an order for leave to serve, without any pretence that it was an order to amend, they cannot then amend when the order is attacked and say it is an order to amend.

I will just add in conclusion that I do not think marginal rule 1037 applies because in the first place the Judge did not act on that rule; he did not either set aside the order in whole or in part or amend it or otherwise deal with it; he just dismissed the application. But if he had attempted to do so, I think he had no power, or ought not, to have done so; especially in view of the fact that the defendant was not resident within the jurisdiction when served. To amend would be by an *ex post facto* act of the Judge to give a retrospective operation to his order, the writ and the service, which they did not have when the writ was served. I do not think authority can be produced for any such exercise of power. I express no opinion upon the question raised whether under the facts disclosed the causes of action against the defendant were within the provision of section 27 of the Ordinance, because I think, for the reasons I have stated, the appeal should be allowed and the order of the learned Judge and all subsequent proceedings set aside.

Appeal dismissed with costs.

LOUGHEED ET AL. v. PRAED ET AL.

Practice—Discovery—Interrogatories—Service with writ ex juris—Ex parte order—Incorporation of English practice.

The Judicature Ordinance R. O. 1888, c. 58, s. 479, enacts: "When no other provision is made by this Ordinance, the procedure and practice existing in England on the 1st January, 1885, shall (adapted to the circumstances of the Territories), be held to be incorporated as part of this Ordinance."†

English Order 31, is intituled "Discovery and Inspection." Rules 1-11 of that order deal with discovery by interrogatories, and do not appear in the Judicature Ordinance. The remaining rules 12-13, with some slight modifications, do appear therein under the same title, ss. 144 *et seq.*

Held, that the practice and procedure laid down by English O. 31, rr. 1-11, were incorporated in the Judicature Ordinance by s. 479.‡

Per WETMORE, J.: Section 185 of the Judicature Ordinance R. O. (1888), c. 58,§ is intended only for the purpose of perpetuating testimony or obtaining evidence to be used at the trial, and not for the purposes of discovery. *Contra* per RICHARDSON, J.

Concurrently with an order for service *ex juris*, an order was made *ex parte* giving the plaintiffs leave to deliver interrogatories with the writ of summons.

Held, ROULEAU, J., dissenting, that as the material in support of the order did not profess to show grounds as provided by Jud. Ord. s. 402,‖ to satisfy the Judge that "delay caused by proceeding in the ordinary way" (*i.e.*, on notice) "would or might entail irreparable or serious mischief," the order ought not to have been made *ex parte*: *Young* v. *Brassey*,[1] discussed.

[Court in banc, June 10th, 1890.

Statement.

This was an appeal from an order of ROULEAU, J., discharging a summons to set aside an order made by him *ex parte*, permitting the plaintiff to deliver interrogatories to the defendants along with the writ of summons and statement of claim; the defendants being resident out of the

† See now the Jud. Ord. C. O. 1898, c. 21, s. 1, for a somewhat similar provision.

‡ This, it is submitted, is no longer so. See Ord. No. 21 of 1900, s. 2, striking out the words "to answer interrogatories, or" in J. O. s. 151, and ss. 32 *et seq.* introducing the system of *viva voce* cross-examination for discovery; now C. O. (1898) c. 21, rr. 201 *et seq.*

§ Now C. O. (1898) c. 21, r. 267.

‖ Now C. O. (1898) c. 21, r. 458.

[1] 1 C. D. 277; 45 L. J. Ch. 142; 25 W. R. 110;

Statement. jurisdiction of the Court and an order to serve the writ out of the jurisdiction having been obtained by the plaintiffs.

The appeal was argued on the 4th June, 1890.

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

P. McCarthy, Q.C., and *E. P. Davis*, for the plaintiffs respondents.

[*June 10th, 1890.*]

WETMORE, J.—The defendants in this case resided without the North-West Territories and the learned Judge made an order for service of the writ of summons upon them *ex juris*. At the same time, but by another order, he granted leave to the plaintiff to deliver to the defendants and each of them interrogatories in writing and ordered that the same might be delivered at the time of the service of the writ of summons and statement of claim and that the defendants and each of them should answer such interrogatories by affidavit within the time required for delivering the statement of defence; he also by the same order directed that the defendants should make discovery of documents.

The defendants, Praed and John Maurice Lloyd applied to have this order, in so far as it related to the interrogatories, set aside. In the first place it is contended for the appellants that the Judge had no power to order discovery by interrogatories because while rule 12 and some following rules of English Order 31, relating to discovery of documents, have been substantially with some slight alterations incorporated into The Judicature Ordinance, rules 1 to 11 inclusive, relating to discovery by interrogatories, have been left out altogether; and this, it was contended, was indicative of the intention of the Legislature not to adopt the practice of discovery by interrogatories. It is urged on behalf of the plaintiffs that the practice of discovery by interrogatories is made applicable to the Territories by section 479 of The Judicature Ordinance, or if not, discovery by interrogatories is authorized by section 185 of the Ordinance.

Judgment. Wetmore, J.

Section 185 is taken from marginal rule 487 of the English rules (O. 37, r. 5), with this difference, that while the English rule merely provides that the Court or Judge may make any order for the examination upon oath before the Court of any witness or person, section 185 of the Ordinance provides that an order may be made for the examination of such person upon oath "*viva voce* or by interrogatories in writing"; and it is claimed that the insertion of these words "or by interrogatories in writing" gives the power to order discovery by interrogatories under this section. This section 185 is placed under the heading "Examination of Witnesses;" and the corresponding rule to the English Orders (O. 37, r. 5), is placed under a similar heading. The English rules relating to discovery by interrogatories are placed under the heading "Discovery and Inspection." I can find no English case where O. 37, r. 5, has been used for the purpose of discovery. It has been used merely for the purpose of obtaining or perpetuating testimony to be used on the trial; it is the rule under which Commissions for the examination of witnesses abroad are issued; and *in re Hewitt, Ex parte Hewitt*,[2] it was held that the rule was not intended to be used for the purpose of discovery. I am aware that, by decisions in the Ontario Courts, it has been held that a similar rule there can be used for the purpose of discovery; but I prefer to follow the English authorities. I think they must be more familiar with the reasons for framing the rule and what it was intended to cover; moreover the Ordinance itself indicates that the section is taken from the English rule; that is the meaning of [E 487] at the end of the section; and besides section 479 adopts the English practice when no other provision is made. Now does the insertion of the words "*viva voce* or by interrogatories in writing" in section 185 carry it any further than the English rule corresponding. I do not think it does. As before stated it is under a similar heading to the English rule, and the authority to examine *viva voce* or by interrogatories is merely

[2] 15 Q. B. D. 159; 54 L. J. Q. B. 402; 53 L. T. 156.

Judgment. Wetmore, J.

declaratory of what the practice was under the English rule, because under that rule the Judge could order the witness to be examined *viva voce* or by interrogatories or both; see the form of long order for a commission, Form No. 37, Appendix K of the English rules. I may also refer to section 198 of the Ordinance as shewing that the evidence taken under section 185 is taken with a view of being used at the trial. I am therefore of the opinion that section 185 was not intended to be used for the purpose of discovery.

Then are the provisions of Order 31 relating to discovery by interrogatories in force in the Territories. I think they are. The language of section 479 of the Ordinance seems to me to be as plain as English can make it. It seems to me that in order to ascertain whether a certain procedure or practice in England is in force here, so far as the practice of the Court is concerned, just three questions are necessary: 1st. Does the Ordinance make any other provision respecting that particular procedure or practice. 2nd. Did it exist in England on the 1st January, 1885? 3rd. Is it adapted to the Territories? If the first question must be answered in the negative and the two others in the affirmative then the practice or procedure is incorporated as part of the Ordinance. Then what have we in this case. 1st. No provision is made for the discovery by interrogatories in the Ordinance. 2nd. The practice relating to such discovery existed in England on the first January, 1855. 3rd. It is adapted to the Territories. I can see no reason nor has any reason been advanced why it is not. If this effect is not given to section 479 I cannot understand what use it is at all or what meaning it has.

The next question that arises is whether the learned Judge was correct in making the order *ex parte*. The only authority relied upon for making such an order was *Young* v. *Brassey*.[1] That case was decided under the English rules of 1875 and seems to be cited in the text books, or some of them, as authority for making such order *ex parte* at the time of giving leave to serve a writ of summons *ex juris* when

the defendant resides abroad. I do not think the case bears out such a proposition. As before stated, it was decided under the rules of 1875. Rule 1 of Order 31 of the rules of 1875 (see Rodgers Jud. Prac. 252) is quite different from Rule 1 of Order 31 of the Rules of 1883. By the rule of 1875 the plaintiff might at the time of delivering his statement of claim, or at any time not later than the close of the pleadings, and the defendant at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, and without any order for the purpose deliver interrogatories for discovery; and either party could *at any time* by leave of the Court or a Judge deliver such interrogatories. This was applicable to all cases. By the rule of 1883, however, it is only in actions, where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, that the plaintiff or defendant may without order deliver such interrogatories; in these cases this may be done at or after the delivery of the statement of claim or of the defence as the case may be. In all other cases no interrogatories for discovery can be delivered without leave; and the very important provision, that this leave may be obtained *at any time*, is left out of these rules. I can find no case under the late rules where an order for leave to deliver such interrogatories has been made *ex parte*. On the contrary, in every case I have found that there has been an application by summons and, I should judge too, that the summons was granted after appearance by the defendant. Of course I have reference only to discovery under Order 31, and no reference to interrogatories administered in Chancery in support of a bill filed. The procedure laid down in Daniell's Chancery Practice is by summons. Section 402 of the Ordinance provides that except on motions or applications for orders to shew cause only, no motion shall be made without previous notice to the parties affected thereby; but the Court or Judge, if satisfied that delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make an order *ex parte* upon such

Judgment.
Wetmore, J.

Judgment. terms, etc. I cannot see that proceeding in the ordinary
Wetmore, J. way in this cause, if that means by summons or notice of motion after the party had appeared, would have entailed irreparable or serious mischief. In fact why should it be assumed, before the defendants appeared that they intended to do so. If they had not appeared or defended the suit, I cannot see why in this case it would have been necessary to administer interrogatories at all. Again section 415 provides that every application at Chambers, not made *ex parte* or on notice, shall be made by summons. Then section 416 provides that every application for payment or transfer out of Court made *ex parte* and every other application made *ex parte*, in which the Judge thinks fit so to require, shall be made by summons. Now I cannot understand what these sections can mean, unless I adopt what has always been my impression in such matters, namely; that there are certain applications which either from their very nature or from necessity, must be *ex parte*, and there are also certain other applications which, by the established course of practice or by virtue of some rule or enactment, are made *ex parte*. Then, if this is correct, unless the application comes under one or the other of these exceptions, it must be upon motion, by summons or notice of motion as the case may be. I cannot see that this application came under either of the exceptions; and therefore I think the learned Judge was in error in making the part of his order relating to delivery of interrogatories *ex parte*, and that the appeal should be allowed and that part of the order be struck out, and that the appellants should be allowed their costs of this appeal. As to the costs of the application to strike out, as this is a matter of practice and I am not aware what rule the learned Judge has established in similar points of practice in his district, I would leave him to deal with the question whether the plaintiffs should be ordered to pay the costs of the application before him to strike out that part of his order, or whether they should be costs in the cause to the defendant, or whether the defendant should have them in any event, and to make an order accordingly.

Judgment. Richardson, J.

RICHARDSON, J.—I agree with my brother Wetmore that this appeal must be allowed, on the ground that the Judge was not authorized upon the material before him to make an *ex parte* order.

I differ from him however as to the interpretation of section 185, which I think confers the power upon a Judge, sufficient material being adduced before him, and it appearing necessary for the purposes of justice, to order the administration of interrogatories at any stage of the cause, and English O. 31 rr. 2-11 prescribe the machinery necessary for carrying into effect such an order.

MCGUIRE, J.—I wish to state that while I agree, with the rest of my brethren who concur in the judgment just delivered by my brother Wetmore, in the conclusion arrived at, I do not agree with *all* the reasons urged by my brother Wetmore. I arrive at the same conclusions, but on other grounds.

First, because the Judicature Ordinance provides that all motions (with some exceptions not affecting this case) are to be *on notice*, unless it be shown to the satisfaction of the Judge that delay would cause irreparable or serious loss. But this was not the ground on which the order was made here, and there was no material to satisfy the Judge that irreparable or serious loss would arise from delay.

But it is urged that *Young* v. *Brassey*[1] decides that an order for particulars may be *ex parte*, in cases where the defendant resides out of the jurisdiction, but I do not think it goes so far. If, which I greatly doubt, the whole of the judgment of Hall, V.C., is reported in the Law Reports, I must say that the judgment is a very bald one indeed. It is very shortly reported and does not give the reasons for the Judge's conclusions. None of the material is set out. It was an application for an injunction and an order granting leave to issue the writ and serve it out of the jurisdiction.

Now it may be assumed, no reasons being given, that the very material, showing that irreparable or serious loss would

Judgment. McGuire, J.

probably result from delay, which is called for by our Judicature Ordinance was before the Judge in asking for the injunction; that might be the reason for the order being made *ex parte*; and *our* Ordinance would in that case permit an order *ex parte*; but it is not claimed that the order was so made in this case. The Judge did not grant it upon that ground; so that if we had all the material before us, which was before the Judge in *Young* v. *Brassey*,[1] we would probably find that the case is not applicable, and I am therefore of opinion that *Young* v. *Brassey*[1] cannot be any authority whatever in this case.

Again a change has been made in the law since the date of the decision in *Young* v. *Brassey*,[1] by the addition of Marginal Rule 344 (O. 31, r. 2), which says that the Judge in considering the application for the order for interrogatories *shall* take into consideration any offer made by the defendant to produce documents or make discovery; he *must* take these offers into consideration—that clause was not in the rules when *Young* v. *Brassey*[1] was decided If there was any doubt as to whether it could be made *ex parte* that section takes away the doubt, because I think that shows that it was contemplated by the rules that the defendant should be before the Judge, since otherwise the Judge would not know what offers if any were made. For these reasons I think *Young* v. *Brassey*[1] does not apply, and that the appeal should be allowed.

MACLEOD, J., concurred.

ROULEAU, J.—I am sorry I can not arrive at the same conclusion as my learned brothers.

Order 31, rule 1, reads as follows:

"In any action where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, the plaintiff may at any time after delivering his statement, of claim, and a defendant may at or after the time of delivering his defence, without any order for that purpose, *and in every other cause or matter*, the plaintiff or defendant may

Judgment. Rouleau, J.

by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite parties, etc." If I read this order correctly, the Judge has full discretion and power to give leave to deliver interrogatories *at any time*, in any cause or matter, except "in any action where relief by way of damages or otherwise is sought, etc." If so, then, when a writ is to be served out of the jurisdiction, the Judge has full power and discretion to grant leave to serve interrogatories at the same time as the writ of summons, on the authority of *Young* v. *Brassey*,[1] which decides that when leave is given to serve a writ out of jurisdiction, leave may also be given to serve interrogatories *therewith*. I must add that this authority is cited as the present law by all the latest text books, viz.: the last edition of Wilson's Judicature Act, Daniel's Chancery Practice, and the Annual Practice of 1888-89; and taking into consideration that Order 31, rule 1, is the same as that of 1875, and consequently is still the law under which *Young* v. *Brassey*[1] was decided, I cannot understand that I am not bound by that authority, when no contradictory authority can be given.

Therefore if that practice is correct, as a matter of course the application must necessarily be *ex parte*; otherwise the object in delivering interrogatories with the statement of claim, when served out of jurisdiction, would be defeated; because I cannot understand how the Judge may give leave to serve interrogatories, if the party has to ask for a summons to show cause why interrogatories should not be delivered at the same time as the statement of claim. The Judge has either power to give leave to serve interrogatories at the same time as the statement of claim, or he has not. If he has, he must necessarily have power to grant that leave *ex parte*.

Therefore under these circumstances, and for the above reasons, it is my opinion that this appeal should be dismissed.

Appeal allowed with costs.

SHOREY ET AL. v. STOBART ET AL.

Fraudulent judgment—13 Eliz. c. 5—Assignment—Equities—Value—Notice.

The assignee of a judgment, void as against creditors under 13 Eliz. c. 5, takes the judgment subject to the rights of the creditors, notwithstanding the assignment is for value, and, *per* ROULEAU and MCGUIRE, JJ., without notice, *per* WETMORE, J., at all events, with notice.

Totten v. *Douglas*[1] discussed.

ROULEAU, J., *February 17th, 1890.*

[*Court in banc, June 10th, 1890.*]

Statement. The pleadings in this case were in substance as follows:

Statement of claim:

For some time prior to the 19th March, 1888, E. H. Riley was carrying on business, and was indebted to the plaintiffs and defendants in large sums of money, and had become greatly embarrassed financially and unable to pay his debts in full, and was then in fact insolvent.

Shortly prior to the said date E. H. Riley and one Georgina Jane Hornsfield Riley, his mother, conceived the fraudulent scheme of defeating and defrauding the plaintiffs and defendants out of their said claims against E. H. Riley, and in order the better to carry out such fraudulent scheme E. H. Riley procured his mother to commence an action against him, and on or about the said 19th March, 1888, caused judgment to be entered in said action in favor of Mrs. Riley for the sum of $2,541.42 debt and costs, although E. H. Riley was not indebted to her in any sum whatever, and caused a writ of execution to be issued upon said judgment, and placed in the hands of the sheriff, and E. H. Riley and Mrs. Riley caused the said sheriff to levy upon the goods and chattels of E. H. Riley under said execution, and the sheriff has sold a large part of said goods and received a large sum of money therefor, and the said sheriff now holds such money, and a

[1] 18 Grant Ch. R. 341; 16 Grant Ch. R. 243.

large quantity of such goods still remain unsold and in the custody of the said sheriff under seizure as aforesaid. Statement.

The plaintiffs and defendants shortly after the said 19th March, 1888, recovered judgment upon their respective claims against E. H. Riley and placed writs of execution in the hands of the sheriff and the plaintiffs' said writs of execution have been ever since, and now are, in the hands of the said sheriff for execution, but the defendants' writ of execution was as hereinafter stated, withdrawn from the hands of the sheriff.

After the plaintiffs and defendants had so placed writs of execution in the hands of the sheriff, they immediately notified him in writing that they claimed the goods of E. H. Riley, or the proceeds, on the ground that the said judgment of Mrs. Riley was not bona fide, but was obtained by fraud and collusion and without value, and in consequence of such claims the said sheriff obtained an interpleader order directing an issue to be tried, wherein the plaintiffs (other than H. Shorey & Co., and the Ames-Holden Company, Limited,) and defendants were to be plaintiffs, and Mrs. Riley was to be defendant, to try the validity of her judgment, to which interpleader order the defendants consented.

Shortly after the making of the interpleader order the defendants, with the intention of aiding Mrs. Riley and E. H. Riley in their fraudulent scheme as against the plaintiffs, and in order to obtain the fruits of Mrs. Riley's judgment, entered into an agreement with her and E. H. Riley whereby the defendants were to abandon their connection with the interpleader proceedings and withdraw their writ of execution against the said E. H. Riley, and the said Mrs. Riley was to assign to them her judgment. This agreement was carried out.

Statement of defence:—

(1-7) Special denials of all the facts alleged in the statement of claim.

(8) That the defendants accepted the assignment of the judgment and became and are assignees and purchasers there-

Statement.

of in good faith, and gave good, valuable and adequate consideration therefor, and that they had not at the date of the assignment, nor did they ever have, nor have they since then acquired notice or knowledge of any actual or constructive fraud, collusion or want of consideration whatever in connection therewith or in connection with the claim on which judgment was founded.

(9) That under an agreement made between Mrs. Riley and the defendants the assignment of judgment was taken as collateral security for the repayment of certain advances, made by them to her, and on re-payment of said advances Mrs. Riley is entitled to a re-assignment of the judgment.

(10) That the assignment was taken on or about the 11th May, A.D. 1888, subsequently to the making of the interpleader order in the statement of claim mentioned.

(11) That the plaintiffs having then all the knowledge relating to the matters in question which they are now possessed were parties to an agreement entered into between the creditors of E. H. Riley, other than the defendants, and Mrs. Riley in September, A.D. 1888, whereby they agreed to settle their alleged claims as against the judgment in question herein, and to withdraw all proceedings that had been taken to set aside the same on the terms set forth in said agreement, and the defendants say that the plaintiffs are now precluded and estopped from impeaching the same upon any grounds whatsoever.

(12) That the plaintiffs H. Shorey & Co. and the Ames-Holden Company, Limited, were not parties to the interpleader proceedings mentioned in the statement of claim, and were and are not entitled to the benefit of the order made by the Supreme Court in banc on the 7th December, 1888, in the said interpleader proceedings and the moneys in the hands of the sheriff ought to have been paid over to the defendants under the terms of the said order, but have not been so paid over though demanded by the defendants.

(13) That the plaintiffs have, by delay on their part in their proceedings to impeach the judgment, and more especi-

Statement.

ally by their not taking such proceedings until long after the assignment of judgment to the defendants, of which they had notice, acquiesced therein, and are now debarred from attacking the same.

(14) That the defendants will object that on the facts alleged in the pleadings, Mrs. Riley should have been a party to this action, and that they are not necessary or proper parties, and in no event ought they to be ordered to pay costs.

(15) That the defendants are not execution creditors of E. H. Riley whose executions rank prior in date, and in their receipt by the sheriff, to those of the plaintiffs, and are subsequent to those of Mrs. Riley.

(16) Admission of the judgment, execution and agreement.

(17) That the writs of execution issued on the judgment of Mrs. Riley against E. H. Riley were placed in the hands of the proper sheriff; that the writs were thereupon duly executed by the sheriff and payment of the moneys realized by him thereunder was demanded by the defendants and ought to have been made long prior to the commencement of this action; and that by reason of the premises the plaintiffs became and are estopped and debarred from impeaching or in any way attacking the said judgment or the writs of execution issued therein.

Reply:—

1. As to the 17th paragraph of the statement of defence, before the said writs had been duly executed, the plaintiffs by writing notified the sheriff not to pay over the proceeds of the sale of the goods seized under the executions issued in the suit of Mrs. Riley against E. H. Riley, as they intended to contest the validity of the judgment and executions and have not withdrawn said notice.

2. The plaintiffs will object that the 17th paragraph sets up no facts which constitute in law any defence to the plaintiffs' claim inasmuch as no privity exists in law nor is al-

Statement.

leged to exist in fact between the sheriff and the plaintiffs, and there being no privity there can be no estoppel.

3. The plaintiffs will object that the facts, in said 17th paragraph set forth, do not show that the money realized was at home when received by the sheriff or while held by him, nor that the same was by the receipt by the said sheriff released from the claim or the rights of the plaintiffs, and that until the said money was at home the same was subject to the plaintiffs' claim in this action.

The case was tried at Calgary before ROULEAU J., on the 20th, 21st, 22nd and 23rd December, 1889, and was argued on the 9th January, 1890.

J. A. Lougheed, Q.C., and *P. McCarthy*, Q.C., for the plaintiffs.

E. P. Davis and *T. C. West*, for the defendants.

Judgment was reserved.

[*February 17th, 1890.*]

ROULEAU J. (after setting out the pleadings):—

There was no attempt on the part of the defendants to sustain their objection in law (par. 14) nor to argue the plaintiffs' objections in law to the 17th paragraph of their defence. I believe that they found their position untenable. I dismiss the defendants' objection in law, and sustain the plaintiffs' objection in law.

The first and most important question to be decided in this case is this: whether a fraudulent judgment duly assigned for good and valid consideration, can be attacked by the creditors of the assignors in the hands of the assignees.

By 13 Eliz. c. 5, it is in substance enacted that all and every feoffment, gift, grant, alienation, etc., and all and every bond, suit *judgment and execution*, which have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc., shall be deemed and taken to be clearly and utterly void, frustrate and of none effect, etc.

There are several provisoes to that enactment. Sec. vi. of the same Act is as follows: "Provided . . . that this Act or anything therein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, etc., not having at the time of such conveyance or assurance to them made any manner or notice or knowledge of such covin, fraud or collusion as is aforesaid," etc., but I cannot find any proviso relating to judgments and executions; and therefore assignments of judgments must be governed by the first section of the Act and the common law. Judgment. Rouleau, J.

The only case in point cited was *McDonald* v. *Boice*,[2] where it was decided that a subsequent creditor had a right to impeach the judgment of a prior judgment creditor. In that case there was a bill filed impeaching a judgment recovered on cognovit by the defendant Joseph S. Beatty against one William Beatty, which had been assigned to the defendant Boice, on the ground that by the fraud of the parties the judgment had been recovered for an amount greatly in excess of what was due by William Beatty to Joseph S. Beatty thereby depriving the plaintiff of the means of enforcing his judgment.

By analogy I think this case should be decided on the same principle as the case of *Pressy* v. *Trotter*,[3] where the rule was laid that an assignee of a mortgage takes it subject to all the existing equities.

On the part of the defendants the case of *Totten* v. *Douglas*[1] was greatly relied upon, but on reading carefully that case, I am of opinion that the facts are very different. Gwynne, J., says in his judgment:—"If the estate which was conveyed by the mortgage executed by Alexander Douglas in

[2] 12 Grant 48. [3] 26 Grant 154.

Judgment. Rouleau, J.

favor of his son James still remained vested in James, I think the transaction would be open to impeachment as a mortgage fraudulent and void against the creditors of Alexander, under 13 Eliz. c. 5; but James Douglas having conveyed that estate to Cook, and Cook having conveyed it to Nesbitt, before any steps had been taken to impeach and avoid the mortgage, we have now to decide what is the effect of these two separate alienations of the estate." So that the action instituted in that case is quite different from the action instituted in this. The sheriff in this case was notified that the creditors would attack the validity of the judgment before it was assigned at all, and the very defendants in this case were amongst the creditors who notified the sheriff. It was declared also in that case that the property was never vested in James Douglas, but he acted only as the agent of Alexander Douglas, so that the action against James could not be sustained in any case.

In the case of *Elliott* v. *McConnell*,[4] it was clearly decided that the assignee of a mortgage, like the assignee of a promissory note after maturity or other chose in action, takes the same subject to all equities, as well those of third parties, as those of the parties to the instrument, and Strong, V.C., in his judgment makes use of the following language. "There is a number of cases, of which I mention the decision of the full Court in *Smart* v. *McEwan*,[5] and my own decision in *Ryckman* v. *The Canada Life Assurance Company*,[6] in which it has been determined that the assignee of a mortgage, like the assignee of a chose in action, stands in no better position than the assignor, the original creditor or mortgagee, and this not merely as regards the debtor or mortgagor, but as regards the world." In conclusion I must add that I cannot see the difference between the assignment of a mortgage, or chose in action and a judgment. I think the same law governs them all, and I am therefore of opinion that the assignment of a fraudulent judgment though made for good and valid consideration can be attacked or impeached

[4] 21 Grant 376. [5] 18 Grant 623. [6] 17 Grant 550.

by the creditors of the assignor and that the assignee takes that judgment subject to all equities. Judgment. Rouleau, J.

Now, returning to the facts of the case, I find that on the 19th day of March, 1888, Mrs. Riley obtained judgment against E. H. Riley for the sum of $2,448.31 and costs. The writ was issued on 17th day of March and judgment obtained on a notice of motion for judgment upon the affidavits of Thomas Riley, the plaintiff's husband. This execution as well as many others were placed in the hands of the sheriff, and on the 6th day of April, 1888, Messrs. Lougheed & McCarthy on behalf of O'Loughlin et al, MacKenzie et al, Lyon et al, and Campbell et al; and Mr. Jephson on behalf of Stobart, Sons & Co., gave a notice in writing to the sheriff that they intended to contest the validity of the judgment and execution in the suit of Mrs. Riley v. E. H. Riley. Upon those two notices the sheriff applied to me on his affidavit for an interpleader summons which was granted on the same day. On the 29th day of May, 1888, an interpleader issue was taken and on the same day Stobart, Sons & Co., had their names struck out from the same. On the 11th day of the same month Stobart, Sons & Co. had got the assignment of Mrs Riley's judgment. Afterwards the above mentioned interpleader order and issue were set aside by the Court in banc on the ground that I had exceeded my jurisdiction as our law in that respect is not similar to that of Ontario; and the parties were placed in the same position as they were before the interpleader order was granted. The judgment of the Court in banc was delivered on 7th Dec. 1888, and proceedings to set aside the judgment in this case taken on the 27th day of the same month, within the time limited by the judgment of the Court in banc.

At the trial of this case Thomas Riley was examined and without entering into long comments on his testimony I will merely say that he swore amonst other things:—"that the money advanced to his son by Mrs. Riley, was advanced

Judgment. Rouleau, J.

in a motherly kind of way; she was not to get any interest; it was for the purpose to help his son; there was no arrangement about the repayment of that money; no acknowledgment of that money or promissory note taken by Mrs. Riley." Mrs. Riley's name does not appear in the books at all, and no sums received from Mrs. Riley appear, nor is there anything to show that Mrs. Riley's money was a liability to the business. In all his evidence Thomas Riley cannot say how that sum of $2,448.31 was advanced to his son by Mrs. Riley. He cannot give a detailed account of that amount. With the exception of £123 0s. 0d. which he handed to his son himself, he cannot swear to any other amount advanced.

E. H. Riley was also examined in this case and he swears that he cannot remember the exact amount of money he got from his mother, and cannot either give any detail. So according to the evidence of the parties who are supposed to have received the money loaned by Mrs. Riley, it is impossible to form any idea what sums of money Mrs. Riley has advanced, although it was at the suggestion of Thomas Riley that she took judgment for the large amount of $2,448.31. In view of that evidence, I cannot come to any other conclusion than that the amount of money for which judgment was obtained was never advanced, and if part of it was advanced at all, the evidence shows that it was advanced not as a loan, but as a gift, and that therefore the judgment obtained by Mrs. Riley was fraudulent and void as against the creditors.

A great many authorities have been cited showing that such transactions between relatives are looked upon by Courts of Justice as suspicious, if the testimony of the parties interested is not corroborated; and I may add that it is well settled jurisprudence that transactions of this kind ought not to be held sufficiently established by the uncorroborated testimony of the parties to it.

There are several other points raised in this case, but I am not going to adjudicate on them, for if the law as laid down by me in this case is correct, there is no necessity for

me to refer to points which cannot materially affect the result. The judgment of the Court is that the said judgment recovered by Georgina Jane Hornsfield Riley against E. H. Riley and assigned to the defendants is declared fraudulent and void and is set aside and vacated, and that the executions issued thereunder are in like manner set aside, and that the plaintiffs be paid upon their said executions the proceeds of the goods sold and of those remaining to be sold, with costs of this suit against the defendants.

Judgment. Rouleau, J.

From this judgment the defendants appealed to the Court in banc.

The appeal was argued on the 4th June, 1890.

E. P. Davis, for the defendants, the appellants.

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

[*June 10th, 1890.*]

McGuire, J.—The defendants, Stobart, Sons & Co., appeal from a judgment of the Hon. Mr. Justice Rouleau, declaring void a certain judgment got by one Mrs. Georgina Jane Riley against her son, E. H. Riley and assigned by her to the plaintiffs the appellants.

E. H. Riley was a merchant in the town of Calgary and, becoming indebted to the appellants and respondents and being in fact insolvent and while unable to pay his debts in full, his mother, Georgina Jane Riley, in March, 1888, brought an action against him, and no defence being entered thereto judgment was signed in her favor for the sum of $2,541.42 and execution delivered to the Sheriff, at Calgary, on March 19, 1888.

Shortly thereafter the respondents and appellants commenced actions against said E. H. Riley and duly recovered judgments for the amounts of their respective claims and costs. Executions in these actions were also placed in the hands of the sheriff, at Calgary, on the 4th, 5th and 14th of April and the 4th June, 1888. The sheriff was proceeding to a sale of the goods of the said E. H. Riley on the execution in

Judgment.
McGuire, J.

favor of Georgina Jane Riley, when on the 6th April, 1888, the appellants caused a written notice to be served on the sheriff by their advocate, forbidding him to pay the proceeds of such sale to Georgina Jane Riley and informing him of their intention to contest the validity of her judgment and execution. A similar notice was on the same day given by Messrs. Lougheed & McCarthy on behalf of four of the respondents then having executions against E. H. Riley. The sheriff retained in his hands the proceeds of the sale and applied to Mr. Justice Rouleau for an interpleader summons which was granted on April 9th, 1888. An order was made therein on April 25th, 1888, directing an issue to be tried by a jury, to to whether the judgment of Georgina Jane Riley was fraudulent and void as against the claimants, the other execution creditors. The appellants were made also parties plaintiff in said issue, but on their application and by consent of the advocates for the other plaintiffs and the defendant, an order was subsequently made striking out the names of the appellants from said interpleader proceedings. This was done on the 29th May, 1888. In the meantime, however, the appellants had purchased from the said Georgina Jane Riley, and obtained from her an assignment of her said judgment, the formal indenture of assignment being between said Georgina Jane Riley of the first part and the appellants of the second part, for the expressed consideration of $2,551 and dated May 11th, 1888.

The interpleader proceedings were in December following, on appeal to this Court, set aside for want of jurisdiction, and the execution in Riley v. Riley, which had been withdrawn by the advocate for Georgina Jane Riley, was ordered to be returned to the sheriff and to have priority and effect as if it had not been withdrawn, and be subject to the control of the appellants, but that the sheriff should not until the expiration of three weeks thereafter pay over any money the proceeds of the sale of E. H. Riley's goods. Before the expiration of said three weeks the present action was commenced to test the validity of said judgment.

Judgment.
McGuire, J

The learned Judge found that the said judgment was fraudulent and void on the ground that the money, for which the judgment was obtained, was never advanced by the plaintiff therein to the defendant, or if it, or any part of it was, that it was not as a loan but as a gift. He further found that the said judgment was, as against the creditors, fraudulent and void in the hands of the appellants, the assignees.

On the argument of this appeal it was rightly conceded by the appellants' Counsel that the judgment, as between the original parties to it, was fraudulent and void as against the creditors. But it was contended that the assignment of it for value to the appellants was *bona fide* and for value, and that it became in their hands unimpeachable by creditors. The question to be considered here was thus narrowed down to this single point. Given a judgment fraudulently obtained, and which would be void as against creditors of the judgment debtor, will the assignment of that judgment for value, under the circumstances in this case, make it valid as against the creditors?

The appellants' counsel rested his argument mainly on the judgment of the Court of Chancery of Upper Canada (on appeal) in *Totten* v. *Douglas*,[1] in which it was held, (Mowat V.C., dissenting), that where an insolvent made a mortgage, for a pretended debt, to a son who, subsequently and before the same was questioned by any creditor, assigned the mortgage to a third party for value but with notice of the fraud, and the third party assigned it to a fourth, also for value but without notice, the mortgage was good in the hands of said fourth party and perhaps also in those of the third party. The learned counsel argued that a judgment, fraudulent as between the parties to it, is to be subject to the same rules as a mortgage under similar circumstances and that an assignment of it *bona fide* and for value to a third party, makes it valid as against creditors even where such third party has notice of the fraudulent character of the judgment, or at any rate if he had not such notice. I do not think that the two things can be compared.

Judgment. McGuire, J

A mortgage is a contract between the mortgagor and mortgagee. A judgment is not a contract between the plaintiff and the defendant. The mortgage may, even when given voluntarily, and without consideration, be free from any taint of immorality, legal or otherwise; whereas a judgment for a pretended but fictitious debt is based on a falsehood and is simply an abuse of the process of the Court. The mortgage and its assignments operated without any intervention on the part of the Court or its officers; whereas a judgment is a judicial creation and gives the plaintiff no estate in the property of the defendant and an assignment of it can therefore pass no estate in such property, and is enforcable only by the Court through its officers. The question therefore in this case is: Granted that by a fraudulent abuse of the process of the Court a judgment has been obtained, must the Court overlook the fraud and enforce this abuse of its process, because it has been passed out of the hands of the person, who fraudulently obtained it, into the hands of a third party? I think not.

But even if an analogy, such as contended for, is for argument's sake conceded to exist between a judgment and a mortgage, would the assignment under the circumstances in this case convert it at once from a voidable thing to one which cannot be impeached by creditors? In the judgment of the Court in *Totten* v. *Douglas*,[1] as delivered by Gwynne, J., the reasoning proceeds on the basis of the mortgage being simply voluntary and without considering it as being also fraudulent as against creditors. But taking it as being simply an instrument executed without valuable consideration, it is laid down at page 344 that a voluntary conveyance, though only voidable, becomes void the moment the grantor conveys *for value* to a purchaser; and that a sale *for value thereafter* by the *volunteer* grantee to a purchaser ignorant of the character of the voluntary conveyance and without notice of the subsequent sale for value, *passes nothing*. Apply this to the alleged analogous case of the judgment here. This judgment was obtained without consideration and

was voidable by creditors. That is conceded. To carry out the analogy the judgment debtor must represent the grantor and the judgment creditor the grantee. While the judgment was still unassigned several judgments for value were obtained against the defendant, E. H. Riley, and executions delivered to the Sheriff on the 4th and 5th of April. These will then be analogous to conveyances for value by the original grantor and will prevail over the voluntary judgment and also as against a subsequent purchaser of the voluntary judgment, even though he be ignorant of the character of the judgment and without notice of the subsequent judgment for value. So that, tried by that test (and if the argument from analogy be applied to the fraudulent judgment, it must also be applied to the other judgments), then, on the doctrine laid down in *Totten* v. *Douglas*,[1] the judgment would be void against the creditors obtaining judgment thereafter and before the assignment of May 11th, 1888, even though Stobart, Sons & Co. were ignorant of the character of the judgment and without notice of the intermediate judgments. A *fortiori* if appellants *had notice* of these judgments and were *not ignorant* of the *character* of the judgment in Riley v. Riley.

Judgment.
McGuire, J.

Looking again at the judgment of the Court in *Totten* v. *Douglas*,[1] we find it based on the fact that the mortgagor was present when the assignment took place to Cook and that part of the consideration was a delivery up of $600 of notes of the mortgagor held by Cook, and that the transaction was therefore regarded as if it were one direct between Alexander Douglas (the mortgagor) and Cook, and so was one for value. This fact made it resemble the case of *Morewood* v. *The South Yorkshire Railway Co.*[7] cited and strongly relied on by Gwynne, J., (p. 347). Pollock, C. B., in that case bases his judgment on the fact that the assignment was "taken *bona fide* by a conveyance made by Morewood in the presence and with the assent of" the original grantor. To

[7] 3 H. & N. 798; 28 L. J. Ex. 114.

Judgment.
McGuire, J.

compare that with the present case the original grantor would be represented here by E. H. Riley the judgment debtor. Now the evidence does not shew that he was present at or assented to the assignment to Stobart, Sons & Co. or any other fact that would warrant one in treating this assignment as if made by E. H. Riley to them or as a judgment by them directly against E. H. Riley, for he, a judgment debtor, cannot be held constructively to be present at the assignment and taking part in it as in case of a mortgage or conveyance. It was still a judgment by Mrs. Riley against Riley and cannot in any sense be considered as a judgment by Stobart, Sons & Co. against Riley. In the case mentioned as cited by Gwynne, J. Watson, B., in his judgment relies on the fact that section 6 of 13 Elizabeth provides that nothing therein contained shall extend to any estate or interest in land, etc., conveyed *bona fide* and upon good consideration to any person not having notice or knowledge of the fraud; but that section does not mention "judgments." Pollock, C. B., says, that "before the question of the validity of the bill of sale arose the property was divested out of the first assignee." Now in this case the validity was questioned, not only by several of the creditors who are respondents but by the appellants themselves. Can it be said either that the respondents had not "any manner of notice" of the fraudulent character of that judgment which they themselves sought to impeach because it was, as they alleged, fraudulent? Moreover section 6 of 13 Elizabeth which makes good a *bona fide* purchase without notice, of the kind of property in question in *Morewood* v. *The South Yorkshire Railway Co.*[1] does not mention "judgment," whereas section 1 declares that a judgment, got as this one was, is void, etc.

The indenture of assignment of the judgment to appellants purports to be in consideration of the sum of $2,550, which sum is alleged to have been paid by Stobart, Sons & Co. to Mrs. Riley. Now, if the appellants' argument be correct, Stobart, Sons & Co. thereupon became in the position of plaintiffs

holding a judgment for value, that is, an honest judgment against E. H. Riley as of the date and priority of the fraudulent judgment and execution; they became judgment creditors of E. H. Riley for $2,550; but neither E. H. Riley nor Mrs. Riley ever in fact received $2,550 or any other sum from Stobart, Sons & Co. as the consideration for that assignment. The evidence of Frederick Stobart shows that, to make up those figures, they added together the judgment they already had against E. H. Riley for some $400, a claim of one C. H. Mahon against E. H. Riley for some $500 and the sum of $1,650 which Stobart, Sons & Co. paid to the sheriff (not to the Rileys) for the balance of E. H. Riley's stock, so that the Rileys, mother or son, received *nothing*. Stobart, Sons & Co. got the equivalent of the $1,650, they had paid the sheriff in the goods sold by him to them, which they subsequently handed over to Mrs. Riley taking a chattel mortgage from her; this mortgage they have since foreclosed. The position of Stobart, Sons & Co. then if they succeeded would be this: They had a *bona fide* judgment for $400, they were assignees of a claim of C. H. Mahon for say $500 or $550 and they paid in cash $1,650 making in all $2,550. In return for this they got $1,650 worth of goods from the sheriff and had the judgment for $2,542 which, being the first in the sheriff's hands, would entitle them to be paid thereunder by the sheriff all the moneys realized out of defendant's goods, namely, the $1,650 and the proceeds of prior sales amounting together to $1,700 or $1,800. So that they would get some $3,350 or $3,450 in return for $2,550; that is, they would get paid their own judgment in full, the Mahon claim in full, get back the $1,650 cash paid by them to the sheriff and some $800 or $900 over and above all their claims; and the other creditors would get nothing.

Judgment.
McGuire, J.

Again, if appellant's contention is right, Stobart, Sons & Co. would become in effect judgment creditors of E. H. Riley for $2,542, a sum far in excess of any possible claim they could set up, because, for the $1,650 paid the sheriff they got an equivalent in goods, and the only other claims they had

Judgment.
McGuire, J.

were their own judgment and the Mahon claim, together say $950, which would be the outside amount, as Frederick Stobart admits in his evidence, for which they could claim to rank as judgment creditors of E. H. Riley. So that if we could by any possibility treat Stobart, Sons & Co. as if they had originally themselves got the judgment for $2,542 it, too, would be fraudulent as against creditors by reason of being vastly greater than what they were in any sense entitled to.

The result of the appellants' contention would be this: A fraudulent judgment might be obtained by default for any amount and five minutes after it might be assigned by the person who obtained it to another person, and then, no matter if such assignee were perfectly aware of the fraudulent character of the judgment, it would be good in his hands as against creditors. When we consider too that judgment by default may be got in ten days and practically in secret so far as the public are concerned, we can see at once the wide door which would thus be thrown open for fraud. I do not think this is the law and it certainly is not justice.

I think the learned Judge was right in finding that the judgment was fraudulent before the assignment, and that the assignment did not prevent it being impeached by the creditors. He has not expressly found, or deemed it necessary to find, that the appellants took the assignment with notice of the character of the judgment; but if such notice is material I think there is ample evidence for saying that the appellants were aware of the character of the judgment and took it without giving value therefor. I think the appeal should be dismissed with costs to be paid by the appellants.

WETMORE, J.—In this case I concur that the appeal should be dismissed with costs against the appellants; but I do not wish to be understood as expressing any opinion with respect to the ground upon which *Totten* v. *Douglas*,[1] was

decided. It is a case which I have not had the opportunity of reading and fully considering, and therefore I am not in a position to express any decided opinion in respect to it. On the other hand I do not wish to be considered as dissenting at all from the comments on that case just read by my brother McGuire. I wish to be considered as not expressing any opinion one way or the other. Neither do I wish to be considered as expressing any decided opinion as to the consideration which may have passed between Georgina Riley and Stobart & Co., for which the judgment was assigned. I have not examined closely into that matter. Judgment. Wetmore, J.

I wish to put my reasons for holding that the appeal should be dismissed upon the ground that there was ample evidence to warrant the judgment being declared fraudulent and void; that the appellants having themselves given notice to the sheriff that they intended to attack it and knowing of the steps that had been taken by the other creditors, ought to have been upon their guard, and having taken an assignment under such circumstances must take it with all risks.

I do not think that *Totten* v. *Douglas*,[1] is an applicable case; essentially differing from this in its being a case of a mortgage.

Judgment having been obtained through the process of the Court, when there was no consideration for it at all —being a fraudulent judgment obtained for the purpose of defeating creditors—it would be a gross abuse of the process to allow such a judgment to have validity in the hands of a person, who must be considered to have had notice of its fraudulent character.

RICHARDSON, MACLEOD, and ROULEAU, JJ., concurred.

Appeal dismissed with costs.

REGINA v. KEEFE.

Gambling—Legislative powers of the Territories—B. N. A. Act, sec. 91—Ultra vires.

R. O. (1888) c. 38,† s. 5, enacts that:—"every description of gaming and all playing of faro, cards, dice or other game of chance with betting or wagers for or stakes of money, or other things of value, and all betting and wagering on any such games of chance is strictly forbidden in the Territories, and any person convicted before a Justice of the Peace, in a summary way of playing at, or allowing to be played at on his premises, or assisting, or being engaged in any way in any description of gaming as aforesaid, shall be liable to a fine for every such offence, not exceeding one hundred dollars with costs of prosecution and on non-payment of such fine and costs forthwith after conviction, to be imprisoned for any term not exceeding three months."

Held, that the evident purpose of the said section was to create an offence, subjecting the offender to criminal procedure, in the interest of public morals, and not for the protection of civil rights; and that the enactment therefore came within the decision in *Russell* v. *The Queen*,[1] and consequently was *ultra vires*.

[*Court in banc, July 16th, 1890.*

Statement. On an appeal from a conviction under R. O. (1888) c. 38, s. 5 (quoted in the head note), ROULEAU, J., referred to the Court in banc the question whether or not the said section was *ultra vires* of the legislative powers of the North-West Territories.

The question was argued by

D. L. Scott, Q.C., for the Crown.

E. P. Davis, for the defendant.

[*July 16th, 1890.*]

The judgment of the Court was delivered by

RICHARDSON, J.—This is a reference by Mr. Justice Rouleau to the full Court to be advised how he should deal with a conviction of Keefe, who was charged and convicted by a

† Amended by Ord. No. 38 of 1897, and wholly repealed by Ord. No. 40 of 1898.

[1] 51 L. J. P. C. 77; 7 App. Cas. 829; 46 L. T. 889.

Judgment. Richardson, J

Justice of the Peace, for violation of R. O. (1888) c. 38, s. 5 (gambling), which is simply a consolidation of Ordinance No. 6 of 1879; the question referred to this Court being whether or not that section is *ultra vires* of the legislative powers of the North-West Territories. To us it seems clear that following the law as laid down in the case of *Russell* v. *The Queen*,[2]—followed in other Courts of the Dominion and recently in Ontario, *Regina* v. *Wason*,[2] and of course binding on this Court—"that laws designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure, belong to the subject of public wrongs rather than civil rights and fall under section 91 of the British North America Act and have relation to the criminal law; that the true nature and character of the legislation in each particular instance must always be determined in order to ascertain the class of subjects to which it really belongs."

There is no doubt in our minds that the real object and the true nature and character of this legislation [R. O. (1888) c. 38, s. 5] was to create an offence in the interest of public morals, and not for the protection of private rights; and this being so that Mr. Justice Rouleau should be advised that the conviction in question cannot be supported.

[2] 17 A. R. 221.

RE CLAXTON.

Territories Real Property Act—Executions—Memorials—Certificate of ownership — Duty of Registrar — Exemption — Dominion Lands Act — Homestead Exemption Act—Exemption ordinance—Homestead—Legislative powers—Ultra vires.

The Territories Real Property Act (R.S.C. c. 51) s. 94, as amended by 51 Vic. (1888) c. 20, s. 16, provides that the sheriff may deliver to the registrar a copy of a writ of execution and a memorandum of the lands intended to be charged; and that the registrar shall thereupon, if the title has been registered or so soon as the title has been registered, enter a memorandum thereof on the register; and that from and after such delivery the same shall operate as a caveat.

Section 54 of the same Act provides that, after a title is registered the applicant shall be granted a Certificate of Title; and that the registrar shall endorse upon the Certificate, and the duplicate, a memorial of every mortgage, encumbrance * * * or other dealing affecting the land.

The Dominion Lands Act (R. S. C. c. 54) s. 34, provides that the title to a homestead and its attached pre-emption shall remain in the Crown until the issue of the patent therefor, and shall not be liable to be taken in execution before the issue of the patent.

R. O. (1888) c. 45, s. 1, s.-s. 9, exempts from seizure under execution "the homestead of the defendant, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon.

The sheriff delivered to the registrar a copy of a writ of execution accompanied by a memorandum comprising land for which the execution debtor then had a homestead entry under the Dominion Lands Act, but for which at that time a patent had not yet issued.

Held, that, whatever might be the liability of the sheriff by reason of his assuming to charge lands which he could not "take," or which were exempt from seizure, under execution, it was the duty of the registrar, when issuing a Certificate of Title to the execution debtor upon his patent, to endorse upon the certificate a memorial of the execution; although without such memorial the land would under s. 61 of the T. R. P. Act be, by implication, subject to the execution.

The term "homestead" in The Dominion Lands Act, The Homestead Exemption Act, and the Exemptions Ordinance, has a different meaning in each case. In the Dominion Lands Act, it means land acquired from the Government by the fulfilment of certain conditions as to residence and improvements; in the Homestead Exemptions Act it means any land specially registered in accordance therewith whether acquired as a homestead under the Dominion Lands Act or not; in the Exemptions Ordinance it may apply to lands which are neither registered under the Homestead Exemption Act, nor acquired otherwise than as a homestead under the Dominion Lands Act.

Per McGUIRE, J.: In the Exemption Ordinance the term "homestead" means the enclosure or ground immediately surrounding the mansion or home-residence of the debtor.

The Exemption Ordinance R. O. (1888) c. 45, s. 9, is ultra vires of the Legislative powers of the N. W. T., inasmuch as it is inconsistent with the Homestead Exemption Act, R. S. C. c. 52.

[*Court in banc, July 16th, 1890.*

Statement.

This was a matter which came before ROULEAU, J., on a reference from the Registrar of the Southern Alberta Land Registration District under the Territories Real Property Act. ROULEAU, J., referred the question involved to the Court in banc.

The questions were argued on the 6th June, 1890.

E. P. Davis, for the applicant.

No one contra.

[*July 16th, 1890.*]

WETMORE, J.—I am of opinion that the applicant Claxton was not entitled to receive a certificate of title without the indorsement which the registrar proposed to put on it. The Dominion Lands Act provides that certain persons may make homestead entries with respect to Government lands. The term "homestead" however is not used in that Act with the idea that the property is exempted from seizure under execution, but it is used to indicate that the person entering may obtain the land on the performance

NOTE.—The Land Titles Act, 1894, has replaced The Territories Real Property Act.

The Homestead Exemption Act was originally passed on 10th May, 1878, as 41 Vic. c. 15; it was consolidated as R. S. C. c. 52; it was amended by 56 Vic. (1893) c. 19, s. 1, so as to make the exemption 160 acres instead of 80 acres; it was repealed by 57-58 Vic. (1894) c. 29, s. 1; and thus was removed the ground of the present decision of the Exemption Ordinance. The first Exemption Ordinance was No. 8 of 1879, but it did not provide for exemption of real estate; it was followed by Ord. No. 28 of 1884, which exempted (s. 1, s.-s. 9), the homestead of the defendant limited to eighty acres. This latter Ordinance was disallowed in consequence of objections to s. 4. It was followed by Ord. No. 8 of 1885, which was consolidated as R. O. (1888) c. 45. The Act 57-58 Vic. (1894) c. 29, mentioned above as repealing the Homestead Exemption Act, validated the exemptions of real estate in R. O. (1888) c. 45. The present Exemptions Ordinance is C. O. (1898) c. 27. Ed.]

Judgment.
Wetmore, J.

of certain conditions without payment of money or giving any similar consideration. The homesteader may also at the same time make a pre-emption entry for an adjoining quarter section. In the pre-emption a money consideration is paid before the patent is issued. When the patent has issued either for the homestead or the pre-emption or both, the land is subject to execution provided that no other statutory provision or Ordinance of the Assembly exempts it. Before the patent is issued the land is not liable to be *taken* in execution. See The Dominion Lands Act, R. S. C. c. 54, s. 32, s.-s. 3. I think it quite clear therefore that the term "homestead" in this Act is not intended to have the same meaning as it has in The Homestead Exemption Act. (R. S. C. c. 52).

Section 16 of 51 Vic. (1888) c. 20 substitutes a new section for section 94 of The Territories Real Property Act. This section provides that the sheriff shall, after the delivery to him of any writ or process affecting land, deliver a certified copy thereof together with a memorandum in writing of "*the lands intended to be charged thereby*" to the registrar; and the registrar shall thereupon, if the title has been registered *or as soon as the title has been registered*, enter a memorandum thereof in the register, and from and after the delivery of the copy of the writ or other process and memorandum to the registrar the same shall operate as a caveat against the transfer by the owner of the land mentioned in such memorandum. Now we will assume that Claxton had made a homestead entry under the Dominion Lands Act, but no patent had issued to him; and that *fi. fa.* executions were issued against him and placed in the sheriff's hands. The sheriff could not *take* the land in execution because the sub-section of the Dominion Lands Act before referred to prevented him doing so, but I see nothing in the intention or spirit of the Acts, taking The Dominion Lands Act and The Territories Real Property Act together, to prevent his delivering to the registrar a copy of the execution and a memorandum under section 94 of The Territories Real

Property Act specifying the lands Claxton had so entered for as intended to be charged, always subject to this, that the sheriff may do so at his own risk; for if he charges lands or casts a cloud upon the title to land which is exempt from seizure, he may be liable to damages if any damage is caused, or he may have to pay the costs of proceedings to have the cloud removed. The sheriff in this case did deliver a copy of the writ and a memorandum charging the land in question to the registrar. This, by virtue of the section of the Act before referred to, operated as a caveat against the transfer by the owner of the land. All the registrar could do however was to file the documents because the title had not been registered. After this was done, the patent having issued, it became the duty of the registrar to register it and grant a certificate of title. I do not understand that any question was raised as to the right of the applicant to have the title registered. That right seems to have been conceded, and the question submitted is merely whether the registrar is required to issue a certificate of title to the applicant free of any indorsement by reason of the delivery by the sheriff of the documents referred to and the entries made by the registrar.

Judgment. Wetmore, J.

Assuming therefore that the applicant was entitled to have the title registered I apprehend, looking at the language of section 47 of the T. R. P. Act and of section 94 (the section substituted by section 16 of the amending Act of 1888), the first thing the registrar had to do was to register the title under the Act. The instant that was done section 94 operated forthwith; and the registrar was required to enter a memorandum in the register of the delivery to him by the sheriff of the copy of the execution and of the memorandum specifying the lands intended to be charged. The next thing in order, that the registrar is called upon to do, is to issue a certificate of title. This is done under section 54 of the T. R. P Act, which provides that the registrar shall indorse upon the certificate a memorial of every mortgage, *encumbrance*, lease, rent charge, term of

Judgment. Wetmore, J.

years or *other dealing affecting the land.* It is urged, because section 61 of the Act provides that the land mentioned in any certificate of title shall be subject to any executions against or affecting the interest of the registered owner, that there was no necessity for the registrar to indorse the charge in this case or that it was by implication intended that he should not do so. I am of opinion that section 61 was framed partly with a view of providing for the case where executions may be registered after the certificate of title has issued; and I am also inclined to the opinion that even in a case like the present, if the registrar issued a certificate of title without indorsing a memorial of the execution, the owner would nevertheless hold the certificate subject to the execution. It may not, however, be necessary to decide that question at present for I cannot see that this in any way alters or takes away from what appears to me to be the plain and unambiguous direction given to the registrar under the 54th section of the Act. Section 94 (the section substituted by section 16 of the Act of 1888) provides that the delivery of the documents by the sheriff shall operate as a tered, even in the case of a patentee applying to have his the time these documents are so delivered, the title of the owner has been registered and a certificate has issued, this caveat would operate in the same way as any other caveat; that is, under sub-section 4 of section 100. The registrar, so long as it remained in force, could not legally enter into the register any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the land;* and sections 47 and 48 of the Act seem to contemplate that *as a general rule* when a caveat has been registered, even in the case of a patentee applying to have his title registered, the registrar shall not do so, but shall transmit the application and all evidence supplied to the Judge. But in a case like the present, when the sheriff had filed the documents before application is made to register the title, the Act evidently contemplates that the registrar *is* to regis-

[* "Unless such dealing is subject to the claim of the Caveator." See Form Q. Caveat.—Ed.]

Judgment.
Wetmore, J

ter the title, notwithstanding the caveat, because section 94 provides that the registrar is to enter the memorandum of the sheriff's certificate, as soon as the title has been registered and therefore in such a case, as soon as he has registered the title, he is bound to enter the memorandum. We have thus a state of things that cannot, so far as I can at present discern, exist with respect to other caveats. This being so I think the duty of the registrar upon issuing a certificate of title under section 54 is plain. The registering of the execution seems to me to be "*a dealing affecting the land.*" It also seems to me to be an "encumbrance affecting the land" within the meaning of The Territories Real Property Act. Upon referring to section 3 of the Act I find (s.-s. g) "The expression 'encumbrance' means any charge on land created *for any purpose whatever.*" Now surely the registering of the execution is a charge on the land mentioned in the memorandum. It may be a charge improperly and wrongfully placed. That however may be said of any encumbrance even of a mortgage, because a mortgage may have been given by mistake or obtained by fraud. So long as the registration of the execution remains, however, if it is not set aside or withdrawn, it binds the lands and they may be liable to be sold under the execution. Section 94, it seems to me, by clear implication, contemplates that the delivery of the copy of execution and the memorandum by the sheriff shall operate as a charge. In the first place the section provides that the sheriff shall deliver a memorandum of the "lands *intended to be charged thereby.*" In the next place it provides that "no land *shall be bound* by any such writ or process until such copy and memorandum have been so delivered." Surely that must mean that when the copy and memorandum are delivered the land shall *be bound.* What is that but *charging the land*? That being so, whatever the effect may be if the registrar did not indorse a memorial of the registry of the execution on the certificate, I think the plain reading of section 54 requires him to make his indorsement and he should do so. It has been suggested that it would be more convenient not to make the indorsement, be-

Judgment. Wetmore, J.

cause the execution may not be kept alive and in that event the indorsement would be of no use. I cannot bring my mind to the conclusion that a consideration of that sort should be allowed to take away the plain and unequivocal language of the statute.

It is further claimed on behalf of the applicant that this land was exempted from seizure under R. O. (1888) c. 45, s. 1, s.-s. 9, and the registrar is bound to take notice of it. It seems to me that this is placing a very onerous duty on the registrar and one not contemplated by the statute. The homestead exempted under the Ordinance need not be lands obtained by the owner under patent from the Government to him. It may be lands purchased from any other source or person. Suppose the sheriff presents the documents and seeks to have the charge entered and states that the land is not the homestead of the execution debtor, exempted under the Ordinance, that he has another property that is his homestead. Is the registrar to run around the country and find out if this is true or not? I think not. I think he has merely to receive the papers and deal with them as the law directs and thus in effect say to the sheriff:—"This is your risk not mine; I have to do what you ask and the consequences if any will fall on you not on me." I cannot see that the indorsement on the patent is a notification to the registrar that the land is exempt from seizure under execution. That may possibly be just the question to try; for it may be that some other land is the homestead covered by the Ordinance and not the land in question, for, as stated before, the term "homestead" in the Dominion Lands Act is used for another purpose.

The question is then raised whether the land in question or any part thereof is liable to seizure under execution; and as regards this point the only questions submitted to us by the learned Judge are: 1st. Whether sub-section 9 of section 1 of R. O. (1888) c. 45 is *intra vires* of the Legislative Assembly? 2nd. If it is not, whether 80 acres of the land is exempted from seizure under the provisions of the Homestead Exemption Act? (R. S. C. c. 52).

Judgment.
Wetmore, J.

The authority of the Legislative Assembly to enact sub-section 9 of section 1 of chapter 45 must be found if anywhere in section 13 of the North-West Territories Act (R. S. C. c. 50) and in the Orders in Council made under the section dated respectively the 26th June, 1883, and the 7th July, 1886. The legislative powers conferred on the Lieutenant-Governor in Council are now transferred to the Legislative Assembly by 51 Vic. (1888) c. 19, s. 2. Sub-section 2 of section 13 of the North-West Territories Act provides that no Ordinance made under the authority of any Order in Council promulgated by virtue of that section "shall be so made which is inconsistent with or alters or repeals any provision of any Act of the Parliament of Canada in force in the Territories." If the Assembly had the power to legislate in the manner it has with respect to the subject in question, it must be found, in my opinion, under paragraph 8 of the powers conferred by the Order in Council of the 26th June, 1883, which gives power to legislate in relation to "Property and Civil Rights in the Territories subject to any legislation by the Parliament of Canada on these subjects." Section 3 of The Homestead Exemption Act provides that "Any man, who is the owner of an estate in fee simple or for life in land situate in the Territories with a dwelling house thereon occupied by him, may register as a homestead an extent of such land *not exceeding* eighty acres, if in a rural locality, or the lot on which such dweling house stands, if in an incorporated city, town or village, in the office for the registry of titles to lands for the place in which the land lies, clearly describing the property in the instrument for effecting such registration"; and section 4 provides that "the homestead so registered shall while the homestead registration continues . . . be wholly exempt from seizure or sale under execution . . . if the value of the homestead does not at the time of such registration exceeds two thousand dollars; and if the value then exceeds that amount it shall be so exempt to that amount." Section 8 provides in case the creditor is of opinion that the value of the homestead is greater

Judgment. Wetmore, J.

than "two thousand dollars an agreement may be made by which a portion of the homestead which represents the excess in value over two thousand dollars may be set apart and sold, and if such agreement cannot be made that the creditor may pay two thousand dollars either to the owner or to be invested as pointed out and may sell the homestead to satisfy the debt." Section 9 provides a form of request to register the homestead in which the applicant is required to state that the property does not exceed two thousand dollars to the best of the applicant's knowledge and belief; and this is to be verified by the affidavit or declaration of at least one credible witness; and it is provided that any wilfully false statement declared to by the applicant, sworn or declared to by the witness, or any fraud committed for the purpose of obtaining such registration shall make the registration void and of no effect; and section 10 provides that when the land is registered as a homestead "the registrar shall make an entry in the registry book and upon the certificate of title in these words, *registered as a homestead*, giving the date, hour and minute when the application for registration was filed." It may be as well to state that the several provisions of the Acts of Parliament referred to were enacted before the year 1886 and were carried forward into the revision. I gather from the several provisions of The Homestead, which would be exempt from seizure or compulsory that a person, residing in the Territories and owning land there, might take such steps as to enable him to have a homestead, which would be exempt from seizure or compulsory sale by execution or otherwise for the purpose of satisfying his debts; that the land so exempted should not exceed eighty acres in the rural districts and a town lot in towns and villages; that the value of the property so exempted should not exceed two thousand dollars; that, if it did exceed two thousand dollars, the surplus should be available for the payment of debts; and that there should be a record of the proceedings by which the property became so exempted, so that the fact might be patent to every one and that the property exempted should be clearly and distinctly specified. Sub-section 9 of

Judgment.
Wetmore, J.

section 1 of chapter 45 of the Revised Ordinances provides that one hundred and sixty acres of land shall be exempted from seizure under execution and that, without regard to the value thereof and without the necessity of any act or thing being done to specify and set apart the property exempted. It seems to me that this provision of the Ordinance is so utterly at variance and inconsistent with the provisions of The Homestead Exemption Act referred to, that it is only necessary to set them out to make the inconsistency apparent; no elaboration is necessary. I am therefore of opinion that the sub-section of the Ordinance is *ultra vires* of the Legislative Assembly. I have some difficulty in understanding sub-sections 9 and 10 of section 1 of chapter 45; reading them together I should judge that sub-section 9 is intended to apply to rural localities alone, but what does sub-section 10 apply to? Is that intended to apply to town and village localities and lots alone? If it is, it does not say so, and I think I can imagine a case, assuming these provisions to be *intra vires*, where an execution debtor might claim exemption as to house and buildings and lots on which the same are situated to the extent of $1,500 and also as to 160 acres besides.

As to the remaining question no part of the land has been registered as a homestead, and therefore the whole of it is liable to seizure and sale under execution.

I think therefore my brother Rouleau should be advised to instruct the registrar:—1st. that he was correct in entering, as soon as the title in question was registered, a memorandum of the delivery to him by the sheriff of a copy of the execution and of the memorandum of the lands intended to be charged; 2nd. that it was his duty to indorse upon the certificate of title a memorial of that charge; and that the learned Judge should declare the whole of the property liable to seizure and sale under execution.

McGUIRE, J.—This is a matter referred for the opinion of the Court by Mr. Justice Rouleau. One Claxton was the patentee of a quarter section of land acquired by him under

Judgment. McGuire, J.

the homestead regulations of the Dominion Lands Act. The patent was issued in October, 1889, was endorsed "Homestead No. 34,998," and was duly forwarded, from the office whence it issued, to the proper registrar at Calgary.

Prior to its receipt by that officer, several executions against lands in which said Claxton was judgment debtor, had been delivered by the sheriff to the registrar with memoranda thereon mentioning the above quarter section as the land thereby intended to be charged as provided by section 94, T. P. R. Act as amended. The registrar was willing to grant to Claxton a certificate of title endorsed with memorials of the said executions, but to this Claxton objected, claiming that the land was a "homestead," and therefore exempt from the operations of the executions, and that the certificate of title should be issued to him without any memorials of the executions. The matter being referred by the registrar to Mr. Justice Rouleau was by him referred to this Court.

The claim to exemption as a "homestead," must be founded either on chapter 52, R. S. C., or chapter 45, R. O. of the North-West Territories (1888). It could not be a "homestead" within the meaning of the former, the Homestead Exemption Act, because the procedure required by that Act had not been complied with by Mr. Claxton; that is, it had not been registered by him as a "homestead." So that his claim to exemption must depend on the provisions of R. O. c. 45. The term "homestead" in the Ordinance does not, in my opinion, mean the same thing as that word when used in the Dominion Lands Act. In this Act it is used to describe the quarter section of land to which a settler has become entitled by virtue of performing the settlement duties described by the Act. In the Ordinance the word must be given a very different meaning, because otherwise it would be extending its protection only to those who acquired land under the homestead regulations of the Dominion Lands Act, and not exempting land acquired by purchase or otherwise.

In my opinion "homestead" in the Ordinance was in-

tended to mean "the enclosure or ground immediately surrounding the mansion or home-residence of the debtor." I am not aware whether any evidence was presented to the registrar or Mr. Justice Rouleau, that the land in question came within this interpretation of a "homestead," i.e., that the debtor had there his home-residence and that this land was immediately surrounding that residence or enclosed therewith. Judgment. McGuire, J

By section 94, T. R. P. Act, as amended by 51 Vic. c. 20, the duty of the registrar is, upon delivery to him by the sheriff of a copy of the fi. fa. lands, with the memorandum of the land intended thereby to be charged, "if the title has been registered, or as soon as the title has been registered, to enter a memorandum thereof in the register." In this case as soon as the patent was registered it was his duty to enter in the register memoranda of the executions against the registered owner. Where the patentee applies for a certificate of title, section 54 provides that "after registration" and on payment of the fees, the registrar shall grant him a certificate (Form F), a copy of which is to be preserved "in the register." The register, in fact, consists (s. 38) of the bound up duplicates of all certificate of title issued. As we have seen, section 94 requires the registrar to enter on this register a memorandum of each fi. fa. lands, etc., delivered to him; in other words, to enter it on the duplicate certificate of title retained by him and bound in the "register." The duplicate to be handed to the owner must (in order to be a duplicate) contain a similar memorandum.

Moreover section 54 expressly requires the registrar to endorse upon both duplicates "a memorial of every . . . encumbrance . . . or other dealing affecting the land." If the document delivered by the sheriff to the registrar under section 94 is an "encumbrance or other dealing affecting the land," he is thereby also required to mention such documents in the certificate of title.

The executions here were against Mr. Claxton, who immediately upon registration of the patent became the registered owner, and so on the face of the documents the

Judgment. McGuire, J.

registrar was justified in entering the memorials on the certificate of title. Even if he had not done so I think the land would nevertheless be bound by these executions, inasmuch as they were against the registered owner (section 61, sub-section e.)

But then Mr. Claxton says, "this land is exempt from the operation of these executions, and so these memorials are merely blots on my title and should not appear there." That contention justified the registrar in referring the master to the Judge under section 114. The question then became one as to exemption.

As I have already said, I think this land cannot claim exemption by virtue of c. 52 R. S. C., for the reason already given. If exempt at all it must be under Revised Ordinances, c. 45, s. 1, s.-s. 9.

Two questions then arise:

(1) Was this land within the protection of that section?

(2) Is this sub-section within the powers of the Legislative Assembly?

If the latter question is answered in the negative it will be unnecessary to consider the former.

The powers of the Assembly are based on the Orders-in-Council, which are themselves limited by section 13 of chapter 50, R. S. C. The power to legislate as the Assembly has here done, must I think be given (if at all) by section 8 of the Order-in-Council of 26 June, 1883, "Property and Civil Rights in the Territories—subject to any legislation by the Parliament of Canada on these subjects." I think that exemption of property from seizure under execution issued under the Judicature Ordinance of the Territories was *prima facie* within the powers of the Assembly.

Parliament had, however, in 1878, passed an Act dealing with the subject of homestead exemption, but because the provisions of that Act were framed with reference to a Real Property Bill, which was at the same time before Parliament, but which did not become law, the Homestead Exemption Act became practically inoperative and the Assembly then passed an Exemption Ordinance (No. 8 of 1885) of which chapter 45

tended to mean "the enclosure or ground immediately surrounding the mansion or home-residence of the debtor." I am not aware whether any evidence was presented to the registrar or Mr. Justice Rouleau, that the land in question came within this interpretation of a "homestead," i.e., that the debtor had there his home-residence and that this land was immediately surrounding that residence or enclosed therewith. Judgment. McGuire, J

By section 94, T. R. P. Act, as amended by 51 Vic. c. 20, the duty of the registrar is, upon delivery to him by the sheriff of a copy of the fi. fa. lands, with the memorandum of the land intended thereby to be charged, "if the title has been registered, or as soon as the title has been registered, to enter a memorandum thereof in the register." In this case as soon as the patent was registered it was his duty to enter in the register memoranda of the executions against the registered owner. Where the patentee applies for a certificate of title, section 54 provides that "after registration" and on payment of the fees, the registrar shall grant him a certificate (Form F), a copy of which is to be preserved "in the register." The register, in fact, consists (s. 38) of the bound up duplicates of all certificate of title issued. As we have seen, section 94 requires the registrar to enter on this register a memorandum of each fi. fa. lands, etc., delivered to him; in other words, to enter it on the duplicate certificate of title retained by him and bound in the "register." The duplicate to be handed to the owner must (in order to be a duplicate) contain a similar memorandum.

Moreover section 54 expressly requires the registrar to endorse upon both duplicates "a memorial of every . . . encumbrance . . . or other dealing affecting the land." If the document delivered by the sheriff to the registrar under section 94 is an "encumbrance or other dealing affecting the land," he is thereby also required to mention such documents in the certificate of title.

The executions here were against Mr. Claxton, who immediately upon registration of the patent became the registered owner, and so on the face of the documents the

Judgment.
McGuire, J.

registrar was justified in entering the memorials on the certificate of title. Even if he had not done so I think the land would nevertheless be bound by these executions, inasmuch as they were against the registered owner (section 61, sub-section e.)

But then Mr. Claxton says, "this land is exempt from the operation of these executions, and so these memorials are merely blots on my title and should not appear there." That contention justified the registrar in referring the master to the Judge under section 114. The question then became one as to exemption.

As I have already said, I think this land cannot claim exemption by virtue of c. 52 R. S. C., for the reason already given. If exempt at all it must be under Revised Ordinances, c. 45, s. 1, s.-s. 9.

Two questions then arise:

(1) Was this land within the protection of that section?

(2) Is this sub-section within the powers of the Legislative Assembly?

If the latter question is answered in the negative it will be unnecessary to consider the former.

The powers of the Assembly are based on the Orders-in-Council, which are themselves limited by section 13 of chapter 50, R. S. C. The power to legislate as the Assembly has here done, must I think be given (if at all) by section 8 of the Order-in-Council of 26 June, 1883, "Property and Civil Rights in the Territories—subject to any legislation by the Parliament of Canada on these subjects." I think that exemption of property from seizure under execution issued under the Judicature Ordinance of the Territories was *prima facie* within the powers of the Assembly.

Parliament had, however, in 1878, passed an Act dealing with the subject of homestead exemption, but because the provisions of that Act were framed with reference to a Real Property Bill, which was at the same time before Parliament, but which did not become law, the Homestead Exemption Act became practically inoperative and the Assembly then passed an Exemption Ordinance (No. 8 of 1885) of which chapter 45

Judgment. McGuire, J.

Revised Ordinances is a consolidation. When, however, the Territories Real Property Act, R. S. C. c. 50, became law on the 1st January, 1887, the Dominion Homestead Exemption Act, consolidated as chapter 52, became operative. There was thereupon "legislation by the Parliament of Canada on this subject," and the Territorial Ordinances must not be "inconsistent with, alter or repeal any provision" thereof.

Is sub-section 9 of the Ordinance "inconsistent with" or does it "alter or repeal any provision" of the Dominion Act? If it does, then I think it is *ultra vires* of the Assembly.

The answer to this is by no means an easy one. By the Dominion Act any man, who is owner in fee or for life, of land may by complying with the procedure there provided register it as a "homestead," "to an extent not exceeding 80 acres," and when that is done certain consequences follow:

(1) It is exempt from seizure or sale under execution, or any Insolvency Act.

(2) It is inalienable by the owner, if married, without the consent of his wife (subject to an exception) if living, or if she is dead and there are minor children, without approval of a Judge.

(3) If not alienated at his death it descends to his widow for life or if no widow, to his minor children during their minority.

(4) Its homestead privileges are not dependent on the continued residence on it of the homesteader.

The Ordinance deals only with exemption from seizure under execution, and not with the mode of descent or the owners powers of alienation, but exempts 160 acres.

It may be urged with considerable force that the Act and the Ordinance are consistent, for that the objects of the Act are not merely to exempt from seizure, or sale, but also to secure it for the wife and minor children of the homesteader and that, while 80 acres and no more were by Parliament considered all that ought to be allowed to be so dealt with, and a certain procedure on the part of the proposed homesteader was made a necessary preliminary, it is not inconsistent therewith that a larger area (160 acres) should be ex-

Judgment
McGuire, J

empted simply from seizure under execution, so long as the land retained its character of being the debtor's homestead. For example, it might be said that Parliament might consistently have passed a subsequent Act exempting 160 acres from seizure under execution as the Ordinance attempts to do, without such Act being inconsistent with, or altering, or repealing the former Act. It is this consideration which creates so much difficulty in my mind. I feel, however, that there is an inconsistency between the Ordinance and the Act; that Parliament has expressed its will that no more than 80 acres should be exempt, and that for the Ordinance to say there shall be more exempt, is to say what is inconsistent with the expressed will of Parliament; that while Parliament requires a man desiring to protect his property from his creditors, to give distinct notice to all the world of his intention, and of the precise land to be so protected, by formally registering it as directed, and provides that as a condition of so securing protection he must at the same time submit to certain limitations on his power of alienation, etc., for the Ordinance to say he *may* have exemption without giving such notice and without submitting to such limitations, is to run counter to the will of Parliament.

Moreover, if the Ordinance is *intra vires*, then a man might own both 80 and 160 acres free from seizure under execution.

For these reasons, though not without some hesitation, I have come to the conclusion that sub-section 9 is *ultra vires* of the Assembly.

I therefore think that Mr. Justice Rouleau should be advised that the certificate of title should have endorsed thereon memorials of the executions in question; although in case of the omission to so endorse the land would by implication be still bound (section 61, sub-section e) by these executions against the registered owner, Mr. Claxton; and further that the said land is not exempted from the operations of the executions.

RICHARDSON, MACLEOD and ROULEAU, JJ., concurred.

Revised Ordinances is a consolidation. When, however, the Territories Real Property Act, R. S. C. c. 50, became law on the 1st January, 1887, the Dominion Homestead Exemption Act, consolidated as chapter 52, became operative. There was thereupon "legislation by the Parliament of Canada on this subject," and the Territorial Ordinances must not be "inconsistent with, alter or repeal any provision" thereof. Judgment. McGuire, J.

Is sub-section 9 of the Ordinance "inconsistent with" or does it "alter or repeal any provision" of the Dominion Act? If it does, then I think it is *ultra vires* of the Assembly.

The answer to this is by no means an easy one. By the Dominion Act any man, who is owner in fee or for life, of land may by complying with the procedure there provided register it as a "homestead," "to an extent not exceeding 80 acres," and when that is done certain consequences follow:

(1) It is exempt from seizure or sale under execution, or any Insolvency Act.

(2) It is inalienable by the owner, if married, without the consent of his wife (subject to an exception) if living, or if she is dead and there are minor children, without approval of a Judge.

(3) If not alienated at his death it descends to his widow for life or if no widow, to his minor children during their minority.

(4) Its homestead privileges are not dependent on the continued residence on it of the homesteader.

The Ordinance deals only with exemption from seizure under execution, and not with the mode of descent or the owners powers of alienation, but exempts 160 acres.

It may be urged with considerable force that the Act and the Ordinance are consistent, for that the objects of the Act are not merely to exempt from seizure, or sale, but also to secure it for the wife and minor children of the homesteader and that, while 80 acres and no more were by Parliament considered all that ought to be allowed to be so dealt with, and a certain procedure on the part of the proposed homesteader was made a necessary preliminary, it is not inconsistent therewith that a larger area (160 acres) should be ex-

Judgment
McGuire, J

empted simply from seizure under execution, so long as the land retained its character of being the debtor's homestead. For example, it might be said that Parliament might consistently have passed a subsequent Act exempting 160 acres from seizure under execution as the Ordinance attempts to do, without such Act being inconsistent with, or altering, or repealing the former Act. It is this consideration which creates so much difficulty in my mind. I feel, however, that there is an inconsistency between the Ordinance and the Act; that Parliament has expressed its will that no more than 80 acres should be exempt, and that for the Ordinance to say there shall be more exempt, is to say what is inconsistent with the expressed will of Parliament; that while Parliament requires a man desiring to protect his property from his creditors, to give distinct notice to all the world of his intention, and of the precise land to be so protected, by formally registering it as directed, and provides that as a condition of so securing protection he must at the same time submit to certain limitations on his power of alienation, etc., for the Ordinance to say he *may* have exemption without giving such notice and without submitting to such limitations, is to run counter to the will of Parliament.

Moreover, if the Ordinance is *intra vires*, then a man might own both 80 and 160 acres free from seizure under execution.

For these reasons, though not without some hesitation, I have come to the conclusion that sub-section 9 is *ultra vires* of the Assembly.

I therefore think that Mr. Justice Rouleau should be advised that the certificate of title should have endorsed thereon memorials of the executions in question; although in case of the omission to so endorse the land would by implication be still bound (section 61, sub-section e) by these executions against the registered owner, Mr. Claxton; and further that the said land is not exempted from the operations of the executions.

RICHARDSON, MACLEOD and ROULEAU, JJ., concurred.

THE QUEEN v. MILLS ALIAS MILLET.

Crown case reserved—Perjury—Evidence—Judge's notes.

Held that, on the trial of a charge of perjury, the production of a book purporting to contain full notes of the evidence taken by the trial Judge (who was proved to have actually taken notes) in the case in which the perjury was alleged to have been committed, and proved to be in the Judge's handwriting, and to be signed by him, afforded, in view of the N. W. T. Act, s. 69, † proper and sufficient evidence of the statement in respect of which the perjury was assigned.

[*Court in banc, December 5th, 1890.*

Statement.

The trial of this case took place before WETMORE, J., who reserved a question for the consideration of the Court in banc. The facts, the question reserved and the points involved fully appear in the judgment.

The question was argued on the 3rd December, 1890.

J. R. Costigan, for the Crown.

E. P. Davis, for the prisoner.

[*December 5th, 1890.*]

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

MACLEOD, J.—This is a Crown case reserved by Mr. Justice Wetmore at the last sittings of the Court of the Judicial District of Northern Alberta at Calgary.

The case is stated by the learned Judge as follows:

The prisoner, George Mills alias George Millet, was convicted of the offence of perjury on the 14th day of November instant before the undersigned Judge of the Supreme Court of the North-West Territories and the undersigned Justice of the Peace in and for the said Territories

† R. S. C. c. 50.

Judgment. McLeod, J.

with the intervention of a jury of six, at Calgary in the Judicial District of Northern Alberta.

The perjury was alleged to have taken place at a trial, before the Honorable Mr. Justice Rouleau and A. E. Skelton, Esquire, a Justice of the Peace for the North-West Territories, with the intervention of a jury of six at Calgary on the twelfth day of July last, of a charge against one Robert Scott, charged with unlawfully, wilfully, and without lawful excuse refusing and neglecting to provide for his wife necessary food, clothing, and lodging for sustenance, support and nourishment; wherein the prisoner was called and sworn as a witness for the defence. The charge against Scott, the trial before ROULEAU, J. and Mr. Skelton and the jury, the fact that the prisoner was called as a witness on such trial for the defence and that he was duly sworn were all duly proved.

For the purpose of proving that the prisoner swore to the statement alleged to be perjured, the Crown Prosecutor produced a witness, who was present at the trial, and was proceeding to prove by him what the prisoner swore to on that trial, when the prisoner's counsel took the objection that as the Judge was required by law to take full notes of the evidence or to cause the same to be taken, those notes and those notes only, were the only evidence that could be received of what the prisoner swore to. The Crown Prosecutor assented to the proposition that these notes were evidence of what the prisoner swore to, but he claimed that they were not the only evidence that was admissible of that fact.

A book was then produced which was proved to be Mr. Justice Rouleau's note book in criminal cases. This book, upon being opened at a certain page, had the following entry:

"The Queen v. Scott. Refusing to provide for his wife. Calgary, 12th July, 1890. Present Hon. Mr. Justice Rouleau and A. E. Skelton, Esquire, J.P."

Judgment. McLeod, J.

The book from that point proceeded with entries which appeared on their face to be full notes of the evidence and proceedings at that trial. They purported to be signed at the end by Mr. Skelton, and ROULEAU, J., and they contained what purported to be notes of the evidence of the prisoner given at that trial. All these entries and notes were proved to be in the handwriting of ROULEAU, J., the signature of Mr. Skelton at the end was proved to be his handwriting and the signature of ROULEAU, J., at the end was proved to be his handwriting. It was also proved that ROULEAU, J., took notes at the trial of the case of the Queen against Robert C. Scott, and there was no evidence that any other person or authority took notes at such trial. These entries and notes so proved were tendered in evidence. The counsel for the prisoner objected to the receipt thereof on the grounds that they were not properly identified; that no person could identify them except ROULEAU, J., who wrote them, or some person, who was looking over his shoulder all the time he was writing them; that these notes might not be full notes and, for all that appeared in evidence, the Judge have caused the full notes, required to be taken, to be taken by somebody else.

The evidence was received and these entries and notes read. There was no other evidence of what the prisoner swore to at the trial of the cause of The Queen against Robert C. Scott; and the jury were directed that what appeared in these notes as the evidence of the prisoner or purporting to be so was conclusive evidence of what he swore to at that trial.

The prisoner was found guilty and sentenced upon conviction to be imprisoned for three years in the Manitoba Penitentiary; but, it having been determined to reserve the question of law which arose at the trial for the consideration of the Justices of the Court for Crown Cases Reserved, execution of the sentence on such conviction was respited, until such question had been considered and decided, and the prisoner was in the meanwhile committed to the cus-

Judgment. McLeod, J.

tody of the North-West Mounted Police Force in the police guard room at Calgary.

The question of law so reserved is whether the notes of ROULEAU, J., were properly received in evidence.

It is the opinion of the Court that the learned Judge was right in receiving in evidence the notes of Mr. Justice Rouleau, as they appeared to him by sufficient evidence to be the full notes of the evidence taken by Mr. Justice Rouleau, in the case of The Queen v. Scott, as prescribed by section 69 of the North-West Territories Act.‡

The conviction is therefore affirmed.

Conviction sustained.

‡ "The Judge shall upon every such trial take, or cause to be taken down in writing, full notes of the evidence and other proceedings thereat." See *Reg.* v. *Riel* (No. 2), *supra* 23, pp. 28, 29, 44, 45, 61, 62.

THE QUEEN v. SALTERIO.

THE QUEEN v. McKENZIE.

THE QUEEN v. TUMULTY.

N. W. T. Act—Intoxicants — Permit — Municipal Ordinance — By-law— Licenses — Hotels — Places of public resort — Places where liquid refreshments are sold—License fee—Excessive amount—Police regulation—Revenue.

The North-West Territories Act, † s. 92, enacts *inter alia* that no intoxicant shall be imported into the Territories, or be sold, exchanged, traded or bartered, or had in possession therein, except by special permission in writing of the Lieutenant-Governor.

The Municipal Ordinance ‡ authorizes municipal councils to make by-laws for licensing, regulating, and governing, *inter alia*, hotels, places of public resort, and places where liquid refreshments are sold: and for fixing the sum to be paid for a license.

Held, that a permit from the Lieutenant-Governor did not dispense the holder from a compliance with a municipal by-law passed under the above mentioned provision of the Municipal Ordinance.

Held, that, assuming that the power to impose a license under the Ordinance was intended as a power to make a police regulation and not for the purpose of raising a revenue (but *semble*, contra, §) a by-law imposing a license fee of $100 was valid as against the objection that the fee was excessive.

[*Court in banc, December 2nd, 1890.*

Statement.

Convictions in these three cases were returned to the Court in pursuance of writs of *certiorari*. Motions to quash the convictions were made in each case. The three motions were argued together. The facts and points involved appear in the judgment.

J. R. Costigan, for the motions.

E. P. Davis, contra.

† R. S. C. c. 50.

‡ Municipal Ordinance R. O. (1888) c. 8, s. 68, s.-s. 34, as amended by Ordinance No. 19 of 1889, s. 4.

§ See Orders-in-Council 1877, s. 4, ante p. xiii.; 1883, s. 4, ante p. xvi.: 54-55 V. (1891) c. 22, s. 6, substituting new s. 13 in R. S. C. c. 50, s. 13, s.-s. 6.—Ed.

Judgment.

Wetmore, J.

[*December 2nd, 1890.*]

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

WETMORE, J.—The defendant Joseph Salterio was convicted before J. D. Lafferty, Esquire, a Justice of the Peace, for that he was, within the limits of the municipality of the town of Calgary, a keeper of a hotel, known as the Grand Central Hotel, without having obtained a license, contrary to the provisions of a by-law of the said municipality.

Colin McKenzie was convicted before the same Magistrate for keeping a place of public resort, known as the Park Hotel, within the limits of the said municipality without license, contrary to the provisions of the same by-law.

And Patrick Tumulty was convicted before the same Magistrate for keeping a place where liquid refreshments were sold within the said limits without license, contrary to the provisions of the same by-law.

The convictions and proceedings were brought into this Court by a writ of *certiorari* issued in each case and application was made to quash the convictions. For convenience the applications to quash the three convictions were heard together.

A number of objections were in the first instance taken to the convictions but they were all abandoned during the progress of the argument, except two to the convictions against Salterio and McKenzie, and one to the conviction against Tumulty.

The by-law in question was passed under the authority conferred by sub-section 34 of section 68 of the Municipal Ordinance, as amended by section 4 of Ordinance No. 19 of 1889, which provides that the Town Council may make by-laws for "licensing, regulating and governing livery stables, sale stables, feed stables, refreshment houses, public boarding or lodging houses, hotels and places of public resort, or accommodation or amusement, places where liquid refreshments are sold and private boarding or lodging houses

Judgment.
Wetmore, J.

where at least four boarders or lodgers are kept and for fixing the sum to be paid for a license for exercising any or all such callings within the municipality and the time the license shall be in force."

This by-law provided that "every keeper of a * * * hotel * * * place of public resort * * * a place where liquid refreshments are sold" within the limits of the municipality should obtain a license in the manner therein directed and fixed the fee to be paid therefor at one hundred dollars. It was proved in evidence that Salterio and McKenzie each held a license or permit from His Honor the Lieutenant-Governor, authorizing each of them to import into the Territories a certain specified quantity of beer of a certain alcoholic strength and to have the same in his possession in his hotel; that is Salterio to have it in the hotel known as the Grand Central Hotel and McKenzie in the hotel known as the Park Hotel, and to sell and dispose of the said beer in their respective hotels for consumption there and not elsewhere. These permits were granted upon certain conditions, among which were that each party shall continue to keep his "said premises as a reputable hotel and keep provided therein separate bedroom accommodation for not less than twelve persons, and, in connection with said premises, proper stable accommodation for not less than five horses and shall conform to and abide by all the by-laws, rules and regulations respecting hotels of the municipality, in which the said premises may be situate."

It was contended, on behalf of Salterio and McKenzie, that this permit which they each so held relieved them from the necessity of complying with the by-law and taking out license; that this permit was in itself a license to keep their respective hotels and, having been issued by His Honor the Lieutenant-Governor, was issued by an authority superior to that of the Town Council of Calgary and was an answer to the prosecutions. The authority of the Lieutenant-Governor, to grant permits for the importation and sale of intoxicating liquor, is obtained under the provisions of section 92 of the North-West Territories Act, which enacts that

Judgment. Wetmore, J.

no intoxicating liquor or intoxicant shall be "imported or brought into the Territories from any province of Canada or elsewhere or be sold, exchanged, traded, or bartered or had in possession therein, except by special permission in writing of the Lieutenant-Governor."

There is no authority then conferred upon the Lieutenant-Governor to override or in any way to affect a by-law lawfully passed under the provisions of the Ordinance, nor does the Lieutenant-Governor by the permits in question attempt to do so. On the contrary, he makes it a condition that the party holding the permit shall conform to the by-laws. I think therefore there is nothing in this objection.

The next objection goes to all convictions. It was urged that the power to license in these cases, conferred upon the municipality, was in the nature of police regulations and not for the purpose of raising a revenue, and that the license fee provided is excessive, and that therefore the by-law is bad. It was urged that, because sub-section 1 of section 68 of the Municipal Ordinance authorized the Council to pass by-laws for "the raising of its revenue by assessment upon real and personal property and income," the raising of a revenue by such assessment was the only source of revenue for municipal purposes contemplated by the Legislature, and therefore that the licensing powers conferred by sub-section 34 and other sub-sections of section 68 were not with a view to raising a revenue. I am by no means prepared to assent to that proposition; but it is not necessary for me to express any decided opinion on that point, as I am of opinion that, assuming the powers to be in the nature of a police regulation, the fee is not excessive so as to render the by-law bad. The powers conferred upon municipalities in the North-West Territories with respect to these licenses are not new; they are similar to powers conferred upon municipalities in other parts of Canada, which have been exercised there for a great number of years. In many instances the fee exacted has been much greater than that provided by the by-law in question. It seems to me

that it is too late to set up that a fee of one hundred dollars is too much to be exacted for such a license, if it could ever have been successfully urged. The Court seems to have been influenced by a consideration of this kind in *Re Neilly et al.*[1] where they held a license fee of three hundred dollars for keeping a billiard table to be not excessive. In the Canadian Law Times, vol. X. (1890), p. 170, it is stated that the Supreme Court of Canada have held in *Pigeon* v. *The Recorder's Court*,[2] that a by-law of the city of Montreal exacting a fee of two hundred dollars for a license to sell, at a private stall, meat, fish, vegetables, or provisions usually sold in markets is valid. This case seems to have arisen under the powers conferred upon the City Council of Montreal to pass by-laws under sub-sections 27 and 31 of section 123 of 37 Vic. c. 51 of the Province of Quebec. In scrutinizing these provisions it seems to me that, if it can be successfully claimed that the powers in question in these cases conferred upon municipalities in the North-West Territories are police regulations only, *a fortiori* those conferred on the City Council of Montreal which I have referred to are police regulations. If a fee of two hundred dollars is not considered excessive under those sub-sections of the Quebec Act, I cannot hold that a fee of one hundred dollars is excessive under the sub-section of the Ordinance. Judgment Wetmore, J

I think the rules ought to be discharged with costs.

Rules discharged with costs.

[1] 37 U. C. Q. B. 289. [2] Subsequently reported 17 S. C. R. 495.

THE QUEEN v. FARRAR.

Habeas corpus—Practice—Dispensing with issue of writ—Discharge of prisoner without being brought up—Parties to be served—Conviction—Hard labor—Duplicity.

A conviction, which attaches hard labor to imprisonment in default of there being sufficient distress to levy the fine imposed, is bad.

A conviction which charges an offence on two separate days, charges two distinct separate offences, and, if it be a case where s. 26 of the Summary Convictions Act † applies,‡ is bad; a warrant of commitment based on such a conviction is consequently bad.

It is a usual, convenient and established practice that a rule *nisi* to shew cause why a writ of *habeas corpus* should not issue should also require cause to be shewn why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ of *habeas corpus* and without his being personally brought before the Court; but in order that the rule may be made absolute in this form; the magistrate, the keeper of the prisoner, and the prosecutor should all be served with the *rule nisi*, or at least be represented on its return.

[*Court in banc, December 3rd, 1890.*

Statement. The facts and the points involved appear in the judgment.

C. C. McCaul, Q.C., moved absolute a *rule nisi* granted by Macleod, J., returnable before the full Court, for a writ of *habeas corpus* to bring up the body of Thomas Farrar or in the event of the rule being made absolute that the prisoner should be discharged without the writ of *habeas corpus* actually issuing, and without his being brought before the Court, on the ground that the warrant of committal was invalid on its face, inasmuch as the conviction on which the warrant was based, and which was recited in it was bad as (1) being for two offences; (2) ordering the fine to be levied by distress; and (3) awarding in default of distress imprisonment for three months with hard labor, to begin after the expiry of the substantive term already awarded.

D. L. Scott, Q.C., for the magistrates and the gaoler.

† R. S. C. c. 178. See new Crim. Code, s. 845, s.-s. 3.

‡ Which is not always the case when the proceedings are under provincial or territorial legislation, *e.g.*, Liquor License Ordinance C. O. (1898) c. 89, s. 102.

[*December 3rd, 1890.*]

Judgment, Wetmore, J

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

WETMORE, J.—An order *nisi* was made by my brother Macleod in this matter requiring all parties concerned to shew cause at this term why a writ of *habeas corpus* should not issue, directed to Richard Burton Deane, Superintendent of the North-West Mounted Police Force at Lethbridge, to have the body of Thomas Farrar before this Court, and why, in the event of the rule being made absolute, the said Thomas Farrar should not be discharged without the writ of *habeas corpus* actually issuing and without his being personally brought before the Court.

A duly verified copy of the warrant of commitment, under which Farrar is held in custody, was read at the argument, by which it appears that he was committed by two Justices of the Peace by virtue of a conviction against him for an alleged offence or offences against the Indian Act.§ The commitment is clearly bad. The conviction is set forth in this document, and it alleges that Farrar was convicted for that he, on the twenty-fifth day of October, did sell intoxicants to "Cree Woman," an Indian, and to "Good Killer," an Indian; and for that, on the twenty-sixth day of October, he did sell intoxicants to the said "Cree Woman" and the said "Good Killer"; and that it was adjudged that for his offence he should be imprisoned in the Guard Room of the North-West Mounted Police, at Lethbridge, and there kept at hard labor, for six months; and also that he should forfeit and pay three hundred dollars; and that he should pay the prosecutor Jarvis the sum of seven dollars and twenty cents costs; and that if these sums were not paid forthwith they should be levied by distress and, in default of sufficient distress, that he should be imprisoned in the said Guard Room, and there kept at hard labor, for the term of three months, to commence from the expiration of the six months, unless the said sums were sooner paid; and

§ R. S. C. c. 43, s. 94, as amended by 51 Vic. (1888) c. 22, s. 4.

Judgment. Wetmore, J.

the warrant, after reciting the conviction substantially as I have set it out, commanded the constables and peace officers to convey the said Farrar to the said Guard Room, and commanded the keeper thereof to receive him into his custody there, and there imprison and keep him at hard labor for the term of six months.

It was admitted at the argument by the learned counsel for the magistrates, and there can be no doubt, that the conviction as set forth is bad for awarding imprisonment for three months *with hard labor* in default of distress. I merely mention this, but do not base my judgment upon this defect, as the warrant in question did not commit the party to custody for the three months in default of distress; and it is not necessary to express any opinion as to the effect of that defect, as the conviction as recited is clearly bad for a cause, which goes to the root of the whole imprisonment and penalties awarded. The sales on the 25th and 26th days of October, although to the same parties, were two separate and distinct offences, and for each offence Farrar would be liable to the full penalties provided for such an offence. Section 26 of the Summary Convictions Act‡ provides that "every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences." This provision of the Act is very plain and positive. If an information can only be laid for one offence, it is very evident that a person can only be convicted of one offence. A person cannot be charged with one offence and convicted of two offences. The conviction as set forth in the warrant is bad, and consequently the warrant, which is founded upon such a conviction, is bad and the order *nisi* for a *habeas corpus* should be made absolute.

Having arrived at this conclusion, the next question which arises is whether the other part of the application

‡ See *Reg.* v. *Mathewson*, ante p. 168; The Summary Convictions Act, R. S. C. c. 178, s. 67; Crim. Code, s. 872.

should be granted, and the prisoner discharged, without the writ of *habeas corpus* actually issuing and without his being personally brought before the Court. The prisoner's counsel, in taking out the order *nisi* in these terms, was acting in accordance with the established practice; and it is quite open to the Court to make an order in this case, in accordance with the terms of the application, cause having been shewn against the rule, provided that the practice has been in other respects complied with. The text of Paley on Convictions, 6th edition, 409, is fully borne out by some of the authorities cited in the notes thereto, which I have examined. This practice is also stated to have been in use before the recent Crown Office Rules in England in Short & Mellor's Crown Office Practice, 351. This is a practice, however, which has merely been adopted by the Courts for convenience. It has not been prescribed in any other way; and before we are called upon to exercise the power of discharge at this stage the practice should be strictly followed. The practice in these cases has been to serve the rule on the magistrates, the keeper of the prison, and the prosecutor; see *Ex parte Jacklin*,[1] and Paley on Convictions, 6th edition, 409, note (*h*). The order *nisi* was served only on Superintendent Deane, as keeper of the Guard Room, as appeared by the affidavit of service, but as the magistrates appeared by their counsel at the argument the omission to serve them is cured. But the prosecutor Jarvis has not been served and no person appeared for him. The prisoner cannot therefore be discharged at this stage.

Judgment.
Wetmore, J.

The motion to make the rule absolute will be adjourned to the 22nd January next, to admit of the prosecutor being served.

On January 22nd, 1891, the rule was made absolute on the terms asked.

Rule absolute.

[1] D. & L. 103; 1 New Sess. Cas. 280; 13 L. J. M. C. 139; 8. C. *sub nom* R. v. Fytche, 8 Jur. 576.

Note.

NOTE—In the report in the Law Journal of *Ex parte Jacklin* (1844), *supra*, there is on p. 140 the following note by the Reporter: "This course has been adopted in several recent cases, in order to save the expense of bringing up the prisoner. If no cause be shewn then a writ of *habeas corpus* must issue; but considering that the expense of bringing up the prisoner. If no cause be shewn and also that the conduct of the magistrate in not adopting the reasonable course of shewing cause upon such a rule, might materially influence the opinion of the jury in the event of the warrant being held to be defective and an action being brought, it seems to be the more discreet course to shew cause."

In re Bull (1846), 1 Bail Ct. R. (Saunders & Cole), 141; 15 L. J. Q. B. 235; 8 Jur. 827; Wightman, J., said: "I must treat the case as if the party had been really brought up upon the *habeas corpus* and everything which now appears on affidavits had been stated upon a return."

In *Ex parte Egginton* (1854), 2 E. & B. 717; 23 L. J. M. C. 44, the Court observed, that this course was a usual and convenient course, as it saved expense. In all those cases the rule was in substantially the same form as the present case.

SEXSMITH v. MURPHY ET AL.

New trial—Newly discovered evidence—Appeal—Amendment of notice.

As a general rule on the argument of an appeal leave to amend the notice of appeal will be given only for the purpose of correcting errors of dates and other trifling matters and on special terms. The circumstances discussed under which a new trial will be granted or refused on the ground of the discovery of fresh evidence.

[*Court in banc, June 2nd, 1891.*

Statement.

Action of detinue for two horses — Defence (1) traverses; (2) the horses the property of the defendant Ross, subject to the terms of a "lien note" given by defendant Murphy.

The defendant Ross was a rancher, the plaintiff a builder. It was agreed between them that plaintiff should put up a building for Ross taking at the time of the agreement the horses in question as payment; that they should be allowed to run on Ross' ranch at plaintiff's risk till plaintiff was ready to take them away. After plaintiff had commenced the work, Ross sold the horses to defendant Murphy, part of the price being secured by a lien note.

The case was tried at Calgary, on the 27th November, 1890, before WETMORE, J., without a jury.

J. R. Costigan, for the plaintiff.

P. J. Nolan, for the defendant Ross.

E. Care, for the defendant Murphy.

[*November 27th, 1890.*]

WETMORE, J.—I find that the property in question was sold absolutely by the defendant Ross to the plaintiff, and that it was agreed between Ross and the plaintiff that from the time of such sale that the horses should be kept in Ross' premises and that such possession by Ross should be as bailee for the plaintiff, that is, I accept the plaintiff's version of the transaction, and I hold that this is a sufficient acceptance and receipt under the Statute of Frauds.

Judgment.
Wetmore, J.

I find for the plaintiff on all the issues and order and direct judgment to be entered for the plaintiff for $2 damages and costs against both defendants.

As between the defendant Murphy and the defendant Ross I find that the defendant Murphy is entitled to indemnity as against the defendant Ross, and I do order that judgment be entered in favor of the defendant Murphy against the defendant Ross for $500, and his costs of defending this action, including a Counsel Fee of $30, but no execution to be issued on such judgment without leave of a Judge obtained by application at Chambers. If the defendant Ross on or before the 2nd January next retire the lien note given by Murphy to him now in the Imperial Bank, and give the said note up to Murphy to be cancelled, and pay the amount of the judgment and costs awarded to the plaintiff and the costs awarded to the defendant Murphy, he may apply to a Judge in Chambers to have satisfaction of the judgment entered at his cost. If he fail in any of these conditions the defendant Murphy may apply to a Judge in Chambers to have execution issued on his judgment against Ross for such amount as the Judge may on hearing the parties determine to be sufficient to keep him Murphy indemnified and harmless. Nothing in this order as between the defendant is to affect the plaintiff in any way.

The defendant Ross appealed, moving for a new trial, on the ground of the discovery of fresh evidence on his behalf since the trial. The defendant Ross having made an assignment for the benefit of his creditors to W. J. O. Bouchier, an order was made allowing the assignee to proceed with the appeal.

The appeal was heard on the 1st June, 1891.

D. L. Scott, for Bouchier (assignee of defendant Ross) the appellant.

J. R. Costigan, for respondent.

Scott, Q.C.—At the time of the conversation between Ross and Sexsmith, upon which the latter relies as constituting an agreement, there was no completed agreement

between them. On the day on which the alleged bargain was made there was not a complete bargain as the time for completion of the house was not agreed upon. There was no acceptance and receipt of the goods within the 17th section of the Statute of Frauds. Argument.

Costigan objected that the only ground of appeal stated was that of the discovery of fresh evidence.

Scott, Q.C., then moved for leave to have the notice of appeal amended by inserting the grounds he had taken.

After an adjournment:—

RICHARDSON, J.—We have been looking up the authorities and we find that leave to amend a notice of appeal has been given only for the purpose of correcting errors of dates and other trifling matters and on special terms. It appears to us that here the appellant asks for something never intended when the notice was given; that he asks leave to introduce grounds for reversing the judgment of the trial Judge in addition to the grounds set out in the present notice, and that it is not merely a question of setting out grounds more fully or correctly than disclosed in the notice. Therefore, and having in view the time that has elapsed since the judgment was given and the delay involved if the amendment be allowed, and the fact that the interests of other parties are involved, the Court does not consider this a case in which the amendment should be allowed.

Scott, Q.C., continuing:—The affidavits show that a number of witnesses named were necessary and material for appellant at the trial of the action; that the appellant was not aware that any of these witnesses were material or were in possession of any knowledge whatever relating to any of the matters in question until after the trial of the action. These affidavits contradict important parts of the evidence given in behalf of the respondent at the trial; I contend they show sufficient grounds for a new trial. *Anderson* v. *Tilmas*.[1]

[1] 36 L. T. 711.

Argument.

Costigan: The evidence contained in the affidavits read is not sufficient to justify the Court in disturbing the verdict of the Court below. *Dumble* v. *Cobourg and Peterboro' R. R. Co.*[2] The rule there laid down is as follows:

In applications to open up proceedings by way of review, on the ground of newly discovered evidence, it is necessary for the party applying to establish (1) that the evidence is such that if it had been brought forward at the proper time it might probably have changed the result; (2) that at the time he might have so used it neither he nor his agents had knowledge of it; (3) that it could not with reasonable diligence have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence.

The whole issue was whether there was a sale and delivery of the horses, and from the beginning of this alleged new evidence to the end there is not one solitary word to the point. It is attempted by White's affidavit to discredit Jackson's evidence as to the conversation and to corroborate defendant; it is the same old evidence, they simply propose to put in another witness upon it. Even admitting that this affidavit of White's is correct or even admitting that they could not have got him at the trial there is no reasonable probability that the verdict would have been different. The affidavit of Morgan is simply an attempt to corroborate Ross and discredit Skirving; there is nothing new in it. The affidavit of McArthur seeks to discredit the evidence of Sexsmith, and McComb seeks to discredit it as to the value of work done. The discovery of new corroborative evidence is no ground for a new trial. *Fawcett* v. *Mothersell*,[3] *Hooper* v. *Christoe*,[4] *Regina* v. *McIlroy*,[5] *McDermott* v. *Ireson*.[6] Nor is the discovery of evidence to impeach the testimony of a witness examined at the trial. *Regina* v. *Hamilton et al.*,[7] *Dickinson* v. *Blake*,[8] *Shields* v. *Boucher*.[9]

[2] 29 Grant Ch. R. 121, p. 123. [3] 14 U. C. C. P. 104. [4] 14 U. C. C. P. 117. [5] 15 U. C. C. P. 116. [6] 38 U. C. Q. B. 1. [7] 16 U. C. C. P. 340. [8] 7 Brown P. C. 177. [9] 1 DeG. & Sm. 40.

Scott, Q.C., in reply: As to the contention that appellant has not brought this case within the principles laid down in *Dumble* v. *Cobourg and Peterboro' R. R. Co.*,[2] the case need not be brought within the principles submitted. The verdict depended upon corroborative evidence and the weight of corroborative evidence being on the side of Sexsmith, Sexsmith got the verdict. We can now give much corroborative evidence on the other side. In such a case a new trial will be granted. *Shields* v. *Boucher*,[9] *Lewis* v. *Trussler*,[10] *Price* v. *Griffin*.[11] Argument.

If there is the possibility of a slight difference in the weight of evidence disturbing the verdict it brings us within the "reasonable probability of the verdict being different." It is contended that some of the cases cited lay down the principle that a new trial will not be granted merely upon the ground of discovery of fresh corroborative evidence. Where any fresh evidence is given on either side it must be corroborative evidence; that referred to in *Robinson* v. *Rapelje*,[12] is nothing more than corroborative evidence. It is also contended that the evidence of none of these witnesses bears upon the question of the bargain and sale. Sexsmith's contention is that there was a bargain and sale at a certain time, that there was a constructive delivery, that there were expressions made use of on certain occasions by Ross which might be construed to be constructive delivery. If we can destroy these alleged admissions we may possibly destroy the whole case. *Fawcett* v. *Mothersell*,[3] *McDermott* v. *Ireson*,[6] and *Regina* v. *McIlroy*,[5] simply lay down the principle that a new trial will not be granted on the ground alone of corroborative evidence. In *Regina* v. *Hamilton*[7] where it is decided that an intention to impeach the testimony of witnesses is no ground for a new trial, the principle is too broadly laid down. *Hooper* v. *Christoe*[4] follows the general principle and is no authority against appellant's contention.

[2] 2 C. L. R. 727. [11] 1 Moll. 401. [12] 4 U. C. Q. B. 289.

Argument.

We have shown at least as far as White's evidence is concerned that we could not possibly have got the evidence before, and that such evidence might have been sufficient to have turned the scale, and as to the other witnesses if there has not been due diligence exercised it is not the default of the defendant but the default of his solicitor.

[*June 2nd, 1891.*]

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

RICHARDSON, J.—In this case we are unanimously of opinion that the appeal must be dismissed.

It has struck me in going through the case, and in this I am expressing my personal views, that the only material which deserves consideration on the present motion is that contained in the affidavit of White, who drove with the two Jacksons, plaintiff's witnesses, and defendant Ross, and who, being present throughout the entire conversation between the Jacksons and Ross, and near enough to hear all that was said and sure he would have heard such had it occurred, did not.

Now, assuming such statement to have been made on the witness stand at the trial, is it the only reasonable conclusion to be arrived at that the Judge would have found the opposite of what he did? I think not, because even had the Jacksons not been called there was evidence pro and con properly submitted to justify the finding complained of as to the facts in dispute, and had White been a witness at the trial and stated just what he has in his affidavit the finding of the trial Judge would be justified.

In *The Commissioners for Railways* v. *Brown*,[13] Lord FitzGerald in giving judgment adopts the rule laid down by Tindal, C.J., 50 years ago, "that where the question is one of fact, and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand; and that the setting aside of such a verdict

[13] 13 Ap. Cas. 133; 57 L. J. P. C. 72; 57 L. T. 895.

should be of rare and exceptional occurrence." That was an action for negligence in New South Wales, the verdict was for the defendant; the majority of full Court held that the verdict was contrary to the weight of evidence, but they were reversed on appeal because there was evidence at the trial to justify the finding. Judgment. Richardson, J.

The appeal is dismissed with costs.

Appeal dismissed with costs.

PARSONS ET AL. v. HUTCHINGS.

Sheriff's fees—Right to demand in advance—Fi. fa.—Whether fi. fa. in sheriff's hands for execution—Effect of directions or statements to sheriff.

The meaning and effect of the Judicature Ordinance R. O. (1888) c. 58, s. 461†, providing for the payment to officers in advance of the fees and allowances fixed by tariff, discussed.

Semble, a sheriff is not under that section entitled to demand in advance his charges for mileage or seizure before executing a *fi. fa.* goods.

Held, that the finding of the trial Judge, that the conduct of the first execution creditor's advocate did not have such effect that the execution was not originally placed, or had ceased to be, in the sheriff's hands for execution, was justified by the evidence.

[*Court in banc, December 10th, 1891.*

This was an interpleader issue tried before RICHARDSON, J., without a jury.

Parsons et al., the plaintiffs in the issue, and Hutchings, the defendant in the issue, were each execution creditors of one Milliken. The plaintiffs' contention was that the defendant's execution although in fact first delivered to the sheriff was not in the sheriff's hands for execution, and that therefore the plaintiffs were entitled to priority.

The learned Judge gave judgment in favor of the defendant. The plaintiffs appealed.

† Jud. Ord. C. O. 1898, c. 21, r. 532, is in the same words except for the insertion of the words "whether under writ of execution or otherwise"

Statement.

The appeal was argued on the 7th December, 1891.

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

J. Secord, Q.C., and *T. C. Johnstone*, for the defendant the respondent.

Hamilton, Q.C.—There were no positive instructions given to seize under the Parsons' execution. From the conduct of the respondent and by reason of the absence of such positive instructions the Hutchings' execution lost its priority if it ever had any. The endorsements on the writ were not instructions and there were no verbal instructions. The Hutchings' execution was placed in the hands of the sheriff simply to protect the goods. The Court should look into the conduct of the parties prior to the issue of the writ, and prior to, and subsequent to its delivery to the sheriff, *Imray* v. *Magnay*.[1] The writ was not handed to the sheriff for the purpose of being executed within the meaning of section 274‡ of the Jud. Ord. Even if it were delivered in the first instance with instructions, the subsequent conduct of the parties was such that the writ lost its priority. Counsel discussed the evidence at length referring amongst other circumstances to the failure of the defendant's advocate to pay the sheriff's fees as demanded and contended that the evidence showed that the sheriff did not levy under the first writ and that he had instructions not to seize unless other executions came in and pressed. *Hunt* v. *Hooper*,[2] *Foster* v. *Smith*,[3] *Trust and Loan Co.* v. *Cuthbert*,[4] *Bank of Montreal* v. *Munro*,[5] *Record* v. *Record*,[6] *Castle* v. *Ruttan*,[7] *Ross* v. *Hamilton*,[8] *Childers* v. *Wooler*,[9] *Smith* v. *Keal*.[10]

Johnstone.—This execution was placed in the sheriff's hands on the 15th May, 1891, endorsed in accordance

‡ See Jud. Ord. C. O. 1898, c. 21, r. 356.

[1] 11 M. & W. 267; 2 D. N. S. 531; 12 L. J. Ex. 188; 7 Jur. 240. [2] 12 M. & W. 664; 1 D. & L. 626; 13 L. J. Ex. 183. [3] 13 U. C. Q. B. 243. [4] 13 Grant Ch. R. 412. [5] 23 U. C. Q. B. 414. [6] 21 N. B. R. 277, p. 281. [7] 4 U. C. C. P. 252. [8] 4 U. C. C. P. 256. [9] 2 E. & E. 287; 29 L. J. Q. B. 129; 6 Jur. N. S. 444; 2 L. T. 49; 8 W. R. 321. [10] 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76, affirming 51 L. J. 487; 46 J. P. 515.

Argument.

with the Judicature Ordinance, section 265,§ and the executions of the other execution creditors were placed in the sheriff's hands on the 27th May. The advocate has no implied authority to instruct the sheriff to seize any particular goods and if the writ is placed in the sheriff's hands endorsed as required by the Ordinance his duty ends. Mr. Secord simply handed the endorsed writ to the sheriff—that was sufficient. *Smith* v. *Keal*,[10] *Childers* v. *Wooler*,[9] *Morris* v. *Salberg*,[11] show that the advocate's duty consists in handing writs to the sheriff and that if the advocate directed goods to be seized at any particular place that he would be exceeding his authority. There is nothing in the argument that a solicitor refusing to pay the disbursements demanded by the sheriff loses his priority. The sheriff could not demand and the solicitor is not bound to pay them. If the sheriff had the right to demand these payments he should demand them from the execution creditor and not from the solicitor, and having demanded them from the solicitor the priority was not lost. *Royle* v. *Busby*.[12] In any case the sheriff, even supposing he had the right to demand these fees, could not take from the execution creditor his priority by simply demanding them, and he could not deprive the first execution creditor of his priority until the other executions were in. As to the weight of evidence, *Webster* v. *Friedberg*.[15]

Scott, Q.C., in reply.—As to the question of the non-payment of the disbursements. Before the sheriff proceeds to levy he is entitled to payment of disbursements. The learned trial Judge has decided that if any demand is made for disbursements it must be made before the receipt of the writ. That rule is too hard and fast. The sheriff should have a reasonable time to make enquiries as to whether it is necessary to have disbursements at all, or whether he should seize. The reasonable construction of the clause

§ Jud. Ord. C. O. 1898, c. 21, r. 347.

[10] 58 L. J. Q. B. 275; 22 Q. B. D. 614; 61 L. T. 283; 37 W. R. 469; 53 J. P. 772. [9] 50 L. J. Q. B. 196; 6 Q. B. D. 171; 43 L. T. 717; 29 W. R. 315. [11] 55 L. J. Q. B. 403; 17 Q. B. D. 736; 55 L. T. 49; 34 W. R. 728.

Argument.

is this, that having made enquiries as to the position and residence of the defendant, he is then for the first time in a position to say whether he should exact disbursements. The result of the refusal on the part of the first execution creditor to advance disbursements was to leave the writ in the sheriff's hands until the disbursements were advanced, but suppose the first execution creditor refused to advance disbursements, was the defendant to go free although there were other executions in the sheriff's hands? The first execution creditor would be placed in exactly the position he desired, namely, protecting the goods.

The verdict was against the weight of evidence. There was no intention on Mr. Secord's part to place the execution in the sheriff's hands at that time. The sheriff in his evidence says: "Then I asked Mr. Secord for money to cover my disbursements if I had to proceed. He declined to furnish it. Then I asked him finally, 'Now am I to proceed under this writ or not?' His reply was, 'I have no instructions to give you.'" Mr. Secord says: "After searching into the mortgage I wrote Hutchings," etc., and "I waited for instructions from him." He was waiting to see whether he would give instructions to seize or not. That is the only reasonable conclusion to be drawn from the evidence. He never got those instructions from Hutchings, and in the face of those instructions his statements as to positive instructions amount to nothing.

Childers v. *Wooler*,[9] and *Morris* v. *Salberg*,[11] have no bearing upon this appeal. They were brought for recovery of goods wrongfully seized under execution. The Court should consider any evidence which tended to show intention to delay execution. Mr. Secord's evidence shows that there was such an intention. There was an express intimation to the sheriff that he was not to do anything until Mr. Secord had ascertained what that chattel mortgage amounted to. As to the question whether the sheriff could insist upon payment of fees so as to deprive an execution creditor of his priority it is simply a question of whether the execution was in his hands for execution or not and the sheriff is not to decide priorities.

[*December 10th, 1891.*]

Judgment.

McGuire, J.

McGUIRE, J.—This is an appeal from the judgment of Mr. Justice Richardson, in an interpleader action tried by him without a jury. The appellants and the respondent were execution creditors of one Milliken. The respondent had placed his execution in the sheriff's hands on the 15th May, 1891; the appellants had given their execution to him on the 27th May, 1891. The sheriff seized and sold under all these executions about the 28th or 29th of May.

The appellants contended that the respondent had lost his priority (if he ever had any); and an interpleader issue was directed to be tried and the proceeds of the sale were paid into Court to abide the result.

At the trial it was contended on behalf of the plaintiffs in the issue (the appellants) that the defendant's (the respondent's) writ was delivered to the sheriff, not for execution, but merely as a protection to the debtor Milliken against any subsequent executions; and that, even if it had originally been given to the sheriff for execution, it had subsequently by the conduct of Hutchings' advocate been in effect withdrawn or stayed, by his telling the sheriff not to proceed on it, unless other executions were pressing, and because, as was alleged, he had refused to advance to the sheriff on demand his disbursements necessary in going to Qu'Appelle to levy on Milliken's goods, pursuant to section 461 of the Judicature Ordinance.

The defendant contended that his execution had been duly delivered to the sheriff for execution and denied that he had done anything which would operate as a stay. He also denied that he had refused to advance the sheriff's disbursements or that his execution had lost its priority on account of his not having advanced these disbursements.

At the trial the sheriff was examined for the plaintiffs; and for the defence Mr. Secord, the defendant's advocate, and the judgment debtor Milliken, were called.

The learned Judge found that the defendant's judgment against Milliken was a valid one; that the defendant's execution was delivered to the sheriff to be executed in

Judgment. McGuire, J.

accordance with the tenor of its endorsement, in the usual form, and that the sheriff had not thereafter been instructed not to proceed, or in any way delayed or interfered with in his execution of it, so as to deprive it of its priority. He also held that, if the sheriff could have refused to accept the writ without being paid in advance his fees, he had by receiving and endorsing it, in conformity with section 274, waived any right to be advanced these fees, and that the writ was thereafter in his hands to be executed.

I have read carefully the evidence before the learned trial Judge and while it is conflicting I think his conclusions as to the facts were such as a jury might reasonably have reached. It is unnecessary to consider whether, on reading the Judge's notes of evidence, I would have decided in the same way as he did; the trial Judge had the witnesses before him and I am not prepared to say that his findings were unreasonably arrived at. That being so this Court ought not, I think, to disturb the verdict on the ground that it is against the evidence or the weight of evidence. It was admitted by the sheriff that he had levied under the defendant's execution. If section 461 gave him the right to insist on payment in advance of his disbursements necessary to enable him to go to Qu'Appelle, it was a right peculiar to the sheriff himself and not one in which the subsequent execution creditors were interested. He could therefore waive that right if it existed; and I think he did so waive it by levying and selling under the defendant's writ.

It was not contended by the appellants that a refusal to advance disbursements would invalidate the execution; at most such refusal could only be a justification to the sheriff for declining to make a levy under it, until compliance with his demand. But he did so levy and therefore I think on this ground also the appellants are not entitled to succeed.

Holding as I do it becomes unnecessary to consider whether section 461 has the meaning apparently attached to it by the sheriff. The disbursements which he demanded must have been the mileage going to and from Qu'Appelle

and any expenses incident to the seizure. Now these are not disbursements which (leaving section 461 aside for the present) the execution creditor would in any event be called upon to pay. Judgment. McGuire, J.

The sheriff is no doubt "entitled to receive and take" (section 458) the fees in the tariff; and, if he made any money out of the goods of the execution debtor, he would be entitled to retain thereout his mileage, etc., but in no event could he look to the execution creditor therefor. The disbursements, which he must be assumed to have referred to, were not such as were in their nature payable by the execution creditor. His fees for receiving and filing the execution are so payable, and these he might, I think, insist upon being paid in advance. But he made no demand as to these; for anything that appears they may have been paid.

Now looking at section 461, which is a comparatively new provision, it says that all "fees and allowances respectively payable * * * shall be paid in advance by the parties at whose instance the service is to be rendered." There are many services in the tariff for which the party at whose instance they are done must pay, such as serving writs of summons, subpœnas, etc., and the mileage fees in connection with these.

It was quite reasonable that the Legislature should provide that the sheriff, before, for example, going some 40 miles to serve a writ of summons or subpœna, should be entitled to payment in advance, instead of being left to his action against possibly a worthless party as his only remedy for recovering payment for these services in case of refusal to pay. But to enable the sheriff to demand in advance from an execution creditor a payment, for which, but for this section, he would not under any circumstances have been liable, would be to make a most radical change in the law.

In Atkinson on Sheriffs at p. 278, it is laid down on the authority of *Hescott's case*,[14] that a "sheriff cannot refuse to execute a writ until his fees are paid," and "that any

See now Jud. Ord. 1898, c. 21, r. 524. [14] 1 Salk. 330.

Judgment.
McGuire, J.

bond conditioned to pay him would be void." See also Churchill on Sheriffs, p. 307. In *Hescott's case*,[14] an under-sheriff refused to execute a *ca. sa.* until he had his fees, but upon motion against him the Court said "that the plaintiff may bring an action against him for not doing his duty, or might pay him his fees and then indict him for extortion." This being the state of the law, did the Legislature intend by section 461 to make the radical change which is involved in the interpretation sought to be placed thereon by the appellants? If the language of the section is clear and unambiguous, the Legislature must of course be taken to have intended what it clearly appears to say. But does this section clearly say (if it says at all) that the mileage necessary to levy under an execution is to be paid in advance by the execution creditor? That seems to me to be at least open to serious question. The words used are "All fees and allowances respectively *payable*," etc., not "all fees and allowances" in the tariff, but only those which are *payable*.

"Payable" by whom? Can it mean by some one other than a party "at whose instance the service is rendered?" Does this section mean any more than that, whatever fees or allowances a party should pay, the sheriff may insist upon being paid in advance? But the disbursements here demanded are not fees or allowances which are payable by the execution creditor. Strictly speaking they were not even "payable" by anyone. The sheriff might "receive and take" them (section 458) from the debtor or might "receive and take" them out of the proceeds of a levy on the debtor's goods, but he could not otherwise look to the debtor for payment of them; he could not sue the creditor for them, in short they are not such charges as in strict language are "payable" by anyone, at any rate by the execution creditor. Now if the creditor did advance them, the sheriff would be bound to pay them back in any event; for if the money was made out of the defendant the sheriff should take his fees thereout; if on the other hand the execution were returned *nulla bona*, it is obvious he could not retain the advance payment for mileage, etc.

Judgment. McGuire, J.

It is worth noticing that the language used in the two sections (458, 461) is not the same. In the former the more comprehensive words "receive and take" are used; in the latter it is a narrower word, "payable," that is used. The Legislature may possibly have used these expressions as being synonymous; but it is also open to the contention that it did not so use them but purposely employed the former words as comprehending every possible fee or allowance to which the sheriff might by the tariff be entitled, including, *e.g.*, poundage; and in section 461 used the narrower word so as to limit it to those "fees and allowances" which were payable by the party at whose instance the service is to be done. If on the other hand "payable" is equivalent to "receive and take," so as to include the "disbursements" here demanded by the sheriff, must it not also be held to cover every possible item in the tariff, so that the sheriff, instead of modestly insisting in advance on payment of mileage, might also demand payment of all the items in the tariff, poundage included, which might, in reasonable probability, be connected with the levy under the execution?

This wider construction, if it be the true one, may place an unfortunate creditor, who has, after great expense, obtained an execution in a difficult position. The debtor may have goods in remote and widely separated portions of the district, and it may be important for the creditor to have a levy made on all these at once, the sheriff in such case may claim to be paid in advance all the disbursements incidental to these different seizures and the sales under them before stirring out of his office—may, in short, insist on an advance which he must in any event pay back.

Another peculiarity of a levy by the sheriff is that it is commanded by the Court; it is a duty imposed upon him *virtute officii* by the Court—he has a monopoly, too, of this kind of "service." In serving a writ of summons or subpœna, on the other hand, he is not in such writ directed by the Court to effect such service and has no monopoly. Here he may properly be said to act at the instance of a party as in section 461.

Judgment.
McGuire, J.

For these, among other reasons, it seems to me to be at least doubtful whether section 461 covers such disbursements as the sheriff in this cause demanded payment of; but as the resolving of this doubt is not, in the view I have taken, necessary in this appeal I shall content myself with directing attention to the difficulty which has occurred to me.

I think the appeal should be dismissed with costs to be paid by the appellants.

RICHARDSON, MACLEOD and ROULEAU, JJ., concurred.

WETMORE, J.—Ordinarily, when a writ of execution is delivered to the sheriff properly endorsed to levy, it is the sheriff's duty to execute it, and that without any further instructions to do so. The writ, however, must be delivered to the sheriff *to be executed*. So if at the time of the delivery or at any time afterwards the sheriff is directed by the execution creditor or any other person duly acting on his behalf not to execute the process or proceed with its execution, or its execution is by any such like instructions delayed, the writ, notwithstanding the endorsement, will not be considered to be in the hands of the sheriff to be executed, and if, in the meanwhile and before such instructions are countermanded, a subsequent execution is placed in the hands of the sheriff to be executed, the first execution will lose its priority. The Judicature Ordinance, section 274, *Hunt* v. *Hooper*,[2] *Foster* v. *Smith*,[3] and a number of other cases may be cited as bearing out that proposition.

It is quite possible that the fact, that the writ was not placed in the hands of the sheriff to be executed, may be inferred from circumstances, and that apart from any question of fraud affecting the judgment. But assuming that the sheriff has, under section 461 of the Judicature Ordinance, the right to demand and receive in advance his fees for executing a *fieri facias*, I am of opinion that the mere fact that the execution creditor, when asked to pay such fees, does not do so will not in itself raise the presumption that the writ is not in the hands of the sheriff to be

executed and thus give priority to subsequent executions. It is possible that this circumstance coupled with other facts and circumstances may raise such a presumption. For instance if the learned trial Judge had found in this case that, when Mr. Secord delivered the execution to the sheriff, the sheriff had asked for disbursements and Mr. Secord had replied that he had not the money to pay for them, that affairs had remained in that position for nearly a fortnight afterwards, and that then the sheriff had asked Mr. Secord for positive instructions with respect to this writ, and Mr. Secord had replied "I have no instructions to give you," and, upon the sheriff informing him that other executions were coming in against Milliken and he wanted positive instructions what to do with this writ, that Mr. Secord replied "If other executions come in and press then I will see about it," I am not prepared to say that all this might not have raised such a strong presumption that the writ was not placed in the sheriff's hands to be executed, that it could not be got over. Judgment. Wetmore, J.

The difficulty is that the learned Judge did not find these facts. On the contrary he informs us that he accepted Mr. Secord's account of what took place between him and the sheriff, and found that he had *bona fide* placed the writ in the sheriff's hands for execution.

Now the question is, not whether the individual members of this Court would have found the same as the learned trial Judge, but whether there was evidence upon which he might reasonably find as he did.

Respecting what took place between Mr. Secord and the sheriff at the time of the delivery of the execution, Mr. Secord is practically uncontradicted. There were apparently only two occasions when these gentlemen had an interview with respect to this writ, and no doubt the meeting, which Mr. Secord states took place on Scarth Street, was the same meeting as the sheriff states took place on the 27th May.

Taking Mr. Secord's version of these conversations as the learned Judge did, it appears that, when he delivered

Judgment. Wetmore, J.

the writ to the sheriff and whenever he was approached by the sheriff on the subject, he always insisted that the writ was in the hands of the sheriff for execution. The question whether the writ was *bona fide* in the hands of the sheriff for execution is a question of fact. Did Mr. Secord then really mean what he said when he made those statements to the sheriff or was this all a pretence? Was the omission to furnish the money for disbursements really because he did not have it, and was waiting to receive it from his client, or because he *bona fide* desired to ascertain what charges or securities were lodged against the property upon which the sheriff spoke of levying, and if there was sufficient left to make it worth his while to advance the money? If so I cannot see why it should be held that the execution was not delivered to be executed. There might be other property which the execution would bind. But if all this was a pretence; if the execution was only really lodged with the intention of its being executed if other executions came in, and Mr. Secord delayed paying the disbursements and made a pretence of enquiring into the Murphy mortgage, believing that the sheriff would not proceed to levy until he got his disbursements, and intending only to advance them, if and when other executions came in, or that, if other executions came in, these execution creditors would advance the disbursements and then that the sheriff must levy under his execution, and so his object of not pressing his execution, unless others came would be secured; then I am of opinion that it might be found that the defendant's execution was not *bona fide* delivered for execution and it would lose its priority. I am free to confess that to my mind Mr. Secord's conduct was exceedingly suspicious.

But the learned Judge having found that Mr. Secord acted *bona fide* and really delivered the writ for execution, I think he might reasonably, under the evidence, have so found, and therefore that his judgment should not be interfered with.

Section 461 of The Judicature Ordinance, was passed for the protection of officers, witnesses, etc. I think the

sheriff was quite at liberty to execute the writ if he chose to do so without his fees being advanced, and, although he demanded them in the first instance, to waive the demand and proceed. In this case he did so. Judgment. Wetmore, J.

I may say that the doubts as to the effect of section 461 of The Judicature Ordinance, expressed by my brother McGuire's judgment, are worthy of consideration.

Appeal dismissed with costs.

FERGUSON ET AL. v. FAIRCHILD ET AL.

Promissory note — Partnership—Signature of individual name with descriptive words—Liability of firm—Admissibility of extrinsic evidence—Goods sold and delivered—Authority of manager.

In an action against the members of a partnership carrying on business under the name of the O. T. L. Co., on a promissory note reading as follows:—" Sixty days after date we promise to pay D. & B. or order $407.⅗" at the Imperial Bank here; value received," and signed " W. D. R., Manager, O. T. L. Co."

Held, WETMORE, J., *dissenting* (1) That evidence of the circumstances surrounding the making and the accepting of the note was admissible for the purpose of showing who was intended to be liable on the note.

(2) That, on the terms of the note and the evidence of the surrounding circumstances in this case, the defendants were liable.

The defendants carried on a lumbering business in partnership. R. was their manager at the place of operations. The partnership kept in the vicinity of their mill a boarding-house, at which their workmen boarded, and a store for the sale to them of supplies. R. ordered goods which were used in the boarding-house, the store or the mill.

Held, that the ordering of the goods was within the scope of R.'s authority and that the defendants were therefore liable.

Judgment of ROULEAU, J., affirmed.

[ROULEAU, J., *April 1st, 1891.*

[*Court in banc, January 23rd, 1892.*

Action on a promissory note—endorsees against makers —and for goods sold and delivered. The facts and points involved sufficiently appear in the judgments and in the arguments before the Court *in banc.*

Statement.

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

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

E. P. Davis, for the defendants.

[*April 18th, 1891.*]

ROULEAU, J.—The plaintiffs claim from the defendants the sum of $723.71, being for the amount of a promissory note, to wit: $411.81, and for the amount of a current account, to wit: $311.90.

This action has been met by the usual denial of facts and by an answer in law to the first six paragraphs of the statement of claim, to the effect that the note sued upon on the face of it is not made by and does not purport to be made by, or for, or on behalf of the defendants.

The note reads as follows:

$407.29. CALGARY, 9TH OCTOBER, 1889.

Sixty days after date we promise to pay to Dolan & Barr or order, $407 $\frac{29}{100}$ at the Imperial Bank here. Value received.

W. D. RORISON,
Manager Otter Tail L. Co.

The question here to be ascertained is—is this note the note of the Company signed by their officer or the personal note of W. D. Rorison? Now, looking at the terms of the note itself, it seems to me that it does not, on its face, purport to be a personal contract. If it had been so, and had been made on some consideration moving towards him personally, it would have been signed "W. R. Rorison" and no more. But I find also that in the body of it the pronoun "we" is used, and it is signed "W. D. Rorison, Manager

NOTE.—The defendants appealed to the S. C. of C. with respect only to promissory note. The appeal was dismissed with costs. *Fairchild* v. *Ferguson*, 21 S. C. R. 484. The head-note in S. C. R. has "incorporated" for "unincorporated"; and the statement on p. 485 "the majority of the Court below held the defendants liable on the note but not on the claim for goods sold" is, as will be seen by this report, incorrect.

Judgment.
Rouleau, J.

Otter Tail L. Co." Unless intended to be the Company's note and not his own, it is difficult to see why it was signed as "Manager Otter Tail L. Co." at all. I have no doubt it was signed by the defendant only as manager and was intended as the note of the Company. Moreover, it has been proven without a doubt that the money, the amount of which that note represented, was for the purpose of the Company and, although strictly speaking that does not affect the question, still the surrounding circumstances may be looked at in order to enable the Court to come to a right conclusion; and the circumstances that that note was given for the amount due to Dolan & Barr on logs made for the Company, and not to Rorison personally, fortifies me in the opinion I have already expressed.

The case of *Alexander* v. *Sizer*[1] is in effect the same as this case. Therefore, in my opinion, the objection in law is not well taken and must be dismissed.

As far as the liability of the Company is concerned, it cannot be regulated by the private agreement made between the partners themselves, of which the public had no notice, but by the general law governing co-partnerships. The general principles laid down in Lindley on Partnership at page 194 shall govern me in deciding this case. He says: "Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way; and the firm is responsible for whatever is done by any of the partners when acting for the firm within the limits of the authority conferred by the nature of the business it carries on, whatever, as between the partners themselves, may be the limits set to each other's authority; every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business in the way in which that business is ordinarily carried on by other people. But no person is entitled to assume that any partner has a more extensive authority than that above described.

[1]L. R. 2 Ex. 102.

Judgment.
Rouleau, J.

The consequences of this principle are:—

1. That if an act is done by one partner on behalf of the firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be liable, although, in point of fact, the act was not authorized by the other partners.

2. That if an act is done by one partner on behalf of the firm and was not necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be not liable."

Was the Otter Tail Lumber Co. a trading company? In my opinion there can be no doubt as to that, according to all the authorities cited on this point; and if it were a trading company there is no question it could oblige itself by notes. It is contended that, the Company being for the purpose of manufacturing lumber, one of the partners could not oblige the Company by incurring debts for groceries or other merchandise.

I must confess that I cannot look at that objection as being serious.

A lumbering company having necessarily to employ men, and those men having to be fed and clothed, it seems to be preposterous to contend that one of the partners cannot supply them with those necessaries of life, when it is proven beyond a shadow of doubt that the same were deducted from their wages. It is proven that the men were hired at the rate of $30.00 per month and their board; and besides that the clothing they got in the store was charged to them on account of their wages. I must also take into consideration the evidence that goes to show that the very situation, where the Company was doing business, compelled the managing partner to procure those things in order to carry on the business of the Company, and therefore the Company, according to the first consequence deducted from Lindley's principle above referred to, is liable, although the act may not be authorized by the other partners of the firm.

I am of the opinion that judgment should be entered for the plaintiffs with costs for the full amount of their claim, except the amount deposited in Court which should be paid to the plaintiffs *pro tanto* of their claim. Judgment. Rouleau, J.

The defendants appealed to the Court *in banc*.

The appeal was argued on the 8th December, 1891.

J. S. Ewart, Q.C., for the appellants.

P. McCarthy, Q.C., for the respondents.

Ewart, Q.C.—There are two claims in this action; one upon a promissory note—indorsee against maker. The question arising on that is whether Rorison is personally liable or only the Otter Tail Lumber Company. The Company is a voluntary association acting under articles of agreement for manufacturing lumber. The operations of the Company are clearly limited to operating saw mills; that is stated in the recital as well as in the articles, and for that reason Rorison's authority among the partners was to be very limited. All the notes Rorison made were signed in the same way. In the first place Rorison had no authority to sign any notes for the Company under the agreement, and he had none outside the agreement. While the note may have been for a debt of the Company, it was his own liability; he was paying his assessment in that way. As to the use of the personal pronoun "We" instead of "I," which it is contended he would have used if he intended to make himself liable, the note is not in Rorison's handwriting, and cannot therefore be taken to be his own language; it was not even written in his presence; it was brought to him ready for signature and naturally he would not alter it, probably would not even notice the use of the plural. This removes this feature from serious consideration. With reference to *Alexander* v. *Sizer*,[1] his Lordship the trial Judge has, I think, entirely overlooked the fact that the note is not the same as in this case. *Leadbeater* v. *Farrow*,[2] "Unless he says I am the mere scribe he becomes liable." *Lennard* v. *Robinson*,[3]

[1] M. & S. 345; 17 R. R. 345. [2] E. & B. 125; 3 C. L. R. 1363; 24 L. J. Q. B. 275; 1 Jur. N. S. 853.

Argument.

if it is not drawn on the Company it cannot be accepted for the Company. *Courtauld* v. *Saunders*,[4] *Dutton* v. *Marsh*,[5] *Hagarty* v. *Squire*,[6] Byles on Bills, 15th ed., p. 42, Chitty on Bills, p. 33. Chalmers on Bills, p. 70. Daniels on Negotiable Instruments, ss. 300, 305.

McCarthy, Q.C.—The value and consideration for this note was a debt of the Company to Dolan & Barr. Rorison came from Winnipeg to Otter Tail not only as a partner of the Company, but as the managing partner. He employed Dolan & Barr to get out a large quantity of logs, which they did, and there was due to Dolan & Barr at the time of giving this note a very much larger amount than the amount of the note. When this contract was made Rorison notified the partners at Winnipeg of the fact, and no objection was offered. Money was not forthcoming as Rorison stated to Fergusson when he advised him to get this note; and in consequence Rorison was forced to give this note, which was endorsed to the present plaintiffs.

The note was for a debt of the Company and not for any debt of Rorison's and the note upon its face shows that it was not and never was intended to be Rorison's note.

The note upon its face by the use of the word "we" is clearly intended to bind somebody else besides Rorison, and to make this more certain he adds, "Manager Otter Tail Lumber Company." There is no hard and fast law with the respect to the form of a note, and the Court will adopt the construction most favorable to the validity of the instrument. *Gadd* v. *Houghton*.[7] The circumstances of the case must be taken into account in interpreting contracts, and Rorison's intention was plainly to bind the Company in using the word "we." *Lindus* v. *Melrose*.[8] As between the partners Rorison's authority was limited, but not as regards outsiders. He had authority to bind the Company. He was the managing partner, and the defendants could not limit

[4] 16 L. T. 562; 15 W. R. 906. [5] 40 L. J. Q. B. 175; L. R. 6 Q. B. 361; 24 L. T. 470; 19 W. R. 754. [6] 42 U. C. Q. B. 165. [7] 46 L. J. Ex. 71; 1 Ex. D. 357; 35 L. T. 222; 24 W. R. 975. [8] 3 H. & N. 177; 24 L. J. Ex. 326; 4 Jur. N. S. 488; 6 W. R. 441.

their liability to the public by any arrangements among themselves. *City Bank* v. *Cheeney*,[9] Lindley on Partnership, 178, 188, 189, *Ex parte Buckley*,[10] Storey on Agency, s. 154. Argument.

[*January 23rd, 1891.*]

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

RICHARDSON, J.—This appeal was argued last term before Macleod, J., Wetmore, J., and myself, the other two members of the Court, Rouleau, J., and McGuire, J., being unavoidably absent.

Two questions are involved.

1st. Are the defendants liable upon the promissory note sued for?

2ndly. Are they liable to pay the remainder of the plaintiff's claim for goods sold and delivered by plaintiffs to defendants?

As regards the note:—At the hearing before Rouleau, J., there was evidence (1) that at the date of the note sued on a sum exceeding its amount ($407.29) was due Dolan & Barr on their contract with the Company (*i.e.*, the defendants), and that the money was slow in coming from Winnipeg; (2) that this note was charged against Dolan & Barr in defendants' books as a payment to them; (3) that $591.43 was paid by defendants to the sheriff under an execution on a judgment obtained by Dolan & Barr against the Company (defendants); that Dolan & Barr sued the Company and recovered a judgment and that in their claim, so sued, Dolan & Barr credited the Company with the amount of the note sued on, the sum recovered being that due extra the $407.29 note.

There was thus evidence upon which the trial Judge was fully justified in finding that on the 9th October, 1889, the Company or partnership of which defendants were members were indebted to Dolan & Barr in at least the amount for which the note was given for partnership purposes.

[9] 15 U. C. Q. B. 400. [10] 14 M. & W. 469; 14 L. J. Ex. 341.

Judgment.
Richardson, J.

Having so found and turning up the note itself the trial Judge was at once confronted with the expression "we," and was called on from the surrounding circumstances, and from what appears on the paper, explained as to signature by the evidence, to determine, not whether Rorison, who signed it using the words "Manager Otter Tail L. Co.," after his own signature "W. D. Rorison," personally and independently of the firm was bound, but whether defendants as members of the firm or company were intended to be bound and were liable as makers of the note; and he has so found.

Now the question to be determined in appeal is, was the finding of the trial Judge one which in law should be supported or not?

In this judgment my learned brother Macleod joins.

In our opinion there being found, upon reasonably clear evidence to support it, that on the 9th October, 1899, there had been a debt incurred for partnership purposes exceeding $407.29 due Dolan & Barr for which, had they sued the firm, they would have recovered judgment (*In re Cunningham & Co., Simpson's Claim*[11]), the circumstances as they existed would justify Rorison in giving the note. It was a debt for which Rorison had power to bind the firm by giving their note.

Had the note been given "I promise," and the additional words used merely to describe who Rorison was, in the absence of circumstances tending to show such was not the intention, there would be ground for contending that for the firm's debt Rorison's individual responsibility was created and accepted by Dolan & Barr. But "we" means something more. The definition in the Imperial Dictionary is "I and another or others." In this case then what does it mean?

Taking as settled law the principle laid down in *Trueman* v. *Loder*,[12] the Lord Chief Justice says:—

"Parol evidence is always necessary to show that the person sued is the person making the contract and

[11]57 L. J. Ch.169; 36 Ch. D. 532; 58 L. T. 16. [12]11 A. & E. 589; 3 P. & D. 567; 9 L. J. Q. B. 165.

bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand or that of an agent are enquiries not different in their nature from the question—Who is the person who has just ordered goods in a shop? If he is sued for the price and his identity made out the contract is not varied by appearing to have been made by a name not his own." And as laid down in *Young* v. *Schuler*,[13] decided in appeal 1883, as stated by the Master of the Rolls to be applicable to all contracts even under seal, "If looking at the document it is doubtful if defendant signed as a contracting party, evidence is admissable to show how the fact was at the time of its execution and such evidence does not contradict the document on its face."

Judgment. Richardson, J.

This principle is recognized in *Lindus* v. *Melrose*,[8] *Thellusson* v. *Rendlesham*,[14] *Stephens* v. *Reynolds*,[15] *Price* v. *Taylor*,[16] *Alexander* v. *Sizer*,[1] Broom's Legal Maxims, p. 570, Taylor on Evidence, p. 1015.

In our judgment the question who was intended to be bound by the note in this suit was a question of fact.

The trial Judge, with the note before him and evidence of the circumstances surrounding its making and acceptance, amply sufficient we conceive to warrant his so finding, found that the defendants were those parties; and his judgment should not be reversed.

In all other respects, including the question of the defendants' liability for the price of the goods as claimed by plaintiffs, we concur in the judgment delivered by our brother Wetmore.

In our opinion the appeal should be dismissed with costs.

MACLEOD, J., concurred.

[13] 11 Q. B. D. 651; 49 L. T. 546. [14] 7 H. L. Cas. 429; 28 L. J. Ch. 948; 5 Jur. N. S. 1031; 7 W. R. 563. [15] 5 H. & N. 513; 2 F. & F. 147; 29 L. J. Ex. 278; 2 L. T. 222. [16] 5 H. & N. 540; 29 L. J. Ex. 331; 6 Jur. N. S. 402; 2 L. T. 221; 8 W. R. 419; 24 J. P. 470.

Judgment.
Wetmore, J.

WETMORE, J.—The appellants, the defendants in the action, with one W. D. Rorison were an unincorporated company doing business at a place called Otter Tail as saw millers and lumber dealers under the name of the Otter Tail Lumber Company.

Rorison was the managing member of the concern at the place of operations. The respondents, the plaintiffs, sued the defendants in respect of two causes of action; one upon a promissory note alleged to be made by the Otter Tail Lumber Company in favor of Dolan & Barr and endorsed to the plaintiffs; the other for goods sold and delivered by the plaintiffs to the Company.

The trial Judge rendered judgment for the plaintiffs for the full amount of their claims; and so far as the claim for goods sold and delivered is concerned, I am of opinion that the learned Judge was right and his judgment should not be disturbed.

Some of the goods furnished, and in respect of which the action was brought, were supplied and used in the Company's boarding-house in boarding their men, some in a store kept for supplying those men, and the remainder in the mill.

At the commencement of the Company's operations the men boarded at a section house between half a mile and a mile from the mill, and then the Company built a boarding house near the mill, and after that the men boarded there.

It is necessary in a business of this sort to employ men and it was quite within the scope of Rorison's employment as manager to employ these men, and I cannot see why it was not equally within the scope of his employment to engage them for certain specified wages and board.

I am of opinion that it was quite open to the learned trial Judge to find, apart from any question of custom, that it was within the scope of the Company's business under the circumstances of this case to board these men and to keep a stock of goods on hand to furnish supplies to them.

Rorison, as the Company's manager, got those goods; they were used for the purposes stated; they were got on the credit of the Company and were charged to the Company,

and the defendant must pay for them. The fact that some of the goods may have been given at the Company's store to other persons will not alter the defendants' liability to the plaintiffs. I may say that, if evidence of custom in that part of the country as to keeping stores in connection with these mills is necessary, there is evidence of such custom in Barr's cross-examination. Judgment. Wetmore, J.

I think, therefore, that the judgment of the Court below in respect of these goods must be affirmed.

As to the claim upon the promissory note, I regret that I have to differ from my learned brethren. I cannot get over the authority of *Dutton* v. *Marsh*,[5] and *Hagarty* v. *Squier*.[6] In *Dutton* v. *Marsh*,[5] at page 362, Cockburn, C.J., is reported as follows: "The law is thus summed up in Smith's Leading Cases, I think rightly:—'In all these cases the question whether the person actually signing the contract is to be deemed to be contracting personally or as agent only, depends upon the intention of the parties *as discoverable from the contract itself.*'" And at page 364 he is reported as follows: "The effect of the authorities is clearly this, that when parties in making a promissory note or accepting a bill describe themselves as directors or by any similar form of description, but do not state *on the face of the document that it is on account of or on behalf of* those whom they might otherwise be considered as representing if they merely describe themselves as directors but do not state that they are acting on behalf of the Company—they are individually liable."

Harrison, C.J., is reported in *Hagarty* v. *Squier*[6] at page 168 as follows: "It is a popular notion that when a person draws a bill of exchange upon a company with which he is in some manner connected, and signs his name with a mere description of his office he is not personally liable, but this notion is at variance with the law * * * The reasons for the decisions as to the liability at law is that the question whether the party signing the bill is to be deemed the contracting party personally depends upon the intention of the parties as manifested *by*

Judgment. Wetmore, J.

the written contract itself and not otherwise. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of his principal though done by the hand of his agent. If he express this, the principal is bound and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person, or a corporation, without indicating that the particular signature is made in the execution of the office and agency is not sufficient to charge the principal or to exempt the agent from personal liability."

The authority of these cases has been nowhere impeached, so far as I can discover, at any rate as far as they apply to promissory notes. They were both decided after *Alexander* v. *Sizer*,[1] upon which the learned trial Judge relied, was decided, and *Alexander* v. *Sizer* was cited in *Dutton* v. *Marsh*.[5] I also refer to *Courtauld* v. *Sanders*.[4]

I can nowhere discover upon the face of the note in question in this case that Rorison has stated that he signed the note on account or on behalf of the defendant's company.

It is assumed that because he has signed describing himself "Manager Otter Tail L. Co.," and that the wording of the note is "*we* promise," the Court must infer under the evidence that "we" means the "Otter Tail Lumber Company."

Now I gather from these cases that the Court is to infer nothing in construing a promissory note except what is expressed. Suppose this note had been drawn as follows:

"Sixty days after date we W. D. Rorison, Manager of the Otter Tail Lumber Co., promise to pay to Dolan & Barr or order four hundred and seven $\frac{29}{100}$ dollars at the Imperial Bank here Value received.

"W. D. Rorison."

Could that be held to be the Company's note? It seems to me it could not.

Judgment. Wetmore, J.

Now the tenor of the note in question is nothing more than that. In *Alexander* v. *Sizer* [1] the secretary whom it was sought to make liable specified on the face of the document that he signed "For Mistley Thorpe and Walton Railway Company," and signed his name as secretary. I cannot help but think that if the note in that case had not in the body been drawn with the personal pronoun "I" no question would have arisen upon that note. The Court held, notwithstanding the note was drawn that way, that under the circumstances of the case—because he had signed *for* the company and as secretary—for both reasons—the note was intended as that of the company.

I do not think that case is authority for anything beyond that.

I think therefore the appeal, in so far as the defendant's liability on this note is concerned, should be allowed.

It was urged for the defendants that there was no evidence of the presentment of this note and no evidence appears in the printed Appeal Book of such presentment; but there were some exhibits used on the trial that have not been printed, and they were produced at this Court, and it appears that the note and notarial protest showing presentment were put in evidence without objection. The learned trial Judge tells us no such point was raised at the trial. I therefore think that it ought not to be allowed to be raised here.

Moreover I am of opinion that the notice of appeal contains no such objection.

I think the plaintiffs should have judgment in the Court below for $311.30, the amount of the goods with costs of suit applicable to that claim, and the judgment reduced accordingly, and that there should be no costs of this appeal to either party.

Appeal dismissed with costs.

EDMONTON v. THOMSON.

Notice of appeal—Amendment—New trial—Judge's charge—Perverse verdict—Commission evidence—Improper evidence—Objection to admissibility of evidence.

An amendment was allowed to a notice of appeal so as to ask expressly for a new trial, but only on the grounds stated in the notice of appeal.

An amendment so as to set up the ground, not stated in the notice, of the improper admission of evidence taken on commission was refused as it did not appear from the judge's notes that objection was made at the trial though the commissioner had noted the objection.*

A new trial on the ground that the verdict was perverse was refused.

[*Court in banc, December 8th, 1891.*

Statement. This was an action for breach of alleged agreements to employ the plaintiff to act as foreman in a lumber camp and to freight logs from a timber limit.

The action was tried before ROULEAU, J., with a jury at Edmonton.

As part of the evidence for the defence, the depositions of one Alexander Fraser, taken on commission, were put in at the trial without objection, so far as the Judge's notes shewed, on the part of the plaintiff. The learned trial Judge charged in favor of the plaintiff; the jury, however, found for the defendant and judgment was entered accordingly.

The plaintiff appealed on the grounds (1) that the verdict of the jury was not unanimous, (2) that the verdict was contrary to the evidence, (3) that the verdict was contrary to law and evidence, (4) that the verdict was arrived at from conclusions drawn from facts not in evidence, (5) that it was contrary to the charge of the learned trial Judge and was perverse. The learned trial Judge gave appellant leave to amend the notice of appeal by adding as an additional ground the discovery of further evidence since the trial.

* Cf. *Mercer* v. *Fonseca*, 2 Man. R. 169.

The appeal was argued on the 9th December, 1891. Argument.

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

P. McCarthy, Q.C., for respondent.

Scott, Q.C., moved for an order granting leave to the appellant to amend the notice of appeal in such a manner as to ask expressly for a new trial of the action, and in such manner as to set up as a further ground of appeal and of the motion for a new trial the admission, and reading to the jury, of improper evidence, namely, the several portions of the depositions appearing in the appeal book of Alexander Fraser taken under commission, which are noted in the depositions as objected to by Mr. Porter on behalf of the appellant.

McCarthy, Q.C., A new trial will not be granted on the ground of admission of improper evidence where there has been no objection at the trial. Taylor on Evidence, s. 1881. The Judge's notes cannot be contradicted even upon affidavit. The Judge's notes cannot be contradicted even upon affidavit. The Judge's notes contain no evidence whatever of objection having been taken to the admissibility of this evidence. *Gibbs* v. *Pike*,[1] *Coles* v. *Bulman*,[2] Best on Evidence, p. 73.

Scott, Q.C., in reply—The motion asks for a new trial upon general grounds as well as upon this particular ground. We have already leave to move for a new trial on the ground of discovery of fresh evidence.

RICHARDSON, J.—We have determined to allow part of the motion and to refuse another part. We allow to be added to the notice of appeal application for a new trial on any or the grounds included in the notice of appeal; that, of course includes the order of the trial Judge. We refuse to allow that part of the motion which asks for leave to move for a new trial on the ground of wrongful admission of evidence contained in the commission, as no objection thereto was made at the trial.

[1] 1 D. N. S. 409; 9 M. & W. 351; 12 L. J. Ex. 257; 6 Jur. 465.
[2] 17 L. J. C. P. 302; 12 Jur. 586.

Argument.

Scott, Q.C.—The learned trial Judge's notes say nothing about his charge to the jury, or whether the verdict was one which met with his approval or not; but I am given to understand that his Lordship was dissatisfied with the finding of the jury, or that it was a perverse verdict.

ROULEAU, J.—My charge was in favor of the appellant on the facts, and the jury took another view.

Scott, Q.C.—On the ground that the verdict was against the weight of evidence I refer to *Webster* v. *Friedberg*,[3] *Metropolitan Railway Co.* v. *Wright*.[4] The evidence of the respondent's brother, Daniel R. Fraser, taken on commission does not amount to anything, because he did not hear the whole of the conversation and could not state positively that the defendant did not hire the appellant. The evidence of Malcolm McLeod is not conclusive; there is nothing in it to plainly contradict the appellant. The only fresh evidence is in the affidavit of 31st October, 1891, of Kelly, that in the spring of 1886 he had a conversation with the defendant Fraser, and said Fraser said he was dissatisfied with getting out logs by contract, and that he intended that his firm of Hardisty & Fraser should for the future themselves get out the logs they required for their mill, and the appellant's name being mentioned in the course of said conversation, Fraser expressed himself distinctly to the affect that the appellant would be a good man as foreman for the said work. The whole proceedings in this case show that there has been a miscarriage of justice, and that the case comes well within *Webster* v. *Friedberg*.[3]

McCarthy, Q.C., was not called upon.

The Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE, and MCGUIRE, JJ.) dismissed the appeal with costs.

Appeal dismissed with costs.

[3]55 L. J. Q. B. 403; 17 Q. B. D. 736; 55 L. T. 49; 34 W. R. 728.
[4]55 L. J. Q. B. 401; 11 Ap. Ca. 152; 54 L. T. 658; 34 W. R. 746.

MACARTHUR ET AL. v. MACDOWALL.

Accommodation note—Holder in due course—Equities attaching to note—Defects in title—Agreement for renewal—Parol evidence—Writing Signature—Amendment.

Action by endorsee of a note against the maker.

The trial Judge found that the note was made by the defendant for the accommodation of K., the payee, subject to the conditions that (1) it was not to be used at all except in a certain stated event; (2) it was to be negotiated, if at all, only at a certain named bank; and (3) it was renewable for a stated period, which had not expired at the commencement of the action. He also found that the second and third of these conditions had been broken; that the plaintiff acquired the note, though for value, after maturity from one C., the trustee for the benefit of the creditors of K., and not from a certain bank which, at the time of the arrangement whereby he acquired the note, actually held it as a collateral security for an indebtedness of K.

Held, that these conditions were "equities attaching to the note," and their breach "defects in the title of the person who negotiated it"; that the note was affected by them in the hands of both C. and the plaintiff; and that therefore the plaintiff could not recover.

The nature and effect of an accommodation note discussed.

Quære, whether the general rule that property in which a bankrupt has no beneficial interest does not pass to his trustee applies, so far as the legal title is concerned, in the case of a voluntary non-statutory assignment for the benefit of creditors.

Where a note is subject to an agreement for renewal, if the renewal is not contemplated, except on the happening of an event not within the knowledge of the holder alone, the obligation of offering to renew is on the party entitled to renew.

The necessity for such offer and the time within which it must be made discussed. In this case it was held that there was a continuing offer to renew and a continuing refusal to accept a renewal.

The character of the evidence of notice of defects in title discussed.

Where it is made to appear that a note, transfer or other writing is merely an incident in or part of a larger agreement, and there is no writing in which the parties professed to set down all the terms of their agreement oral evidence of the agreement is admissible.

Signature is a convential mode of declaring a writing to be the record of an agreement; but it is not essential, except where made so by statute.

The fact that such a writing is directed to a third party does not prevent its being taken as the record of such an agreement.

At the close of the plaintiff's case, a defence, that the plaintiff was not the holder of the note at the commencement of the action being on the record, a motion to dismiss on this ground was made. The trial Judge held that this defence was established, it appearing that the note had been deposited with a certain bank as a collateral security and had not been returned to the plaintiff until after

the commencement of the action; but on the plaintiff's application an amendment was allowed adding the bank with its consent as a co-plaintiff on the terms that the bank stand on the title of the plaintiff.

[McGUIRE, J., *March 1st, 1892.*

[*Court in banc, June 8th, 1892.*

Statement. This was an action tried before McGUIRE, J., at Prince Albert sitting without a jury.

The facts and points involved appear sufficiently from the judgments.

[*March 1st, 1892.*]

McGUIRE, J.—This is an action brought originally by James MacArthur to recover the amount of a promissory note for $5,500 made by the defendant, payable to the order of Joseph Knowles, dated Nov. 10, 1889, payable 18 months after date, without interest.

The defences raised were that the note was an accommodation one, given without consideration to Joseph Knowles; that the plaintiff was not the holder when the action was commenced; that the note was paid at maturity; that in addition to its being an accommodation note, it was subject to the conditions that, if negotiated, it was to be negotiated only at the Winnipeg branch of the Bank of Ottawa, and if not paid at maturity was to be renewable for 18 months, without interest, of all which plaintiff had notice; that plaintiff took the note after maturity, and subject to all its equities; that he acquired it from one Coombs, the assignee of the insolvent estate of Joseph Knowles, the payee, and took it subject to its equities; that he paid no value for it, or if any only 85 per cent. of its face; that the note being made for the accommodation of Joseph Knowles, and subject to the conditions above mentioned, Knowles, in breach thereof, deposited it as collateral security with the Commercial Bank before maturity, and that afterwards and before its maturity he failed and made an assignment, which included this note, to one Coombs, who retired the note and sold his interest to the plaintiff for 85 cents on the dollar of its face value, of all which plaintiff had notice.

Judgment. McGuire, J.

At the close of the plaintiff's case the defendant asked that the action be dismissed, because it appeared that the plaintiff had transferred the note to the Commercial Bank as collateral security for advances, and although it had been returned to him before the trial, this return was some days after the commencement of this action. The plaintiff, while opposing this motion, asked in the alternative that the bank be made plaintiff, and filed a consent by the bank to that effect, the bank to stand on the title of MacArthur. I accordingly having considered that MacArthur was not holder when the writ issued, allowed the plaintiff to add the bank as a party plaintiff. The defendant then proceeded with his defence.

The defence substantially resolved itself into three main lines:—(1) That the note was paid shortly after maturity by Coombs to the Commercial Bank, and such payment discharged the defendant; (2) That, being an accommodation note and subject to the conditions mentioned, the plaintiff (MacArthur) took the note from Coombs after maturity, and subject to the equities attaching to the note in the hands of Knowles, and therefore could not maintain this action; (3) That if entitled to recover he could only claim what he paid, namely, 85 per cent. of its face value.

As to the first ground of defence, if it is assumed that it was an accommodation note, Knowles was the person "ultimately liable to pay it," *Parr* v. *Jewell*;[1] and payment by him would be the same as payment by the maker as laid down in that case by Parke, B. That case is almost identical with the facts assumed here. It was there held, as a good defence to an action by an endorsee against the acceptor of a bill for accommodation of the drawer, endorsed by the drawer to the plaintiff, that it was paid by the drawer at maturity. Our Bills of Exchange Act, 1890,† s. 59 (3) is to the same effect. But did Coombs so pay it? I think not. It is clear to my mind that Coombs never intended to pay it off? His agreement with Mr. MacArthur was to sell it and other notes

[1] 16 C. B. 684.

† 53 Vic. (1890) c. 33.

Judgment.
McGuire, J.

to him, and what he did was to send the proceeds of the sale to the bank then holding these notes as collateral security, in order to obtain from the bank a release of its lien. There is not one word in the negotiations which even suggests *payment* of these notes. The drafts sent by Coombs to the bank were so sent expressly "to be applied towards liquidating your claim against the (Knowles') estate." It would have been a great breach of faith had Coombs used the draft he got from Mr. MacArthur to pay off the notes, and thus rendering them so much worthless paper ere handing them over to plaintiff in apparent performance of his agreement, (like the juggling "fiends" in Macbeth, "that keep the word of promise to our ear and break it to our hopes"). The maxim *ut res magis valeat* should apply, and such construction be placed upon the acts of parties as will give effect to, rather than defeat, their well ascertained intentions. The case of *Lyon* v. *Maxwell*[2] is some authority for giving effect to the intentions, expressed or actual, of the party alleged to have paid the note.

As to the third ground of defence, that plaintiff should in no event recover more than 85 per cent., in the view I have taken of the second ground of defence, it is unnecessary to express any opinion.

The facts as they appear in the evidence, are as follows:—In November, 1889, Joseph Knowles was in partnership with Mr. MacArthur in a private banking business in Prince Albert, and contemplating a dissolution of this partnership, and a setting up of a separate bank in his own name, he applied to the defendant for assistance. Defendant says that the assistance asked was of two kinds. (1) Knowles wanted a line of credit with some chartered bank to the extent of $5,000—or at least $3,000. (2) He wanted a fund of $4,000 to draw upon in case only of a withdrawal of funds by depositors upon dissolution of the existing firm. Defendant was willing to assist him, and wrote a letter to Mr. Mathewson, Manager of the Bank of Ottawa, Winnipeg branch, dated Nov. 8th, 1889, in which, among other things,

[2] 18 L. T. 28; 16 W. R 437.

he mentions these two propositions to Knowles. He also therein says, "Knowles suggested selling me with a Torrens title a certain property on John McDonald's estate for $5,500, payable in the following manner:—A note for the amount at 18 months, renewable for a further 18 months without interest, he giving an agreement to this effect, of which the enclosed is a copy. The agreement also to embrace the stipulation that the note should only be used in case of a withdrawal of deposits, and in that event should only be placed in the hands of your bank. This, it was supposed, would cover his second difficulty. To cover the first he proposes to transfer to me, with a Torrens title, certain property if I will become surety with you for the $5,000, it being thoroughly understood that in the event of your desiring to call in this $5,000, I should be allowed a reasonable time to put the property on the market at any time (after consultation with Knowles as to prices), the proceeds thereof to reduce or pay off the $5,000 of guarantee. Now from a business and personal point of view, I was willing to undertake this * * * on these conditions:—1st. that Knowles should attend to business of my company, &c.; 2nd. that my guarantee could only be given if you considered that I was fairly free to do so, and that the guarantee should only be to your bank."

Judgment. McGuire, J.

The defendant in his oral evidence says the agreement with Knowles was substantially as set out in the above letter; that if Knowles could not pay the note at maturity it was to be renewed for a further period of 18 months, without interest; that he received no value or consideration for the note, and that it was given solely for accommodation of Knowles; that to secure him (defendant) against liability on the note, Knowles gave him a Torrens transfer of certain land on the McDonald estate; that in effect while the transfer was absolute in form, it was only intended to be in the nature of a mortgage; that the proposal first mentioned in the Mathewson letter was never carried out further than by defendant bringing the matter to the notice of Mathewson; that that letter was read over to Knowles, and certain interlineations appearing therein, in particular one "after

Judgment. McGuire, J.

consultation with Knowles as to prices," were made at Knowles' suggestion; that Knowles took the letter to present it to Mr. Mathewson. The note bears date the 10th Nov., 1889, two days subsequent to the date of the Mathewson letter, but defendant says that both were written about the same time.

It appears from the evidence of Mr. Mathewson that Knowles in the same month presented to him the letter and note together, and that Knowles and he discussed "all the circumstances in connection with the giving of the note" as they set forth in the letter.

There is a reference in that letter to an enclosed copy of agreement to be signed by Knowles. Defendant is not certain whether this was actually enclosed; but Mr. Mathewson, while not positive, is of the belief that it was, but not signed, and that it set out "that the note (sued on) was to be renewed at maturity for 18 months, and at end of that time the lands transferred to defendant were to be deeded back to Knowles and the note was to be handed back to Macdowall; any lands sold to be settled for." Macdowall further said that the note was originally to have been drawn at three years, but at Knowles' request was changed to 18 months, renewable for another 18 months.

The first point which I shall consider is how the plaintiff became holder of the note; whether, as he asserts, as transferee from the Commercial Bank, or as the defendant claims, from Coombs, assignee of the Knowles estate, and whether he acquired before or after maturity.

In his evidence the plaintiff says he bought it from the bank, but he admits that all his negotiations with the bank relating to the acquisition of the note were embraced in certain letters. I shall examine these. The first letter in which the subject is mentioned is one written by Mr. MacArthur to R. T. Rokeby, Manager of the Commercial Bank at Winnipeg, dated May 1, 1891. In that, he says, "I have thought of making an offer to the estate for the notes held by you and other property to the amount of your bank's

claim, provided I could make an arrangement with your board regarding payment of same. Judgment. McGuire, J.

The amount of your claim you state to be--$16,807 00
Taking off the MacDowall note 5,500 00

$11,307 00

I propose for the favorable consideration of your board the following, viz., that I assume this amount and give my notes to you at 2, 4, 6 , 8, 10, 12 and 14 months in equal instalments and forward, with same, collateral notes to the amount of the principal and $2,000 as a margin."

It seems to me that this is not a proposal to purchase these notes, and particularly the MacDowall note, from the Bank, but the statement of an intended offer to the estate (i.e., of Knowles), and the reason he mentions it to the bank is, as he says, to secure "an arrangement with your board regarding payment," this being the bank with which he had been dealing for years and which was in the habit of making him advances, the President, Mr. Duncan MacArthur, being his brother. On May 6th, Mr. Rokeby, replies and referring to this proposed purchase says: "With regard to your proposition to buy out our claim you, of course, understand that in the meantime we are practically acting as trustees for the assignee, but if he is willing to make a deal with you in the way you speak of, we are quite ready to sell you our claim as it stands at present—$16,-918.13, payable $2,000 in cash and by your notes at 2, 4, 6, you to give us collateral notes with a margin of $2,000." The next lettter is dated 12th May, 1891, from plaintiff to "J. M. Coombs, assignee," in which he says:—

"It has occurred to me that to insure rapid progress in the winding up of this estate that you might be open to entertain an offer for the notes held by you and other property sufficient to wipe out the Commercial Bank claim. I shall be glad to meet with you and discuss the matter at your convenience."

These are all the letters that passed until the close of the purchase. Plaintiff had seen Coombs, he says, and made

Judgment.
McGuire, J.

him a verbal offer to purchase. Mr. Coombs admits this and says that he suggested the proposal being put in writing, and that it was then that the plaintiff sent him the above letter; that he, Coombs, called a meeting of certain creditors of Knowles, who had been appointed as a sort of advisory or managing committee to aid the assignee in winding up the estate. Plaintiff attended that meeting, and, acting on the advice of the committee, the assignee agreed to accept plaintiff's offer, which was to give 85 cents on the dollar of the face value of two batches of notes, one batch being those pledged to the bank, some $13,505.00, and the other being notes received by the assignee from sales of portions of the estate and with which the bank had nothing to do and amounting to $2,228.60.

It will be seen that this purchase is not at all in accordance with the proposal in Rokeby's letter to plaintiff. That was an offer to sell the bank's claim against the estate at its face value—not the securities which it held, still less an offer to sell at 85c. on the dollar, of such securities—and it was a purchase not only of the securities held by the bank but a number of other notes. The total price of both batches amounted only to $13,673, considerably less than the amount of the bank's claim. So it was not an arrangement by which the plaintiff was to stand in the place of the bank, but a purchase of a number of notes from the assignee; and the bank received from the assignee the proceeds not only of the notes held by it but also $1,894, proceeds of other notes on which it had no lien, and, as will be seen presently, a draft in addition of $600.

The purchase of the notes was completed on the 20th May as far as plaintiff and Coombs were concerned and on that day plaintiff paid Coombs a draft on the Commercial Bank for $13,673.56. Coombs at once wrote Rokeby forwarding this draft and another for $600, making together $14,273.56, "to be applied," he writes, "towards liquidating your claim against the estate." The bank's claim was thus reduced to a sum less than $3,000, but they still held a mortgage on real estate ample to secure them against this, without retaining or looking to the notes as against the estate.

The bank had in Rokeby's letter of May 6th substantially agreed to confirm any arrangement made with the assignee by plaintiff, provided plaintiff gave them certain notes and securities and cash. Plaintiff also on same day wrote Rokeby. He says: "In further reference to my letter of the 1st inst. and yours of the 6th, I found that upon meeting Mr. Coombs and his committee, that I could make a purchase of the notes belonging to the estate. But regarding the balance required to make up the (sum) due you they thought it would be better to get you to allow a sale at auction in Coombs' name of so much real estate as would pay off your claim. As I had no doubt that this would meet your views, I purchased the notes to the amount of $13,673.56 and for which I have issued my draft on you. * * * Mr. Coombs will remit by this or the following mail $700 which "(with the $1,300 mentioned in earlier part of his letter)" makes $2,000. I enclose my notes at 2, 4, 6, 8, 10, 12 and 14 months for $1,667.65 each for the balance, and a list of the notes now held by you, assigned by Coombs to me and by me to you. I enclose collateral notes to the amount of $2,268.21 * * *."

Judgment. McGuire, J.

The last sentence but one of the quotation shows that plaintiff considered the deal as one with Coombs, and that in effect Coombs had assigned these notes to plaintiff and that he was assigning them to the bank, as collateral security to his own notes in order to satisfy the bank in accepting his draft, given as payment to Coombs. And I think that was the correct view, and it was the one taken by plaintiff at the time when the transaction was still warm. But now, after a lapse of months and when he had a strong reason for wishing to have the transaction viewed in a different light, he says that the purchase was from the bank, and that he dealt with Coombs only to obtain his consent to the Bank selling the notes at a discount of 15%. I think it was open to the parties concerned to have had the deal take that shape. Both the bank and Coombs were necessary parties to any sale of the notes at a discount, if the total proceeds fell short of the bank's claim. Had the bank assumed to sell at a discount without the assignee's consent, it ran the risk of being called upon to account to

Judgment.
McGuire, J.

the estate for the full face value. Had Coombs assumed to sell without the bank's approval the latter might have refused to release its lien on the notes, unless it received an amount equal to their face value, when, of course, as Mr. Rokeby admits in his evidence, they must release the notes. Now, in this case the assignee was able to send the Bank $14,273.56, which was more than the face of the notes which it held, so that unless it refused to accept MacArthur's draft it had no alternative but to release these notes; Coombs, therefore, in fact, would seem to have had practically full power to sell; the only thing uncertain being the bank accepting MacArthur's draft, but that was merely an arrangement between the bank and him as to providing the funds. The point however is not material, as it is clear both from the letters of Rokeby and from his evidence, that the Bank acquiesced in the sale and gave MacArthur the assistance he desired.

But what the parties might, or could, or should have done is less material for our consideration than what they actually did agree to do and did. It was never a fact that the Bank absolutely owned these notes; its title was always defeasible; until they were paid, it held merely as security, and the moment its advances, for which the notes were security, were repaid, the bank was bound to hand over the notes to Knowles or his assignee. Rokeby recognizes this, both in his evidence and in his letter of May 6th, where he points out that the bank is really only a trustee of these notes for the assignee, and refers the plaintiff to him.

We can thus understand how plaintiff, without ever mentioning to the bank the proposed terms of purchase, concludes his deal with Coombs, and makes a draft on the bank for the price, feeling confident the bank would concur—"as I had no doubt that this would meet your views," —and hands it to Coombs. He knew what other security the bank held for the comparatively small balance remaining due it.

It was not until the 9th of June, owing to the absence of Mr. Rokeby, that the bank made any reply to either

Coombs or plaintiff. On that day Rokeby writes plaintiff, "Re your purchase of the collateral notes, * * * I have given instructions that the matter be carried through in accordance with your arrangement." To Coombs he writes, "On my return to business to-day your letter of May 20th, together with enclosures relating to sale of collateral notes to James MacArthur, was placed before me, and I now beg to say that we confirm the sale as arranged." Judgment. McGuire, J.

In his evidence he says, "They (the notes) were released so far as Knowles went; but we held them as collateral against MacArthur's indebtedness, which was caused by our honoring his draft, etc." In another place he says, "he bought the notes and put them in again to us."

The effect of these negotiations was that the bank agreed to "release" its lien on these notes and that being done, it in effect handed back these notes to Coombs, and they were then, as plaintiff himself puts it, assigned to him, and by him to the bank. Of course most of this was done only in contemplation of the parties, for the notes, which were in the safe of the bank, never actually left it, owing to the accidental circumstance that they were to be repledged by MacArthur to the bank, and, being already payable to bearer or to the same bank, they required no endorsement by either plaintiff or Coombs to carry out the successive transfers. Besides it was not necessary that the forms should be gone through of sending them up to Prince Albert, only to be immediately returned to Winnipeg in order that Coombs should transfer them; it was only necessary that they should "come into the hands of some agent for him," *Glasscock* v. *Balls*;[3] and after the bank had been paid the proceeds as arranged, the lien was at an end, and thenceforth until the bank handed them to plaintiff, it was an agent of Coombs, (trustee, Mr. Rokeby would say), and subject to his directions, consistent with its own agreement to have them again as security for advances to plaintiff.

In further confirmation of this view there is the evidence of plaintiff and Coombs, that in the purchase it was

[3]24 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L. T. 163; 38 W. R. 155.

Judgment. McGuire, J.

stipulated that the assignment should be "without recourse." If Coombs were merely an assenting party to a sale by the bank no such stipulation would have been thought of.

Again we find in exhibit Q that MacArthur signs a receipt, acknowledging having received from "Coombs, assignee of estate of J. Knowles, the above mentioned notes," which included the note sued on, and in the same document Coombs gives a receipt for the price paid by MacArthur.

There is another difficulty in the way of the plaintiff's present contention. It is clear that all three parties—the plaintiff, the bank, the assignee—all knew perfectly well what was going on, and understood it in the same way. The bank authorized Coombs to sell (see Rokeby's evidence, p. 31, his letter of May 6th, and his letters to plaintiff and Coombs on June 9th.) This was an implied agreement to do what was necessary to make the sale effective as far as it was concerned, viz.:—to release its lien on the notes as against the estate on receiving the proceeds of the sale. It did accordingly receive the proceeds and more, the drafts sent by Coombs being accepted as payment as far as the assignee was concerned, and being, in fact, subsequently paid. (Rokeby's evidence, p. 18.) Immediately on receipt of the drafts the bank was bound to carry out the arrangement, to which it had given approval, and on the strength of which it had got over $14,000, and to hand these notes to Coombs on June 9th). This was an implied agreement that could be done so as to ensure its getting them back as security for its acceptance of MacArthur's draft. After receiving from Coombs the $14,000 could the bank have transferred these notes to a fourth party, or dealt with them otherwise than in pursuance of the agreement? Now, even if Rokeby had not already known the arrangement, Mr. MacArthur in his letter of May 20th informed him that the arrangement was one whereby "Coombs assigned to me and I assign to you." How then can plaintiff now be heard to assert that the bank, in violation of that agreement and understanding, thus so tersely and distinctly stated by himself, knowingly did something which was a breach of

faith, and had never been mentioned or thought of, namely, a sale of these notes by the bank to him? We are not lightly to assume that the bank acted in bad faith or contrary to the known arrangement, and there is not so far as I can see, a particle of evidence that it did so. Even if it had assumed to do so, it was after the maturity of this particular note, and after its title had been extinguished, and plaintiff would, it seems, be affected with the infirmity in the agent's (the bank's) title. Byles on Bills, 15th ed., p. 190, notes, citing *Lee* v. *Zagury*.[4]

Judgment. McGuire, J.

Mr. Newlands suggested that if the note turned out to be an accommodation note, it would not pass to the assignee of Knowles and cited Byles on Bills, 15th ed., p. 481. That appears based on a decision in bankruptcy proceedings and to refer to an assignee under such proceedings. The assignee there stands in a very different position from the assignee here under a deed. Even if this rule did apply in a case such as this, I do not see how it can alter the agreement or strengthen the plaintiff's title.

The evidence seems to me to be all one way, and to clearly show what all the parties intended and understood, namely, that it was a sale by the assignee to plaintiff.

Assuming, then, that plaintiff acquired whatever title he did acquire from the assignee of Knowles, we may treat the notes as if they had never been out of the hands of Knowles, the temporary pledge of them to the bank being put an end to, and Coombs in effect getting them back free from that lien took them is if he had found them among the other assets of the estate in Knowles' safe.

We have next to consider when (before or after maturity) plaintiff acquired this note. It fell due and was protested on May 13th, a Wednesday. Plaintiff's letter to Coombs was dated May 12th. Plaintiff says he met the committee to the best of his recollection on the Friday or Saturday of same week. The evidence given as to the reading of a telegram from Rokeby points to its being on the 16th

[4] 8 Taunt. 114.

Judgment.
McGuire, J.

May, Saturday. That telegram stated that the MacDowall note had not been paid. The deal was not finally closed at that meeting, awaiting the return to town of Mr. McKay, Coombs' advocate, and on the 19th it was closed by Coombs and MacArthur each signing a receipt, — the former for the price, the latter for the notes. I must find, therefore, that plaintiff took the note after it was overdue, and with knowledge that it had not been paid by the defendant. Finding, as I do hereinafter, that the note as proved to be subject to conditions which forbade its being negotiated to plaintiff after maturity, any such negotiation of it, in defiance of these conditions, was I think affected with fraud, and by sec. 30 (2) of the Bills of Exchange Act, 1890, the burden of proof was thereafter on the plaintiff to show that he took it before maturity he not having shown that value was paid subsequently to such fraud by some other holder in due course. Independently, however, of that, I think the issue on this point must be found in favor of the defendant.

The defendant contends that owing to the mere fact that the note was an accommodation one and plaintiff having taken it overdue, he is in no better position than Knowles would have been, but I think it is now well settled that this is not so; see Byles on Bills, 15th ed., p. 191, *Charles* v. *Marsden*,[5] *Sturtevant* v. *Ford*,[6] *Lazarus* v. *Cowie*,[7] *Carruthers* v. *West*,[8] *Ex parte Swan*,[9] and Bills of Exchange Act, 1890, sec. 28 (2), the reason being that an accommodation note is made expressly to enable the party accommodated to raise money on it from any one, who may be found willing to give it, and, in the absence of any agreement to the contrary, there is no reason why its negotiation should be limited to the period of its currency. But defendant says there was an agreement not to negotiate after maturity arising out of the conditions attached to the note; that it was to be renewed at maturity, and if so it was not to be negotiated after maturity. This seems the reasonable deduction from the al-

[5] 1 Taunt. 224. [6] 4 M. & G. 101; 4 Scott. N. R. 668; 11 L. J. C. P. 245. [7] 3 Q. B. 459; 2 G. & D. 487; 11 L. J. Q. B. 310. [8] 11 Q. B. 143; 17 L. J. Q. B. 4; 12 Jur. 79. [9] L. R. 6 Eq. 344; 18 L. T. 230; 16 W. R. 560.

leged conditions as to renewal. *Prima facie* an accommodation note which is one given to enable the payee to raise money on it is intended to be negotiated during its currency. The mere statement of the proposition shows its truth; and I find that, so long ago as *Parr* v. *Jewell*,[1] that was the expressed opinion of Platt, B., and that the mere fact of its being an accommodation bill was some evidence for a jury to find that it was not intended to be negotiated after maturity. In the present case, if the alleged conditions be proved, there is much stronger evidence of such an intention. Another of these alleged conditions was that it should be negotiated, if at all, only at the Bank of Ottawa. Now, it would be rather out of the ordinary for a bank to discount a note which had stood for over 18 months, and after it was due and unpaid. I think it can hardly be seriously denied that such (assuming the conditions proved) must have been, if not the expressed, at least the actual, understanding, and such an agreement is fairly implied. Judgment. McGuire, J.

If that be so, then there is abundance of authority that an overdue holder of an accommodation note given under such a condition cannot show a better title than the original payee or than his immediate transferor. See the cases cited, commencing with *Charles* v. *Marsden*[5] down to *Parr* v. *Jewell*,[1] in which it is laid down that the agreement may be either express or implied.

This brings us to an enquiry as to the existence of the conditions mentioned. The defendant seeks to establish these in two ways, by parol and by written evidence. An agreement to renew cannot be shown by parol evidence as that would be to vary a written document, assuming that such document was intended to be the record of the agreement between the parties. Oral evidence is admissible to show want of consideration or the true nature of the consideration, even though the document states a consideration, or one different from the oral evidence. Byles on Bills, 15th ed., p. 97, *Abbott* v. *Hendricks*,[10] *Stott* v. *Fairlamb*.[11] It is

[1] 1 M. & G. 791; 2 Scott. N. R. 183; 10 L. J. C. P. 51. [11] 53 L. J. Q. B. 47; 49 L. T. 525; 32 W. R. 354.

Judgment. McGuire, J.

also admissible to show the circumstances under which the note was made; also to show that it was not intended to take effect as a binding instrument: *Clever* v. *Kirkman*,[12] or not until the happening of some event, such as the approval of a third party: *Pym* v. *Campbell*;[13] the insertion of a date left blank: *Davis* v. *Jones*;[14] until approved by the landlord: *Wallis* v. *Littell*;[15] until stamped with the Company's stamp: *Brown* v. *Howland*;[16] see also *Kearns* v. *Durell*,[17] *Murray* v. *Earl of Stair*,[18] *Bell* v. *Ingestre*.[19] This last was where the endorsee sued the endorser of a bill, and the defence was that the drawer delivered the bill to plaintiffs with a letter stating that the bill was for the purpose of retiring certain other bills, which were to be returned to him by next post. This was not done, and it was held that the bill sued on was delivered as a sort of escrow, and that the plaintiffs, not having performed the condition, were not in a position to sue. In this case it is true the conditions were set out in a letter, but the case does not seem to depend on there being a writing. In the present case it seems to me the oral evidence is admissible to show the existence of two conditions, until the performance of which the note was not to take effect at all—conditions precedent, as between the parties, to the commencement of the defendant's liability, or to use the language of Brett, J., in *Abrey* v. *Crux*,[20] which "suspended the commencement of the defendant's liability," an expression which is explained by Cameron, C.J., in *Porteous* v. *Muir*,[21] as meaning "to suspend the operation of the agreement." These two conditions were:—(1) the note was not to be negotiated at all, unless and until the event of the withdrawal of deposits on the dissolution of the existing partnership; (2) it was not to be negotiated except at the Winnipeg branch of the Bank of Ottawa, which was in

[12]33 L. T. N. S. 672; 24 W. R. 159. [13]6 E. & B. 370; 25 L. J. Q. B. 277; 2 Jur. N. S. 641; 4 W. R. 528. [14]17 C. B. 625; 25 L. J. C. P. 21; 4 W. R. 248. [15]31 L. J. C. P. 100; 11 C. B. N. S. 369; 8 Jur. N. S. 745; 5 L. T. 489; 10 W. R. 192. [16]9 O. R. 48 affd.; 15 O. A. R. 750. [17]6 C. B. 590; 2 D. & L. 357; 18 L. J. C. P. 28; 13 Jur. 153. [18]2 B. & C. 82; 3 D. & R. 278; 26 R. R. 282. [19]12 Q. B. 317; 19 L. J. Q. B. 71. [20]L. R. 5 C. P. 37; 39 L. J. C. P. 9; 21 L. T. 377; 18 W. R. 63. [21]8 O. R. 127.

effect that it was not to be used, unless the manager of the branch consented on behalf of his bank to discount it. The defendant has not pleaded or proved that the former of these conditions was not satisfied, and I shall disregard it in this connection. As to the second, Mr. Mathewson says that he refused to discount the note, and in another place that he refused to have anything to do with Knowles, and it is clear that the note never was negotiated at the Bank of Ottawa. It seems to me that this was a condition within the class of conditions referred to in the cases I have just quoted, and that the existence thereof might be proved by oral testimony, if that were necessary to the decision, and unquestionably by written testimony. Judgment. McGuire, J.

Beyond all question, however, oral evidence was receivable to show no consideration, and the circumstances under which the note was given, and on these grounds the oral evidence must be looked at. The defendant says that he received no consideration whatever, and that the note was given under the circumstances already set out and which need not be repeated in detail; that the first proposition of Knowles as to defendant becoming security for a line of credit of $5,000 was never carried out; that as to the second proposal for a fund to draw on in case of withdrawals by depositors, etc., Knowles agreed to give him as security a Torrens title of certain land on the MacDonald estate, if defendant would give him a note for $5,500 payable in three years without interest, to be used, if at all, only at the Bank of Ottawa in Winnipeg, and only in the event of withdrawals by depositors of old firm; that this was subsequently changed so as to make the note payable at 18 months, renewable for a further 18 months without interest. The note was the means adopted for enabling the defendant to assist Knowles in getting what he wanted, viz., " a fund of $4,000 on which to draw, etc." A Torrens Title was accordingly given to him, which, though absolute in form, was only intended to be a security to defendant against any liability he might incur by reason of this note. The true agreement was that defendant should aid Knowles in get-

Judgment. McGuire, J.

ting "a fund of $4,000 to draw on" on the happening of certain events, and the note was the device adopted to effectuate their purpose. The agreement entered into was, in the first place, an oral agreement of a much larger scope than the note or the transfer, and I do not think that the parties "professed to put down" in the note and transfer, or either of them, "the agreement between them," to use the language of Lord Bramwell in *Rogers* v. *Hadley*.[22] Had they done so, then oral evidence would not be admissible to vary the agreement so recorded. The note was, I think, only an "incident in, or part of a larger agreement," as it is expressed by Cameron, C.J., in *Porteous* v. *Muir*,[21] a means of carrying into practical effect that agreement. As laid down in *Davies* v. *Stainbank*,[23] and cited with approval in *Laing* v. *Taylor*,[24] "this is not the case of a party asking to put a different construction, etc," and saying, "this is not the agreement I entered into," but merely "I agreed to sign in this way as the best way of making my principal liable on the express understanding that I was not to be personally liable." Changing the language to suit the facts here, it is a case of the defendant saying "I signed the note in this form as the best way to enable Knowles to get the required funds to draw on—to get the fruits of the agreement we had that I was not to be sued at its maturity; that I was not already entered into—but upon the express understanding to be liable at all unless the note could be negotiated at the Bank of Ottawa. In *Laing* v. *Taylor*,[24] there is a quotation from Story's Eq. Jurisprudence that "where an instrument is drawn and executed to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil that intention or violates it, Equity will correct the mistake so as to produce conformity." In *Rogers* v. *Hadley*[22] bought and sold notes signed by the parties were, under the circumstances there, declared not to have been signed for the purpose of evidencing the contract, but as Pollock, C.B., suggested, "no

[22] H. & C. 227; 32 L. J. Ex. 241; 9 Jur. N. S. 898; 9 L. T. 292; 11 W. R. 1014. [23] 6 DeG. M. & G. 679. [24] 26 U. C. C. P. 416.

doubt to serve some ulterior purpose, to comply, I should think, with some official regulation." Here the note would not have served the purpose of the parties, had the conditions been written on it, under the laws governing bills and notes, and commercial usage, and to comply with such usage the note was drawn without conditions written thereon. In *Clever* v. *Kirkman*,[12] the defendant signed a paper saying, "The terms upon which I agree to sell you the business are as follows: * * * " addressed to plaintiff, and plaintiff on receipt of it wrote at the foot of it "I agree to the above terms and accept the same," and signed it; defendant subsequently refused to carry out the sale, and plaintiff sued him for refusing. The defence set up was that defendant never intended to sell to plaintiff. He stated "that paper was given to him and signed by me, with the terms on which I would sell the business, and I put his name in to prove he had the power to offer it, not for him." Brett, J., left it to the jury to say whether the paper was signed as an agreement to sell to plaintiff, or only, as the defendant contended, to enable him to offer it for sale to some responsible person, and to show the terms on which a sale could be made. The jury found for the defendant and on a rule being taken out it was held that Brett, J., was right, and the verdict was sustained. Notwithstanding, then, the signing of the note and the execution of the transfer I think oral evidence of the agreement would be admissible if there were no evidence of any writing in which the parties did profess to set down the terms of their agreement. See also the following cases: *Pym* v. *Campbell*,[13] *Davis* v. *Jones*,[14] *Clever* v. *Kirkman*,[12] *Wake* v. *Harrop*,[25] *Foster* v. *MacKinnon*,[26] and observations of Hagarty, C.J., in *Ellis* v. *Abell*.[27]

Judgment.
McGuire, J.

Defendant, however, contends that there was another writing in which were embodied the terms agreed on, viz., the letter to Matthewson already frequently referred to and partly set out. The plaintiff objects to the admission of

[25] 1 H. & C. 202; 31 L. J. Ex. 451; 8 Jur. N. S. 845; 7 L. T. 96; 10 W. R. 626. [26] L. R. 4 C. P. 704; 38 L. J. C. P. 310; 20 L. T. 887; 17 W. R. 1105. [27] 10 O. A. R. 226.

Judgment. McGuire, J.

this letter, and argues that it was not a written agreement, because, *inter alia*, it was not signed by Knowles and not addressed to him. This raises the question, "What is an agreement in writing?" Does it require to be signed at all? or if signed by one must it be signed by the other in the absence of an express stipulation that it is not to be an effective document until so signed In *Ellis* v. *Abell*,[27] Burton, J., said, "Where a proposal is made in writing, and accepted in terms by the party to whom it is addressed, whether verbally or by acting upon it, it is a written contract." It must be kept in mind, as remarked by Lord Bramwell in *Wake* v. *Harrop*,[28] that the writing (not being a deed) "is not itself the contract, but merely the evidence of it." Signature is a convenient mode of declaring a writing to be the record of the agreement, and that the person had so declared; but it surely is not the only mode, except where by statute signature is necessary; that the signature is that of the party must be proven orally. Pollock in his work on Contracts, 5th ed., p. 2, after stating that an "agreement is an act in the law whereby two or more declare their consent as to any act, etc.," says "such declaration may consist of the concurrence of the parties in a spoken or written form of words as expressing their common intention,"—a definition wide enough to cover the case where two persons, finding a written or printed document which happened to express their agreement, mutually declared that such document should be deemed the record of their agreement. Mr. Leake, in his book on Contracts, expressly states that, except where required by statute, signature is not necessary. That the writing is not addressed to Knowles, but to a third person, does not prevent it being treated as a written record: *Welford* v. *Beazely*,[28] and see notes to *Birkmyr* v. *Darnell*, in Sm. Lead. Cases, Vol. 1, 9th ed., p. 522.

The agreement entered into being then reduced to writing this letter was taken by Knowles and along with the note presented shortly after to Mr Matthewson and they

[28] 3 Atk. 503; per Ld. Hardwicke.

Judgment. McGuire, J.

discussed its contents. Parol evidence is admissible to identify the subject matter of a written agreement: 1 Sm. L. C. 527, citing *Shortrede* v. *Cheek*,[29] and other cases; *Stoll* v. *Fairlamb*.[31] If so, there is parol evidence to show the identity of the note sued on with that mentioned in the letter. Apart, however, from such parol or extrinsic evidence there is internal evidence in the letter and note sufficient to identify the note as the one referred to.

Now either that letter was, as defendant claims, the record of their agreement, or it was not. If not, then I think the agreement was not reduced, or intended to be reduced to writing at all, and oral evidence would be admissible supplemented by all the writings; if it was to be the record, it must be taken and oral evidence excluded. I think the letter was intended to state their agreement.

While it is well settled that you cannot vary the expressed or implied terms of a note or bill by oral testimony, it is equally well settled that you can by a contemporaneous written agreement between the same parties control it. In *Maillard* v. *Page*,[30] it is said:—"Now as between the immediate parties to a bill it is clear that the effect of the bill can be controlled by a written contemporaneous agreement." See Byles on Bills, p. 111, Bills of Ex. Act, 1890, s. 21, s.s. (2) (*b*) *Webb* v. *Spicer*,[31] was cited against this; but, as explained by Cockburn,C.J., in *Flight* v. *Gray*,[32] these cases were decided before equitable pleas were allowed, and the agreement there was not between the same parties. *Ford* v. *Beech*,[33] cited by Mr. Newlands is also quite distinguishable; see note on it in Smith's Mer. Law, ed. 10th, p. 229. Here then is a contemporaneous written agreement, on the faith of which the note was delivered and received and as between the parties it was as if the terms of it were written on the note, and I think these terms constitute equities affecting it. What are the equities which constitute a defect of title affect-

[29] 1 A. & E. 57; 3 N. & M. 866; 3 L. J. K. B. 125. [30] L. R. 5 Ex. 312; 39 L. J. Ex. 235; 23 L. T. 80. [31] 13 Q. B. 894; 7 D. & L. 624; 19 L. J. Q. B. 34; 14 Jur. 33; affirmed *sub nom. Salmon* v. *Webb*, 3 H. L. Cas. 510. [32] 3 C. B. N. S. 320; 27 L. J. C. P. 13; 4 Jur. N. S. 131. [33] 11 Q. B. 842; 17 L. J. Q. B. 114; 12 Jur. 310.

Judgment.
McGuire, J.

ing one taking the note after maturity? It must be an equity affecting the note itself: *Holmes* v. *Kidd*,[34] and *Sturtevant* v. *Ford*;[6] and does not include every defence which might be raised by the maker against the payee, *e.g.*, set off, unless there be an agreement that such set off shall stand against the note: *Oulds* v. *Harrison*,[35] *Ching* v. *Jeffery*.[36] In *Burroughs* v. *Moss*,[37] Parke, B., said, "If there is an agreement, express or implied, affecting the note, that is an equity which attaches upon and is available against any person who takes it when overdue." If this be a fair definition, then I think the conditions set out in the Mathewson letter were such equities and defects of title. We have seen what these were. (1), not to be used except in case of withdrawals by depositors; (2), to be renewable at maturity; (3), if negotiated at all then only at the Bank of Ottawa, Winnipeg, and (4), as an obvious corollary of this, that it was not to be negotiated unless that bank was willing to discount it. For the reasons already given, the defendant cannot avail himself of the first condition as an equity. The other three conditions are pleaded.

A question not raised at the trial has occurred to me: Defendant has not pleaded that he was always ready to give a renewal, or that he offered to renew or tendered a renewal note if that be necessary. However, by s. 91 of the Judicature Ordinance,† it is not necessary to aver performance of conditions precedent necessary for the case of the party pleading, averment of performance being implied. Formerly a pleader would use the stereotyped formula, "and all things happened and all times elapsed, etc." This is no longer necessary here, and reasonably so, for the fact of mentioning the condition implies that the pleader is asserting that the circumstances admit of his availing himself of it. The plaintiff probably so understood it for he denies in his reply, that "the defendant ever offered to

[34]28 L. J. Ex. 112; 3 H. & N. 891; 5 Jur. N. S. 295; 7 W. R. 108. [6]24 L. J. Ex. 66; 10 Ex. 572; 3 W. R. 160; 3 C. L. R. 353. [36]12 O. A. R. 432. [37]10 B. & C. 558.

† R. O. (1888) c. 58; see now Jud. Ord. C. O. (1898) c. 21, r. 115.

renew said note." Had this allegation occurred in a statement of claim or defence, the silence of the other party in his next pleading would have been an admission of its truth, but by s. 71,‡ if defendant failed to plead to this reply within eight days, "the pleadings are to be deemed closed, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue." So that apart from the implied averment of all necessary conditions being performed by s. 91, there is a material allegation deemed to be denied and put in issue.

Judgment. McGuire, J.

Now as to the evidence on this issue. There is evidence that defendant offered to the bank, while it held the note and a short time before its maturity, to give a renewal note for 18 months without interest, but this offer was not accepted. The bank continued to be holders of the note from that time on till after the action was begun, except for the brief moment when, in contemplation of law, or constructively, it was in the hands of MacArthur and Coombs. There is no evidence, and it is very improbable, that defendant knew of the momentary possession of the note by Coombs or MacArthur, so that no opportunity was given to him of offering to either of them to renew. The offer he had made to the bank may be treated, and I think fairly should be treated, as a continuing offer, and the refusal of the bank a continuing refusal, until it made a demand for a renewal or expressed its willingness to accept a renewal. It is not certain when such offer to renew should be made. Where the renewal is not contemplated except on the happening or not happening of some event not within the knowledge of the holder of the note, he ought to be informed by defendant that the event has occurred which requires a renewal; for the holder may not know that he wishes to renew at all. In this case, however, the renewal was not contingent on the happening of any event but the maturity of the note itself, which was not a fact known only to the defendant. In *Maillard* v. *Page*,[30] it is said that defendant "did apply for a renewal and the plaintiffs clearly declined to renew. We

‡ Now r. 156.

Judgment. McGuire, J.

think, therefore, that the plaintiff dispensed with the actual tender of an acceptance by defendant, *if that was necessary.*" It was contended there that he should have applied before maturity. But the Court said, "we think that as the defendant did apply, though not during the currency of the bill nor until application had been made to him, yet before the action was actually commenced and within what was considered a reasonable time, he did what was required."

It is, however, by no means clear that defendant was bound to be more than ready and willing to renew, especially where, as in this case, the renewal was not subject to any uncertain condition, such, *e.g.*, as his not being able to pay at maturity. In the course of the argument in *Maillard* v. *Page*,[30] Pigott, B., asked counsel, "Have you any cases in Equity showing that defendant was bound to give notice of his wish to renew?" No case was given. In this case I think the offer was made to the holder before maturity, and that the duty of requiring a renewal was shifted to the holder of the note, and no request is suggested and it is reasonably clear that neither of the plaintiffs would have accepted a renewal if tendered.

As to the other two conditions, as to negotiating only at the Bank of Ottawa and its corollary, the evidence is that Mathewson refused to discount it or to have anything to do with Knowles, and that it never was discounted or negotiated in that bank. So far as appears, the note remained in the possession of Knowles for nearly a year, and until after he had set up a separate bank in his own name. On October 6th, 1890, he deposited it with the Commercial Bank with other notes as collateral security for advances. This was of course a distinct breach of the agreement on which he had received it. That, however, in the view I take of the facts, is not very material, as I regard the pledge as a mere incident in the history of the note, and one which was put an end to before the plaintiff bought the note. In that view of it, on or before the 20th of May, 1891, it once more got back into the hands of the original holder, or rather of his assignee and representative, Coombs, who, I take it, could

Judgment.
McGuire, J.

have no other or better title to it than Knowles had or would have had, had it been redeemed by him under like circumstances. Could Knowles or Coombs have sued on it then? I should say not, if for no other reason than that it was renewable apart from its being, as alleged, an accommodation note.

There remains still the question which, in some aspects of the case, is material. Was it an accommodation note? This a question of fact largely, and one which has given me a good deal of hesitation. There is conflicting evidence as to this. Was the transaction as to the land, for which defendant received a "Torrens title," a sale or a mortgage—a security to him against his liability on the note? I was at first inclined to believe that defendant was mistaken, and had confused the two propositions and the two land deals mentioned in the Mathewson letter, one of which was never carried out; that it was as to this one that it was agreed the land should be held as security and that the other was an absolute sale for $5,500. In favor of this view of it the following evidence presses one:—(1) The Mathewson letter speaks of it as a sale, "Knowles suggested selling me." Defendant seeks to explain this as a first suggestion which was afterwards changed to transfer by way of mortgage. (2) Mr. Mathewson in a letter to plaintiff speaks of the note being given "for the purchase of a block of land," from which one might infer, as he was then acting as MacDowall's agent, that he had been so informed by defendant. In his evidence Mathewson states that he believes there was an unsigned agreement to be signed by Knowles which, according to his recollection of its contents, showed that the transaction was not a sale, and in another place he calls this note an "accommodation note." It may be therefore supposed that in writing the letter mentioning "purchase," he was speaking loosely or else in part forgetfulness of what had come to his knowledge. (3) Mr. Rokeby says defendant told him "he had given it to Knowles in payment of certain property at Prince Albert." In another place he refers to what defendant told him as follows: "He told me a story about how

Judgment.
McGuire, J.

he come to give the note, mentioning some land transaction he had with Knowles." This, he said, happened about a month before the maturity of the note and at a time when (as we learn from a letter written by Rokeby to MacArthur on 8th April, 1891), defendant had apparently decided to resist payment and had given Rokeby so to understand. It strikes me, reading those two statements of Rokeby, that his recollection of what was said about the land was not very distinct. (4) The instrument of transfer of the land is absolute in form. This is, of course, strong confirmation of the view that the deal was a sale, yet it is not an unusual thing for deeds absolute in form to be given by way of mortgage, and oral evidence is admissible to show that it was so intended. See Smith's Principles of Equity, p. 219, and cases there cited, also *Bank of Hamilton* v. *Isaacs*.[38]

It is in evidence that it was contemplated that sales of portions of the land should be made—at any rate as to one of the parcels of land, the one not transferred, and possibly as to the other also (see Mathewson's evidence as to the contents of the undersigned enclosure in the letter of 8th Nov., 1899). If sales took place it would be necessary to give purchasers a clear title, and it may have been thought more convenient that the absolute title should in the meantime be in MacDowall for this purpose. These, I think, are all the pieces of evidence to show that it was a sale. On the other side we find the following:—(1) Defendant's own evidence is very positive, and he was the only witness who really knew the facts, that it was not a sale. (2) The Mathewson letter shows that the note was not to be used at all except in certain contingencies, neither of which might ever happen, and one of which did not happen, I mean the event of a withdrawal of funds by depositors, and the Bank of Ottawa being willing to discount it. These conditions are utterly inconsistent with the transaction being a sale, for if it were defendant would have got the land as a gift in effect. Further, this evidence does not depend on the fleeting record of memory, but is distinctly set out in a letter written contemporaneously with the giving of the note and not as a

[38]16 O. R. 450.

Judgment.
McGuire, J.

mere afterthought. (1) Mathewson says there was enclosed in that letter an agreement to be signed by Knowles and which, according to his recollection of it, showed that it was not a sale. This agreement he could not, however find, and we have only his recollection of its contents more than a year after he saw it, and it is to be noted that the first day he was examined he could not remember if there was such a writing enclosed, and it was only on the second day that he remembered it at all, and then not so that he could speak positively. (4) It is in evidence that some months after the transfer, defendant re-transferred it, Knowles desiring, it is said, to have the land surveyed into town lots; that it was so surveyed and again transferred to defendant. These two transfers are registered and fairly beyond dispute. If Knowles had no further interest in the land, one cannot understand the parties going to the expense attending these transfers, or why Knowles would care whether it was surveyed or not.

In weighing this evidence *pro.* and *con.*, I think by far the greater weight is to be given to the written documents, and next to these the circumstances; and I have come to the conclusion that the preponderance is in favor of the mortgage theory.

Mr. Newlands has drawn my attention to the statement in the Mathewson letter and in defendant's answer, touching certain work to be done by Knowles in collecting accounts and notes for defendant's firm. In the Mathewson letter it is said, "now from a personal and business point of view, I am willing to undertake this." Mr. Newlands contends that this refers to the note sued on, and that one of the conditions on which the defendant was willing "to undertake this" was that Knowles should attend to business of his company, and that consideration is a valuable one. Mr. Newlands argues that this shows the note was not given without some consideration at least. It seems to me that this does not refer to the $5,500 transaction at all, but to the other proposal which was not carried out. The position of this statement in the letter leads to that conclusion; it comes immediately after his statement of the proposal that defendant

Judgment. McGuire, J.

should go surety for Knowles, and he uses the words "this" in the singular as referring to the nearer of two things, and this condition is described as the "first," the second being that his guarantee could only be given "if you considered I was fairly open to do so, and that the guarantee should only be to your bank." This second condition is clearly not applicable to the $5,500 deal, and the other conditions being coupled with it tends to the conclusion that it refers to the same matter. Further, if what he says he was "willing to undertake" refers to both deals, one would have expected to find him using the word "properties" instead of "property," for there were two parcels of property, and the word "amounts" instead of the singular "amount mentioned," if he was referring to both the $5,500 and $5,000. Besides, when he is stating the proposition in which this note appears, he states there the conditions on which it is to be given. In his evidence it is true the defendant, while asserting that he received no value for the note, speaks of the work to be done by Knowles, and uses language very like the "first" condition in the Mathewson letter; so much so that one cannot help supposing that he has been reading and thinking over that letter a good deal. I believe that he had got the two propositions considerably confused in his mind, for he asserts that in the "second" condition, referring to "my guarantee," the word guarantee means this $5,500 note. Now, I am satisfied he is mistaken, for that word could only refer to the proposal that he should be "surety" for Knowles to enable him to get "a line of credit, etc."

Besides, one cannot understand an ordinarily intelligent man even, and the defendant is at least that, asserting that he received, or was to receive, no consideration for the note, and in almost the same breath asserting that he was to receive what he describes as "part of the consideration for my giving him this note as accommodation." If he meant "consideration" in the legal sense, then it was a contradictory statement and directly opposed to his previous evidence. If he meant what is spoken of as "considerations"

Judgment. McGuire, J.

of friendship or prospective advantage, etc., we could understand him. Men do not usually endorse for others without having some prospect of deriving advantage, especially when the persons to be accommodated are not relatives. If it was "considerations" of that nature he had reference to, his statements would then be consistent; and when it is remembered that the collections which Knowles was to attend to, were not to be done gratuitously, but to be paid for as such work is usually done, and not done in return solely for the favors extended him by defendant, one cannot understand the defendant as meaning that he gave Knowles $5,500 because Knowles agreed to look after collections, notes, etc., for which he was to be paid the ordinary charges for such work, and even that for no definite period. I do not mean to say that the "consideration" for a note must be money or goods or lands; it may be any consideration which would support a contract, and, as Byles mentions, bills drawn specifically the one against the other for the same amount are not, in this sense accommodation bills, but that is a very different case from the present. In any case the written agreement must prevail over the parol evidence, and, as I have already said, I think the agreement by Knowles to look after collections was there stated in connection only with the proposal which was never carried out.

There is just one more issue which may, in some aspects of the case, be material, namely, did plaintiff, MacArthur, take the note with notice of the defects in title to it. As I have held that the note was subject to conditions limiting its negotiability, and that it was a breach of faith for Knowles or his representative to negotiate it contrary to the agreement on which it was given, there was in this case fraud in the subsequent negotiation of it within the meaning of s. 30 (2) of Bills of Exchange Act, 1890, and the burden of proof that plaintiff was a holder in due course was then thrown on him; one who takes a note overdue has the onus on him to show that his transferor had a good title: *Down* v. *Halling*;[39] unless and until he proves that value had been

[39] 6 D. & R. 455; 4 B. & C. 330; 2 C. & P. 11; 3 L. J. K. B. (O.S.) 234.

Judgment.
McGuire, J.

given subsequent to such fraud by some other holder in due course. This, of course, he has not done, and the onus was on him to show all the things necessary to constitute him a holder in due course, *Tatam* v. *Haslar*.[40] The law was the same before the Act: *Bailey* v. *Bidwell*,[41] *Smith* v. *Braine*,[42] *Harvey* v. *Towers*.[43]

He did offer some evidence on the issue of notice of the conditions. He says "he had no notice of the matters set out in paragraph 15 of the statement of defence, about only discounting at bank of Ottawa and as to renewal for 18 months." This, I think, is all the evidence offered in his own favor. He, however, admits receiving a letter from Rokeby dated 8th April, 1891, and endorsed "14th April," presumably the date of its receipt, in which, speaking of this note he says, "When Mr. MacDowall was down here some time ago he led me to understand that he did not intend to pay this note. Please let me know what the prospects are of collecting it and give me what information you can in regard to the matter." Whether MacArthur made any inquiry, or, if so, what information he got, or what answer he returned to Rokeby, is not stated. Over a month after this he attends a meeting of the assignee and some creditors of the estate and makes an offer to purchase this and other notes at a discount. He tells them that this note has not been paid, reads a telegram from Rokeby to that effect. This was three days after the note fell due. He also tells them that he "understood MacDowall objected to paying it." Bearing in mind that he was desirous of a favorable answer to his offer, and that this note represented about one-third of the total face value of the whole batch of notes, such a remark, even though not so intended, would have the effect of influencing the assignee towards a favourable reply. Having volunteered so much information, as a fair man, it would be his duty to, and he would, naturally, give them the benefit of any information he had got in favor of the note, and as he gave no such information, the inference is that he had

[40]58 L. J. Q. B. 432; 23 Q. B. D. 345; 38 W. R. 109. [41]13 M. & W. 75. [42]16 Q. B. 244; 20 L. J. Q. B. 201; 15 Jur. 287. [43]6 Ex. 656; 20 L. J. Ex. 318; 15 Jur. 544.

none and was still of the belief that defendant was going to resist payment—a belief which would be confirmed by the fact known to him that he had let it go to protest. All these circumstances were facts from which a jury might find that plaintiff knew that there were defects in the title of the note: see *Parr* v. *Jewell*.[1] In Byles on Bills, 15th ed., 143, it is said, "Thus if when he took the bill he was told in express terms that there was something wrong about it, without being told what the vice was, * * * such a general or implicit notice will destroy his title;" see also *London and County Bank* v. *Groome*,[44] where it is held that the question for the jury was "Did he take the cheque under such circumstances as ought to have excited his suspicion?" It was a reasonable inference from Rokeby's letter that "there was something wrong (or rather alleged to be wrong) about it, and knowing MacDowall's means of paying and also knowing the insolvent Knowles pretty well, it is more than likely that the "something wrong" would be referable by him to some defect of title rather than to a mere threat by MacDowall to put the holder to the annoyance of a law-suit, or that he would beat him on the execution. He had had a month to make the inquiries asked by Rokeby, and MacArthur was then Rokeby's agent here; he knew where MacDowall was, or had ready means of ascertaining, and if he either simply or intentionally neglected to make the inquiries open to him, the inference arises that he had "implicit notice" of the defects. Opposed to this is simply his own statement that he had "no notice of the matters set out in paragraph 15, etc.," a formula which might in his mind be very different from a square denial of any knowledge or belief that the note was tainted with any such defects of title. This evidence to me does not seem sufficient to displace and outweigh the evidence tending to an opposite conclusion, and I find this issue in favor of defendant.

Judgment.
McGuire, J.

I find therefore that the note sued on was an accommodation note given without consideration to Joseph Knowles

[1] 8 Q. B. D. 288; 51 L. J. Q. B. 224; 46 L. T. 60; 30 W. R. 382; 46 J. P. 614.

Judgment.
McGuire, J.

to enable him to raise money on the happening of a named event, at a certain place, and subject to the consent of the Bank of Ottawa at Winnipeg to discount it, and further, that it was to be renewable for 18 months without interest; that there was an implied agreement not to negotiate it after maturity; that the pledge of it to the Commercial Bank by Knowles himself was for a special purpose, which was afterwards satisfied by the payment made to the bank by the assignee, and the bank's agreement to release the note from such lien; that in effect the note got back after maturity into the possession or control of Coombs, who then held it subject to the same conditions as it had been held by Knowles; that Coombs transferred it for value to MacArthur after it became due and dishonored; that the conditions mentioned were equities attached to it or defects of title of his immediate transferor, Coombs, and that he took it with no better title than had Coombs, and cannot, therefore, maintain this action; that his co-plaintiff, the Commercial Bank, standing on MacArthur's title, held it also subject to these defects of title, and that consequently neither of the plaintiffs was entitled at the commencement of this action to bring and maintain the same.

For these reasons I find a verdict for the defendant with costs, and direct that judgment be entered accordingly.

The plaintiff appealed.

The appeal was heard on 6th June, 1892.

D. L. Scott, Q.C., and *H. W. Newlands*, for the plaintiffs the appellants.

W. H. Culver, Q.C., and *James McKay*, for the defendant the respondent.

In the course of the argument the following additional authorities were referred to:—*Lysaght* v. *Bryant*,[45] *Chapman* v. *Cottrell*,[46] *Re Lewis Ex parte Munro*,[47] *Austin* v. *Pal-*

[45] 9 C. B. 46; 19 L. J. C. P. 160. [46] 3 H. & C. 865; 34 L. J. Ex. 186; 11 Jur. N. S. 530; 12 L. T. 706; 13 W. R. 843. [47] 45 L. J. Q. B. 816; 1 Q. B. D. 724; 35 L. T. 857; 24 W. R. 1017.

mer,[48] *Cross* v. *Currie*,[49] *Engle* v. *Stourton*,[50] Byles on Bills, p. 335, McLaren on Bills and Notes, 134, *Downes* v. *Richardson*,[51] *Harmer* v. *Steele*,[52] *Bartrum* v. *Caddy*,[53] *Beaumont* v. *Greathead*.[54] Argument.

[*June 8th, 1892.*]

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

WETMORE, J.—There was evidence upon which the learned trial Judge might reasonably find that the note sued on in this action was an accommodation note given by the defendant to Knowles, and, he having so found, we see no reason for interfering with his finding.

We are satisfied that the purchase by the plaintiff MacArthur of this note with the other notes set out in Exhibit "Q" in the Appeal Book was a purchase from Coombs, Knowles' assignee, and not from the bank.

The assent of the bank was only required because the transfer could not be completed without it; the negotiations for the sale were made with Coombs; it was with him the arrangement was made as to the amount of the consideration to be paid; the consideration was paid to him, and the transfer is expressed to be made from him. There was a constructive delivery under that transfer to MacArthur and to the bank for him, when the bank ceased to hold the notes as collateral for Knowles' indebtedness and held them as collateral for the notes given by MacArthur, upon the security of which the bank honored his draft given to Coombs. Having purchased from Coombs, MacArthur was in the same position as if he had purchased from Knowles, and, having purchased after maturity, took Macdowall's note subject to any equities which might attach to it as an accommodation paper; the bank having changed the capacity in which it held this note had no better title than MacArthur.

[48] 30 U. C. Q. B. pp. 12, 13. [49] 5 O. A. R. 31. [50] 53 J. P. 535; 5 Times L. R. 44. [51] 5 B. & Ald. 674; 1 D. & R. 332; 24 R. R. 522. [52] 4 Ex. 1; 19 L. J. Ex. 34. [53] 1 P. & D. 207; 9 A. & E. 275; 1 W. W. & H. 724; 8 L. J. Q. B. 31. [54] 6 D. & L. 631; 2 C. B. 454; 15 L. J. C. P. 130.

Judgment.
Wetmore, J.

By a writing contemporaneous with the note dated November 8th, 1889, and marked Exhibit No. 2 of Commission evidence, it was clearly stated in effect that this note was only to be used in a certain event and then only to be placed in the hands of the Bank of Ottawa at Winnipeg. It was urged that this writing ought not to be held to affect the question because it was not directed to Knowles or signed by him.

We think there is nothing in this contention. Although the letter was directed to Mr. Mathewson, Knowles dictated part of its contents; it was handed to him, and he, as it was intended he should do, took it with the note to Mr. Mathewson, who declined to enter into the contemplated arrangement. Knowles subsequently placed the note in the Commercial Bank of Manitoba. This was against good faith and contrary to the purpose for which it was intended to be used. It having got back into the hands of Coombs the assignee after maturity and after that transferred to MacArthur, the equities attached and neither McArthur nor the bank can succeed in this action.

In view of the very exhaustive judgment given by the learned trial Judge, and the manner in which he has dealt with the authorities bearing on the question, we do not consider it necessary to say anything further. We do not wish to be understood as dissenting from any part of his judgment; but having come to the conclusion expressed above, we do not consider it necessary to express any opinion as to the other parts of his judgment—beyond this, that we have very great doubts whether the learned Judge was not in error in holding that the note was not paid by Coombs. However, we express no decided opinion upon that point. The appeal will be dismissed with costs.

Appeal dismissed with costs.

REGINA v. McCLUNG.

Criminal Law—Felony—Polling jury — Jury separating — Refreshments for jury.

Held, in a prosecution for felony, that it was discretionary with the trial Judge to permit or refuse to allow the jury to be polled.†

Held, the prisoner being convicted of felony, that the circumstances—that two of the jurors had, during the trial, but before the Judge's charge, been allowed to separate for a short time from the other jurors in the custody of one of the constables who had been placed in charge of the jury, and during such separation to hold a short conversation, not referring to the cause, with a stranger to the proceedings, and to partake, at their own expense, of intoxicating liquor, insufficient in quantity to cause intoxication—did not constitute sufficient ground for discharging the prisoner, or for a new trial.

[WETMORE, J., *December 5th, 1890.*
[*Court in banc, January 23rd, 1891.*

Statement.

On the 3rd December, 1890, *T. C. Johnstone* moved for a rule directing that the record of the trial be returned to the Court with the view of afterwards applying for a writ of error. The grounds of the motion were two, namely, 1st, because the prisoner was refused the right to poll the jury; 2nd, because the jury were allowed to separate and hold conversation with other people during the progress of the trial.

[*December 5th, 1890.*]

The judgment of the Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE and MCGUIRE, JJ.) was orally delivered upon the first point by

RICHARDSON, J.—The Court is unanimous in holding that there is no right to poll a jury, but it is discretionary with the Judge. The Court, however, think on the other ground of misconduct by the jury, Mr. Johnstone should have the rule asked for directing that the record be brought in, and allowing him on the 22nd January next (until which date we adjourn) to make an application for discharge. The condition is that copies of the affidavits which are already

† The weight of authority in the U. S. appears to be the other way. See Am. & Eng. Ency. of Law, Vol. 28, tit. "Verdict," p. 349.

Judgment. Richardson, J.

here be served on the Crown prosecutor together with the rule, so that he may have notice. We propose to limit a time within which these are to be served on the Crown prosecutor—within a week.

On 22nd January, 1891, *D. L. Scott*, Q.C., and *T. C. Johnstone*, for prisoner, moved on ground of misconduct of the jury for the discharge of the prisoner, and in the alternative for a new trial.

W. White, Q.C., for the Crown.

[*January 23rd, 1891.*]

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

MCGUIRE, J.—The prisoner, David S. McClung, was tried at Moosomin by Mr. Justice WETMORE and a jury on the charge of having feloniously poisoned a mare, the property of one Hostetter, and, being found guilty, was sentenced to five years' imprisonment.

Mr. Johnstone, counsel for the prisoner, applied to this Court in December for an order to the Clerk of the Judicial District of Eastern Assiniboia, requiring him to forward to the Registrar of this Court the proceedings had on the trial of the prisoner, with a view to moving thereon to quash the conviction or for a new trial or a *venire de novo* on the grounds: (1) That the trial Judge had wrongfully refused to permit the jury to be polled; and (2) that two of the jurors had during the course of the trial been allowed to separate from their fellows, and while so separated to have conversation with a person not a juror and to partake of intoxicating liquor.

The Court on such application decided that the polling of the jury is a matter discretionary with the Judge at the trial and not one to which the prisoner is entitled as of right; but the order was granted with a view to enable the prisoner's counsel to move on the second ground above mentioned. The order further provided for service on the Crown prosecutor for the said district of copies of the affidavits filed.

Judgment. McGuire, J.

The clerk of the said district having returned as directed the proceedings in said trial, a motion is now made on behalf of the prisoner to quash the conviction and for an order to discharge the prisoner, or for a new trial, or a *venire de novo*.

The affidavits, on which the application was originally made, were those of one William A. McClung, and of Charles E. Park and George Garmeson, the two jurors alleged to have separated from their fellows.

On this motion the Crown prosecutor objected to the reception of affidavits by jurors as to what took place in the jury-room, but, subject to that objection, he filed further affidavits by the same two jurors as to what took place.

The facts, as they appear from all the affidavits before the Court, were that the two jurors named, on the night before the last day of the trial, did, while in charge of one of the constables, leave the place where the rest of the panel were and proceed to a room in a building about 100 yards distant, and while there partake of some intoxicating liquor, and did speak to some person, but the conversation consisted in the juror Garmeson saying to the person who opened the door "How do you do," and in the other juror remarking that the liquor he was drinking was good; that there was no further conversation or any conversation by or to the jurors in any way connected with the case; that the constable in charge of these two jurors during all the time they were so apart from the rest of the panel had cautioned them not to have any conversation while in the room in question, and that they were so separate from their fellows only about five minutes.

It was not contended on behalf of the prisoner that the liquor of which the two jurors partook had been sufficient to produce any intoxicating effect or that any conversation which took place related in any way to the trial or its subject matter, but the possibility of such a conversation was suggested.

In answer to this the Crown showed what the conversation—if it can be called such—consisted in. It was con-

Judgment. McGuire, J.

tended that, inasmuch as in cases of felony the jury cannot be allowed to separate, any separation at all must make the trial a nullity.

The case of *Ex parte Ross*[1] was referred to in support of this. I cannot agree with the position taken by the majority of the Court in that case, but prefer that held by King, J., one of the dissenting judges.

In *Rex* v. *Woolf*,[2] it was held that the separation of the jury in a trial of a misdemeanor did not vitiate the verdict, but it was argued for the prisoner here that the law is different in cases of felony.

Assuming the law to be that in felonies the jury cannot be allowed to separate, but that in misdemeanors they may be so permitted "in the discretion of the Court and under its directions as to the conditions, mode and time" (R. S. C. c. 174, s. 169§), it follows that in the latter case, in the absence of permission from the Court, the law is just as imperative that the jury should not separate, and the same results should follow an unauthorized separation in either case.

While *Ex parte Ross*[1] is an authority in favor of the prisoner, *Regina* v. *Kennedy*[3] is an authority directly against him.

The rule against the separation of the jury must be taken to be founded on some good reason, and that reason must be that the jurors are, or may be thereby exposed to improper influences. When, however, it is shown, as in this case, that the jurors so separating from their fellows were during the whole period of such separation under the charge of one of the constables to whom the jury was given in charge by the Court, that in fact no improper act or conversation did take place, I cannot agree that such conversation could possibly in any degree affect the minds of the jurors as to the case, and therefore I think it is no ground for quashing the conviction. That the jurors may by their conduct have

[1] 21 New Bruns. R. 257. [2] 1 Chitty 401. [3] 3 Thompson (Nov. Sc.) 203.

§ See now Crim. Code, s. 673, for which a new section was substituted by 58-59 Vic. (1898) c. 40, sched.

exposed themselves to punishment for contempt is quite another matter. Judgment. McGuire, J.

I am not quite satisfied that the facts in this case even show a separation of the jury within the meaning of the rule. Here they were, during all the time (five minutes) they were apart from the rest of the panel, in charge of a duly appointed constable. It must not be overlooked, too, that here the alleged separation was before the conclusion of the trial and before the Judge's charge. A separation after the case had been committed to the jury and they had gone to consider their verdict might be regarded more strictly.

In no case that I have seen reported has the mere fact of a conversation between the jurors and other persons been held to vitiate the verdict, but in all cases the Courts have directed their enquiry as to whether the conversation was in reference to the case in hand, and, if so, was it such as might improperly affect the minds of the jurors. Here no conversation whatever in relation to the case took place.

As to the two jurors partaking of liquor, I find it laid down in 2 Hales Pleas of the Crown, p. 306, that if food or drink be partaken of by jurors at their own expense and not at that of the prisoner, while it renders them liable to punishment, it is no longer a ground for avoiding their verdict.

On the whole, I think that no good ground has been shown why we should interfere with the conviction of the prisoner.

Conviction affirmed.

LE JEUNE ET AL. v. SPARROW ET AL.

Promissory note—Collateral security—Accommodation endorser—Principal and surety—Renewal—Extending time for payment—Married woman—Separate estate—Evidence—Presumption.

T. B. L. and A. C. S. being indebted on several promissory notes to the plaintiffs who demanded security, the defendant H. A. S., the wife of A. C. S., at his request and without knowing of the purpose for which he proposed to use it, endorsed a blank form of note, which was afterwards filled out as a note made by T. B. L., payable to H. A. S., and endorsed by her and A. C. S., and was then given to the plaintiffs. This note was afterwards renewed, H. A. S. again endorsing a blank form, A. C. S. being made payee and endorsing ahead of H. A. S. While the plaintiffs held this latter note, they kept the several notes, as security for which they held it, renewed the renewals extending beyond the date of the maturity of the note held as security. In an action on the latter note, H. A. S. pleaded that she was discharged, by reason of the plaintiffs having given time by a binding agreement to T. B. L. and A. C. S. the principal debtors, without her consent.

Held, by ROULEAU, J., the trial Judge, and by the Court *in banc*, MCGUIRE, J., dissenting, that the renewal of the notes constituted such an agreement and that the rule invoked—that giving time to a principal debtor by a binding agreement without the surety's consent, discharges the surety—was applicable; and that H. A. S. was entitled to a dismissal of the action.

Semble, per MACLEOD, ROULEAU and WETMORE, JJ.:

1. The fact that T. B. L. falsely stated to the plaintiffs, when they demanded security, that H. A. S. was indebted to him, and asked them if they would accept her endorsement, to which they consented; could not bind H. A. S., as T. B. L. had no authority from her to make the statement.
2. If notice to the plaintiffs that H. A. S. was merely an accommodation endorser were necessary, the mere fact that she was second endorser on the first note, and first endorser on the second note would be sufficient evidence of such notice.
3. The case was distinguishable from that of a party, who, being asked for collateral security, brings paper founded on an actual indebtedness to himself. In that case, giving him time would in no case relieve the parties to the paper given as security.

Per MCGUIRE, J., dissenting.

1. There can be only two views of the contract entered into by H. A. S.

(*a*) Her contract was simply that which the law implied from her endorsement of the note, that is, she thereby became surety for the payment of that note only—not of any notes as security for the payment of which it might be pledged. Her obligation was complete when she delivered the note, and oral evidence was not admissible to attach conditions to her liability as endorser beyond what the law implied.

(*b*) If such evidence were admissible for the purpose of showing that the note she had endorsed was given as collateral security for certain other notes, the evidence was to the effect that she

had appointed her husband agent to use it as he wished, and that he, in the exercise of that authority, had pledged it to the plaintiffs as a continuing pledge, and she must in this view of it be held to have agreed to it being security until the other notes were paid.

In either view, the giving of time to the principal debtors on the other notes, did not affect the question of the liability of H. A. S. to the plaintiffs.

2. The defence of coverture and a reply of separate property having been pleaded, and the evidence having shown that H. A. S. was the owner of separate property when she endorsed, it would be presumed that she contracted with reference to it.

Form of judgment against a married woman.

[ROULEAU, J., *April 12th, 1892.*

[*Court in banc, June 13th, 1893.*

In this action the plaintiffs set up their claim as follows : Statement.

(1) On a promissory note dated 11th August, 1890, for $664.50, made by the defendant Lafferty, payable three months after date, and endorsed by the defendant to H. A. Sparrow, wife of the defendant A. C. Sparrow, and endorsed by A. C. Sparrow to the plaintiffs;

(2) And alternatively as follows:

That prior to and on the 8th May, 1890, the defendants T. B. Lafferty and A. C. Sparrow were indebted to the plaintiffs in divers sums of money, for money lent to them, amounting in all, with interest, to $664.50, secured to the plaintiffs by notes of the defendant T. B. Lafferty to the amount of $80 and by notes of the defendants T. B. Lafferty and A. C. Sparrow to the amount of $584.50, and on the said 8th May T. B. Lafferty, in consideration that the plaintiffs would give further time to him and A. C. Sparrow for the payment of the said sum of $664.50, made his promissory note, dated 8th May, 1890, whereby he promised to pay to the order of A. C. Sparrow $664.50, three months after date, and A. C. Sparrow indorsed the said note to the defendant H. A. Sparrow his wife, who at their request indorsed the same to the plaintiffs; that T. B. Lafferty then delivered the note so indorsed to the plaintiffs as security to them for the payment of the said sum of $664.50, and the several notes securing the same, and any and all notes upon which T. B. Lafferty then was or might

Statement. thereafter become liable to the plaintiffs; that on the maturity of the said note the plaintiffs at the request of the defendants renewed the same for the term of three months from the 11th August, 1890, and received as such renewal from the defendants the note first mentioned and sued upon in this action, upon the same terms as they had received the original note of the 8th May, 1890.

(3) And alternatively that on the 8th May, 1890, the defendants T. B. Lafferty and A. C. Sparrow were indebted to the plaintiffs in the sum of $171 upon a promissory note then overdue, dated the 2nd March, 1890, made by T. B. Lafferty and indorsed by A. C. Sparrow to the plaintiffs, payable two months after date, and in the further sum of $80 upon a certain other promissory note, dated April 28th, 1890, made by T. B. Lafferty to the plaintiffs, payable ten days after date, the consideration of which notes formed part of the $664.50 secured by the note first mentioned sued upon herein, and which notes after being renewed became due and payable on the 24th November, 1890, and on the 28th November, 1890, respectively.

The plaintiffs claimed:

1. $664.50 and interest from the 14th day of November, 1890, and protest charges, $3.03, $667.53.

2. In the alternative, $171 and interest from the 24th November, 1890, and $80 and interest from the 28th November, 1890, also protest charges, $3.03, $254.03. Part of the said sum of $664.50.

3. A declaration that the note of $664.50 was the property of the plaintiffs as security for all notes upon which the defendant T. B. Lafferty is liable to the plaintiffs over and above the sum of $254.03 and interest to the extent of $664.50.

The defendants T. B. Lafferty and A. C. Sparrow did not defend the action.

The defences of the defendant H. A. Sparrow so far as pressed were: (1) that the $664.50 note was indorsed by her for the accommodation of T. B. Lafferty and A. C. Sparrow,

for whom she was to the plaintiff's knowledge a mere surety, and that the plaintiffs by a binding agreement gave time to T. B. Lafferty and A. C. Sparrow, namely, by renewing the notes as security for which the $664.50 was given and so discharged her; and (2) Coverture. Statement.

The plaintiff replied separate property.

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

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

P. McCarthy, Q.C., for the defendants.

[*April 12th, 1892.*]

ROULEAU, J.—This is an action on a promissory note made by T. B. Lafferty, payable three months after date, to H. A. Sparrow, and indorsed by her and A. C. Sparrow to the plaintiffs for the sum of $664.50. That note was the renewal of another note made payable, three months after date, by T. B. Lafferty to A. C. Sparrow, and indorsed by him and H. A. Sparrow to the plaintiffs for the same amount.

The note sued upon was given as collateral security for the four following notes, to wit: $80, $171, $100 and $313.50 notes.

[The learned Judge then set out the substance of the pleadings.]

There is no question about the facts that exhibit A sued upon was given as a renewal of exhibit B, and that the note sued upon, exhibit A, as well as exhibit B, was given to secure four notes of $313.50, $100, $171 and $80, or their then current renewals; also that Mrs. Sparrow indorsed the blank notes; that they were filled in at the office of T. B. Lafferty; that she never had any consideration for the said notes; that they were accommodation notes; that T. B. Lafferty never saw or spoke to Mrs. Sparrow about them.

According to Mr. Christie's evidence: the note for $300 was renewed on May 21st, 1890, for three months and, when due on 25th August, was renewed for one month, and on

Judgment. Roulcau, J.

September 29th was renewed for one month, and on November 1st, 1890, was renewed for three months more and became due on the 4th February, 1891; the $171 was past due when the $664.50 was got, then it was renewed on May 10th, and was renewed afterwards for one month, five times; October 21st was the last renewal, and it became due on 24th November, 1890; the note for $100 was renewed also several times, when it became due on the 5th January, 1891, after the last renewal; the fourth note of $80 was also renewed several times till it became due on the 28th November, 1890, after the last renewal.

Besides Mr. Christie in his evidence before me at the trial, stated that he took the $664.50 note in consideration that he would not sue the other notes that became due, but renew them, and further on he adds: "I took the notes exhibits "B" and "A" as security for paper then held by me for monies advanced, and also the note sued upon was given as security for the four notes."

The first question raised by the pleadings is this: Does the taking of a new note from the acceptor (who stands in the position of maker of promissory note) payable at a future date, discharge indorsers. Byles on Bills of Exchange, page 324, says: "The taking of a new bill from the acceptor, payable at a future day, discharges the indorsers." Cavanagh on Money Securities lays down the following rule: "If the debt be modified between the creditor and the principal debtor without the consent of the surety, the latter will in general be discharged from all liability on the contract."

In *Polack* v. *Everett*,[1] Blackburn, J., says: "It has been established for a very long time beginning with *Rees* v. *Berrington*,[2] to the present day, without a single case going to the contrary, that on the principle of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had

[1] Q. B. D. 669, p. 673; 45 L. J. Q. B. 369; 46 L. J. Q. B. 218; 35 L. T. 350; 24 W. R. 689. [2] 2 Ves. J. 543.

Judgment.
Rouleau, J.

from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of a farthing, and even positively benefiting him, nevertheless by the principle of equity, it is established that this discharges the surety." In *Blackley* v. *Kenney*,[3] the same rule as above is followed, and Robertson, J., in his judgment, refers to the case of *Davies* v. *Stainbank*,[4] which I think is very much *ad rem* with this case.

There it was held that a creditor who holds a floating guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to any portion of the debt, without reserving the creditor's right against the surety liable for that portion.

The same principle was upheld in the following cases: *Croydon Commercial Gas Co.* v. *Dickinson*,[5] *Holme* v. *Brunskill*,[6] and several other cases cited.

On the other hand, all the authorities cited by the plaintiffs to wit: as to (1) liability of indorser to innocent holder for value, (2) accommodation indorser, and (3) suretyship, are good law as far as they apply; but the propositions laid down by Daniels on Negotiable Instruments, Vol. 2, pages 341 to 347, particularly 345 and notes, also Vol. 1, pages 771, 774, 775, 777 and notes cannot be applied to this case, for the reason that Daniel speaks always of the principal debtor the maker of the note or the acceptor of the bill of exchange. But here the defendant is merely an indorser on a note given as collateral security, and as proven by one of the plaintiffs, H. A. Sparrow was merely an accommodation indorser. Mr. Christie, one of the plaintiffs, says in his evidence "when I asked him (T. B. Lafferty) to get security, I did not ask him to get Mrs. Sparrow's name (defendant H. A. Sparrow); I told him I must have further security and as a result of that he brought me the note."

[3] 19 O. R. 169. See 16 O. A. R. 522. [4] 6 DeG. M. & G. 679. [5] 56 L. J. C. P. 157; 2 C. P. D. 46; 36 L. T. 135; 25 W. R. 157. [6] 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.

Judgment. Rouleau, J.

I do not know by what fiction of law the plaintiffs can make the defendant H. A. Sparrow principal debtor in this case. The plaintiff knew she was only a surety, and therefore could not be treated otherwise, and was entitled to all the rights and privileges of a surety.

The case of the *Can. Bank of Commerce* v. *Woodward*[7] is clearly distinguishable from this case for the reasons already alluded to. The defendants in the case referred to were makers of the note and not indorsers, and therefore were principal debtors and interested in retiring McLagan's paper. In the present case H. A. Sparrow, as I stated before, indorsed the note sued on on behalf of the maker, T. B. Lafferty, who used it as security only for the notes actually held by the plaintiffs. I think also that the case of *Devanney* v. *Brownlee*[8] is a case very much the same as the one under consideration. There is no doubt in my mind that the plaintiffs knew that H. A. Sparrow indorsed the note merely as a surety without consideration and, according to the authorities, is discharged by the creditors giving an extension of time to the principal debtor.

When the note of $664.50 exhibit "A" became due, were the plaintiffs in a position to obtain judgment against the maker or principal debtor of said note?

There is no doubt they could not; the four notes for which exhibit "A" was given as surety were not then due, because the plaintiffs had renewed them and would have become due long after exhibit "A" became due.

Can the indorser of a note be placed in a more unfavorable position than the maker; if the plaintiffs could not sue the maker, how could the indorser H. A. Sparrow enforce her remedy against the maker; the law as cited above is very explicit on this point, Blackburn, J., as I have already mentioned, says: "If this right be suspended for a day or an hour the surety is discharged altogether."

I need not enter into the consideration of the second branch of the defence, to wit: The defendant being a *feme*

[7] 8 O. A. R. 347. [8] 8 O. A. R. 355.

covert is not liable. I am not just now favorably impressed with the soundness in law of that part of the defence in this case. Judgment. Rouleau, J.

The general rule is that a married woman with a separate estate can validly indorse a note for another. No doubt it is contended in this case that the defendant H. A. Sparrow indorsed the note as security for her husband, and therefore was not liable. This is a very delicate question in this case, and I am not prepared to give an opinion. At all events, whether I should decide in favor of the defendant or in favor of the plaintiffs on that contention, it would not help the plaintiffs and alter my conclusion on the first branch of the defence.

Judgment is therefore in favor of the defendant H. A. Sparrow with costs.

The defendants appealed.

The appeal was argued on the 9th and 10th June, 1893.

D. L. Scott, Q.C., for the defendant H. A. Sparrow, the appellant, cited *Oriental Financial Corporation* v. *Overend, Guerney & Co.*,[9] *Healey* v. *Doeson*,[10] *Devanney* v. *Brownlee*,[8] *Wyke* v. *Rogers*,[11] De Colyar on Guarantees, 300; *Clark* v. *Devlin*,[12] *Mayhew* v. *Crickett*,[13] *Swire* v. *Redmond*.[14]

P. McCarthy, Q.C., for the plaintiffs, the respondents, cited Byles on Bills, 318, 324, *Gould* v. *Robson*,[15] *English* v. *Darby*,[2] *Blackley* v. *Kenney*,[3] *Davies* v. *Stainbank*,[4] Chalmers on Bills, 3 Edn. 205 and 206; *Darling* v. *Rice*,[16] *Lawson* v. *Laidlaw*,[17] *Butler* v. *Cumpston*.[18]

Scott, Q.C., in reply, referred to *Merchants Bank* v. *Bell*,[19] *Kerr* v. *Stripp*,[20] Sec. 40 of N. W. T. Act, *Davies* v. *Jenkins*,[21] Pollock on Contracts, 670.

[2]24 L. T. 774; 19 W. R. 869. [3]8 O. R. 691. [4]1DeG. M. & G. 408; 21 L. J. Ch. 611. [5]3 Bos. & P. 363; 7 R. R. 793. [6]2 Swanst. 193; 1 Wils. Ch. 418; 19 R. R. 57. [7]1 Q. B. D. 536; 35 L. T. 470; 24 W. R.1069. [8]8 East 576; 9 R. R. 498. [9]1 O. A. R. 43. [10]3 O. A. R. 77. [11]38 L. J. Ch. 35; L. R. 7 Eq. 16; 17 W. R. 24. [12]29 Grant's Ch. R. 413. [13]24 Grant's Ch. R. 198. [14]6 Ch. D. 728; 26 W. R. 266.

Judgment.

Wetmore J.

[*June 13th, 1893.*]

WETMORE, J.—The plaintiffs held paper of one Lafferty and A. C. Sparrow, the husband of the respondent H. A. Sparrow, to secure indebtedness they were respectively in to the plaintiffs.

They required collateral security for this paper. In order to furnish such security a note was prepared made by Lafferty in favor of A. C. Sparrow or order and indorsed by him and the respondent and delivered to the plaintiffs. This note was drawn at three months. The transactions, so far as the plaintiffs were concerned, were carried on by T. N. Christie, a member of the firm. At the time Christie demanded the collateral Lafferty informed him that the respondent owed him between $600 and $700 and asked him if he would take her indorsement upon a note, to which Christie assented. As a matter of fact, the respondent did not owe Lafferty, and her indorsement was purely by way of accommodation. When this note matured it was renewed by another note at three months made by Lafferty to the order of the respondent and indorsed by her and A. C. Sparrow. This is the note sued on.

After the maturity of this note the plaintiffs from time to time accepted renewals of the several notes, to secure which the note sued on was deposited, and so extended the time for payment by Lafferty and A. C. Sparrow with respect to such notes.

The defence is that by so extending the time for payment the respondent was relieved.

There is no necessity to cite authority to establish the proposition that when a holder of a security given by a surety enters into a binding contract without the consent of such surety, giving time to the principal debtor the surety is discharged, because that proposition is clear.

If notice to the plaintiffs that H. A. Sparrow was merely an accommodation indorser were necessary, I am of opinion that there was evidence from which the learned trial Judge might reasonably find that the plaintiffs had such notice.

Judgment.
Wetmore, J.

The mere fact that she was the second indorser on the first note and payee and first indorser on the second note would be sufficient, and it is to be borne in mind that when Lafferty stated to Christie that the respondent was indebted to him he had no authority whatever to make a statement which would bind her.

I think this case is very distinguishable from the case of a party who, being asked for collateral security, brings paper as such security to his creditor which he had in his possession founded in indebtedness to him. In that case giving time to such debtor would in no case relieve the parties to such paper because the consideration for such paper is the debt existing between the depositor and the parties to the paper, not the indebtedness between the depositor and the party with whom he has deposited it, and such last mentioned person could not in any way affect the liability of the parties to that paper. In case the consideration for the paper, and the only consideration so far as the respondent was concerned, was the indebtedness of A. C. Sparrow and Lafferty to the plaintiffs, and for which they held the paper of A. C. Sparrow and Lafferty. Now when the respondent indorsed these notes she indorsed them in blank and gave no instructions or directions whatever; her husband simply asked her to indorse them and she did so. Now what authority did she give to her husband by this act? In the first place she authorized him to fill in the note for such amount and to make it payable at such time as he pleased, and when it was so filled in she authorized him to pledge it according to its tenor and effect. She never authorized him to cut down or take away from her her legal or equitable right in any manner whatever. When that note was pledged the respondent on its face pledged herself that Lafferty would pay the monies which the note represented at maturity or she would, nothing more than that. When the note matured, if time was given to Lafferty and her husband by a binding agreement without her consent to pay the monies which the note was given to secure, she became relieved. I

Judgment.
Wetmore, J.

think it is quite immaterial that the indebtedness which the note was given to secure was also secured by other paper of the principal debtors. Was time given to pay that indebtedness, by a binding agreement? if it was, the respondent would not be in a position to protect herself against the principals until that time had expired. And was the taking of these notes from Lafferty and A. C. Sparrow extending the time for payment of the indebtedness by a binding agreement? Surely it was. If the plaintiffs had attempted to sue Lafferty and A. C. Sparrow on the note in question before the notes they had given had matured, that fact would be an answer to such action. I cannot possibly distinguish this case from what it would have been if the note in question had been given to secure a floating indebtedness of Lafferty and A. C. Sparrow and the plaintiffs had after it matured taken a new note from Lafferty and A. C. Sparrow payable at a further time without the respondent's consent.

I would hardly think that it would be disputed that in such case the respondent would have been discharged. I cannot see that the respondent's testimony that her husband had the right to do as he wished with the notes as far as she was concerned affected the question. No authority to her husband can be spelled out of a statement made by her after action brought when all rights and liabilities with respect to the note had either attached or been lost. If it were necessary to find as a matter of fact that the notes were not pledged as security, for all time, of Lafferty and A. C. Sparrow's notes and all renewals of notes, I think there is evidence from which the learned Judge might have so found.

The fact that the plaintiffs accepted renewal of the first note would indicate that. If the first note was so pledged, where was the necessity for the second note?

I will just refer to the case of *Atwood* v. *Crowdie*.[22] I am free to confess that that case somewhat surprises me, but it is very distinguishable from this case, because there the accomodation was given for a floating indebtedness, and no time for payment had ever been given the principal debtors. The accommodation parties could at any time after their

[22] 1 Stark 483.

paper matured have paid the indebtedness, taken up their paper and had a cause against the principal debtor. Judgment. Wetmore, J.

I think the judgment is right and ought to be affirmed, and this appeal dismissed with costs.

RICHARDSON, J.—It appears that when Mrs. Sparrow signed Exhibit "A," which is the note sued on, it was as a surety for Lafferty, who was indebted to LeJeune & Co. in $664.50, represented by four promissory notes, aggregating that sum, then shortly coming due.

Mrs. Sparrow's undertaking would therefore be that if Lafferty did not, by the time "A" fell due, pay off the indebtedness represented by these notes, she, receiving the proper notice of dishonor, as indorser (quoad what was unpaid thereon by Lafferty) would.

Had Lafferty so failed to pay, and had she received notice of dishonor and paid "A," she could not have successfully maintained a suit upon "A" against Lafferty as the maker, because LeJeune & Co. had extended the time for payment of Lafferty's said indebtedness by accepting four other notes payable at dates subsequent to maturity of "A" in lieu of those held when Mrs. Sparrow's indorsement of "A" was given, to which extension she was not a consenting party.

LeJeune & Co. thus having changed the situation prejudiced Mrs. Sparrow's rights, and thus she is entitled to claim the advantage which a surety may set up when, without his consent, the creditor gives further time to the debtor than stipulated in the agreement when the surety undertook the suretyship.

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

MCGUIRE, J.—This is an appeal from the judgment of the Honorable Mr. Justice ROULEAU, in an action upon a promissory note for $664.50 made by defendant Lafferty, indorsed by the defendants H. A. Sparrow and A. C. Sparrow and held by the plaintiffs.

Judgment. McGuire, J.

The defendants Lafferty and A. C. Sparrow allowed judgment to go by default. The statement of claim, besides claiming in the ordinary form upon the said note, in the alternative claimed specially that the defendants Lafferty and A. C. Sparrow had been indebted to them in divers sums of money lent to the said defendants by the plaintiffs, amounting in all to $664.50, secured by four notes, two made by Lafferty alone and the other two by him and A. C. Sparrow, and that in order to obtain further time for payment of these notes Lafferty gave them a note for $664.50, made by himself and indorsed by the other defendants, the same being delivered to them by Lafferty as security for the payment of the $664.50, represented by the said four notes, and of all and any notes on which Lafferty then was or might thereafter become liable to plaintiffs; that on the maturity of this note the plaintiffs, at the request of the defendants, renewed it for three months, receiving as such renewal the note sued upon.

The defences set up on behalf of H. A. Sparrow, who is the wife of the defendant A. C. Sparrow, were in effect coverture, and that she indorsed the said note if at all at the request of her co-defendants, and as security for the payment of said four notes, and that the plaintiffs by extending the time for the payment of said notes thereby released her, she being, as the plaintiffs then knew, only a surety.

The plaintiffs replied, joining issue, and as to the coverture replying that she was possessed of separate estate.

The action was tried by Hon. Mr. Justice ROULEAU without a jury, and he found in favor of the defendant H. A. Sparrow, except as to the defence based upon her coverture as to which he gave no judgment.

He found that the note sued on was given as collateral security for the four notes mentioned, also that the note sued on had been signed in blank by Mrs. Sparrow and was filled in subsequently at the office of Lafferty, that she never had any consideration for so endorsing, that it was

an accommodation note, and that Lafferty never saw or spoke to her about this note. Judgment. McGuire, J.

He held that the plaintiffs had renewed the four notes to which this note had been deposited as collateral, without the consent of the defendant Mrs. Sparrow, and thereby released her.

He also found that when this note fell due the renewals of the four notes were still current, and that as the plaintiffs could not then have sued thereon, they could not sue Lafferty or A. C. Sparrow upon the collateral note, and as the indorser could not be placed in a more unfavorable position than the maker, that therefore they could not succeed against her.

There seems to be no reason to doubt that Lafferty did pledge the note sued on to the plaintiffs as collateral security, either for the said four notes or the sums represented thereby, or as collateral to any paper held by plaintiffs with his name on.

On the note of which the note sued on is a renewal, there is indorsed a pencil memorandum, signed by Lafferty, as follows: "This note is collateral to any paper held by LeJeune, Smith & Co. with my name on."

Mrs. Sparrow in her evidence says that when she signed the note, of which the note sued on is a renewal, she did not know what it was and does not know yet, has no recollection about it, and has no better recollection about the note sued upon, and that she is in the habit of signing for her husband without enquiring for particulars, and that she gave her husband no instructions whatever what to do with these two notes, and that her husband had a right to use them as he wished.

Mr. Sparrow in his examination says "there was no conversation took place between Mrs. Sparrow and myself when she indorsed the note. I asked her to indorse it and she did it; she did not know for what purpose the indorsement was to be used. She did not know before the suit was begun what the note had been used for." And as to the delivery of the note sued on to the plaintiffs, he says,

Judgment. McGuire, J.

"I did not present it to him (Christie, plaintiff's manager). If it was presented to Christie it would be by T. B. Lafferty." Lafferty says that when the first note indorsed by Mrs. Sparrow fell due he gave plaintiffs the note sued on for the same purpose.

Now it is clear that Mrs. Sparrow made no contract or agreement other than that what is implied by her indorsing the two notes referred to; she had no knowledge that they were to be pledged as collateral security for the four notes held by the plaintiffs, and she gave no instructions to anyone so to use them, or as to how they were to be used. Therefore I think it is quite clear she was not a party to any arrangement by which they were pledged to the plaintiffs; there was no contract whatever between her and the plaintiffs, other than what is implied by the fact of her being an indorser. The pledging of these notes was entirely and solely the act of Lafferty and A. C. Sparrow, and any agreement, express or implied, between Lafferty and the plaintiffs as to such pledging was one to which she was not privy and of which she was not even aware.

Now, then, what was the contract and the only contract, assuming her to be an accommodation indorser without consideration, into which she entered? That Lafferty, the maker of the note, would duly pay the same at maturity, and that if he did not she would. She was a surety for the payment by him of this note. She never became surety that he would pay any of the four notes held by the plaintiffs.

Her suretyship was confined to the note sued on. Had the plaintiffs extended the time for payment of this note without her consent she would undoubtedly have been released.

In what way did the dealings between the plaintiffs and Lafferty as to matters for which she was not a surety affect her? As soon as she indorsed the note and delivered it to her husband she became liable thereon. Her liability arose certainly before it was pledged to the plaintiffs, and it would not be open for her to show by oral evidence, even if she

attempted to do so, that her indorsement was subject to any conditions. Her delivery was unaccompanied by conditions or directions. Had she been compelled to pay this note in default of payment by the maker, what was there to prevent her suing Lafferty? Had she taken up this note after its dishonor, could she not have sued Lafferty at once? Could Lafferty have set up a collateral agreement between himself and the plaintiffs as to certain other notes, to which notes she was not a party and to which agreement she was in no sense privy? In what way were her rights then affected, advantageously or disadvantageously, by the renewals of the four smaller notes? and if not, then she was not released. Judgment. McGuire, J.

Bills and notes pledged by a customer with a banker as collateral remain the property of the customer subject to the lien of the bank for the indebtedness of the customer, and he can at any time redeem the collateral paper. When he ceases to be indebted to the bank he is entitled to a return of the collateral paper, but if he permits it to remain with the bank and subsequently become indebted to it, the bank may sue on the collateral. (See *Atwood* v. *Crowdie*,[22] *Thompson* v. *Giles*,[23] Byles on Bills 146, Chalmers 77.)

We have seen that Mrs. Sparrow had no knowledge of the pledging of the note, and so personally was no party to that arrangement. But she also says that her husband had authority to do as he liked with it, that in effect he was her agent to use it as he pleased. If so, what he did do with it may be taken to be done as her agent and to bind her.

He knew what Lafferty pledged it for, and it may fairly be assumed that he was a party to the pledging as collateral.

Now what was the first note pledged for? As "collateral to any paper held by LeJeune, Smith & Co. with my name on," as appears by Lafferty's pencil memorandum. Was that merely collateral to the particular paper then in existence, or was it intended as a continuing security for Lafferty's liability on renewals as well?

[22] 2 D. & R. 733; 2 B. & C. 422; 2 L. J. K. B. 48; 26 R. R. 392.

Judgment. McGuire, J.

One of the four notes to be secured was already overdue, the one for $171, and it was renewed on May 10th, two days after the delivery of the first collateral note.

The next of the four notes fell due on May 21st.

Now, if the first collateral note were given merely to cover the then existing notes and not renewals, what was in reality the effect of such pledging? As to the $171 note, plaintiffs were then in a position to sue on it. To be of any assistance to Lafferty the pledge in this case must have been on the understanding that the bank would not sue on it, and if so for how long?

As to the next note to mature, what was the understanding? The bank could not sue till it would mature. To be of any help to Lafferty it must have been that time would be given after its maturity. Must it not therefore have been intended to secure the renewal of this note. And so for the other two?

As to the note sued on, Lafferty, in his evidence, says that Christie asked him for a renewal of "B," or to "get another of the same amount and for the same purpose, which I did." Therefore this note was pledged on the same terms as "B." It was given on 11th August.

One of the notes then in existence to which it would be collateral matured on August 15th, and the other three on 22nd, 25th and 27th of same month.

Was note "A" pledged to secure these notes merely during their currency? that was needless, for the bank could not have pushed Lafferty till then—or was it given to obtain time for payment after their maturity? No one can reasonably doubt that such was the intention.

Therefore in the case of note "B" it was pledged to obtain an indefinite extension on a note then overdue, and for the renewals of others shortly falling due. In the case of exhibit "A" it was pledged to secure an extension of time for payment of notes falling due within a few days. Now, was any period of extension agreed upon at that time: I mean when it was delivered to plaintiffs? No, for nothing was said as to that. Was it to obtain an extension during

the currency of the collateral note? Let the acts of the parties answer this. While the matter was fresh in their minds the agreement as to extension was put in effect by renewals for one month, and, as these renewals fell due, by further renewals from time to time. Can anyone doubt that the understanding was that exhibits "A" and "B" were pledged generally until payment of the Lafferty paper? That seems to have been also Mr. Sparrow's view of it. He says, "when the first note was given it was given on the understanding that it should be *carried on* until the notes for which it was given as collateral should be paid off," and Lafferty tells us that the second note was given for "the same purpose." Were these notes ever paid? Judgment. McGuire, J.

No, for on the dishonor of the renewals the originals revived. In the case of *Atwood* v. *Crowdie*,[22] already referred to, the accommodation acceptor of the bills there pledged, was, so far as appears from the case, and as is proved in this case, no party to nor aware of the pledging or the terms of the pledge. There is no doubt that the pledge in the first instance was to secure "the then floating account" due by the pledgor to the bank. "It is clear," says Lord Ellenborough, "that there was a period when the plaintiff's lien ceased to attach, and when the bills might have been redeemed, but they were not reclaimed, and by allowing them to remain in the hands of the plaintiffs the lien re-vested, when upon fresh advances made, the balance turned in favor of the plaintiffs." In the Atwood case the purpose for which the bills were pledged had been satisfied prior to the maturity of the bills, so that then the pledgor owed the plaintiffs nothing, yet it was held that the permitting the collateral to remain in the pledgee's hands amounted to a new pledge for an entirely new debt; a much stronger case than the present, where the note was permitted to remain, and the debt for which it is a collateral is not a new debt, but the same old debt for which it had originally been pledged.

If the pledgors in the Atwood case could pledge the bills there for a new debt, and after the maturity of the

Judgment. McGuire, J.

bills without thereby affecting the liability of the accommodation acceptor, surely it must follow that the pledgor here could in effect continue to keep the note as a continuing pledge for the same debt without thereby releasing the defendant.

I think with all due respect to the learned trial Judge and my brethren who differ from me, that they confuse the extension of time on the four small notes with an extension of the collateral note. No doubt any binding extension without her consent of the note sued on would release her, but I fail to find any evidence of such an extension which would have prevented the plaintiffs suing upon it immediately it became due and unpaid. The plaintiff's remedy on the collateral security does not depend on the state of the secured indebtedness. The plaintiffs in suing on this note would claim and recover its full amount, and if that were more than the indebtedness of the pledgor to them they would hold the difference as trustee for the pledgor. Chalmers on Bills, 3rd edition, p. 77. Byles, p. 196 and note (*g*). The pledge of a bill is a different thing from a "discount" of it. A pledgee, like any other bailee, must use due diligence with reference to it. He must not part with it; he must if he can collect it at maturity. If the pledge implies that the pledgee is to collect at maturity, how can it be urged in the absence of an express agreement to the contrary, that the pledge here was on the understanding that it was not to be sued on at maturity. The title to a pledged bill remains in the pledgor subject to the pledgee's lien, and the pledgor is entitled to it back when the lien ceases, and he can put an end to the lien at any time by satisfying the debt for which it is pledged, and demanding his collateral. *Thompson* v. *Giles*.[23]

I find no case cited that the giving further time for payment of the debt for which a promissory note has been pledged, has been deemed an extension of the time of payment of the collateral note, or is such a variance of the security entered into by the parties to the collateral note, quoad that note itself, as to release an indorser thereof who has been no party to the pledging of it.

Judgment. McGuire, J.

In *Gould* v. *Robson*,[15] the note sued on was not pledged but assigned absolutely to the plaintiffs, and after maturity the holder accepted payment of part of it and took a new bill for the residue, the former bill being left as security for the payment of the new one. This was an extension of the bill itself and not of something else for which the bill was pledged, and of course released the indorser.

The other case relied on is *Blackley* v. *Kenney*,[3] where a married woman, who was security for a mortgage which was itself in terms security for certain notes held by the mortgagee, was held released from her security on the mortgage by the mortgagee accepting part payment of these notes as they fell due, advancing further goods and taking renewals for the unpaid residue of the retired notes and the fresh advances. There the undertaking of the wife was in effect (as expressly stated in the mortgage) to be surety for the payment of these notes and the delivery up of these notes, and the extension given was an extension of the very thing for which she was surety, and differs materially from the present case, where the contract of suretyship entered into by Mrs. Sparrow was limited to the note sued on and was complete and absolute before it was ever pledged.

To my mind there can be only two views of the contract entered into by Mrs. Sparrow.

1st. Her contract was simply that which the law of promissory notes says is implied by her indorsement of the note. Her obligation was complete when she delivered the note, and oral evidence is not admissible to attach conditions to her liability as indorser beyond what the law implies.

2. If such evidence were admissible, so as to show that it was given as collateral security for four certain notes, then it could only be by treating her as having appointed her husband as "agent to use it as he wished," that he in the exercise of that authority pledged it to the plaintiffs, and I have shown what seems to me the nature of that pledge, in respect of being a continuing pledge, and if he had authority to pledge there appears no limit to the mode of pledging, and she must in this view of it be held to have agreed to it being security until those four notes were paid.

Judgment.
McGuire, J.

In either view of it, I think the plaintiffs are entitled to succeed, unless the coverture of the defendant is a good defence. I am inclined to think it is not. The plaintiff's reply that she was and is possessed of separate property is proved by Mrs. Sparrow herself, and I think that where she is shown to have owned separate estate at the time of contracting it will be presumed that she contracted it with reference thereto.

The judgment should be in the usual form against her separate estate, "that the plaintiff do recover out of the separate estate of the defendant H. A. Sparrow, which was at the date of the promissory note sued on and is at the present date vested in her, or in any other person for her, the sum of $, the amount of the note and interest, and $, for costs taxed, making in all $, with which sum the said separate property is hereby charged."

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

Distinguished 1 Can. R. 225

A. HARRIS, SON & CO. v. DUSTIN.

Conditional sale—Lien note — Rescission by seller — Agency—Implement dealer—Evidence—Objection—Striking out.

Held, that the buyer of an article under a sale, conditional upon the property not passing until full payment of the price, was entitled to treat the contract as rescinded where the seller took possession, used, offered for sale, and neglected to take proper care of, the article, although he made no actual use of it.

Sawyer v. *Pringle*[1] followed.

The evidence of the authority of a person assuming to act as agent for a dealer in agricultural implements, and the scope of his authority discussed.

Where, on the trial, parol evidence was given without objection to establish agency, and afterwards it appeared that the agent's appointment was in writing, and, on appeal, it was contended that the parol evidence should not have been and should not be considered;

[1]18 O. A. R. 218, reported in Court below 20 O. R. 111.

Held, that, though upon the written appointment being put in evidence, an application might, perhaps, have been properly made to strike out the parol evidence bearing on the same point, yet, as no such application had been made, nor any objection taken to its reception, the parol evidence might properly be considered.

[RICHARDSON, J., *April 27th, 1892.*

[*Court in banc, December 9th, 1892.*

Statement.

This action was tried before RICHARDSON, J., at Moose Jaw, without a jury.

The facts and the points involved fully appear in the judgments.

D. L. Scott, Q.C., and *W. Grayson*, for the plaintiffs.

W. J. Nelson, for the defendant.

[*April 27th, 1892.*]

RICHARDSON, J.—Plaintiffs sue defendant to recover from him the moneys represented by the three instruments of which the following are copies:—

"$37.50. Winnipeg, Man., April 21st, 1885.

"On or before the first day of January, 1887, for value received, I promise to pay to A. Harris, Son & Co. (Limited), or order, the sum of Thirty-seven $\frac{50}{100}$ Dollars, at Winnipeg, with interest at Seven per cent. per annum till due, and one per cent. per month after due till paid. Given for One 14 Hoe spring tooth Seeder. The title, ownership and right to the possession of the property for which this note is given, shall remain in A. Harris, Son & Co. (Limited), until this note or any renewal thereof is fully paid; and if default in payment is made, or should I sell or dispose of my landed property, or if for any reason A. Harris, Son & Co. (Limited), should consider this note insecure, they have full power to declare it due and payable, even before maturity of same. I also waive all homestead and exemption laws as to this debt.

"(Sgd.) David Dustin."

"$90.00. Winnipeg, Man., August 19th, 1885.

"On or before the first day of January, 1887, for value received, I promise to pay to A. Harris, Son & Co. (Limited),

Judgment. Richardson, J.

or order, the sum Ninety Dollars, at Winnipeg, with interest at Seven per cent. per annum till due, and one per cent. per month after due till paid. Given for one Six foot Brantford Binder. The title, ownership and right (&c., &c., as in above copy).

"(Sgd.) David Dustin."

"$90.00. Winnipeg, Man., August 19th, 1885.

"On or before the first day of January, 1888, for value received, I promise to pay to A. Harris, Son & Co. (Limited), or order, the sum Ninety Dollars, at Winnipeg, with interest at Seven per cent. per annum till due, and one per cent. per month after due till paid. Given for one Six foot Brantford Binder. The title, ownership and right (&c., &c., as in above first written copy).

"(Sgd.) David Dustin."

Defendant sets up an almost inconceivable number of defences, together with a counterclaim, thus showing an extra amount of legal ingenuity on the part of his advocate, most of which, however, except for exhibiting a talent for special pleading, I consider unimportant for adjusting the disputes between the parties to this suit. The substantive defence and that which alone bears upon the case, is practically:

That plaintiffs, having entered into executory agreements—one to sell defendant a seeder for $37.50, and the other a binder for $270, provided defendant made certain payments to plaintiffs, of which the instruments sued on represented portions unpaid—by their own acts and conduct relieved defendant at his option from paying the amounts sued on, which relief the defendant claims to have awarded him here.

The case was heard at Moose Jaw sittings, 13th April, 1892 (Mr. Scott, Q.C., and Mr. Grayson, for plaintiffs, and Mr. Nelson, for defendant), when not only was all evidence adduced bearing on the question taken, but most elaborate argument followed on both sides.

Judgment.
Richardson, J.

From the evidence so taken I find the following facts:

(1) That the defendant signed the instruments sued on, and that they have never been paid;

(2) That the machines, for payment in part of which these instruments were given, plaintiffs delivered into defendants' keeping to use on his farm, evidently to enable defendant for their use to help him in earning means to pay for them;

(3) That defendant, having suffered reverses by loss of crops, in October, 1886, left his farm and went to British Columbia for the purpose of earning his livelihood, which by loss of crops he felt obliged to do, leaving on his premises the implements in question, and that he returned to his farm in March, 1890;

(4) That during defendant's absence one Gass, plaintiffs' representative for the Moose Jaw district, with full powers to act for them, and for whose acts in connection with the matters in question here plaintiffs are responsible, late in 1887, or in the spring of 1888, and when all the payments save perhaps the last $90 due 1st January, 1888, were overdue, went to the defendant's farm and removed these implements into Moose Jaw, with the deliberate intention, as he states, of selling them on plaintiff's behalf to other parties;

(5) That Gass had previously in 1887 taken one Low to defendant's farm for the purpose of (if it suited and fitted the latter's reaper) removing a portion of the reaper, intending at some subsequent period, or when necessary, to replace the portion so to be removed from plaintiff's stock;

(6) That the reaper was in the fall of 1888 taken by Gass to his own farm twelve miles north of Moose Jaw, and used there in cutting a part of some forty-five acres of grain, and it was afterwards used, with Gass's permission, by one Fowler, with a view to a sale by him in cutting both thirty-five

Judgment.
Richardson, J.

acres of his own and twenty-five acres of a neighbour's crop in that year;

(7) That Gass used the seeder for his own purposes with the intention, if he found on using it that it suited, to sell it for plaintiffs' to himself, paying the balance the defendant had not paid.

(8) That in 1887 and in 1888, when so dealing with the machines, Gass was impressed with the idea that defendant would not return to the North-West Territories.

(9) That the machines were subsequently brought back into Moose Jaw and left, as I hold, unduly and unreasonably cared for, as also had occurred previously after Gass resumed possession in 1888, and when (12th May, 1891,) Gass notified defendant that he might again take them they were in a more dilapidated condition than with that reasonable care which a contracting seller was bound to give to property held for his purchaser they should be.

The contracts, the subject matter of this suit, although not exactly in words are practically (in so far as it is material here) parallel with the main features in *Sawyer* v. *Pringle*,[1] and the facts the same, except that in the Sawyer case plaintiff besides resuming possession had sold the machine to another party, and thus it was held by the Ontario Court of Appeal, rightly, as I agree, the contract was rescinded and defendant relieved, the consideration for which the notes were given having wholly failed.

In this case there has been no actual sale, consequently no such complete rescission has occurred as in *Sawyer* v. *Pringle*.[1]

Thus the more important question is presented, *i.e.*, the plaintiffs not having actually sold away the machines forming the consideration for defendant's promises, is defendant upon the facts as found entitled to be relieved?

In *Freeth* v. *Burr*,[2] Lord Coleridge, C.J., expresses as the law in actions for breach of contract: "Where the

[2]43 L. J. C. P. 91; L. R. 9 C. P. 208; 49 L. T. 773; 22 W. R. 370.

question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts and conduct of the one do or do not amount to an intimation of an intention to abandon or refuse performance of the contract, the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

Judgment. Richardson, J.

And in *Mersey Steel and Iron Co.* v. *Naylor*,[3] Lord Selbourne, approving of Lord Coleridge's expressions in *Freeth* v. *Burr*:[2] "In questions on contracts, the fair result of the authorities is, you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether (1) it amounts to a renunciation, (2) to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." . . . "Has the one party so conducted himself as to leave it to the option of the other party to relieve himself from a future performance of the contract. The question is, do the facts justify such a conclusion."

And in the same case, Lord Blackburn also approves:—(p. 442) "Where there is a contract which is to be performed in future, if one of the parties has said to the other, in effect: 'I will not perform the contract,' the other party may say, 'I will not wait until you have broken it, but I will treat you as having put an end to the contract, * * and at all events I will not go on with the contract.'"

Accepting such as the law here, upon the facts as I have found them, these plaintiffs by their acts and conduct in my opinion evinced an intention no longer to be bound by the contract, their intention when retaking as expressed by Gass was to sell, and their conduct after retaking as proved, using, offering to sell, and the kind or rather want

[3] App. Cas. 434; pp. 439, 440, 442; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.

Judgment. Richardson, J.

of care bestowed, fully justified defendant in treating the contracts as put an end to by plaintiffs, and in refusing to pay the claim as sued for.

My judgment therefore is, that plaintiffs' claim be dismissed with costs to the defendant, and that the defendant's counterclaim be dismissed with costs relating thereto to the plaintiffs. There will be only one taxation.

The plaintiffs appealed. The appeal was heard on the 5th December, 1892.

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

W. J. Nelson and *J. G. Gordon*, for respondent.

[*December 9th, 1892.*]

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

WETMORE, J.—Two grounds of objection to the judgment of the trial Judge were in substance argued on this appeal.

1st. That there was no evidence to warrant the learned Judge in finding that Gass was authorized by the plaintiffs to re-take possession for them of the machines in question, and to deal with them in the manner in which the Judge found he did deal with them.

2nd. That if there was evidence to warrant the learned Judge so finding, Gass did nothing which could be construed as a rescission of the contracts by the plaintiffs or which would authorize the defendant to treat the contracts as rescinded.

As to the first point:—

Gass was called as a witness on behalf of the plaintiffs and in cross-examination he swore that at the time the contracts were made he was plaintiffs' "Head Agent" for the Moose Jaw District.

It is quite evident, from the tenor of the evidence and the content and marginal writings on the documents put in, that the machines in question were delivered, and the

Judgment.
Wetmore, J.

contracts in respect of them were made, in Moose Jaw or its vicinity, or in what must be considered according to the witness' meaning within the Moose Jaw District. Gass further swore that he took possession of the machines as "plaintiffs' agent," and that he took possession of them to make the best he could of them "for the plaintiffs," and that he thought he "notified plaintiffs of having taken possession." This evidence was all received, as far as the appeal book shows, without any objection being raised to its reception. The learned counsel for the plaintiffs contended that, because it was shown that Gass' appointment as agent was in writing, all this testimony amounted to nothing as establishing Gass' authority. I am of opinion that, while this possibly might have been good ground for striking out so much of Gass' testimony just quoted respecting his relations to the plaintiffs and the capacity in which he took possession, as was given before the fact of the appointment being in writing was got out, and for objecting to so much of it as was given after that fact was got out, yet inasmuch as no application was made to strike out the one part nor any objection raised to the reception of the other, the testimony was entitled to such consideration at the hands of the learned Judge as it was worth and could not be treated as of no value whatever. Now, keeping this in mind, there is another piece of testimony, which, in my opinion, has an important bearing on the subject of Gass' authority. Between three and four years after Gass took possession of these machines, about the 13th May, 1891, he caused the defendant to be served with a notice addressed to him, which was in the following words: "Please take notice that I the undersigned agent at Moose Jaw of A. Harris, Son & Company, Limited, have on my premises here the Spring Tooth Seeder and part of the Self Binder bought by you of them: that this Seeder and Binder may be removed by you at any time, and that they are on my premises at your risk. Yours truly, Chas. A. Gass, Agent for A. Harris, Son & Co. (Limited). Moose Jaw, N.W.T."

Judgment.
Wetmore, J.

Now it will be observed that in that document Gass holds himself forth as the plaintiffs' agent. The writing was offered in evidence by the defendant, and no objection whatever was offered to its reception on behalf of the plaintiffs.

Under such circumstances I must assume that Gass was acting within his authority in giving such notice. Now that document amounts to a ratification by the plaintiffs of Gass' action in taking the machines to Moose Jaw, because otherwise the plaintiffs would have directed the machines to be carried back to the defendant's premises from whence they were taken and left there, but the notification was that defendant could remove them. That notice is a ratification and adoption by the plaintiffs of Gass' action in taking possession of these machines and bringing them to Moose Jaw, or at least the learned Judge was justified in viewing it as such. The principal is responsible for the negligent acts or omission of his agent, while acting within the scope of his authority, and Gass was acting within the scope of his authority in taking care of these machines after taking possession, and his principals are responsible for his acts or omissions with respect to such machines while under his care.

I am therefore of opinion that the evidence which I have referred to, taken as a whole, was sufficient to warrant the learned Judge finding, as a matter of fact, that what Gass did with respect to these machines he did as the plaintiffs' agent and with their authority.

As to the second point, that is:—

Whether Gass' acts with respect to these machines could be construed as a rescission of the contract by the plaintiffs, or authorized the defendant to treat the contract as so rescinded, the instruments sued on may be treated as exactly similar to the instrument sued on in *Sawyer* v. *Pringle*.[1] It was there held that the vendors, the plaintiffs, having, under the provisions of the contract, recovered possession of the article sold and re-sold it to a third person, and so put it out of his power to carry out his contract with the defendant, this amounted to a rescission of the contract

and the plaintiff could not recover from the defendant the balance of the agreed price. In my opinion, that case lays down the law correctly, and I would have no hesitation in following it. But the learned counsel for the plaintiffs urged that in this case there was no re-sale, and he therefore draws a distinction between this case and *Sawyer* v. *Pringle*.[1] It is true that there is that distinction; but it is not necessary that there should be a re-sale to bring a case within the *ratio decidendi* of *Sawyer* v. *Pringle*.[1] That case is far more far reaching in its consequences than that. For instance, if the vendor after resuming possession were to burn the article or break it in pieces or otherwise destroy it, he would just as much put it out of his power to carry out his contract as if he had re-sold it. The question is how must a vendor, who takes possession of an article under a contract such as those in question in this case, deal with it, if he wishes to hold the buyer to the agreement and recover the unpaid price. Suppose a vendor contracts to sell and deliver at a future specified time a specific and ascertained machine for an agreed price; I will assume that such machine has been inspected by the buyer on the vendor's premises and that it is an entirely new article in which the vendor deals. It is clear that in such a case no title or property would pass to the buyer until the price was paid. Now I will assume that, when the time arrives to pay the money and accept the machine, the buyer goes to the vendor to complete the contract, he finds that, since he has made the bargain, the vendor has been using the machine and allowing other persons to do so; surely he would be justified in refusing to accept the article or pay for it; still more would he be justified in refusing to do so, if he discovered that the vendor had turned the machine out into a mud hole and allow the people in the neighborhood to use it for a hitching post to tie their horses and their oxen to. Now, I cannot conceive that the right of a buyer, from whom a machine has been taken under such agreements as those now under consideration, are very much different. I am not prepared to hold that the mere fact, that the vendor, when he repossessed himself of the article, did so with the intention of

Judgment. Wetmore, J.

Judgment. Wetmore, J.

selling it, in itself would amount to a rescission of the contract or would justify the buyer in treating it as a rescission; nor am I prepared to hold that the additional fact, that he offered it for sale or attempted to sell it, would amount to a rescission. It is possible that, if he afterwards changed his mind and concluded to hold the buyer to his bargain, he might do so if the machine was in the same condition that it was when he took it from the buyer, or he had done nothing which would justify the buyer in treating his acts as amounting to a rescission. It is not, however, necessary to decide these questions. It seems to me the question is not whether the vendor has rescinded the contract, or whether or not he had any such intention. The question is,—has the vendor so dealt with the article as to justify the buyer in considering that the vendor had rescinded the contract and in treating it accordingly. If the vendor wishes to hold the buyer to his agreement and enforce his claim against him for the price, he has simply the right to hold the article and he is bound to take care of it. The buyer has a right to insist that he shall not use it, and that he shall not allow other persons to do so, and that he shall take care of it. If he has got to take it back, he has a right to receive it just in the same condition as it was when taken out of his possession. Of course I would not now hold that putting necessary repairs upon it would put it out of the vendor's power to insist on the balance of the price being paid; but apart from that the buyer could insist upon its being kept in the condition it was in when taken away. If not kept in that condition, or if used by the vendor or allowed by him to be used, the buyer would have the right to say:—You have by your conduct rescinded the agreement and I will not pay you the balance of the price.

The learned Judge has found that the plaintiffs' agent, after he took possession, used one of the machines on his own place; that on another occasion he allowed one Fowler to use it; that both of the machines had not been duly and reasonably cared for; and that they were in a more dilapidated condition than, with that reasonable care which a

contracting seller was bound to give to property held for his purchaser, they should be. Judgment. Wetmore, J.

There was ample evidence to warrant the learned Judge in these findings, and it is no answer to say that the defendant had been careless in his care of these machines; that would not justify the plaintiffs being negligent.

It is not necessary, in the view I have taken, to decide the question raised as to the form of action or whether, if an action did lie, it should be for the balance of the price or an action on the case for damages.

I am therefore of opinion that the judgment appealed against should be affirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

THE QUEEN v. NIMMONS.

Crown Case reserved—Hudson's Bay Co.'s lands—Old trail—Survey and transfer to Territories—Obstruction—Compensation—Petition of right.

When a statute authorizes the expropriation of private land, the owner is not entitled to compensation, unless the statute so provides.

Even where compensation is payable by the statute, the party expropriating may (unless the statute otherwise provides) enter upon the land for the purposes expressed by the statute, without being liable to an action for damages; the owner must take such proceedings as may exist for obtaining compensation—in the case of expropriation by the Crown by Petition of Right in the Exchequer Court.

Where land, which was part of the lands reserved to the Hudson's Bay Company,† was sold in a state of nature to a purchaser, who obtained a certificate of ownership therefor under the Territories Real Property Act,§ and cultivated and enclosed it, thus preventing the use of an old trail, which, subsequently, was surveyed and transferred to the Lieutenant-Governor for the use of the Territories.‖

Held, that the purchaser was rightly convicted of obstructing a public highway.

[ROULEAU, J., *April 15th, 1892.*
[*Court in banc, December 9th, 1892.*

† See Dom. Lands Act, R. S. C. c. 22.
§ R. S. C. c. 51.
‖ See N. W. T. Act, R. S. C. c. 50, s. 108; 54-55 Vic. (1891), c. 22, s. 17; 60-61 Vic. (1897), c. 28, s. 19.

Statement.

The accused purchased a half section of land from the Hudson's Bay Company, across which a travelled trail existed, and obtained a certificate of ownership therefor under the Territories Real Property Act. He afterwards built a fence across the land, thereby closing up the trail. The Dominion Government caused the trail to be surveyed and by proclamation transferred it to the Lieutenant-Governor-in-Council for the use of the Territories. The accused was charged with having unlawfully obstructed the Queen's highway and was found guilty, sentence being deferred until the opinion of the Supreme Court could be obtained. The following questions were reserved for the opinion of the Court.

(1) Are purchasers of Hudson's Bay Company lands entitled to compensation for lands taken by the Dominion Government for highways or roads, after the said Hudson's Bay Company has divested itself of its title in favor of any party, before said land has been taken by the Dominion Government for said road purposes?

(2) Had the Government any right to enter upon and survey the said trail on the accused's property, and afterwards transfer it to the Lieutenant-Governor-in-Council?

(3) If so, was the accused guilty of obstructing the Queen's highway after the said trail was surveyed and proclaimed a Government road?

The case was argued on the 6th day of December, 1892.

J. R. Costigan, Q.C., for the Crown.

Defendant not represented.

[*December 9th, 1892.*]

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

RICHARDSON, J.—The defendant was charged with having committed a nuisance in obstructing a public highway running from Calgary to Morleyville.

He is the owner of the north half of section 8, township 24, range 1, west of the 5th principal meridian, through

which the alleged highway passes, and the obstruction consisted in erecting and maintaining a fence across this alleged highway. Judgment. Richardson, J.

The defendant, on being charged before Mr. Justice ROULEAU, elected to be tried by a Judge without a jury; and the trial occurred at Calgary in April, 1892, when Mr. Justice ROULEAU convicted him, but sentence was respited and a case reserved for the opinion of the Court for Crown Cases Reserved, on the following points:—

1. Are purchasers of the Hudson's Bay Company's lands entitled to compensation for lands taken by the Dominion Government for highways or roads after the said company has divested itself of its title, and after such land has been taken by the said Government for such road purposes?

2. Had the Government any right to enter upon and survey the said trail on the accused's property and afterwards transfer it to the Lieutenant-Governor-in-Council?

3. If so, was the accused guilty of obstructing the Queen's highway after the said trail was surveyed and proclaimed a Government road?

The facts, on which the case stated is based, appear to be as follows:—The land, on which the alleged obstruction was placed, belonged to defendant who had, previous to the survey of the road by the Dominion Government, purchased it from the Hudson's Bay Company; it being land included in the Imperial Order-in-Council of 23rd June, 1870,§ the fee simple of which became vested in the company by section 22 of the Dominion Lands Act,† as part of the one-twentieth of each township, to which by the said Order-in-Council the company became entitled.

By section 8 of that Order, the Government had the right to lay out any public roads through the lands so made over to the company without compensation, except in cases where the lands so appropriated for roads were actually under cultivation, in which instances the Government should pay to the company the fair value of the same.

§ See Memorandum, *ante* p. viii. † R. S. C. c. 54.

Judgment.
Richardson, J.

It appeared from the case stated that, while, when defendant purchased this land, it was in its natural state, after purchase, and before the Government proceeded to lay out the highway through it, he had cultivated; and it was urged on his behalf that this was consequently a case where compensation would be payable, had the land still remained the company's; and as defendant had purchased from it he was entitled to compensation; and that none being paid or tendered to him, as the fact was, he was justified in preventing the public from using the trail until payment or tender.

It was contended on behalf of the Crown that the provision as to compensation applied only to the lands occupied as trading posts of the company, and blocks around them, and not to the other lands, namely, the one-twentieth of each township, to which class the land in this case belonged; and that, even if the company would have been entitled to compensation for the land taken for the highway, he was not; nor was he, if he had these rights, justified in obstructing until payment or tender of compensation.

It is laid down in Cooley on Constitutional Limitations, p. 560, as well settled in the United States that, where compensation is payable, it is not necessary in the case of a state or municipal corporation authorized to expropriate land to pay or tender compensation before expropriating, provided the statute has given to the owner of the land a means of obtaining compensation, though the rule is the other way in the case of a private individual or corporation taking land; because in this latter instance the remedy of the owner by action might be valueless. The same statement of the law is given in Dwarris on Statutes.

In the United States the powers of the Federal Government are limited by a written constitution, which provides that no private property shall be taken for the public use without compensation. But no such limit exists upon the powers of the Imperial Parliament. In England, when a statute authorises the expropriation of private land, the owner is not entitled to compensation, unless the act expresly so provides.

In *The Mayor, &c., of Montreal* v. *Drummond*,[1] the law on this subject is stated by Sir Montagu Smith thus: "It is clearly established that a statute which authorises works makes their execution lawful, and takes away the rights of action which would have arisen without such authority. Statutes of the kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that, though the action is taken away, compensation is only recoverable when provided by the statutes and in the manner prescribed by them." Judgment. Richardson, J.

Broom's Constitutional Law, p. 238:—

"The constitution of England has wisely distributed to several Courts the determination of proper causes, but has left no subject in any case where he is injured without his adequate remedy, if he will go to the right place for it. If the subject has cause of complaint against the Crown he must proceed by that pathway which the constitution has laid out for him."

It follows from the foregoing that, even where compensation is payable by statute, the persons expropriating may enter upon the lands for the purposes expressed by the statute, without being liable to an action at the suit of the owner.

Applying this rule here: Assuming that the defendant was entitled to compensation, he would not have a right of action against the surveyors sent by the Government to survey the road; and if he could not bring an action at law against them for entering on his land or enjoin them from so entering, it cannot be seriously contended that he could take the law into his own hands and prevent by force such entry.

Then, referring to the law as laid down by Cooley, *supra*.

Has the Government provided a means by which the defendant could recover any compensation to which he might be entitled? We think such means are provided by Petition of Right through the Exchequer Court, and, assuming he had

[1] 1 App. Cas. 384, p. 410; 45 L. J. P. C. 33; 35 L. T. 106.

Judgment.
Richardson, J.

and has this right, defendant was not justified in obstructing as he did the said highway until compensation for the land taken therefor had been first paid or tendered.

The learned Judge has found that this was a public travelled road for some fifteen or sixteen years past, and long before defendant purchased the half-section through which the road passes, and long before any survey of the land through which any portion of the trail in question passed.

The proceedings which were had were taken under section 108 of the North-West Territories Act,‖ and, in the absence of proof to the contrary, we must assume from the case before us, that the proceedings taken in the matter were authorised under that section, the result being that the control of the public travelled trail from Calgary to Morleyville passing through defendant's land became vested in the Lieutenant-Governor for the public uses of the Territories.

In the above view it is not necessary to consider whether or not the defendant is entitled to compensation.

The judgment of the Court is that the conviction of defendant be affirmed and that judgment be given thereon at the next sittings of the Supreme Court for the Judicial District of Northern Alberta.

Conviction affirmed.

SCHILLER v. THE CANADA NORTH-WEST COAL AND LUMBER SYNDICATE.

Practice—Pleading—Ambiguity—Embarrassing pleading—Objection in law—Striking out—Amendment.

The word "efficient," as applied to a medical practitioner in a statement of claim for damages for his unskilful treatment of the plaintiff, was held to be ambiguous, inasmuch as it might be taken to mean that the practitioner was merely competent, or that he was not only competent, but would in fact skilfully treat, and the statement of claim was therefore held to be embarrassing.

Judge's order dismissing application to amend by setting up objection in law varied, and plaintiff given leave to apply to amend, and in default defendant given leave to apply to strike out portion of claim as embarrassing.

[*Court in banc, June 8th, 1892.*

The statement of claim was as follows:

Statement.

1. The plaintiff is a laborer and resides at Canmore, Alberta. The defendants are an incorporated company doing business at Canmore as coal-miners and lumberers.

On or about the 20th November, 1891, the plaintiff was in the employ of the defendants as a coal picker at the company's coal mines at Canmore. The sky-light in the roof of the building constructed for the protection of the company's coal screen, had, by the defendant's negligence, been left without a window, and open, so that the snow falling through such sky-light upon the screen near which the plaintiff was working, interfered with the procees of screening. The company's foreman, well knowing the danger and risk to be incurred, ordered the plaintiff to climb upon the said roof and close up the said sky-light with boards, and the plaintiff, under compulsion of the said order and not knowing the risk and danger to be incurred, proceeded to carry out the said order, in doing which the plaintiff, owing to the further negligence of the defendants in not supplying proper and safe appliances for the said work, fell, and was wounded and injured, and incurred great suffering of mind and body, and loss of time and expense, to the great damage of the plaintiff; and the plaintiff claims $2,500 damages for such injuries.

Statement.

2. It was the custom and established rule of the defendant company to retain from the wages of each and every of its employees the sum of one dollar per month for medical and surgical attendance upon the said employees when required; they the said defendant company reserving and exercising the right to select the medical and surgical attendant, and guaranteeing his efficiency as such, and the plaintiff had had the said sum of one dollar per month deducted from his wages during all the time of his employment with the defendant company.

3. Walter Hayden, M.D., was the medical and surgical attendant selected and retained by the defendant company, under the aforesaid custom.

4. The plaintiff, immediately after receiving the injuries complained of in the first paragraph hereof, was, by the defendants' servants, placed in charge of the said Walter Hayden, M.D., as the defendants' medical and surgical attendant, as aforesaid, for the purpose of being properly treated by him for the aforesaid injuries.

5. The said Walter Hayden, M.D., negligently, improperly and unskilfully treated the plaintiff for the said injuries.

6. In consequence of such negligent, improper and unskilful treatment, the plaintiff was seriously and permanently crippled; and the plaintiff claims $2,500 for such treatment and its results.

And the plaintiff claims $5,000 damages, and his costs of suit.

The statement of defence was as follows:

1. The defendants say that they were not guilty of the alleged or any negligence.

2. In further answer to the first paragraph of the statement of claim, that the plaintiff was not ordered to climb upon the roof and close up the sky-light, as alleged, nor at all.

3. In further answer thereto, that there was contributory negligence on the part of the plaintiff, of which the following are the particulars: The plaintiff well knew the condition of the said roof, and the risk and danger incurred

Statement.

in climbing thereon in snowy weather, yet, he voluntarily, and in opposition to orders received, climbed thereon, and, the roof being slippery owing to the snow then falling and being upon it, the plaintiff slipped and fell, causing the injuries complained of.

4. In further answer to the second and third paragraphs of the statement of claim, that Walter Hayden, M.D., was not selected and retained by the defendants as the medical and surgical attendant, under the alleged custom, or otherwise.

5. In further answer to the fourth paragraph, that they did not place the plaintiff in charge of the said Walter Hadyen, M.D., as their medical and surgical attendant for the purpose of being properly treated by him for said injuries, or otherwise.

6. In further answer to the fifth paragraph, that the said Walter Hayden, M.D., did not improperly, negligently and unskilfully treat the plaintiff, but on the contrary, that the said Walter Hayden, M.D., treated the plaintiff in a careful, skilful and proper manner.

7. In further answer thereto, that at the time of the said injuries complained of, the plaintiff was suffering from previous injuries received by him when not in their employment, and under the circumstances of such previous injuries the said Walter Hayden, M.D., treated him for the injuries, herein complained of, in the most skilful and proper manner.

8. That the plaintiff did not suffer any damage in consequence of the treatment received from the said Walter Hayden, M.D.

The defendants took out a summons to amend their statement of defence, by adding thereto the following paragraph:

"(9). The defendants will object that the second, third, fourth, fifth and sixth paragraphs of the statement of claim do not show any cause of action against the defendants, because they do not allege that the said Walter Hayden,

Statement. M.D., was not competent to perform the duties of medical and surgical attendant therein mentioned."

The summons was heard before ROULEAU, J., who, by order of 3rd May, 1892, discharged it with costs to the plaintiff in any event.

From this order the defendants appealed. The appeal was argued on the 7th June, 1892.

D. L. Scott, Q.C., for the defendants, the appellants.

The amendment should be allowed. It raises a question of liability. If the plaintiff and the physician were fellow-servants the defendants would be liable only if at all, for negligence in not providing an efficient medical attendant for their servants. The defendants are not liable if the damage complained of was the result of negligence on the part of the plaintiff's fellow-servant. The plaintiff alleges that the physician was negligent and unskilful in his treatment of the plaintiff, it does not allege that he was inefficient. A master is not responsible for injury by one servant to another though he might be liable if he employed an incompetent man through whose act the fellow-servant is injured: Smith on Negligence, Blackstone ed., p. 45. The proposed amendment is not frivolous. The question might be raised as to whether these men were fellow-servants, or as to whether the statement of claim discloses that they were. That point might come up at the trial. The proposed amendment to the defence is necessary to set that doubt at rest. It is also alleged that defendants guaranteed the efficiency of the physician employed, there should have been an allegation that he was not efficient. The amendment sought is not frivolous, therefore appellant's right to the amendment is undoubted.

T. C. Johnstone, for the plaintiff, the respondent.

The demurrer is frivolous as the pleadings do not show the relationship of fellow-servants. The clauses proposed to be objected to show that H. was a physician presumably in the employ of the company as far as regards

attendance on plaintiff was concerned at that time. The leading authority that I find which might seem in favor of appellants that this relationship did exist is *Priestley* v. *Fowler*.[1] The plaintiff could not be presumed to have contemplated that he would be ill-treated and treated unskilfully. The plaintiff is a coal picker engaged in a mine and the other man is engaged in a different employment altogether. Theirs was not a common employment. There was an implied contract on the part of the defendants to furnish medical aid; they did furnish it, but it was unskilful. Argument.

Scott, Q.C., in reply.

[*June 8th, 1892.*]

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

RICHARDSON, J.—This is an appeal from an order made by ROULEAU, J., refusing with costs defendants' application to amend their statement of defence, holding that the proposed amendment was not necessary in the interests of justice.

The action is to recover damages sustained by plaintiff while working in appellants' coal mines for them, and besides charging defendants with having provided insufficient appliances for the work plaintiff was at the time ordered to perform, further charged defendants with having violated one of the terms of plaintiff's engagement with defendants, by which defendants were bound to provide an efficient medical and surgical attendant for their employees when required, and charging in this instance that the physician they provided negligently, improperly and unskilfully treated plaintiff, by reason whereof plaintiff was permanently crippled, etc. The case was fully argued by Mr. Scott, Q.C., for appellants, and Mr. Johnstone for respondent, as a result of which it appears that the difference has arisen from the use of the word "efficiency" in the statement of claim.

[1] 3 M. & W. 1; M. & H. 305; 7 D. J. Ex. 42; 1 Jur. 987.

Judgment.
Richardson,J.

To us it seems that the word as used in the statement is capable of two meanings:

(1) That the physician was competent and would perform his duties in a careful and skilful manner,

(2) Merely that this physician was competent for their performance.

Now, if the former meaning was intended by plaintiff to be understood, the order made by ROULEAU, J., would be correct.

On the other hand, if competency alone was intended, his decision was, as we conceive, erroneous. To us it seems that the statement of claim under consideration is so uncertain that the Court cannot clearly (as should always be the case) comprehend what the plaintiff's real cause of action in that respect is, and that it is in that respect ambiguous.

This Court has the power of making such a disposition of the whole matter as the learned Judge could, and the subject matter is disposed of thus:—

The order of this Court is (1) That the appeal be dismissed without costs to either party; (2) That the order of ROULEAU, J., be varied by striking out the last paragraph which relates to costs of the application; (3) That the plaintiff may apply to the local Judge to amend the second branch of his claim as he may be advised; or defendant may apply to have the clause expunged as embarrassing.

Appeal dismissed without costs.

DALY v. ROBERTSON.

Highway—Private way—Dedication—Plan—Injunction.

The plaintiff's predecessor in title bought a certain lot according to a plan (then unregistered), on which was shown a strip 33 feet in width, running along one side of the lot. The plaintiff claimed that this strip had been dedicated, either as a public highway or a private way for the use of the owner of the lot, and claimed a declaration to that effect and an injunction.

On the evidence, the Court found for the plaintiff and gave judgment, accordingly.

[ROULEAU, J., *June 20th, 1892.*

[*Court in banc, December 9th, 1892.*

Statement.

The statement of claim in the action was as follows:

1. On the 20th October, 1888, Richard Hardisty, since deceased, and the defendant, being owners of lot 25, block A, on a plan registered in the Land Titles Office for the Northern Alberta Land Registration District as Plan "D," executed, in pursuance of a previous agreement in writing in that behalf, a transfer of the said lot under the provisions of the Territories Real Property Act to Elizabeth Graham.

2. The said Elizabeth Graham transferred all her estate and interest in the said land to the plaintiff, by transfer in the form provided by the said Act, dated the 11th July, 1889.

3. The plaintiff says that at the time of the said sale and transfer by the said Hardisty and Robertson, they had dedicated a certain strip of land 33 feet wide, running southerly from Jasper Avenue along the entire depth of the westerly boundary of said lot 25, as a public street or highway, inasmuch as they had so indicated the said strip of land upon the said registered plan, which was so registered by them, and had and ever since have allowed the said strip of land to be used as such, and as an alternative allegation, the plaintiff says that at the time of the said sale and transfer by the said Hardisty and Robertson, they were owners of the said strip of land, and made the said sale and transfer on the condition that the said lot 25 was then and

Statement.

should always continue to be a corner lot, having along the whole of its westerly side a street or lane 33 feet wide, over which the owners of said lot 25 should be at liberty to pass as over a public street or highway.

4. The plaintiff says that the condition referred to in the preceding paragraph was expressed in the said agreement of sale, and also verbally by the said Hardisty and Robertson at the time of the execution of the said agreement of sale; and as an alternative allegation, the plaintiff says that the said condition is to be implied from the general course of conduct of the said Hardisty and Robertson in negotiating the said sale, and in fixing the price thereof, from the expressions contained in the said agreement and the terms thereof, and from the manner in which the said lot 25 and the said strip of land are laid out and marked on the said plan.

5. The defendant denies that the said strip of land is either a public street or highway, or a private way for the benefit of the owners of said lot 25, and asserts that the plaintiff has no right of way or other easement of any kind therein, and has attempted and threatened and intends to sell the said strip of land as soon as opportunity offers, as a lot upon which buildings may be erected.

The plaintiff claims:—

1. A declaration that the said strip of land is a public street or highway, or a private way for the benefit of the owners of said lot 25.

2. An injunction restraining the defendant from selling the said strip of land or otherwise interfering with the plaintiff's rights therein or thereover.

The statement of defence has in substance a traverse of the material allegations in the statement of claim.

The action was tried at Edmonton before ROULEAU, J., without a jury on the 10th May, 1892.

N. D. Beck, for the plaintiff.

S. S. Taylor, for the defendant.

[*June 20th, 1892.*]

Judgment.

Rouleau, J.

ROULEAU, J.—The plaintiff alleges that he bought lot 25, block A, of the town of Edmonton; that the lot was sold to him as a corner lot; that according to plan "D," registered on the 2nd of April, 1888, a strip of land west of said lot 25 has been dedicated to the public as either a public street or private way, and that the defendant threatens and intends to sell the said strip of land as soon as opportunity offers, as a lot upon which buildings may be erected. And the plaintiff claims: 1st, a declaration that the said strip of land is a public street or a private way for the benefit of the owners of said lot 25; 2nd, an injunction restraining the defendant from selling the said strip of land or otherwise interfering with the plaintiff's rights therein or thereover."

Lot 25 originally formed part of River lot 12, which was purchased by a certain number of gentlemen and subdivided afterwards into town lots. Those town lots were sold according to a plan made by Simpson, D.L.S., afterwards registered as plan "D."

Long before plan "D" was registered, one William J. Graham bought from the agent of Robertson, the present defendant, and one McGinn, lot 25, block A, as shown by the said plan. Graham afterwards transferred the said lot to one Oliver, who transferred it to Elizabeth Graham, the wife of the first purchaser. The plaintiff afterwards acquired it from Elizabeth Graham.

By the evidence it appears that the said lot was sold according to a plan exhibited, which was either a tracing or a copy of plan "D," which was registered on the said 2nd day of April, 1888. By a simple inspection of plan "D" it is evident that lot 25 is the last lot west on block A, and that the strip of land west of said lot was not intended for any other purpose except to form part of a street running north and south across "Jasper Avenue." If the proprietors had intended that strip of land for any other purpose, the plan would certainly show it. True there is no other description given of the said lot 25 in the different transfers

Judgment.
Rouleau, J.

than the following:—"Lot twenty-five (25), Block A—Robertson & McGinn's estate, River lot number 12—Government survey;" but taking the plan as registered in connection with the evidence adduced, I cannot help being confirmed in the opinion that the said strip of land was intended for a public highway. William J. Graham, the first purchaser of said lot 25, swears positively that he bought the said lot from Mr. Mulkins, the agent of Robertson & McGinn, for the sum of $250, because it was a corner lot; the other lots of the block being only $200 each. This last statement is corroborated by several witnesses, and also by the price list on the margin of all the plans filed. Even supposing that such an agreement—that Mulkins was selling a corner lot to Graham—had not taken place, it would be now too late for the owners of river lot 12 to claim the said strip of land, because as they registered their plan "D" the dedication of that strip of land to the public was sanctioned by them. It is of evidence, too, that the proprietors have sold town lots for several years on the very same plan as they afterwards registered without alteration. There never was any contention till now that the said strip of land was not dedicated for the purposes of a public highway; the plan registered shows it plainly; and the behavior of the proprietors showed it also all along until lately. The law effecting this case is clearly indicated and argued in the case of *Carey* v. *The City of Toronto*.[1] In reading that case carefully, and applying the rules of law laid down to this case, I cannot come to any other conclusion than that my judgment should be in favor of the plaintiff. The judgment of the Court is therefore as follows:—

The Court declares that the strip of land 33 feet wide west of lot 25, block A, plan D, is a public highway, having been dedicated as such to the public by the defendant and his co-owners on the 2nd April, 1888; and an injunction is hereby granted restraining the defendant from selling the said 33 feet of land or otherwise interfering with the plaintiff or any other person to have free access over the same. Costs to the plaintiff.

[1] 11 A. R. 416; 14 S. C. R. 172.

Statement.

From this judgment defendant appealed.

The appeal was argued on the 5th day of December, 1892.

D. L. Scott, Q.C., for the plaintiff (respondent).

P. McCarthy, Q.C., for the defendant (appellant).

[*December 9th, 1892.*]

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

MCGUIRE, J.—This is an appeal from the judgment of Mr. Justice ROULEAU, in an action tried before him without a jury at Edmonton.

The plaintiff sought to have a certain strip of land contiguous to his property declared a highway or private way, and that the defendant should be restrained from selling said strip of land or dealing with it otherwise than as a street or way.

The land in question is situate in the town of Edmonton.

In 1882 the owners of a certain piece of land there had a survey made and a plan pursuant thereto prepared. This plan was subsequently registered, in 1888. Several tracings or copies of this plan were made by the owners, one of which, put in as Exhibit 1, appears to have been delivered to one Stewart D. Mulkins, with prices of lots marked thereon, and he was empowered to sell lots at such prices.

On April 10th, 1883, Mulkins sold, to one William J. Graham, lot 25 in block A. The only writing in reference to such sale was a receipt on a printed form, one of a book of forms provided with stubs. This receipt was not produced at the trial, but the book of forms with a stub referring to the sale to Graham was put in. The stub is as follows:

"No. 26, date April 10th, 1883.

"Lots 25, Block A.

"Purchaser, William J. Graham.

"Residence, Edmonton.

"Amount paid, $150. Balance due, $100.

Judgment.
McGuire, J.

"Date of maturity, $50 10th of October, 1883, and $50 10th of April, 1884."

The form of receipt as printed refers to a plan made by George A. Simpson, D.L.S., for Robertson & McGinn, and a note at the foot states, "Deed to be given as soon as Patent from the Crown issues, and on full payment of the price."

Mulkins says he had power of attorney from Robertson & McGinn to sell, and that Exhibit 1 looks like the plan he was selling by.

William J. Graham says he purchased from Mulkins by reference to a plan produced; that he wanted a "corner lot;" that Mulkins pointed out lot 25 as a corner lot, and that he, Mulkins, also went on the ground and pointed out the lot, and stated that the strip to the west of it was a street, and it was after that the purchase was completed. Mulkins does not deny making the representations as to it being a corner lot, or as to the strip to the west being a street, but says he "does not remember telling him it was a corner lot."

It is clear from this evidence and the testimony of defendant himself and of one Cameron, a former part owner, that the sale was with reference to the plan and the tracing of it used by Mulkins. It is evident that lot 25 was intended to be a corner lot, and that the strip of land 33 feet wide, along its west side, was to be left as a street. Defendant contends that it was not so intended, but that this strip was left an unnumbered lot. Cameron in his evidence says, "The street west of lot 25 would have been left just for the convenience of that lot." He had previously stated, as the fact is, that the "hill" (in rear of lot 25) "is steep and high and cannot be used for beasts or wagons."

Defendant in his evidence gave two explanations why the disputed strip was left unnumbered. He first says, "There was a dispute between the owners of River lots 10 and 12" (of which lot 25 is a part) "and we left 33 feet on our side provided the other owner" (*i.e.* of 10) "would leave 33 feet also, and that was done also on the north side of Jasper Avenue." Now does not that mean that the 33 feet in question was left as their half of the street? He

then adds that the reason the 33 feet was not made into a lot was because there was some dispute as to the boundary line. These two statements are not reconcilable and the latter statement is inconsistent with the rest of the survey as shown by the plan, for if there was a dispute as to the boundary at this point, no explanation is given why that dispute did not apply to the rest of the boundary between 12 and 10. The plan shows a street (Namayo Avenue) north of Jasper Avenue inconsistent with any such dispute. Moreover all the plans, Exhibits G, I, K, show a broad black line between 25 and the disputed strip similar to the dividing line elsewhere used on these plans as separating lots from streets, and dissimilar to the lines indicating divisions between lots. Exhibit G further shows a street the full width of Namayo Avenue and a straight continuation of it past lot 25, and tinted as all other streets on this plan are tinted. This plan was produced by Mr. Cameron, who was one of the owners at the time the plan was made. The defendant also mentions this plan, and says that the marginal memorandum thereon is in his handwriting. Exhibit K shows the disputed strip treated as a street. Judgment. McGuire, J.

Lot 25 is shown to be wider at the rear than in front; the division lines between the lots were not parallel at the line of Namayo Avenue, and if lot 25 had been laid out like those to the east of it, there would have been a small gore left between it and the line of the avenue. Now if 25 was intended to be the last lot in that direction, it is quite obvious why this gore, too small for a separate lot, was taken in as part of 25, thus bringing this lot flush with the avenue, but if defendant's contention is correct, there is no apparent reason why the gore was not left as part of the unnumbered lot, which he says this strip was intended to be.

There is also the fact that this lot was priced and sold at $250, other lots being held at $200, and a memorandum on the plan Exhibit 1 states that "corner lots" were to be $250, other lots $200.

From a full consideration of the evidence we are of opinion that not only did it justify the learned trial Judge

Judgment. McGuire, J.

in finding as he did, but that no other conclusion could reasonably have been arrived at.

It was shown that in pursuance of the agreement of sale a transfer was subsequently made to Eliza Graham, wife of W. J. Graham, and she transferred the lot to the plaintiff, who therefore took whatever rights the Grahams had, the appeal will be dismissed with costs.

Appeal dismissed with costs.

CHALMERS v. FYSH.

Practice—Leave to appeal—Appeal to Court in banc from refusal of leave by trial Judge—New trial—Neglect to give necessary evidence.

The Judicature Ordinance, R. O. 1888, c. 58, s. 435, provides that "no appeal shall lie from the judgment or order of the Court presided over by a single Judge or of a Judge of the Court to the Court *in banc*, without the special leave of the Judge or Court, whose judgment or order is in question, unless the title to real estate, or some interest therein is affected, or unless the matter in controversy on the appeal, (in matters of contract exceeds the sum of $500, and, in matters of torts,) exceeds the sum of $200, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary, or other duty or fee, or a like demand of a general or public nature affecting future rights.†

Held, that, where a trial Judge had not granted leave to appeal in a case in which, by virtue of this section, leave to appeal was necessary, the Court *in banc* had no jurisdiction to entertain an appeal, or to give leave to appeal, even, *semble*, had it appeared that the Judge had said that the applicant might apply to the Court *in banc* for leave.

Semble, where a party fails in his case by reason of his neglecting to give necessary evidence, of which at the time of the trial he had knowledge, he should be allowed a new trial to permit him to supply the evidence, only under special circumstances.

[*Court in banc, June 5th, 1893.*

This was an action against a married woman for a sum less then $200. The trial Judge, ROULEAU, J., dismissed the action, holding that the plaintiff had failed to prove

† Rule 501, Jud. Ord. (C. O. 1898, c. 21) is the same words, omitting the words in parentheses.

that the defendant was the owner of separate property. Subsequently counsel for the plaintiff moved, before the same Judge, for a new or further trial, or for leave to appeal, on an affidavit of the plaintiff to the effect that the defendant, at the time she contracted with the plaintiff, was the owner of real estate in her own right. The Judge refused the application. Statement.

On the 5th June, 1893,

W. J. Nelson, for the plaintiff, renewed the application before the Court *in banc*.

[*June 5th, 1893.*]

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

MCGUIRE, J.—The matter in dispute in this case is under $200, and is not within any of the classes of cases in respect to which the Judicature Ordinance permits an appeal without the leave of the Court or Judge whose judgment or decision is complained of. The plaintiff has not obtained such leave, but he now asks the Court *in banc* to grant him that leave which was not given by the trial Judge; he in effect is appealing to this Court from the refusal of the trial Judge to grant him leave to appeal.

We see no provision in the Ordinance permitting any such appeal, or giving this Court any jurisdiction to entertain an appeal from the decision of a Judge in a matter of this kind, when the trial Judge has not granted such leave. The plaintiff states that the learned Judge told him that he could apply to this Court for such leave. The learned Judge informs us that the plaintiff must be in error, in so stating; but even were it otherwise, I do not see that the fact of the Judge so stating would confer on this Court a jurisdiction not conferred by the Ordinance.

We have seen the notes taken by the learned trial Judge of the evidence in this case, and even had this Court jurisdiction under the circumstances to allow an appeal, we do not think that we would be justified in doing so; moreover,

Judgment. McGuire, J.

it appears from the affidavit of the plaintiff filed in support of his present application, that he was aware of the fact alleged therein at the time the cause of action arose, and gave credit to the defendant on the faith thereof. If so, it would be quite improper to permit him now to have a re-trial, when he chose to keep back at the trial the evidence he now claims he could have then offered. There must be an end to litigation some time, and to permit a party to put in so much of the evidence at the trial, and then to allow him a new trial to enable him to put in another portion of it on the same issue, would be, in our opinion, a course which, if ever allowed, ought only to be allowed under very peculiar circumstances, not suggested in this case.

Application refused.

McDOUGALL v. McLEAN ET AL. (1).

Appeal—Amount in controversy—Special leave.

The plaintiff sued for $617.85, and defendants with their defence, while denying liability, brought into Court $367 as being sufficient to satisfy the plaintiff's claim; the trial Judge found the plaintiff entitled to $543.22, and applied the $367 in Court, leaving, with an adjustment of interest, a balance due to the plaintiff of $182.43.

Held, that the amount in controversy exceeded $200, and the defendant was entitled to appeal without special leave.†

[*Court in banc, June 5th, 1893.*

Plaintiff sued for $617.85. Defendants, with their defence, though denying liability, brought into Court $367, as being enough to satisfy plaintiff's claim. The plaintiff joined issue as to the defence. The learned trial Judge found the plaintiffs entitled to recover $543.22. He applied the $367 in Court upon that amount which, including some interest, left a balance due plaintiff of $182.43, for which he directed that plaintiff should have judgment.

† See the Rule set out in full in the head note to the preceding case of *Chalmers* v. *Fysh*, and the note thereto.

Statement.

The defendants having given notice of appeal, the question arose under section 435 of the Judicature Ordinance, R. O. 1888, c. 58,† as to whether the amount in controversy on the appeal exceeded $200, so as to give the defendants the right of appeal without special leave.

RICHARDSON, J., made an order settling the appeal book subject to the objection, and the appeal was likewise inscribed subject to the same objection.

The preliminary objection was argued on the 5th day of June, 1893.

W. J. Nelson, for the appellants. Payment into Court may be made under sections 107 and 111 of the Judicature Ordinance.§ Where the payment is made under 107, the defendant admits the cause of action sued on, but if paid in under 111, it is a denial of liability, and merely an offer to end litigation. Wilson Jud. Act, Rule 255. Plaintiff not having accepted the amount paid in has put the whole matter in issue, and, therefore, the amount in controversy is the whole claim of $617.85.

T. C. Johnstone, for respondents. The amount now in dispute is less than $200. The rules of 1883 make no difference as to the effect of a payment into Court with a denial of liability. It is still an admission of the cause of action.

[*June 5th, 1893.*]

The Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE and MCGUIRE, JJ.) held that the defendant had a right to appeal without special leave.

§ See now Rule 130, Jud. Ord. C. O. 1898, c. 21, which, in some respects, differs from these sections.

MacDONNELL ET AL. v. ROBERTSON.

Sheriff—Public officer—Protection—Wrongful seizure—Principal and agent—Trust—Fraud.

The sheriff is not, when executing a *fi. fa.* at the suit of a private individual, a public officer entitled to notice and other protection under s. 468 of the Judicature Ordinance, R. O. 1888, c. 8.†

McWhiter v. *Corbett*[1] followed.

[ROULEAU, J., *June 25th, 1892.*

On the evidence in this case, it was found that an arrangement, between merchants and an insolvent person, against whom there were unsatisfied judgments—whereby the former supplied the latter, as their agent, with goods to be exchanged with Indians for furs, which were to be delivered for sale to the merchants, who were to retain from the proceeds of the sale of the furs the invoice price of the goods, plus 10 per cent. thereon and 2½ per cent. of the selling price of the furs, the agent getting all further profit as his remuneration—was established as against the defence, that it was an arrangement in fraud of the agent's creditors; and it was *held*, that such an arrangement was legal, and that therefore the merchants were entitled to damages against the deputy sheriff, who had seized some furs comprised in the agreement under an execution against the agent.

[ROULEAU, J., *February 16th, 1893.*

[*Court in banc, June 12th, 1893.*

Statement. This was an action for conversion of a quantity of furs.

The statement of defence, besides traversing the allegations of the statement of claim, contained the following paragraph:

(3) That the said defendant is the deputy sheriff of the Northern Alberta Judicial District, and is a public officer, and in purusance of his duty as a public officer, seized the goods described in the particulars in said statement of claim, under said writ of *fieri facias de bonis*, against said Tupper, duly issued at the instance of Norris & Carey out of this honorable Court, and delivered to him in due course to be executed; and that no notice in writing or otherwise of this action, and of the cause thereof, was given to the defendant

† Now Rule 536, Jud. Ord. C. O. 1898, c. 21.

[1] 4 U. C. C. P. 203.

one month before the said action was commenced, as is required by section 468 of the Judicature Ordinance of the Revised Ordinances of the North-West Territories of 1888. Statement.

The plaintiffs joined issue and, as to the third paragraph of the statement of defence, objected that the defendant in seizing the goods under a writ of *fieri facias de bonis*, at the instance of Norris & Carey against said G. F. Tupper, was not a public officer acting in discharge of his duty as such within said section 468, and was not entitled to notice of action thereunder.

The objection in law was set down and argued before ROULEAU, J., on the 9th May, 1892, at Edmonton.

N. D. Beck, for defendant.

S. S. Taylor, for plaintiff.

[*June 25th, 1892.*]

ROULEAU, J.—On the authority of *McWhiter* v. *Corbett*,[1] allowed the objection in law.

The case came on for trial before ROULEAU, J., at Edmonton at the October Sittings, 1892.

N. D. Beck, for plaintiff.

S. S. Taylor, for defendant.

It appeared that the defendant, as the deputy sheriff, had seized the furs in question under a writ *fi. fa.* in a suit of Norris & Carey v. Tupper; that on the furs being claimed by the plaintiffs, Norris & Carey indemnified the defendant, who thereupon refused to recognize the plaintiffs' claim, and was proceeding to sell, when the plaintiffs paid the amount of the execution under protest and brought the present action.

The evidence on which the ownership of the furs was determined was substantially as follows:

For the plaintiff:

William McDonnell: Am member of the firm of McDonnell & Co. Am trading for the purpose of collecting furs. Have my centre of business at Bear's Hill. Have a

Statement.

number of persons trading for us at different points. G. F. Tupper is one of them. Made arrangements with him in August last. It was verbal. Told him the only way I could supply him was to appoint him as my agent and deliver the goods to him at Victoria. We were to get half of the profits of his trade. We thought that after he had paid his ordinary expenses, 25 per cent. profit on the goods would be all he could realize; so that my firm's share would be 12½ per cent. made up this way: 10 per cent. on the face of the invoice and 2½ per cent. on all furs. Under that agreement he was not to buy goods from any body else. We were to supply him altogether. He was not allowed to sell furs to any body else; he was to bring the furs to us. All unsold goods were to be brought back in good order. We supplied him with a large quantity of goods from time to time. My ledger, at page 37, headed Geo. F. Tupper, Agent, Saddle Lake, shows his account from August 1st, 1891, to Sept. 20th, 1892. In March, 1892, our account against Tupper at the time of seizure amounted to $2,105.55 and his credit $709.78, leaving a balance of $1,395.87 representing the goods and freights to him. The title in the day book is the same. Have Tupper as agent because I knew there were judgments against him. We paid the freights and bought the goods and paid for them, and sent them up to him. If Tupper got any goods from other people it was on our order and we paid for them. Gave a verbal order to Cameron to supply certain goods to Tupper on my account. Wrote to Norris & Carey to same effect. Letter dated 28th October, 1891, filed as Exhibit "A." Reply was received, including the invoice of goods from Norris & Carey (letter filed as Exhibit "B.") Those things I ordered from Norris & Carey went to Tupper under the same arrangement. Saw the furs seized, and I deposited the money and I got them. We claim them as our furs, because they have been exchanged for our goods as per agreement with our agent Tupper. Each lot of fur we get from our agents is put up differently and sold separately, and the proceeds credited to the accounts of our different agents. Tupper does not belong to our firm.

He is our agent at Saddle Lake. Am trusting him as an honest man, that is all; 12½ per. cent represents the profits I make out of the goods to Tupper. There are other small profits, as for instance on freighters whom we pay in goods. Had no winding up with Tupper since our present arrangement. Since August 1st, Tupper was credited twice with proceeds of fur. The furs seized were credited to Tupper as soon as I got the return from Chicago where I sold them. Gave Tupper fifteen different ledger entries. All Saddle Lake cheques may be made to different parties endorsed by them to Tupper and held by him as cash, and I gave him credit for them. As far as I know, Tupper has not taken any stock. Don't know the amount of goods Tupper has in hands. Have nothing to with Tupper's losses except if the goods were burnt I would be the loser. Have nothing to do with his profits either. He has only to pay me my 12½ per cent. profit, as I explained before. No time stated in the agreement. The only thing that would stop it would be Tupper's dishonesty as far as I am concerned. Have no other papers concerning this matter in dispute. Claim the right to inspect his own books if I were going to Saddle Lake. Statement.

Geo. F. Tupper: Have been trading in connection with McDonnell & Co. since August or September, 1891. They were to supply me with goods at invoice price plus ten per cent. and 2½ per cent. for the furs. I was to trade those goods for furs, and they were to dispose of the furs and charge 2½ per cent. The trading post was at Saddle Lake. MacDonnell & Co. were to send those goods there by freighters. I was to send the furs or take them to MacDonnell & Co.'s store at Bear's Hill. Was able to change my trading post. No definite arrangement made as to quantity of furs. Was to send all the furs I got. Was not at liberty to sell them to any body else. As a matter of fact sent them all the furs I got. In pursuance of that agreement I got supplied with goods. The first lot of goods was got in August, 1891, and was sent to me at Saddle Lake by freighters. MacDonnell & Co. paid the freighters. Got goods later on from others

Statement.

on MacDonnell & Co.'s order. Paul brought me goods also from Norris & Carey, bought by MacDonnell & Co. Last March was relieved of my furs by Deputy Sheriff Robertson, who seized them at Fort Saskatchewan. Told the deputy sheriff at the time that the furs were not mine, but MacDonnell & Co's. After that I went to MacDonnell and he returned here with me, and eventually the furs were released. Traded for those furs with the goods MacDonnell & Co. supplied. It is the fact with all the furs that were seized. Was taking those furs at the time to MacDonnell & Co.'s because they belonged to them. Bought no goods from any body else, because the arrangement I had with MacDonnell & Co. did not allow me. Never disposed of any furs to any body else for the same reason. Never got any wages from MacDonnell & Co. The price of the goods were invoiced to me at cost price, plus 10 per cent, according to agreement. Owe a large amount of money to Norris & Carey for a judgment they got against me. That judgment was obtained before I made that arrangement with MacDonnell & Co. I told Norris & Carey that I would not pay more than the original debt; and not the costs. The first case was withdrawn. Had no money to pay them before the second suit was entered. Never intended to pay the judgment. When I made arrangements with MacDonnell & Co., I had not Norris & Carey particularly in view. Had not changed my original intention. Told MacDonnell that I had no intention to swindle Norris & Carey of their debt, but that I would never pay the costs incurred in it. Was to deliver all furs at MacDonnell's place. Furs were seized at Fort Saskatchewan. Prior to seizure they were not delivered to MacDonnell & Co.; they were in transit. Owe a large quantity of debts, besides Norris & Carey. Paid during the last five years about $2,000 of old debts—dead horses.

W. S. Robertson, Deputy Sheriff: Am defendant. Seized the furs in question on 27th February last. Heard what Mr. Tupper said and it is correct. Held those furs a few days and was paid by cheque the whole amount of judgment and costs. The payment was made under protest, which I

made a note of on Exhibit "F." Cheque produced and filed as Exhibit "G." I released the furs after getting the cheque. Those furs were seized by me under execution from Norris & Carey in my official capacity as deputy sheriff. Am indemnified in this matter by Norris & Carey. Statement.

John Cameron: Know Mr. MacDonnell and Mr. Tupper. Consider MacDonnell the best man financially. Supplied goods for MacDonnell & Co. for that post. I understood Mr. Tupper was in charge. On several occasions I did it within the last year and a half. Mr. MacDonnell told me any time Mr. Tupper wanted any goods, to give them to him and charge them to MacDonnell & Co. Have no account against Tupper for the last year and a half. Know nothing about the arrangement between MacDonnell & Co. and Tupper. Simply know that MacDonnell ordered goods for Tupper to be charge to MacDonnell & Co.

For the defence:

E. F. Carey: Know G. F. Tupper and plaintiffs for several years. Prior to the seizure in question Tupper owed me the judgment referred to in this case. Tupper was requested to pay the amount several times before he was sued. This seizure was the first opportunity to collect the money, and Tupper's tracks were well covered. Had a conversation with regard to the offer of settlement of Tupper's debt with MacDonnell. He offered me fifty cents on the dollar on the original debt. It was understood by MacDonnell and myself that MacDonnell was simply acting for Tupper to defraud his creditors: MacDonnell persisted in saying that Tupper would pay, and I insisted that Tupper was a dishonest man and would not pay. Tupper never offered to make any settlement with me since the judgment. In spring of 1889 he made an offer and he did not carry it out. Tupper was trading for Tweed & Ewart then, and he offered to pay my account with furs. And I went to Lac la Biche, and when I came back, I found that Tupper had traded his furs with plaintiffs, for goods. MacDonnell only offered me one-half of the amount of the original amount. Fifty cents

Statement.

on the dollar, on the whole amount would have paid the original debt. MacDonnell did not tell me Tupper asked him to settle that amount for him.

In rebuttal:

William MacDonnell: Often urged Tupper to settle that debt, after having argued it so often with Mr. Carey; Tupper always refused to pay more than the debt. Made an offer of fifty cents on the dollar on the total amount, the result of which would have paid the original debt without the costs. That offer was made after I urged Tupper to pay. I had enough credit at the time for Tupper to pay that amount. The goods I got from Norris & Carey for Tupper were just the same as those I got for myself at Bears' Hill.

EXHIBIT "A."

October 28th, 1891.

Messrs Norris & Carey, Edmonton.

Gentlemen,—Please furnish to bearer goods as per enclosed order. Make prices as low as you can. Send us your account by mail. Make out a bill of lading in favor of G. F. Tupper, Agt., Victoria, for Wm. MacDonnell & Co., and please tell freighters amount of freight and the same thing on invoice to us.

Yours, Resp'y,

Wm. MacDonnell & Co.

Philip Paul, the bearer, will hand you a small package of silver change. Please credit our account.

EXHIBIT "B."

Edmonton, Alberta, 30th October, 1891.

Messrs. William MacDonnell & Co.,

Bears Hills Plain.

Gentlemen,—Enclosed please find invoice of goods ordered, which we have to-day shipped by Phillip Paul to Victoria as requested. We regret that our teas have not

arrived yet, and in consequence had to supply the 30-cent tea, this being the best we could do under the present circumstances. We also enclose shipping bill and statement to date as requested. Statement.

Yours Respectfully,
Norris & Carey.

SHIPPING BILL.

Edmonton, 30th October, 1891.

Received in good order and condition from Norris & Carey the following goods, viz.:

* * * * *

Which I agree to deliver in like good order and condition to G. F. Tupper, at Victoria.

his
Witness (Sgd) Phillip (X) Paul.
(Sgd) T. Hourston. mark.

STATEMENT.

Edmonton, Alberta,
30th October, 1891.

Norris & Carey, retail and wholesale grocers, sold to Messrs. Wm. MacDonnell & Co., Bears Hill Plain, for G. F. Tupper, at Victoria.

* * * * *

[*February 16th, 1893.*]

ROULEAU, J.—This is an action for damages against the defendant for having seized goods in the possession of one Tupper. Said goods, it is contended, were the property of the plaintiffs.

The plaintiffs MacDonnell & Co. advanced a certain quantity of goods to the said Tupper to trade for furs, and the furs were to be disposed of by MacDonnell & Co., and credit for them was to be given to Tupper for the full amount less 2½ per cent.

When Tupper was going to deliver the furs to MacDonnell & Co., the same were seized in his possession at Fort

Judgment. Rouleau, J.

Saskatchewan by the defendant the deputy sheriff. The said furs afterwards were released on payment, under protest, in full of the execution by MacDonnell & Co.

Hence, this suit against the deputy sheriff, who is indemnified by the execution creditors.

The point to be ascertained is this: Was Tupper proprietor of the said furs or not?

I think the evidence on this point is incontrovertable. Tupper was merely MacDonnell & Co.'s agent for a certain purpose, to wit: for the purpose of trading goods for furs in general, after paying 10 per cent. profit to MacDonnell & Co. for their goods and 2½ per cent. on the proceeds from the furs. If there were any more profits Tupper was to get them for his remuneration. In other words: MacDonnell & Co. put some property in trust in the hands of Tupper for the purpose above mentioned, and it is a well-known principle of law, that all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether in its original or its altered state, continue to be subject or affected by the trust. In *Frith* v. *Cartland*,[2] Vice-Chancellor Page-Wood has stated the rule to be as follows: "A trustee, or person in the position of trustee, can never assert a title of his own to trust property. He may destroy that property and render himself liable in consequence. If it is stock, he may sell that stock and invest the proceeds in other property. If he destroys the trust fund by paying away the money, the trust is at an end, but if he invests it in other property and that can be traced, he is still in possession of the trust property, and to that he can never assert a right."

If, according to the evidence, Tupper was acting only as plaintiffs' agent or trustee, which makes no difference in law, in disposing of the goods advanced, there is no doubt that the proceeds of those goods belonged to the plaintiffs.

True, that when MacDonnell & Co. advanced the goods, they knew that Tupper was greatly involved; but I don't

[2] H. & M. 417; 34 L. J. Ch. 301; 11 Jur. N. S. 238; 12 L. T. 175; 13 W. R. 493.

think it can be contended for one moment that MacDonnell & Co. made that agreement with Tupper for the purpose of defrauding Tupper's creditors, but it was to secure themselves for advances they were going to make. Judgment. Rouleau, J.

It would be just as unmaintainable as to say that a vendor cannot take a chattel mortgage on things sold by him to another, in order to secure himself against all comers.

Having come to the conclusion that Tupper was acting only as agent or trustee for MacDonnell & Co., and that the latter were entitled to the possession and sale of the furs under their agreement, I therefore give judgment in favor of plaintiffs for the sum of $232.97 and interest thereon from the 8th March, 1892, and costs of this suit. As there was no special damage claimed by the plaintiffs, I will allow none.

From the foregoing judgment at the trial, the defendants appealed to the Court *in banc*.

The appeal was argued on the 6th June, 1893.

S. S. Taylor, for the appellant, the defendant, contended that the evidence showed that the whole arrangement between the plaintiffs and Tupper was a fraudulent scheme to defeat Tupper's creditors.

N. D. Beck, for the respondents, the plaintiffs, contended that no fraud was shown; that even though the arrangement was expressly for the purpose of preventing the goods and furs from being subject to the claims of Tupper's creditors, the arrangement was perfectly lawful; that at least it amounted to an equitable assignment of the furs to the plaintiffs on account of their claim against Tupper, assuming him to be merely their debtor; that the Court could not possibly but conclude that so much at least was intended by the parties, even if led to believe that evidence on the part of the plaintiffs was deliberately untruthful on some matters of detail. In any case the question of fraud was one depending on the conduct and demeanor of the witnesses at the trial, and hence the trial Judge's findings should not

Argument. be disturbed. He referred (on the weight to be given the trial Judge's finding) to *Metropolitan Railway Co.* v. *Wright*;[3] *Phillips* v. *Martin*;[4] and (in the other points) to *Dominion Bank* v. *Dandson*;[5] Blackburn on Sales, 268, 271, 278, 279; White & Tudor's Leading Cases, Vol. 1. p. 837; notes to *Ryall* v. *Rolls*; *McMaster* v. *Garland*;[6] *McPherson* v. *Macdonald*;[7] *Lane* v. *Dungannon*;[8] *Banks* v. *Robinson*;[9] *Blake* v. *Izard*;[10] *Reeves* v. *Barlow*.[11]

S. S. Taylor, in reply.

[*June 12th, 1893.*]

RICHARDSON, J.—In this appeal the defendant seeks to have the judgment of ROULEAU, J., for the plaintiffs reversed and entered for defendant on the grounds:

1. That the judgment is contrary to the evidence.

2. That the judgment is against law and the weight of evidence.

The action is by plaintiffs against a deputy sheriff who, under execution in a suit of Norris & Co. v. Tupper, seized some furs, which plaintiffs claimed as theirs.

The furs when seized were in the possession of this man Tupper, and it was claimed at the trial, supported by evidence which the trial Judge held authorized it, that notwithstanding the furs were in Tupper's possession, they were really plaintiffs'.

The defence urged was fraud in that plaintiffs' claim was a scheme concocted between plaintiffs and Tupper for the purpose of preventing Norris & Co. from realizing their execution, the furs being really Tupper's.

There being evidence before the trial Judge in support of plaintiffs' title to the goods the question for this Court is—

Is the trial Judge so clearly wrong that this Court, after reading the evidence taken at the trial and hearing the argu-

[3]L. R. 11 App. Cas. 152; 5 L. J. Q. B. 401; 54 L. T. 658; 34 W. R. 746. [4]15 App. Cas. 193. [5]12 O. A. R. 90. [6]8 O. A. R. 1. [7]18 N. S. R. 242; 12 S. C. R. 416. [8]22 O. R. 264. [9]15 O. R. 618. [10]16 W. R. 108. [11]53 L. J. Q. B. 192; 12 Q. B. D. 436; 50 L. T. 782; 32 W. R. 672.

ments made before it, can come to no other reasonable conclusion than the opposite of that arrived at by him, for if so then this Court should interfere. Judgment. Richardson, J.

The rule upon which this Court acts and has acted in such instances is that laid down in *Brown* v. *Commissioner for Railways*,[12] which briefly is, that a verdict being one which a jury can reasonably find, should not be set aside as against the weight of evidence, and in *Ferrand* v. *Bingley*,[13] that the verdict must be greatly against the weight of evidence to induce the Court to interfere.

It is not questioned that there was evidence given to support plaintiffs' contention as to their ownership of the furs seized by defendant, but it was urged that this evidence indicated a plot or scheme between plaintiffs and Tupper in fraud of Norris, a creditor, and that the trial Judge should have so found.

The question was one of fact, and there being evidence upon which, as I hold, the trial Judge could reasonably find as he did against fraud, this Court will not interfere.

The appeal will be dismissed and with costs.

MACLEOD, ROULEAU, WETMORE and MCGUIRE, JJ., concurred.

Appeal dismissed with costs.

[12]59 L. J. P. C. 62; 15 App. Cas. 240; 62 L.T. 469. [13]8 Times L. R. 70; 56 J. P. 277.

McDOUGALL v. McLEAN ET AL. (2).

Bill of Exchange—Unincorporated body—Officers—Acceptance — Personal liability—Mechanics' Lien Ordinance—Right of retention.

Plaintiff brought an action on the following document: "The Board of Managers, Presbyterian Church, Moose Jaw. Please pay H. McDougall the sum of $817.85 on my account and oblige me. James Brass," and accepted as follows: "Accepted. D. McLean, Chairman; A. E. Potter, Treasurer." It was found as a fact that McLean and Potter were members of the Board, an unincorporated body.

Held, that (1) the document was a bill of exchange, and (2), following *Owen* v. *Van Uster*,[1] that McLean and Potter were personally liable thereon.

Brass was the contractor with the board for the erection of a manse. If the contract had been completed $817.85 would have been owing to him; but the trial Judge found that it had been left uncompleted to the value of $80. This was allowed to be set off against the amount of the plaintiff's claim; but it was also claimed that the defendants were entitled to retain 10 per cent. of the contract price for thirty days after the completion of the contract, under the provisions of the Mechanics' Lien Ordinance.†

Held, that the defendants were not so entitled.

The notes taken at the trial are conclusive of what took place thereat.

[RICHARDSON, J., *October 12th, 1892.*

[*Court in banc, June 12th, 1893.*

Statement.

This was an appeal from a judgment of RICHARDSON, J., and a motion for a new trial. The case was tried at Moose Jaw on 12th October, 1892.

Plaintiff sued to recover $617.85 on a document which was in the following terms:

Moose Jaw, January 28th, 1892.

The Board of Managers Presbyterian Church,
Moose Jaw.

Please pay H. McDougall the sum of Eight Hundred and Seventeen Dollars and Eighty-five cents ($817.85) on my account and oblige me.

James Brass.

Accepted.

D. McLean, Chairman. A. E. Potter, Treasurer.

†R. O. 1888, c. 48, s. 7. now C. O. 1898, c. 59, s. 7.

[1] 10 C. B. 318; 20 L. J. C. P. 61.

Statement.

Brass was contractor for the erection of a manse. The balance due him on the contract was represented by the document in question which was delivered by him to the plaintiff and accepted by the defendants. Plaintiff sued on the document as an assignment of the debt and in the alternative as a bill of exchange. At the trial the plaintiff abandoned his claim on the document as an assignment of the debt. The defences set up were in effect:

(1) Denial of indebtedness of the Board to Brass.

(2) That the acceptance of the order was conditional and the condition had not been performed.

(3) A denial of personal liability on the part of the defendants.

(4) Payment of $200 before action and payment into Court of $367.85.

Defendants also claimed to be entitled to retain 10 per cent. on the contract price under The Mechanics Lien Ordinance.

The trial Judge found as facts that while, if Brass had completed his contract $817.85 would have been due him, there was $80 worth unfinished, and that plaintiff had knowledge of the condition of affairs. The trial Judge held that defendants were personally liable and were not entitled to retain the 10 per cent. under The Mechanics Lien Ordinance, and gave judgment for plaintiff for balance after deducting the $80 and a payment of $200.

From this judgment defendants appealed. The appeal was argued on 7th June, 1893.

W. J. Nelson, for the defendants, appellants.

The intention of the parties must govern. From the document itself and from the oral evidence, it is clear that it was intended for an order and not a bill of exchange: *Lane* v. *Dungannon Agricultural D. P. Association*.[2] The acceptance is by defendants as officers; as individuals they could not accept. The fact as to who was intended to be

[2] 22 O. R. 264.

Argument.

charged can be ascertained from the document itself. See judgment of WETMORE, J., in *Fergusson* v. *Fairchild*,[3] *Madden* v. *Cox*.[4] The oral evidence also bears out the contention. Under the Mechanics' Lien Ordinance defendants are under the duty of deducting ten per cent. of the contract price until thirty days after the completion of the contract. There is no evidence that defendants were members of the board. The only case in which members of a board are liable is where the bill is addressed to them by name. The document alone must be looked to, oral evidence is not admissible: *Bult* v. *Morrel*.[5]

The learned counsel proceeded to argue the motion for a new trial upon affidavits which did not appear in the appeal book, and which, referring to the trial, alleged facts of which no record appeared in the notes of the trial Judge. The Court declined to hear the motion, holding that the notes of the trial Judge were conclusive as to all that had taken place at the trial.

T. C. Johnstone, for plaintiff, the respondent, was not called on.

[*June 12th, 1893.*]

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

WETMORE, J.—The appellant set up that the document set out in the statement of claim as a bill of exchange was not a bill of exchange, as the parties did not intend it to be one or treat it as such, that it was merely an order for the payment of money. We disposed of this objection at the argument, holding that the document came within the definition of an inland bill of exchange, as set out in all the books treating upon such documents, and that the opinions of the parties to it could not take away its legal effect, nor could their verbal understandings alter the legal effect of the written document.

[3] 1 N. W. T. R. No. 3, 48; 1 Terr. L. R. 329. [4] 5 O. A. R. 473, pp. 480, 495. [5] 12 A. & E. 745; 10 L. J. Q. B 52.

Judgment. Wetmore, J

The Bill of Exchange was addressed "To the Board of Managers, Presbyterian Church, Moose Jaw," and was drawn by James Brass. The defendants accepted in the following terms, "Accepted. D. McLean, Chairman; A. E. Potter, Treasurer."

The Board of Managers of the Church was not an incorporated body. It was urged that the defendants were not personally liable.

In *Owen* v. *Van Uster*,[1] the bill was addressed to "The Allty-Crib Mining Company near Talybart Aberystwith," and was accepted by the company as follows: "Per pro. the Allty-Crib Mining Company, payable at Messrs. Williams, Deacon & Co., W. T. Van Uster, London Manager."

The Allty-Crib Mining Company was not an incorporated company, and it was set up that the defendant was not liable. In giving judgment, Jervis, C.J., is reported at p. 324 as follows: "It appears from the form of the acceptance that the defendant was the manager of the company, and it appeared from the other evidence in the cause, that four persons had, in the year 1849, agreed to form a company for the purpose of working this mine, and that it had been worked accordingly. It was therefore a question for the jury, whether or not the defendant was a member of the firm. They found that he was. Being then a member of the firm, the next question is whether the acceptance by one member in his own name of a bill addressed to a firm composed of four, imposes any liability on the individual who so accepts. It seems from the authorities * * * that under such circumstances the acceptance is binding upon the individual so accepting." The other members of the Court expressing themselves in the same or a similar way, the defendant was held liable.

In this case, one of the defendants accepts as chairman and the other as treasurer of the board. The plaintiff swore that two days after he got this document from Brass, he took it to the board of management in Chalmers' store, and that the two defendants, Chalmers, Rollo, and Lang, were there, and that he (the plaintiff) remained there till after

Judgment. Wetmore, J.

the order was accepted; that Chalmers opposed the acceptance of the order, and that there was an animated discussion.

I think this is evidence which warranted the learned Judge in holding that the two defendants and Chalmers, Rollo and Lang were members of the board. There may have been other members of the board, but that is not material.

Under the authority of the case above cited, that was sufficient to hold the defendants to their acceptance. It was urged that the learned trial Judge should have deducted from the amount of the judgment ten per cent. of the price to be paid to the contractor Brass. That ground might very possibly have been successfully urged if the plaintiff had rested his claim on the assignment of the contractor's claim upon the contract. The plaintiff abandoned that part of his claim, and rested his case on the bill of exchange entirely, and on that claim the defendants were not entitled to be allowed the deduction.

Appeal dismissed with costs.

TOWN OF EDMONTON v. BROWN & CURRY.

Crown lands—Patent—Squatter—Trail—Highway — Dedication — Conditional dedication—Appeal—New point—Notice of appeal.

The defendants, claiming under the original squatter on certain Dominion lands, erected a building thereon fronting on an old trail; the original squatter subsequently, in expectation of the Crown recognizing the claims of himself and his assigns, registered a plan of the entire land, whereon was shown a highway approximately conforming to the lines of the old trail, but so that the building in question projected into the highway shown on the plan. The Crown did, afterwards, grant a patent to the original squatter for the entire land, excepting the portions shown on the plan, as reserved for the defendants and others in like position. These excepted portions as they appeared on the plan approximately conformed in size and position to the portions which the squatter had assumed to convey to the defendants and others. Patents for these excepted portions were granted by the Crown to the defendants and others, respectively.

Held, that the Crown, by issuing patents in accordance with the registered plan, had adopted it, and thereby dedicated to the

public the highway as shown thereon; that the plaintiff municipality, within which the land lay, having demanded of the defendants the removal of the building, so far as it encroached on the highway as shown on the plan, and the defendants having refused to comply with the demand, the plaintiff municipality were entitled to a mandatory injunction to abate the building as being a nuisance.

Held, also, that the defendants were consequently not entitled to compensation as owners or occupiers under the provision of the Municipal Ordinance.†

[ROULEAU, J., *February 8th, 1893.*

On appeal to the Court *in banc*, counsel for the defendants (appellants) having sought to raise for the first time the point that, although there had been a dedication, such dedication was made and accepted subject to such obstructions as existed upon it at the time of dedication, the Court, considering that the point was not covered by any of the grounds stated in the appellants' notice of appeal,

Held, that the appellants were not at liberty to raise the point at this stage.

Judgment of ROULEAU, J., affirmed.§

[*Court in banc, June 13th, 1893.*

Statement of claim: Statement.

1. The plaintiffs are a town municipality, incorporated by ordinance of the North-West Territories.

2. A public highway, known as Jasper Avenue, is the chief and most important highway within the limits of the said municipality.

3. The northerly boundary line of Jasper Avenue, between the highways known as Fraser Avenue and Namayo Avenue, runs in a direct line between the said streets.

4. Jasper Avenue was laid out as a public highway as aforesaid by official surveys and plans made by the proper officers in that behalf of the Government of Canada, the land upon which it was so laid out being then vested in the Crown.

5. The defendants are the owners and occupiers of a certain large building and are obstructing Jasper Avenue by allowing the said building to project beyond the direct line forming the northerly boundary of Jasper Avenue, and

† R. O. 1888, c. 8, s. 269, s.-s. 5 & 6; see now C. O. 1898, c. 70, s. 245.

§ Affirmed on the merits, 23 S. C. R. 308, and see 28 S. C. R. where the judgment of the Supreme Court appears at length.

Statement.

to stand upon Jasper Avenue in such manner as to prevent the plaintiffs from properly grading and draining Jasper Avenue, laying sidewalks thereon and otherwise improving the same; and so as to decrease the value of the assessable property thereon on both sides of the said building.

6. The defendants although requested to remove the said building have refused to do so, claiming to be entitled to some estate or interest in the portion of Jasper Avenue upon which the said building projects.

The plaintiffs claim:

(1) A declaration that the northerly boundary of Jasper Avenue, between Fraser Avenue and Namayo Avenue, runs in a direct line between the said avenues, and that the defendants' building, so far as it projects southerly beyond the said northerly boundary, is an obstruction and a nuisance upon Jasper Avenue.

2. An order or injunction that the said building be removed or abated.

The defence besides traverses of the material allegations of the statement of claim alleged:—

That prior to the year 1881 one Colin Fraser was the occupant of a certain piece of land, of which the land in question forms a part, now within the said municipality, and which piece of land was subsequently surveyed in 1882 by the Government of Canada, and called River lot number 10 of the Edmonton settlement survey;

That at all times up to the time of the said survey, the title to the said River lot 10 remained in the Crown;

That on the 9th day of February, 1881, the said Colin Fraser, then being the occupant of the said land, subsequently surveyed as River lot 10, bargained, sold and conveyed to one James McDonald, a certain portion of the said River lot, which portion is described as follows: "that part of Colin Fraser's then present claim situate on the east side his (said Colin Fraser's) ploughing, and fronting on the then

main travelled road, the lot to be of the following dimensions, to wit; beginning at a point 3 feet east of the said ploughing, and extending eastward along the main travelled road 50 feet, thence northward parallel with the ploughing aforesaid 100 feet, thence westward to within 3 feet of the ploughing aforesaid 50 feet, thence southward to the main road 100 feet. Statement.

That on or about the said 9th day of February, James McDonald bargained and sold to the defendants all his interest in the said piece of land, and the defendants immediately entered into possession thereof and erected thereon valuable buildings (being the buildings in question), and have been in possession of the said buildings and land ever since;

That the said land conveyed by the said Colin Fraser to the said McDonald, and sold by the said McDonald to the said defendants, extended out to a main travelled trail, which trail at that point runs along about the centre of said Jasper Avenue;

That subsequent to said sale by Fraser to McDonald, Fraser sold and conveyed his interest in other portions of the said River lot 10 to various parties, and subsequently thereto sold and conveyed his interest in the remaining portion of said River lot 10 to one Samuel Pritchard;

That Samuel Pritchard, after his purchase as aforesaid, to wit, about 1st January, 1883, procured a subdivision to be made by George A. Simpson, D.L.S., of the said piece or parcel of land which he had previously purchased from the said Colin Fraser, and in making the said subdivision survey the said Pritchard assumed to and did lay out what is now called by the plaintiffs "Jasper Avenue," over and along the front part of the land which had previously been sold as aforesaid by Fraser to the said McDonald, and which was and had been for a long time prior thereto, in the possession of the defendants as hereinbefore mentioned, upon a portion of which land the defendants erected their said buildings, and which portion the plaintiffs now claim as part of Jasper Avenue;

Statement.

That Pritchard subsequently, to wit: about the 15th March, 1886, caused the said plan to be registered in the registry office; and at the time of the said subdivision survey, the title to the whole of the said land, which the defendants had bought as aforesaid, still remained in the Crown;

That after the registration of the said plan, the Crown by deed granted to the defendants a certain portion of the said land so purchased by them as aforesaid from the said McDonald, and the patent to Pritchard was not issued by the Government of the Dominion of Canada until the 31st August, 1887, and the title to said land until that time remained in the Crown;

That for the reasons aforesaid, the defendants say that there has never been a dedication for a highway on any portion of the land on which their said buildings are erected, and that therefore the buildings complained of, are not upon any portion of any highway within the said municipality;

That they are the owners and occupiers of the land which the plaintiffs claim as being part of Jasper Avenue, and upon which their said buildings are erected, and that the plaintiffs have not prior to this action, paid the defendants the value of the land which the plaintiffs wish to appropriate as and for part of Jasper Avenue;

That they have not compensated the defendants for the damages which they would sustain by reason of their having to remove the said buildings, or which would necessarily result by reason of the said municipality exercising the powers referred to; nor have the plaintiffs referred the said matter to arbitration as they were bound to by law, and that therefore the plaintiffs are not entitled to any declaration as claimed or to any order or injunction against the defendants for the removal of the said buildings or abatement of the nuisance complained of.

The action was tried at Edmonton before ROULEAU, J., without a jury.

N. D. Beck, for plaintiff.

S. S. Taylor, for defendants.

[*February 8th, 1893.*]

Judgment.

Rouleau, J.

ROULEAU, J.—The statement of claim alleges that the defendants' building projects southerly beyond the northerly boundary of Jasper Avenue, and is an obstruction and a nuisance upon the said Jasper Avenue, which is a public highway, and that an order or injunction be given that the said building be removed and said nuisance be abated.

The defendants plead that they were long previous to the survey of Jasper Avenue, proprietors and in possession of the land upon which their building is erected; that there never was any dedication of that part of said Jasper Avenue as a public highway, and that they cannot be compelled to remove said building without compensation.

By the evidence, it appears that the defendants, through James McDonald, purchased in 1881 from Colin Fraser, his claim and interest in the parcel of land in question, which was bounded south by a road or travelled trail. It is on that piece of land that the defendants built their store. In August, 1886, a plan prepared by Geo. A. Simpson, D.L.S., was registered as Plan "A." That plan comprises part of lot 10, and includes the property of the defendants, and shows Jasper Avenue without any obstruction. In 1887 the Dominion Government granted to the defendants and others the patents of their land, according to the said registered plan, thereby dedicating Jasper Avenue as a public highway or street. In granting the defendants' patent, the Government allowed them in rear of their lot, the same quantity of land as it was necessary to take away from them for Jasper Avenue.

As the title to the land was in the Crown till April, 1887, it could not be contended that the defendants were proprietors of the said land till that date; but it was argued that, although not proprietors, they were occupants, and as such were entitled to compensation from the plaintiffs. I think that the defendants can hardly sustain the position that they were rightful occupants. In February, 1886, the defendants and others signed a petition to the Government

Judgment.
Rouleau, J.

to grant them their patent according to Plan "A1," which is exactly, as far as it goes, the same as Plan "A" registered. Besides, it is shown by the correspondence filed in this case, that the Government refused to grant the patents to the petitioners' land, until a sketch of the plan of the subdivision of lot 10 as registered should be forwarded to the Department of the Interior.

Then the Government, by granting the patents to the petitioners, and also to Pritchard, according to Plans "A" and "A1," have, by that fact, dedicated Jasper Avenue as a public highway, and nobody else before had the right to make such dedication, because the title to lot 10 remained in the Crown till 1887, and before that date there was certainly no legal dedication.

Therefore, the defendants have been trespassers since 1887, and cannot claim to-day any compensation for their illegal possession; and when they were notified by the corporation to remove their building from the street, they should have done so.

In conclusion, I find that the defendants are not entitled to any compensation from the corporation; that the defendants' building, so far as it projects southerly beyond the northerly boundary, is an obstruction and a nuisance upon Jasper Avenue. I order that the said part of the building on Jasper Avenue be removed by the defendants between this and the first day of June next, 1893, in order to abate the said nuisance; and that the said defendants pay the costs of this action.

From this judgment the defendants appealed to the Court *in banc*.

The appeal was argued at Regina on the 5th June, 1893.

S. S. Taylor, for the appellants, the defendants. He contended there was no dedication, but if there was, it was made subject to, and must be taken subject to the existing obstruction constituted by the appellants' building, and

relied on *Fisher* v. *Prowse*,[1] *Robbins* v. *Jones*,[2] *Haggarty* v. *Prior*.[3] Argument.

[Counsel for respondents object that this point was not raised in the notice of appeal.]

Appellants' counsel also contended that the defendants were entitled to compensation as owners or at least as occupiers under the provisions of the Municipal Ordinance, R. O. 1888 c. 8, s. 269, s.-s. 5 and 6.

N. D. Beck, for the respondents, the plaintiffs.

[*June 12th, 1893.*]

WETMORE, J.—Only three grounds for appeal were stated at the argument herein by the appellants' counsel, and they are as follows:

1st. That at the time the dedication of the street in question was made, the building in question was there and existing, and it must be held that such dedication was made and accepted subject to such building being there, and therefore that the respondent could not obtain the relief sought for in this action.

2nd. That the appellants are the owners of such building and entitled under section 269, sub-sections 5 and 6 of the Municipal Ordinance, R. O. c. 8, to compensation before they can be compelled to remove it.

3rd. That the appellants are the "occupiers" of such building, and are under the same provisions of the Ordinance entitled to compensation before they can be compelled to remove it.

In my opinion there is nothing in the last two grounds of appeal. Sub-section 6 referred to, only provides that compensation shall be made when lands are "entered upon, taken or used by the corporation *in the exercise of its powers*," that means in the exercise of its powers of appropriation conferred by sub-section 5. As the corporation in this case

[1] 2 B. & S. 770; 31 L. J. Q. B. 212; 8 Jur. N. S. 1208; 6 L. T. 711. [2] 15 C. B. N. S. 221; 33 L. J. C. P. 1; 10 Jur. N. S. 239; 6 L. T. 523; 12 W. R. 248. [3] 8 Nova Scotia R. 532.

Judgment. Wetmore, J.

did not enter upon or take the street in question, or seek to enter upon or take the *locus in quo* by virtue of such powers, but by virtue of the dedication claimed, sub-section 6 does not apply. In fact the learned counsel for the appellants did not very strenuously urge these last two grounds of appeal, and practically accepted the construction of the Ordinance which I have adopted.

In taking the first ground of appeal which I have mentioned, the appellants' counsel distinctly stated at the outset that it was new, and had not been presented to the learned trial Judge. It is true that at a later stage of his argument he desired to withdraw that admission, and stated that he did not intend to make it, that he did urge that ground before the learned trial Judge against the plaintiff's right to succeed, and that all he intended to say to this Court was that he did not present it to the trial Judge in as clear and concise a manner as he presented it to this Court. Upon inspecting the pleadings, I cannot find that any such question was raised by the statement of defence. The appeal book contains a copy of the Judge's notes of the arguments before him at the trial. I cannot find among them any mention of such ground being taken, nor can I find in the judgment of the learned trial Judge that any such ground was dealt with. I cannot conceive his not dealing with it if it were taken, as the question is one undoubtedly of great importance, but to settle the whole question, the learned Judge informs us that no such ground was taken before him. That is conclusive upon the subject. I have inspected the notice of appeal, and I cannot find that any such objection is set out therein as a ground for appeal. The appellants' counsel claimed at the hearing that the ground is covered by paragraphs 8 and 9 of the notice of appeal. In my opinion this is not correct. Section 437 of the Judicature Ordinance provides that the notice of appeal therein called the notice of motion, *shall state the grounds* on which the application is based. It is evident that the grounds must be so stated as to give the opposite party reasonable information of the question or questions which are intended to be argued before

Judgment.
Wetmore J

the Court, otherwise the notice, so far as the grounds are concerned, would be of no more use than a blank sheet of paper. Now would any counsel, reading the pleadings in this case, and knowing what has been argued in the Court below, ever imagine from reading paragraphs 8 and 9 of the notice of appeal, that the appellants ever intended to urge any such ground of appeal as the one now under consideration. The respondent's counsel informs us that he was quite taken by surprise when the ground was taken before this Court. I am therefore forced to the conclusion that this objection to the plaintiffs obtaining the relief which he seeks, did not occur to the defendant's advocate in drawing the defence or at the trial, or when the notice of appeal was prepared and served, but that it was an afterthought. Under the circumstances, I am of opinion that this Court cannot entertain this ground of appeal.

The appellants' counsel urged at the argument no other objections to the judgment of the Court below than what I have stated, and I am of opinion that he could not have successfully urged any other objection that is set out in his notice of appeal.

I think, therefore, the appeal must be dismissed with costs.

RICHARDSON, MACLEOD, ROULEAU and MCGUIRE, JJ., concurred.

Appeal dismissed with costs.

RE RIVERS.

Territories Real Property Act—Transfer given in for registration—Transfer not executed by registered owner—Executions—Priority—Registrar's duty.

While the Territories Real Property Act was in force, a title stood as follows: 5th July, 1887, Certificate of Ownership to Canadian Pacific Railway Co.; 12th July, 1887, Transfer, J. S. to L. H. R., filed and entered in day book; 31st March, 1888, Transfer, Canadian Pacific Railway Co. to J. S. registered, and certificate of ownership issued to J. S.; 5th February, 1891, 14th April, 1891, 13th January, 1893, Executions, King and others v. J. S., lodged by Sheriff.

On 19th January, 1893, L. H. R. applied to the registrar to issue her a certificate of ownership upon her transfer of 12th July, 1887. The registrar was ready to do so, but proposed to mark the certificate as being subject to the several above mentioned executions.

On a reference by the registrar under s. 114.

Held, That, in view of ss. 34 and 65, the registrar had no right, where the land had been brought under the Act, to receive a transfer for registration executed by a person other than the certificated owner, and that therefore the filing of the transfer, prior to the lodgment of the executions, was ineffective, and that therefore the registrar's view was correct.

[ROULEAU, J., *January 31st, 1893.*

[*Court in banc, June 13th, 1893.*

Statement. Mrs. Laura H. Rivers having applied to the Registrar of the Southern Alberta Land Registration District for a certificate of ownership to herself clear of incumbrances for certain lands, the parties interested agreed upon the facts and stated them in a form of a special case, and the case so

NOTE BY THE EDITOR.—In a subsequent case of *Wilkie* v. *Jellett*, 2 N. W. T. R. No. 1, p. 125 (which will also be reported *infra*), 26 S. C. R. 282, counsel for the plaintiff admitted the correctness of the decision in *Re Rivers*, but contended that there, the Court was asked to exercise its purely statutory jurisdiction, under ss. 114 *et seq.*, to direct the registrar as to his duties as such; that the registrar had no power to enquire into or decide upon the beneficial rights of the parties, and the Court, in the exercise of this statutory jurisdiction, had no greater power than merely to direct the registrar to do what he ought to have done; but that, when the ordinary jurisdiction of the Court was invoked, the Court had power to enquire into and decide the beneficial rights of the parties, and declare that such rights were not as the registrar (quite rightly so far as his duty was concerned) had made them appear on the register. This distinction was recognized by the Court in *Wilkie* v. *Jellett*.

stated was referred by the registrar under s. 114 of the Territories Real Property Act to a Judge. Statement.

The case stated was in substance as follows:

1. On or about the 5th July, 1887, the lands in question were brought under the operation of the Territories Real Property Act, by the registration of the patent from the Crown, and the issue of a certificate of ownership to the Canadian Pacific Railway Company.

2. On the 12th July, 1887, a transfer, in the usual form, from James Sproule to Laura H. Rivers was filed and deposited with the registrar, and an entry thereof made in the day-book, but nothing further has been done towards the completion of its registration except as hereinafter mentioned.

3. On the 31st March, 1888, a transfer from the Canadian Pacific Railway Company to Sproule was registered, and the certificate of the Canadian Pacific Railway Company was cancelled and a new folio opened in the register by Certificate of Ownership B, 134, dated 31st March, 1888, issued in the name of Sproule.

4. On the 5th February, 1891, a writ of execution against lands was delivered to the sheriff at the suit of G. C. King & Company against Sproule, and a copy of such writ certified under the hand of the sheriff, with a memorandum in writing of the lands in question as being the lands intended to be charged thereby, was delivered by the sheriff to the registrar, and the registrar entered a memorandum thereof in the register on the folio constituted by certificate of ownership B, 134.

5. At and prior to the registration of the writ of execution, the advocates for G. C. King & Co. searched the register and ascertained that the certificate of ownership stood in the name of Sproule free from incumbrance, and they had no notice or knowledge that any transfer from Sproule to Mrs. Rivers had been filed or deposited with the registrar.

6. On the 24th February, 1891, the advocate for G. C. King & Co. applied to the registrar for an abstract of all

Statement.

instruments registered in his office, mentioning the above lands, and the abstract marked exhibit "A" hereto, was thereupon issued by the registrar. [This abstract showed only certificate of ownership No. B, 134, to Sproule, and King & Co.'s execution.]

7. An allegation similar to paragraph 4, as to an execution of one Salterio v. Sproule.

8. An allegation similar to paragraph 5, respecting the execution Salterio v. Sproule.

9. All the interest of Salterio in the said execution was transmitted by his death to the executrix of his will Mary Jane Salterio; and Costigan & Bangs are the purchasers (*bona fide*, for value, without notice of the interest, if any, of the said Laura H. Rivers in the said land) of the interest and title of the said Mary Jane Salterio, executrix, etc., under the execution.

10. An allegation similar to paragraph 4, as to an execution of Lafferty & Moore v. Sproule.

11. At the time of delivery of the writ to the sheriff, the advocates for Lafferty & Moore had notice that the transfer from Sproule to Laura H. Rivers had been filed and deposited with the registrar, and an entry made thereof in the day-book on the 12th July, 1887.

12. All the said executions remain in full force and effect, and nothing has been paid to the said execution creditors thereon.

13. On the 16th January, 1893, the advocates for the said execution creditors, who had only ascertained the existence and filing of the said transfer from Sproule to Rivers on the 6th day of January, 1893, wrote Mrs. Rivers, suggesting that she apply to the registrar for a certificate of ownership, so that the questions involved might be referred by him to a Judge.

14. On the 19th January, 1893, the advocate for Mrs. Rivers applied to the registrar to have the registration of the transfer from Sproule to herself completed, and for the issue of a new certificate of title.

15. None of the said execution creditors had any knowledge or notice of any matter or thing herein, except through their said advocates. Statement.

16. Exhibited a copy of certificate B, 134, showing title in James Sproule, subject to the three above mentioned executions.

17. The registrar has refused to issue a certificate of ownership to said Laura H. Rivers clear of said executions, unless so directed by the Judge.

The questions for the opinion of the Court are:

1. Whether at the time the said executions and each of them were delivered to the registrar, Laura H. Rivers had any estate or interest in the said lands?
2. Whether the said executions, or any of them, and, if so, which, bound the said lands from the date of such delivery to the registrar? And how and to what extent this question is affected by the issue of the abstract of title, dated 24th of February, 1891?
3. Whether any transfer can be made by the registrar of such lands, or of the interest of said Sproule therein, except subject to such writs of execution?
4. Whether the said transfer from Sproule to Laura H. Rivers is entitled to priority over the said writs of execution or any of them?
5. Whether the said Laura H. Rivers is entitled to now have the registration of the said transfer completed, and a certificate of ownership issued to her free and clear of the said execution or any of them?

And the several parties hereto, pray for such order or direction to the registrar as the circumstances of the case may require, and that an order may be made directing how and to whom and by whom the costs of and incidental to this matter shall be paid.

Dated 23rd January, 1893.

Statement.

The matter of the reference was argued before ROULEAU, J., at Calgary, and on the 31st January, 1893, he made an order in substantially the following terms:—

It is declared and adjudged

1. That at the time the said executions and each of them were delivered to the registrar, Laura H. Rivers had no estate or interest in the said lands.

2. That the said lands became, were and continue bound by the said executions and each of them, from the respective dates of the delivery of a copy of said executions to the registrar.

3. That no transfer can be made of the said lands, or of the estate or interest of said Sproule therein, except subject to such writs of execution.

4. That the said writs of execution are entitled to priority, and are hereby declared prior to the transfer from James Sproule to Laura H. Rivers of the said lands.

5. That said Laura H. Rivers is entitled to now have the registration of said transfer completed, but that her title to said lands is subject to said several writs of execution and the terms of this order.

2. And it is ordered and adjudged, and the registrar is hereby directed, that if the said Laura H. Rivers shall so require, and upon payment of the proper fees to him, the said registrar shall complete the registration of the transfer from James Sproule to said Laura H. Rivers of the said land, and shall issue a new certificate of title to said Laura H. Rivers of the said lands, namely: the north-east quarter of section 35, in township 23, range 1, west of the 5th meridian, but, subject to (and the registrar shall enter in the register and indorse on the duplicate certificate of ownership, so to be issued), the said several writs of execution, and this order dated 31st January, 1893, made on reference from registrar dated 23rd January, 1893.

3. And it is further ordered that the said King & Co., Costigan & Bangs, and Lafferty & Moore, shall be at liberty to add their costs of and incidental to the said

reference and special case to the amounts of their several executions, as if the same had been included in the amount of such executions, such costs to be taxed and allowed by the clerk of this Court, and his certificate of the amount of such costs to be registered by the registrar against said lands. Statement.

Mrs. Rivers appealed to the Court of Appeal constituted by s. 138 of the Territories Real Property Act, namely "the several Judges of the Supreme Court of the North-West Territories sitting together."

P. McCarthy, Q.C., for the appellant.

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

[*June 13th, 1893.*]

WETMORE, J.—The land in question was brought under the provisions of the Territories Real Property Act, and a certificate of ownership was issued to the Canadian Pacific Railway Company on the 5th July, 1887.

On the 31st March, 1888, a transfer of these lands from the Canadian Pacific Railway Company to James Sproule was duly registered, the certificate of the Canadian Pacific Railway Company was cancelled and a new folio opened in the register by a certificate of ownership dated the day last mentioned issued to the transferee Sproule.

It is admitted and seems to be quite clear that at least up to the 31st March, 1888, when such transfer was given in for registration under section 39 of the Territories Real Property Act (which I will for convenience hereafter designate as "the Act") the Canadian Pacific Railway Company was the registered owner of this land.

On the 12th July, 1887, while the Canadian Pacific Railway was so registered owner and before the transfer from them to Sproule was given in for registration, the appellant, to use the language of the case, "filed and deposited" with the registrar a transfer to her from Sproule, and an entry was made thereof in the day book by the registrar.

Judgment.
Wetmore, J.

Nothing whatever was done with respect to this last mentioned transfer until the 19th January last, when the appellant applied to the registrar to have the registration of such transfer from Sproule to her completed and for the issue of a certificate of title to her.

In the meanwhile, however, executions in which the respondents were or became interested were lodged with the sheriff, who under section 94 of the Act delivered copies of such writs with memoranda specifying that the lands in question were intended to be charged by such executions to the registrar, who, as the respective copies of writ and memorandum were so delivered, entered a memorandum thereof in the register on the folio constituted by the certificate of ownership to Sproule before mentioned.

The appellant claims that as soon as the transfer from the Canadian Pacific Railway Company to Sproule came into the registrar's office, the transfer from Sproule to her operated to pass Sproule's title to her, and that upon the cancelling of the certificate of ownership to the Canadian Pacific Railway Company the new certificate of ownership should have been issued to her instead of to Sproule, and that now although the registrar as a matter of fact issued such new certificate to Sproule, she is entitled to have Sproule's certificate cancelled and a new certificate issued to her.

Her right to have Sproule's certificate cancelled and a new certificate issued to herself is not disputed, but she claims that by virtue of section 39† of the Act, the time of filing the transfer to her from Sproule must be taken as the time of registration, that such filing was before the executions bound the land, and that she therefore is entitled to have a certificate of title clear of any charges or liens and encumbrances created by reason of the executions.

It was urged that there was no evidence that the transfer to the appellant was "given in for registration," the language of the case is that it was "filed and deposited"

† Cf. s. 33 L. T. Act, 1894.

Judgment.
Wetmore, J.

with the registrar. Possibly the question of whether it was "given in for registration" might be a question of intention on her part. As the registrar, however, treated it as if it had been *given in for registration*, that is, he entered it in the day book, I will assume for the purposes of this case that she did give it in for registration; that is, she delivered it with the purpose and object of having it registered. But whether she gave it in for registration within the meaning of the Act, or whether the registrar had any right to enter it in the day book is entirely another matter.

It is to be borne in mind that this land had been brought under the operation of the Act at this time. That being so under section 65,§ the only person who could execute a transfer was the registered owner of the land, and under section 62‖ the certificate of title is conclusive evidence at law and in equity that the person named in the certificate is entitled to the land included therein subject to the exceptions mentioned in section 61 and some other exceptions which do not affect this question.

The registrar it seems to me had therefore, especially in view of section 34‡ of the Act, no right to receive for registration and enter in the day book an instrument which only the Canadian Pacific Railway had under the Act the right to execute. Who was Sproule? What title had he in any way which authorized him in any way to affect by transfer the lands in question?

It was claimed that it was the duty of persons seeking to charge the lands as against Sproule, or seeking a claim in the lands against Sproule, to ascertain by examining the day book whether Sproule before he became registered owner had in any way charged the land or affected it. Surely Parliament, in view of the sections I have quoted, never intended that, after providing that the certificate of title was conclusive evidence of title, a person inspecting the records and finding absolute evidence of title in say Sproule of a certain date, could possibly contemplate that

§ Cf. s. 61 L. T. Act, 1894. ‖ Cf. s. 57 L. T. Act, 1894.
‡ Cf. s. 59 L. T. Act, 1894.

Judgment. Wetmore, J.

Sproule, before he got such title, and while it was absolutely in another person by virtue of the Act, could in any way affect the land so far as to transfer it at any rate. Suppose a person did inspect the entries in the day book before the certificate of title was granted to Sproule and saw Sproule's name, would he ever for a moment suspect that this man who had no title whatever so far as the register showed, could possibly affect the land, and would he not pay no attention whatever to the entry? Lay down a different rule, and it appears to me that the system of registering would simply be a trap. One would not know what unexpected document lurking as entered in the day book might be sprung on him.

But leaving section 65 of the Act out of the question, I am of opinion that section 62 is the key to the intention of Parliament and settles this question. I will refer to that section again. By that section "every certificate of title granted under this Act shall . . . so long as the same remains in force and uncancelled . . . be conclusive evidence at law and in equity as against Her Majesty *and all persons whomsoever* that the person named in such certificate is entitled to the land included in such certificate for the estate or interest therein specified," subject to certain exceptions and reservations not material to the question before us.

Now the registrar having issued the certificate of title to Sproule, while that certificate remained in force and uncancelled, how in the face of such legislation could any other person than Sproule be deemed to be the "owner" of the land within the definition of the word "owner" in section 3 paragraph (*b*) of the Act?

Assume for the purposes of the argument that the registrar has made a mistake and ought to have issued the certificate to the appellant, he has not done so, and the law gives what appears to my mind a clear and unequivocal effect to what he has done, and no matter how much he may have erred, third parties who have acquired rights under it, can hold them and the appellant's remedy if any is against

the assurance fund. Sproule's title being on its face absolute and the creditors having obtained rights, *quoad* those creditors Sproule must be considered the owner, and although the appellant is entitled to her certificate of title it must be subject to the charges created in respect of the executions specified. Judgment. Wetmore, J.

I think the appeal ought to be dismissed with costs.

McGUIRE, J.—The facts in this case sufficiently appear from the judgment of my brother WETMORE.

The advocate for Mrs. Rivers relied in support of his contention on the decision in *Re Bentley and Morris*.[1]

It is sufficient to say that in that case it was a question merely of priority between two mortgagees from the same mortgagor, who at the time he gave the mortgages was the registered owner.

This is a case of a transfer assumed to be made by a person who was not then a registered owner, and so far as appears from the case stated does not appear to have had any interest in the land.

[1] 12 Can. L. Times, 119. The head note to this case is as follows:

IN RE BENTLEY AND MORRIS.

Registry laws—Territories Real Property Act, R. S. C. c. 51—Mortgage entitled to registration though certificate of ownership not produced therewith to register—Priorities—Memorials.

B.'s mortgage, unaccompanied by a certificate of ownership, was "received and filed" and entered in the day book by the registrar on the 7th October, 1889, but no memorial was then entered in the register.

M.'s mortgage, accompanied by a certificate, was received and registered on the 14th October, 1889. In March, 1890, B. produced his certificate to the registrar, who then completed the registration of B.'s mortgage by entering a memorial in the register and on the certificate, but under those of M.'s mortgage. The memorial of M.'s mortgage was defective in not showing the date of registration.

Held, 1. That B.'s mortgage, being filed and entered in the day book prior to M.'s mortgage, was entitled to priority or registration, by s. 39 of the Territories Real Property Act, R. S. C. c. 51.

That the memorials showed the facts from which priority could be inferred, and the order in which they appeared in the register was immaterial.

That the memorial of M.'s mortgage should be amended without charge.

[McGUIRE, J., *February 10th, 1892.*

Judgment.
McGuire, J.

A transfer is an instrument introduced by the Act and would not apart from the Act have been sufficient to pass any title in the land. The Act, which substitutes a new method of passing title, must be complied with in order that the transferee may be entitled to the benefit of the Act.

It is section 65 and subsequent sections which deal with transfers. Now section 65 says who may execute a transfer, and that person is "a registered owner." There is no provision for anyone else executing a transfer. The form of transfer (Form G) commences thus: "I, A.B., being registered owner of an estate," etc., showing clearly that the person entitled to execute a transfer must have the status of a "registered owner," which unquestionably Sproule had not.

Subsequently it is true Sproule did become the registered owner and a certificate of title issued to him.

It is urged that the registrar ought at once to have cancelled this certificate and issued a new certificate to Mrs. Rivers, and had he done so I am not prepared to say that she would not thereby have acquired a good title.

But he did not do so and the certificate of title issued to Sproule and the land continued to stand in Sproule's name.

By sections 60 and 62 that certificate is conclusive evidence, so long as it remains uncancelled, both at law and in equity, that the person therein named is entitled to the land for the estate or interest therein specified, subject only to such incumbrances, liens, estates, or interests as are notified in the folio of the register, and to certain incidents implied by the Act not affecting the question here.

Therefore at the time the executions came in Sproule must be deemed the owner, and these executions became thereupon *caveats* against any transfer by the owner, except subject thereto.

Therefore the right of Mrs. Rivers to a transfer to her must be subject to these executions.

The title of Sproule became subject to the executions upon their being duly entered in the register and thus becoming part of the certificate. Judgment. McGuire, J

It is said that had King's advocate searched in the day book he might have found there the entry of Mrs. Rivers' transfer. Perhaps, but having before him the certificate of title to Sproule, he would not in any case be expected to search the day book, if such search was ever necessary, further back than the date of Sproule's certificate, and if so his search would not have disclosed the River's entry.

For these reasons I think the executions must prevail as *caveats* against any transfer by the owner except subject to such executions.

RICHARDSON, MACLEOD and ROULEAU, JJ., concurred.

THE QUEEN v. BROWN.

Criminal law—Manslaughter—Master and servant—Negligence.

The deceased, a lad, aged about 15, was engaged by the prisoner as a farm-hand, on the terms of receiving for his work his board, lodging and clothing. He died on the 14th February, after having been in the prisoner's employment about nine months. Death was caused by the gangrenous condition of many parts of his body resulting from frost bites. He was in the habit of wetting his bed, and on this account was made to sleep in the stable, and had slept there for two or three months up to the 10th February. From the 1st to the 10th February the weather was excessively cold. The lad's fingers had been badly frozen *at least* three weeks before his death, and it was found that the prisoner must be taken to have known it for that length of time, nevertheless, he paid no attention to it till the 10th February. During the night of 9th-10th February, the deceased's feet were frozen solid to the ankles; this was discovered by the prisoner, who then took him to the house. It was found that the lad became so frozen, by reason of the earlier frost-bites rendering him unable to attend to himself properly, and his being left without assistance in the stable in excessively cold weather. The prisoner, on bringing the lad to the house, attended to him personally, asked a neighbor for a remedy for frost-bites, drove to a physician, got from him a prescription for frost-bites, but did not disclose to him the serious condition the lad was in. On and after the 10th February, the lad was helpless, and died on the 14th February. The prisoner had means to procure medical attendance.

Held, that, in view of the age of the deceased, the circumstances of the country, the fact of there being no provision for maintaining poor people, it was the duty of the prisoner, as master towards the deceased as his servant, to have taken care of him, and that by his omission to do so he was guilty of gross negligence, to which the lad's death was attributable, and that, therefore, the prisoner was guilty of manslaughter.

[WETMORE, J., *March 15th, 1893.*
[*Court in banc, June 15th, 1893.*

Statement.

This was a Crown case reserved by WETMORE, J., for the opinion of the Court *in banc*.

The case stated by the learned Judge was as follows:

The prisoner Brown was charged before me at the last sitting of the Supreme Court, Judicial District of Eastern Assiniboia, held at Grenfell, in March last, with manslaughter of one William White. The prisoner elected to be tried by me in a summary way and without the intervention of a jury, and was accordingly so tried. I convicted the prisoner.

But questions of law having arisen in such trial, I reserved the same for the consideration of the Justices of the Court for Crown Cases reserved, and thereupon postponed judgment upon such conviction until such questions have been considered and decided; and admitted the prisoner to bail with two sureties, to appear at such time and place as may be appointed, of which the prisoner is to have notice, to receive judgment upon the said conviction in case the same be affirmed.

I found that the deceased William White entered the employment of the prisoner as a servant on the 13th May, 1892, and that he was obtained as such servant from the Reverend Mr. Leslie, an agent stationed at Winnipeg, Manitoba, for a society in England called the Children's Aid Society, which sends young lads to this country. The only consideration which the deceased was to receive for his services was his board and clothing.

The deceased was about fifteen years of age when he died, which was on the 14th day of February last. Death was caused by the gangrenous condition of the body resulting from frost bites. The post-mortem examination disclosed that the toes, the soles of the feet, extending up to the ankle

joints behind the heels, the penis, the left ear, the fingers and thumbs to be gangrenous from this cause. Some two or three months before the death the deceased commenced to wet his bed, and in consequence of that and of the smell arising therefrom becoming disagreeable, the prisoner put him to sleep in his stable, and kept him sleeping there until the 10th February. Statement.

During the latter period of that time, either from infirmity of the urinary organs, or from inability to unbutton his clothes, caused by the state in which his fingers were from the frost bites, the deceased wet his clothing also. From the 1st of February to the 10th, both inclusive, the weather was excessively cold, the thermometer ranging from thirty to forty-five degrees below zero. The evidence does not establish when, or under what circumstances, the frost bites which occasioned the gangrenous condition of the penis, the ear and the fingers occurred. But I found that the fingers were badly frozen at least three weeks before the lad's death, and that the prisoner then knew it. The evidence did not satisfy me that the mere fact that the prisoner sent the deceased to the stable to sleep was a culpable act, nor did the evidence satisfy me that the prisoner was alive to the serious condition the deceased's hands were in, but I did find that from the knowledge he had he ought to have been alive to it, and that if he had exercised ordinary care and showed the reasonable interest in the boy's welfare which he ought to have done, he would have been alive to it. No care or attention whatever was paid to the deceased in respect to this condition of his hands up to the 10th of February.

During the night of the 9th and the morning of the 10th February, while sleeping in this stable, the deceased's feet became frozen solid up to the ankles, and he was so discovered by the prisoner early in the morning of the 10th, and was then carried by him to the house. I found that the deceased's feet became so frozen by reason of the state his system was in as the result of the other frost bites before mentioned, rendering him unable properly to look after and

Statement.

attend to himself, and being left in that condition unattended to in the stable during the excessive cold weather beginning on the 1st February, and possibly his urinating in his clothes to some extent contributed towards it. The prisoner after he carried the deceased to the house took his clothes off, bathed him and put him to bed, he asked a neighbor for a remedy for frost bites, and he saw Dr. Hutchinson, told him the deceased's feet were frozen, asked him for something for them, and obtained a prescription from him; but he did not tell the doctor how badly the feet were frozen, or the condition of the lad in respect to the other parts of his body, although he knew that the feet were badly frozen, that the fingers were frozen at least three weeks before, and that they had been getting worse, and with ordinary attention he must have observed the condition the deceased's body was in generally when he bathed him. The evidence did not satisfy me that even then the prisoner was alive to the serious condition the deceased was in; but, as before, I found that from the knowledge he had, he ought to have been alive to it, and that if he had exercised ordinary care and showed the reasonable interest in the deceased's welfare which he ought to have shown, he would have been alive to it. Up to the 10th February, the deceased was physically able to withdraw himself from the prisoner's control and service, but owing to want of means he was unable to do so; and owing to the state he was in from the time his hands became frozen, coupled with the infirmity respecting his urinary organs, no one in the neighborhood knowing these facts would be at all likely to receive him. Upon and after the 10th of February he was helpless and unable to take care of himself. The prisoner had means to procure medical attendance. Under these findings, I held that in view of the age of the deceased, and the circumstances of the country, there being no provision for maintaining poor people, that it was the duty of the prisoner from a period beginning three weeks before the lad's death, to have either removed him from the stable, and brought him into the house, and there taken care of him, or to have sent him back

Statement.

to Mr. Leslie to have him cared for; or to have cared for him in some other way, and not to have left him entirely unattended to in the manner he was left in the stable, especially during the excessive cold weather, commencing at least on the 1st February; and that in omitting to do this, the prisoner was guilty of gross negligence amounting to indifference. I also held that from and after the 10th February, he was guilty of gross negligence amounting to indifference, in not acquainting the doctor with the actual condition of the deceased. I found that by reason of such gross neglect in keeping the deceased in the stable the feet became frozen, and that from such neglect, and the other negligence stated, the condition of the feet and the other frost bites became aggravated and gangrenous, and that the death was attributable to such negligence, and I therefore convicted the prisoner.

The questions for the consideration of the Court are:—

First—Whether the findings and circumstances stated warranted the holdings.

Second—Whether under the findings and holdings stated the prisoner ought to have been convicted.

Third—As the learned counsel for the prisoner urged, that the evidence would not support the findings of fact, I also reserve that question for the consideration of the Court, and attach hereto a copy of the evidence.

Dated this 19th day of May, A.D. 1893.

(Sgd.) E. L. WETMORE, J.S.C.

The case was argued on the 7th June, 1893.

D. L. Scott, Q.C., for the prisoner, referred to Smith's Master and Servant, p. 230; *Wennall* v. *Adney*;[1] Russell on Crimes, Vol. 1, p. 678; N. W. T. Act; R. S. C. c. 50, s. 11; *Regina* v. *Smith*;[2] *Regina* v. *Nicholls*;[3] *Regina* v. *Finney*;[4] *Rex* v. *Smith*.[5]

[1]3 B. & P. 247; 6 R. R. 780. [2]Leigh & Cave, 607; 34 L. J. M. C. 153; 11 Jur. N. S. 695; 12 L. T. 608; 13 W. R. 816; 10 Cox C. C. 82. [3]13 Cox C. C. 75. [4]12 Cox C. C. 625. [5]2 C. & P. 449.

Argument.

W. White, Q.C., for the Crown, referred to *Regina* v. *Instan*;[6] *Regina* v. *Marriott*;[7] *Regina* v. *Walters*;[8] *Regina* v. *Doherty*.[9]

[*June 12th, 1893.*]

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

RICHARDSON, J.—James Wheelton Brown was tried and convicted before Mr. Justice WETMORE, of manslaughter, but consequent upon objections raised by accused's counsel at the trial, the learned Judge reserved for the consideration of this Court the following questions:—

1. Whether the findings and circumstances stated warranted the holdings.

2. Whether under the findings and holdings stated, the prisoner ought to have been convicted.

3. Whether the evidence given at the trial was sufficient to support the findings of fact.

From the evidence as stated by the learned trial Judge the following facts appear:—

1. That the lad, William White, whose death formed the subject of the prosecution, entered the prisoner's (a farmer) service on or about 13th May, 1892.

2. That White was then about 14 years of age.

3. That in return for faithful services rendered White was to have "a good home," including clothing, board, and lodging, but no money wages.

4. Thus at least the relation of master and servant was then established between White and the prisoner.

5. That some time early in January, 1893, about a month before his death, the lad's hands were badly frost-bitten, and from inattention his fingers became raw and sloughing, consequent upon which state he was unable to use his fingers for the ordinary purposes of nature.

[6] 62 L. J. M. C. 86; (1893) 1 Q. B. 450; 5 R. 248; 68 L. T. 420; 41 W. R. 368; 17 Cox C. C. 602; 57 J. P. 282. [7] 8 C. & P. 425. [8] Car. & M. 164. [9] 16 Cox C. C. 306.

Judgment.
Richardson, J.

6. That this condition was openly in view of the prisoner, who paid no attention, so far as shown, whatever to the lad until the morning of the 10th February, 1893, when the prisoner found the lad utterly helpless, and on examining him discovered his feet and lower legs up to above the ankles frozen solid and the inside of his upper legs raw, etc.

7. Instead of communicating the true state of affairs outside his own house during the 10th February, the prisoner, on the following day, the weather very severe, left the lad alone, helpless, so far as appears, and drove into Grenfell, sixteen miles distant, where he called on Dr. Hutchinson, whom he asked for medicine for frost bites, then informing the doctor that the lad was *slightly* frost-bitten, which to his knowledge was an untrue statement, since by his own evidence before the coroner he admitted that for a period of a month previous the lad's hands had been frozen and kept getting worse, and he had told the witness, Harry Read, on 11th February that he found him badly frozen on the 10th. What the prisoner did for the lad after calling on the doctor does not appear. The lad died on the 14th February, and death was shown to have been caused or accelerated by gangrene following severe frost-bites.

The question for this Court in effect is,—

Was there a common law duty devolving upon the prisoner to do more than he did, knowing the condition of the lad from the time he was frozen three weeks or a month prior to his death?

It will be recollected that the prisoner undertook to provide a good home, which would certainly mean taking much better care than there is shown to have been given to an utterly helpless lad after being, as he was, severely frost-bitten, and as it must be assumed that the case was so serious as to require the prisoner to consult a medical man, it was surely his duty to explain to the doctor the condition the lad was discovered in on the 10th, which he certainly did not do, representing him as being "slightly frozen."

The learned trial Judge has found from the facts disclosed on the trial, that the prisoner was guilty of negligence

Judgment. Richardson, J.

"that by reason of gross neglect in keeping the deceased in the stable the feet became frozen, and that from such neglect and other negligence stated, the condition of the feet and the other frost-bites became aggravated, and that the death was attributable to such negligence."

This Court is of opinion that the evidence warranted the learned trial Judge so finding, that at common law the prisoner was bound to supply care and attention reasonably suited to the lad's condition, in which he failed, and for want of which death was accelerated, and that upon the authority of *Regina* v. *Marriott*,[7] *Regina* v. *Finney*,[4] *Regina* v. *Nicholls*,[5] and *Regina* v. *Instan*,[6] the conviction of the said James Wheelton Brown by Mr. Justice WETMORE should be affirmed.

Conviction affirmed.

THE QUEEN v. WALKER.

Criminal law—Seduction—"Under promise of marriage"—Direction to jury—Mis-trial—New trial.

The meaning of "under promise of marriage" in 50-51 Vic. (1887), c. 48, s. 2, substituting a new section for R. S. C. c. 157, s. 4,† means "by means of a promise of marriage."

Where therefore the trial Judge directed the jury that the intention of the section was to impose a punishment for the seducing of young women under twenty-one by men over twenty-one to whom they were engaged, and the jury rendered a special verdict as follows: "The verdict is that the prisoner promised to marry F. S. in June, 1892, with the intention of carrying out his promise, but in November of the same year he seduced her, at the same time renewing his promise of marriage, and in our opinion no other man had conection with her."

Held, that there had been a misdirection and therefore a mis-trial; and a new trial was ordered.

[*Court in banc, December 3rd, 1893.*

This was a Crown case reserved for the opinion of the Court of Appeal for reserved cases by MACLEOD J.

The case was argued on the 7th day of December, 1893.

N. F. Hagel, Q.C., for the defendant.

D. L. Scott, Q.C., for the Crown.

† Now Crim. Code, s. 182.

[*9th December, 1893.*]

Judgment.

Richardson, J.

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

RICHARDSON, J.—This is a Crown case reserved by MACLEOD, J., upon a charge preferred against Donald Walker, tried at Medicine Hat, 7th and 8th August, 1893, before him with the intervention of a jury, for that the said Donald Walker, being a person above the age of 21 years, at Medicine Hat, on or about the 5th November, 1892, did under a promise of marriage seduce and have illicit connection with one Fanny Ford Small, an unmarried female of previously chaste character and under 21 years of age.

The accused was convicted, such conviction being based upon the special finding of the jury in writing:—"The verdict is that Donald Walker promised to marry Fanny Small in June, 1892, with the intention of carrying out his promise, but in November of the same year he seduced her, at the same time renewing his promise of marriage, and in our opinion no other man had connection with her."

The learned Judge, on objection raised by Mr. Hagel, Q.C., who defended the accused, postponed the passing of sentence and admitted the convict to bail pending a reference to the Court of Appeal, to which the Judge referred the question as to whether or not, upon the facts as found by the jury on the learned Judge's charge, the said Donald Walker was properly convicted.

On the 7th December, 1893, the case as reserved was argued at length by Mr. Hagel for Donald Walker and answered on behalf of the prosecution by Mr. Scott, Q.C.

The learned Judge informs the Court that at the trial he had "grave doubts" as to what construction should be given the words "under promise of marriage," used in section 2 of chapter 48, 50 & 51 Victoria, the clause under which the charge was laid, but giving what consideration he was enabled then to give to it in the absence of any authorities within reach to assist him, he charged the jury that in his judgment what the legislature intended to punish was

Judgment. Richardson, J.

"the seducing of young women under 21 by men over 21 to whom they were engaged."

The question for our consideration is in effect whether or not the trial Judge rightly interpreted the Act in charging the jury in leading them to infer that if they found that Fanny Small was a female under 21 years of age, that the accused's age exceded 21, and that he had promised to marry her, and had while so engaged seduced her, the offence was complete.

The section of the Act dealing with the offence reads "every one above the age of 21 years who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character, and under 21 years of age, is guilty of a misdemeanour . . ."

To us the proper construction which should be given this section is:

That whoever accomplishes the seduction described by means of a promise of marriage, in other words, who ever influences the female, by the promise made, to yield to his embraces, is guilty, etc.

In order to ascertain the meaning of "under" in the expression "under promise of marriage," we must look at the first part of the section and observe the collocation of the words. "Everyone above the age of 21, who, under promise of marriage, seduces, etc." Now, "under promise of marriage" must be taken to qualify either "who" or "seduces." If it qualifies "who" it will probably mean to describe him as a person who has become under the obligation to marry, but if it qualifies "seduces" then it must intend to indicate the means by which the seduction is effected. The word is capable of either of these meanings.

In Webster's Dictionary one of the meanings is "(c) Denoting relation to something that . . . furnishes a cover, pretext, pretence, or the like, as 'he betrayed him under the guise of friendship,'" showing the means by which something was accomplished. In the common expression

"to do a thing under threats" would mean to do it by reason of the threats. Judgment. Richardson, J.

Now, looking again at the section, we find a phrase qualifying "everyone," namely, "above the age of 21 years."

If the expression "under promise of marriage" had been intended to further qualify "everyone," it is reasonable to expect that it would have followed immediately after the word "years," being connected therewith by the word "and."

But such is not the case. Apparently the qualifications of "everyone" end with "years," "who" is introduced, and then comes "under promise of marriage," just where we almost invariably find adverbs introduced to qualify the verbs which follow. "Everyone who lawfully and maliciously does injury . . ." for example. Had the statute used "unlawfully and maliciously" to qualify "seduces," that is just where these words would have been placed, between "who" and "seduces." Again, if "under, etc.," were intended merely to qualify or describe "who" as a person engaged to the female, it would probably have read thus, "everyone . . . who *being* under promise, etc., seduces, etc."

For these among other reasons we think the expression "under promise of marriage" qualifies "seduces," that is, shows the means by which the seduction is effected.

We conceive that the interpretation which we give to the Act is that aimed at and intended by Parliament in enacting it, and that it was never intended to make the seduction of a female under 21, at any time during the currency of a promise of marriage, by a promiser over 21 years of age, a criminal offence.

Notwithstanding that the view we take may be open to some possible doubt, it is conceived that it is the correct one, and that the jury should have been so instructed in order that they might find directly upon the evidence whether the seduction was attained by means of a promise of marriage on the part of the accused, or that he by the promise

Judgment. Richardson, J.

of marriage influenced Fanny Small to yield to his embraces, in which case the verdict should be guilty, otherwise the accused should be acquitted.

The jury was not so instructed, and it appears to us to have been essential that the minds of the jury should have been clearly drawn to the question whether the seduction was accomplished by means of the promise or not.

From the finding of the jury it does not appear how they would have found had the construction, which we hold to be the proper one, been placed upon them.

If the construction we place upon the Act is open to doubt, it is equally plain that that placed before the jury is also doubtful, and there being some reasonable doubt, the accused ought to have the benefit of the doubt.

The case is one in which in our view a mis-trial has occurred, but not one in which an acquittal should be directed.

The opinion entertained by this Court is:

That the ruling of the learned trial Judge was erroneous, that there has been a mis-trial in consequence, and that in our judgment there should be a new trial, which the Court directs.

THE QUEEN v. MENNEL ET AL.

Criminal law—Maliciously killing cattle—Rebutting implied malice—Mens rea—Verdict—Refusal of Judge to receive.

On a charge of unlawfully and maliciously killing cattle† it appeared that the animal was killed by the prisoners, when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it.

Held, that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, a *mens rea* on the part of the prisoners being disproved.

Power of trial Judge to refuse a particular verdict considered.

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

Statement.

This was a Crown case reserved for the opinion of the Court of Appeal for such cases by WETMORE, J. The case was argued at Regina on the 6th day of December, 1893.

N. F. Hagel, Q.C., for the prisoners.

Wm. White, Q.C., for the Crown.

[*December 11th, 1893.*]

MCGUIRE, J.—The defendants were tried before the Hon. Mr. Justice WETMORE for that on the 8th day of January, 1893, they feloniously, unlawfully and maliciously did kill an ox the property of Edward Arthur Meaton.

It appeared from the case stated that on a very cold night in January, James Mennel, senior, found the ox lying on the prairie near Mennel's residence unsheltered, its legs frozen to above the knees and utterly helpless; that Mennel

† Under R. S. C. c. 43, which reads as follows: "Everyone, who unlawfully and maliciously kills, maims, wounds, poisons, or injures any cattle, is guilty of felony and liable to fourteen years' imprisonment." 32-33 Vic. c. 225, 45 (D.); 24-25 Vic. c. 975, 40 (Imp.). The corresponding provision in the Crim. Code appears to be s. 499 (B) (b), in which the word "wilfully" appears instead of the words unlawfully and maliciously." Section 481, sub-section 1, reads: "Everyone, who causes any event by an act, which he knew would probably cause it, being reckless whether such event happens or not, is deemed to have caused it wilfully for the purposes of this part" (xxxvii—'mischief' in which section 499 is included). Sub-section 2. "Nothing shall be an offence under any provision contained in this part, unless it is done without legal justification or excuse and without colour of right."

Judgment. McGuire, J.

called one Cockrane to his assistance and they endeavored to raise the animal so as to get it to a place of shelter, but were unable to do so owing to its helpless condition; that they returned to the house; that Pepper and James Mennel, junior, hearing about the ox went out and endeavored to raise the animal and bring it to shelter but were unable to do so; that the animal was then in a dying condition and believing it to be an act of mercy towards the ox they killed it by knocking it on the head with an axe. The defendant Pepper was called for the defence and testified as to the part he and James Mennel, junior, took in killing the animal and the circumstances under which they killed it.

The learned Judge being of opinion that there was evidence on which the jury might find that Mennel, senior, was a party to the killing and evidence from which they might find that he had nothing to do with it, left that question to the jury, who acquitted Mennel, senior.

As to the other two defendants, the learned Judge directed the jury that as according to Pepper's own testimony the killing of the ox was an unlawful act and done deliberately, and therefore wilfully, that constituted malice in the legal definition of the term, and that therefore the jury must find these two defendants guilty; and he further told the jury that he would receive no other verdict than that of "guilty."

The jury accordingly found them guilty and they were convicted.

The learned Judge, however, in order to guide him as to sentence, and also to the necessity of reserving a case, left the following questions to the jury:

1. Was the ox in question when Mennel, junior, and Pepper killed it, in a dying condition from cold and exposure?

2nd. Did they kill the animal in the *bona fide* belief that the animal was in a dying condition from cold and exposure, and *bona fide* believing that it was an act of mercy to do so?

Both these questions were answered in the affirmative.

The learned Judge reserved a case for this Court, the questions reserved being:

Judgment.
McGuire, J.

1st. Was I correct in directing the jury that under the evidence of Pepper the killing was an unlawful act, and "malicious" according to the legal meaning of that word as applicable to this case?

2nd. Was I correct in telling the jury that under such evidence they must find the defendants Mennel, junior, and Pepper guilty, and that I would receive no other verdict so far as they were concerned?

3rd. Under the findings of the jury ought the defendants Mennel, junior, and Pepper to have been acquitted?

In order to constitute the offence the killing must have been (*a*) unlawful, and (*b*) malicious.

The findings of the jury show that there was no actual malice on the part of the defendants. The law, however, would from the mere unlawful killing, if nothing further appeared, imply that it was done maliciously. But this implication of malice may be rebutted by the facts and we have to consider whether in view of the circumstances alleged to have attended the killing and the special findings of the jury this legal implication of malice was rebutted.

Now, what is the definition of malice? I find it laid down in the latest edition of Roscoe's Criminal Evidence on the authority of Littledale, J., in *McPherson* v. *Daniels*,[1] that "malice in its legal sense denotes a wrongful act done intentionally, without just cause or excuse." Bayley, J., in *Bromage* v. *Prosser*,[2] said "malice in the common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse." In *Johnson* v. *Emerson*,[3] the above definition of Littledale, J., in *McPherson* v. *Daniels*[1] is quoted approvingly. In the *Queen* v. *Martin*,[4] Stephen, J., quotes with approval the definition of "maliciously" given by Mr. Justice Blackburn in *Regina* v. *Ward*[5] and *Regina* v. *Pembliton*,[6]

[1] 10 B. & C. 263; 5 M. & Ry. 251; 8 L. J. O. S. K. B. 14. [2] 6 D. & R. 296; 4 B. & C. 247; 1 C. & P. 475; 3 L. J. O. S. K. B. 203; 28 R. R. 241. [3] L. R. 3 Ex. 329; 40 L. J. Ex. 201; 25 L. T. 337. [4] 14 Cox C. C. 633; 8 Q. B. D. 54; 51 L. J. M. C. 36; 45 L. T. 444; 30 W. R. 106; 46 J. P. 228. [5] L. R. 1 C. C. R. 356; 41 L. J. M. C. 69; 26 L. T. 48; 30 W. R. 392; 12 Cox C. C. 123. [6] L. R. 2 C. C. R. 119; 43 L. J. M. C. 91; 30 L. T. 405; 22 W. R. 553; 12 Cox C.

Judgment. McGuire, J.

that "a man acts maliciously when he wilfully and without lawful excuse does that which he knows will injure another."

It is elementary law that there must to constitute felony be a guilty mind—a *mens rea*—true that they may be presumed from the mere wrongful act, but the presumed felonious intent—a *mens rea*—may be disproved by showing as in this case that there was no wrongful intent either against the owner of the animal or anyone else, but on the contrary a meritorious intent.

In *Hall* v. *Richardson*,[7] a very recent case, the defendant a servant of a milkman, accidently spilled some of his master's milk, and to conceal the fact he added water and sold the milk thus adulterated to customers. He was prosecuted under the Malicious Injuries Act. The magistrate discharged the defendant, but stated a case which came before Lord Coleridge and Mr. Justice Mathew. It was contended that the defendant was guilty because he wilfully did an unlawful act, and the law would presume that it was malicious. The Court, however, without hesitation, came to the conclusion that the magistrate was right in acquitting. Lord Coleridge said that he must look at the real scope and object of the statute—and he found that it indicated that damage is contemplated as the result of the act; that here no injury was intended to anyone; that no doubt if a man does an act which causes an injury, and with the intention of causing it, then he may be convicted, unless he shows any legal excuse for doing the act; and Lord Coleridge added that it would be monstrous to convict in such a case. Mr. Justice Mathew said it was essential to such an offence to show a "guilty mind," and the magistrate here had found that there was "no guilty mind."

Now, in the present case, not only is there no evidence of guilty mind, but, on the contrary, evidence of a meritorious and laudable intent; the jury have found that there was no guilty mind, but that the defendants *bona fide* believed that the animal was dying, and that it was an act of mercy

[7] 54 J. P. 345.

to put it out of pain—their finding, too, that the animal was in fact in a dying condition shows that the killing of it was no injury to the owner, but might, in fact, be advantageous to him, since the carcass might possibly have been thereby rendered fit for food, which it would not have been if it had died from exposure. Judgment. McGuire, J.

Again, do not the facts show a "just excuse?" If the voluntary doing of an unlawful act which injures another is to be deemed malicious and therefore a crime, it must still be open to the accused to show, in rebuttal of the implied malice, that he had "just cause" or "lawful excuse" for his acts. What would otherwise be a crime loses its criminal character when a just cause or legal excuse is shown.

I think the observations of Mr. Bishop are worthy of citation as being particularly applicable to cases of this kind.

"Criminal punishment" he says "should be kept within the conscience of mankind and be withheld where it refuses consent" (Bishop on Statutory Crimes, s. 235). "No theories however fine should ever persuade a Court to pronounce against a defendant a judgment to which the conscience of mankind will refuse to respond." (Bishop on Criminal Laws, 211).

I think that the three questions reserved for the opinion of this Court should be answered as follows: The first two in the negative, and the last in the affirmative.

I do not, however, wish to be understood as saying that if a defendant goes into the witness box and admits the doing of the unlawful act, but without showing a just cause or excuse for so doing, the Judge would not be justified in telling the jury that he would receive no other verdict but guilty, but in this case I think he did show a just cause.

RICHARDSON, MACLEOD, WETMORE and ROULEAU, JJ., concurred.

THE QUEEN v. HOWSON.

Indian Act—Halfbreed—Meaning of "Indian."

The Indian Act R. S. (1886) c. 43, defines (s. 2 *h*) "Indian" as meaning *inter alia* "any male person of Indian blood reputed to belong to a particular band."

Held, (1) Against the contention that "of Indian blood" means of full Indian blood, or at least of Indian blood *Ex parte paterna*—that a half breed of Indian blood *Ex parte materna* is "of Indian blood."

(2) Against the contention that the defendant having been shown to have *actually* belonged to a particular band, this disproved, or was insufficient to prove, that he was *reputed* to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of *actual* membership in the band.

(3) Against the contention that by virtue of s. 11 the mother of the defendant by her marriage to his father, who was a white man, ceased to be an Indian, and that therefore the defendant was not a person of Indian blood—that while the mother lost her character of an Indian by such marriage, except as [illegible] in that section, it did not affect her blood which she transmitted to her son.

[*Court in banc, June 13th, 1894.*

Statement.

This was a case stated for the opinion of the Court *in banc* by Justices of the Peace, who had convicted defendant under section 94 of the Indian Act for selling liquor to an Indian. From the evidence it appeared that the person to whom the liquor was sold was not an Indian of pure blood, being the son of a Frenchman by an Indian mother, but he was a member of a band of Indians and was living on a reserve and sharing in the Indian Treaty payments.

N. F. Davin, Q.C., and *T. C. Johnstone*, for the defendant.

D. L. Scott, Q.C., for the Crown.

[*June 13th, 1894.*]

WETMORE, J.—The defendant was convicted under R. S. C. c. 43, s. 94, of selling an intoxicant to an Indian, a case was signed and stated to this Court by the convicting Justices.

The only question submitted by such a case is whether the person to whom the intoxicant was sold was an Indian

Judgment.
Wetmore, J.

within the meaning of the Act. This person goes by the name of Henry Bear. The evidence shows that he is a half-breed, his father having been a Frenchman and his mother an Indian, that he belongs to and is a member of Mus-cow-e-quan's Band of Indians and lives on his reserve and has taken treaty-money for a number of years past since a period before the railway came into the Territories. The only question raised by the defence was that Bear being a half-breed was not an Indian within the meaning of the Act,

1st. Because he was a half-breed.

2nd. Because the evidence showed that he actually belonged to the band, not that he was "reputed to belong thereto."

Section 2 paragraph (*h*) defines what the expression "Indian" means when used in the Act unless the context requires a different meaning to be given to the word.

I can find nothing in the context of section 94 which requires a different meaning to be given to the word from that provided in section 2.

Now paragraph (*h*) defines the expression "Indian" shall mean "any male person of Indian blood reputed to belong to a particular band." Paragraph (*d*) of the same section provides what the expression "band" when used in the Act shall mean.

The evidence shows that Bear belongs to a band as so defined. But it is urged that where in paragraph (*h*) the words "any male person of Indian blood" are used they mean any person of full Indian blood, or failing that, that the blood of the father, is to govern, and therefore that Bear's father, having been a white man, Bear is not an Indian. A number of sections of the Act were cited with a view to showing that it was not the intention of the Legislature that a half-breed was to be embraced by the expression "Indian" as defined in paragraph (*h*). I am however of opinion that by every rule of construction that can be applied to the expression as so defined "half-breeds" were intended to be included in it if they fitted the definitions.

Judgment.
Wetmore, J.

The first and golden rule of construction is that the words of a statute are to be construed according to their popular and ordinary meaning. I understand the popular and ordinary meaning of the words "any male person of Indian blood" to mean any person with Indian blood in his veins, and whether such blood is obtained from the father or mother. This rule of construction, however, has its exceptions and undoubtedly as urged at the argument another rule of construction is that we are to consider the evil which the statute is intended to remedy, and having discovered that, so to construe the words as to give effect to the intention of the Legislature, and in that case if necessary the ordinary and popular meaning of the words are sometimes departed from and some other meaning which they may bear from the context or otherwise is accepted.

But applying that rule, what was the intention of Parliament in enacting The Indian Act.

It is to be borne in mind that this Act is not only applicable to the Indians in the North West, but it is also applicable to Indians throughout the whole of Canada.

It is intended to apply to a body of men who are the descendants of the aboriginal inhabitants of the country, who are banded together in tribes or bands, some of whom live on reserves and receive monies from the Government, some of whom do not. It is notorious that there are persons in those bands who are not full blooded Indians, who are possessed of Caucasian blood, in many of them the Caucasian blood very largely predominates, but whose associations, habits, modes of life, and surroundings generally are essentially Indian, and the intention of the Legislature is to bring such persons within the provisions and object of the Act, and the definition is given to the word "Indian" as aforesaid with that object.

In some instances possibly the Act goes further than I stated, and in some of its provisions applies to half-breeds, as for instance in s. 111, which provides that "every one who induces, incites, or stirs up any three or more Indians, non-treaty Indians or half-breeds apparently acting in

concert" to do certain specified things is guilty of a misdemeanor. That section is so framed because admittedly there are half-breeds who would not be embraced by the term "Indian" or "Non-Treaty Indian," as defined by the Act. For instance, a half-breed who was not "reputed to belong to a particular band," would not be an Indian within the meaning of the Act. Nor would a half-breed, who did not belong to an "irregular band" as defined in the Act and who did not follow the Indian mode of life be a "non-treaty Indian" as defined by paragraph (*i*) of section 2. So by section 13 of the Act "no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian." Nor under the same section shall the half-breed head of a family anywhere with certain specified exceptions except under certain specified circumstances be considered an Indian. The very provisions of this section which I have mentioned show that it was the intention of the Legislature that there are half-breeds who must be considered Indians within the meaning of the Act; because if the word "of Indian blood" in paragraph (*h*) of section 2 meant "of full Indian blood," then these provisions in section 13 were entirely unnecessary. Judgment. Wetmore, J.

Assuming that there may be a section or so of the Act which might render such a construction apparently doubtful, the Act must be construed according to its general provisions, not to make it fit into one or two exceptional sections. See the consequences of a different construction from that which I have adopted and if that urged for the defendant were accepted. A prosecution is brought against a person for doing or omitting to do something with respect to an Indian under the provisions of the Act for which a penalty is provided; if the defendant's contention is adopted it would be necessary in every case to prove that such Indian was a full blooded Indian, because the burthen of proof is on the prosecutor, and he is bound to show that the person with respect to whom the offence was committed is an Indian as defined by the Act, and that is according to his contention a full blooded Indian—how in the world could that be done? Or in the other view, if he had some

Judgment.
Wetmore, J.

white blood in him, he would have to prove that he got his Indian blood from his father, and possibly have to go generations back, because the alleged Indian might so far as his skin was concerned be as white as a Spaniard or an Italian or as many Englishmen or Frenchmen for that matter, and yet not understand a word of any European language, and be in thought, association and surrounding altogether Indian.

I am of opinion, therefore, that Bear was a person of Indian blood within the meaning of the Act, and I am of opinion that there was evidence which warranted the Justices in finding that he was "reputed to belong to a particular band" within the meaning of the Act, because as a matter of fact it was found that he did belong to a particular band. The words "reputed to belong" in paragraph (h) are used so as to provide facility of proof, that is, that proof of mere repute that he so belongs is sufficient not merely for the purposes of section 94, but for all the purposes of the Act; *a fortiori* evidence that he actually belongs is sufficient. I am not impressed with the view that Bear's mother being married to his father ceased to be an Indian by virtue of section 11.

Assuming that she did marry as alleged, and I have doubts whether there is any evidence of any such marriage, while she herself lost her character of an Indian by such marriage, it did not affect her blood which she transmitted to her son. I think the conviction must be affirmed with costs.

RICHARDSON, MACLEOD, ROULEAU and MCGUIRE, JJ., concurred.

Conviction affirmed with costs.

DIGEST OF CASES REPORTED IN THIS VOLUME

ABANDONMENT.

See EXECUTION, I.

AMENDMENT.

See CONVICTIONS, 3, 4, 5—NEW TRIAL —APPEAL, 2—BILLS, NOTES AND CHEQUES, 2.

APPEAL.

Appeal — *Objections to Regularity —Value of Subject Matter.*]—An objection on the ground of irregularity in the proceedings leading to an appeal cannot be taken on the argument of the appeal. In determining the value of the subject matter in dispute, upon which the right of appeal is made to depend, the proper course is to look at the judgment as to the extent that it affects the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal. MacFarlane v. Leclaire, 15 Moore P. C. 18, 8 Jur. N. S. 267, 10 W. R. 324, followed. *Steele* v. *Ramsay, Bratt, claimant.* (Ct. Q. B. Man. 1885), p. 1.

Notice of Appeal—*Amendment — New Trial—Judge's Charge—Perverse Verdict—Commission Evidence — Improper Evidence—Objection to Admissibility of Evidence.*]—An amendment was allowed to a notice of appeal so as to ask expressly for a new trial, but only on the grounds stated in the notice of appeal. An amendment so as to set up the ground, not stated in the notice, of the improper admission of evidence taken on commission, was refused as it did not appear from the Judge's notes that objection was made at the trial, though the commissioner had noted the objection. A new trial on the ground that the verdict was perverse was refused. *Edmonton* v. *Thomson* (Ct. 1891), p. 342.

Appeal—*Amount in Controversy—Special Leave.*]—The plaintiff sued for $617.85, and defendants with their defence, while denying liability, brought into Court $367 as being sufficient to satisfy the plaintiff's claim — the trial Judge found the plaintiff entitled to $543.22, and applied the $367 in court, leaving, with an adjustment of interest, a balance due to the plaintiff of $182.43:—Held, that the amount in controversy exceeded $200, and the defendant was entitled to appeal without special leave. *McDougall* v. *McLean et al.* (1). (Ct. 1893), p. 436.

Appeal—*New Point—Notice of Appeal.*]—On appeal to the court in banc, counsel for the defendants (appellants) having sought to raise for the first time the point that, although there had been a dedication, such dedication was made and accepted subject to such obstructions as existed upon it at the time of dedication, the court, considering that the point was not covered by any of the grounds stated in the appellant's notice of appeal:—Held, that the appellants were not at liberty to raise the point at this stage. *Edmonton* v. *Brown & Curry* (Ct. 1893), p. 454.

See CRIMINAL LAW, 2, 7—CONVICTIONS, X.—NEW TRIAL—BILLS, NOTES AND CHEQUES, 2.

ASSESSMENT AND TAXATION.

Canadian Pacific R. W. Co. Lands — *Exemption from Taxation—Sale—Proper Authority to Assess.*]—Lands vested in the Canadian Pacific R. W. Co. subject to a provision that the same should, "until they are sold or occupied, be free from taxation for twenty years," were, by the company, agreed to be sold and conveyed to the appellants as trustees, who were to sell them, accounting for an interest in the proceeds to the company. At the date of the assessment of the lands, the

consideration owing by the trustees to the company had been paid:—Held, that the lands had ceased to be exempt from taxation. Held, also, Wetmore and McGuire, JJ., dissenting, that in view of the Ordinance relating to municipalities, and to schools, the lands being situated partly within and partly without the municipality, the school district was authorised to assess, and need not make a demand upon the municipality to do so. *Angus et al.* v. *The Board of School Trustees of the School District of Calgary* (Ct. 1887).

See TAX SALE.

ASSIGNMENT.

See EQUITABLE ASSIGNMENT—FRAUD, 1, 2, 3.

BILLS, NOTES AND CHEQUES.

Promissory Note — *Partnership—Signature of Individual Name with Descriptive Words—Liability of Firm—Admissibility of Extrinsic Evidence—Authority of Manager.*]—In an action against the members of a partnership carrying on business under the name of O. T. L. Co. on a promissory note reading as follows:—"Sixty days after date we promise to pay D. & B. or order $407.29 at the Imperial Bank here; value received," and signed "W. D. R., Manager O. T. L. Co.":—Held, Wetmore, J., dissenting: (1) That evidence of the circumstances surrounding the making and the accepting of the note was admissible for the purpose of shewing who was intended to be liable on the note. (2) That, on the terms of the note and the evidence of the surrounding circumstances in this case, the defendants were liable. *Ferguson et al.* v. *Fairchild et al.* (Ct. 1891, S. C. 21, S. C. R. 484), p. 329.

Accommodation Note—*Holder in Due Course — Equities Attaching to Note—Defects in Title—Agreement for Renewal — Parol Evidence — Writing Signature—Amendment.*]—Action by indorsee of a note against the maker. The trial Judge found that the note was made by the defendant for the accommodation of K., the payee, subject to the conditions that: (1) it was not to be used at all except in a certain stated event: (2) it was to be negotiated, if at all, only at a certain named bank; and (3) it was renewable for a stated period, which had not expired at the commencement of the action. He also found that the second and third of these conditions had been broken; that the plaintiff acquired the note, though for value, after maturity from one C., the trustee for the benefit of the creditors of K., and not from a certain bank which, at the time of the arrangement whereby he acquired the note, actually held it as a collateral security for an indebtedness of K:—Held, that these conditions were "equities attaching to the note," and their breach "defects in the title of the person who negotiated it:" that the note was affected by them in the hands of both C. and the plaintiff; and that therefore the plaintiff could not recover. The nature and effect of an accommodation note discussed. Quære, whether the general rule that property in which a bankrupt has no beneficial interest does not pass to his trustee applies, so far as the legal title is concerned, in the case of a voluntary non-statutory assignment for the benefit of creditors. Where a note is subject to an agreement for renewal, if the renewal is not contemplated, except on the happening of an event not within the knowledge of the holder alone, the obligation of offering to renew is on the party entitled to renew. The necessity for such offer and the time within which it must be made discussed. In this case it was held that there was a continuing offer to renew and a continuing refusal to accept a renewal. The character of the evidence of notice of defects in title discussed. Where it is made to appear that a note, transfer or other writing is merely an incident in or part of a larger agreement, and there is no writing in which the parties professed to set down all the terms of their agreement, oral evidence of the agreement is admissible. Signature is a conventional mode of declaring a writing to be the record of an agreement; but it is not essential, except where made so by statute. The fact that such a writing is directed to a third party does not prevent its being taken as the record of such an agreement. At the close of the plaintiff's case, a defence, that the plaintiff was not the holder of the note at the commencement of the action being on the record, a motion to dismiss on this ground was made. The trial Judge held that this defence was established, it appearing that the note had been deposited with a certain bank as a col-

lateral security and had not been returned to the plaintiff until after the commencement of the action; but on the plaintiff's application an amendment was allowed adding the bank with its consent as a co-plaintiff on the terms that the bank stand on the title of the plaintiff. *McArthur et al.* v. *McDowall et al.* (McGuire, J., Ct. 1892), p. 345.

Collateral Security — *Accommodation Indorser—Principal and Surety—Renewal—Extending time for Payment — Married Woman — Separate Estate — Evidence — Presumption.*]—T. B. L. and A. C. S. being indebted on several promissory notes to the plaintiffs who demanded security, the defendant H. A. S., the wife of A. C. S., at his request and without knowing of the purpose for which he proposed to use it, indorsed a blank form of note, which was afterwards filled out as a note by T. B. L., payable to H. A. S., and indorsed by her and A. C. S., and was then given to the plaintiffs. This note was afterwards renewed, H. A. S. again indorsing a blank form, A. C. S. being made payee and indorsing ahead of H. A. S. While the plaintiffs held this latter note, they kept the several notes, as security for which they held it, renewed, the renewals extending beyond the date of the maturity of the note held as security. In an action on the latter note, H. A. S. pleaded that she was discharged, by reason of the plaintiffs having given time by a binding agreement to T. B. L. and A. C. S., the principal debtors, without her consent:—Held, by Rouleau, J., the trial Judge, and by the court in banc, McGuire, J., dissenting, that the renewal of the notes constituted such an agreement and that the rule invoked—that giving time to a principal debtor by a binding agreement without the surety's consent, discharges the surety—was applicable; and that H. A. S. was entitled to a dismissal of the action. Semble, per Macleod, Rouleau and Wetmore, JJ.: 1. The fact that T. B. L. falsely stated to the plaintiffs, when they demanded security, that H. A. S. was indebted to him, and asked them if they would accept her indorsement, to which they consented, could not bind H. A. S., as T. B. L. had no authority from her to make the statement. 2. If notice to the plaintiffs that H. A. S. was merely an accommodation indorser were necessary, the mere fact that she was second indorser on the first note, and first indorser on the second note, would be sufficient evidence of such notice. 3. The case was distinguishable from that of a party, who, being asked for collateral security, brings paper founded on an actual indebtedness to himself. In that case, giving him time would in no case relieve the parties to the paper given as security. Per McGuire, J., dissenting: 1. There can be only two views of the contract entered into by H. A. S. (*a*) Her contract was simply that which the law implied from her indorsement of the note, that is, she thereby became surety for the payment of that note only—not of any notes as security for the payment of which it might be pledged. Her obligation was complete when she delivered the note, and oral evidence was not admissible to attach conditions to her liability as indorser beyond what the law implied. (*b*) If such evidence were admissible for the purpose of shewing that the note she had indorsed was given as collateral security for certain other notes, the evidence was to the effect that she had appointed her husband agent to use it as he wished, and that he, in the exercise of that authority, had pledged it to the plaintiffs as a continuing pledge, and she must in this view of it be held to have agreed to it being security until the other notes were paid. In either view, the giving of time to the principal debtors on the other notes, did not affect the question of the liability of H. A. S. to the plaintiffs. 2. The defence of coverture and a reply of separate property having been pleaded, and the evidence having shewn that H. A. S. was the owner of separate property when she indorsed, it would be presumed that she contracted with reference to it. Form of judgment against a married woman. *Le Jeune et al* v. *Sparrow et al.* (Rouleau, J., Ct. 1893), p. 384.

Unincorporated Body—*Officers—Acceptance—Personal Liability — Mechanics' Lien Ordinance—Right of Retention.*]—Plaintiff brought an action on the following document: "The Board of Managers, Presbyterian Church, Moose Jaw. Please pay H. McDougall the sum of $817.85 on my account and oblige me. James Brass," and accepted as follows: "Accepted. D. McLean, Chairman; A. E. Potter, Treasurer." It was found as a fact that McLean and Potter were members of the board, an unincorporated body:—Held, that (1) the document was a bill of exchange, and (2), following Owen v. Van Uster, 10 C. B. 318, 20

L. J. C. P. 61, that McLean and Potter were personally liable thereon. Brass was the contractor with the board for the erection of a manse. If the contract had been completed $817.85 would have been owing to him: but the trial Judge found that it had been left uncompleted to the value of $80. This was allowed to be set off against the amount of the plaintiff's claim; but it was also claimed that the defendants were entitled to retain 10 per cent. of the contract price for thirty days after the completion of the contract, under the provisions of the Mechanics' Lien Ordinance:—Held, that the defendants were not so entitled. *McDougall* v. *McLean et al.* (2): (Richardson, J., 1892, Ct. 1893), p. 450.

BILLS OF SALE AND CHATTEL MORTGAGES.

Chattel Mortgage — *Description, Date of Renewal.*] — Goods were described in a chattel mortgage as follows: — "All and singular the goods, chattels, stock-in-trade, fitxures, and store building of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise, now being in the store of the said mortgagors on, &c.:—Held, Rouleau, J., dissenting, that the description was sufficient. The mortgage was filed 12th August, 1886, at 4.10 p.m.; a renewal was filed 12th August, 1887, at 11.49 a.m. Held, Rouleau, J., dissenting. That the renewal was filed within one year from the filing of the mortgage. *Quirk* v. *Thompson* (Ct. 1888), p. 159.

Bill of Sale — *Affidavit of Bona Fides—Fraudulent Assignment — Preferential Assignment—Construction of Statutes.*] — The Bills of Sale Ordinance makes necessary an affidavit "that the sale is not for the purpose of holding or enabling the bargainee to hold the goods against any creditors of the bargainor:"—Held, that the use of the words "the creditors" instead of "any creditors" in the affidavit of bona fides did not invalidate the bill of sale. The same Ordinance makes necessary an affidavit "of a witness thereto of the due execution thereof":—Held, that, as attestation is not made essential to the validity of a bill of sale it is not necessary to call the attesting witness to prove the execution thereof. Held, also on the evidence, that inasmuch as the trial Judge could reasonably find as he had, that there was no fraudulent intention on the part of the bargainee, the bill of sale could not be held void as being made with intent to defraud creditors of the bargainor, and that inasmuch as the trial Judge could reasonably find, as he had, that the bargainee was not in fact a creditor of, but a bonâ fide purchaser from, the bargainor, the bill of sale could not be held void as being made with intent to give, or as having the effect of giving a preference to one creditor over another, and that therefore the bill of sale was not void under the Ordinance respecting preferential assignments. Judgment of Rouleau, J., on all points affirmed. Affirmed 19 S. C. R. 1. *Emmerson* v. *Bannerman* (Ct. 1890), p. 224.

See DETINUE.

CASES CONSIDERED.

Barber v. Nottingham and Grantham R. W. Co., 15 C. B. N. S. 726; 33 L. J. C. P. 193, followed. *R.* v. *O'Kell*, p. 79.

Brown v. Cockburn, 37 U. C. Q. B. 592, followed. *Dickie* v. *Dunn*, p. 83.

Dickie v. Dunn, 1 Terr. L. R. 83, distinguished. *Turriff* v. *McHugh*, p. 186.

Mayer v. Grand Trunk R. W. Co., 31 U. C. C. P. 248, followed. *Walters et al.* v. *Canadian Pacific R. W. Co.*, p. 88.

Morley v. Allenborough, 3 Ex. 500; 18 L. J. Ex. 148, distinguished. *Dickie* v. *Dunn*, p. 83.

Macfarlane v. Leclaire, 15 Moore P. C. 181; 8 Jur. N. S. 267; 10 W. R. 324, followed. *Steele* v. *Ramsay—Bratt*, claimant, p. 1.

McLennan v. McKinnon, 1 O. R. 219, not followed. *R.* v. *Tebo*, p. 196.

McWhiter v. Corbett, 4 U. C. C. P. 203, followed. *MacDonnell* v. *Robertson*, p. 438.

Owen v. VanUster, 10 C. B. 318; 20 L. J. C. P. 61, followed. *McDougall* v. *McLean et al.*, p. 450.

R. v. Beemer, 15 O. R. 266, followed. *R.* v. *Smith*, p. 189.

R. v. Dunning, 14 O. R. 52, considered. *R. v. Laird*, p. 179.

R. v. Grant, 14 Q. B. 43; 19 L. J. M. C. 59, followed. *R.* v. *O'Kell*, p. 79.

R. v. Mathewson, 1 Terr. L. R. 168, followed. *R.* v. *Hamilton*, p. 172.

R. v. McFarlane, 7 S. C. R. 217, considered. *R.* v. *Mowat*, p. 146.

R. v. Wright, 14 O. R. 668, followed. *R.* v. *Hamilton*, p. 172.

Raphael v. Burt, 1 Cab. & E. 325, followed. *Dickie* v. *Dunn*, p. 83.

Russell v. McQueen, 51 L. J. P. C. 77; 7 App. Cas. 829, followed. *R.* v. *Keefe*, p. 280.

Sawyer v. Pringle, 18 O. A. R. 218, followed. *A. Harris, Son & Co.* v. *Dustin*, p. 404.

Totten v. Douglas, 18 Gr. Ch. R. 341; 16 *Ib.* 243, discussed. *Shorey et al.* v. *Stobart et al.*, p. 262.

Windsor and Annapolis R. W. Co. v. The Queen, considered. *R.* v. *Mowat*, p. 146.

Young v. Brassey, 1 Ch. D. 277; 45 L. J. Ch. 142, discussed. *Lougheed* v. *Praed*, p. 253.

CERTIORARI.

Certiorari — *Findings of Fact — Scienter—Mens Rea.*]—The applicant was convicted, under the N. W. T. Act, s. 95, for having in his possession intoxicating liquor without the special permission in writing of the Lieutenant-Governor. On a motion for a certiorari to quash the conviction:—Held (1) Following Barber v. Nottingham and Grantham R. W. Co., 15 C. B. N. S. 726; 33 L. J. C. P. 193; and R. v. Grant, 14 Q. B. 43; 19 L. J. M. C. 59, that where the charge is one which, if true, is within the magistrate's jurisdiction, the findings of fact by him are conclusive. (2) That, as the statute does not express knowledge by the accused of the intoxicating character of the liquor, to be an essential element of the offence, first, it was not necessary for the prosecution to allege or prove it; secondly, that it was necessary for the accused to prove not merely that he had no such knowledge, but that he had been misled without fault or carelessness on his part. *The Queen* v. *O'Kell* (Ct. 1887), p. 79.

Certiorari — *Jurisdiction of Single Judge.*] — Held, following Regina v. Beemer, 15 O. R. 266, that a single Judge has no jurisdiction to hear and determine a motion to quash a conviction upon a writ of certiorari; and that such writs should be issued from the office of the registrar and be made returnable before the court in banc. *The Queen v. Smith* (Ct. 1889), p. 189.

Certiorari — *Conviction — Recognizance—Sufficiency of Sureties—Proof of Discharging Rule Nisi—Leave for New Rule.*]—A rule of court required that no motion to quash a conviction should be entertained unless the defendant were shown to have entered into and deposited a recognizance in $300, with one or more sufficient sureties, or to have made a deposit of $200. On a motion to make absolute a rule nisi to quash a certain conviction a recognizance had been entered into and deposited, but without an affidavit of justification of the sureties or other evidence of their sufficiency:—Held, following Regina v. Richardson, that the rule of court had not been complied with, and that therefore the rule nisi must be discharged. But $200 having been deposited a day or two before the return day of the rule nisi with the view of complying with the rule of court:—Held, that the ends of justice would be served by allowing the applicant to take a new rule nisi in the terms of the one discharged; and this privilege was accordingly granted. *The Queen* v. *Petrie.* (Ct. 1889), p. 191.

See CONVICTION.

CHATTEL MORTGAGES.

See BILLS OF SALE AND CHATTEL MORTGAGES—DETINUE.

COMMISSION EVIDENCE.

See APPEAL, 2.

COMMON CARRIERS.

Common Carriers — *Termination of Transit — Warehousemen—Conditions—Negligence—Railway Act—Discharge of Goods — Judicature Ordinance.*] — The defendant company between the 30th April and the 4th May received goods at Winnipeg from the plaintiffs for carriage. The goods were addressed to the plaintiffs, in some instances, "Prince Albert," in others "Prince Albert via Qu'Appelle," in others, "Prince Albert, Qu'Appelle," in others, "Duck Lake, Qu'Appelle," in others "Care George Hanwell, Qu'Appelle." Of the places named only Qu'Appelle was a station on the company's line. The goods were destroyed by fire about noon on the 13th May. They

had arrived at Qu'Appelle from day to day between the 5th and noon of the 12th May, and were apparently on the same days put in the company's freight sheds. The plaintiff's agent at Qu'Appelle was aware each day of the arrival of the goods:—Held, following Mayer v. Grand Trunk R. W. Co., 31 U. C. C. P. 248, that the company's duties as common carriers had ceased before the fire, and that they were liable, if at all, only as warehousemen. The shipping note was indorsed inter alia with conditions to the following effect: No. 3. That the company should not be liable for damages occasioned by fire. No. 5. That the defendants should not be liable for any goods left until called for or to order, and warehoused for the convenience of the owner, consignor or consignee, and that delivery should be considered complete and the responsibility of the company should terminate when the goods were placed in its sheds or warehouse (if there be convenience for receiving the same) at their final destination, or when the goods should have arrived at the place to be reached on the company's railway, and that the warehousing of all goods should be at the owner's risk and expense. No. 10. That all goods addressed to the consignees at points beyond the places where the company had stations, and respecting which no directions were received at those stations, should be forwarded to their destination by public carrier or otherwise as opportunity offered, without any claim for delay against the company for want of opportunity to forward them, or they might, at the discretion of the company, be suffered to remain on the company's premises or be placed in shed or warehouse (if there were such convenience for receiving them), pending communication with the consignees at the risk of the owners as to damage thereto from any cause whatsoever; but delivery should be considered complete, and all its responsibility should cease when such other carrier should have received notice that the company was prepared to hand him the goods for further conveyance; and that the company should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by it, if such loss, misdelivery, damage or detention, occurred after the goods arrived at said stations or places on its line nearest to the points or places they were consigned to or beyond its said limits. Per Richardson, J.: The goods having reached Qu'Appelle, conditions three and five applied and protected the company. Per Wetmore, J.: The Consolidated Railway Act, 1879, s. 25, s.-s. 4, did not prevent an agreement being made that when the goods should reach the point on the company's railway to which they were to be carried, a certain act or dealing with the goods by the company should constitute a discharge of the goods within the meaning of the statute, and that thereupon the character of the company should be changed from that of common carriers to that of warehousemen, and that conditions five and ten constituted such an agreement. Per McGuire, J.: Independently of the conditions, the company was not liable even as warehousemen; the company in this capacity being bound to use only ordinary care, and there was no evidence of negligence. Held, per curiam, that the Consolidated Railway Act, 1879, s. 27, s.-s. 1, applies to an action charging the company with negligence as warehousemen, and therefore the action not having been commenced within six months was barred. Per Wetmore and McGuire, JJ.: The Consolidated Railway Act, 1879, s. 25, s.-s. 4, applies only to receiving, transporting and discharging. It being contended that the jury having found that the company had not performed its contract by delivery of the goods, the court could not find that the character of the defendant company had been changed from that of common carriers to that of warehousemen on the ground that the effect would be to draw an inference of fact inconsistent with the finding of the jury, which is not permissible under Judicature Ordinance, 1886, s. 331. Per Wetmore, J.: The section refers to inferences of fact inconsistent with the finding of the jury, when such finding is within the province of the jury. *Walters* v. *Canadian Pacific R. W. Co.* (Ct. 1887), p. 88.

COMPANY.

See BILLS, NOTES AND CHEQUES, 1, 4.

CONDITIONAL SALE.

Lien Note—*Rescission by seller—Agency—Implement Dealer—Evidence—Objection—Striking Out.*]—Held, that the buyer of an article under a sale, conditional upon the property not

passing until full payment of the price, was entitled to treat the contract as rescinded by the seller, where the latter took possession, used, offered for sale, and neglected to take proper care of, the article, although he made no actual use of it. Sawyer v. Pringle, followed, 18 O. A. R. 218, reported in court below, 20 O. R. 111. The evidence of the authority of a person assuming to act as agent for a dealer in agricultural implements, and the scope of his authority discussed. Where, on the trial, parol evidence was given without objection to establish agency, and afterwards it appeared that the agent's appointment was in writing, and, on appeal, it was contended that the parol evidence should not have been and should not be considered:—Held, that, though upon the written appointment being put in evidence, an application might, perhaps, have been properly made to strike out the parol evidence bearing on the same point, yet, as no such application had been made, nor any objection taken to its reception, the parol evidence might properly be considered. *A. Harris, Son & Co.* v. *Dustin.* (Richardson, J., Ct. 1892), p. 404.

CONSTITUTIONAL LAW.

Gambling — *Legislative Powers of the Territories—B. N. A. Act*—s. 91, *ultra Vires.*]—R. O. (1888) c. 38, s. 5, enacts that:—"Every description of gambling and all playing of faro, cards, dice or other game of chance with betting or wagers for stakes or money, or other things of value, and all betting and wagering on any such games of chance is strictly forbidden in the Territories, and any person convicted before a justice of the peace in a summary way of playing at or allowing to be played at on his premises, or assisting, or being engaged in any way in any description of gaming as aforesaid, shall be liable to a fine for every such offence, not exceeding one hundred dollars with costs of prosecution, and on non-payment of such fine and costs forthwith, after conviction, to be imprisoned for any term not exceeding three months:—Held, that the evident purpose of the said section was to create an offence subjecting the offender to criminal procedure in the interest of public morals, and not for the protection of civil rights; and that the enactment therefore came within the decision in Russell v. The Queen, 31 L. J. P. C. 77; 7 App. Cas. 829, and consequently was ultra vires. *Regina* v. *Keefe.* (Ct. 1890), p. 280.

See MEMORANDUM OF STATUTES—ORDINANCES AND ORDERS-IN-COUNCIL, 7.

See CRIMINAL LAW.

CONTRACT.

Agreement Conditional on Consent of Third Party—*Time for Fulfilment of Condition—Reasonable Time —Judge's Charge.*]—Where an agreement is made subject to the consent of a third party, it must be looked upon as a conditional agreement, dependent upon such consent being given within a reasonable time in default of which the agreement must be taken not to have become effective:—Held, on the evidence that, assuming there was evidence of such a conditional agreement the date of which it was alleged the consent of the third party was obtained, could not, under the circumstances, be reasonably found by the jury to be within a reasonable time after the making of the agreement; and that therefore the charge of the learned trial Judge to the effect that there was not evidence of an agreement, was not objectionable at all events, per Richardson, J., as no substantial wrong or miscarriage of justice was occasioned thereby. *Martin* v. *Reilly* (Ct. 1889), p. 217.

See CROWN.

CONVICTIONS.

Summary Convictions Act—*Appeal—Notice—Address.*]—A notice of appeal from a conviction under "The Summary Convictions Act," C. S. C. c. 178, was addressed to the convicting magistrate only, and was served upon him only. The notice contained no intimation that it was served on the magistrate for the prosecutor or complainant, nor did it appear that the magistrate was otherwise notified to that effect:—Held, the notice of appeal was insufficient. *Keohan* v. *Cook.* (Ct. 1887), p. 125.

Distress—*Imprisonment—N. W. T. Act—Conviction — Distress — Imprisonment.*]—A statute provided that in

case of non-payment of the penalty and costs immediately after conviction, the Justice might, in his discretion, levy the same by distress and sale, or might commit the person who was so convicted and made default, to any common gaol for a term not exceeding six months, with or without hard labour, unless the said penalty and costs should be sooner paid. N. W. T. Act, s. 99. A conviction under this statute ordered that the penalty and costs be levied by distress, and that in default of sufficient distress the defendant be imprisoned for one month:—Held, that the imposition of imprisonment in default of distress was authorized by the Summary Convictions Act, R. S. C. c. 178, s. 67. *Queen* v. *Mathewson* (Ct. 1889), p. 168.

Imprisonment — *Certiorari — Return of Conviction — Amendment of Conviction.*]—Defendant was convicted under a statute which authorized, in default of payment of the penalty and costs (1) distress, or (2) six months' imprisonment. The magistrate's minute directed six months' imprisonment, unless the fine and cost should be sooner paid. The magistrate filed with the proper officer a formal conviction which directed distress, and in default of distress, six months' imprisonment. This conviction being obviously bad, inasmuch as (besides not according with the minute) three months is the limit for imprisonment for default of distress (Summary Convictions Act, s. 67. Regina v. Mathewson): upon the issue of a certiorari the magistrate filed a new formal conviction which accorded with the minute, except that there were added the words "(unless) the costs of conveying the defendant to the guard room are sooner paid:"—Held, following Regina v. Mathewson, 1 Terr. L. R. 168, that the first formal conviction was bad. Held, also, that the second formal conviction was also bad inasmuch as the statute under which the conviction was made did not authorize the imposing of the costs of conveying to gaol; the words to that effect in the forms to the Summary Convictions Act being intended to be used only when expressly made applicable. Regina v. Wright, 14 Q. R. 668, followed. Semble, per Richardson, J. The Summary Convictions Act, s. 85 (as remodelled by 51 Vict. c. 45, s. 9m.), directing that the convicting magistrate shall transmit the conviction to the proper officer "before the time when an appeal . . may be heard thereto, be kept by the proper officer among the records of the court," and the magistrate having complied with this provision, he filing the first formal conviction, the second could not be considered. *Queen* v. *Hamilton* (Ct. 1889), p. 172.

Summary Convictions Act—*Dismissal — Costs — Authorized Items — Amendment.*]—A Justice's order dismissing an information under "The Summary Convictions Act," ordering the informant to pay as costs the sum which included items for "rent of hall," "counsel fee," "compensation for wages," and "railway fare":—Held, that none of these items could legally be charged as costs and that, therefore, the order was bad, so far as it awarded any costs. Held, also, that the court could not amend the order by deducting the illegal items: though it could amend by striking out in toto all that part of the order relating to costs. Regina v. Dunning, 14 O. R. 52, considered. *Queen* v. *Laird* (Ct. 1889), p. 179.

Malicious Injury to Property—*Conviction—Penalty—Amount of Injury Done—Damages—Compensation—Costs — Illegal Items — Amendment — Defects on Face of Conviction—Excessive Imprisonment.*]—One of the sections of the Act respecting Malicious Injuries to Property enacted that an offender should on summary conviction be liable to a penalty not exceeding $100 over and above the amount of injury done, or to three months' imprisonment. A conviction thereunder adjudged the defendant "to forfeit and pay the sum of $5 as a penalty, together with $50 for the amount of injury done as compensation in that behalf":—Held, that it was not the intention of the section in question that there should be two separate penalties, but that one penalty should be fixed by first ascertaining the amount of damages, and then adding to that amount such sum not exceeding $100 as the justice should deem proper: and that it was therefore beyond the jurisdiction of the justice to award a sum as compensation. Held, also, that the words "as compensation in that behalf" could not be struck out as surplus under the power of amendment given by s. 80 of the Summary Convictions Act, and the $50 be treated as part of the penalty in as much as the effect of such an amendment would be to punish the offender not according

to the conviction of the magistrate, but according to the conviction as amended by the court, which was not the intention of that provision. The conviction also adjudged the payment of a sum for costs which comprised several items which exceeded the amounts allowed therefor by the tariff fixed by The Summary Convictions Act, as amended by 52 Vict. (1889), *c.* 45, s. 2, or were not mentioned in the tariff. Held, that the conviction was therefore bad, and that it could not be amended by striking out the charges improperly made. The conviction also adjudged in default of payment, imprisonment for three months. Held, that s. 68 of the Summary Convictions Act applied and that inasmuch as the penalty imposed together with the costs did not exceed $25, two months was the maximum term of imprisonment which could be imposed. It being contended that the court had no power on appeal to quash a conviction for defects or errors appearing on the face of the conviction. Held, that the court had such power. McLellan v. McKinnon, 1 O. R. 219, on this point not followed. *The Queen* v. *Tebo* (Ct. 1889), p. 196.

Conviction — *Justice's Summary Order—Appeal — Recognizance—Time of Filing.*]—It is too late to file the recognizance required by s. 77 of the Summary Convictions Act, on an appeal from a summary conviction or order, where the defendant has not remained in custody, after the appellant has entered upon his case. *Bestwick* v. *Bell* (Ct. 1889), p. 193.

See HABEAS CORPUS.

COSTS.

See CONVICTIONS, 4, 5.

C. P. R. LANDS.

See ASSESSMENT AND TAXATION.

CRIMINAL LAW.

Criminal Law—*Procedure—In Territories—Foundation of Charge—Grand Jury—Coroner's Inquest — Applicability of Imperial Laws.*]—In the Territories it is not necessary in order to put an accused upon his trial on a criminal charge that the charge should be based upon either an indictment by a grand jury or a coroner's inquest. The applicability of the laws of England to the Territories discussed. *The Queen* v. *Connor.* (Ct. Q. B. Man. 1885), p. 4.

Criminal Law—*Appeal—Appellate Powers of Manitoba Court—Habeas Corpus — Presence of Prisoner — Production of Record.*] — The Court of Queen's Bench for Manitoba has no power to send a habeas corpus beyond the limits of Manitoba, and the North-West Territories Acts have not extended its power in this respect. That court will hear an appeal in the absence of the prisoner. Upon such an appeal the original papers should be produced; but if the prisoner cannot procure them the court will act on sworn or certified copies. *The Queen* v. *Riel* (No. 1). (Ct. Q. B. Man. 1885), p. 20.

Treason—*Jurisdiction of Territorial Court—Information—Notes of Evidence in Shorthand—Appeal on Questions of Fact—Insanity.*]—1. In the North-West Territories a stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, have power to try a prisoner charged with treason. The Dominion Act 43 Vict. *c.* 24, is not ultra vires. 2. The information in such case (if any information be necessary), may be taken before the stipendiary magistrate alone. An objection to the information would not be waived by pleading to the charge after objection taken. 3. At the trial in such case the evidence may be taken by a shorthand reporter. 4. A finding of "guilty" will not be set aside upon appeal if there be any evidence to support the verdict. 5. To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated, but plenary powers of legislation. Insanity as a defence in criminal cases, discussed. *The Queen* v. *Riel* (No. 2). (Ct. Q. B. Man. 1885). See Addenda et Corrigenda, p. 23.

Criminal Law— *Forgery — Corroborative Evidence.*]—The prisoner was charged in the first count with forging the name of a superintendent of the N. W. M. Police to a requisition for transport, and in the second, with uttering the same knowing it to be forged:—Held, that the superintendent was not "a person interested, or supposed to be interested," within the meaning of the

Criminal Procedure Act, R. S. C. c. 174, s. 218, and that therefore his evidence did not require corroboration. *Queen* v. *Farrell* (Ct. 1888), p. 166.

Crown Case Reserved — *Perjury — Evidence — Judge's Notes.*] — Held, that on the trial of a charge of perjury, the production of a book purporting to contain full notes of the evidence taken by the trial Judge (who was proved to have actually taken notes), in the case in which the perjury was alleged to have been committed and proved to be in the Judge's handwriting and to be signed by him, afforded, in view of the N. W. T. Act, s. 69, proper and sufficient evidence of the statement in respect of which the perjury was assigned. *The Queen* v. *Mills alias Millet* (Ct. 1890), p. 297.

Felony—*Polling Jury—Jury separating—Refreshments for Jury.*]—Held, in a prosecution for felony, that it was discretionary with the trial Judge to permit or refuse to allow the jury to be polled. Held, the prisoner being convicted of felony, that the circumstances—that two of the jurors had, during the trial, but before the Judge's charge, been allowed to separate for a sort time from the other jurors in the custody of one of the constables who had been placed in charge of the jury, and during such separation to hold a short conversation, not referring to the cause, with a stranger to the proceedings, and to partake, at his own expense, of intoxicating liquor sufficient in quantity to cause intoxication—did not constitute ground for discharging the prisoner, or for a new trial. *Regina* v. *McClung.* — Wetmore, J., December 5th, 1890 (Ct. 1891), p. 379.

Seduction — "*Under Promise of Marriage*"—*Direction to Jury—Mistrial — New Trial.*] — The meaning of "under promise of marriage" in 50 & 51 Vict. (1887), c. 48, s. 2, substituting a new section for R. S. C. c. 157, s. 4, means "by means of a promise of marriage." Where therefore the trial Judge directed the jury that the intention of the section was to impose a punishment for the seducing of young women under twenty-one by men over twenty-one to whom they were engaged, and the jury rendered a special verdict as follows: "The verdict is that the prisoner promised to marry F. S. in June, 1892, with the intention of carrying out his promise, but in November, of the same year, he seduced her, at the same time renewing his promise of marriage, and under opinion no other man had connection with her:"—Held, that there had been a misdirection, and therefore a mis-trial; and a new trial was ordered. *The Queen* v. *Walker.* (Ct. 1893), p. 482.

Manslaughter — *Master and Servant — Negligence.*] — The deceased, a lad, aged about 15, was engaged by the prisoner as a farm-hand, on the terms of receiving for his work his board, lodging and clothing. He died on the 14th February, after having been in the prisoner's employment about nine months. Death was caused by the gangrenous condition of many parts of his body resulting from frost bites. He was in the habit of wetting his bed, and on this account was made to sleep in the stable, and had slept there for two or three months up to the 10th February. From the 1st to the 10th February the weather was excessively cold. The lad's fingers at least had been badly frozen at least three weeks before his death, and it was found that the prisoner must be taken to have known it for that length of time, nevertheless, he paid no attention to it till the 10th February. During the night of 9th-10th February, the deceased's feet were frozen solid to the ankles; this was discovered by the prisoner, who then took him to the house. It was found that the lad became so frozen by reason of the earlier frost-bites, rendering him unable to attend to himself properly, and his being left without assistance in the stable in excessively cold weather. The prisoner, on bringing the lad to the house, attended to him personally, asked a neighbor for a remedy for frost-bites, drove to a physician, got from him a prescription for frost-bites, but did not disclose to him the serious condition the lad was in. On and after the 10th February, the lad was helpless, and died on the 14th February. The prisoner had means to procure medical attendance: —Held, that, in view of the age of the deceased, the circumstances of the country, the fact of there being no provision for maintaining poor people, it was the duty of the prisoner, as master towards the deceased as his servant, to have taken care of him, and that by his omission to do so he was guilty of gross negligence, to which the lad's death was attributable, and that, therefore, the prisoner was guilty of manslaughter. *The Queen* v. *Brown.* (Wetmore J., Ct. 1893), p. 475.

Maliciously Killing Cattle—*Rebutting Implied Malice—Mens rea—Verdict—Refusal of Judge to Receive.*] —On a charge of unlawfully and maliciously killing cattle it appeared that the animal was killed by the prisoners when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it:—Held, that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, a mens rea on the part of the prisoners being disproved. Power of trial Judge to refuse a particular verdict considered. *The Queen* v. *Mennel et al.* (Ct. 1893), p. 487.

See HUSBAND AND WIFE. WAY.

CROWN.

Crown—*Breach of Contract by Servant—Sureties—Discharge.*] —The defendants were sued as sureties for the performance of a contract to deliver hay to the N. W. M. Police. The defendants claimed they were relieved from liability because the police authorities failed to carry out their part of the contract in material particulars, viz., (1) By using a quantity of the hay before it had been inspected by a board of officers, as provided by the contract; (2) By allowing a portion to be carried off by some of the constables, and another portion to be destroyed by cattle before the hay was weighed or measured, as provided by the contract; (3) By measuring instead of weighing the hay as provided by the contract; the result by weighing being much in favour of the defendant's principal:—Held, that the third objection afforded a good defence. Held, also, that the Crown was responsible for breaches of contract, resulting from the acts or omission of its servants, though not for their torts. Queen v. MacFarlane, 7 S. C. R. 217, and the Windsor & Annapolis R. Co. v. The Queen, 55 L. J. P. C. 41; 11 App. Cas. 607. *Queen* v. *Mowatt et al.* (Ct. 1888), p. 146.

CROWN LANDS.

Patent—*Squatter — Trail — Highway—Dedication—Conditional Dedication.*]—The defendants, claiming under the original squatter on certain Dominion lands, erected a building thereon fronting on an old trail; the original squatter subsequently, in expectation of the Crown recognizing the claims of himself and his assigns, registered a plan of the entire land, whereon was shown a highway approximately conforming to the lines of the old trail, but so that the building in question projected into the highway shown on the plan. The Crown did, afterwards, grant a patent to the original squatter for the entire land, excepting the portions shown on the plan, as reserved for the defendants and others in like position. These excepted portions as they appeared on the plan approximately conformed in size and position to the portions which the squatter had assumed to convey to the defendants and others. Patents for these excepted portions were granted by the Crown to the defendants and others, respectively:—Held, that the Crown, by issuing patents in accordance with the registered plan, had adopted it, and thereby dedicated to the public the highway as shown thereon; that the plaintiff municipality, within which the land lay, having demanded of the defendants the removal of the building, so far as it encroached on the highway as shown on the plan, and the defendants having refused to comply with the demand, the plaintiff municipality were entitled to a mandatory injunction to abate the building as being a nuisance. Held, also, that the defendants were consequently not entitled to compensation as owners or occupiers under the provision of the Municipal Ordinance. Judgment of Rouleau, J., affirmed. (Affirmed on the merits, 23 S. C. R. 308, and see 28 S. C. R., where the judgment of the Supreme court appears at length.) *Town of Edmonton* v. *Brown & Curry* (Ct. 1893), p. 454.

DEDICATION.

See WAY—CROWN LANDS.

DETINUE.

Detinue—*Buildings — Chattels appurtenant to Real Estate—Estoppel.*] —The defendant gave a chattel mortgage to the plaintiffs on certain buildings, and also a certain ferry, and "the ferry boat with cables, pulley and other machinery used therewith:"—Held (1) that detinue or replevin would not lie for the buildings, at least where the

defendant was in possession of the land on which they stood; nor for the ferry boats or attachments, as they were appurtenant to the ferry, which was an easement arising in respect of land. (2) That there was no estoppel by the mortgage, in such sense as to make detinue or replevin an appropriate remedy for property of the character in question. *Stimson et al.* v. *Smith* (Ct. 1889), p. 183.

EQUITABLE ASSIGNMENT.

Equitable Assignment—*Order—Address of Order—Specific Fund.*]—The Dominion Government was indebted to Bull, for transport services rendered during the N. W. Rebellion. On the 25th July, W., a Government Transport Officer, notified Bull by letter to put in his account, certified, to the H. B. Co., Winnipeg, where it will be paid. Bull, being indebted to the plaintiffs, wired them 1st August, "Will send order on transport account, payable at Winnipeg." Bull also wrote to the plaintiffs 4th August, enclosing a copy of W.'s letter and an order reading "4th August. To the H. B. Co., Winnipeg. Please pay Messrs. G. F. & J. Galt or order, amount of my account." This order was presented to the company, but payment was refused for the reason assigned that the Government had stopped payment of transport accounts. Subsequently Bull made a general assignment for the benefit of his creditors to the defendant, to whom the Government eventually paid the amount of Bull's claim. The plaintiff sought to recover the amount from the defendant, as money had and received to their use:—Held, per curiam: That the order per se did not constitute an equitable assignment. Held, McQuire, J., dissenting: That the order in conjunction with the other documents, could not operate as an equitable assignment because the evidence did not show that the company either were debtors to Bull or held a specific fund to which he was entitled. Per McGuire, J.: The several documents taken together constituted a good equitable assignment, for they showed clearly Bull intended to assign to the plaintiffs the debt owing to him by the Government, and the order, though addressed to the company in whose hands there was no funds belonging to Bull, was virtually addressed to the Government, the company being considered merely the Government paymaster. *Galt et al.* v. *Smith* (Ct. 1888), p. 129.

ESTOPPEL.

See DETINUE.

EVIDENCE.

See APPEAL, 2—SALE OF GOODS, 1—TRANSFER ABSOLUTE IN FORM—CRIMINAL LAW, 2, 3, 4, 5—HUSBAND AND WIFE, 1, 2—NEW TRIAL—BILLS, NOTES AND CHEQUES, 1, 2 3,—COMMISSION EVIDENCE, 9.

EXECUTION.

Execution — *Notice — Seizure — Custodia Legis—Abandonment—Security—Interpleader.*]—Goods were seized under execution by the sheriff, who left them in possession of the judgment debtor's wife, who claimed to be the owner, upon her agreeing to hold them for him. Some months after the sheriff, under the same writ took the goods which were then in possession of the claimants, Thompson & Nelson. They claimed to have bought from one Hodgson, who claimed to have bought from the wife after the original seizure:—Held, in view of "The Administrator of Civil Justice Ordinance, 1884" s. 83, that there was no abandonment by the sheriff: that he was right in resuming actual possession, and that, therefore, the execution prevailed over the claimants' title. *Brittlebank* v. *Gray, Jones, Thompson & Nelson*, claimants. (Ct. Q. B. Man., 1887), p. 75.

Sheriff's Fees — *Right to Demand in Advance—Fi. fa.—Whether fi. fa. in Sheriff's Hands for Execution—Effect of Directions or Statements to Sheriff.*]—The meaning and effect of the Judicature Ordinance R. O. (1888) c. 58, s. 461, providing for the payment to officers in advance of the fees and allowances fixed by tariff, discussed. Semble, a sheriff is not under that section entitled to demand in advance his charges for mileage or seizure before executing a fi. fa. goods:—Held, that the finding of the trial Judge, that the conduct of the first execution creditor's advocate did not have such effect that the execution was not originally placed, or had ceased to be, in the sheriff's

hands for execution, was justified by the evidence. *Parsons et al.* v. *Hutchings* (Ct. 1891), p. 317.

See LAND TITLES.

EXEMPTIONS.

See LAND TITLES, 1.

FIRE.

See PRAIRIE FIRE.

FRAUD.

Fraudulent Conveyance — *Insolvency—Bona Fides of Grantee.*]—In an action attacking a conveyance as fraudulent against creditors the evidence showing that there was an actual sale from the debtor to the claimant, and that if even there was any fraudulent intent on the part of the former, the latter bought bona fide, the conveyance was held valid. *Steele* v. *Ramsay—Bratt*, claimant. (Ct. Q. B. Man. 1885), p. 1.

Fraudulent Judgment—13 *Eliz.* c. 5—*Assignment—Equities — Value—Notice.*]—The assignee of a judgment void as against creditors under 13 Eliz. c. 5, takes the judgment subject to the rights of the creditors, notwithstanding the assignment is for value, and per Rouleau, and McGuire, JJ., without notice, per Wetmore, J., at all events with notice. Totten v. Douglas, 18 Grant Ch. R. 341; 16 Grant Ch. R. 243, discussed. *Shorey et al.* v. *Stobart et al.* (Rouleau, J., Ct. 1890), p. 262.

Principal and Agent—*Trust.*]—On the evidence in this case, it was found that an arrangement between merchants and an insolvent person, against whom there were unsatisfied judgments, whereby the former supplied the latter as their agent, with goods to be exchanged with Indians for furs, which were to be delivered for sale to the merchants, who were to retain from the proceeds of the sale of the furs the invoice price of the goods, plus 10 per cent. thereon and 2½ per cent. of the selling price of the furs—the agent getting all further profit as his remuneration, was established as against the defence, that it was an arrangement in fraud of the agent's creditors; and it was held, that such an arrangement was legal, and that therefore the merchants were entitled to damages against the deputy sheriff, who had seized some furs comprised in the agreement under an execution against the agent. *MacDonnell* v. *Robertson.* (Rouleau, J., Ct. 1893), p. 438.

See BILLS OF SALE AND CHATTEL MORTGAGE, 2.

FRAUDULENT ASSIGNMENT.

See FRAUDULENT CONVEYANCE — FRAUDULENT JUDGMENT — FRAUD.

HABEAS CORPUS.

Habeas Corpus — *Practice — Dispensing with Issue of Writ — Discharge of Prisoner without Being Brought up—Parties to be Served—Conviction—Hard Labor — Duplicity.* — A conviction which attaches hard labor to imprisonment in default of there being sufficient distress to levy the fine imposed, is bad. A conviction which charges an offence on two separate days, charges two distinct separate offences, and, if it be a case where s. 26 of the Summary Convictions Act applies, is bad; a warrant of commitment based on such a conviction is consequently bad. It is a usual, convenient and established practice that a rule nisi to shew cause why a writ of habeas corpus should not issue should also require cause to be shewn why in the event of the rule being made absolute the prisoner should not be discharged without the actual issue of the writ of habeas corpus, and without his being personally brought before the court; but in order that the rule may be made absolute in this form, the magistrate, the keeper of the prisoner, and the prosecutor shall all be served with the rule nisi, or at least be represented on its return. *The Queen* v. *Farrar* (Ct. 1890), p. 306.

See CRIMINAL LAW, 2.

HUDSON'S BAY LANDS.

See WAY.

HUSBAND AND WIFE.

Crown Case Reserved—*N. W. T. Act—Indian Marriage—Evidence of—*

Wife's Evidence—Applicability of English Law.]—The North-West Territories Act, R. S. C. c. 50, s. 11, provides that, with some limitations, the laws of England, as the same existed on the 15th July, 1870, should be in force in the Territories in so far as the same are applicable to the Territories:—Held, that the laws of England relating to the forms and ceremonies of marriage are not applicable to the Territories—certainly quoad the Indian population, and probably in any case. On the trial of a prisoner, an Indian, on a criminal charge, the evidence of two Indian women M. and K. was tendered for the defence. M. stated "that she was the wife of the prisoner; that he had two wives, and that K. was his other wife; that she, M., was his first wife; that she and the prisoner got married Indian fashion; that he promised to keep her all her life, and she promised to stay with him, and that was the way the Indians got married; that he married the other woman last winter; that he and the other woman lived with each other, and that he took her for a wife, that was all about it. The trial Judge, Wetmore, J., rejected the evidence of M. and admitted that of K. Held, affirming the decision of Wetmore, J., that the evidence quoted was sufficient evidence of a legally binding marriage between M. and the prisoner for the purpose of excluding the evidence of M. as being neither a competent nor a compellable witness against the prisoner on a criminal charge. *The Queen* v. *Nan-E-Quis-A-Ka.* (Ct. 1889), p. 211.

See MARRIED WOMEN'S PROPERTY.

IMPLIED TERMS OF CONTRACT.

See SALE OF GOODS, 1, 2.

IMPRISONMENT.

See CONVICTIONS.

INDIAN.

Indian Act—*Half-breed—Supplying Liquor to.*]—The Indian Act, R. S. (1886) c. 43, defines (s. 2*h*) "Indian" as meaning inter alia "any male person of Indian blood reputed to belong to a particular band." Held, (1) against the contention that "of Indian blood" means of full Indian blood, or at least of Indian blood ex parte paterna—that a half-breed of Indian blood ex parte materna is "of Indian blood." (2) Against the contention that the defendant having been shewn to have actually belonged to a particular band, this disproved, or was insufficient to prove, that he was reputed to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of actual membership in the band. (3) Against the contention that by virtue of s. 11 the mother of the defendant by her marriage to his father, who was a white man, ceased to be an Indian, and that therefore the defendant was not a person of Indian blood—that while the mother lost her character of an Indian by such marriage except as stated in that section, it did not affect her blood which she transmitted to her son. *The Queen* v. *Howson* (Ct. 1894), p. 492.

See HUSBAND AND WIFE.

INJUNCTION.

See TAX SALE.

INSANITY.

See CRIMINAL LAW, 3.

JUDGE'S CHARGE.

See CONTRACT, 1—APPEAL, 2.

JUDGE'S NOTES.

The notes taken at the trial are conclusive evidence of what took place thereat. *McDougall* v. *McLean* (2) (Ct. 1893), p. 450.

JURY.

See CRIMINAL LAW, 6, 7.

LAND TITLES.

Territories Real Property Act—*Executions — Memorials — Certificate of Ownership—Duty of Registrar*

—Exemption—Dominion Lands Act—Homestead Exemption Act—Exemption Ordinance — Homestead Legislative Powers—Ultra Vires.]—The Territories Real Property Act (R. S. C. c. 51) s. 94, as amended by 51 Vic. (1888) c. 20, s. 16, provides that the sheriff may deliver to the registrar a copy of a writ of execution and a memorandum of the lands intended to be charged; and that the registrar shall thereupon, if the title has been registered or so soon as the title has been registered, enter a memorandum thereof on the register; and that from and after such delivery the same shall operate as a caveat. Section 54 of the same Act, that after the title is registered, the applicant shall be granted a certificate of title; and that the registrar shall indorse upon the certificate and the duplicate a memorial of every mortgage, incumbrance or other dealing affecting the land. The Dominion Lands Act (R. S. C. c. 54), s. 34, provides that the title to a homestead and its attached preemption shall remain in the Crown until the issue of the patent therefor, and shall not be liable to be taken in execution before the issue of the patent. R. O. (1888) c. 45, s. 1, s.-s. 9, exempts from seizure under execution "the homestead of the defendant, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon. The sheriff delivered to the registrar a copy of a writ of execution accompanied by a memorandum comprising land for which the execution debtor then had a homestead entry under the Dominion Lands Act, but for which at that time a patent had not yet issued:—Held, that whatever might be the liability of the sheriff by reason of his assuming to charge lands which he could not "take," or which were exempt from seizure under execution, it was the duty of the registrar when issuing the certificate of title to the execution debtor upon his patent, to indorse upon the certificate a memorial of the execution; although without such memorial the land would, under s. 61 of the T. R. P. Act be, by implication, subject to the execution. The term "homestead" in the Dominion Lands Act, the Homestead Exemption Act, and the Exemptions Ordinance, has a different meaning in each case. In the Dominion Lands Act, it means land acquired from the Government by the fulfilment of certain conditions as to residence and improvements; in the Homestead Exemptions Act, it means any land specially registered in accordance therewith, whether acquired as a homestead under the Dominion Lands Act or not; in the Exemptions Ordinance, it may apply to lands which are neither registered under the Homestead Exemption Act, nor acquired as a homestead under the Dominion Lands Act. Per McGuire, J.: In the Exemption Ordinance the term "homestead" means the enclosure or ground immediately surrounding the mansion or home residence of the debtor. The Exemption Ordinance R. O. (1888) c. 45, s. 9, is ultra vires of the legislative powers of the North-West Territories inasmuch as it is inconsistent with the Homestead Exemption Act, R. S. C. c. 52. *Re Claxton* (Ct. 1890). See Addenda et Corrigenda, p. 282.

Registry Laws — *Territories Real Property Act, R. S. C. c. 5 —Mortgage Entitled to Registration Though Certificate of Ownership not Produced Therewith to Register — Priorities — Memorials.*]—B.'s mortgage, unaccompanied by a certificate of ownership, was "received and filed" and entered in the day book by the registrar on the 7th October, 1889, but no memorial was then entered in the register. M.'s mortgage, accompanied by a certificate, was received and registered on the 14th October, 1889. In March, 1890, B. produced his certificate to the registrar, who then completed the registration of B.'s mortgage by entering a memorial in the register and on the certificate, but under those of M.'s mortgage. The memorial of M.'s mortgage was defective in not shewing the date of registration:—Held, that B.'s mortgage, being filed and entered in the day book prior to M.'s mortgage, was entitled to priority of registration, by s. 39 of the Territories Real Property Act, R. S. C. c. 51. That the memorials shewed the facts from which priority could be inferred, and the order in which they appeared in the register was immaterial. That the memorial of M.'s mortgage should be amended without charge. *In re Bentley and Morris* (McGuire, J., 1892), p. 473 (*a*).

Territories Real Property Act *—Transfer Given in for Registration —Transfer not Executed by Registered Owner—Executions—Priority — Registrar's Duty.*] — While the Territories Real Property Act was in force, a title stood as follows: 5th July, 1887, Certificate of Ownership to Canadian Pacific Railway Co.; 12th July, 1887,

Transfer, J. S. to L. H. R., filed and entered in the day book; 31st March, 1888, Transfer, Canadian Pacific Railway Co. to J. S. registered, and certificate of ownership issued to J. S.; 5th February, 1891, 14th April, 1891, 13th January, 1893, Executions, King and others v. J. S., lodged by sheriff:. On 19th January, 1893, L. H. R. applied to the registrar to issue her a certificate of ownership upon her transfer of 12th July, 1887. The registrar was ready to do so, but proposed to mark the certificate as being subject to the several above mentioned executions, on a reference by the registrar under s. 114:—Held, that in view of ss. 34 and 65, the registrar had no right, where the land had been brought under the Act, to receive a transfer for registration executed by a person other than the certificated owner, and that therefore the filing of the transfer, prior to the lodgment of the executions, was ineffective, and that therefore the registrar's view was correct. *Re Rivers* (Rouleau, J., Ct. 1893), p. 464.

LAWS OF ENGLAND.

See CRIMINAL LAW, 1, 3—HUSBAND AND WIFE.

LICENSES.

See LIQUOR LAWS.

LIEN.

See LIEN NOTE.

LIEN NOTE.

See CONDITIONAL SALE.

LIMITATION OF ACTIONS.

See PRACTICE, 1.

LIQUOR LAWS.

N. W. T. Act—*Intoxicants — Permit—Municipal Ordinance—By-Law—Licenses—Hotels—Places of Public Resort — Places Where Liquid Refreshments are Sold—License Fee—Excessive Amount—Police Regulation—Revenue.*] — The North-West Territories Act, s. 92, enacts inter alia that no intoxicant shall be imported into the Territories, or be sold, exchanged, traded off, bartered, or had in possession therein, except by special permission in writing of the Lieutenant-Governor. The Municipal Ordinance authorizes municipal councils to make by-laws for licensing, regulating, and governing, inter alia, hotels, places of public resort, and places where liquid refreshments are sold; and for fixing the sum to be paid for a license:—Held, that a permit from the Lieutenant-Governor did not dispense the holder from a compliance with a municipal by-law passed under the above mentioned provision of the Municipal Ordinance. Held, that, assuming that the power to impose a license under the Ordinance was intended as a power to make a police regulation, and not for the purpose of raising a revenue; but, semble, contra, a by-law imposing a license fee, $100, was valid as against the objection that the fee was excessive. *The Queen* v. *Salterio*, *The Queen* v. *McKenzie*, *The Queen* v. *Tumulty* (Ct. 1890), p. 301.

See INDIAN.

MARRIED WOMEN'S PROPERTY.

Married Women — *Separate Estate—N. W. T. Act—Interpleader.*]—The claimant was married in England. By her marriage settlement, there were settled upon her, to her separate use, certain moneys over which she was given a power of appointment; she exercised the power by appointing a part to her own separate use. This was paid or sent to her in the Territories. With it she bought farm stock, which was used on her farm, but it was found as a fact that it was the husband who carried on the farming operations. In the absence of evidence that the husband had constituted himself a trustee for the wife:—Held, that the farm stock had become the husband's property, notwithstanding the settlement of the provisions of the N. W. T. Act. *Brittlebank* v. *Gray-Jones*, *Gray-Jones*, claimant (Ct. Q. B. Man. 1887), p. 70.

See BILLS, NOTES AND CHEQUES, 3.

MASTER AND SERVANT.

See CRIMINAL LAW, 8.

MECHANICS' LIENS.

See BILLS, NOTES AND CHEQUES, 4

MENS REA.

See CRIMINAL LAW, 9—CERTIORARI, 1.

MORTGAGE.

See TRANSFER ABSOLUTE IN FORM—LAND TITLES.

MUNICIPAL LAW.

Municipal Ordinance — *Municipality — Sidewalk — Liability for Accumulation of Ice.*]—The Municipal Ordinance gives municipalities in the Territories jurisdiction over roads, casts upon them the duty of maintaining them, authorizes them to abate nuisances, and affords them means for raising money for corporate purposes: Held, therefore, that where a municipality had constructed a sidewalk upon one of the roads within its limits, upon which snow and ice had accumulated, which it had not removed within a reasonable time, in consequence of which the plaintiff slipped and fell and was injured, the municipality was liable. *Cuzner* v. *Calgary* (Ct. 1888) p. 162.

See LIQUOR LAWS—CONSTITUTIONAL LAW, 2.

NEGLIGENCE.

See CRIMINAL LAW, 8—COMMON CARRIERS.

NEW TRIAL.

New Trial—*Newly Discovered Evidence — Appeal — Amendment of Notice.*]—As a general rule on the argument of an appeal leave to amend the notice of appeal will be given only for the purpose of correcting errors of dates and other trifling matters and on special terms. The circumstances discussed under which a new trial will be granted or refused on the ground of the discovery of fresh evidence. *Sexsmith* v. *Murphy et al.* (Ct. 1891), p. 311.

See PRACTICE, 7—CRIMINAL LAW, 3. *See* APPEAL, 2.

NOTICE AND KNOWLEDGE.

See FRAUD.

PARTNERSHIP.

See BILLS, NOTES AND CHEQUES, 1.

PATENT FOR LAND.

See CROWN LANDS.

PETITION OF RIGHT.

See WAY.

PLAN.

See WAY.

PRACTICE.

Practice—*Pleading — Striking Out —Embarrassing—Reasonable Cause of Action — Amendment — New Cause of Action—Limitation of Actions — Railway Act.*]—Section 25 of the Judicature Ordinance, R. O. (1888) c. 58, can be invoked only (1) when the whole pleading and not merely "matter in the pleading," within s. 103, is attacked; and (2) when the pleading discloses not merely no cause of action or answer, but one not reasonable, that is, not fairly open to argument as a point of law, or when the action or defence is shewn by the pleadings to be frivolous or vexatious. If it is fairly open to argument whether a pleading discloses a good cause of action or answer, the question involved should be raised as a point of law by the pleadings under s. 123. On the pleadings set out below, it was objected that the amended statement of claim set up a new cause of action, which had become barred by provisions of the Railway Act:—Held, that a new cause of action was not set up in the amended statement of claim. *McEwen* v. *The N. W. Coal and Navigation Co.* (Ct. 1889), p. 203.

Practice—*Writ of Summons — Defendant Described within Actual Jurisdiction—Regularity—Service Ex Juris —Order — Amendment — Concurrent Writ — Power of Judge — English*

Forms.]—A writ of summons was issued in the form of a writ for service within the jurisdiction in which the time for appearance was that fixed in such cases, and in which the defendant was stated to be a resident of the judicial district wherein the writ was issued. It appeared that the defendant was not in fact at the time within the Territories, but that, for portions of several years previous, he had resided within the said judicial district:—Held, per curiam, following Fry v. Moore, that the writ was not irregular. Subsequently an order was made giving the plaintiff leave to serve the said writ on the defendant out of the jurisdiction, and extending the time therein fixed for appearance; but the order did not expressly amend or authorize the amendment of the writ. Held, Wetmore, J., dissenting against the objection that a concurrent writ for service ex juris should have been issued, or that the original writ should have been amended, that the Judge's order should be looked upon as involving an exercise of the powers given by E. M. R. 1037, and also as a constructive amendment to the writ. Held, Wetmore, J., doubting that none of the British forms of writs of summons are introduced into the Territorial practice. Semble, Wetmore, J., dissenting, that one form provided by the Judicature Ordinance is adaptable even to the case of foreign defendants ex juris, inasmuch as it is in effect notice, not a command. Held, Wetmore, J., expressing no opinion, that on an application for leave to serve a writ out of the jurisdiction, the plaintiff need show only a primâ facie case within the provisions of the Ordinance. *Moore* v. *Martin* (Ct. 1890), p. 236.

Practice — *Discovery — Interrogatories—Service with Writ Ex Juris—Ex Parte Order—Incorporation of English Practice.*]—The Judicature Ordinance R. O. 1888, c. 58, s. 479, enacts: "When no other provision is made by this Ordinance the procedure and practice existing in England on the 1st January, 1885, shall (adapted to the circumstances of the Territories), be held to be incorporated as part of this Ordinance." English Order 31, is entituled "Discovery and Inspection." Rules 1-11 of that order deal with discovery by interrogatories, and do not appear in the Judicature Ordinance. The remaining rules, 12-13, with some slight modifications, do appear therein under the same title, ss. 144 et seq.:—Held, that the practice and procedure laid down by English Order 31, Rules 1-11, were incorporated in the Judicature Ordinance by s. 479. Per Wetmore J.: Section 185 of the Judicature Ordinance R. O. (1888) c. 58, is intended only for the purpose of perpetuating testimony or obtaining evidence to be used at the trial, and not for the purposes of discovery. Contra, per Richardson, J. Concurrently with an order for service ex juris, an order was made ex parte giving the plaintiffs leave to deliver interrogatories with the writ of summons. Held, Rouleau, J., dissenting, that as the material in support of the order did not profess to shew grounds as provided by Judicature Ordinance s. 402, to satisfy the Judge that "delay caused by proceeding in the ordinary way" (i.e., on notice) "would or might entail irreparable or serious mischief," the order ought not to have been made ex parte: Young v. Brassey, 1 Ch. D. 277, 45 L. J. Ch. 142, discussed. *Lougheed et al.* v. *Praed et al.* (Ct. 1890), p. 253.

Pleading — *Ambiguity — Embarrassing Pleading—Objection in Law—Striking Out — Amendment.* — The word "efficient," as applied to a medical practitioner in a statement of claim for damages for his unskilful treatment of the plaintiff, was held to be ambiguous, inasmuch as it might be taken to mean that the practitioner was merely competent, or that he was not only competent, but would in fact skilfully treat, and the statement of claim was therefore held to be embarrassing. Judge's order dismissing application to amend by setting up objection in law varied, and plaintiff given leave to apply to amend, and in default defendant given leave to apply to strike out portion of claim as embarrassing. *Schiller* v. *The Canada North-West Coal and Lumber Syndicate* (Ct. 1892), p. 421.

Leave to Appeal — *Appeal to Court in banc from Refusal of Leave by Trial Judge—New Trial—Neglect to Give Necessary Evidence.*] — The Judicature Ordinance, R. O. 1888 c. 58, s. 435, provides that "no appeal shall be from the judgment or order of the court presided over by a single Judge of the court to the court in banc, without the special leave of the Judge or court, whose judgment or order is in question, unless the title to real estate, or some interest therein is affected, or unless the matter in controversy on the appeal (in matters of con-

tract exceeds the sum of $500, and, in matters of torts), exceeds the sum of $200, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary, or other duty or fee, or a like demand of a general or public nature affecting future right: — Held, that, where a trial Judge had not granted leave to appeal in a case in which, by virtue of this section, leave to appeal was necessary, the court in banc had no jurisdiction to entertain an appeal, or to give leave to appeal, even, semble, had it appeared that the Judge had said that the applicant might apply to the court in banc for leave. Semble, where a party fails in his case by reason of his neglecting to give necessary evidence, of which at the time of the trial he had knowledge, he should be allowed a new trial to permit him to supply the evidence, only under special circumstances. *Chalmers* v. *Fysh* (Ct. 1893), p. 434.

Irregularity: *See* APPEAL, 1.

Inferences of Fact: *See* COMMON CARRIERS.

Severing Defences: *See* COSTS.

Setting Aside Judgment: *See* COSTS.

Discovery: *See* DISCOVERY, AND COSTS.

New Trial: *See* NEW TRIAL.

PRAIRIE FIRE.

Prairie Fire Ordinance — *Railway Engine — Escape of Fire.*] — An Ordinance of the Territories prohibited the kindling and placing of fire "in the open air in any part of the Territories," except for certain purposes. The defendants, who were respectively firemen and engineer on a freight train, were severally convicted of a breach of the Ordinance upon evidence to the effect that sparks from the fire which they had kindled in the locomotive engine had kindled a fire on the adjacent prairie, there being, as the magistrate found, no evidence of improper construction of the engine, or of negligence on the part of the defendants:—Held, that the facts afforded no evidence of the defendants kindling a fire "in the open air." *Queen* v. *Clive*, *Queen* v. *Holdsworth* (Ct. 1889), p. 170.

PRINCIPAL AND AGENT.

Goods Sold and Delivered — *Partnership—Unincorporated Company —Authority of Manager.*] — The defendants carried on a lumbering business in partnership. R. was their manager at the place of operations. The partnership kept in the vicinity of their mill a boarding house, at which their workmen boarded, and a store for the sale to them of supplies. R. ordered goods which were used in the boarding house, the store, or the mill:—Held, that the ordering of the goods was within the scope of R.'s authority and that the defendants were therefore liable. Judgment of Rouleau, J., affirmed. *Ferguson* v. *Fairchild* (Rouleau, J., Ct. 1892), p. 329.

PRINCIPAL AND SURETY.

See BILLS, NOTES AND CHEQUES, 3—CROWN.

PUBLIC OFFICER.

Sheriff—*Public Officer—Protection —Wrongful Seizure — Principal and Agent—Trust—Fraud.*]—The sheriff is not, when executing a fi. fa. at the suit of a private individual, a public officer entitled to notice and other protection under s. 468 of the Judicature Ordinance, R. O. 1888 c. 8. McWhiter v. Corbett, 4 U. C. C. P. 203, followed. *MacDonnell* v. *Robertson* (Rouleau, J., 1892), p. 438.

RAILWAYS.

See COMMON CARRIERS — PRAIRIE FIRE—PRACTICE, 1.

REASONABLE TIME.

See CONTRACT.

REVENUE.

See LIQUOR LAWS.

RULES OF COURT.

Consolidated Rules, 1898, including tariff, p. i.

Additional Rules, December, 1900, p. xlix.

Amendments to Rules, December, 1901, p. l.

SALE OF GOODS.

Sale of Specific Chattel—*Implied Warranty of Title—Evidence.*] — The defendant sold to the plaintiff a mare, then, as was assumed in the absence of evidence to the contrary, in the defendant's possession: — Held, following Raphael v. Burt, 1 Cab & E. 325, and Brown v. Cockburn, 37 U. C. Q. B. 592, and distinguishing Morley v. Attenborough, 3 Ex. 500, 18 L. J. Ex. 148, that the sale being one of a specific article, and there being no evidence that the vendor did not intend to assert ownership, but only to transfer such interest as he might have, there was an implied warranty of title. The defendant having arranged with the plaintiff that a third party should hold the mare pending settlement of the dispute about the title, and having upon inspecting the adverse claimant's alleged title, authorizing the custodian to give her up to the claimant:—Held, sufficient evidence, by way of admission, on which the trial Judge could reasonably find a breach of the warranty. *Dickie* v. *Dunn* (Ct. 1887), p. 83.

Sale of Goods—*Implied Warranty of Title—Knowledge.*] — If where a specific article is sold, there is knowledge on the purchaser's part of a defect in the vendor's title, there is no implied warranty of title as against such defect. Dickie v. Dunn, 1 Terr. L. R. 83, distinguished. *Turriff* v. *McHugh*, (Ct. 1889), p. 186.

SHERIFF.

See PUBLIC OFFICER—EXECUTIONS.

TAX SALE.

Tax Sale—*Injunction — Appeal to Court of Revision—Estoppel.*]—An injunction may be granted to restrain a tax sale. The limits of such jurisdiction discussed. It is not necessary that exemption from taxation should be raised before the court of revision, and a party, wrongfully assessed by reason of exemption, is not estopped by appealing to the court of revision. *The Canadian Pacific Railway Co.* v. *The Town of Calgary* (Ct. Q. B. Man. 1887), p. 67.

TRANSFER ABSOLUTE IN FORM.

Transfer Absolute in Form — *Security — Parol Evidence.*] — The plaintiff executed a transfer absolute in form to the defendants. The plaintiff alleged that the transfer was executed to secure the defendants against their liability as indorsers of a promissory note for him; that he made default in payment at maturity, and that eventually the whole amount had been paid, partly by the plaintiff, and partly by the proceeds of the sale of a portion of the property transferred, and claimed an account, and re-conveyance. The defendants alleged that the transfer was intended to operate according to its terms, i.e., an absolute conveyance. The trial Judge found the facts in favor of the plaintiff upon evidence, which beyond the transfer and the notes was wholly parol:—Held, that the plaintiff was entitled to judgment declaring the transfer though absolute in form to be a mere security, and directing an account, and the reconveyance of the residue of the property. *Blunt* v. *Marsh et al.* (Ct. 1888), p. 126.

TRUST.

See FRAUD.

ULTRA VIRES.

See CONSTITUTIONAL LAW.

VERDICT.

See APPEAL, 2—CRIMINAL LAW, 3, 9

WAY.

Hudson's Bay Co.'s Lands—*Old Trail—Survey and Transfer to Territories — Obstruction — Compensation —Petition of Right.*]—Where a statute authorizes the expropriation of private land, the owner is not entitled to compensation, unless the statute so provides. Even where compensation is payable by the statute, the party expropriating may (unless the statute otherwise provides) enter upon the land for the purposes expressed by the statute, without being liable to an action for damages; the owner must take such proceedings as may exist for obtaining compensation—in the case of the Crown expropriating by petition of right in the exchequer court. Where land, which was part of the lands reserved to the Hudson's Bay Company, was sold in a state of nature to a purchaser, who obtained a certificate of ownership therefor under the Territories Real Property Act, and cultivated and enclosed it, thus preventing the use of an old trail, which, subsequently, was surveyed and transferred to the Lieutenant-Governor for the use of the Territories:—Held, that the purchaser was rightly convicted of obstructing a public highway. *Regina* v. *Nimmons* (Ct. 1892), p. 415.

Highway—*Private Way — Dedication Plan—Injunction.* — The plaintiff's predecessor in title bought a certain lot according to a plan (then unregistered), on which was shewn a strip 33 feet in width, running along one side of the lot. The plaintiff claimed that this strip had been dedicated, either as a public highway or a private way for the use of the owner of the lot, and claimed a declaration to that effect and an injunction. On the evidence, the Court found for the plaintiff and gave judgment, accordingly. *Daly v. Robertson* (Rouleau, J., Ct. 1892), p. 4.

See CROWN LANDS.