

THE
MANITOBA LAW JOURNAL.

VOL. II.

FEBRUARY, 1885.

No. 2.

A SYNOPSIS OF THE MORE IMPORTANT IMPERIAL
ACTS, &c., RELATING TO MANITOBA AND
THE NORTH WEST TERRITORIES.

2ND MAY, 1670. — *Royal Charter for Incorporating The
Hudson's Bay Company.*

This charter was granted by Charles II. It recites that Prince Rupert and others had undertaken an expedition for Hudson's Bay, for the discovery of a new passage into the South Sea, and for the finding some trade for furs and other commodities. It gives, grants, ratifies and confirms unto Prince Rupert *et al.*, and such others as shall be admitted into said Society thereafter expressed, that they shall be one body corporate in deed and in name, by the name of The Governor and Company of Adventurers of England, trading into Hudson's Bay, and by such name have perpetual succession, and capable in law to have, purchase, receive, possess, enjoy and retain, lands, rents, privileges, liberties, jurisdictions, franchises and hereditaments, and also to give, grant, demise, alien, assign, and dispose of, lands, tenements and hereditaments. It gives, grants and confirms unto the said governor and company, and their successors, the sole trade and commerce of all those seas, "streights," bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the

“streights” commonly called “Hudson’s Streights,” together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks, and sounds aforesaid, that are not already actually possessed of, or granted to, any of the King’s subjects, or possessed by subjects of any other Christian Prince or State. It makes, creates and constitutes the said governor and company for the time being, and their successors, the true and absolute lords and proprietors of the same territory, limits and places, saving always the faith, allegiance, and sovereign dominion due to the King, his heirs and successors for the same, to be holden of the King, his heirs and successors, as of his manor of East Greenwich, in the county of Kent, in free and common socage, and not *in capite* or by knight’s service, yielding and paying for the same, two elks and two black beavers, whensoever and as often as he the King, his heirs and successors, should happen to enter into the said countries, territories and regions thereby granted.

That it shall be lawful for the said governor and company, and their successors, to make, ordain, and constitute such and so many reasonable laws, constitutions, orders and ordinances as to them shall seem necessary and convenient for the good government of the said company, and of all governors of colonies, forts and plantations, factors, masters, mariners and other officers employed, or to be employed, in any of the territories and lands aforesaid and in any of their voyages; and for the better advancement and continuance of the said trade or traffic and plantations; and the same laws, constitutions, orders and ordinances so made to put in use and execute accordingly, and at their pleasure to revoke and alter the same, or any of them, as the occasion shall require; and that the said governor and company shall and may lawfully impose, ordain, limit and provide such pains, penalties and punishments upon all offenders contrary to such laws, constitutions, orders and ordinances, or any of them, as to the said governor and company for the time being, or the greater part of them then and there being present (the said governor or his deputy being always one),

shall seem necessary, requisite or convenient for the observation of the same laws, constitutions, orders and ordinances, and the same fines and americiaments shall and may by their officers and servants levy, take and have to the use of the said governor and company and their successors. All and singular which laws, constitutions, orders and ordinances to be made, are to be duly observed and kept, under the pains and penalties therein to be contained, so always as the said laws, constitutions, orders and ordinances, fines and americiaments, be reasonable and not contrary or repugnant, but as near as may be agreeable to the laws, statutes or customs of this realm.

The charter further grants unto the said governor and company, and their successors, that they and their successors, and their factors, servants and agents, for them and on their behalf, and not otherwise, shall for ever thereafter have, use and enjoy, not only the whole, entire and only trade and traffic, and the whole, entire, and only liberty, use and privilege of trading and trafficking to, and from, the territory, limits and places aforesaid, but also the whole and entire trade and traffic to, and from, all havens, bays, creeks, rivers, lakes and seas, into which they shall find entrance or passage by water or land out of the territories, limits, or places aforesaid.

It further grants to the said governor and company, and to their successors, that neither the said territories, limits and places thereby granted as aforesaid, nor any part thereof, nor the islands, havens, ports, cities, towns or places thereof or therein contained, shall be visited, frequented or haunted by any of the subjects of the King, his heirs or successors, contrary to the true meaning of those presents.

It further grants that all lands, islands, territories, plantations, forts, fortifications, factories or colonies, where the said company's factories and trade are, or shall be, shall be immediately and from thenceforth under the power and command of the said governor and company, their successors and assigns, saving the faith and allegiance due to be performed

to the King, his heirs and successors. The said governor and company shall have liberty, full power and authority, to appoint and establish governors, and all other officers to govern them, and the said governor and his council of the several and respective places where the said company shall have plantations, &c., may have power to judge all persons belonging to the said governor and company or that shall live under them, in all causes whether civil or criminal, according to the laws of this Kingdom, and to execute justice accordingly.

And in case any crime or misdemeanour shall be committed in any of the said company's plantations, &c. where judicature cannot be executed for want of a governor and council there, then in such case it shall and may be lawful for the chief factor of that place and his council, to transmit the party, together with the offence to such other plantation, factory or fort, where there shall be a governor and council, where justice may be executed, or into the Kingdom of England, as shall be thought most convenient, there to receive such punishment as the nature of his offence shall deserve.

It further grants unto the said governor and company, and their successors, free liberty and licence in case they conceive it necessary, to send either ships of war, men or ammunition unto any their plantations, &c., for the security and defence of the same, and to choose commanders and officers over them, and to give them power and authority by commission under their common seal or otherwise, to continue or make peace or war with any prince or people whatsoever, that are not Christians, in any places where the said company shall have any plantations, &c. as shall be most for the advantage and benefit of the said governor and company and of their trade; and also to right and recompense themselves upon the goods, estates or people of those parts, by whom the said governor and company shall sustain any injury, loss or damage, or upon any people whatsoever that shall any way, interrupt, wrong or injure them in their said

trade, within the said places, territories, and limits granted by the charter.

That all and every person or persons, any ways employed by the said governor and company within any of the parts, places and limits aforesaid, shall be liable unto and suffer such punishment for any offences by them committed in the parts aforesaid, as the president and council for the said governor and company there shall think fit, and the merit of the offence shall require, as aforesaid; and in case any person or persons being convicted and sentenced by the president and council of the said governor and company, in the countries, lands or limits aforesaid, their factor or agents there, for any offence by them done, shall appeal from the same, that then and in such case, it shall and may be lawful to and for the said president and council, factors or agents, to seize upon him or them, and to carry him or them home prisoners into England, to the said governor and company, there to receive such condign punishment as his cause shall require and the law of the nation allow of.

The charter then proceeds to state: "and we do hereby streightly charge and command all and singular our admirals, vice admirals, justices, mayors, sheriffs, constables, bailiffs, and all and singular other our officers, ministers, liege men and subjects whatsoever to be aiding, favoring, helping and assisting to the said governor and company and to their successors, and to their deputies, officers, factors, servants, assigns, and ministers, and every of them, in executing and enjoying the premises as well on land as on sea, from time to time, when any of you shall thereunto be required."

TREATY OF UTRECHT, 1713.—By this treaty "the Bay and Straits of Hudson, together with all lands, seas, sea coasts, rivers and places situate in the Bay and Straits, and which belong thereto," were finally ceded to Great Britain.

TREATY OF PARIS, 1763.—By this treaty France ceded to England "Canada with all its dependencies . . . in the most ample manner and form without restriction."

By Article VII, "It is agreed that for the future, the confines between the Dominions of His Britannic Majesty and those of His Most Christian Majesty . . . shall be fixed irrevocably by a line drawn along the middle of the Mississippi from its source" to the sea.

The King of Great Britain agreed to grant the liberty of the Catholic religion to the inhabitants of Canada.

PROCLAMATION OF QUEBEC, 7TH OCTOBER, 1763.—By this proclamation the territories to the west and north of Canada and the Hudson's Bay territory were reserved for His Majesty's (George 3rd) Indian subjects.

The law of England civil and criminal was introduced into the ceded territory, then formed into the Province of Quebec.

Power was given to the governors to constitute courts for hearing and determining causes, civil and criminal, according to law and equity, and as near as might be agreeable to the laws of England, with right of appeal in civil cases to the Privy Council.

6 GEO. 3, C. 12.—*An Act for the better securing the dependency of His Majesty's dominions in America upon the Crown and parliament of Great Britain.*

By this Act the colonies and plantations in America are declared to be subordinate to and dependent upon the Imperial Crown and parliament of Great Britain; and the legislative authority of Great Britain declared to extend to and bind the colonies and people of America as subjects in

all cases whatsoever: and all resolutions and proceedings of the said colonies denying or calling in question the said power are declared null and void.

14 GEO. 3, c. 83.—*An Act for making provision for the Government of the Province of Quebec.*

This Act defines the boundaries of the territories in North America belonging to Great Britain; declares that the inhabitants of Quebec may profess the Romish religion, subject to the King's supremacy, as declared by 1 Eliz.; and enacts that the clergy may enjoy their accustomed dues; that His Majesty's Canadian subjects (religious orders excepted) may hold all their possessions; in matters of controversy, resort to be had to the laws of Canada; the Act not to extend to lands granted by His Majesty in common socage; power to alienate by will; that criminal law of England was to be continued; all Acts of Great Britain relating to trade or commerce of His Majesty's colonies and plantations in America and all Acts respecting said colonies and plantations to be in force in said Province of Quebec.

31 Geo. 3, c. 31, and The Stat Law Rev. Act, 1872, repeal the other provisions of this Statute.

18 GEO. 3, c. 12.—*An Act for removing all doubts and apprehensions concerning taxation by the Parliament of Great Britain in any of the colonies, provinces, and plantations in North America and the West Indies; and for repealing so much of an Act made in the seventh year of the reign of His present Majesty, as imposes a duty on tea imported from Great Britain into any colony or plantation in America, or relates thereto.*

See Stat. Law. Rev. Acts, 1867 and 1871.

(To be continued.)

PROPHETIC CONVEYANCES.

At Law.—"Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiatur effectum, interveniente novo actu."—Lord Bacon's celebrated Rule 14.

"The law has long been settled that a person cannot by deed, however solemn, assign that which is not in him—in other words, that there cannot be a prophetic conveyance." *Belding v. Read*, 3 H. & C. 961, per Pollock, C. B.

"As a general rule . . . a bill of sale can at law operate as a conveyance only of property which exists and belongs to the assignor at the time when he executes it."—*Ibid.* Per Channell, B.

In Equity. The rule in equity is different. "If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. *Holroyd v. Marshall*, 10 H. L. C., 210, per Lord Westbury.

"A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. *Collyer v. Isaacs*, L. R. 19 Ch. D. 343.

Limitation of Rule. This equity rule, however, is applicable only where the subject of the assignment is described in terms sufficiently specific to render its identity certain.

In *Belding v. Read*, 3 H & C. 955, the assignment was of "all his household furniture, plate, linen, &c., and all other his personal estate and effects whatsoever, then being, or

thereafter to be, upon, or about his dwelling-house, farm or premises at R., or elsewhere in Great Britain." It was held that no estate passed in the after acquired goods, for the reason "that the equitable title to goods, as well as to land, is confined to specific goods, and does not extend to goods which are undetermined,"

The description in *Re Thirkell, Perrin v. Wood*, 21 Gr. 492, after mentioning, in general terms, all the stock of drugs and chemicals in the assignor's shop, proceeded: "and also any stock purchased hereafter by the said . . . and which may be in his possession upon said premises during the continuance of this security, or any renewal thereof." These words were held to be sufficiently explicit to pass the after-acquired goods. So also in *Reeve v. Whitmore*, 9 Jur. N. S. 243, where the words were: "the clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects and property which may then be in, upon, or about the said premises."

Lord Westbury's illustration of the rule (*Holroyd v. Marshall*, 10 H. L. C. 209, is as follows: "A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in any warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The dictum of *Lopes, J.*, in *Lazarus v. Andrade*, 5 C. P. D., 318, that the principle deducible from *Holroyd v. Marshall*, and *Belding v. Reed*. "is, that property to be after acquired, if described so as to be capable of being identified, may be, not only in equity, but also at law, the subject matter of a valid assignment for value" must be considered to be overruled. See *Joseph v. Lyons*, 54 L. J., Q. B. N. S. 4.

As between the grantee and a subsequent assignee for the benefit of creditors—the goods meanwhile having been ac-

quired. We have so far considered the subject as between the original parties. An assignee for the benefit of creditors "is merely the legal personal representative of the debtor with such right as he would have had if not bankrupt, and no other." *Kitching v. Hicks*, 6 Ont. R. 749, per Patterson, J. See also *Re Mapleback*, 4 Ch. Div. 150; *Ex parte Newitt*, 16 Ch. Div. 531; *Harris v. Tremain*, 7 Q. B. Div. 340; *Re De Epineuil*, 20 Ch. Div. 217; *Collver v. Shaw*, 19 Gr. 599; *Re Coleman*, 36 U. C. R. 559; *Re Barrett*, 5 App. R. 206; *Re Andrews*, 2 App. R. 24; *Boynton v. Boyd*, 12 U. C. C. P. 334; *Re Thirkell*, *Wood v. Perrin*, 21 Gr. 504 b.; *West v. Skipp*, 1 Ves. Sr. 239.

As between the grantee and a subsequent execution creditor, the goods meanwhile having been acquired. In *Lazarus v. Lopes*, 5 C. P. D. 318 the grantee was held to be entitled as against a subsequent execution creditor, and this decision is said to be right, although the reason given by the learned judge who decided it was wrong. See *Joseph v. Lyons*, 54 L. J. Q. B. N. S. 4. *Holroyd v. Marshall*, 10 H. L. C. 190, moreover, is ample authority for the same position.

As between the grantee and a subsequent grantee for value—the goods meanwhile having been acquired. As above stated a prophetic assignment does not pass the legal title. It passes an equitable interest only. It constitutes a *jus ad rem*. If then, while the legal title remains in the grantor, by a sufficient assignment, he convey it to a purchaser for value without notice of the outstanding equity, the new purchaser acquires an indefeasible title. At least, this is the decision of the Court of Appeal in England in *Joseph v. Lyons*, 54 L. J. Q. B. N. S. 4.

Query. Had the assignment in the last mentioned case contained a covenant that, upon the acquisition of the goods, the legal title should be conveyed to, or immediately become vested in, the grantee, would the decision have been as it was. There is much in the judgments to show that it would not. If A. agree to sell to B. goods which are to be afterwards ascertained, upon ascertainment the *legal* title vests in the purchaser. If, then, A. sell to B. certain speci-

fied goods, when they come upon A.'s property, the legal title ought to pass as soon as the time arrives. And if A. lend to B. on security of the same goods, B. should have the legal title at the same time as in the case of a sale. The judges, in *Joseph v. Lyons*, felt the force of this argument, but held it to be inapplicable to the case. *Brett, M. R.*, said: "It was ingeniously argued that the bill of sale was equivalent to a contract by M., that the after-acquired goods should become the legal property of the plaintiff on their being acquired. . . . Can it be said that there was a contract to pass the property in the goods? There never was such an intention. The parties must be taken to have contracted for an equitable, and not a legal, interest." And *Cotton, L. J.*, said: "It is said that the bill of sale amounts to a contract that the goods should be assigned. But the common law says that it is void, and the rule that goods contracted to be sold become the property of the vendor on ascertainment, does not apply when there purports to be a present assignment."

These extracts seem to imply that, if there had been a contract instead of an assignment, the decision would have been for the plaintiff, instead of for the defendant. This would leave the law in a very unsatisfactory and anomalous condition. An absolute assignment of goods ought to be as efficacious to pass the legal title as an agreement to give an assignment of them.

The true answer to the argument just stated seems to us to be that a contract for an assignment of the legal estate will not cause it to pass without *novus actus interveniens*. In the case of a contract for the sale of goods upon ascertainment, the act of ascertaining is in pursuance of the contract, and is *novus actus*, but in the case of a contract to pass the legal title in goods which may afterwards be brought upon the mortgagor's premises, the act of transportation is not in ordinary cases referable to the contract, it is not undertaken for the purpose of carrying out the contract, and there is no *novus actus* at all. See *Lunn v. Thornton*, 1 C. B. 379; 14 L. J., C. P., N. S. 161.

MR. TRAVIS JUSTIFIED, AND CONDEMNED.

IN reviewing a pamphlet issued by Mr. Travis, entitled "A Law Treatise on the Constitutional Powers of Parliament and of The Local Legislatures," we took occasion to find fault with his want of respect for the *judges*, admitting that the *judgments* were fair subjects for discussion. *The Legal News* (Montreal), in the same vein, remarked: "We are disposed to think he is right in a good deal of his criticism, though we deprecate the trenchant style in which he deals with adverse views. The subject is confessedly intricate, and it does not follow that because Mr. Travis sees one side in a very bright light indeed, there is nothing to be said on the other."

It is very easy to be philosophical and good-natured when some one else is feeling hurt, but when some cherished notion of one's own is upset, complacency is more difficult. *The Legal News* has evidently had extremely strong opinions anent the boundary case—and neither the award nor the decision of the Privy Council has had the effect of raising the slightest doubt as to the correctness of its views. Our friend's composure has been sadly disturbed by the failure of the court of last resort to confirm his ideas, and like an ordinary human being, as he must be (although he once spoke like a god), gets angry, and joins Mr. Travis in his tirade against the judges. These are a few of its most convincing arguments: "One member, at any rate, of that body (the Privy Council) was competent to understand what he was about"; "the opinion which they have consented to have put in their mouth"; "as far as getting an intelligent opinion on such a question is concerned, we might just as well have appealed to Og, Gog and Magog, or to the Beef-eaters at the Tower. Juge Bridoye's mode of guiding the scales of justice is miserably overlooked, *par les temps qui courent*." And the advice naturally follows: "not to trouble their Lordships again respecting questions they know nothing about, and which they don't intend to take the least pains to understand,"

We may be permitted to remark that our angry friend may be "right in a good deal of his criticism, though we deprecate the trenchant style in which he deals with adverse views. The subject is confessedly intricate, and it does not follow that because "*The Legal News*" sees one side in a very bright light indeed, there is nothing to be said on the other."

But while Mr. Travis can comfort himself over a convert to his opinion of the usefulness of the Privy Council, he has to mourn the lapse from intelligence of the only judge in whom he had any confidence—the Chief Justice of the Supreme Court. Mr. Travis confidently predicted, that the Dominion License Act of 1883 "being a general Act for the regulation of traffic in intoxicating liquors, for the 'peace and order' of Canada, is an Act regulating trade, and is as valid as the Canada Temperance Act, the Fisheries Act, or the Insurance Act." But the Supreme Court has unanimously decided otherwise. The questions submitted to the court were:—

(1) Are the following Acts in whole or in part within the legislative authority of the Parliament of Canada, viz.:—
I. The Liquor License Act of 1883. II. An Act to amend the Liquor License Act of 1883.

(2) If the Court is of opinion that a part, or parts only, of the said Acts are within the legislative authority of the Parliament of Canada, what part or parts of the said Acts are within such authority.

In rendering the opinion of the court, the Chief Justice said:—"We have considered all the matters referred, and my learned brother Strong, my learned brother Fournier, my learned brother Gwynne, and myself, are of opinion that the Acts in question are *ultra vires* of the Parliament of the Dominion, except in so far as they regulate vessel licenses and wholesale licenses. My learned brother Henry is of opinion that the Acts are *ultra vires* in whole. We shall report to the Government accordingly."

No reasons were given by the Court.

CASES STANDING FOR JUDGMENT.

THERE are now standing for judgment a number of cases argued during last Term. Without legislation, these must all be re-argued after the appointment of a new judge. We would suggest the adoption of the Ontario statute 45 Vic. c. 6, sec. 3, modified as follows:—

“In case, after a cause or matter in the Court of Queen’s Bench has been heard by three judges thereof and stands for judgment, one of the judges by whom the said cause or matter was heard is transferred to the Supreme Court of Canada, or resigns his office, or is absent from illness or other cause, or dies, the remaining judges, if unanimous in their decision, may give judgment, as if such judge were still a judge of the Court of Queen’s Bench, and were present and taking part in the said judgment.”

At the same time, an adaptation of the Ontario statute 44 Vic. c. 5, s. 86, might also be passed:—

“Where a judge of the Court of Queen’s Bench, or of any County Court, is transferred to another court, or resigns his office, and any cause or matter which has been fully heard by such judge, either alone or jointly with another judge, or other judges, stands for judgment, he may give judgment therein as if he were still a judge of the same court, and any such judgment shall be of the same force and validity as if he were still such judge, provided that such judgment of the judge be delivered within six weeks after the said resignation or transfer.”

It has been suggested that our Act, which provides that the judge whose decision is appealed from must not take part in the appeal, should be repealed. We trust that it will not. The Act has given the greatest satisfaction, and is sound in principle.

MR. JUSTICE SMITH.

ON Monday, the 19th day of January, died one of the finest men who ever adorned the bench of any court of law. He died because his duties were too heavy for his strength; and because he regarded the discharge of his duties as of greater importance than the preservation of his health.

The unflinching courage of the soldier who yields his breath rather than his post, is worthy of the highest admiration, for his employment requires the sacrifice. But we humbly submit that there is no implied term in a judge's engagement which demands his death rather than the acknowledgment of *vis major*—the *vis inertia* of too many tangled law suits. It is impossible seriously to blame a judge for working too hard. He can have no selfish object in view—his salary is not affected by the quantity of his work, nor his repose in any way assisted by it. If his labor is excessive it is because he is constrained to it by the demand for the speedy administration of justice, and by a restlessness under the thought of work undone, and, therefore, of wrongs unredressed. But can we not fairly blame the government which, to save a paltry \$4,000 a year, presents to our judges the alternative of heavy overwork or heavy arrears. We should hardly have said *an alternative*, for there is in practice no choice or selection. The judges have both the work and the arrears.

Mr. Justice Smith has been with us only a few months, but during that time he has won the respect and admiration of every member of the bar, not only for his legal ability and attainments, but also for his kind and courteous bearing. His mind was singularly acute, subtle, and logical; and his knowledge of the law accurate and extensive. He evidently enjoyed discussion, and he never seemed so well pleased as

when chopping law with some learned advocate who was unlucky enough to commit himself to some incomplete, or some too general, proposition. When thus engaged (and it happened frequently) his wonderful resources showed to the greatest advantage; but no barrister ever complained of his interruptions—they were always to the point under discussion at the moment, and always tended to elucidation.

The whole community will join in the following resolution passed by the Law Society:—

Resolved,—That in the death of the Hon. Mr. Justice Smith the courts of Manitoba and the legal profession have sustained a great loss. During his short residence in Manitoba he had earned the respect and esteem of all who had come into contact with him, and he was universally looked upon as a judge whose course upon the Bench would serve as a model for all who might succeed him. The Law Society desire to express their sincere sympathy with his widow and family in their great bereavement.”

The secretary was instructed to forward a copy of this resolution to Mrs. Smith.

MR. JUSTICE KILLAM.

JUST as we are going to press, the announcement is made that Mr. Killam, Q.C., has been elevated to the Bench. The appointment has been received by the bar, not only with satisfaction, but with gratification, if not absolute enthusiasm—gratification, partly because Mr. Killam will be no unworthy successor even to such a model judge as the late Mr. Justice Smith, and perhaps still more because he belongs to our own bar.