4648.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Queen's Bench, Manitoba,

WITH

TABLES OF CASES AND PRINCIPAL MATTERS.

BY

JOHN S. EWART,

ONE OF HER MAJESTY'S COUNSEL.

VOLUME II.

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ERRATA.

Page 252, line 11, for "agreed," read "argued."

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VOLUME II.

1885.

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MANITOBA LAW REPORTS.

VOLUME II.

Re G. A. STANBRO.

Extradition.—Habeas Corpus.—Forgery.—Judicial knowledge of Orders-in-Council (a.)

Prisoner was charged with committing forgery in the State of Minnesota.

Held, 1. Upon the evidence, that a *prima facie* case had been made out.

2. Judicial notice must be taken of Orders-in-Council bound up with the Dominion Statutes, in pursuance of 38 Vic. c. 1.

N. F. Hagel and *Ghent Davis* for Stanbro.

S. Blanchard, Q.C., and *J. S. Ewart, Q.C., contra.*

[*2nd December, 1884.*]

DUBUC, J.—The first ground on which the discharge of the prisoner is moved, is that the evidence did not establish any crime under the Extradition Act. In support of that ground, the counsel for the prisoner referred to the evidence of the professional witness who stated that, under the laws of Minnesota, if a man obtains money by false representations, without signing anything, he commits the offence of obtaining money under false pretences; and if he goes back and signs a receipt for said money previously obtained, but gets nothing more, it would only be evidence to sustain the first offence. But it is not a parallel case to this one. Here, the evidence shews that the prisoner already had the money lawfully in his possession, and when he signed the name of "Hulgeson" to the receipt for the purpose of appropriating the money, he then committed the crime complained of, and that crime is forgery.

The learned Chief Justice, sitting as a judge under the Extradition Act, having so found, we think that his finding should be maintained, and that the objection is not sustainable.

(a) See article in *2 Man. Law Journal*, p. 1.

The second objection raised is, that the proceedings were taken under the Extradition Act of 1877, and it is not shewn that that Act is in force in Canada. Section 5 of the Act provides that, as regards its application to any foreign state, it shall come into force by an Imperial Order-in-Council suspending the operation in Canada of the Imperial Act of 1870, concerning the extradition of criminals; said Order-in-Council to be published in the *Canada Gazette*.

The counsel for the prisoner contends that the passing of said Order-in-Council, and its publication in the *Canada Gazette*, should have been proven by the production of the *Gazette*; and no such evidence was adduced.

In fact, the Order-in-Council was passed on the 28th day of December, 1882, and it is found published in the first volume of the Dominion Statutes of 1883.

But the contention of the counsel for the prisoner is that, it not having been proven before the extradition judge, the Court cannot take judicial notice of it.

It is true that the return, under the writ of *certiorari*, does not shew that said Order-in-Council was proved to have been passed; it is, however, admitted by the counsel for the prisoner that it was mentioned to the extradition judge at the examination, and the volume of the Statutes of 1883, in which it was published, was sent for and brought into court; but it is claimed that it should have been put in as part of the evidence.

The real question is, whether the Court can take judicial notice of said Order-in-Council, and of its publication in the Statutes of 1883.

By Dominion Statute 38 Vic. c. 1, s. 1, it is provided that the Orders-in-Council and proclamations, or other documents, and such Acts of the Parliament of the United Kingdom, as the Governor in Council may deem of a public and general nature or interest in Canada, and may direct to be inserted in the first volume of the Statutes, published in any session of Parliament, shall be printed in said volume.

So, Orders-in-Council may be published in two ways: in the *Canada Gazette*, and in the volume of the Statutes; and it seems that those more particularly of a public and general nature or interest in Canada, shall be printed in the said volume. And as they are so published in the same volume as the Statutes, for

the information of the public in general, are the judges alone prevented from judicially taking notice of them? I do not think so.

It was held, in *Regina* v. *Bennett*, 1 Ont. R. 445, that the Court should not take judicial notice of Orders-in-Council, or of their publication in the *Canada Gazette*, without the production of the *Gazette*. But it was a case under the Scott Act, a very different one from the present case. The second part of the Act was to come in operation, after the provisions of the first part had been found to have been complied with, and after the publication in the *Canada Gazette* of the Order-in-Council declaring said Act to be in force in the county or city in which it had been adopted.

The provisions of said Act so referred to in the Order-in-Council were to affect, and be in operation in, only *one* of the two hundred and more counties or cities of the Dominion, after the requirements of the first part of the Act had been complied with. Under such circumstances it is easy to understand why it would be necessary to establish before the magistrate sitting under the Scott Act, that the Act was in force in the particular county or city where the proceedings were taken. The Order-in-Council in such case would be published in the *Gazette;* but it not being deemed of a public and general nature, it would not be printed in the volume of the Statutes.

But the Extradition Act affects, and its provisions apply to, the whole of the Dominion of Canada; its coming into operation is declared by Imperial Order-in-Council, and said Order-in-Council, for the information of the public, is printed with the Statutes of Canada, in the volume containing the same. It is promulgated and made public along with the Statutes, in the same authentic manner, under the same authority of Parliament. One cannot see any reason why it should not be competent for a judge to take the same judicial notice thereof.

The commitment of the prisoner, by the Chief Justice acting as extradition judge, is maintained.

SMITH, J.—This case has been so much discussed that the facts are well known. The evidence brought forward on this application is substantially the same as that produced last Term. The learned Chief Justice, who committed the prisoner for extradition, delivered a judgment reviewing the facts, and from the

evidence now read I have arrived at the same conclusion as that come to by the Chief Justice.

Two points were raised in behalf of the prisoner by his counsel. First, that the evidence of Randolph Augustus Williamson, the professional witness called to prove the law of Minnesota, does not establish that the acts of which the prisoner was guilty amount to the crime of forgery. I think it does. The only point on which the witness hesitates is whether, in case the prisoner had embezzled the money and afterwards signed Hulgeson's name—that signing would be forgery. Such a case, however, is not that shewn on the evidence.

There is no proof of any appropriation by the prisoner before he signed the receipt. The money was lawfully in his custody, and the first act of appropriation was his signature to that receipt. He could have taken the money without signing that document. It would then have been embezzlement. But he chose to sign it, and thus appropriated it by forgery. It seems a very clear case of the latter crime.

The second ground taken was, that there is no evidence of the Order-in-Council bringing the Extradition Act of 1877 into operation, and that, as it does not mention any date on which it should take effect, its publication in the *Canada Gazette* should have been proved.

There is nothing before the Court to shew that any proof of these matters was tendered to the learned Chief Justice, and unless the Court can take judicial notice of the Order-in-Council printed by the Queen's Printer, and included in the first volume of the Dominion Statutes, 46 Vic., commencing on page 26, the prisoner must be discharged.

Up to the year 1875 the necessity of proving Orders-in-Council undoubtedly continued, but in that year the Statute 38 Vic., c. 1, was passed, and this seems to have placed these Orders-in-Council on a different footing. By section 1 the 10th and 11th sections of the Interpretation Act are repealed, and new sections substituted. The new section 10 contains these words: "The Acts of the Parliament of Canada passed in the present or any future session thereof, shall be printed in two separate volumes, the first of which shall contain such of the said Acts, and such Orders-in-Council and proclamations or other documents, and

such Acts of the Parliament of the United Kingdom as the Governor in Council may deem to be of a public and general nature and interest in Canada, and may direct to be inserted in the said volume." It is to be observed that the "Acts of Parliament" are to be printed in two separate volumes, the first of which shall contain such Acts, such Orders-in-Council, and such Imperial Acts as the Governor may direct. For the purposes of the Interpretation Act, we think all matters printed in the first volume are placed on the same footing, and may be judicially noticed. It may further be noticed that all are placed on the same footing in the matter of selection. The Governor is empowered to direct such only of each class to be printed as he "may deem to be of a public and general nature and interest in Canada." There is no obligation to include any public general Act. It is entirely a question of discretion with the Governor, and that discretion extends equally to all the documents mentioned. Then for what reason are they published? Because they are deemed to be of a public and general nature and interest in Canada. Every one, then, is invited to read them, to trust in them, and to act upon them. It would seem singular if the judges alone were officially unable to notice them. Further, the prisoner's counsel does not seem to contend that it would require any further evidence than the production of a copy of the Order, purporting to be printed by the Queen's Printer, to the extradition judge who hears the evidence. To this argument I would certainly give effect, if I did not feel the Court can judicially notice the Order. But I confess I am glad to escape from the necessity of deciding that a judge can read and act on what is handed to him by another, though he could not read or act on it if of his own mere motion he picked up the book.

It may be said, however, that the publication in the *Canada Gazette* must still be proved, in order to shew the Order-in-Council is in force. I think not. I must presume everything was done to make it perfect before it was allowed to appear in the Statutes. The maxim *omnia præsumuntur rite esse acta*, applies to criminal as freely as to civil cases, sometimes being used almost harshly against the prisoner, as in *Reg.* v. *Cresswell*, L. R. 1 Q. B. Div. 446.

The prisoner's commitment by the learned Chief Justice is sustained.

TAYLOR, J.—I concur in the judgments delivered by my learned brothers. The evidence produced shews the offence with which the prisoner is charged to be forgery, and one within the terms of the Extradition Treaty with the United States. I cannot, from reading the 38 Vic. c. 1, which amends the Interpretation Act, come to any other conclusion than that by it Orders-in-Council, published with the Statutes, are placed upon the same footing as Acts of Parliament, and must be taken judicial notice of by the courts. The Order-in-Council of 28th December, 1882, which suspended the operation in Canada of the Imperial Extradition Act, 1870, and thereby brought into force the Canadian Extradition Act, 1877, was published along with the public Statutes, and should be taken judicial notice of.

In my judgment the prisoner should be remanded to custody, to await any requisition which may be made for his surrender to the United States authorities.

(IN THE COUNTY COURT OF THE COUNTY OF SELKIRK.)

McFIE v. CANADIAN PACIFIC RAILWAY CO.

Fencing railway.—Accident.—Liability of Company.

Action for the value of an ox, killed by defendants' locomotive. The animal was on the prairie close to the track. The engineer reversed the engine and whistled, but, before the train could be stopped, the animal having got on the track, was run over and killed.

Held, 1. That the evidence did not disclose such negligence as would entitle the plaintiff to recover.

2. That where the land adjoining the railway is unoccupied, the company is not bound to erect fences at that part of their line.

David Glass for plaintiff.

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

[*12th November, 1884.*]

ARDAGH, Co. J.—I reserved judgment in this case to consider certain points, which the plaintiff's counsel seemed to think had

an important bearing on his client's right to recover. One was, the question of fencing or maintaining a fence after it had once been in existence; and another, how far a trail crossing a railway should be held to be a highway requiring protection, or a slackening of speed, when it was being approached.

I do not now think that, under the evidence given at the trial, the defendants can be held to have been under any obligation to fence their line, or maintain the old fence at the place where it is supposed that the plaintiff's ox got upon their land, either as against an adjoining owner or the public generally, including the plaintiff. I cannot see either how any question as to the trail mentioned in the evidence being properly a highway, liable to be guarded or otherwise, can affect the result of this suit, inasmuch as the animal killed by the locomotive was not upon the trail at the time of the accident, and was not proved even to have got upon the track at the crossing. It did occur to me that the existence of a fence along a certain portion of the railway, especially coupled with proof of its having been maintained by the company, would be presumptive evidence that it had been placed there under a statutory obligation and I am inclined to think that it should be so held; but, in the present case, it was not shewn that there was ever any enclosure of land adjoining the railway where the fence is alleged to have been, and I think it appears from the evidence that there has been no fence there for a couple of years.

Dom. Stat., 46 Vic. c. 24, s. 9, provides that "Within three months from the passing of this Act (May 25th, 1883), in the case of a railway already constructed on any section or lot of land, any part of which is occupied * * * fences shall be erected and maintained over such section or lot of land, on each side of the railway, of the height and strength of an ordinary division fence, with openings or gates or bars or sliding or hurdle gates, with proper fastenings therein, at farm crossings of the railway, and also cattle guards at all highway crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

This enactment does away, in the present case at least, with any implication which could arise in respect to a fence, as such had not been in existence since May, 1883, and even in the case of a fence in existence subsequent to that date, between the

railway and unoccupied or open land, I am not prepared to say that the company could not remove or neglect to repair it, without increasing the present extent of their liability. The Act seems to make a new departure for the company as regards time, but it imposes upon them (where the road had been already constructed) the duty of making and maintaining a fence where any part of the adjoining land was occupied, without being required by the occupant to do so.

It was, I believe, contended that the company was bound to fence its whole line within three months after construction, or otherwise that the words "any part of which is occupied" do not necessarily apply to the whole section. I think, however, that the words "fences shall be erected and maintained over such section or lot of land on each side of the railway" have reference to land any part of which is occupied, in every instance. Subsection 2, however, would seem to settle this point, as it restrains the liability for damage to "the occupant of the land in respect of which such fences, etc., have not been made."

The plaintiff's counsel referred to the case of *Philips* v. *C. P. R.*, 1 M. L. J. 110, tried in this court, as being a decision bearing in favor of his contention that the defendants were bound to protect the highway crossing; but the point in Philips' case turned chiefly upon the meaning of the word "person," in section 79 of the Consolidated Railway Act. Philips was held entitled to recover because there was a person in charge of his cattle, and they had a right to be on the highway as against the defendants. Philips being within his rights as against the railway company, could take advantage of the fact that the latter had neglected to keep their cattle guards free from snow; but, in the present case, the plaintiff's ox was not in charge of any one, and even if the trail was held to be a highway within the meaning of the Act, there was no contributory negligence on the part of the defendants, because not being bound to fence at that particular place, they could not be held bound to have cattle guards, which, without the fence, would be entirely useless to prevent cattle getting on the line.

Defendants' counsel cites a number of well known decisions in the Ontario courts in reference to the question of fencing, all of which, so far as I remember, or have been able to look at

them in connection with the present uit, go to show that a railway company was only bound to fence as against the owner of adjoining land. In *McIntosh* v. *G. T. R. Co.*, 30 U. C. Q. B., 601, it was held that defendants were not bound to fence as against the plaintiff who had been accustomed to pasture his cattle for thirty or forty years on land of the Canada Company, through which the railway ran..

In *Dolrey* v. *Ontario, Simcoe and Huron Railway*, 11 U. C. Q. B. 600, plaintiff's cow, trespassing on A.'s close, strayed upon the railway adjoining, through a defect in the fence which as against A., the defendants were bound to make and maintain; the plaintiff was held not entitled to recover.

The case of *Wilson* v. *The Northern Railway of Canada*, 28 U. C. Q. B. 274, is one of much interest in connection with this question. It was tried before Judge Gowan, of Simcoe, with a jury. The learned judge of the county court withdrew certain of the issues from the consideration of the jury. His decision was appealed from, but was sustained by the court above, which held with him that the plaintiff must be owner of the land, or in occupation by license of the owner, to be enabled to recover damages by the omission to fence.

It seems to me, that the only question on which the plaintiff could properly have raised an issue in the present suit, is that of gross negligence on the part of the defendants in the manner of driving their engine.

In *Gillis* v. *G. W. R. Co.*, 12 U. C. Q. B. 427, it was shewn that the animal killed was not lawfully where she was at the time of the accident, and held that as no negligence, in the manner of using the railway track, had been charged upon the defendants, the action had to fail.

In the case before me such negligence is charged, or, as there are no pleadings, must be assumed as being charged; and the evidence in support of it is, that on that part of the line where the ox was killed a person could see along the track, about 1½ miles in the direction in which the train was moving, when the accident happened. That the engine-driver, who is himself the defendants' witness, saw the ox in question some distance ahead at the side of the track, whereupon he shut off steam, whistled, and slowed the engine to about three or four miles an hour, in-

tending to pass the animal which was about thirty feet from the rails. When the engine was about two car lengths from the ox it started to cross the track, when the engine was at once reversed, the cylinder cocks opened, and a whistle given for "down brakes." The ox had got nearly across when it was struck by the engine and killed.

The witness also stated that he had made every effort to stop the train and avoid the accident; that he thought there was no occasion in the first instance to stop the train; that the brakesmen had got out, but did not think it necessary to lose time in driving the animal further away, as the practice generally was to try and crawl by in such cases. Previous to seeing the animal the rate of speed had been about twelve miles an hour.

It is true that a plaintiff's own negligence which contributed to the injury, does not defeat his right of action, if the defendants might or could, by exercise of ordinary care, have avoided it.

The absence of ordinary care would, no doubt, be considered culpable negligence. "If the cattle were not lawfully there, the plaintiff must prove such negligence as will nevertheless make the defendants liable," is the language used in a work on negligence, in reference to a state of facts such as we have in the present instance. The plaintiff's counsel cites the case of *Renaud* v. *G. W. R. Co.*, 12 U. C. Q. B. 409, but there the declaration is, that the defendants drove their train at such a rate of speed, and with such gross negligence, that the engine struck and killed two of the plaintiff's cows then lawfully being and passing upon said highway. It was shewn that the cattle were killed on a highway by a train going at full speed, and defendants were held liable on account of gross negligence.

In the case of *Auger* v. *Ontario, Simcoe and Huron Railway*, 16 U. C. Q. B. 94, it appeared that the train was stopped in order to get the horses off the track, and the steam whistle sounded, but the animals ran ahead along the track for a quarter of a mile, when they were run over and killed. The plaintiff, however, did not charge this as negligence, although it may be fairly inferred that he would have done so, had he believed he could have succeeded in establishing that it was such negligence as would entitle him to a verdict.

I cannot see that the evidence in the present case discloses such negligence on the part of the driver or conductor of the train, as would entitle the plaintiff to recover, and, in my opinion, he must be non-suited with costs.

The defendants have filed a set-off, claiming damages for their locomotive having been thrown off the track; but, as they offered no evidence upon it, I presume that they did not intend to press the claim, and, I may add that, had they done so, I should not have felt disposed, under the circumstances, to consider it favorably.

WHITHAM *v.* COOPER.

Fraudulent preference.—Judgment obtained by consent.—Injunction to stay proceedings at law.

The defendant N. being indebted to the defendants C. and S., [illegible] commenced an action against him to recover the amount due. An acknowledgment of service was given, appearance entered, declaration and pleas filed, [illegible] to strike out the pleas obtained, judgment signed and execution issued [illegible] same day. Plaintiffs had also obtained judgment and execution against N., and now filed their bill to set aside the judgment and execution obtained by defendants C. and S.

On an application to continue an interim injunction to restrain proceedings upon the judgment of the defendants C. and S.

Held, That the injunction should be continued till the hearing.

J. B. McArthur, Q.C., for the plaintiff.

W. R. Mulock and *E. H. Morphy* for defendants Cooper and Smith.

[*14th February, 1884.*]

TAYLOR, J.—On the best consideration which I have been able to give this case in the short time at my disposal, I am of opinion that the injunction should be continued.

It is true there may be some difficulty about the position of the plaintiffs, they having themselves recovered judgment against Nixon upon a consent signed by his attorney to withdraw pleas filed and allow final judgment to be signed. But this judgment they are willing to abandon. A plaintiff may, as I understand the practice, waive judgment which he has obtained in an irregular or improper manner.

The bill here is filed on behalf of the plaintiffs and all other creditors of Nixon, and if relief is obtained it will enure to the benefit of all the creditors.

The cases decided in Ontario, under the corresponding Statute there as to fraudulent preferences, are strongly relied on by the defendants, and certainly go a long way towards supporting their position. Yet these cases do not, so far as I have been able to examine them, go quite so far as it seems to be supposed they do.

The first case, *Young* v. *Christie*, 7 Gr. 312, was a case in which a debtor, sued by two persons, defended one suit, and in the other allowed judgment to go by default. *McKenna* v. *Smith*, 10 Gr. 40, was another case in which exactly the same thing happened. In *Labatt* v. *Bixel*, 28 Gr. 593, the debtor defendant defended one suit, and only entered an appearance in the suit brought against him by his son, which enabled the latter to get an earlier judgment. In *Heaman* v. *Seale*, 29 Gr. 278, the defendant entered an appearance and filed pleas in the suit first begun against him. To the second action he entered an appearance and filed pleas, but on the same day that the latter were filed he signed a *relicta verificatione*, after which the plaintiff signed judgment and issued execution. Proudfoot, V.C., held that the judgment did not offend against the Statute, saying a *relicta verificatione* is neither a confession, nor a cognovit, nor a warrant of attorney, and is therefore not prohibited by the Statute.

Davis v. *Wickson*, 1 Ont. R. 369, was a case in which an order was obtained in chambers on consent, striking out the defence and giving leave to enter up judgment. Although in that case Chancellor Boyd says, that he does not think that the plaintiff could have successfully attacked the judgment recovered by Wickson against Foster, yet that is a mere *obita dictum* of the learned judge, for he had previously said that, for the purpose

of deciding the question before him, "it became unnecessary to express any opinion upon the validity of the judgment recovered by Wickson against Foster."

The question came before the Queen's Bench Division of the High Court of Justice in Ontario, in *Turner* v. *Lucas*, 1 Ont. R. 623. In that case the debtor's solicitor in one of two suits brought against him, gave a consent to an order striking out the statement of defence, and giving leave to sign final judgment whereby priority was gained over another.

The question came up first on an interpleader issue in which the one who so obtained judgment was defendant. Burton, J. A., before whom it was tried, gave judgment in his favor, but stated that he would have given judgment in favor of the plaintiff had he not felt bound by authority. In Term on a motion to set aside the judgment, Chief Justice Hagarty and Mr. Justice Cameron gave no judgments, contenting themselves with concurring in the judgment of Mr. Justice Armour. The latter gave judgment discharging the rule *nisi*, because the authorities had limited the words "confession of judgment," "*cognovit actionem*," and "warrant of attorney to confess judgment," strictly to the instruments known as such at the time of the passing of the Act. He, however, expressed a most decided opinion that, had the matter been *res integra*, he would have held that where a debtor had actively interfered to enable a creditor to recover a judgment against him sooner than he would have recovered it by due course of law and without such interference, such defendant was giving a confession of judgment within the very words of the Act, and certainly within its spirit, and was doing the very mischief aimed at by the Act.

The judges who decided the earlier cases never contemplated or intended to deal with cases in which the debtor took active steps to enable the creditor to recover judgment. In *McKenna* v. *Smith*, Chancellor Vankoughnet said, "While the Act endeavors to prevent the debtor himself, from helping a particular creditor by any act of his own, to a portion of his property, it leaves it open to any such creditor, by active proceedings on his part, the debtor being passive, to sweep away the whole estate from all the other creditors.

The whole question is one which, in my opinion, well deserves further consideration, especially when, as here, we are

untrammelled by authorities binding upon us, however much we may be inclined to respect them. I am the more prepared to continue the injunction for the purpose of having the question further considered, in that the evidence leaves on my mind the strong impression that the defendants' judgment was not only procured by the active co-operation of the debtor, but that it was at first, at all events, intended to be the means of protecting him against his creditors, and enabling him to continue his business.

The injunction should therefore be continued.

RE BRANDON BRIDGE.

Mandamus to purchase bridge.—Bridge company.—Local charter.—Navigable river.—Jurisdiction of Legislative Assembly.

By an Act of the Legislature of Manitoba, 45 Vic. c. 41, the Brandon Bridge Company was incorporated and empowered to build a bridge across the Assiniboine River; and, by another Act, 45 Vic. c. 35, incorporating the City of Brandon, power was given to the Mayor and Council to purchase any bridge built, or being built, within the city.

On an application by an adjoining land owner for a *mandamus* to compel the city to purchase the bridge,

Held, 1. The Act authorizing the building of the bridge was *ultra vires* of the Local Legislature.

2. That the title of the Bridge Company was not such as would be forced upon an unwilling purchaser.

A. C. Killam, Q.C., and *A. Haggart* for applicant Ross.

H. M. Howell and *J. S. Ewart* for the City of Brandon.

[*31st October, 1884.*]

WALLBRIDGE, C. J., delivered the judgment of the Court (*a*): James A. Ross applied for a rule *nisi*, calling on the City of

(*a*) Wallbridge, C. J., Dubuc, Smith, JJ.

Brandon to shew cause why a *mandamus* should not issue, commanding them to obtain possession, "by purchase or otherwise," of the bridge situate on Eighteenth Street, in the said city. In Michaelmas Term, 1884, this rule was argued, when affidavits were filed shewing the facts upon which the mover relied, and on the part of the city, affidavits in answer.

The Statute of Manitoba 45 Vic. c. 40, recites that, under the Manitoba Joint Stock Company's Act, a corporation was constituted on the 24th February, 1882, called the "Brandon Bridge Company," for constructing and operating a bridge across the Assiniboine River, and in and by which the charter was confirmed and amended. By this Act the company are empowered to make and sink piers, abutments, blocks, and erections on the edge or banks of the Assiniboine River as might be necessary for the construction of a bridge, build approaches thereto, and levy tolls. That this bridge should be commenced within a year and completed within two years from the passage of the Act. This Act was passed on 30th May, 1882.

Under the authority of this charter and of the Act confirming and amending it, the bridge company built a bridge on Eighteenth Street, in the City of Brandon, across the River Assiniboine, or rather at the time of the passing of the Act the bridge was in course of construction, and was completed by the company during the summer or autumn of the same year.

The Act of the Legislature of the Province of Manitoba, under which this rule is moved for, is the Act incorporating the City of Brandon, 45 Vic. c. 35. By section 159 of this Act it is enacted "that the Mayor and Corporation of the City of Brandon shall have power and authority to enter into a contract with the proprietor or proprietors of any bridge built, or being built, within the said city, for the purchase of the same upon such terms as may be agreed upon, and the said proprietor or proprietors shall be and are hereby empowered and authorized to enter into a contract with the Mayor and Council for the sale of any such bridge to the city; and the Mayor and Council of the said City of Brandon shall obtain possession of said bridge, by purchase or otherwise, with all reasonable dispatch, and the said bridge shall be free for all traffic of whatsoever nature and kind, and shall be forever maintained and kept in proper repair." Under this Statute, and particularly under the latter part of the

clause, "the City of Brandon shall obtain possession of said bridge, by purchase or otherwise, with all reasonable dispatch," it is contended that the city should be ordered to obtain such possession either by purchase or expropriation. This bridge appears to have been in course of construction when the Act incorporating the city was passed, and was not finished until the summer or autumn following. It is sworn that the River Assiniboine is a navigable river, far above the place at which this bridge is built, for steamers, and the manner in which the bridge has been built confirms that idea. It is described as a draw bridge.

The approaches to the bridge are sworn to as having been built on an allowance for road, and the bridge itself spans the river with each end resting on this allowance for road. It is difficult to see what the bridge company really have to sell. It does not appear that the company have ever acquired the right to this public highway, at least it is not sworn to, nor is it even proved that the bridge company desire or are willing to sell the bridge to the city. It is true that Mr. Ross, a land owner on the north side of the river, has requested the city to obtain possession of this bridge, but he does not assume in that letter to state that he acts on behalf of the bridge corporation. Without at present discussing the question whether this section 159, taken as a whole, is imperative or not, the Court are of opinion that the Legislative Assembly of the Province, in authorizing the construction of a bridge over a navigable river, exceeded their powers as a legislature. By section 91 of the British North America Act it is declared that the exclusive authority of the Parliament of Canada extends to matters coming within the classes of subjects next hereinafter mentioned. Under this head sub-section 10, are set down navigation and shipping. If this bridge should be found to be an obstruction to navigation or shipping, as it manifestly is, unless authorized by the Dominion Legislature, or at least by charter under the Dominion Government, this bridge company have, without lawful authority, erected a bridge across a navigable river, and are themselves now unlawfully impeding the free use of the Assiniboine River by this bridge.

The bridge company do not appear ever to have acquired the title to any land, or to the road allowance upon which the approaches have been made, or in fact to be the owners of any-

thing except the bridge itself. The utmost they can claim under the 1st section of their Act of the Legislature of Manitoba, is to be excused as trespassers there. The City of Brandon are unwilling purchasers, and the title of the bridge company is not such as a court of equity would compel an unwilling purchaser to accept. Besides this, whilst the city is directed in the 159th section of their Act to obtain possession of the bridge, there is no clause compulsory upon the bridge company to sell it. The clause relating to expropriation is clearly not imperative. From the evidence it appears that the bridge was only in course of construction when the city charter was passed, and was not finished until the next summer or autumn. Was the bridge company authorized to build a bridge as expensive, or to erect one as unsuited as they chose, or was the city to buy a bridge in course of construction only in so far as it had then been constructed. It is to buy a bridge completed that the *mandamus* is now asked to go. In my opinion the city could not be asked to pay for a bridge built after the Act passed, and, at furthest, could not be compelled to buy or pay for any more of the bridge than was done at the time of the passing of the city charter. It will be observed that both the bridge company's Act as amended and the city charter became law on the same day.

Granting a *mandamus* is discretionary with the Court, and although the writ is said to have lost its prerogative character, it is in many cases applicable only where a bill for specific performance would lie, this case is not one in which the Court would compel an unwilling purchaser to accept the title such as the gentleman applying for the *mandamus* seeks to make them accept.

The Grand Junction Railway Company v. *The Corporation of Peterboro'*, 8 Sup. C. R., the judgment of Gwynne, J., p. 101, *Stratford and Huron Railway Company* and *Corporation of the County of Perth*, 38 U. C. Q. B. 112, amongst others have been looked at. We are of opinion that the rule should be discharged with costs.

REGINA v. BIGGS.

Criminal information.—Foundation for libel.—Public officer.

Held, A criminal information will not be granted except in case of a libel on a person in authority, in respect of the duties pertaining to his office.

2. Where the libel was directed against M., who was at the time Attorney-General, but alleged improper conduct upon his part when he was a judge, an information was refused.

3. The applicant for a criminal information must rely wholly upon the Court for redress, and must come there entirely free from blame.

4. Where there is a foundation for a libel, though it fall far short of justification, an information will not be granted.

On the 24th of November, 1884, *N. F. Hagel* (with him *Ghent Davis*) on behalf of James A. Miller, obtained a rule calling upon the defendants S. C. Biggs, T. H. Preston, and C. Handscomb to show cause why a rule should not issue out of the Court of Queen's Bench, for the filing and exhibiting by the proper officer, or person in that behalf, of a criminal information against them for having, on 17th November, 1884, falsely and maliciously composed, printed, and published a certain false, scandalous, malicious and defamatory libel in a certain newspaper called *The Winnipeg Daily Sun*, containing divers false, scandalous, malicious and defamatory matters of and concerning James A. Miller.

S. C. Biggs was one of the proprietors of the *Sun*, T. H. Preston the editor, and C. Handscomb a reporter on the paper.

The article complained of was as follows:—

"A STARTLING STORY TOLD BY AN EX-POLICEMAN OF ATTORNEY GENERAL MILLER.

"The recent investigation by the Board of Police Commissioners, ordered by the Attorney-General, who charged two members of the city police force with attempting to allow the prisoner Cormack to escape justice, and the full exoneration of the officers, has caused a great deal of discussion in certain circles. One gentleman said to a *Sun* reporter the other day:

'Mr. Miller should never have made such a charge, for the simple reason that by doing so he has caused people to pry into actions of his own in aiding criminals to escape justice.' 'You surely do not mean that the Attorney-General ever aided a criminal to escape the law?' said the reporter, more surprised than ever. 'That is just exactly what I do mean to say,' was the reply, 'and if you find a Mr. R. Farrell, who was at one time on the city police force, he will probably enlighten you on the subject. It's no good going to any members of the city police force, because they dare not tell you anything even if they knew.' The Mr. Farrell referred to was found by the reporter, but he seemed very reluctant to say anything about the matter. By degrees, however, the story was learned, and was in effect as follows:—About two years ago, or perhaps more, he (Farrell) then being on the force, arrested a certain gentleman, a former resident of St. Catharines, on the charge of having robbed one R. E. Vidal of $300, or some such sum. When searched the stolen money was found in the prisoner's possession, and his guilt was practically admitted. Sergeant English was in charge of the police station at the time of the arrest. The prisoner sent for Mr. Miller, who was then a judge of the Supreme Court. The judge visited him and ordered his release. The police could do nothing but obey an order coming from a judge, and the prisoner was set free, and on the judge's order the stolen money returned to its rightful owner. This having been done it was arranged that the prosecutor should let the case fall through, which arrangement was carried out. This was in effect the story told by the ex-policeman. Chief Murray was next visited by the reporter and asked to corroborate it. He seemed greatly surprised that the story should have obtained publicity, and failing to find who had told it to the reporter, refused to say anything about it. Sergeant English was also spoken to, but he too, as may be imagined, would say nothing. The actions of both chief and sergeant, however, were sufficient to corroborate the story."

The affidavit of James A. Miller stated that, since the 6th day of September, 1883, he had been Attorney-General of Manitoba; that he was, on the 28th day of October, 1880, appointed a Puisne Judge of the Court of Queen's Bench in Manitoba, and continued in such office until the 31st day of December, 1882;

that he had read the article in the *Sun* newspaper headed "A startling story," which was complained of; that said S. C. Biggs was the principal proprietor and owner and controller of the stock of the "Sun Printing and Publishing Company (Limited)," and had acknowledged to him (Miller) that he was responsible for all articles which appeared in the editorial columns of said newspaper, other than such as appeared as letters or correspondence over signatures of parties writing same; that Preston was editor, and Handscomb a reporter on said *Sun* newspaper, and employed and paid by said Biggs; that Handscomb wrote said article with the approval and sanction of Biggs and Preston; that he (Miller) was the person referred to in the said article as Attorney-General Miller; that the article and the statements, charges, and imputations therein contained against him were false and malicious, and without foundation in fact, and intended to prejudice and injure him; and that the actual facts in connection with the matters referred to in the said article were as follows:—He was, at the time referred to, a Justice of the Court of Queen's Bench of Manitoba. A policeman called at his residence and asked for him to go down to the police station in the city of Winnipeg, as a person was confined there who said he knew him, and that he could release him from confinement. On learning the name of the prisoner, and going to the police station and learning he was confined, one of the policemen in charge told him that the prisoner was dazed, but he (the prisoner) knew him (Miller). When he went down he was accompanied by Mr. William George Nicholl, and found, on his arrival, that the prisoner was confined in the apartment used for prisoners awaiting trial; he found the smell of the apartment almost unbearable; he asked the officer in charge if he could not bring the prisoner out, so he could speak to him, and the prisoner was brought out into the office; he then saw that, owing to over indulgence in liquor, he was not able to give any satisfactory explanation of the cause of his arrest; the prisoner gave an explanation with which he was not satisfied, and asked him to procure him bail; he thought it was better, as the officer in charge said he would allow him to remain in the outside office and sleep on the lounge in the office, to allow him to remain there for the night; and he then said, as no charge was then preferred against him, (which he was informed by the officer in charge was the fact,) that he had better remain there

until a charge was preferred; and then there were several others in the city who knew him as well as himself, and that he would have some one look after his case. The next morning he went to the Court House to attend to his judicial duties, and was informed about noon that the so-called complainant had called at the Police Station and had said that he remembered everything and had nothing to complain about, and that the prisoner had been discharged.

The affidavits filed on behalf of the defendants were as follows:—

The affidavit of Hon. S. C. Biggs stated that he was not personally responsible for the articles published in the *Sun*, which was controlled by a joint stock company, the composition of which he gave. That he denied having seen or heard of the alleged libellous article until after it was published, and that it had not been submitted to him by Mr. Handscomb or anyone else; that Mr. Handscomb was not in his employ, and he then gave his version of the conversation held with the Attorney-General, to which reference was made in the affidavit of that gentleman.

The affidavit of T. H. Preston stated that he was the editor, and, by virtue of his position with the company, the publisher of the *Sun*. He corroborated Mr. Biggs' evidence as to that gentleman having no knowledge of the article in question, and as to the fact that Mr. Handscomb was not employed by him (Biggs.)

The affidavit of C. W. Handscomb stated that Mr. Biggs had no cognizance of the article complained of, or of any other article that he might have written for the *Sun*, and that he had not been employed by him (Biggs.)

The affidavit of D. B. Murray, the chief of police in the city of Winnipeg stated, that he had read the copy of the affidavit of Attorney-General Miller, sworn on the 24th of November, 1884; that the prisoner was released on the intervention and at the request of Mr. Miller; that he was requested by Mr. Miller to hand back the money taken from the prisoner Pierce, to one Vidal, Mr. Miller stating to him that the money had been given for safe keeping, and, in his opinion, there was no case against

the prisoner, and, in consequence, the prisoner was liberated. It was on the morning of the 14th of March, 1882, that Mr. Miller was at the police office; he did not see him on the evening of the 13th of March, 1882, as far as he could remember, although he might have been at the police office then; that he would not have taken upon himself the responsibility of allowing the prisoner to be released with such strong evidence against him, unless he was requested to do so by one higher in authority than himself, or unless he was bailed out in the proper course; that evidence had been brought to a policeman on his duty that a felony had been committed, and strong suspicion pointed to the prisoner Pierce, and he was accordingly arrested, and an information would have been laid against the prisoner were it not for the intervention of Mr. Miller; and that it was not through Vidal, the complainant's request that the prisoner Pierce was liberated.

The affidavit of James Naismith, proprietor of the Russell House, stated that Vidal was in his place on the night in question, drinking. Pierce and two others came in, all appearing to be acquainted; that Vidal afterwards complained of the loss of some $400, and Pierce, holding up his hands, pretended that he had not taken it; that he (deponent) afterwards sent for a policeman, and Farrell came in and made the arrest; that on the way to the station, Pierce said he had a friend or relative in the city who would see him through and have him released; and that Pierce appeared to be sober.

The affidavit of Mr. Ewar, of the *Free Press*, stated that Attorney-General Miller had requested him to insert in that newspaper a denial of the alleged libel, and that such denial had been inserted.

The affidavit of J. J. Johnston stated that on the morning of the 14th day of March, 1882, he was at the police station in the said city of Winnipeg, and on that morning Mr. Miller, who was then a judge of the Court of Queen's Bench for the Province of Manitoba, came into the police court about nine o'clock and had a private interview with David B. Murray, who then was, and still is, chief of police of the city of Winnipeg; that he heard the said chief of police say to the said Mr. Miller that it was all right and that he would see that it was done, and,

after Mr. Miller left, the chief of police gave orders for the release of the prisoner Pierce, who had been arrested for stealing a sum of money in the neighborhood of five hundred dollars; that it was the subject of comment about that time at the police station that the then Judge Miller was quite too officious in giving orders.

The affidavit of R. Farrell stated that he was a member of the city police force on the 13th March, 1882, when information was brought to him that a robbery had been committed at the Russell House; that he went in and found Vidal, Pierce, and one Alexander, and there was another member of the party at the door; Pierce was sober, and he remembered him saying that he had borrowed ten dollars from Vidal, and had no more money; that all three were arrested; that Pierce said that he was a relative of Justice Miller, and the deponent was of opinion that Pierce had mentioned that Mr. Miller was his cousin; that he came down on the morrow to appear against the prisoner, but was told by several policemen in the station that his prisoner had been released on the order of Mr. Miller; that Vidal afterwards thanked him for making the arrest, and said that if it had not been for him he would not have got his money back.

The affidavit of Sergeant English stated that Mr. Miller said that Pierce was to have what he wanted, and he was given whiskey and lemon.

The affidavit of Sergeant McRae stated that the suspicious circumstances in connection with the finding of the money on the prisoner Pierce were decidedly strong enough to place the prisoner on his trial; that he knew of no reason why he was not put on his trial, other than through the intervention of the said Attorney-General Miller.

H. M. Howell, Q.C., for Mr. Biggs:—This Court has no jurisdiction to entertain the application. The Local Legislature which created the Court had no power to give it criminal jurisdiction. That jurisdiction was given by Dom. Stat. 34 Vic. c. 14, sec. 2, which reads: "shall have power to hear, try, and determine, in due course of law, all treasons, felonies, and indictable offences." This application does not come within the above provision, and so the Court has no jurisdiction.

If, as it is claimed, the old common law made the master liable criminally for the libellous acts of his servant, that law

has now been entirely changed by the Dom. Stat. 37 Vic. c. 38. This Statute, in respect to agency, brings the criminal liability of the master in libel within the same rules as in any other crime, and, as there is no agency in crime, Mr. Biggs is not liable, he not having directed the publication of the libel. *Reg.* v. *Holbrook*, L. R. 3 Q. B. Div. 60, in appeal L. R. 4 Q. B. Div. 42.

But, in this case, the relationship of master and servant, or principal and agent, does not exist, for at most Mr. Biggs is merely a shareholder and director of a company, and the publisher is simply a fellow officer with Mr. Biggs; it would be dangerous indeed to make one fellow servant liable for the acts of another.

The malice necessary to be proved or inferred is entirely different in civil and in criminal cases. If a person inadvertently delivered a libellous writing by mistake to a third person, while he would be civilly liable, he would not be criminally. *Rex* v. *Abingdon*, 1 Esp. 226; *Rex* v. *Topham*, 4 T. R. 129; indeed if Mr. Biggs actually wrote and published the libel, and, at the same time, believed and had reason to believe it was true, although it was in fact false and libellous, he would not be criminally liable. *Rex* v. *Harvey*, 2 B. & C. 257. Much more then is Mr. Biggs not liable, as it is clearly shown that he did not know of the existence of the article until after its publication.

Mr. Biggs being an officer of the Court, the extraordinary remedies asked should not, in an oppressive way, be granted against him. The real wrong-doer (if any) was the *Sun* Company, and, if the Attorney-General desired to punish them, he could do so, for a company may be indicted for libel and fined. *The Pharmaceutical Society* v. *The London and Provincial Supply Association*, L. R. 5 App. Ca. 857, judgment of Blackburn, J., at page 870.

J. S. Ewart, Q.C., for Preston, took the following points: (1). An information is granted in England only where some person holding an important office has been libelled in connection with his office. *Reg.* v. *Labouchere*, L. R. 12 Q. B. D. at p. 329; *ex parte Chapman*, 4 Ad. & E. 773. (2). Information should not be granted at all in this country, it being inadvisable to give rank any privilege. *Reg.* v. *Labouchere*, L. R. 12 Q. B.

Div., at page 329; *Reg* v. *Wilson*, 43 U. C. Q. B. 589 (opinions of Cameron and Armour, J J.) (3.) It is only where the libel is so gross as to endanger the peace that informations are now granted; *Reg.* v. *Labouchere*, L. R. 12 Q. B. Div., at page 322; *Reg.* v. *Wilson*, 43 U. C. Q. B. at page 583; *Reg.* v. *Plimsoll*, 12 C. L. J. N. S., at page 233. (4.) Information will not be granted, unless informer free from all blame in the matter; *Reg.* v. *Plimsoll*, 12 C. L. J. N. S., pp. 228, 233. In the present case the Attorney-General's affidavit itself contains a libel on the judge, unless its truth could be proved. He admits that he was asked to go to the gaol at night because a prisoner who knew him thought he could release him; that he went to the prison, procured unusually favorable treatment for the prisoner, and conversed with him on the matter of the alleged crime; and that he undertook to get some one to act for him. Lord Bacon gave good advice to Villiers upon his elevation to the woolsack: "By no means be you persuaded to interpose yourself, either by word or letter, in any cause depending in any court of justice, or suffer any great man to do it, where you can hinder it. If it should prevail, it prevents justice; but if the judge be so just and of such courage as he ought to be, as not to be inclined thereby, yet it always leaves a taint of suspicion behind it." (5.) The truth of the libel may be inquired into upon a motion for an information, and if there be a good foundation for the statements complained of, an information will be refused. *Reg.* v. *Plimsoll*, 12 C. L. J., N. S. 229. (6.) The informer did not make a "full and candid" statement of the facts upon getting the rule. *Reg.* v. *Wilkinson*, 41 U. C. Q. B. pp. 25 and 27.

J. B. McArthur, Q.C., appeared for C. Handscomb, and showed that Mr. Miller had chosen his own *forum*, he had sought redress by going to the *Free Press* office, and seeking to have the public informed of what he said on his side of the case.

In *Reg.* v. *Wilkinson*, 41 U. C. Q. B. 1, it was held that, if any one who deems himself to be libelled shall seek redress by assaulting the offender, or otherwise securing redress, he debarred himself from securing from the Court any redress.

In going to the *Free Press* office and securing the publication of his version of the case, Mr. Miller had secured redress which, according to law, would debar him from the protection of the Court.

He also referred to and commented on the following cases on this branch of the argument: *Queen* v. *The Proprietors of the Nottingham Journal*, 9 Dowl. 1042; *Reg.* v. *Lawson*, 1 A. & E. N. S. 486; *Daw* v. *Elev*, L. R. 7 Eq. 61; *Reg.* v. *Marshall*, 4 E. & B. 475. The result of the cases being as stated by Harrison, C. J., at page 25, in *Reg.* v. *Wilkinson*, 41 U. C. Q. B. as follows: "A party who wants a criminal information must place himself entirely in the hands of the Court. If it appear that a party has put himself into communication with the publisher of the libel, for the purpose of retorting, or with a view of obtaining redress, or has in any manner himself attempted to procure redress, or take the law into his hands, the remedy by criminal information will be refused: *ex parte Beauclerk*, 7 Jur. 373. See further *Rex* v. *Larrien*, 7 A. & E. 277."

N. F. Hagel, in reply, contended that the Court had power to grant the rule for the information asked, and cited, in support of his contention, the general Act giving jurisdiction to the courts in this Province, 34 Vic. c. 14. He urged that Mr. McArthur's argument did not apply in this instance, for, in this case, Mr. Miller had simply given a statement to a reporter, and in the cases cited they had either taken some proceedings in court or written letters to the libeller, or in some other way submitted to a *forum*, and thus become disentitled to relief. Mr. Miller, being a judge of the Court of Queen's Bench, was libelled in that capacity. The fact that he had ceased to occupy that position did not prevent him obtaining what he asked, he contended that the article affected Mr. Miller, as it was told of him as Attorney-General. The defendants had not produced any evidence to show that there were public grounds why the libel should be published. Mr. Biggs held a controlling interest in the stock, and was, therefore, the controller. He contended that the evidence of D. B. Murray did not establish that an "order" had been given by Mr. Miller, as stated in the article complained of. The most it could be said to show was a request, and this was not distinctly stated. He read extracts from the affidavit of the complainant to show that he had not given such an order.

In view of all the facts, he submitted the information ought to go against the writer of the article, and the editor of the paper who inserted it, if not against Mr. Biggs.

[*2nd December, 1884.*]

WALLBRIDGE, C. J.—The remedy by criminal information is an extraordinary one. To entitle a person to that remedy, the party applying must rely wholly upon the Court for redress, and must come there entirely free from blame; that is, there must be no foundation for the charge, though falling far short of a justification. Reading the affidavit of Chief Murray, I cannot say there is no foundation for the charge. The remedy by indictment is open to Mr. Miller if he desires to follow it. This remedy (criminal information) is peculiarly within the discretion of the Court, and, under the circumstances above stated, I am of opinion that the rule should be refused.

DUBUC, J.—This proceeding is a rather special remedy resorted to in certain instances of libel; but more particularly now in cases of libel on persons in authority in respect of their public duties. In this case Mr. Miller, being Attorney-General, is a person in authority, but the libel does not attack him in relation to his duties of Attorney-General; it reflects on certain actions of his while he was on the Bench. The libel, therefore, is not against a judge, for Mr. Miller exists no more as a judge; it is against a person who has been a judge. It not being a libel against a person actually holding a public office in respect of his conduct as such public officer, the Court does not feel justified in granting, in this instance, the rather extraordinary remedy asked for, and leaves Mr. Miller to the ordinary remedy by indictment.

SMITH, J.—There is not enough evidence to show Mr. Biggs' liability. The libel does not touch the office of the Attorney-General, and consequently is not what the counsel for the prosecution has sought to make it. If it had touched the office of the Attorney-General, or been a charge against him as that officer, the matter would have been different. As to the article, there was some reasonable ground for writing it, although perhaps not enough to legally justify it. There is a very strong conflict of evidence, so that the Court cannot allow the rule to go.

Rule discharged without costs.

MOORE v. FORTUNE.

Bond.—Joint obligors.—Demurrer.

Action on a joint bond against three defendants. The declaration revealed the fact that five persons were liable jointly with the defendants.

Held, That as the declaration did not show that these others had sealed the bond, and were resident within the jurisdiction, the defendant should have pleaded the non-joinder in abatement, and not have demurred.

S. C. Biggs, Q.C., for defendant Fortune.

W. H. Culver for defendant Rigney.

A. Howden for plaintiffs.

[*13th October, 1884.*]

SMITH, J.—Demurrer by each of the defendants Fortune and Rigney to the declaration, on the ground of non-joinder of co-obligors.

This action is brought on a joint bond against three defendants. The declaration alleges it to be the bond of the defendants, but reveals the fact that whether by recital or the operative part of the instrument, five persons, in addition to the defendants, agreed to perform the condition. There is no direct allegation, however, that these five persons sealed the bond, and it seems well settled by authority that, unless such an allegation appears, the declaration is not open to demurrer.

It would seem also that, even if that fact did appear, the proper course is to plead in abatement, and not to demur. By 3 & 4 Will. IV. c. 42, s. 8, the plea is required to state that the person sought to be added as a defendant is resident within the jurisdiction of the court, stating such place of residence in an accompanying affidavit. Thus, in the old language, the defendant gives the plaintiff a better writ. The duty is cast on the defendant of shewing where the declaration is defective, and of affording the means of supplying that defect, a duty which would be entirely evaded by demurrer. This view was taken in *The City of Toronto* v. *Shields*, 8 U. C. Q. B. 133, where the previous authorities are reviewed, and similar statutes in Ontario

commented on. The subsequent case of *Mills v. McBride*, 10 U. C. Q. B. 145, is not opposed to this decision, since that was an action on a recognizance where a different rule prevails. The recognizance is matter of record, and the record must be strictly followed. One of the cases cited in the course of the argument was an action of the latter nature.

Since the Statute 3 & 4 Will. IV. c. 42, s. 8, only joint obligors, resident within the jurisdiction, need be joined as defendants. The declaration does not declare that those omitted were resident within the jurisdiction. It cannot, therefore, be said to be defective. The defendant, by plea, must show the defect and how to remedy it.

In the notes to *Cabell* v. *Vaughan*, 1 Saund. 291, it is laid down as a rule of pleading, that to enable a defendant to demur it must appear from the declaration that the omitted defendant is living.

I cannot conclude without remarking upon the rather vague manner in which the bond is stated in the declaration. It is true the pleader had to deal with an ill-drawn instrument; but, having two courses open, the one to set out the bond *verbatim*, and the other to allege its legal effect, he seems to have tried to combine the two, a combination that certainly does not add to perspicuity.

Judgment for the plaintiff.

PARKER v. NUNN.

(IN CHAMBERS.)

Scale of costs.

Action brought in the Queen's Bench for $225, for goods sold and delivered,

Held, That the action might have been brought in the County Court, and that the plaintiff was not entitled, therefore, to tax Queen's Bench costs.

The plaintiff obtained, under 46 & 47 Vic. c. 23, ss. 16 and 18, an order to sign judgment for part of his demand, without prejudice to his right to proceed to recover the balance if so advised. He afterwards determined not to proceed further, and took out a summons calling upon the defendant to show cause why he should not tax full Queen's Bench costs.

G. B. Gordon for plaintiff.

C. H. Allen for defendant.

[*16th December, 1884.*]

TAYLOR, J.—The plaintiff has obtained an order to sign judgment for $193, part of his claim. The amount originally claimed by the indorsement on the writ of summons was $225, an amount within the jurisdiction of the County Court. The action was begun since the coming into force of the 47 Vic. c. 22, the 3rd section of which repeals the proviso in sub-section 2 of section 33, chapter 34 of the Con. Stat. The case has never gone to trial, so the 47 Vic, c. 21, s. 13, which provides for a judge certifying for costs in certain cases, has no application.

But the plaintiff contends that the action was properly brought in the Court of Queen's Bench. It is said that the plaintiff resides in Ontario, and the action is brought to recover the price of goods sold and delivered in Ontario to the defendant, while he was resident there, and to prove the delivery of these it might have been necessary to issue a commission for the examination of witnesses there. In answer to Mr. Allen's statement that the County Court has been in the habit of issuing foreign commissions, Mr. Gordon admitted that such had been the practice, but he argued that such commissions were irregular, the Statute containing no provision to warrant these being issued,

and he cited a number of cases decided in Ontario before the County Courts there were empowered to issue commissions.

On referring to the Statute I find that express provision is made for issuing them. The words of the County Court Act, Con. Stat. c. 34, s. 230, are: "Any judge may, at any time, on a proper application to him, in any case, in any County Court, order the issue of a writ of commission to take evidence in the cause as may in like cases issue in the court of Queen's Bench, and for like purposes." As the plaintiff could, if necessary, have obtained a commission from the County Court; I can see no reason for this action not having been begun there, and I dismiss the plaintiff's summons with costs.

MERCHANTS' BANK v. MURRAY.

(IN CHAMBERS.)

Inspection of documents in possession of opposite party.

Held, Upon an application for inspection of documents, an affidavit of the party, as well as of the attorney, is not necessary.

A summons having been taken out to inspect certain books of the plaintiffs containing entries relating to the promissory note sued upon under the provisions of 14 & 15 Vic. c. 99, s. 6.

W. E. Perdue shewed cause. The summons issued upon the affidavit of the defendant's attorney. It was contended that an affidavit of the defendant also is required. *Barwick* v. *DeBlaquiere*, 4 Ont. Pr. R. 267.

N. D. Beck (*Aikins, Culver & Hamilton*) supported the summons. The case cited is not clear. It purports to follow the English case of *Christopherson* v. *Lotinga*, 15 C. B. N. S. 809. That case has been hastily taken as a decision upon 14 & 15 Vic. c. 99, s. 6, whereas it is in fact upon the Common Law Procedure Act 1854, s. 50.

[*17th September, 1884.*]

Held, by WALLBRIDGE, C. J., that the defendant was entitled to an order for inspection, following the form given in Chitty's forms, and that, on such an application, an affidavit of the party, as well as of the attorney, is not necessary.

CAREY v. WOOD.

(IN CHAMBERS.)

Examination of parties.—Practice.

Upon a motion, defendant filed an affidavit of A., who afterwards made another explanatory affidavit at the instance of the plaintiff,

Held, That defendant was not entitled to an order for the oral examination of A.

The defendant filed an affidavit, made by a witness, in answer to a rule taken out by the plaintiff to set aside certain proceedings. Hearing afterwards that this witness had made an affidavit for the plaintiff, professing to explain statements made in the first affidavit, the defendant's attorney prepared another affidavit and requested the witness to swear to it, which he refused to do. The defendant then applied for an order to examine the witness, under the Common Law Procedure Act, 1854, s. 48, which provides that "Any party to any civil action, or other civil proceeding, in any of the superior courts requiring the affidavit of a person who refuses to make an affidavit, may apply by summons for an order to such person to appear and be examined upon oath * * * * as to the matters concerning which he has refused to make an affidavit."

H. A. McLean for defendant.

A. E. McPhillips for plaintiff.

[*16th December, 1884.*]

TAYLOR, J.—The section of the Common Law Procedure Act, under which the defendant moves, cannot apply to a case like the present. The witness has already made an affidavit, and all that he has now done is to decline making a further affidavit. I do not see that a person can properly be required, under the penalty of an order against him for examination, to go on making a succession of affidavits to suit the convenience of a litigant. I discharge the summons with costs.

MANITOBA AND NORTH WEST LOAN CO.

v.

HARRISON.

Practice.—Decree where defendant served by publication.

Held, Where defendant is served by publication, it is necessary to move in court for a decree.

2. In other cases where there is no defence, or where the answer admits the facts entitling the plaintiff to a decree, or amounts to a disclaimer, and the defendants are *sui juris*, decrees may issue on præcipe.

G. G. Mills for plaintiff.

[*10th December, 1884.*]

TAYLOR, J.—This is a mortgage suit which has been taken *pro confesso* against the defendant after service effected by advertising. It was stated by counsel that recently the master has declined, in any mortgage case, to allow the costs of setting down and hearing *pro confesso*, on the ground that in all such cases decrees can be obtained on præcipe (*a*); and I was asked to express an opinion upon the question. The order of court under which præcipe decrees are issued is No. 426, which is an exact copy of the Ontario order 435, except the words "This order shall apply to redemption suits."

In Ontario, after order 435 had been in force for several years, order 646 was passed. By this order decrees might be issued on præcipe in redemption suits, hence the addition to our order 426 of the words above referred to. The registrar was also given power to embody in such decrees all the ad-

(*a*) The master desires it to be said that this is an error. He declined to allow the extra costs of setting down and hearing in all such cases, excepting where the bill had been served by publication. In these cases he has always allowed full costs; but he held that when the service was substitutional, such as service on an agent, or by mailing, the proper practice was to obtain a decree on præcipe. His ruling is, therefore, upheld by this case.—REP.

ditional remedies for immediate payment, delivery of possession, &c., given under the Administration of Justice Act. This order 646 also contained the provision that such a decree might be granted, notwithstanding that the defendant had been served by publication or otherwise, or was a corporation, followed by a proviso "that where the bill has not been personally served, the claim of the plaintiff shall be duly verified by affidavit:" a similar proviso finds a place in our order 427. No order the same as, or corresponding to the Ontario order 646 is in force here, except in so far as the addition of the few words to order 426 and of the proviso to order 427 extends.

Our practice, therefore, as to what decrees may be issued on præcipe must be governed by the practice which prevailed in Ontario under general order 435, and before order 646 was passed. As to what that practice was, I have (to refresh my recollection) corresponded with Mr. Holmsted, the registrar of the Chancery Division of the High Court of Justice, than whom I know of no more competent authority upon questions of practice. He informs me that in Ontario, under general order 435, decrees were issued on præcipe, where defendant (being *sui juris*) was served (1) personally, (2) substitutionally by service on an agent or relation, or (3) by mailing an office copy of the bill to the defendant. But that when defendant was served by advertising, it was always necessary that the bill should be taken *pro confesso*, and a decree moved for in court as originally decided in *McMichael* v. *Thomas*, 14 Gr. 249.

It would, therefore, seem necessary under our orders to move in court for a decree when the defendant is served by advertising. In other cases, where there is no defence, or when the answer admits the facts entitling the plaintiff to a decree, or is a disclaimer, and none of the defendants is an infant, decrees may issue on præcipe.

TAYLOR v. SHARP.

Mortgage suit where mortgage assigned.—Covenant by mortgagee for payment.—Remedy against mortgagee as surety.

On an assignment of a mortgage, the mortgagees covenanted to pay the assignee all moneys secured by the mortgage, according to its terms, in the event of default being made by the mortgagors.

In a suit for sale the original mortgagees were made parties, and a personal order was asked as against them.

Held, 1. That no order could be made against the original mortgagees for immediate payment, but only an order for payment of any deficiency after a sale.

2. That the original mortgagees were entitled upon payment forthwith after decree of principal, interest, and the costs of an undefended action at law against them upon their covenant, to be discharged from further liability; and to an assignment of the plaintiff's securities upon payment of any costs he might have against the other parties.

The plaintiff filed his bill on a mortgage made by the defendants C. W. Sharp and J. W. Smith to H. S. Crotty and Robert Gerrie, and by them assigned to him. The assignment contained a covenant by Crotty and Gerrie to pay to the plaintiff all and every sum and sums of money and interest secured by the mortgage, as they respectively fell due, according to the terms of the mortgage, in the event of default being made by the mortgagors, together with all costs, charges, and expenses to which the plaintiff might be put, or might incur, in and about the proceeding for enforcing payment of such moneys and interest, and the foreclosure or sale and obtaining possession of the mortgaged premises, or otherwise howsoever. The defendants were, the original mortgagors, Crotty, Gerrie, and a number of persons who had purchased portions of the mortgaged premises. The bill prayed immediate delivery of possession by all the defendants, immediate payment of principal and interest now due by the original mortgagors, and Crotty and Gerrie; for a reference to make and take the usual inquiries and accounts; and for a sale on default in payment. The bill had been noted *pro confesso* against all the defendants, but counsel appeared for

Crotty and Gerrie to argue the question of what relief the plaintiff was entitled to as against them.

G. R. Howard for plaintiff.

F. B. Robertson for Crotty and Gerrie.

[*14th January, 1885.*]

TAYLOR, J.—The defendants Crotty and Gerrie are, by virtue of the covenant contained in the assignment from them to the plaintiff, sureties for the original mortgagors and liable upon the default of the latter to pay the mortgage debt. There is no authority for making a surety a party to a suit, brought for foreclosure or sale, by the mortgagee against the mortgagor, except what is contained in general order 418. Before the passing of that order the only remedy the mortgagee had against the surety was to sue him at law upon his covenant. So, in a suit for sale against the original mortgagor, the mortgagee, in the event of a deficiency, had no mode of recovering that deficiency against the mortgagor except by suing him at law upon the covenant for payment in the mortgage, until general order 417 was passed. That order provides that, instead of foreclosure, a sale may be prayed, and that any balance of the debt remaining due after the sale may be paid by the mortgagor. Then order 418 provides that any person who is surety for the payment of a mortgage debt, may be made a party to a suit for sale, "and the relief specified in the last order" may be prayed against both the mortgagor and the surety, and decreed accordingly. The relief specified is, the payment of any balance of the mortgage debt remaining due after the sale. The plaintiff, instead of suing the sureties at law, has elected to make them parties to this suit, and to take the remedy which the general order gives him. He is not, therefore, entitled to an order against them for immediate payment, but only to an order for payment of any deficiency after the sale takes place.

The proper decree will be one ordering immediate payment of the amount now due by the original mortgagors, delivery of possession of the lands by all defendants except Crotty and Gerrie, a reference to the master to make and take the usual inquiries and accounts, tax costs and appoint a day for payment, sale upon default and then payment of any deficiency by the mortgagors and Crotty and Gerrie.

Mr. Robertson contended that, in ascertaining the deficiency, the sureties should not, in any event, be liable for costs beyond the costs of an action at law on the covenant to which no appearance was entered; but it seems to me that, if a sale takes place, the plaintiff would be entitled to deduct all his costs before the deficiency is reported. If thought desirable, however, the decree may contain a clause that, upon payment forthwith by the sureties of the amount now due for principal and interest, and the costs of an action at law in which judgment is obtained on default of appearance, they be discharged from all further liability and entitled to the benefit of the securities held by the plaintiff, after payment of any costs he may be entitled to against any of the other parties.

RICE v. MURRAY.

Mortgage suit—Time to redeem.

Held,—There should be only one period of six months allowed for redemption, for all parties, mortgagor and subsequent incumbrancers.

G. G. Mills for plaintiff.

[*27th December, 1884.*]

TAYLOR, J.—The bill in this case is filed for the foreclosure of a mortgage, and has been taken *pro confesso* against the defendant, the mortgagor.

There are subsequent incumbrances upon the property, and a reference to the master is necessary for the purpose of making the holders of these, parties, settling their priorities and taking the accounts.

The question is raised as to the period which should be allowed for redemption, and also whether there should be successive periods given to the several incumbrancers and to the mortgagor, or one day fixed for redemption by them all.

Hitherto the mortgagor, when he is the sole defendant, has been given six months for redemption. In the case of subsequent incumbrancers, the practice has been to give the first subsequent mortgagee six months, then in the event of his failing to redeem, to give the next three months and so on until they are all disposed of, the mortgagor having three months more after the last of the subsequent mortgagees has been foreclosed. The only departure from this course has been in the case of subsequent incumbrances in the form of judgments, the practice having been to give all judgment creditors only one day and not successive periods. In doing so the practice which has obtained in Ontario has been followed. There the practice which prevailed in England in 1837, when the Court of Chancery in Ontario was established, was adopted, with this variation, that in England no distinction was made between subsequent mortgagees and judgment creditors, all were given successive periods. The practice in England has, however, in recent times been greatly changed. The first departure appears to have been in *Radcliff* v. *Salmon*, unreported but cited 5 De G. & S. 560 (note), decided in 1850 by Lord Justice—then V. C.—Knight Bruce, in which he appointed for subsequent judgment creditors only one day. This case was followed by V. C. Kindersley in *Stead* v. *Banks*, 5 De G. & S. 560, and by the Master of the Rolls in *Bates* v. *Hillcoat*, 16 Beav. 139, where, however, successive days were given each judgment creditor, although not successive periods of three months each. The next case I have found is *Bartlett* v. *Rees*, L. R. 12 Eq. 395, which went much further. In that case questions between subsequent incumbrancers, mortgagees and judgment creditors, not affecting the plaintiff were raised, and the Court gave one day for all to redeem, or be foreclosed, without prejudice to the rights of the several defendants *inter se*.

Of late years this practice seems generally followed, but the judges cannot be said to be quite agreed upon it. In *The General Credit and Discount Company* v. *Glegg*, L. R. 22 Ch. Div. 549, V. C. Bacon gave only one day for redemption, six months, to a mortgagor and subsequent mortgagee. This was followed by Pearson, J. in *Smith* v. *Olding*, L. R. 25 Ch. Div. 462. However, in *Street* v. *Combley*, L. R. 25 Ch. Div. 463, (note), Fry, J. refused in the absence of the mortgagor, who had not appeared to the action, to fix only one day; and in another case, unreported but mentioned, L. R. 26 Ch. Div. at

page 692, North, J. said, that one time for redemption for several defendants could be fixed only in cases in which there is so much entanglement that the plaintiff would be unduly delayed if successive periods of redemption should be allowed.

In *Mutual Life Assurance Company* v. *Langley*, L. R. 26 Ch. Div. 692, Pearson, J., gave successive periods of six months and three months. He then had before him all the cases to which reference has been made, and although giving the successive periods on the ground that the case was a very peculiar one, he said, "But my opinion is in favor of fixing as a general rule one period of redemption, the practice of giving successive periods has been found very inconvenient." The weight of authority in England seems now to be in favor of giving only one period of six months for redemption by mortgagor and all subsequent incumbrancers, whether mortgagees or judgment creditors. I quite agree with the opinion expressed by Mr. Justice Pearson, that the opposite practice has been found inconvenient. It has also been expensive, owing to the necessity of taking orders of foreclosure at the expiry of each period. By fixing only one day for judgment creditors to redeem, it was considered that no injustice was done them in Ontario. I do not see how any injustice is done subsequent mortgagees by giving them only the same day as the mortgagor. They take their securities with notice through the registry office of any existing incumbrances ahead of them, which they may at any time be called upon to pay off in preservation of their own rights. In the event of the prior mortgagee exercising the power of sale, which most mortgages now contain, they would not have even the six months in which to prepare for redeeming. In future there should, in my judgment, be only one period of six months allowed for all parties, mortgagor and subsequent incumbrancers, redeeming.

FENERON v. O'KEEFE.

Master and servant.—Dismissal.

The plaintiff was engaged as a surveyor. The defendant furnished the instruments. In the morning of one day, while the plaintiff was pursuing his usual course, the defendant's son (who had authority to act for him) asked plaintiff for the key of the instrument box, which plaintiff gave him. The plaintiff remained at the camp during the day unoccupied, and unable to get the instruments, and the defendant's son did not complain of his conduct, or offer him the instruments, but, on the contrary, told the plaintiff to go and see the defendant, who was at another camp four miles away.

Held. 1. It does not require any form of words to amount to a dismissal of a servant.

2. That plaintiff was justified in considering himself dismissed.

3. If a servant be engaged for a definite period at so much per month, the amount earned may be recovered, although the defendant subsequently be properly dismissed for misconduct.

4. A servant hiring for the performance of specified duties impliedly warrants that he is possessed of the requisite skill, and if he have it not he may be dismissed.

J. H. D. Munson for plaintiff.

F. Beverley Robertson for defendant.

[*14th June, 1884.*]

WALLBRIDGE, C. J., delivered the judgment of the Court (*a*):—The action is for work and labor, on the common counts, the pleas are never indebted and payment.

The evidence shows that the defendant hired the plaintiff, both being then in Toronto, to work for him as a surveyor, at the rate of $50 a month, to commence from 21st June, 1882: and to continue in defendant's service until the completion of the survey. Mr. Foster, a witness, called by defendant says, the plaintiff was engaged at $50 per month, and the plaintiff asked the defendant, at the time of the hiring, how long the work would last, and he answered "until the weather got such that they could not work," and Mr. Foster says this is all that took place.

(*a*) Wallbridge, C. J., Dubuc, Taylor, JJ.

The plaintiff left the defendant's service on the 13th September following, claiming that he was then dismissed by David O'Keefe. The dismissal is the principal question to be determined on this rule. Mr. Foster says that the plaintiff's expenses were to be paid by the defendant from Toronto to the place where the work was to be done. The plaintiff was allowed on the trial for 2 months and 22 days, at $50 per month, amounting to $136.66. The defendant has moved for a non-suit, or to enter a verdict for him, or for a new trial.

It is contended, on behalf of the defendant, that there was no dismissal in fact, that plaintiff left the defendant's employment without cause, and that he has forfeited his wages. On the contrary, the plaintiff contends that he served this 2 months and 22 days, and was then dismissed by the defendant's son, David O'Keefe.

The plaintiff says that, on the morning of the 13th of August, about four or five o'clock, as he was dressing himself, David O'Keefe came to him and asked him for the key of the instrument box, in which the surveyor's instruments used by plaintiff were kept, and told him his services were no longer required; that he told him also to go and see his father, who was surveying in another place, the camp being about four miles away. Plaintiff remained until about nine o'clock and then left. David O'Keefe, who was sworn for the defence, denies having dismissed the plaintiff, but admits having asked for the key and kept it, and having told the plaintiff to go to see his (David's) father. The plaintiff was hired as a surveyor, and had been employed as such for the time above mentioned, and, at the time when the key of the box containing the instruments was demanded from him, was engaged in that work.

David O'Keefe gives no reason why he demanded the key, or why he told the plaintiff to go to the defendant.

The plaintiff took this as a dismissal. The survey has been completed, the defendant has received payment for the work which the plaintiff did, and now refuses to pay him anything, alleging that the contract was an entire one, that defendant left of his own accord, and was not dismissed. The plaintiff, on the contrary, says his wages accrued by the month, and, he claims his wages for the broken period, alleging wrongful

dismissal. The defendant himself is also a surveyor, and provided the instruments for the plaintiff to use.

At the trial, by further evidence and by the manner of conducting the defence, the defendant tried to justify the dismissal, though he denies that he ever did in fact dismiss the plaintiff. He finds fault with plaintiff's work, endeavors to show his mistakes and want of skill, which would form a good defence if proved, for a person hiring as the plaintiff did, impliedly warrants that he is possessed of the requisite skill, and, if he have it not, he may be dismissed; *Harmer* v. *Cornelius*, 5 C. B. N. S. 236. Though the evidence was directed to that point, the defendant does not now urge that as a defence, but relies on the two points, the entirety of contract, and that he did not dismiss the plaintiff. I do not think in any event the evidence of want of skill goes far enough to warrant the Court in depriving the plaintiff of his wages, as to the other two points, I think the evidence shows that David O'Keefe did dismiss the plaintiff, and that he had such authority from the defendant. The plaintiff swears that David O'Keefe was generally in charge of the principal camp, and that defendant said that he (David) had as much authority there as he (the defendant) had; and another witness swears that the defendant said he (David) was as much boss as he was; the defendant never asked the plaintiff to return, or to continue his services. On the morning of the dismissal the plaintiff was pursuing his usual course; David O'Keefe asked him for the key of the instrument box, which plaintiff gave him; he never returned this key; the instruments were in the box; the plaintiff remained at the camp until nine o'clock; David O'Keefe did not complain of this conduct, did not offer him the instruments, with which alone he could render the services required; told him to go and see his father who was at another camp four miles off, engaged in surveying from that camp, the camp simply being the place of lodging. The plaintiff was then 140 miles from any place where he could get employment, or find food or shelter; yet David O'Keefe pledges his oath he did not dismiss the plaintiff. It does not require any particular form of words to amount to a dismissal. In *Lash* v. *Meriden Britannia Company*, 8 Ont. App. R. 680, the plaintiff was hired as a book-keeper, and was not bound to serve in any other capacity. If not allowed to perform those duties,

he was not compellable under his engagement to undertake others, but had a clear right to treat the refusal to allow him to continue in charge of the books as equivalent to a dismissal. This case appears to me to be exactly in point. Taking this view it is immaterial whether the wages were payable monthly, or when the work was completed. But the defendant's witness (Foster) states the wages were at $50 per month, using the exact words used in *Taylor* v. *Laird*, 1 H. & N. 266, in which case it was held that the wages were payable monthly, and that plaintiff would be entitled to them even in case of subsequent dismissal for misconduct. As to the charge of $20, by which it is asked that the verdict be reduced, it is shown in exhibit D. that this sum was accounted for to defendant by the plaintiff in the payment of his expenses from Toronto to the place of working. The rule should, therefore, be discharged with costs, and the verdict stand for the plaintiff as rendered.

THE WASHBURN & MOEN MANUFACTURING COMPANY v. BROOKS.

(IN CHAMBERS.)

(IN EQUITY.)

Issue of commissions.—Expert evidence.—Witnesses abroad.

Held, by TAYLOR, J., on appeal, affirming the decision of the referee:—

1. A commission to examine a party to the suit or his employée will not be ordered, if opposed, no special circumstances being shown.
2. Expert evidence will not be permitted to be taken abroad, except under special circumstances.
3. The issuing of a commission to take evidence abroad is in the discretion of the Court.

This was an application by the plaintiffs to take the evidence under commission of certain witnesses in the United States.

A. C. Killam, Q. C., for the plaintiffs.

E. H. Morphy, for defendants, cited *Mair* v. *Anderson*, 11 U.C. Q. B. 160; *Russell* v. *G. W. R. Co.*, 3 U. C. L. J., O. S. 116; *Attorney General* v. *Gooderham*, 10 Ont. Pr. R. 259: *Lawson* v. *Vacuum Brake Co.*, L. R. 27 Chy. Div. 137.

The judgment of Mr. Leggo, referee in chambers, was as follows:—

This application was moved on the affidavit of Mr. Taylor, "employed" in the office of the plaintiffs' solicitor, who says merely, that the witnesses proposed to be examined abroad are, as "I am informed and believe, material and necessary witnesses, and that they (the plaintiffs) cannot safely proceed to a hearing of this cause without their evidence."

The affidavit of Mr. Mulock was filed in answer, and in reply to it the affidavit of Mr. Killam was filed, in which he states, that the plaintiffs cannot safely proceed to a hearing without the evidence of these witnesses, and that "under my instructions I believe that it will not be possible to procure the attendance in Winnipeg of any of said witnesses."

Lawson v. *The Vacuum Brake Co.*, L. R. 27 Chy. Div. 137, shews, "that it is the duty of the party making the application (for an examination abroad), to bring before the Court such circumstances as will satisfy it that it is for the interest of justice that the witnesses should be examined abroad." In that case the affidavits on which the motion was made, and by which it was supported, were very similar to these, but stronger, and the application was refused. I gather from the expressions of the judges that on this ground alone the application would have been refused, though other grounds existed. I do not think the plaintiffs have shewn any difficulty in obtaining the attendance of these witnesses. It does not appear, even, that they have been asked to attend, and the ground stated, that in the opinion of Mr. Taylor or of Mr. Killam, it will be impossible to obtain their attendance, unsupported by evidence of any attempt to obtain it, amounts to nothing.

But on looking at the pleadings I find that Gliddon, at all events so far as evidence is concerned, occupies really the place of the plaintiffs. The case will be decided mostly by his statements. He is charged in the answer with fraudulent representation and dishonest acts in obtaining the patent, which the plaintiffs now claim, and the success of the plaintiffs will depend much on his statements. It is therefore of the utmost consequence to the defendant that he give his evidence in full court, where he may be subject to a proper cross-examination under the eye of the judge.

Of course, if it be shewn that it is impossible to obtain his attendance here, the plaintiffs must not be debarred altogether from obtaining the benefit of his evidence, and where this impossibility is shewn an order will be given for his examination abroad, and it would then be for the Court to determine how far the weight of his evidence was affected by their not having seen or heard him (Per Cotton, L. J., in *Lawson* v. *Vacuum Brake Co.*). But in the meantime I do not think it would be in the interest of justice that this most important witness should be examined abroad.

As to the other witnesses, there are two objections to the order going as to them. The first is, that it is not shewn that they cannot be brought here; the second is, that their statements will be very largely expert evidence. *Russell* v. *G. W. R. Co.*,

3 U. C. L. J., O. S. 116, and *Attorney General* v. *Gooderham*, 10 Ont. Pr. R. 259, shew that such evidence is not permitted to be taken abroad, except under special circumstances, and none are shewn here.

The motion therefore must be dismissed with costs.

The plaintiffs appealed.

A. C. Killam, Q.C., for the appeal.

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

(*8th January, 1885.*)

TAYLOR, J.—After reading the affidavits filed, the pleadings and the interrogatories which have been prepared in the common law suit of these plaintiffs against Chisholm and another, I can come to no other conclusion than that the order made by the referee should not be disturbed.

Of the persons sought to be examined, one Elwood is a plaintiff, so no order for his examination abroad should be made. Gliddon very clearly should be produced in open court for examination and cross-examination. It does not appear who Washburn is, but from the name and his residence being at Worcester, Massachusetts, he may very fairly be assumed to be a plaintiff, or in the employment of the plaintiffs' company. If so, there is the same reason against issuing a commission for his examination, as in the case of Elwood. The other two witnesses are to have interrogatories put to them for the purpose of their giving expert evidence, and it is exceedingly undesirable that such evidence should be given under commission and not in open court.

The issuing of a commission to take evidence abroad is in the discretion of the Court, and as appears from *Daniel's Pr.* (Perk. Ed.) p. 1099, "will not, if the application is opposed, be granted, unless the Court is fully satisfied that the justice of the case requires it."

A perusal of the recent authorities on the subject of taking expert evidence under commission, satisfies me that the referee exercised a wise discretion in refusing the order in this case. The appeal is dismissed with costs.

KEATING v. MOISES.

Issue of patent on false representations.—Acts in force in Manitoba.

Held, 1. Where a patent is issued in error, through the false and fraudulent representations of the patentee, he may be declared to be a trustee of the land for the party legally entitled thereto.

2. The laws in force in Manitoba have been as follows:

Up to 11th April, 1862, the law of England, at the date of the Hudson Bay Company's Charter.

On 11th April, 1862, the law of England at the date of Her Majesty's accession was introduced.

On 7th January, 1864, the law of England, as it stood at that date, was declared to be the law of Assiniboia.

The bill asked for the cancellation of a patent issued to the defendant, Mary Burns Moises, and that she might be declared a trustee of the land in question for the plaintiff, as she had procured the patent to be issued to her through false representations, which were also fraudulent.

J. S. Ewart and *G. A. F. Andrews* for plaintiff.

H. M. Howell for defendant Crotty.

W. H. Culver for defendant Wolf.

[*16th October, 1883.*]

TAYLOR, J.—The Imperial Act 8 & 9 Vic. c. 106, was referred to and relied on by the defendant, and it was contended that Kenny could not be regarded as a tenant having a lease from the Hudson Bay Company, as, by that statute, every lease must be by deed. That Act, however, was not in force here in 1851, the date at which, as appears by the entry, Kenny's connection with the land seems to have begun. Up to 11th April, 1862, the law in force here was the law of England at the date of the Hudson Bay Company's charter. Then, on the 11th April, 1862, the law of England at the date of Her Majesty's accession was introduced. This continued to the 7th January, 1864, when the law of England, as it stood at that date, was declared to be the law of Assiniboia.

By the Statute of Frauds, which undoubtedly was in force in 1851, leases not in writing and signed by the party executing the same have the effect of leases at will only. Here the memorandum or entry in the Hudson Bay Company's registry was not signed by any one, and it does not seem to contain particulars from which it could be treated as an agreement for a lease; for instance, no term is mentioned for which the grantee was to hold the land. Kenny then seems to have been in possession of the land, with the sanction and under the license and authority of the Hudson Bay Company. If a tenant of the Company, he was only a tenant at will, and the tenancy determined at his death on the 24th May, 1863. After his death the widow, M. B. Moises, and his children continued in possession, and were in actual possession in 1869; and in 1870 they so continued in possession with the sanction and under the terms and authority of the Hudson Bay Company, and were, in my opinion, the owners of the land, within the meaning of that clause of sub-section 3 of section 32 of 33 Vic. c. 3 of the Statutes of Canada, and so were the persons entitled to call upon the Crown for the grant of an estate in freehold.

It was argued that, if so, under the terms of 43 Vic. c. 7, s. 1, of the Statutes of Canada, their right to ask for a patent became barred on the 1st May, 1882; but here a patent was applied for within the time, and the right thereto recognized, although the Crown was deceived as to other persons being entitled to an interest in the land. The application for a patent was made by M. B. Moises in 1873, and, by her affidavit in support of her claim on the 30th July of that year, she swears, "that about the year 1863 my late husband, Edward Kenny, died intestate, leaving one child, Edward Kenny." It cannot be that, when she made that affidavit, she had any idea that the heir at law was the person entitled, for in that case she would have used the expression "one son." I think she used the expression "one child," suppressing the fact that there were really five children, with the deliberate intent of deceiving the Crown. Then, a further affidavit was made by her on the 2nd November, 1881, in which she states that she is the widow of Edward Kenny, and mother of Edward Kenny, the younger, that she resided on the land on the 15th July, 1870, had resided there for more than ten years before, and continued to reside there about seven years after. She then stated that her

son was born while she resided on the lot, giving the date, and that he was ten years old on 15th July, 1870; also, that he resided with her from his birth until he left the land. On the same day Edward Kenny, then a young man twenty-one years of age, made an affidavit in which he swore "that the facts stated in his mother's affidavit were, he believed, true in substance and in fact." On this occasion, as on the former one, no mention is made of the existence of the other members of the family, or of the possession of the land by them. I do not think there is much force in the argument that the Minister of Justice evidently considered the heir-at-law, and not the children generally, entitled, when he required legal evidence to be furnished by the claimant "that her son's right as heir-at-law had been vested in her." The claim made disclosed the existence of one child only, a son, and no more, and he would naturally be spoken of as heir-at-law of his father.

The son having released his interest to his mother, and the Crown having no notice or knowledge of any other possible claimants, the patent issued to her on the 23rd January, 1882.

The case made by the bill, as the foundation of the plaintiff's claim to relief, is not very well stated. She alleges a lease from the Hudson Bay Company to her grandfather for 999 years; then his death is stated; and the names of his widow and children are given; and then the death of her mother, his daughter Ann, is stated, and she claims to be heir-at-law and next of kin of her mother; then an actual occupation of the land by the various members of the family, including her mother, on the 15th July, 1870, is alleged; and, after stating the various assignments and conveyances which have been made, she submits that the patent should be declared void, and that the defendant M. B. Moises should be declared a trustee for her share of the land.

I do not think that the widow of Edward Kenny could, by her second marriage, confer upon her husband any right as the owner of the land, within the meaning of the 3rd sub-section of section 32 of the Manitoba Act. There is no evidence that he ever occupied with the sanction and under the license and authority of the Hudson Bay Company.

The father of the infant, the husband of Ann Keating, makes no claim to a share. By filing the bill as next friend of his infant child, and claiming that she alone is entitled to any share or interest which his dead wife had, he may well be taken to have waived any claim on his own behalf.

This is not a case in which the Crown, with the knowledge of all the facts, after exercising a deliberate judgment upon them, has granted the land to the defendant. It is a case in which the Crown, by a wilful and, in my opinion, fraudulent concealment of facts, has been induced to grant a patent, and I have power, under the statute, to declare the patent void, as issued through error. It is not, however, necessary to do so, as complete relief will be given to the plaintiff by declaring M. B. Moises to be a trustee for her of her share of the land The defendants, Crotty and Wolf, derived title to the land under persons who obtained conveyances from the defendant Moises before any patent to her had issued; they, therefore, took the land, and now hold it, subject to and affected by any equities which the plaintiff can set up against her.

The proper decree will be to declare M. B. Moises a trustee for the land in question, to the extent of a $\frac{2}{15}$ share thereof, for the plaintiff, and that all parties claiming title thereto under her are affected with notice of the trust, and hold the land subject thereto.

The bill has been taken *pro confesso* against all the defendants except Crotty and Wolf. I give the plaintiff her costs against the defendants Moises, Crotty and Wolf; no costs to or against the other defendants.

THE WESTERN ELECTRIC LIGHT COMPANY

v.

McKENZIE.

(In Chambers.)

Security for costs where no defence on the merits.

Held, That a defendant has no right to security for costs, unless he has a defence on the merits.

G. G. Mills for plaintiffs.

E. C. Goulding for defendant.

[*24th December, 1884.*]

Taylor, J.—This is an application made by the defendant for security for costs, which is opposed by the plaintiffs on the ground that the defendant has no defence to the action. In support of this an affidavit is filed, verifying two letters written by the defendant, which certainly admit the claim, and promise payment if a little time is given.

The defendant claims that he is entitled to an order for security notwithstanding these letters, and he relies on the case of *Taylor* v. *Rainy Lake Lumber Co.*, 1 M. L. R. 240. I regret that I cannot agree with my brother Dubuc in the conclusion he then came to, that a defendant is entitled to security for costs, even in cases where there is no defence on the merits.

None of the recent cases were cited to him except *La Banque des Travaux Publiques* v. *Wallis*, W. N. 1884, at p. 64, and that case is not consistent with *De St. Martin* v. *Davis*, W. N. 1884, at p. 86.

The current of recent authorities, both in England and Ontario, is clearly in favour of the position that the defendant has no right to compel the plaintiff to give security for costs, unless he has a defence on the merits. It was so held in *Winterfield* v. *Bradnum*, L. R. 3 Q. B. Div. 324, where the Court of Appeal affirmed an order of the Queen's Bench Division refusing security on the ground that the defendant had admitted his liability for

the debt sued for, and had set up a counter claim founded npon a distinct claim. This case was followed in Ontario in *Doer* v. *Rand*, 10 Ont. Pr. R. 165, in which a defendant who, on his examination, admitted the debt, was held not entitled to security. More recently in *Anglo-American* v. *Rowlin*, 20 C. L. J. N. S. 371, Boyd, C., affirmed an order of a local master setting aside an order for security which had been obtained on præcipe. In that case the defendant had written a letter referring to the note sued on, and asking a month's time, when it would be paid. The learned Chancellor held that the failure to answer the affidavit of the plaintiff, and to explain the admissions in the letter, warranted the conclusion that he had no defence. In both of these Ontario cases, *The Bank of Nova Scotia* v. *La Roche*, 9 Ont. Pr. R. 503, was cited, but the judges refused to follow that case.

In England, *Winterfield* v. *Bradnum* has been followed in *Mapleson* v. *Masini*, L. R. 5 Q. B. Div. 144, and in *De St. Martin* v. *Davis*, W. N. 1884, at p. 86.

I accordingly discharge the summons, but, in consequence of the decision in *Taylor* v. *Rainy Lake Lumber Co.*, *ante*, it must be without costs.

THE NORTH-WESTERN NATIONAL BANK v. JARVIS.

(IN CHAMBERS.)

Bills of Exchange Act.—Rescinding order for leave to appear.—Note payable in "legal tender money."—Place of payment.

Held, That upon new material it is competent for one judge to set aside the order of another.

2. That the words "payable in legal tender money," in a note, convey no meaning beyond or otherwise than would have been given to the note if these words had been omitted.

3. Where a note is payable at a particular place, but does not contain the words "and not otherwise or elsewhere," the *lex loci contractus*, and not the *lex loci solutionis* prevails.

This was an action on a promissory note. Defendants having obtained leave from a judge to defend, entered an appearance. Plaintiffs thereupon took out a summons to rescind the order giving leave to defend and for leave to enter judgment.

A. C. Killam for plaintiffs.

W. E. Perdue for defendants.

[*29th December, 1883.*]

WALLBRIDGE, C. J.—A writ of summons was issued, under the Bills of Exchange Act, on the 14th November, 1883, upon a promissory note, dated at Winnipeg, in this Province, which on its face purports to be payable, at the First National Bank, Minneapolis, in legal tender money. The note fell due on the 28th October, 1883. The suit was thus commenced within six months from the day on which it became due. This writ of summons was issued under and in accordance with the Bills of Exchange Act, 18 & 19 Vic. c. 67.

The defendants obtained a judge's order to entitle them to appear, on the 1st December, 1883, upon an affidavit that the note sued on had been given by the defendants to one T. B. Walker, as part of the consideration for the delivery by him, to the Winnipeg Lumber Company, of 12,000,000 feet of saw logs, or thereabouts, one-half during the season of 1883,

and the balance in the spring of 1884; that Walker did not fulfil the contract, nor deliver the logs, nor any part of them, as he engaged to do by his said contract; that they were informed that the plaintiffs obtained the note from said Walker after it became due, and that they held it subject to all the equities and defences between the makers of the note and Walker; and that defendants had a good defence on the merits as above disclosed.

Upon this affidavit a judge's order was obtained, permitting the defendants to appear, and an appearance was entered on the 1st December, 1883.

By Con. Stat. Man. c. 31, s. 30, any person making an affidavit used in any action, suit, or proceeding shall be liable, and, upon a judge's order, shall be compelled to submit to a *viva voce* examination on such affidavit, which examination shall be reduced to writing.

A judge's order was obtained, ordering deponent to appear and submit to be examined, before one of the examiners of the court, at the place and time to be appointed therefor.

In pursuance of this order the defendant making the affidavit appeared and was examined, and, in his examination, says the note sued upon was given upon the consideration referred to (exhibit B.) Exhibit B., on being examined, is a letter written by the Winnipeg Lumber Company to the T. B. Walker to whom the note sued on was delivered, and by whom the same was negotiated to the plaintiffs. This letter was written before the note was given and before the contract was made between Walker of the first part, the Winnipeg Lumber Company of the second part, and five of the defendants in this suit of the third part. This contract bears date the 25th June, 1883, and in it the parties of the second and third parts covenant with T. B. Walker that they will pay the note at maturity. The parties of the second and third parts embrace all the defendants except the defendants Dick & Banning; with respect to the delivery of the logs, which forms the consideration in part for the note; by the agreement they are to remain at Clear Water Lake and River Clear Water, in the United States, until the spring of 1884, unless otherwise agreed upon by the parties. By these agreements the notes fall due before T. B. Walker is obliged

to deliver the logs for which the note is given. It is clear, therefore, that the payment of the note was not dependant upon the prior delivery of the logs. This, however, only formed part of the consideration for the note. This note, with others, appears to have been given upon a compromise of a debt due to Walker by the Lumber Company, by which Walker reduces his claim against them by about $14,000, and reduces the price from $18 to $16, at which he had agreed to deliver the logs to the Lumber Company, taking the notes, of which one of $25,000 is sued, being two separate notes of $25,000 each, and taking the Lumber Company's notes for $140,000. The consideration for the note sued on appears, therefore, to be made up of various items. The full consideration not being the delivery of the logs agreed for. But it never could have been intended that payment of the notes depended upon the delivery of the logs, as the notes became due long before the logs were to be delivered, besides the agreement contains an express covenant for the payment of the notes; this covenant is entered into by all the defendants, except Dick & Banning.

It appears to me the defence set up by the affidavit on which leave to appear was obtained, is fully met and explained by new material, namely by Mr. Walker's affidavit and by the agreements dated the 25th June, 1883, namely the agreements executed on the day the notes were given. This suit was commenced by writ of summons under the Act giving summary procedure on bills of exchange (1855), and was commenced within six months after the maturity of the note: by this Act, unless the defendants can get leave from a judge to appear and defend the action, the plaintiffs may sign final judgment at once.

The defendants did get this leave, but the plaintiffs have examined the deponent and have produced the affidavit of T. B. Walker, and the agreements made at the time of giving the notes, and have asked to have the order of the judge so made, rescinded.

The power of the judge to make such order is limited to the giving leave to appear and defend, either by the defendants paying into court the sum indorsed on the writ, or upon affidavits, satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder

to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise, as to the judge may seem fit.

Upon this summons to rescind the judge's order giving leave to appear and defend, coming on for argument, the defendants contended, first, that one judge ought not to rescind the order of another judge, but that an application to the full court is the only and proper course to be pursued.

Upon this point I do not consider the practice of the court is open to argument, having been settled both in England and in Canada, by authority. And first in Canada the present Chief Justice of the Queen's Bench in Ontario lays it down, not as new, but as well settled practice, as follows: "The full court seems to be the proper tribunal to rescind a judge's order, except when it is sought to rescind it on matters arising afterwards, and not in review of the judge's discretion or right to make the order." *Ross* v. *Grange*, 27 U. C. Q. B. 308.

This matter does not come up by way of an appeal, but is an independent application founded upon new material. The case of *Agra & Masterman's Bank* v. *Leighton*, L. R. 2 Ex. 56, arose under this very Bills of Exchange Act, and it was then held that, upon new material, it was competent for one judge to set aside the order made by another, and the case of *Girvin* v. *Grepe*, L. R. 13 Ch. Div. 174, is in *pari materia*, and is also applicable.

It was further objected that the insertion of the words, "payable in legal tender money," distinguished this case, and that it was not a promissory note within the statute of 3 and 4 Anne, c. 9, made perpetual by 7 Anne, c. 25. I can find no case exactly like this, but in principle the words objected to convey no meaning beyond or otherwise than would have been given to the note if these words had been omitted, for these words express only the legal import of the note, if they had been omitted.

There is, however, this peculiarity in this note, it is made in Winnipeg, Canada, payable at the First National Bank, Minneapolis; the words, "and not otherwise or elsewhere," are not in the body of the note; the effect of this is, that the note is payable generally, and not at a particular place, and consequently the *lex loci contractus*, and not the *lex loci solutionis*,

prevails, and thus this note is payable in Canadian currency. This was so held in Ontario when the United States Treasury notes were not equal to gold, and the maker of the note was obliged by this construction to pay a much larger sum than would have pai his note if he had paid it in the United States, where, by the plain and evident meaning of it, it was made payable. The Statute 1 & 2 Geo. 4, c. 78, makes these words compulsory in order to fix the place where payable, and to prevent its being held a note payable generally. I refer to *Hooker* v. *Lesslie*, 27 U. C. Q. B. 295, and *Meyer* v. *Hutchinson*, 16 U. C. Q. B. 476.

Generally, unless there be fraud or perjury in obtaining the order, or it be clear that there is no defence, it will not be rescinded. *Pollock* v. *Turnock*, 1 H. & N. 741. *Febart* v. *Stevens*, 30 L. J. Ex. 1.

By the English practice the application to rescind should be made to the judge who granted the order. *Mathews* v. *Marsland*, 27 L. J. Ex. 148.

We have, however, in this court, in Manitoba, adopted the practice in *Agra & Masterman's Bank* v. *Leighton*, L. R. 2 Ex. 56, and act upon it daily; from our peculiar position and the amount of business before us we adopted that rule advisedly, (consenting to one judge rescinding the order of another,) indeed, if we had not done so it would have caused great inconvenience to suitors, and would have enabled defendants, having merely a *prima facie* defence, to free themselves from the very stringent provisions contained in the Bills of Exchange Act.

In my opinion it clearly appears that the defendants have no defence to the action, and I direct that the order permitting the defendants to appear should be rescinded, and the plaintiffs allowed to enter judgment.

REGINA v. HOUSE.

(IN CHAMBERS.)

Habeas corpus.—Defective commitment.—Substitution of corrected commitment.

Prisoner had been committed under a warrant, which was defective. Subsequent to the service on the jailor of a writ of *habeas corpus* he received another warrant of commitment which was regular.

Held, That the second warrant of commitment was valid, and sufficient to detain the prisoner in custody.

L. W. P. Coutlee for the Crown.

J. S. Hough for the prisoner.

[*15th January, 1885.*]

DUBUC, J.—The prisoner was arrested for stealing an ox, at St. Andrews, County of Lisgar, and, after a preliminary examination, was committed for trial, by James Stewart, Justice of the Peace of St. Andrews, under a warrant of commitment dated the 12th January instant, (1885,) which disclosed no offence.

At the same time, the depositions taken by the magistrate were sent to the office of the Deputy Attorney-General.

On the 14th instant, a writ of *habeas corpus* was issued, commanding the jailor to bring the body of the prisoner, on the 15th instant, before the judge sitting in chambers at Winnipeg. The said writ was served on the jailor on the same day.

An hour or two after service of the writ on him, the jailor received another commitment, in due form, signed by the same Justice of the Peace, James Stewart, committing the prisoner to the common jail, for the said offence of stealing an ox. The said commitment was indorsed: "Corrected warrant of commitment."

This morning the jailor made his return to the writ of *habeas corpus* before me in Chambers, in these words indorsed on said writ: "To His Lordship the Chief Justice and the Judges of Her Majesty's Court of Queen's Bench for Manitoba. My return to the within writ appears by the warrants hereunto annexed and marked respectively schedule A and schedule B."

The counsel for the prisoner moved for the discharge of his client, on the ground that the commitment under which the prisoner has been brought and is detained in custody does not disclose any offence. He contended that, although the second warrant was issued by the magistrate before the writ of *habeas corpus*, as the jailor had no notice of it when he was served with said writ, he could not detain the prisoner under said second warrant; when he received the writ of *habeas corpus*, he had no legal commitment to detain him, and, therefore, the prisoner was entitled to his discharge.

The counsel for the Crown argued that the prisoner, being now detained under a valid commitment, should not be discharged.

It appears to be settled that a second warrant of commitment delivered by the magistrate to correct or amend a first one which is defective, or to be substituted therefor, is valid and sufficient to detain a prisoner in custody. *Ex parte Cross*, 2 H. & N. 354. *Re Fell*, 15 L. J. M. C. 25.

The question here is, whether a second commitment is valid when delivered to the jailor after service on him of a writ of *habeas corpus*.

In *Rex* v. *Marks*, 3 East 157, it was held that, on the return of a writ of *habeas corpus*, the Court may go beyond the warrant of commitment and look at the depositions, to see whether there is a *corpus delicti* justifying the detention.

The same was held by Robinson, C. J., in *re Anderson*, 20 U.C.Q.B. 162, where he says: "Upon the return to a *habeas corpus*, it is the foundation of the warrant to which the Court looks when that is before them upon a *certiorari*, rather than the warrant itself. When a legal cause for the imprisonment appears upon the evidence, the ends of justice are not allowed to be defeated by a want of proper form, but the Court will rather see that the error is corrected."

In *Ex parte Page*, 1 B. & Ald. 568, it was held that, after the issuing of the writ of *habeas corpus*, and before the return to it, a fresh warrant of commitment may be made, stating more fully the cause of detention; and that, if both warrants are defective in form, the Court will, if a cause of commitment appears, recommit the prisoner.

The same thing was held in *Rex* v. *James Gordon*, 1 B. & Ald. 572. (n.)

It is true that in *Re Elmy*, 1 Ad. & E. 843, the second commitment was not allowed, but the circumstances were very peculiar. The jailor stated in his return that the first warrant had been taken away from his possession and replaced by a new one; how and by whom the change was made he did not know. As it did not appear on the face of the second warrant that it had been placed there in substitution of the first one, the Court would not assume that it was so substituted.

That case was referred to and discussed in *Reg.* v. *Richards*, 5 Q. B. 926, where a second warrant had been sent to the jailor, and Denman, C. J., said: "It is impossible not to see that the jailor has returned a good warrant upon which the parties may be lawfully detained." The same doctrine was followed in *Ex parte Cross*, 2 H. & N. 354. In *Re Smith*, 3 H. & N. 227, the jailor stated in his return that, after having received a warrant of commitment, the magistrate had caused to be delivered to him a certain other warrant of commitment; it was held that the defect in the first warrant was cured by the second, it appearing by the return that the second warrant was substituted by the same magistrate as an amendment to the first.

In *Chaney* v. *Payne*, 1 Q. B. 712, it was held that the first conviction must be drawn, before the former one has been quashed for informality. But it appears that at any time before it is quashed it can be received. The same was adopted in *Charter* v. *Greame*, 13 Q. B. 216.

In the present case, the jailor returned both warrants to the writ of *habeas corpus*, showing thereby that they are both in connection with the detention of the prisoner. The second warrant is marked as a corrected warrant, and bears the same date as the first one. In the different cases on the point, it appears to be of no matter whether the writ of *habeas corpus* is issued or served before the delivery of the second warrant. The return of it alone appears to be considered, and, as held in *Chaney* v. *Payne* and *Charter* v. *Greame*, it seems that the second warrant might be allowed at any time before the conviction has been quashed for informality and the prisoner discharged.

Under the authority of the above cases, I think the prisoner is lawfully detained under the second warrant, and should not be discharged.

By the writ of *habeas corpus*, the jailor is commanded to bring the body of Joseph House, with the cause of his being taken and detained on the 15th day of January, 1885. He has obeyed the writ in returning both warrants, and, as the second warrant shows a good cause of detention, the prisoner should not be discharged.

ALLEN v. DICKIE.

(IN CHAMBERS.)

Pleading—Pleading a number of pleas together— General Rule No. 5.

Held, Under general rule 5 of the Court of Queen's Bench for Manitoba any number of pleas may be pleaded together without a judge's order.

The plaintiff declared on the common counts, and the defendant —besides the pleas of never indebted and payment—pleaded specially that the work sued for by the plaintiff was done under a special contract between the parties, and averred that the work had not been done according to the terms of the contract.

G. Davis, for the plaintiff, obtained a summons to strike out the special plea, on the ground that it was equivalent to the general issue, and on the further ground that no order had been obtained from a judge allowing the plea to be pleaded with the general issue. He cited *Bullen & Leake*, 3rd Ed., pp. 442 and 463.

W. E. Perdue showed cause and contended that the special plea could be pleaded with the others under general rule 5 of the Court of Queen's Bench for Manitoba, without the leave of a judge.

[*December, 1884.*]

WALLBRIDGE, C. J.—*Held*, That under the above rule any number of pleas may be pleaded together, without an order from a judge, and he allowed the plea to stand and discharged the summons.

McMILLAN v. BARTLETT.

(In Chambers.)

Interpleader—Examination of parties.

Held,—That an order cannot be made for the examination of a defendant in an interpleader issue.

The plaintiff in an interpleader issue, who claimed the goods in question under a chattel mortgage, having obtained, *ex parte*, an order for the examination of the defendant in the issue, a judgment creditor, under whose execution the goods had been seized, the defendant obtained a summons to rescind the order.

J. W. H. Wilson for execution creditor.

A. Haggart for mortgagee.

[*16th December, 1884.*]

Taylor, J.—As the defendant has not filed any bill, petition, or declaration, or answer, or pleaded any plea, or made any affidavit used or to be used on this proceeding, the plaintiff is not entitled to an order under Con. Stat. c. 31, s. 30, for her examination. Section 48 of Con. Stat. c. 37, does not warrant the making of such an order, for that section relates to the final disposition of the merits of claimants, and the rules and orders referred to there are evidently rules and orders as to costs and all other matters incident to such final determination and disposition of the merits. The case of *The Canada Permanent Savings Society* v. *Forest*, 6 Ont. Pr. R. 254, was relied upon in support of the order. But that was a case decided under section 24 of the Ontario Administration of Justice Act 1873 (Ont. Stat., 36 Vic., c. 8), which provides that "any party to an action at law, whether plaintiff or defendant, may * * * * obtain an order for the oral examination * * * * of any party adverse in point of interest." What was decided in that case was, that the words "action at law" there include an interpleader proceeding. Our statute is by no means so wide in its terms, and the order complained of must be discharged and set aside with costs. See *In re Turner* v. *Imperial Bank of Canada*, 9 Ont. Pr. R. 19.

PATTERSON v. KENNEDY.

(IN CHAMBERS.)

Interpleader summons—Costs of sheriff where claimant abandons.

Held,—That where a plaintiff examines a claimant upon his affidavit, and the claimant subsequently abandons his claim and is barred, and ordered to pay the costs of the sheriff and the plaintiff, the proper order is, that the sheriff's costs be taxed to him and an *allocatur* served on the plaintiff, that the plaintiff add them to his costs, and upon receipt of the amount pay it to the sheriff.

The facts appear from the judgment.

J. S. Hough for the sheriff.

G. Patterson for plaintiffs.

[*13th October, 1884.*]

WALLBRIDGE, C. J.—The plaintiffs placed an execution against goods in the hands of the sheriff of the Eastern Judicial District, and pointed out and instructed him to seize on certain personal property as that belonging to the defendant. This property was claimed by one Cottingham. The sheriff with reasonable dispatch applied to a judge in chambers at Winnipeg for, and obtained, an interpleader summons calling on the plaintiffs and the claimant to appear and maintain or relinquish their claims to this property. Upon the return of the summons the plaintiffs examined the claimant upon his affidavit of claim to the goods. After such examination the claimant abandoned, and he was barred and the sheriff was ordered to sell; the claimant was also ordered to pay the costs both of the sheriff and the plaintiffs. Before this order was drawn up Mr. Hough for the sheriff applied to have the terms of the order varied by directing that the plaintiffs should be ordered to pay the sheriff's costs to him forthwith and ordered to add such costs to the plaintiff's costs and levy the whole from the claimant. By this means the plaintiffs would be obliged to pay the sheriff's costs, in any event, and might not be able to get them again from the claimant. Mr. Patterson appeared for the plaintiffs and contended the plaintiffs should not be compelled to pay the sheriff's costs, or at all events not so compelled until they should actually receive the same from the claimant. Mr. Hough contending that as the plaintiffs had done more than merely examine the claimant's affidavit, as in *Wilkins* v. *Peatman*, 7 Ont. Pr. R. 84, and

had directed the particular levy made, taken out an order to examine the claimant on his affidavit, had the summons enlarged to admit of such examination, (though the claimant when served and paid his conduct money, failed to attend, and allowed his claim to be barred,) the plaintiff had brought himself within the rule laid down in *Canadian Bank of Commerce* v. *Tasker*, 8 Ont. Pr. R. 351, and should now be compelled to pay the sheriff's costs, and take his chances of being able to get them from the claimant. The case is not exactly like either of the cases cited. Here, it is true, the plaintiffs directed what property should be seized, but events have shewn these directions to be correct, and the claimant has been barred. The plaintiff's contention in all cases has been sustained.

Con. Stat. Man. c. 37, s. 53, directs that in case the claimant abandon his claim the judge may order him to pay the sheriff his costs. This is direct authority for ordering the sheriff's costs to be paid by the claimant, but it is not said to whom he shall pay them. And it is said in the concluding words of that section, that "the judge may make such other rules and orders as may appear just according to the circumstances of the case." It is not every step taken by a plaintiff beyond looking at the claimant's affidavit which subjects him to costs, for by reference to section 58 of that Act, even when the plaintiff takes an issue with the claimant—which is a much greater step than examining the claimant upon his affidavit—in such case, this section declares that the plaintiff shall be liable to pay the sheriff's costs, only upon receipt of the same; though these costs are in the discretion of the judge by section 53. I think I shall be exercising the discretion which the statute contemplates by directing that the sheriff's costs be taxed to him and an *allocatur* served on the plaintiffs, that the plaintiff add them to his costs, and levy the same upon the claimant, and upon receipt of those costs he shall pay the same to the sheriff. This form of order is suggested in *Smith* v. *Darlow*, L. R. 26 Ch. Div. 605, and, I think, meets the statutory requirements and the proper demands of this case; and, in case the plaintiffs refuse or neglect to take the proceedings to collect these costs then the judge has power in his discretion under section 53 to order the plaintiff to pay the same directly to the sheriff. The sheriff will take the possession-money from the amount levied under the *fi. fa.*, and if he shall have paid it over to the plaintiff the plaintiff must refund to that extent.

FISH v. HIGGINS.

Chattel mortgage.—Consideration.—Debt represented by notes not held by mortgagee.

A. executed a chattel mortgage to F., the consideration being stated as $912.20. It appeared that of this amount $612.20 was made up of notes given by A. to F., but then under discount in the Merchants Bank, and not due, and the sum of $300 advanced in cash. The notes were subsequently taken up by F., and he produced them at the trial. The usual mortgagee's affidavit was indorsed upon the mortgage, stating that the mortgagor was justly and truly indebted to the mortgagee in the amount mentioned in the mortgage.

Held, by the full Court (Taylor, J. dissenting), affirming the decision of Wallbridge, C. J., that the mortgage was valid.

J. J. Robertson for plaintiff.

W. H. Culver for defendants.

The sheriff of the Eastern Judicial District having seized, under the executions against goods, the goods and chattels claimed by Higgins, Neild, and Anderson & Gordon as execution creditors, and claimed by H. D. Evans as assignee of the execution debtor John Angus, an interpleader order dated the 2nd of May, 1883, was made, to try the rights of the respective parties, in which interpleader the assignee, Evans, asked to be made a party.

The order in which the executions came to the sheriff's hands was as follows:—

Anderson & Gordon	21st March, 1883.
Higgins	24th March, 1883.
Neild	12th April, 1883.
Assignment, Angus to Evans, for the benefit of all creditors . .	27th February, 1883.

Evans went into possession forthwith.

Fish claimed under a chattel mortgage on certain lines of the execution debtor's stock of goods, by mortgage dated the 19th of February, 1883, which was filed with the clerk of the county

court in the proper office, on the 23rd of the same month, and was made for the sum of $912.20, payable on the 19th of May, 1883, without interest.

Angus carried on business under the style of Angus & Co., but it was his sole business, and he had no partners.

Houston claimed under a chattel mortgage from the execution debtor, John Angus, dated 19th of February, 1883, filed with the proper clerk of the county court on the 23rd of the same month, for the sum of $1,055.85, proviso for payment on 19th of May, 1883, without interest. By the evidence it appeared that the chattel mortgage to Fish was made up as follows,—of $300 cash, obtained by Angus on Fish's acceptance; $100 cash lent, and the balance of a former note to Fish of $150, and interest $2.75, equal to $252.75; an account for goods sold of $147.45; a note due 23rd of March, 1883, of $210, with some addition making $212; this was Angus' account of the manner in which the chattel mortgage was made up. Fish gave substantially the same account of the sums making the amount of the chattel mortgage. The mortgage was for $912.20, and of this amount there was, at the time the chattel mortgage was given, $611.45, under discount in the Merchants Bank here, and not due. Those notes were subsequently taken up by Fish, and he produced them on the trial.

The chattel mortgage to Houston was for $1,055.85, the mortgagees were merchants, residing in Montreal, and the mortgage was given to secure them for the amount of Angus' notes, which were not due when the mortgage was given; these notes were produced by the mortgagees, and it was not charged they had been discounted or negotiated away; that sum appeared to be due for goods and merchandise supplied to Angus by the mortgagees.

[*4th February, 1884.*]

WALLBRIDGE, C. J.—I have already expressed my opinion of the validity both of the mortgage to Fish and to the claimant, Houston, in the judgment delivered upon the hearing (*a*). It was objected to my finding, that because the promissory notes were under discount in a bank when this chattel mortgage was given,

(*a*) His Lordship then held that the mortgages were *bona fide*.

that therefore this chattel mortgage is void; the fact being claimed that for part of the amount only was the mortgage given, $300 being for cash then advanced by the mortgagee, the whole amount of the mortgage being $912.20.

It is also further objected, that this is a case coming within the 4th section of the Act respecting the mortgaging and selling of personal property, Con. Stat. Man., c. 49. The *bona fides* of the chattel mortgage was found in the claimant's favor, and the mortgage is attacked upon these grounds as a matter of law. With respect to the first ground, it is argued that the debt, at that time, was due to the bank with which the notes had been discounted, for at least part of the debt; I can find no authority which goes that length. The debt represented by the notes so discounted was a debt due to Fish, for goods sold to Angus in the ordinary course of business, and the notes were but the evidence of the debt; the debt existed by reason of the sale of the goods, not by reason of giving the notes. Fish had indorsed the notes, got them discounted, and took them up and produced them as his property at the trial. *The Meriden Silver Co.* v. *Lee*, 2 Ont. R. 451, *Smith* v. *Harrington*, 29 Gr. 502, *Troop* v. *Hart*, 7 Sup. C. R. 512, in my judgment fully sustain this view.

I do not think the case is one at all affected by the 4th section of the Chattel Mortgage Act, upon the ground that it is not a mortgage to secure the mortgagee against the indorsement of the notes; the mortgage is to secure the debt represented by the notes, the consideration for which was real and valid, and is not a transaction of the kind mentioned in the statute, namely, securing the mortgagee against the indorsement of promissory notes; that section of the statute refers in my opinion to cases in which the mortgagee is secured against a liability created by reason of an indorsation, and not when there is a debt due by the mortgagor to the mortgagee; moreover, if Fish had not paid the notes, and the bank continued to be the holder, I think it is clear the bank could have compelled Fish to transfer the mortgage to them. Respecting the mortgage to Houston, the debt was real, he was the holder of the notes for which the mortgage was given, and the notes represented goods sold by him to Angus. In my judgment the rule *nisi* should be discharged with costs.

DUBUC, J.—The evidence shows that when the claimants took the chattel mortgages from Angus, they did not know that he was insolvent, and that Angus himself, though pressed for money, was not aware of his insolvency. And in fact, in taking stock, his assets were put down at $11,106.08, while his liabilities amounted to $11,366.56. The only difference is $260.48. So we may believe Angus when he says that when he got the $300 from Fish and gave the chattel mortgages, he thought he was solvent, and in a little time could pay all his liabilities. He adds, that he had not been sued nor threatened to be sued. Under these circumstances I think that the learned Chief Justice properly found that the two chattel mortgages in question were given for good consideration and *bona fide*.

TAYLOR, J.—The question to be decided is the validity of two chattel mortgages dated 19th February, 1883, and made by John Angus, the one to S. B. Fish for $912.20, the other to Charles Houston & Co. for $1,055.85.

Angus was a merchant, carrying on business at the town of Emerson, and had purchased goods from Fish, who carried on business in the City of Winnipeg, and also from Charles Houston & Co., merchants in Montreal, through Fish, who was their agent in this province. A few days before giving these mortgages, and on the 5th February, he gave two chattel mortgages upon portions of his stock in trade, one to W. H. Nash, and the other to Charles Constantine, to secure them against accommodation indorsements by them for him. On the 27th February, eight days after the giving of the mortgages in question, Angus executed an assignment for the benefit of his creditors to H. G. Evans, the manager of the Ontario Bank at Emerson.

Executions against Angus were placed in the sheriff's hands, one at the suit of Anderson & Gordon on the 21st March, one at the suit of Higgins on 24th March, and a third at the suit of Neild on the 12th April.

A warrant from the sheriff to seize was sent to one William Williams, his bailiff at Emerson, apparently on 23rd March. That bailiff was then absent from Emerson, and the warrant came to the hands of his brother, James A. Williams, who acted as bailiff for the four chattel mortgagees, and there is a dispute as

to whether, when he seized, he was acting under the sheriff's warrant, or as bailiff for the mortgagees.

Taking up the mortgage to S. B. Fish, I have come to the conclusion that its validity cannot be upheld. I have arrived at this conclusion only after a careful consideration of the able arguments of counsel and of the evidence; the more careful, that the conclusion at which I have been compelled to arrive is not in accordance with that arrived at by the other members of the court.

The amount secured by the mortgage was $912.20, made up as follows,—three notes of $252.75, $149.45, $210, and a sum of $300, a draft drawn by Angus upon Fish, and accepted and paid by the latter. It appears that on the 23rd January this draft was drawn and sent from Emerson to Winnipeg, but Fish declined to accept. Shortly after, Angus came to Winnipeg, and then persuaded Fish to accept the draft, which he did on the 7th February, and then he, on the 12th February, paid it by a cheque on the Merchants Bank. Before he would accept this draft, Fish insisted that Angus must give security for his indebtedness, which he agreed to do, and in pursuance of this request the mortgage in question was given.

The ground upon which I hold the mortgage invalid is, that it was given for the sum of $912.20, stated in the mortgage as the consideration for which it is given, and sworn in the affidavit of the mortgagee to be the amount in which the mortgagor "is justly and truly indebted to me this deponent." In fact, the mortgagor was not, at the date of the mortgage, indebted to the mortgagee in any such sum. The total amount of the direct and actual indebtedness at that date was the sum of $300, the amount of the acceptance paid on the 12th February.

The three notes which make up the remainder of the $912.20, were at that time the property of the Merchants Bank, having been discounted there by Fish. It is true that Fish was liable upon these notes to the bank as an indorser, and he might have taken security by way of chattel mortgage against that liability under section 4 of the Chattel Mortgage Act. But in that case the mortgage and the affidavit should have shewn the true consideration for which the mortgage was taken.

That the mortgage here does not show the true consideration is, in my opinion, sufficient to render it invalid.

The case of *Walker* v. *Niles*, 18 Gr. 210, was relied on by the mortgagees, but that case was not like the present. There, it is true, part of the consideration for which the mortgage was given was a promissory note made by the mortgagee, and which he had not at the time paid; but there the mortgagor took the note as cash, and it was a note made by the mortgagee, and upon which he was directly and primarily liable.

In several cases in Ontario the fact that, as here, the notes were under discount, was referred to on the argument, but not treated by the Court as of any moment. I cannot regard it in that light. Indeed, even had the courts in Ontario expressly decided, that under such circumstances the mortgage would be good, it would not alter the opinion at which I have arrived.

In *Smith* v. *Harrington*, 29 Gr. 502, where it was sought to impeach a mortgage on the ground that it had been made in contemplation of insolvency, and with a view of fraudulently preferring the defendant, the present learned Chief Justice of Ontario held, that while the defendant might, under the circumstances proved, hold the mortgage for advances made by the mortgagee contemporaneously with the execution of the incumbrance, and also for future advances, intended to be secured thereby, he could not hold it for notes indorsed by the mortgagee for the mortgagor outstanding in the hands of third parties and not paid.

The case of *Troop* v. *Hart*, 7 Sup. C. R. 512, was one in which the question of whether a vendor who had sold goods and taken a note therefor, could claim a lien on the goods in the event of the purchaser's insolvency before payment was discussed. In that case Chief Justice Ritchie, in discussing the question and speaking of the effect of taking a bill or note, said, "If the creditor negotiates the bill or note for value, and without rendering himself liable it will operate as payment though dishonored. * * * * But if the creditor negotiates the bill or note, so as to render himself personally liable upon it, in that case it will not operate as a payment if dishonored."

And Strong, J., speaking of the lien, said, "the vendor is entitled to insist upon this lien, as well in the case where a bill or note has been taken for the purchase money, as where the price is unsecured, and the circumstance that a bill so taken is

outstanding in the hands of a *bona fide* holder for value makes no difference in the vendor's rights if he is himself liable as an indorser on the bill."

But the whole question there was, whether the vendor had a lien or not, whether in fact he was entitled to hold the goods as a security.

No one questions here, that Fish had a right to take security, in respect of the indebtedness of Angus. The question is, as to the form in which it was taken. At the time the mortgage in question was taken, who was entitled to call upon Angus for payment? Not Fish, but the Merchants Bank which held the notes. Fish could be called on only if Angus failed to pay, and against this liability he had a right to take a mortgage under the 4th section of the Act.

To hold that a person liable as a surety can take a chattel mortgage for the amount for which he is liable, stating it as an amount actually due, or accruing due, to him, and not according to the truth of the matter, is directly contrary to the whole current of authorities, which require the most minute and particular accuracy in chattel mortgages. It is true that sometimes the requiring such accuracy in minute particulars has operated hardly, but when it is borne in mind that so many frauds are attempted in connection with chattel mortgages, it is, in my judgment, unwise to relax the stringent rules which the courts have applied to them.

At the time the mortgage to Charles Houston & Co. was taken, the amount of Angus' indebtedness to them was represented by five promissory notes. One of these, for $260.40, fell due the next day, but in taking the mortgage a note for that amount—either the note due the next day or one for the same amount falling due on the 10th May following—was omitted, Fish says by mistake. The mortgage was taken for $1,055.85. At the time the mortgage was given, Fish says that Angus produced a statement showing a surplus of assets over liabilities amounting to $500. That he had no such surplus, but was in fact insolvent, there can be no doubt; for when he made his assignment a few days after, he was so, and he says he incurred no new liabilities after the giving of the mortgages. We hear nothing of any losses he sustained during the short interval.

In face of the finding of the learned Chief Justice, that the transaction was *bona fide*, I am not prepared to say that it was not, though in my opinion the circumstances attending the taking it, are exceedingly suspicious. The giving of it cannot be accounted for by pressure brought to bear upon the mortgagor, for his indebtedness was secured by notes, none of which were due. Then it was taken, payable at a date before one at least of the notes would mature.

As to the taking possession of the goods by the mortgagee, Fish, in the view I take of his mortgage, had no right to take possession, for it was invalid. As to Houston, the goods were bound by the delivery of the writ of *fi. fa.* to the sheriff, and no one could acquire a title to them as against that writ, except a person purchasing *bona fide* and for valuable consideration before the actual seizure by the sheriff. A mortgagee cannot set up the defence that he is a purchaser for value, without notice. I think, however, that upon the whole question it might fairly be held, that the seizure by the sheriff was as early as the taking possession by these mortgagees.

LEWIS v. WOOD.

Ex parte injunction on appeal after refusal by single judge.

A motion for injunction to restrain a sheriff's sale was refused by a single judge after argument. Upon motion *ex parte* to the full court, the plaintiff's counsel stating his intention to appeal, an injunction was granted, until the re-hearing of the order or the hearing of the cause, whichever should first come on.

In this case the plaintiffs, who had obtained a judgment at law against M. B. Wood, filed their bill to restrain the sale by the Sheriff of the Eastern Judicial District of his stock in trade, under an execution issued upon a judgment obtained against him by Jane Wood, alleging the latter to be a judgment obtained fraudulently, and for the purpose of giving the plaintiff, Jane Wood, a preference over other creditors. A motion for an injunction made before Mr. Justice Dubuc was refused. The sale being advertised to take place at two o'clock on the same day, the full court sitting in Term was moved for an *ex parte* injunction to stay the sale, counsel stating that it was the intention of the plaintiffs to appeal against the order refusing the injunction made by Mr. Justice Dubuc.

J. S. Ewart, Q.C., and *J. B. McArthur, Q.C.*, for the plaintiffs, cited *Galloway* v. *Mayor of London*, 3 De G. J. & S. 59; *Lazenby* v. *White*, L. R. 6 Ch. App. 89; *Walford* v. *Walford*, L. R. 3 Ch. App. 812; *Wilson* v. *Church*, L. R. 11 Ch. Div. 576; *Joyce on Injunctions*, 1319–21.

TAYLOR, J.—The case of *Wilson* v. *Church*, L.R. 11 Ch. Div. 576, cited by Mr. Ewart, seems an authority for granting such an injunction as is asked. But in the present case we do not think we should grant one which would have the effect of staying the sale entirely. The judgment of Jane Wood is for a large amount, said to be greatly in excess of the value of the debtor's stock in trade. The judgment of the plaintiffs, Lewis & Co., is only for $1,500, and beyond being secured in the recovery of that, should they succeed in their present contention, they have no interest in saying how the stock should be disposed of.

As my brother Dubuc, who has been referred to, says there were matters involved in this case and argued before him which might properly be discussed on an appeal, we propose issuing an order, that upon the plaintiffs undertaking to set down the order made herein, dated the 20th of December, 1884, for re-hearing upon the first day upon which the same can be re-heard, and to serve notice thereof, the Sheriff of the Eastern Judicial District do either retain goods in question in this cause to the value of $1,500, or do, out of the proceeds of the sale of the said goods, pay into court, to the credit of this cause, the sum of $1,500, to be retained until the re-hearing of the said order, or until the hearing of this cause, whichever may first come on; any of the parties to be at liberty to make any application respecting the goods or money which they may be advised, before a single judge of the court.

That the appeal has not been set down for hearing, or that notice of the intention to appeal has not yet been given under general order 165, does not seem to be an obstacle to the Court making such an order. Proceedings have frequently been stayed on the mere statement of counsel that the parties have been advised to appeal, and intend to do so. See *Cotton* v. *Corby*, 5 C. L. J. O. S. 67; *Mayor of Gloucester* v. *Wood*, 3 Hare, 131.

WALLBRIDGE, C. J., and SMITH, J. concurred.

REG. EX. REL. HAIGHT v. NASH.

Municipalities Act.—Special charter—Contestation of elections.—Jurisdiction.

Held. That the procedure prescribed for the contestation of elections by the General Act relating to municipalities, 47 Vic. c. 11, s. 95, superseded that contained in the special charter of the City of Emerson, 46 & 47 Vic. c. 80.

Hon. S. C. Biggs, Q.C. and *F. E. Burnham* for plaintiff.
H. M. Howell, Q.C. and *A. McKay* for defendant.

[*13th February, 1885.*]

TAYLOR, J.—The charter of the City of Emerson, 46 & 47 Vic. c. 80, passed by the legislature in 1883, provides in section 18, that if the election of the mayor or of one or more of the aldermen be contested, such contestation may be tried in Term or Vacation by a judge of the Court of Queen's Bench or County Court for the judicial district wherein the city is situated. The section then goes on to point out the mode of proceeding. The statute nowhere contains any provisions showing what shall render an election invalid.

In 1884 a General Act relating to municipalities was passed, 47 Vic. c. 11. The 41st section of that Act is an interpretation clause, and it provides, that "municipality" "shall mean any locality, the inhabitants of which are already incorporated, and are continued, or which become incorporated under this Act, or under any other Act of this Legislature, passed at the last session, or the present session thereof." As the City of Emerson was incorporated under an Act passed at the last session, these words would embrace the City of Emerson as a municipality under this latter Act.

The 95th section of this General Act says, "If the election of the mayor, reeve, or of any councillor of any municipality be contested, such contestation shall be decided by the judge or acting judge of the County Courts in an for the judicial district within the limits of which the election is held." The next seven sections provide for the proceedings upon such a contestation,

and the mode of proceeding there pointed out is entirely different from that provided in the charter of Emerson.

The 160th & 161st sections deal with bribery and illegal practices, and define what these are. The 163rd section points out how evidence shall be taken on proceedings, where any question is raised as to whether the candidate or a voter has been guilty of any violation of these sections, it shall be proved by *viva voce* evidence, taken before a judge of any County Court, or by an examiner upon an appointment granted by him.

The objection is now taken, among others, that in consequence of this later statute I have no jurisdiction in the present matter, which should have been proceeded with before the judge of the County Court of the Eastern Judicial District. When the objection was raised, I at first overruled it, but when Mr. Howell proceeded to take further objections as to my proceeding, under the clauses about bribery and corruption, it did seem that there was more in the objection than I at first thought.

The general rule no doubt is, that a General Act is to be construed as not repealing a particular one; that is, one directed towards a special object. A general later law does not abrogate an earlier special one, by mere implication. "But," says Maxwell, in his work on the Interpretation of Statutes, at page 218, "if there be in the Act, or in its history, something showing that the intention of the legislature had been turned to the earlier special Act, and that it intended to reach the special cases within the General Act, or something in the nature of either Act to render it unlikely that any exception was intended in favor of the special Act, the maxim under consideration ceases to be applicable."

Now here, the attention of the legislature was called, when passing the General Act, to the existence of special Acts of incorporation. The 46th section, by its language, shows this. Then the 47th section says, that the manner of providing for holding municipal elections, pointed out by the Act, shall be subject to the "provisions of any special Act, or to the provisions of any charter, or Act, or letters patent of incorporation, of any city or town not herein repealed." No such limitation is expressed in the clauses which refer to contested elections, and the mode of proceeding therein.

Then the 495th section says, "That all Acts or parts of Acts contrary to, or repugnant with the provisions of this Act are hereby repealed." These words are wide enough to cover a special Act.

The provisions, too, of the 95th & 163rd sections are, that the "contestation shall be decided by the judge or acting judge of the County Court," and that the offences relied on as invalidating the election "shall be proved by *viva voce* evidence, taken before the judge of any County Court." By the Interpretation Act, Con. Stat. Man. ch. 1, s. 7, sub. sec. 2, it is enacted that the word "shall" shall be construed as imperative.

On a closer examination of the Acts, and on further consideration, I have come to the conclusion, that the provisions contained in the Act incorporating the City of Emerson, as to contested elections, cannot be regarded as now in force, and that I have no jurisdiction to proceed with this matter.

Taking that view, it is unnecessary to consider the other objections taken on behalf of the respondent.

(IN THE COUNTY COURT OF THE COUNTY OF DUFFERIN.)

REG. EX REL. DUNCAN v. LAUGHLIN.
REG. EX REL. STEVENSON v. BLANCHARD.

Municipal election— Contestation—Disqualification—Seat claimed by petitioner.

Held. 1. A registrar and a county court bailiff are disqualified for the office of mayor and councillor respectively.

2. A returning officer must receive nominations for any candidate who appears to be assessed for $100, even if he be in fact disqualified upon other grounds.

3. The petitioner claimed the seat, but he appeared to be largely indebted to the Municipality, and a new election was directed.

The case of *Reg. ex rel. Duncan* v. *Laughlin* was an application to contest the right of the respondent, Laughlin, to sit as mayor of the town of Nelson; and the case of *Reg. ex rel. Stevenson* v. *Blanchard*, an application to contest the right of the respondent, Blanchard, to sit as one of the councillors of Nelson.

J. B. McLaren for plaintiffs in both matters.

C. Locke for defendant Laughlin.

H. S. Lemon for defendant Blanchard.

[*2nd February, 1885.*]

ARDAGH, CO. J.—The petition in the case of *Reg. ex rel. Duncan* v. *Laughlin* is presented under the provisions of the "contested election" clauses of the Manitoba Municipal Act of 1884, and the petitioner asks that the respondent, Andrew Laughlin, the mayor-elect of the town of Nelson for the current municipal year, be declared to be and to have been disqualified, his said election set aside, and the petitioner declared to have been duly elected to said office, or to have such further and other relief in the premises as the circumstances of the case might seem to require.

I am not unaware that the authority of a County Court judge to adjudicate upon the mere question of qualification in cases like

the present has been questioned, but I think the wording of the clauses of the Municipal Act, under the heading of "Contested Elections," is comprehensive enough to include all cases of contestation. Section 95 might have been made more definite by the addition of the words "or qualification" after the word "election" in the first line; but I think it is evident from what follows that the legislature intended to give the County Court jurisdiction in all questions involving the right of a municipal candidate to hold his seat, the main object being no doubt to lessen the cost of such proceedings, which, under the old practice, was felt to be too great, and to involve in many cases the denial of justice.

The first question which I have to decide in the present case is as to the alleged disqualification of the respondent. His counsel admits, and if he had not done so I presume that it would have been quite susceptible of proof, that the respondent is registrar of deeds for the county of Dufferin, and it is within my judicial knowledge that the town of Nelson is a municipality within that county incorporated under the Manitoba Town Corporations Act.

Before the passing of the Municipalities Act of 1883, with which, so far as the matter under consideration is concerned, the provisions of the Manitoba Municipal Act, 1884, are identical, a registrar was not disqualified for holding a municipal office, and if the Municipal Acts of 1883 and 1884 have not disqualified him, he is still eligible. Section 495 of the last mentioned Act repeals all Acts or parts of Acts contrary or repugnant to its provisions, but it might be doubtful how far this would affect a negative provision of a previous enactment, although I think it must be held as affecting the Town Corporations Act wherever the latter contains any substantive provision contrary or repugnant to a like provision of the Municipal Act.

By sub-section 2 of section 41 of the Municipal Act the term municipality is declared to mean any locality the inhabitants of which are already incorporated, and sub-section 9 further provides that "the word municipality shall embrace, as well as local municipalities, any incorporated town, etc., unless otherwise expressed, or a different meaning shown by the context," but these definitions only affect the general question of repeal, by implication, of certain portions of the Town Corporations Act

which seem to be repugnant to provisions of the Municipal Act. There can, of course, be no doubt upon the point wherever the reference is an express one.

The relator relies upon section 46 of the last mentioned Act as controlling and extending the provisions of the Town Corporations Act with respect not to the qualification, but to the disqualification of voters. It declares that the council of an incorporated town shall consist of "a mayor and such number of councillors as may be specified in the charter or letters of incorporation of such town, subject, however, to the same cause of disqualification in either case as mentioned above in the case of local municipalities, and to such other, if any, as shall be specified in any such charter or letters of incorporation aforesaid." Amongst the persons "mentioned above" as disqualified to hold a municipal office in a local municipality is "a registrar," and if the clauses just quoted or referred to do not disqualify the respondent, the intention of the Legislature must be considered as opposed to the seemingly plain language it has made use of.

The county of Dufferin is composed of five municipalities—four local and one town municipality. It will scarcely be contended that the respondent is not disqualified from holding a municipal office in any of the four municipalities, and if this is the case, on what principle could the Legislature be held to consider him ineligible in four municipalities and eligible in the fifth, his office having the same relation to the whole county. In the Province of Ontario the same official is disqualified as to all municipalities, and the same principle underlies the disqualification in both provinces.

The reason for this disqualification of judges, sheriffs, bailiffs, registrars and other officials is easily understood. They have services to perform of a public character, affecting all classes of the community, and it is obviously against public policy that they should be allowed to fill elective positions or be subject to influence calculated to affect their minds to the prejudice of individuals, or to interfere with their duty to the public at large.

If it is contrary to public policy that a registrar or County Court bailiff should be disqualified from holding a municipal office in a local municipality, the principle is surely applicable with equal force to a town or city within the limits of the official's jurisdiction

or duties. So far as this question of disqualification is concerned, I have no hesitation in holding it affirmatively.

The relator asks to be seated, contending, in the first place, that no election should have been held, and that he should have been declared elected by the returning-officer, owing to the fact that there was no other candidate but the respondent, whose disqualification, it is alleged, was notorious, and should have been recognized by the returning-officer.

I cannot quite agree with this view of the matter. It seems to me that there is a marked distinction between the terms "qualified" and "disqualified," as used in the Act in connection with these contests. A candidate for the office of reeve or councillor in a local municipality is "qualified" if he is assessed as owner of real estate to the amount of $100, or, in other words, if he is qualified and entitled to vote at a municipal election as shown by the assessment roll and the voters' list, but he may nevertheless be "disqualified" on various other grounds. The *prima facie* qualification of a candidate or elector is within the personal knowledge of the returning officer, by recognized documentary evidence.

He is, it seems to me, bound to receive nominations for all candidates who appear to be qualified, although it may afterwards turn out that all the candidates were aliens.

If the returning officer was obliged to decide upon the question of disqualification it would lead to much confusion and litigation.

The petitioners' counsel laid much stress upon the introduction of the word "qualified" in section 54 of our Act, as upholding his contention, especially as this word is not used in the corresponding section of the Ontario Act. I think, however, that this word was not intended to mean anything more than that the candidate must appear to be qualified within the distinction which I have already drawn between the words qualified and disqualified; and also that the clause in which it occurs, must be read in connection with section 51, in order to arrive at its proper meaning. This last section provides that in case of more candidates being nominated than are required to be elected, the clerk or chairman shall announce the same and make known the time and place where the polls shall be opened for taking the votes for the candidates nominated.

I take it that the meaning of section 54 is, that in case there is only the one candidate proposed, the duty of the returning officer is to declare him elected if he appears to be qualified.

In *Reg. ex rel Adamson* v. *Boyd*, 4 Ont. Pr. R. 204, it is held that a candidate claiming to be seated at the nomination, owing to his opponent's disqualification should, besides claiming the seat at the nomination, also notify the electors at the polls that they are throwing away their votes, and in *Reg. ex rel, Forward* v. *Detler*, 4 Ont. Pr. R. 197, it is added that a candidate who claims the right to be elected at the nomination, owing to his opponent's disqualification, waives such right by going to the polls. It was alleged on behalf of the petitioner that he did give notice at the nomination that his opponent was disqualified, but I do not think there was any allegation or admission that he warned the electors also at the polls. There was some discussion at the hearing as to the relator's taking part in the election afterwards or otherwise, but as to this I think the vote shows, by inference at least, that he continued to be a candidate at the polls. Out of ten votes polled for him at least four were those of near relatives, who it must be supposed voted with his consent. I do not think that the relator has shown any title to the seat on this ground which ought to be recognized, especially in view of other considerations to which I intend to refer, and even if the Act had not given me authority to disregard any such claim, if I think it proper to do so.

It is further urged that if the respondent is declared disqualified, the petitioner, as being the only other candidate, ought to be seated, if for no other reason than to avoid the expense of another election. This last ground should no doubt have some influence, but in the present case there are at least two considerations which weigh in my mind against it. The vote was 34 to 10, or resident 24 to 7, and non-resident 10 to 3. There is nothing before me to show that this was not the full strength of both candidates, and if it was so, I must assume that the gentleman who had been mayor for the previous year had not retained the confidence of the electors, so that by seating the petitioner I might be giving the municipality a representative who would not, under any circumstances, have been its choice.

Another consideration has much weight with me, and that is the tax question. It was admitted that the petitioner owed the

municipality nearly $400, the greater part of which was arrears behind 1884. It is contended that taxes being unpaid, if a disqualification at all, is so only in respect to voters, and as to this I do not consider it necessary in this connection to express a decided opinion. The question may be open to discussion on the ground that a candidate must be an elector, and that no one can be an elector whose taxes are in arrear; but the latter part of subsection 1 of section 45 seems to negative disqualification on this ground. It is very clear to me, however, that a candidate who is indebted to the municipality is open to the suspicion of having an interested motive in seeking office, and that no prudent and unprejudiced elector would be justified in voting for such an one. The fact in this case has certainly an influence on my discretion, and I feel that the proper course in the interest of the municipality is to order a new election.

I propose to follow the same course in respect to the petition in the case of *Reg. ex rel. Stevenson* v. *Blanchard.*

The same grounds on which I hold the respondent Laughlin to be disqualified applies of course, under the admissions and consent of counsel, to the respondent Blanchard; except that in my opinion it applies with even greater force in the case of a County Court bailiff than in that of a registrar.

CORISTINE v. MENZIES.

(IN CHAMBERS.)

Striking out Jury notice.—Second contract a satisfaction for damages under the first.

Upon an application by the plaintiff to strike out a jury notice,

Held, 1. Inquiry will be made into the facts to ascertain whether the case is one which ought to be submitted to a jury.

2. If the defendant has no defence he is not entitled to a jury.

3. Plaintiffs sold goods to defendant, to be shipped upon a particular day. They were not shipped until afterwards. The defendant then wrote to the plaintiffs refusing to accept the goods unless upon extended terms of credit, to which the plaintiffs assented, and the defendant then accepted the goods. *Held*, that the defendant had waived any right to damages under the first contract, the second being a satisfaction of the breach, and there being therefore no defence the jury notice should be struck out.

J. W. E. Darby for plaintiff.

J. J. Robertson for defendant.

[*November, 1884.*]

WALLBRIDGE, C. J.—The defendant, residing in Winnipeg, ordered a bill of goods from the plaintiffs, who reside in Montreal. The goods were to have been shipped prior to the 2nd of August, 1883, and were to have been paid for at four months from 1st of October, 1883. The plaintiffs did not ship the goods by that day, but falsely wrote to defendant that they had done so. The goods were not in fact shipped until a much later date, and arrived in Winnipeg on the 23rd of November, 1883. On the 26th of November defendant wrote the plaintiffs complaining of the delay, but stated in the letter that she would accept the goods if the plaintiffs would give four months from 1st of January, 1884, to pay for them. Plaintiffs answered this letter by telegram of 1st of December, 1883, complying with the wishes of defendant as expressed in her letter of 26th of November, 1883, the defendant accepted the goods. There was no obligation upon the defendant to accept the goods not shipped at the time agreed upon between the plaintiff and

the defendant, she was then at perfect liberty to have refused to receive them at all. The goods having arrived in Winnipeg on the 23rd of November, the defendant must have known of the date of shipment, as it would be expressed in the way-bill accompanying the goods, and the defendant had notice of their arrival before writing to make new terms for their acceptance, she availed herself of the right to refuse receiving the goods, as appears by the letter of 26th of November, and only agreed to receive them upon different terms of credit, *i. e.*, four months from 1st of January, 1884, to which the plaintiffs agreed; she in fact then took the goods on 3rd of December.

I think the letter of the 26th of November, the telegram accepting of the terms of the 1st of December, and the receipt of the goods on 3rd of December, does waive any right of action for the delay in delivery of which the defendant had complained in her letter of 26th of November, and the new bargain was substituted for the first one, and accepted in satisfaction of any breach committed by the not forwarding the goods according to the terms of the original contract.

On the 5th of December the defendant wrote complaining that her letter of 26th of November was written by mistake, and that she wished to withdraw from the substituted bargain; the plaintiffs give no answer to that; the defendant now contends that she thought she would have an action against the railway for the delay, but says she discovered that the delay in the railway has not been such as to subject them to an action. The defendant has pleaded by way of counter claim that she suffered damages, by reason of the delay in shipping, which her counsel states she places at $50, and she has required that the cause should be tried by a jury, and paid the jury fee of $12. The plaintiff now makes application to have the cause tried without a jury.

This case comes under Con. Stat. Man. c. 31, s. 14. The words of that Act are, that "all issues of fact in civil cases, in actions, and proceedings at law, shall be tried by a jury according to the law and practice in that behalf, unless the said Court or the Chief Justice (now any judge) upon application being made before trial direct or decides that the issue or issues shall be tried and damages assessed without the intervention of a jury." Under this clause I am asked to order that this cause be tried

without a jury. The words of the statute are wide enough to justify the judge in exercising a very arbitrary judgment; but it is not in that way that judges exercise their judgment in matters left so entirely to them.

This statute means, that the judge shall exercise his judgment in each particular case upon some principle upon which he can rely advisedly called judicial discretion.

This section 14 begins by saying that all issues in fact shall be tried by a jury, unless, &c., recognizing the jury as the ordinary method of trial, and any departure from a jury trial to be adopted only when a satisfactory reason can be given for dispensing with a jury. In all cases to which I have been referred or can find myself the judge does inquire into facts, and ascertain from the facts whether the case is one in which a jury ought not to be called upon. If the case be one purely of an equitable character, this has been thought sufficient to justify dispensing with a jury. The judge then does inquire into the facts as well as sees the pleadings, and if I am to do that, in this case in my opinion there are no facts which on the defence ought to be submitted to a jury at all; in other words, the defendant does not show that she has any defence; first, because the correspondence produced shows that whatever damages she might have sustained were satisfied or compensated for by the agreement made between plaintiff and defendant for an extension of time; and secondly, because the defendant has accepted the goods. If the defendant had intended to claim damages she should have refused the goods.

Since having received them, even in the absence of the bargain made to give additional time, I think she has waived any cause of action arising from delay in shipping.

Delivery made and accepted after the day operates not only as delivery, but in satisfaction of the breach.

In my opinion the defendant has no claim for damages, in respect of which alone she desires a jury. The plaintiffs' claim apparently is admitted, and a jury in my opinion should be dispensed with.

WOOD v. WOOD.

(IN CHAMBERS.)

(IN EQUITY.)

Time for appeal from referee.—Prompt issue of execution.—Waiver of irregularity.

Held.—1. An appeal from the referee must be brought on for hearing within 14 days from the issuing of the order.

2. A party entitled to costs may proceed to collect the same by execution immediately after taxation; the practice of the court does not require that any time be given for payment.

3. An irregularity may be waived in equity, as at law, by delay, or by taking a step in the cause after knowledge of the irregularity.

J. S. Hough for defendant.

G. B. Gordon for plaintiff.

[*6th February, 1885.*]

TAYLOR, J.—The defendant appeals from an order of the referee, refusing a motion made by him to set aside a writ of execution issued by the plaintiff.

Three preliminary objections were taken on the part of the plaintiff, two of which were disposed of at the time. The appeal was heard subject to the third; that was, that the appeal was too late, the order complained of having been made on the 20th of January, and the appeal not brought on for hearing until the 4th of February, the fifteenth day. The order of court No. 201 provides, that appeals from the referee "are to be made within fourteen days from the date or making of the order." This is the same as Ontario general order 329, and in *Jackson* v. *Gardner*, 15 Gr. 425: 2 Ch. Ch. R. 385, V. C. Mowat held, that under the latter order the appeal must be brought on within the fourteen days. In *Harvey* v. *Boomer*, 3 Ch. Ch. R. 11, the same judge held, that the day from which the fourteen days are to be reckoned, must be construed to be the entering of the order. The order here appealed from is not an entered order, and there is nothing upon it to show when it was issued. Mr.

Gordon contends that I must therefore take the date of the order as the date of its being issued. But I cannot shut my eyes to the fact, that on a former appeal from this very order, brought before me on the 23rd of January, Mr. Gordon took the objection that the order had not then been issued, and got the appeal dismissed on that ground, under the authority of *Gibb* v. *Murphy*, 2 Ch. Ch. R. 132.

This appeal, therefore, seems to have been brought on within fourteen days from the issuing of the order, and that, under *Harvey* v. *Boomer*, is sufficient.

The facts here are, that on the 3rd of October last, an order was made overruling with costs a demurrer filed by the defendant. On the 4th of November the defendant obtained an order from the referee to stay all proceedings pending a rehearing of the order of the 3rd of October, upon his giving security for the costs, or paying the amount into court, but giving the plaintiff leave to proceed with the taxation of the costs for the purpose of ascertaining the amount. The costs were taxed on the 7th of November, and the defendant's solicitor says, that having to leave the master's office before the bill was added up, and the amount ascertained, he requested Mr. Monkman, who was in attendance for the plaintiff, to inform him of the amount, and he would pay the same into court, or give security in accordance with the terms of the order staying proceedings. Against this Mr. Monkman files an affidavit in which he says, that Mr. Hough "left the master's office without saying anything about delay in issuing execution, nor did he say anything to lead me to suppose that he intended to pay the same into court or give security." As a fact, execution was issued, and placed in the sheriff's hands, upon the same day on which the costs were taxed.

The principal case upon which the defendant relies for setting aside the execution, is *Cullen* v. *Cullen*, 2 Ch. Ch. R. 94. There the costs were taxed one day, and the next day the plaintiff's solicitor wrote, between 12 and 1 o'clock, to the defendant's solicitor, that the costs had been taxed at $110.95, and *fi. fa.* $4. This was the first intimation the defendant's solicitor had that a *fi. fa.* was issued. Before 2 o'clock on the same day the writ was placed in the sheriff's hands. V. C. Mowat held this haste was irregular, and set aside the *fi. fa.* with costs.

Several other cases at common law were cited. In one, *Anon.*, 4 Ont. Pr. R. 244, a verdict was obtained against the defendant, in October. In Michaelmas Term a rule for a new trial was discharged, and on the 27th of November the defendant's attorney wrote that his client was ready to pay the debt and costs, as soon as the amount was properly ascertained, and asked that notice of the taxation might be given to him. The plaintiff's attorney took no steps until the 28th of March following, when notice of taxation was served, but the taxation was not proceeded with. On the 2nd of April the defendant's attorney again wrote that he was prepared to pay the debt and costs so soon as they were regularly taxed. On the 3rd of April the costs were taxed, judgment entered, execution issued, and sent to the sheriff with peremptory instructions to levy forthwith, and he levied upon the 4th. No reason was given by the plaintiff's attorney for acting so rigorously, except that on some former occasion the defendant's attorney had acted sharply towards him. On these facts Morrison, J., held, that the course pursued had been vexatious and oppressive, and an abuse of the practice of the court. The delay of five months in taxing the costs and entering judgment showed that no danger of loss was apprehended, and he discharged the defendant from the *fi. fa.*, upon payment of the amount of judgment, costs of *fi. fa.*, and interest on the verdict to the 3rd of April, and ordered the plaintiff's attorney to pay the costs of the application. In *Davidson* v. *Grange*, 5 Ont. Pr. R. 258, Morrison, J., followed his decision in the case just cited, holding that where a party gives clear notice that he is ready and willing to pay the amount forthwith, and there is no reason to suspect that he is acting other than *bona fide*, and the recovery of the amount is in no way prejudiced, in the absence of some reasonable excuse, under such circumstances the placing of a *fi. fa.* in the sheriff's hands is *prima facie* vexatious.

On the other hand, in *Coolidge* v. *Bank of Montreal*, 6 Ont. Pr. R. 73, after a careful review of numerous authorities, Wilson, J., held, that a party who has to pay debt and costs on final judgment, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them; and that a party entitled to costs may proceed to collect them by execution immediately after revision, without waiting a reasonable time for payment. From the language used on page 76,

the learned judge would evidently have agreed with the conclusions arrived at in the two cases decided by Morrison, J., for after saying that a party is not entitled to any time to pay the money, he proceeded, "although if the plaintiff offered to pay as soon as he went to his office or the bank for money, or if he offered his cheque at once, which the other from mere caprice and without just cause refused to take, so that the money had to be gone for in lieu of the cheque, and if it appeared that the one entitled to payment had no just or reasonable ground for refusing to wait so short a time, it is very likely that an execution sued out under such circumstances would be set aside as an abuse of the process of the court."

The English case of *Smith* v. *Smith*, L. R. 9 Ex. 121, is a decision of the full Court of Exchequer, that a party is entitled to issue execution immediately, and is not bound to wait a reasonable time. In that case, *Perkins* v. *National Assurance and Investment Association*, 2 H. & N. 71, referred to in *Cullen* v. *Cullen*, and relied on now for the defendant, is distinguished as a case on a judge's order which required that a default should be made.

At common law, then, it is abundantly evident that a party liable to pay a debt and costs is not entitled to a reasonable time to do so before execution is issued, although cases may occur in which the right to issue the execution may be interfered with on the ground that it was exercised for a vexatious and oppressive purpose. In equity, I am aware, the general custom has been not to proceed in such a summary way, but to give some reasonable time for payment; I am not aware, however, apart from *Cullen* v. *Cullen*, that it has ever been held irregular to act otherwise. It may be the custom to give some time, but I cannot see that the practice of the court requires it. And the case of *Cullen* v. *Cullen* stands alone.

I do not think I can, on the evidence before me, find that the execution issued here was vexatious or oppressive.

The order of the 4th of November did not absolutely stay proceedings. A defendant ordered to pay debt and costs could, in any case, stay the entering of judgment and the issuing of execution, by paying the money. Under the order in this case he could stay the proceedings by giving security or paying the

money into court. Until one or the other was done, proceedings were not stayed.

That at the close of the taxation the defendant's solicitor, when leaving the office, requested to be informed of the amount of the bill when added up, and he would pay the amount into court, or give security, is alleged on the one side and denied on the other. As a fact, the money was not paid into court until the 12th of November, although on the 10th the solicitor knew that an execution had been placed in the sheriff's hands on the 7th.

The plaintiff's solicitor gives, as the reason for acting promptly in issuing execution, that he knew the defendant was in doubtful circumstances, and that promptness in getting execution would be the only safe way of securing the amount. From another affidavit, it appears that a suit was then pending against the defendant, a judgment in which was entered and an execution for $19,000 placed in the sheriff's hands, just a few days after the execution now moved against. Numerous other creditors were also pressing their claims against him.

Even if in equity, a party ordered to pay money should be held entitled to a reasonable time for payment before the issuing of execution, the issuing it too soon would only be an irregularity. That the right to move for irregularity is waived at common law, by delay, or by taking a step in the cause after knowledge of it, is abundantly clear. And the rule is the same in equity, *Manning* v. *Birely*, 2 C. L. J. N. S. 332.

Here the defendant's solicitor knew on the 10th of November that the execution had issued, yet it was not moved against until the 10th of January following, when the notice of motion before the referee was served. In the interval not only did he take a step in this cause by setting the order of the 3rd of October down for rehearing, but he allowed the plaintiff to take several proceedings.

The appeal must be dismissed with costs.

HAGEL v STARR.

(IN CHAMBERS.)

Pleading.—Distinct causes of action.

The declaration stated that in consideration that the plaintiff would let to the defendant a certain house and furniture therein for a certain period, at $60 a month, the defendant promised to enter on the said premises and occupy the same, and keep the same in tenantable repair, and to use and take care of the said furniture for and during the said period, and to deliver the same up at the end of the said period, in good repair, reasonable wear and tear excepted, and to pay to the plaintiff the said sum of $60 a month, at the end of each and every month. The breaches alleged were, that "the defendant, after having entered on and taken possession of the said premises and furniture, and occupied and used them for a portion of the said term, wilfully and without reasonable cause or excuse, left the said premises and furniture unoccupied and uncared for, for a long time, and during the remainder of the said term, and refused to pay the plaintiff the said rent of $60 per month, whereby the plaintiff lost the use and profit of the said money and the said premises and furniture, and was put to great expense, cost and trouble, in caring for and storing the said furniture, and in insuring the same from injury and damage, and was otherwise greatly damaged."

Held, That the count could not be objected to on the ground that it embraced two distinct causes of action.

C. P. Wilson, for defendant, applied to strike out part of the first count in the declaration, on the ground that it embraced two distinct causes of action.

Ghent Davis for plaintiff.

[*22nd September, 1884.*]

TAYLOR, J.—The defendant applies to strike out part of the first count in the declaration, on the ground that it embraces two distinct causes of action. I do not think the count is open to the objection taken to it. There is only one contract alleged, although there are two breaches of it assigned: that the defendant left the premises and furniture therein uncared for, and refused to pay the rent during the remainder of the term. This seems to me to be in accordance with the rule which forbids several counts on the same cause of action, yet expressly allows several breaches of the same contract or duty to be assigned

It was urged that the defendant cannot plead properly to such a count, as he may have a defence as to one of the alleged breaches, and none, or a different one, as to the other. I do not see that he can have any difficulty in pleading, for he may plead one plea as to so much of the first count, and another plea as to another part of it. Forms of pleas so framed are given in *Chitty on Pleading*.

The summons should be discharged, with costs.

THE REAL ESTATE LOAN CO. v. MOLSWORTH.

(IN CHAMBERS.)

(IN EQUITY.)

Examination of officer of company.

Held. That the chief officer in this Province of a foreign corporation can be examined for discovery.

The defendant, Molsworth, took proceedings, under general order 42, for the examination of Augustine Ponton, the agent of the plaintiffs—a foreign corporation—in the Province of Manitoba. Ponton refused to attend.

L. G. McPhillips for defendant, Molsworth, moved for an order that Ponton attend at his own expense and be examined, or stand committed, and cited *Consolidated Bank* v. *Neilon*, 7 Ont. Pr. R. 251.

F. B. Robertson contra.

[*22nd January, 1885.*]

TAYLOR, J.—Ponton is such an officer of the plaintiffs as can be examined under general order 42. He is the chief officer in this Province; being under the advisory board makes him none the less such chief agent. He is such a party as could, under the old practice, have been made a party to a cross bill for discovery. The order will go for his examination.

MOORE v. FORTUNE.

(IN CHAMBERS.)

Notice of trial by defendant.

Held, That a defendant can give notice of trial, although plaintiff not in default.

The plaintiff moved to set aside the notice of trial given by the defendant, on the 28th of October, 1884, for the sittings of assize and *nisi prius*, holden on the 4th of November, 1884, alleging as grounds for setting aside the notice, that issue had been joined on the 28th of April, 1884, and that no sitting of assize or *nisi prius*, had taken place since issue had been joined, and notice of trial given; that there was no default in proceeding to trial, when by the course and practice of the court he ought to have done so. Common Law Procedure Act, 1852, section 101. The notice of trial should have been a notice of trial by proviso.

A. E. McPhillips, for defendant, showed cause to the summons, and cited Con. Stat. Man. c. 31, s. 24, where it is enacted, "either party to any action, so soon as issue is joined, and the same is ripe for trial or hearing, may at any time thereafter give to the other party, whether plaintiff or defendant, the usual eight days' notice of trial, or hearing, of the cause to take place before and by a judge on a Tuesday."

He contended that rule 31 of the general rules of the Court of Queen's Bench, as of Michaelmas Term, 1880, reads, that "eight days' notice of trial shall in all cases be sufficient, both days inclusive; and where a cause is at issue, either plaintiff or defendant may give notice of trial." And as to *laches* on the part of the plaintiff in making the application, cited *Anderson* v. *Culver*, 3 Ont. Pr. R. 306; *Allen* v. *Boice*, 3 Ont. Pr. R. 200; *Skelsey* v. *Manning*, 8 U. C. L. J. O. S. 166.

A. Howden, for plaintiff, supported the summons and urged that Con. Stat. Man. c. 31, s. 24, and rule 31 of the general rules of the Court of Queen's Bench, referred to Tuesday trials only.

[*26th January, 1885.*]

DUBUC, J.—*Held*, That a defendant can give notice of trial after issue joined, without there being any default on the part of the plaintiff; that the notice need not be by proviso, and that the notice can be given for the sittings of assize and *nisi prius*; and that the plaintiff in any case was too late in his application. The summons would be discharged with costs.

WALKER v. CAMERON.

(IN CHAMBERS.)

Date of pleadings.—Filing same.

Held. 1. Pleadings must be dated of the day of the month and the year when pleaded.

2. Pleadings must be filed as well as served.

J. W. E Darbey for plaintiff.

L. G. McPhillips for defendant.

[*22nd September, 1884.*]

TAYLOR, J.—On the ground taken, that the declaration violated the requirements of section 54 of the Common Law Procedure Act, which provides, that every declaration and other pleading shall be entitled of the proper court, and of the day of the month and the year when the same was pleaded, there is no doubt it is open to objection. It is dated the 4th of September, served on the 9th, and filed on the 10th.

In *Archbold's Pr.*, 10 Ed., p. 207, it is said, "The provisions of this enactment, which are imperative, must be strictly complied with"; but it is added, "unless under peculiar circumstances, a judge will generally allow of an amendment on payment by the plaintiff of 6*s.* 8*d.* costs." There are no peculiar circumstances here to stand in the way of leave being given to amend, and the defendant cannot be in any way prejudiced by my giving leave.

I therefore give the plaintiffs leave to amend their declaration by dating it the 9th of September. As the defendant fails on his application to set aside the declaration, and the plaintiffs get leave to amend an irregularity, there should be no costs to either party.

Mr. Darbey contended that it is not necessary to file a declaration, that it need only be served on the other side. Certainly, in England this seems to be the practice. There the declaration is delivered to the defendant's attorney; and it is only where the defendant has not appeared that it must be filed. But in England, after the pleadings are complete an issue is made up and served on the opposite side. Here, under *Reg. Gen.* 7, no issue book need be delivered, but a *nisi prius* record is made up and passed in the prothonotary's office. I do not see how the prothonotary can pass the record, which is an *ex parte* proceeding, unless the pleadings have been filed. It therefore seems to me that in this court the pleadings must be filed with the proper officer, as well as delivered to the opposite party.

HENRY v. GLASS.

Assignment for benefit of creditors.—Discretion of trustee.—Interpleader.—Costs.

An assignment for the benefit of creditors empowered the trustee to sell the estate "when and so soon as they shall deem expedient, in such manner and on such terms . . . . as they or he shall deem proper . . . . and with power for them or him to cancel or revoke any such sale, or withdraw from sale and re-sell without being answerable for any loss arising therefrom;" and the trustee was directed "to pay and divide the clear residue among the creditors of the debtor ratably according to the amount of their respective claims."

Held, 1. The assignment was valid.

2. An assignee for the benefit of creditors, who is himself a creditor, may render the assignment irrevocable by acting under it.

3. Plaintiff in an interpleader suit was allowed his costs although he might have brought the parties together in some garnishee proceedings; an injunction being necessary to protect his goods pending litigation.

The plaintiff Henry, on the 27th of March, 1883, purchased a quantity of goods from Robert Dixon, and secured him on the unpaid purchase money by chattel mortgage thereon.

On the 14th of August, 1883, Dixon being in insolvent circumstances, made an assignment of all his estate for the benefit of his creditors, to the defendant Glass, who was himself a creditor. On the 10th of July, 1884, Rowe, Newton & Co. obtained an *ex parte* order before judgment in a suit by them against Dixon, and attached the money due under this chattel mortgage, under Con. Stat. Man. c. 37, s. 44, and served this order on Henry. Henry having notice of the assignment to Glass, informed him of the order. Glass then threatened him, that if he did not pay the money secured by the mortgage in the afternoon of that day, he would take proceedings upon it, and did in fact subsequently take possession of the goods, and put a man in possession of the shop in which the goods were. Rowe, Newton & Co. did not obtain judgment in their suit against Dixon until the 20th of July, 1884, when they signed judgment for $461.42.

J. B. McArthur, Q.C., for plaintiff.

D. Glass and *J. S. Hough* for defendant.

J. S. Ewart, Q.C., for Rowe, Newton & Co.

[*4th March, 1885.*]

WALLBRIDGE, C. J.—Henry was ready to pay the money, but was unable to determine to whom it should be paid. If he had paid it into court, and Rowe, Newton & Co. had taken it out, he might have been called upon to pay it a second time to Glass, as assignee.

The statute does not provide any summary remedy for a person situate as Henry was, to compel the adverse claimants to litigate their claims. His only remedy appears to me to be the one he took, by filing an interpleader bill. This course was approved of in the case of *Davidson* v. *Douglas*, 12 Gr. 181. Henry was not called upon to take the responsibility of deciding upon the rights of rival claimants. He paid into this court the amount due Rowe, Newton & Co. Why he was continued in this suit after this, I do not see. I think he ought not to have been so continued.

The interpleader bill, as between Rowe, Newton & Co. and Glass, came on to be tried before me, when the facts above stated were proved, and in argument it was admitted that Dixon, when he made the assignment to Glass on the 14th of August, 1883, was in insolvent circumstances, within the meaning of the clauses of the Administration of Justice Act against Fraudulent Preferences, Con. Stat. Man. c. 37, s. 95.

On the hearing, the assignment was produced. It recites that Dixon was unable to pay his debts in full, and was desirous of having his estate equitably divided and distributed among all his creditors. Then it was contended that the assignment was void, inasmuch as the property (all personal estate) was thereby conveyed to Glass as trustee, upon trust, in the following words: "And it is hereby declared, that the trustee shall hold the said real and personal property and choses in action hereby granted and assigned to him, other than the said monies, upon trust to get in, sue for, recover and collect the said debts, or sell and dispose of the same, and to sell and dispose of the said real property and other personal property when and so soon as they shall deem expedient, in such manner and on such terms, and either together or in lots, and either by auction or private sale, as they or he shall deem proper, and either with or without special or other conditions of sale, and with power for them or him to cancel or revoke any such sale, or withdraw from sale,

and re-sell without being answerable for any loss arising therefrom." The conveyancer used a printed form, without making any alterations in it to suit the particular case in hand; but the case was argued as if the only matter affected by the assignment was this chattel mortgage, and Glass himself was the sole assignee. No creditor had accepted of the assignment by his signature, not even the assignee. The assignee, however, was, in fact, a creditor, and by his conduct had accepted of it, had advertised for creditors, many of whom had sent in their accounts. It has been frequently held that this kind of acceptance of the trusts by an assignee who is a creditor, is sufficient to uphold the deed and prevent its being treated as voluntary; see remarks of Patterson, J. A., in *Cooper* v. *Dixon*, 10 Ont. App. R. 61.

Is this such a deed as it is reasonable to expect a creditor, willing to take his fair share of the debtor's property, should accede to? If so, then it comes within the rule in *Owen* v. *Body*, 5 Ad. & E. 28; *Janes* v. *Whitbread*, 11 C. B. 406; and *Coates* v. *Williams*, 7 Ex. 205, approved in *Bank of Toronto* v. *Eccles*, 2 Ont. E. & A. 53.

Under the statute of Elizabeth one creditor may be preferred to another; that statute is directed against transfers of property, not being *bona fide*, the debtor yet retaining an interest. *Pickstock* v. *Lyster*, 3 M. & S. 371; *Wood* v. *Dixie*, 7 Q. B. 892; *Ex parte Games* in *re Bamford*, L. R. 12 Chy. Div. 321. An assignment for the benefit of creditors under the statute of Elizabeth c. 5, is valid, if made for the benefit of all the creditors, and *bona fide*, if there be an unconditional surrender by the debtor of all his property and effects, even if it hinder some particular creditor, but does not deprive him of his fair share of the debtor's property if he choose to become a party to the deed.

This assignment does not provide for a release nor give a preference to any creditor. Is it then void by reason of falling within the provisions of Con. Stat. Man. c. 37, sections 95 to 98, against Preferential Assignments? This statute is taken from a similar statute of Ontario, and as explained by Esten, V.C., differs from the statute of Elizabeth only in this, that it makes void preferential assignments, which were not so by the statute of Elizabeth—see *Metcalf* v. *Keefer*, 8 Gr. 394.

Patterson, Judge of Appeal, adds, in *Alexander* v. *Wavell*, 10 Ont. App. R. 152, that this statute avoids such sales as would be held good under *Wood* v. *Dixie*. In my opinion, the statute of Manitoba against preferential assignments includes all sales made by a person in insolvent circumstances with intent to hinder or delay, &c., or by which a preference is gained, excepting those coming either under one or the other of the provisoes of that statute; the first of which saves assignments made for paying and satisfying ratably and proportionably all the creditors of such debtor their just debts, and the other *bona fide* sales of goods in the ordinary course of trade.

It is objected to in the assignment that the trusts given to the trustee by the words, "when and so soon as he shall deem expedient, and in such manner and on such terms, either together or in lots," &c., as copied in full above, and with power to cancel and revoke sales, and re-sell without being answerable for any loss, &c., show this deed void on its face. Then, first, is this such a power as it is reasonable to expect a creditor would become a party to, as in *Owen* v. *Body*, *Janes* v. *Whitbread*, and *Coates* v. *Williams*. In respect to this part of the deed, I accept as the reasonable view what was said by the present Chief Justice of Appeal in Ontario, in *Alexander* v. *Wavell*, 10 Ont. App. R. 149, "it must be presumed that an assignee will apply a general power which can have a lawful operation, to a lawful purpose, and hold this assignment is not void on that ground. And that these stipulations are such as a creditor, willing to accept his fair share of his debtor's assets, could be reasonably expected to assent to." It is not contended that there was fraud, actual or intended, otherwise than as such might be inferred from the deed itself.

It was argued that no time is limited within which the assignee is required to distribute the estate. In such case the law would imply a reasonable time. I have been referred by my brother Taylor to the case of *Ontario Bank* v. *Lamont*, 6 Ont. R. 147, 152-3, by which a year is held to be such reasonable time by analogy to the time allowed executors and trustees, and in sales of lands under execution, as a proper time, and this would be so considered by the Court. The deed does provide for a ratable distribution of the estate, and when that is provided for, by the proper construction of the language of the deed, I do not see

that the exact words of the proviso in the statute are necessary to the validity of the deed. The words of the deed are, "to pay and divide the clear residue among the creditors of the debtor ratably, according to the amount of their respective claims"; this, in my opinion, expresses the full meaning, though not in the exact words of the proviso under which this deed was intended to operate.

I uphold the assignment, and direct that the costs both of Henry and Glass shall be paid by Rowe, Newton & Co. Henry should be allowed to deduct his costs from the money in court, and Glass add them to his costs against Rowe, Newton & Co.

SMITH v. STRANGE.

(IN APPEAL.)

Puis darrein continuance.—Evidence in diminution of damages.—New contract.—Estoppel by judgment or payment.—Adding new pleas.—Discretion.

1. Leave may be given to withdraw pleas, and plead *de novo* to enable a defendant to plead matter arising subsequent to the last pleading, without thereby waiving his former pleas.
2. In actions upon *quantum meruit* for work and labor, defective workmanmanship may be proved in mitigation of damages, although not pleaded. *Secus* if the action be upon a special contract.
3. In an action upon a special contract for the sale of a specific article, for goods sold and delivered, evidence of a breach of a warranty may be given in reduction of the contract price, although not pleaded.
4. In an action for goods sold and delivered, or for work and labor, evidence of damage for delay cannot be given unless under a counter-claim.
5. *Semble.*—In an action by a carrier for freight, evidence of damage to the goods cannot be given unless under a counter claim.
6. If the terms of a special contract be not fully complied with, a new contract to pay for the work actually done at its true value, may be implied from the defendant's accepting the benefit of it.
7. A judgment against a contractor and his surety may be pleaded, as an estoppel, against the contractor alone in an action by him against the other parties to the contract and their sureties.

8. Payment for work and labor after action brought is no estoppel in an action by the employer for non-completion of the contract, or for delay.

9. A judge has no discretion to shut out a defendant from a *bona fide* defence, or a plaintiff from a right *bona fide* to press a claim upon a mere slip of a party or his attorney, unless other rights intervene, or there are aggravating circumstances.

10. The discretion of a judge as to admitting new pleas not interfered with.

This was an appeal from the order of Dubuc, J., dismissing an application by defendants to withdraw their pleas, and plead *de novo*, in order that they might add to their other pleas a plea by way of estoppel by a judgment of this court, recovered after the commencement of this action, in an action brought by two of the present defendants against the present plaintiff and another, in which it was contended that the matters material to the plaintiff's claim in this action were adjudicated upon.

The action was brought upon a bond of the present defendants in favor of the present plaintiff, conditioned for the performance of the acts, terms and conditions on the part of two of the defendants, Strange and Johnson, contained in a certain contract between these two defendants and the plaintiff, and against any loss occasioned by breach of such contract on the part of those two defendants. The contract, which was set out in the declaration, was under the seals of the plaintiff and those two defendants, and was one by which the defendants, Strange and Johnson, agreed to press and bale hay for the present plaintiff in a good and workmanlike manner; the hay to be furnished by the plaintiff, put up in stacks of a certain quantity; the whole quantity to be so baled and pressed to be 1,000 tons, or thereabout, but not less than 900 tons; the bales to be properly piled by Strange and Johnson, and deliverable by the hundred tons as baled; the whole quantity to be delivered with the greatest possible despatch. By the contract the present plaintiff agreed to pay Strange and Johnson $5.50 per ton for each one hundred tons, well and satisfactorily delivered to plaintiff; and provision was made for each party furnishing to the other good, substantial security in the sum of $1,500 for the due fulfilment of the contract. The bond sued on in this action was the security furnished plaintiff by Strange and Johnson. The other action in which was recovered the judgment, which the defendants now seek to set up by way of estoppel, was upon the bond furnished by the present plaintiff

to Strange and Johnson as the security required of him under the contract. This action was against Strange, Johnson and one Mowat, the latter being a surety only for the other two. The other action was brought by Strange and Johnson against Smith and his co-obligor, Leacock, who was merely surety for Smith.

There were two counts in the declaration in the present action; in one, the breach of the contract alleged is, that Strange and Johnson did not deliver the whole quantity of hay to be delivered under the contract with the greatest possible despatch; in the other it was, that the defendants Strange and Johnson did not bale and press 900 tons of hay, as required by the contract, or any part thereof.

In the other action the breach of the contract alleged was, that although Strange and Johnson pressed and baled a large quantity of hay, to wit, 223 tons, Smith and Leacock did not pay them the $5.50 per ton therefor. The declaration also contained the common counts. The pleas in that action were: 1st. *Non est factum;* 2nd. Denial of the pressing and delivery of the 223 tons alleged, or any part thereof; 3rd. Never indebted (to common counts); 4th. Payment (to whole declaration). That action was tried before Dubuc, J., without a jury, after this action was at issue, and a verdict was rendered on the 26th day of January, 1884, in favor of the plaintiffs therein for $1,226.50, being $5.50 per ton upon the whole 223 tons claimed for. Judgment was entered for that amount on the 3rd day of May, 1884, and the application to add the plea now in question was made on the 23rd day of May, 1884.

The plea sought to be added sets up the proceedings in such prior action, and alleges that the issues joined therein were tried at the Assizes at Winnipeg by a judge, and that the judge found, that the defendants Strange and Johnson had sufficiently carried out the contract in question to entitle them to be paid for the 223 tons, portion of the 900 tons mentioned in the contract, but that the now defendants Strange and Johnson had not strictly complied with the terms of the contract, in that they had not pressed, baled and delivered the whole of the hay with the greatest possible despatch, and that in consequence thereof the present plaintiff and Leacock were entitled to be, and were allowed, a certain sum in deduction from the claim of Strange and Johnson, and that the said judge assessed the claim of

Strange and Johnson at $1,226.50, after allowing for such deduction, and that judgment was entered thereon in favor of Strange and Johnson, and is still in full force.

J. S. Ewart, Q.C., and *C. P. Wilson* for defendants, the appellants.

W. R. Mulock and *W. E. Perdue* for plaintiffs, the respondents.

[*9th March, 1885.*]

KILLAM, J., delivered the judgment of the Court (*a*):

The defendants do not desire to plead the new plea as a plea *puis darrein continuance*, because this would involve a waiver of their other pleas, but they wish to withdraw all the pleas and plead them again, with the new plea added as a defence arising after action brought. Such a course is sanctioned by the authority of a case cited in *Bullen & Leake's Precedents*, in a note at foot of page 452, and of *Pender* v. *Bryne*, 22 U. C. C. P. 328.

It is contended on the part of the defendants, that in the prior action, there could be allowed in reduction of the damages to which the then plaintiffs were entitled, any damages which the present plaintiff is entitled to recover for breach by the defendants, Strange and Johnson, of any of their covenants contained in the contract in question between them and Smith; and in support of this contention are cited: *Mayne on Damages*, p. 96; *Allen* v. *Cameron*, 1 C. & M. 832; *Turner* v. *Diaper*, 2 M. & G. 241; *Newton* v. *Forster*, 12 M. & W. 772.

It was at one time questioned whether a defendant sued for goods sold and delivered, or work done and materials furnished, could set up the bad quality of the goods or material, or defects in the work, or failure in regard to any of them to come fully up to what the contract in question might require, in reduction of the amount claimed by the plaintiff, and in some of the earlier cases it was held that such defects would furnish only a ground for a cross-action.

The earliest case that is regarded as a leading authority for allowing the defendant a reduction in price, as compensation for such defects, is *Basten* v. *Butter*, 7 East. 479. There the plaintiff sued in *assumpsit* for work and labor performed and materials supplied therefor, by plaintiff for defendant, at his request, with

(*a*) Present, Wallbridge, C. J.; Taylor, Killam, JJ.

common counts. The defendant offered evidence at the trial to show that the work was improperly done, but the evidence was excluded. On motion a new trial was allowed, expressly on the ground that no price was agreed on, that the plaintiff sued on *quantum meruit*, and in order to determine the value of the work evidence of any defects discovered in it should be allowed and taken into account. It is difficult to imagine that there ever could have been a different holding.

In *Newton* v. *Forster*, 12 M. & W. 772, cited by defendant's counsel, the plaintiff sued in debt for work done and materials furnished. There was a written contract for a fixed price, for the whole of the work and materials. The defendant furnished some of the materials which the plaintiff should have furnished under the contract, and the plaintiff used in the work the materials furnished by the defendant. A deduction was allowed from the contract price for the materials furnished by defendant. Parke, B., held, that the contract was not performed, because the plaintiff had not supplied all the materials, but that there was a new contract to be implied, under which the plaintiff did all the work, and furnished a portion only of the materials, and that it was not a case for a cross-action, as there was no contract by the plaintiff to pay the defendant for the materials furnished by the latter. And Alderson, B., says: "If you find cloth for your coat, the tailor has no right to charge you for it."

In *Turner* v. *Diaper*, also cited for defendants, it was held, that where defendant himself got and paid others to do a portion of the work, which, under the contract the plaintiff was to do, the defendant was entitled to deduct from the contract price the amount paid by him for such portion; not, however, on any ground of a right of set-off, but because plaintiff had not performed that portion of the work paid for by defendant, and was not entitled to recover for it. Here, too, the action was in such a form that plaintiff could recover on a *quantum meruit*. So far as I have been able to consider the authorities, they all seem, so far as actions for work and labor are concerned, not necessarily to take us farther than this, that where the action is wholly on *quantum meruit* the plaintiff is to be paid only for the work he has done, and materials he has furnished, and that in arriving at the value, the defects must be considered in some way, whether by taking the value of the work if well done, and making a deduction from this, or otherwise; and where there is a

special contract, if not wholly performed, a new contract to pay for the work actually done, at its true value, may be implied from the defendant's accepting and receiving the benefit of it; and all the cases which I have found in which deductions for defects in the work have been allowed, are those of actions brought in such form that the plaintiff could recover on *quantum meruit*.

Allen v. *Cameron*, 1 C. & M. 832, so strongly relied on by defendant's counsel, is quite consistent with this view. There, two parties agreed to supply the defendant with a quantity of trees, they were to plant them on his land, to keep them in order for two years after the planting, and replace such as should die in the meantime. For this they were to be paid a certain sum, of which a portion was only to be paid on the expiration of the two years. The action was brought for the last instalment, and was upon the special contract, and the common counts for goods sold, and work done. The defendant contended that, under the contract to keep the trees in order, the plaintiffs were bound to keep the ground sufficiently free of weeds to allow the trees to grow and thrive, and offered evidence to show that this was not done, and that in consequence many of the trees died. The judge rejected the evidence, but on motion for a new trial it was held that the weeding was required by the contract, and that there should be a deduction from the contract price for failure to do this work. Vaughan, B., in his judgment, says: "I think the rule that there should be an abatement of price for the non-performance of any part of the contract by the plaintiff, is a convenient rule." It is contended that this statement is sufficient to warrant us in adopting the rule laid down by defendant's counsel; but it is plain that the learned Baron is there speaking wholly with reference to the particular case before him, and his remark may well be understood as meaning that the plaintiff is not to be paid for work not performed, and that the method of arriving at the value of what has been performed, may well be to make an abatement from the contract price for the non-performance of what is left undone. This is evidently the view taken by Bayley, B., who says: "The agreement is to pay £220. 10*s*. 0*d*. for plants of a particular description, if kept in order; and if plants of less value are introduced, or the trees are not kept in order, the vendee is not driven to his cross-action, but has the right to say, if the trees had been what they ought to have been, they would have been worth that sum, but they

were not. That sum, less by the difference in value of the trees supplied, and by their not being kept in order, is the true amount of the plaintiff's claim, and that value only is to be recovered; so that, if by the plaintiff's neglect they were worth nothing, he has no claim for any price; he is entitled to compensation only for what he has really supplied and done, and not for anything beyond." The action here also is in such a form that the plaintiffs can be allowed to recover on *quantum meruit*.

In *Mayne on Damages*, p. 96, 3rd ed., it is stated that, "Formerly where the action was for the agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to a contract, the defendant was never allowed to give its inferiority in evidence, but was forced to pay the stipulated amount, and re-imburse himself by a cross-action; but it is now settled, that whether the action is for the price of a specific article, or of unascertained goods sold with a warranty, or is brought on a special contract to pay for goods or work at a certain price, or upon a *quantum meruit* for work and labor done, and materials found, or for the value of the plaintiff's services, the defendant may show the actual value of the goods, work, services, &c., and reduce the claim accordingly."

The only authority cited by Mayne to support this statement, in case of an action brought on a special contract to pay for work at a certain price is *Chapel* v. *Hickes*, 2 C. & M. 214, which is in direct contravention of the statement in Mayne, if the form of action is there referred to. There the plaintiff declared in special *assumpsit*, and on the common counts; and Lyndhurst, C. B., says: "If the plaintiff has not performed the work in the manner which by the contract he agreed to do, he cannot recover on the contract, but must recover on the other counts of his declaration, for the work that he has done." We can only reconcile the statement in Mayne with the authority, by supposing that the reference is rather to the *subject matter* of the action than to its *form*.

This view is also supported by Lord Ellenborough in *Denew* v. *Daverell*, 3 Camp. 451, where he says, "Where there is a special contract for a stipulated sum to be paid for business done by plaintiff, it has been usual to leave defendant to his cross action for negligence, but where the plaintiff proceeds, as here, on a *quantum meruit*, I have no doubt that the just value of his services may be ascertained."

Similarly, in an action for goods sold and delivered, Parke, B., in *Cousins* v. *Paddon*, 2 C. M. & R. 552, says, "We are all of opinion that it was competent to a defendant under the old plea of the general issue, to show that the goods delivered were not of such a description as they ought to have been, to entitle the plaintiff to avail himself of the special contract, on the general *indebitatus* counts, and that therefore he must be driven to his *quantum meruit*." And on page 557 he says, "The defendant is entitled, under the plea of *non assumpsit* or *nunquam indebitatus*, to an action for the price of goods, to show, either that there was no sale or delivery, or none such as to make him liable on the contract, so also in an action for work and labour and materials, to show that the work done, or materials provided, were not such as to render him liable to pay for them under the contract, and then he opens his liability to pay on a contract of another description, namely, on a *quantum meruit*."

In turning, however, to consider the case of an action for goods sold and delivered, there appears to be a departure from the principle which I have adopted with respect to actions for work and labor. It is presented by the case where there is a sale of a specific, ascertained chattel, at an agreed price, with a warranty. There, in an action for the price, the defendant may offer evidence of a breach of the warranty in reduction of damages. It is, however, so easy to suggest for this apparent departure from the general principle an origin thoroughly in accord with the principle, that it can give us no ground for any wider departure. The leading authority for this method of compensation to the defendant in such an instance is *Street* v. *Blay*, 2 B. & Ad. 463. An examination of that case shows us that, when it was decided, it was still regarded as a moot point whether, upon a sale of a specific ascertained chattel with a warranty, the article on being found not to be as warranted could be returned. If it could be returned, it is quite clear that the keeping of the article might be held only to give rise to an implied contract to pay for it, *quantum valebat*. This point is not settled in *Street* v. *Blay*, but the decision that in that action, which was for the price of a horse sold with a warranty of soundness, the unsoundness could be set up in reduction of the price, is avowedly based on *Cormack* v. *Gillis* and *King* v. *Boston*. The latter case appears to be reported only in a note to *Basten* v. *Butter*, 7 East, p. 479, and the former is only referred to in

the argument of counsel in *Basten* v. *Butter*, who there relies merely on a dictum of Lord Kenyon in favor of the view. Both this dictum and the holding in *King* v. *Boston* may still be based on the idea of a new contract to pay on a *quantum valebat*. From the holding in *Street* v. *Blay*, all the other decisions, such as *Parson* v. *Sexton*, 4 C. B. 899, an action directly on a special contract, for sale of a machine with a warranty, have followed, and the right to a deduction from the agreed price, of the damages for breach of warranty, whatever its origin, has been found so convenient as to be firmly settled.

Mondel v. *Steel*, 8 M. & W. 858, was an action in special *assumpsit*, on a contract to build a ship according to certain specifications, assigning a breach in not building the ship with scantling, &c., according to the specifications, and alleging as special damage, that on a voyage the ship was so strained that it became necessary to repair her, and thereby the plaintiff lost the use of her during the time she was undergoing repairs. There was a plea setting up a prior action in *indebitatus assumpsit* for balance unpaid of the original price, and a further sum for extra work, and that evidence was given therein by plaintiff of the same breach now sued for, to show that the ship was not built of the best materials, or according to the specifications, and the plea alleged that the judge charged the jury to allow for such defects, and that the jury did make a deduction for them. On demurrer to the plea it was argued for defendant that in an action for the stipulated price of a chattel, which the plaintiff had contracted to make for the defendant, of a particular quality, or of a specific chattel, with a warranty, and delivered, the defendant had the option of setting up a counter claim for breach of the contract in the one case, or of the warranty in the other, in the nature of a cross action. But Parke, B., says of it, "This argument was founded on no other authority than an expression of Lord Tenterdon, in *Street* v. *Blay*, his lordship having said that a breach of warranty might be given in evidence in an action for the price of a specific chattel sold, in mitigation of damages, on the principle, it would seem, of avoiding circuity of action. But we are all of opinion, that no such inference can be drawn from that expression. What was meant was, that the sum to be recovered for the price of the article might be reduced, by so much as the article was diminished in value, by reason of the

non-compliance with the warranty, and that this abatement was allowed in order to save the necessity of a cross-action. It must be considered that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to contract, the rule which has been so convenient is established, and that it is competent for the defendant in all of these, not to set off by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of contract, but simply to show how much the subject of the action was worth by reason of the breach of contract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent and no more. All the plaintiff could by law be allowed in diminution of damages on the former trial, was a deduction from the agreed price according to the difference at the time of the delivery, between the ship as she was, and what she ought to have been, according to the contract, but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs could not have been allowed in the former action, and may now be recovered."

In the United States, authorities go to the extent claimed by the defendant, and in most of the States of the Union by what is called "recoupment," a defendant may set-off in reduction of damages for breach of his own covenants, damages which he is entitled to recover for the plaintiff's breaches of entirely independent covenants in the same contract. See *Sedgwick on Damages*, vol. 2, p. 270, *et seq.*, where the distinction between the English and the American authorities, in this respect, is clearly shown. No such principle prevails in England, and to see how jealous the courts there have been of carrying the doctrine farther than I have mentioned, we have only to consider the cases where it is held, that a party sued by a common carrier, for carriage of his goods, is not allowed to deduct from the price of carriage, damage which the goods have sustained through the negligence of the carrier. *Dakin* v. *Oxley*, 15 C. B. N. S. 646; *Robinson* v. *Knights*, L. R. 8 C. P. 465; *Merchants' Shipping Co.*, v. *Armitage*, L. R. 9 Q. B. 99.

In my opinion, as under the bond sued on in *Strange* v. *Leacock*, only default in performance of the special contract could be recovered, for the defendants could not in that action have been allowed anything by way of deduction on the ground that the work done was not worth the amount of the contract price, and the verdict in that instance is necessarily a finding, that the work of baling and pressing the 223 tons was properly done, so that Smith was bound to accept it; but here Smith does not sue for negligent or improper workmanship, but only for delay, and because the full quantity of hay was not baled or pressed.

I find no authority that, in any form of action, damages or a deduction are allowed for delay as against a claim for the price of goods sold and delivered, or of work and labor done. And with the facility offered for pleading, by way of set-off or counter claim, any claim against a plaintiff, although sounding in damages, we cannot be called upon to advance beyond the precedents in English cases.

As to the contention that the plaintiff has had the benefit of an allowance for such damages as he now claims, as it does not appear that it should have been allowed, as in no event could we suppose it would be with regard to any but the 223 tons, and as the learned judge who tried the former action, and before whom in consequence of his special knowledge of the matter, this application was first made, has not seen fit to adopt that view, we cannot give weight to it. As appears from the evidence in the former case, if there was anything which the plaintiff had a right to claim from Strange and Johnson, it was for bad workmanship, for which no claim is now made.

The defendants seek to set up in their plea, that Strange and Johnson delivered 500 tons to plaintiff, and were paid therefor, and that the former action was brought for the pressing and baling of 223 tons more, and that a verdict for the pressing and baling of the 223 tons was found in their favor. Strictly speaking, as to 223 tons of the quantity mentioned, this answers the second count. As stated in *Outram* v. *Morewood*, 3 East, 355, "the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined, solemnly found against them."

The addition or omission of a surety in either case cannot alter the fact, that it was determined in the former action in favor of Strange and Johnson against Smith, though there was another defendant, his surety, that Strange and Johnson had baled and pressed and delivered to Smith, 223 tons of hay under the contract.

See *Franklin* v. *Gream*, 20 U. C. Q. B. 84; *Smith* v. *Cleghorn*, 10 U. C. C. P. 520; *Miller* v. *Corbett*, 26 U. C. Q. B. 478; *Taylor* v. *Hortop*, 22 U. C. C. P. 542; *Gillies* v. *How*, 19 Gr. 32; *Blakemore* v. *Glamorganshire Canal Co.* 2 C. M. & R. 133; *Nevil* v. *Johnson*, 2 Vern. 447.

As to the 500 tons, the payment is no estoppel. Even payment after action brought is no estoppel. *Davis* v. *Hedges*, L. R. 6 Q. B. 687.

But of what use is it to the defendants to encumber the record with such a long plea, altered as it must be so as to be pleaded only as to damages under the 2nd count for non-delivery of 223 tons of the hay mentioned? It is not to be supposed, that for such a purpose, the defendants would have made the application, as there can be no difficulty in the proof of the delivery of at least that quantity; and if they expect to prove delivery at all, they must proceed farther and require the same evidence in that respect without this plea as with it.

The defendants ask in a certain sense for an indulgence.

They did not make their application to add this plea within the time limited by the practice. They wish also for liberty to do something to which strictly they are not absolutely entitled. The learned judge who heard the application concluded that the plea should not be added. It could hardly fail, as I think, to give rise to demurrers and trouble, and some controversy, without service to anyone in the end. Under these circumstances, though I do not think that a judge has a discretion to shut out a defendant from a *bona fide* defence, or a plaintiff from a right *bona fide* to press a claim, upon a mere slip of a party or his attorney, unless other rights intervene or there are aggravating circumstances, it does not appear that the Court should interfere with the exercise by the learned judge of the discretion which here he certainly had.

The appeal should be dismissed with costs.

McLEAN v. GILLIS.

Exemption from seizure under execution.—Lien under a certificate of judgment.

Held.—Land exempt from seizure under execution may be made available by bill upon a registered judgment.

The defendant entered upon and took up land as a homestead; having built a house, stable and granary, and put a wire fence around 85 acres, he obtained his patent.

One James McBain recovered a judgment against the defendant, and registered a certificate of it in the proper registry office. Afterwards he assigned the judgment to the plaintiff, who filed a bill asking to have it declared a lien and charge on the defendant's land and for a sale.

Joseph Martin for plaintiff.

N. F. Hagel and *Ghent Davis* for defendant.

[*4th March, 1885.*]

WALLBRIDGE, C. J.—Con. Stat. Man. c. 37, s. 83, declares that a certificate of a judgment may be recorded in any registry office of this Province, and from the time of recording it the same shall bind, and form a lien or charge on all the estate and interest in the lands of the judgment defendant, the same as though charged in writing by the defendant under his hand and seal. This certificate of judgment was registered by the plaintiff on the 16th of October, 1883, and in the words of the statute bound the lands, and formed a lien and charge thereon, the same as though charged in writing by the defendant under his hand and seal. McBain, the assignor of the plaintiff, acquired this lien and charge on the 16th of October, 1883, and on the 14th of April, 1884, sold his judgment to this plaintiff, who filed his bill to realize the judgment. Why should he not be able to do this? The latter words of the section declare that the plaintiff may, if he elect to do so, proceed in equity upon that lien or charge. This the plaintiff could have done, without the words last cited.

McBain has a lien or charge on this land, why cannot he sell it, and his assignee sue thereon in his own name? Such rights

are assignable in equity. Does the assignment convey this charge, or simply the judgment?

There is no enactment declaring what a homestead *eo nomine* shall be. The defendant relies on the exemption clause in Con. Stat. Man. c. 37, s. 85, sub-sec. 8, which is in the following words: "The following personal and real estate are hereby declared free from seizure by virtue of all writs of execution issued by any court in this Province" Sub-section 8 exempts "the land cultivated by defendant, provided the extent of the same be not more than 160 acres." Is this anything more than a freedom from that particular remedy for enforcing payment of the judgment. Two remedies are given by this statute, one by enforcing the lien, the other by execution. The exemption clause says only you shall not use the remedy by execution as to 160 acres of land cultivated.

The Legislature has not declared a homestead, but simply certain land excepted from the remedy by execution. The defendant is so situate in regard to this land, that it cannot be seized under execution, and that is all, but does that deprive a plaintiff of the right to proceed by any other method than execution?

I think that the remedy by execution alone is affected by the statute, and the right to enforce the lien is not in any way barred, either directly or by implication.

HAMILTON v. McDONALD.

(IN APPEAL.)

Affidavit for Garnishing order.—Garnishees "reside" within the jurisdiction.

An affidavit upon which a garnishing order issued, stated that the garnishees *reside*—not that they *are*—within the jurisdiction.

Held, sufficient.

The defendant took out a summons to set aside a garnishing order, on the ground that the affidavit on which the order was obtained did not state that the garnishees "are" within the jurisdiction of the court.

The affidavit contained a paragraph stating that the garnishees

"reside" within the jurisdiction; but it was contended, that it must be sworn, that the garnishees "are" within the jurisdiction, as provided by the statute.

An order was made discharging the summons, and the defendant appealed.

C. P. Wilson for the defendant, the appellant.

G. Patterson for the plaintiff, the respondent.

[*9th March, 1885.*]

DUBUC, J., delivered the judgment of the Court (*a*).

The question is, whether the requirements of the statute may be complied with by using the word "resides," instead of the word "is."

A person may be within the jurisdiction, without residing therein, as when he is within the limits of the jurisdiction on a temporary visit. And a person may reside within the jurisdiction without being actually therein, as when he is temporarily absent.

To arrive at a correct interpretation of a statute, it is proper to examine what may have been the intention of the Legislature; and to find that intention one may consider what was the object sought to be obtained by the enactment in question.

Now what is the object contemplated by the enactment here? Is it that the garnishee, when the affidavit is made, should be actually and then and there present in person, within the jurisdiction? Or is it not, rather, that he should be legally or judicially within the jurisdiction, that is to say, subject and amenable to said jurisdiction by the orders of the Court? I am of opinion that the latter interpretation is the correct one.

A man temporarily present here might be served with garnishee process, without any effect on him; as he might leave the next day, and the Court would have no means to enforce its orders on him outside of the jurisdiction.

While a man, having his residence here, may be absent for a few days, or a few weeks; but if he is properly served, the Court may more easily and more effectually enforce its orders against him, because he is supposed to come back to his residence; and, having a residence, he is supposed to have some property, against which the orders and proceedings of the court may be executed.

(*a*) Present: Dubuc, Taylor, Killam, JJ.

I therefore think that the object of the words "is within the jurisdiction," is, not that the garnishee should be then necessarily present in person, but that he should be judicially within the jurisdiction, *i. e.*, subject to it for the particular purpose and amenable to it. I also think that the object might be more easily and more surely obtained by this interpretation of the statute, and the intention of the Legislature must have been to attain this object.

It is true that when a man is in person within the limits of the jurisdiction of the court, he is for general purposes subject to its jurisdiction; but he may not be subject to it for some particular purposes; for instance, a man residing outside of the jurisdiction, who comes here temporarily, could not be duly arrested and detained here under a writ of *capias ad respondendum*, or if arrested he would be discharged. He would not therefore be subject and amenable to the jurisdiction of the Court for this particular purpose. The same thing may be said of garnishee proceedings which might issue, and be served, but could not be followed and enforced after the garnishee would have left the country.

The case of *Martyn* v. *Kelly*, Ir. R. 5 C. L. 404, was cited in favor of the contention that the words "is within the jurisdiction," should be construed strictly; but the garnishees were a corporation, an insurance company, and the decision went not on the ground that the affidavit was insufficient, but on the ground that the garnishees having their head office outside of the jurisdiction, were not in fact within it.

That decision was under the English Act which contains also the words "is within the jurisdiction;" but our own statute, Con. Stat. Man. c. 37, s. 44, in addition to the above has also the following qualifying words: "according to the provisions of this Act or otherwise." If these words have any meaning, they must mean that the words in question are not to be taken in their strict, literal and restrictive sense, that the garnishee should be then actually present in person; but that the object and intention of this and other enactments having relation to the same subject, are to be read and considered in connection with this statute, and in construing it.

I think the appeal should be dismissed with costs.

IMPERIAL BANK v. BRYDON.

(IN APPEAL.)

Bills of Exchange Act.—Leave to appear.—Discretion.

Parol evidence of a verbal agreement, made at the time of signing a promissory note, that the note should not be payable at maturity, is not admissible; and more especially if there be a written agreement, made at the same time, inconsistent with the alleged verbal agreement. Such evidence could only be given on the ground of fraud or mistake.

A defendant should be admitted to defend in an action under the Bills of Exchange Act where there is a shadow of reason to believe that he has a defence. Where evidence of the alleged defence would be inadmissible, no appearance should be permitted.

This was an appeal from an order of Dubuc, J., refusing leave to the defendant to appear, and defend an action begun by writ issued under the Bills of Exchange Act. The action was brought upon four promissory notes, for $2,500 each, made by the defendant in favor of Kilpatrick & Armit, by whom the same were indorsed to the plaintiffs.

H. M. Howell, Q.C., and *L. McMeans* for defendant, the appellant.

W. H. Culver for plaintiffs, the respondents.

[*9th March, 1885.*]

KILLAM, J., delivered the judgment of the Court (*a*):

By section 2 of the Bills of Exchange Act, 18 & 19 Vic., c. 67, leave to appear may be given "on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms, as to security or otherwise, as to the judge may seem fit."

Here the defence sought to be set up is, that the notes were made as collateral security for indebtedness of Kilpatrick & Armit to the plaintiffs, amounting to $22,768.56; that another

(*a*) Present, Wallbridge, C.J., Taylor, Killam, JJ.

firm, Kilpatrick & Hooper, were to give, and did give, notes for $12,500, to make up the balance of the indebtedness of Kilpatrick & Armit; that there was an agreement between the plaintiffs, the defendant, and the firms of Kilpatrick & Hooper and Kilpatrick & Armit, when the notes were given, that no proceedings were to be taken against the defendant until the estates, first of Kilpatrick & Armit, and then of Kilpatrick & Hooper were proceeded against, and both exhausted; and that the defendant was then only to become liable for the balance due the plaintiffs; that since the making of the notes, the indebtedness of Kilpatrick & Armit to the plaintiffs has been "considerably reduced"; that other parties are liable to the plaintiffs for a portion of the indebtedness of Kilpatrick & Armit, and actions are now pending against them therefor; that Kilpatrick & Hooper have offered to give security to plaintiffs for their liability as sureties for Kilpatrick & Armit, to the extent of their indebtedness; that no action has been taken by plaintiffs to realize on their securities. A summons was granted on this affidavit, and on the material filed it appears, that the notes in question were given under a written agreement, made at the same time as the notes, to which the plaintiffs, the defendants, and both the above firms were parties. The agreement distinctly states that the notes are to be paid at maturity, and does not contain any of the conditions as to proceeding first against others, before action against defendant. Defendant admits he knew that these conditions were not in the written agreement, and did not ask to have them inserted, and that the agreement he sets up was wholly verbal.

I can see no shadow of ground to suppose that the defendant can have any defence in this action. In *Abrey* v. *Crux*, L. R. 5 C. P. 37, a similar defence was sought to be maintained by a drawer of a bill as against the payee, upon oral evidence, and it was held that the oral agreement could not be set up. It is contended that one of the judges in that case dissented, and that this shows that there is a case for argument. There, however, the contract of the drawer to pay at maturity, if the bill should be dishonored, was only an implied one, and not the direct positive promise of the maker of a note as in this nstance, and the discussion there showed that it could only be on an assumption of a difference between the positions of drawer and acceptor that there could be a defence; and in

that case there was not, as here, a written contract to determine the conditions of delivery of the bill. To set up the defence here, the defendant must contradict not only the note itself, but the other written agreement. He can only do this on the ground of fraud or mistake entitling him in a suit in equity to reform the agreement.

Erskine v. *Adeane*, L. R. 8 Chy. App. 756, and *Morgan* v. *Griffith*, L. R. 6 Ex. 70, have no application, for in those cases, as appears on a close examination of the reports, the oral agreements proved were not in direct contradiction of the written agreements, as the oral agreement alleged in the present case would be, but only collateral agreements not intended to be inserted in the written agreements, which were not intended to embrace all the parties agreed to.

As to the reduction of the indebtedness of Kirkpatrick & Armit, there is not a shadow of claim that it has been reduced to less than the aggregate of these notes made by defendant. The defendant does not even set up that he believes, or has any reason to believe, that there is any such reduction, and it appears that under the very agreement mentioned, defendant had charge of the business of Kilpatrick & Armit, in the interests of himself and of the plaintiffs, and had the control of the moneys derivable from it, and was in a position to know of any reduction from that source.

There is no allegation that the defendant has applied for or has been refused an account of the amounts realized on the indebtedness in question. Here again, if the defendant has any claim to relief, he can get the full benefit of it by filing his bill in equity.

We agree with the contention of the defendant's counsel, that the defendant should be let in to defend if we could have any shadow of reason to believe that he has a defence, but on the material before us we must apply the plain principles of law as to the non-admissibility of parol evidence to contradict a written instrument, except by showing in equity, fraud or mistake, and we should require the defendant to show us that he himself has some anticipation, or some reason to expect, that the indebtedness in question was so far reduced as to be less than the aggregate of the defendant's notes. The general statement in defendant's affidavit that he is "advised and believes" that he has

a "good defence on the merits," cannot avail here, as the defendant should "disclose" a "legal or equitable defence," or "such other facts as the judge may deem sufficient." The judge to whom the application was made, exercised his discretion in leaving defendant to seek his relief in equity, if he wished. It could be more satisfactorily obtained in that way, if defendant is entitled to it, and there is no reason for our interference with his decision.

The appeal should be dismissed with costs.

THE OGILVIE MILLING CO. v. SMALL.

(IN CHAMBERS.)

Power of Taxing Officer.

Held, A taxing officer has power to allow or disallow affidavits used on an application, without express direction.

2. A motion was refused upon a technical objection, and the master disallowed affidavits filed in answer to the motion. His discretion was not interfered with on appeal.

On an application made in chambers, several affidavits were filed in regard to the merits of the application.

The matter was dismissed on preliminary technical points, and the affidavits were not used.

On the taxation of costs the taxing master disallowed the affidavits, and an appeal was made to the judge.

J. W. E Darby for the defendant, the appellant.

C. P. Wilson for the plaintiffs, the respondents.

[*17th November, 1884.*]

TAYLOR, J.—The contention in support of the appeal is, that the order contains no reference directing the master to inquire into the materiality or propriety of these affidavits, and that in

the absence of such a direction, he has no right to go into the subject matter of affidavits and strike out what he thinks immaterial, because the facts, and the points involved, are not sufficiently before him to enable him to decide intelligently.

Several cases were referred to in support of the position, that a direct reference to the master is necessary to justify his making such an inquiry None of them, however, go that length. *Re Fredericksburgh School Trustees* and *The Corporation of Fredericksburgh*, 37 U. C. Q. B. 534, was a case in which although the *mandamus* asked for against the corporation was refused, yet the corporation having filed, in answer to the application, affidavits of unnecessary length, the Court sai they should be allowed only half the costs of them. *Corley* v. *Roblin*, 5 U. C. L. J. O. S. 225, was a case in which Richards, J., on discharging a summons with costs, directed that no costs should be allowed the defendant for an affidavit filed on his behalf, and he did so because it contained statements charging improper conduct on the part of the plaintiff's attorney, which the learned judge considered unnecessary and improper. In *Hooper* v. *Burley*, 1 C. L. J. N. S. 273, Draper, C. J., discharged a summons with costs, but closed his judgment by saying, "There are many useless affidavits, and a great many repetitions as well as idle statements on information and belief in affidavits filed for plaintiff. They should not be allowed to plaintiff on taxation."

From the fact that in a particular case a judge has given an expression of opinion for the guidance of a taxing master, it does not follow that without that, or without an express direction to inquire into the matter, the latter has no discretion.

Reference was also made to a passage in *Leggo's Pr.* p. 573, where the Ontario general order 71, which corresponds with the English order 122, of May 1845, and with our general order in equity, No. 50 is remarked upon. There is no doubt that under that order it has been usual in England to direct specially an inquiry as to whether any particular pleading, petition, or affidavit, is of unnecessary length; the order having, as was said by the Master of the Rolls, in *Moore* v. *Smith*, 14 Beav. 393, "had an effect the opposite to that which was intended." But we have two orders amply wide enough to permit a taxing officer in equity to deal with affidavits as the master has dealt with them in the present case. These are orders 302 and 304.

That a master can at common law as well as in equity deal with such matters even in the absence of any special reference, seems clear. Mr. *Marshall*, in his standard work on *Costs* (2nd ed. p. 229) says: "the master * * * decides whether the business charged for was, under the circumstances, necessarily done or not." And again, "He may disallow the charge for steps taken, or the expenses of proceedings, on the ground that they were unnecessary or altogether inapplicable and unproductive." He also says that the taxing masters "have frequently to decide questions as to the scope of the pleadings and the nature and effect of the evidence."

The master had, I think, power to deal with these affidavits as he has done. As to the mode in which he has dealt with them, I am not inclined to interfere with it. The motion went off before me on a preliminary objection, so that the merits were never gone into, and the affidavits were never read. That being the case, the master had quite as good an opportunity on the taxation of judging whether they were material or not, as I have now. I dismiss the appeal with costs.

VIVIAN v. WOLF.

(In Chambers.)
(In Equity.)

Postponement of hearing.—Costs.

Held, A trial being postponed because of the unavoidable absence of a material witness, the costs should be costs in the cause.

This case was set down for hearing by the defendant. Before it was reached, the plaintiff applied to the referee to postpone the hearing until another sittings, on the ground of the absence of a material and necessary witness. The defendant did not oppose the cause being put at the foot of the list, contending that if that were done, the attendance of the witness could be secured before the cause was reached. It was not shown that

any effort had been made to procure the attendance of the witness, or that he was so situated that any effort to do so would have been unavailing. The referee made an order postponing the hearing until the next sittings, costs to be costs in the cause. From this order the defendant appealed.

C. P. Wilson for defendant, the appellant.

J. S. Hough for the plaintiff, the respondent.

[*28th October, 1884.*]

TAYLOR, J.—By the time the appeal could be brought on, it was too late to restore the cause to the list, if the referee's order was wrong. Even if put at the foot of the list, the plaintiff could not have procured the attendance of the witness before the close of the sittings. The order appealed from has therefore to stand, so far as it postponed the hearing, but the question of costs has to be dealt with.

Where a party has done everything in his power to procure the attendance of a necessary witness, but has been unable to secure his attendance; or where it is shown that the situation of the witness is such that nothing the party could do would be availing for that end, a cause may be postponed, making the costs costs in the cause. But where, as here, nothing has been done to procure the attendance of the witness, and it is not shown that, even if due diligence had been used, his attendance could not have been secured, the party applying to postpone the hearing should be ordered to pay costs. I therefore vary the order of the referee, by ordering the plaintiff to pay the defendant's costs occasioned by the postponement of the cause. The defendant is also entitled to the costs of the appeal.

VIVIAN v. PLAXTON.

(IN CHAMBERS.)

Change of venue.—Security for costs.—Nominal plaintiff.

Held, 1. A judge in chambers has power to change the venue, notwithstanding a prior change in Term.

2. A plaintiff having assigned his cause of action, the defendant is entitled, upon discovery of the fact, to security for costs, if he move promptly, notwithstanding that he may, by delay, be disentitled upon other grounds.

At the trial a verdict was found for the defendant. In Term plaintiff obtained a rule for a new trial, and asked that the venue be changed to the Western Judicial District, which was granted by the Full Court. Defendant then took out a summons—(1) To change the venue from the Western back to the Eastern Judicial District; (2) To obtain security for costs; (3) To add a plea. The plaintiff did not object to the defendant having an order to add the proposed plea on the ordinary terms.

T. D. Cumberland, for plaintiff, showed cause to the summons.

R. Cassidy, for defendant, supported summons.

[*31st January, 1885.*]

TAYLOR, J.—I do not think I should change the venue. The plaintiff laid it at first in the Eastern District; but at the time he did so there was no other district in which a cause could be tried. Then the Court in Term on plaintiff's request changed it to the Western District. The case of *Darrington* v. *Price*, 6 D. & L. 114, is an authority for the judge in chambers having jurisdiction, even under such circumstances, to change the venue back again. But here, while the convenience, so far as the number of witnesses goes, seems about equally balanced between the Eastern and Western Districts, it is sworn that the plaintiff desires to have the jury view the property in dispute, and that, I think, settles the question in favor of the venue being retained in the Western District. As to the security for costs, the

defendant is, I think, entitled to that. It is true, that he may have lost his right to security on the ground of the plaintiff having left the jurisdiction, by delay in moving. But he has moved promptly since he discovered that the plaintiff has now no interest whatever in the action, having assigned his entire interest to a person resident in England. The only cases to which I was referred, in which security has been ordered, of an assignee suing in the name of his assignor, and security being ordered, are cases in which the assignor was insolvent. Here there is no evidence of the plaintiff's insolvency, but I think the case of an assignee out of the jurisdiction suing in the name of an assignor also out of the jurisdiction, is quite as strong; and I direct security to be given within sixty days.

The defendant succeeds on part of his summons, and fails on the rest, so there should be no costs.

MANITOBA AND NORTH WEST LOAN COMPANY v. SCOBELL.

(In Chambers.)

(In Equity.)

Mortgage suit.—Notice of credit.—New day.

Held, Where, in a mortgage suit, a payment is made during the time fixed for redemption, and no notice of credit is given, there should be an order referring it to the master to fix, or the order may itself fix, a new day for payment.

In this case, which was one upon a mortgage, the master, on the 30th of June, 1884, made his report, finding the amount due to the plaintiffs and the amounts due upon two judgments held by subsequent incumbrancers. He also (following the practice

which obtained at that time, *Rice* v. *Murray*, *ante* 37, not having been decided,) appointed the 30th of December last as the day upon which the subsequent incumbrancers should pay the amount due the plaintiffs. During the currency of the six months the state of the account became changed, but the plaintiffs did not give the parties ordered to redeem on that day notice of credit as provided for by general order 448. On an application to the referee for an order appointing a new day, he declined to make the order, but, as master, made under the original decree a subsequent report finding the amount due the plaintiffs with subsequent interest up to the 27th of April then next, and ordered payment thereof on that day by all the defendants, the original mortgagor and the subsequent incumbrancers.

Against this the plaintiffs appealed.

G. G. Mills for the plaintiffs.

[*29th January, 1885.*]

TAYLOR, J.—The course adopted by the master is irregular. When an account has been changed between the time of making the report aud the day fixed for payment, and the plaintiff has not given notice of credit, under general order 448, the proper course of proceeding is that pointed out by general order 450. Either there should be an order referring it to the master to take an account and fix a new day, or an account should be taken in chambers, and the result embodied in an order naming the new day. The latter is the course usually followed, a reference to the master never being made except where there are complicated accounts of debits and credits, or a conflict as to the amount of rents and profits received, and which change the account. Where there are subsequent incumbrancers who fail to redeem the plaintiff, then, on their being foreclosed, the master may take a subsequent account as against the original defendant by bill, and appoint a day for payment by him; or where the subsequent incumbrancers redeem the plaintiff, he may take a subsequent account against the original defendant of the amount due to them, and of what they have paid the plaintiff, and appoint a day for payment, all by virtue of the original decree. But having once taken an account and made his report as against the incumbrancers, he has no power without an order of referenee to take a new account as against them.

The plaintiff is entitled to have an order drawn up in chambers, taking the account, and fixing a new day for payment, giving the incumbrancers 10 or 15 days within which to pay the money, or in default be foreclosed.

McCAFFREY v. RUTLEDGE.

(In Chambers.)

(In Equity.)

Examination of defendant.—Shortening of time to answer.—Costs.

Held, 1. Plaintiff is not entitled to the costs of an irregular examination of one defendant, to discover the address of his co-defendant, as costs in the cause.

2. Nor to the costs of an application to shorten the time for answer.

G. B. Gordon for plaintiff.

[*18th December, 1884.*]

Taylor, J.—This is a mortgage suit in which the bill has been taken *pro confesso* against the defendants. Originally it was filed against the mortgagor only, and then, on the plaintiff discovering that he had made a conveyance of the equity of redemption, the bill was amended by adding the assignee as a party defendant. The plaintiff's solicitor, not knowing the residence of the added defendant, took steps, after the time for answering had expired, to examine the original defendant, for the purpose of ascertaining this. The defendant did not attend on the appointment taken out for his examination, whereupon a motion was made to compel him to attend and be examined at his own expense. The defendant then made an affidavit as to the residence of his co-defendant. On taxation the master has

disallowed the costs of these proceedings, and I think he has properly disallowed them.

The examination, it is admitted, was not intended to be upon any matter arising upon the bill or affecting any possible defence the defendant might set up, and so it was not an examination for discovery under the general orders. There was no motion pending, for the purposes of which the plaintiff was entitled to examine the defendant under general order 262. I do not see what right the plaintiff had to examine the defendant at all. Then the defendant made an affidavit, or in some way supplied the desired information, and there is nothing to show that he would not, if applied to, have given it at first, and before these costs were incurred, even supposing the plaintiff entitled to take the proceedings he did.

The plaintiff also made several applications to shorten the time to be allowed the added defendant for answering, the costs of which have also been disallowed. They were properly disallowed. Shortening the time for a defendant putting in his answer is a proceeding for the benefit and advantage of the plaintiff, and I do not see why the defendant should be made to pay for it. It seems to me similar to an application by a defendant for further time to answer. The costs of such an application were payable by the defendant and could never be charged against the plaintiff. The only exception was under the old practice, where one order for further time was allowed as of course, and the costs of that were costs in the cause.

The plaintiff's appeal is dismissed.

RE ROCKWOOD ELECTION.

W. J. BRANDRITH, PETITIONER,

v.

S. J. JACKSON, RESPONDENT.

(IN APPEAL.)

Corrupt Practices.—Treating.—Intent.—Appeal.—Disqualification.—Payments for Accommodation.

Held, Upon an appeal by the petitioner, the respondent has no right to seek a reversal of the certificate dismissing counter charges against the defeated candidate.

Held, (Taylor, J. dissenting), Although a successful candidate, at an election for the Legislative Assembly, may be found guilty of treating electors, with intent to influence their votes, he may be unseated only, and not disqualified.

Held, Per Wallbridge, C. J. 1. Treating *per se* is not illegal. It is the corrupt intent of influencing voters by it that the statute condemns.

2. The word "corrupt" in the statute does not mean depraved, but rather that the act was done in so unusual and suspicious a way, that the judge ought to impute to the person a criminal intention in doing it.

Held, Per Taylor, J. 1. The difficulty of finding the existence of corrupt intent in treating, where, according to the habits and practices of the respondent, and existing generally in the locality, treating is customary, discussed.

2. Payments to an elector not an hotel keeper for accommodation unless excessive, are not *prima facie* corrupt.

3. Treating, after a meeting, at taverns where supporters of both parties are present—promiscuous treating among a large crowd of men attracted together by a political meeting is not *prima facie* corrupt.

4. Much weight will be attached to the denial by the respondent of corrupt intent.

5. To prove agency, authority from the alleged principal must be shown.

At the election of a member to serve in the Legislative Assembly of Manitoba for the Rockwood Electoral Division, held on the 23rd day of January, 1883, there were two candidates, James Andrews Miller and Samuel J. Jackson, the latter of whom was elected by a considerable majority.

On the 5th of March following, William J. Brandrith, a duly qualified elector of the division, filed his petition, complaining of the return of Jackson; alleging that the respondent was at, and during, the election guilty of corrupt practices, within the meaning and intent of Con. Stat. Man. c. 3, the Act respecting the Legislative Assembly, and Con. Stat. Man. c. 4, the Manitoba Controverted Elections Act. He by his petition charged that the respondent did, directly and indirectly, by himself and by other persons on his behalf, give and lend, and agree to give and lend, and did offer and promise money, places or employment, and made divers gifts and loans and paid money in bribery, and that he did directly or indirectly give or provide, or cause to be given or provided, and was an accessory to the giving or providing, wholly or in part, expenses incurred for meat, drink, refreshments, or provisions, to and for certain persons, in order to be elected or for being elected, or for corruptly influencing persons to give, or refrain from giving, their votes at said election, and that he and his agents gave, or caused to be given, to voters on the nomination day, and also on the following day, meat, drink, refreshment, or money or tickets, to enable such voters to procure refreshments; also that he used undue influence to compel such persons to vote or refrain from voting; that he paid for horses, carriages, and other conveyances to convey voters to or from the polls; that one or more of these corrupt practices was, or were, committed by the respondent, or with his actual knowledge and consent, and the petitioner prayed that the election of the said Jackson might on these grounds be declared void, and that he should be visited with personal disqualification under the provisions of the statute in that behalf.

To this petition the respondent Jackson filed an answer, denying in specific terms the charges made against him, and praying to have the petition dismissed with costs.

Besides filing his answer to the petition, the respondent during the course of the proceedings gave notice, under section 57 of the Manitoba Controverted Elections Act, that he would on the trial offer evidence to show that Miller, the opposing candidate at the same election, had been guilty of corrupt practices.

Evidence was taken at great length, and the various questions involved were argued before the Chief Justice. That learned

judge, although he took the evidence tendered pursuant to the notice in support of the charges against the unsuccessful candidate Miller, upheld the objections taken on his behalf, and did not give effect to the charges brought against him by the respondent.

The principal cases to which evidence was directed were those known as (1) the John McKiver case; (2) the Edward McKiver case; (3) the Laycock and Laing & Riley case; (4) the White case, and (5) the Wells case. The first three of these consisted of treating—the McKiver cases at the houses of electors during the canvas, and the Laycock and Laing & Riley cases at taverns. The evidence on the John McKiver case showed that he and the respondent went out together on a number of days through a large part of the constituency, for the purpose of canvassing, taking with them considerable quantities of liquor, supplied, in part at least, by the respondent. In the course of their trip they called upon a large number of the electors, and while the respondent was talking with them McKiver produced liquor and treated, the respondent in many cases joining in the drinking. Liquor was also supplied liberally at the houses where they stayed over night, and given not only to the inmates but to other persons, voters, who happened to be present. John McKiver when examined, said he did nothing on these occasions except what was customary with him at all times. The respondent himself was always in the habit of carrying liquor in his sleigh, having long before had special provision made in it for carrying a keg of liquor, in fact the very keg which was taken when going round with McKiver. That there was any corrupt intention in the treating was in the most positive terms denied by the respondent.

The case of Edward McKiver was very similar to that of John McKiver, except that the liquor taken out when he went with the respondent, and when alone, seems to have been supplied by himself, while in John McKiver's case it was supplied, in part at least, by the respondent. That the respondent treated extensively there was no doubt, but there was much proof that his doing so was not confined to the time of the election, bnt was his usual and constant custom.

In the Laycock's and Laing & Riley's tavern cases, it appeared, that after a meeting, at which both candidates were present, a

number of the persons who had attended the meeting adjourned to first one of these taverns and then to the other. There was a large amount of treating and drinking carried on, in which supporters and agents of the respondent, and perhaps the respondent himself took part The treating and drinking was by supporters of both parties. There was a large crowd, and while the drinking was going on, there were hurrahs for Jackson and hurrahs for Miller, showing that both parties were represented and taking part in the drunken orgie.

In the White case, the evidence showed that the respondent and friends twice stayed all night at White's house, and on each occasion the sum of $10 was paid. On the first visit there were six persons with the respondent and a span of horses, on the second, seven and a span of horses. White swore there was no bribery about it. There was no other place at which they could stay, they had supper, lodging for the night, and breakfast in the morning.

In the Wells case, which was for entertainment furnished at the house of Emily Wells, on the day of the election, the evidence showed that dinners were provided under the order or request of one Rutherford, who said he ordered them on his own responsibility, after some conversation with a man named Sutherland.

Upon the original petition, the learned Chief Justice delivered judgment, which after reviewing the law, and a number of distinct charges made, concluded as follows: "It is not necessary to make an express finding upon each case. I find the respondent, Samuel J. Jackson, guilty of the offence of treating, during the election so held for the Electoral Division of Rockwood, that such treating was corruptly done, and for the purpose of corruptly influencing the voters at such election to give their votes thereat for him as such candidate; I find the same was so done through his agents, whose authority I also find; and I find the election void in consequence of such corrupt treating, and I order that the respondent, Samuel J. Jackson, do pay to the petitioner, W. J. Brandrith, the costs, charges, and expenses resulting from the prosecution of the said petition, and of the proceedings consequent thereon."

From this judgment the petitioner appealed under the 93rd section of the Manitoba Controverted Elections Act, seeking the personal disqualification of Jackson, but limiting his appeal to four special and defined questions.

The respondent, upon the argument, claimed, that the whole case was, under the wording of that section, open before the Court, and that he was entitled to argue against the finding of the learned Chief Justice, as not warranted by the law or the evidence, and that the petition should have been dismissed with costs.

And further, that he stood in the same position as if a cross-petition had been filed by him, and that he should be allowed to go into the charges against Miller, for the purpose of disqualifying him.

The Attorney-General (*J. A. Miller, Q.C.,*) and *Hugh McMahon, Q.C.*, for petitioner.

S. C. Biggs, J. S. Ewart, and *W. R Mulock* for respondent.

At the opening of the argument the Court decided that the counter charges could not be gone into, on the ground that there was no appeal on the part of the respondent.

[*4th February, 1884.*]

WALLBRIDGE, C. J. :—I have reviewed my former judgment given herein, and after considering all that has been said on both sides I find I am still obliged to adhere to the judgment then pronounced.

Perhaps I did not sufficiently draw attention to the words of the clause in the Act, entitled An Act respecting the Legislative Assembly and the representation of the people therein, being Con. Stat. Man. c. 3, s. 186, the words of which are as follows :—"Every candidate who corruptly, by himself or by, or with, any person, or by any other way or means on his behalf, at any time either before, during, or after any election, directly or indirectly, gives or provides, or causes to be given or provided, or is accessory to the giving or providing, or pays, wholly or in part, any expenses incurred for any meat, drink, refreshment, or provision, to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person or any other person to give, or refrain from giving his vote at such election, shall be deemed guilty of the offence of treating," and section 188 of that Act declares: "Any act or offence punishable under any of the provisions hereof (amongst them s. 186) shall be corrupt within the meaning of this Act and the Controverted Elections Act."

We have been pressed very much with decisions under the Ontario Acts, and amongst them under the Act prohibiting treating at "meetings of electors," and treating on "polling days," when the statute under which this case is tried contains neither of those provisions. Section 186, above quoted, is applicable to treating, (by the candidate or his agents,) any person in order to influence such person to give his vote, or refrain from giving it, without any reference whatever to meetings of electors or to treating on polling days. Section 186 extends to treating at any time when an election is in contemplation, if done with the intent of influencing the electors. I cannot read what took place at Joseph H. Wells', and during the two trips through the constituency made by the respondent, in company with the McKivers, when whiskey was taken along in the sleigh, and distributed as the respondent went along, and not come to the conclusion that this was done for the purpose of influencing the votes of the constituency. Treating *per se* is not illegal. It is the corrupt intent of influencing voters by it that the statute condemns. It is not possible that in this amount of treating Mr. Jackson was only following what was his ordinary custom; no evidence was given to justify a finding such as that. That Mr. Jackson is a generous man and liberal out of his abundant resources, no man denied, but no one was bold enough to say that his usual habits extended to anything approaching the amount of treating proved here. The word "corrupt" in the statute does not mean depraved, but rather that the act was done in so unusual and suspicious a way that the judge ought to impute to the person a criminal intention in doing it. In the Ontario cases there was some pretense at least of concealment, but here it was open, generous and profuse. Better repeal the Act by the Legislature than to nullify it by judicial interpretation.

In my opinion the appeal should be dismissed with costs, to be paid by appellant.

DUBUC, J., concurred.

TAYLOR, J.—The section 93, of The Manitoba Controverted Elections Act, under which the present appeal is brought, is copied from the 35th section of 37 Vic. c. 10 (Dom. Stat.), and it was decided in the *London* case, 24 U. C. C. P., at p. 441, that the effect of that section upon an appeal is to throw open the whole matter to be determined by the Full Court.

The whole case therefore has now to be disposed of.

The various cases sought to be established by the evidence offered for the petitioner, are all cases of corrupt treating, falling within the 187th section of the Act respecting the Legislative Assembly, (Con. Stat. Man. c. 3) The cases of John Montgomery and George A. White have the distinguishing feature that they are both payments of money, expenses incurred for meat, drink, refreshment or provisions.

Treating *per se* is not such an act as will by the common law avoid an election. It is so only, when it is, "in order to be elected," for then it is a species of bribery, or when it is by statute made a corrupt act. *Dundas* case, Hod. 205; *North Middlesex* case, Hod. 376.

It is not within the old statute of 17 Wm. III. c. 4, if that Statute be in force in this Province, for that Act only forbids treating within certain specified times "in order to be elected or for being elected." That Act has been interpreted to be only in affirmance of the common law. *Hughes* v. *Marshall*, 2 Cromp. & J. 118.

The 186th section of the Statute of this Province, the Act respecting the Legislative Assembly (Con. Stat. Man. c. 3), says: "Every candidate who corruptly, by himself or by or with any person, or by any other ways or means on his behalf, at any time either before, during or after any election, directly or indirectly gives or provides, or causes to be given or provided, or is accessory to the giving or providing, or pays wholly or in part any expenses incurred for any meat, drink, refreshment, or provision to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person or any other person, to give, or refrain from giving, his vote at such election, shall be deemed guilty of the offence of treating." It is only treating within the meaning of that section, treating corruptly in order to be elected, or for being elected, or for the purpose of corruptly influencing the person treated, or some other person, to give, or refrain from giving, his vote at the election, which is, by the 178th section of the same statute, a corrupt act within the meaning of the Act respecting the Legislative Assembly and the Manitoba Controverted Elections Act.

The 186th section, in fact, only declares, with the authority of the Legislature, that treating to be corrupt which the courts

had declared to be so. Then Mr. Justice Blackburn, in the *Wallingford* case, 1 O'M. & H. 59, defined corrupt treating thus: "Whenever a candidate is, either by himself or by his agents, in any way accessory to providing meat, drink, or entertainment, for the purpose of being elected, with an intention to produce an effect upon the election, that amounts to corrupt treating."

The same learned judge, in the *Hereford* case, 1 O'M. & H. 195, said, that corrupt treating, means "with a motive or intention by means of it to produce an effect upon the election." Mr. Justice Willes, in the *Lichfield* case, 1 O'M. & H. 25, says treating is forbidden "whenever it is resorted to for the purpose of pampering people's appetites, and thereby inducing electors either to vote, or abstain from voting, otherwise than they would have done if their palates had not been tickled by eating and drinking supplied by candidates." And at p. 26 he says the treating must be done "in order to influence voters."

The language of those learned judges has been quoted with approval, and acted upon in numerous cases in the Province of Ontario, as by C. J. Hagarty in the *Glengarry* case, Hod. 8, C. J. Richards in *East Toronto* case, Hod. 70, and the present Chief Justice of Appeal in the *North Middlesex* case, Hod. 376.

Whether the act is corrupt or not, is always a question of intention. Thus, in the *Tamworth* case, 1 O'M. & H. 83, Mr. Justice Willes said, it is always a question of intention, an intention to produce that effect which the Legislature meant to forbid. So Baron Martin, in the *Bradford* case, 1 O'M. & H. 37, used this language as to the meaning of "corruptly:" "I am satisfied it means a thing done with an evil mind and intention, and unless there be an evil mind or an evil intention accompanying the act, it is not 'corruptly' done. 'Corruptly,' means an act done by a man knowing that he is doing what is wrong, and doing it with an evil object. There must be some evil motive in it, and it must be done in order to be elected." That language was said, by the Chief Justice of the Court of Appeal in Ontario, to contain, no doubt upon the whole, a sound exposition of the law. *North Middlesex* case, Hod. at p. 385.

The same learned judge said, on another occasion, "The true consideration is, was the thing done corruptly, *i. e.* with the object of doing what the Legislature intended to forbid." *Dundas* case, Hod. at p. 210.

In considering the question of intent, there is no doubt, the extent of the treating, or the quantity of drink supplied must be taken into account. *North Middlesex* case, Hod. at p. 385. And see *East Elgin* case, Hod. 769, and the language of C. J. Richards in the *Kingston* case, Hod. at p. 635.

The same rule prevails in England, and Blackburn, J., in the *Wallingford* case, 1 O'M. & H. 59, considered that upon the question of intention the amount of treating was an element of consideration. He observed, "When we are considering, as a matter of fact, the evidence, to see whether a sign of that intention does exist, we must, as a matter of common sense, see on what scale and to what extent it was done."

But in considering the intent with which the treating was done, and the extent to which it was carried, the habits of the candidate or party treating must also be taken into account, and are an exceedingly important element. Thus, in the *North Middlesex* case, Hod. 376, the personal habits of the candidate, who had been engaged in business as a drover, and who had in the course of his business always been in the habit of treating at taverns, were taken into consideration. So in the *Kingston* case, Hod. 625, where treating extensively prevailed, C. J. Richards said (at p. 635), "The general practice which prevails here amongst classes of persons, many of whom are voters, of drinking in a friendly way when they meet, would require strong evidence of a very profuse expenditure of money in drinking to induce a judge to say that it was corruptly done, so as to make it bribery, or come within the meaning of 'treating,' as a corrupt practice at the common law."

Again, in the *East Elgin* case, Hod. 769, where the learned judge, V. C. Blake, found that the amount of treating was such, that if found in one not theretofore given to this vice, would have been sufficient to have "avoided the election," he still would not declare the election void, because with the agent Day who did the treating, it "was an ordinary act of everyday life. Whenever and wherever the occasion offered it was indulged in."

The weight to be attached to the habits and practice of a candidate received consideration from the Supreme Court in *McKay* v. *Glen*, the *South Ontario* case, 3 Sup. C. R. 641. Among the charges made against the candidate, were charges

that during his canvass he corruptly made gifts of money and other valuable considerations to religious and charitable associations, and especially to members of the Roman Catholic church, to induce the members of the said church, and others generally, to vote or refrain from voting at the election.

It appeared from the evidence that he had given a valuable donation in the form of trees for ornamenting the Catholic cemetery near the town; had given a considerable contribution to the Sisters of Charity to provide Christmas dinners for the poor, and when on an application made by the Sisters to have the taxes assessed on their property remitted, the town council would only remit one half, he paid the other half himself. The respondent admitted that he had never before been so liberal in his charitable expenditure, and when asked his object in thus spending money liberally on behalf of the Roman Catholic body, he replied that he "did not know any particular object; to have their good will in the first place," and he also admitted that it was to make himself popular with the Catholic people of the riding. The evidence however also showed that it was not on his part any suddenly developed zeal for charitable or public or religious objects. For 16 or 17 years before the election, he had been very liberal to Roman Catholic objects, and had a general reputation for generosity for years.

The Chief Justice of the Court dealing with this branch of the case, said: "All the acts charged were entirely consistent with the respondent's established character for charity, generosity, and liberality, and with his previous acts . . . . I think therefore the conduct of the respondent for years before this election, in respect to contributions to charitable and religious objects justifies the conclusion that he was actuated by legitimate motives rather than that what he did was done in an illegitimate sense to influence his election. No doubt liberality of that kind would not operate unfavorably to him, but naturally the reverse, still, the fact that what he did would give him popularity would not make that corrupt which otherwise would not be corrupt."

Mr. Justice Henry said: "He is a pretty extensive manufacturer, and such persons not unfrequently are found, from benevolent feelings or policy in regard to their business, to do as the respondent alleges he was in the habit of doing, irrespective of political results, and the law is not so unreasonable as to

oblige a man, who intends to be a candidate at an election to stay his hand in such cases. He is not certainly to use money to secure or aid in his election, but he is not required to injure his prospects by withdrawing the usual support or aid to such benevolent or public objects he would be expected under ordinary circumstances to afford. I think the evidence shows little, if at all beyond his accustomed gifts to the same and similar objects."

Dealing now with the present case, in the light of the authorities referred to I take up first the John McKiver case.

The Chief Justice has found, and I think correctly, that he was an agent of the respondent.

It was contended that he was employed only for a special purpose, to go round with the respondent through parts of the constituency with which he was not acquainted for the purpose of introducing him, and that his employment being so limited the respondent cannot be held responsible for anything done outside of that employment. For this the *London* case, Hod. at p. 220, was relied on. There the candidate was held not responsible for the acts of an agent employed to canvass in Ward No. 2, the acts complained of having been done in Ward No. 6. Here McKiver himself says he was canvassing actively and he did so to the knowledge of the respondent, and in company with him.

The evidence shows that he and the respondent went out together on a number of days through a large part of the constituency, for the purpose of canvassing, taking with them considerable quantities of liquor, supplied, in part at least, by the respondent. In the course of their trip they called upon a large number of the electors, and while the respondent was talking with them McKiver produced liquor and treated, the respondent in many cases joining in the drinking. Liquor was also supplied liberally at the houses where they staid over night, and given not only to the inmates but to other persons, voters, who happened to be present.

But after all, does the evidence carry the case any further than the *North Middlesex* case, where the candidate when canvassing, himself treated, sometimes friends with him treated, and the treating was general to all who might happen to be present. Or does it go further than the *East Elgin* case, where Day, the agent, treated indiscriminately and to so large an extent, or many

others of the Ontario cases in which, although the judges felt compelled to remark upon the extent to which treating was carried, they did not feel at liberty to find that it was corrupt.

McKiver when examined, says he did nothing on that occasion except what was customary with him at all times. The respondent himself was always in the habit of carrying liquor in his sleigh, having long before had special provision made in it for carrying a keg of liquor, in fact the very keg which was taken when going round with McKiver. That there was any corrupt intention in the treating is in the most positive terms denied by the respondent, and in all the Ontario cases such a denial has always had great weight attached to it.

In the *Glengarry* case Hod. 8. where the respondent was charged with bribery, the particular act being a gift of $10 to the child of a voter which had several years before been named after him, he admitted giving the money, but said it was in pursuance of a purpose avowed years before. C. J. Hagarty in disposing of the case said: "I do not feel at liberty to refuse to believe that part of his evidence which proves his innocence, and to accept as conclusive the existence of a motive which he expressly disclaims." The fact that the respondent positively negatived the charge of corrupt motives was remarked on by the Supreme Court in the *South Ontario* case already cited 3 Sup. C. R. at pp 662 and 678.

So in the *North Middlesex* case, where the candidate himself treated extensively, the present Chief Justice of Ontario in acquitting him of any corrupt intent, laid stress upon the fact that he denied emphatically that he treated with any view of influencing voters.

In the *Niagara* case, Hod 568, where a large sum of money had been handed by the respondent to an agent, who entrusted it to another, who used it in bribery, while the election was declared void on account of corrupt practices by agents, C. J. Hagarty said, (at p 572,) "I see no reason to doubt the respondent's very emphatic denial of any corrupt motive or intention. I accept his declaration that he entered into the contest intending to spend no money illegally, and that he was in no way cognizant of any illegal act."

A good deal was made of an answer given by McKiver to one question. While he was detailing some of the events of the trip, and the treating, the counsel examining him said: "I believe you generally do that election times up there," to which he replied, "Yes, that is the way I talk." In another place, when the question was put, "You can't electioneer without whiskey," his answer was "No." Now the case of McKiver seems very like that of Day the agent in the *East Elgin* case. V. C. Blake speaking (Hod, at p. 776) of the mode in which he canvassed said: "He is described as a man who did not do much on the platform, but who was a powerful man outside. He appears to have thought that there was not much in himself to commend him to those he met, and at once he invariably turned to his potent friend the bar . . . . He employed this, (*i. e.* treating), as he ordinarily did as his argument." Yet there, it being, as it is shown here to have been, the ordinary practice of the man, the judge held he could not find the corrupt intent.

The case of Edward McKiver is very similar to that of John McKiver, except that the liquor taken out when he went with the respondent, and when alone, seems to have been supplied by himself, while in John's case it was supplied, in part at least, by the respondent. That he treated extensively there is no doubt, but there is ample proof that his doing so was not confined to the time of the election but was his usual and constant custom.

When he went to election meetings he on several occasions took liquor with him in a flask, but there is no evidence that he treated people at any of these meetings. He positively denies that he ever did so, although he sometimes gave some of his friends a drink after they were over. The respondent denies all knowledge of liquor having been taken to the meetings. The case though similar to that of John McKiver is not to my mind by any means so strong a one.

As to the entertainment furnished at the house of Emily Wells on the day of the election, the Chief Justice has found that it was provided by the order of Robert Rutherford, who was a clerk in the shop of Jos. H. Wells, and that Rutherford was a sub-agent of Wells.

The evidence is sufficient to establish that the dinners were provided under the order or request of Rutherford, but I fail to

find any evidence that in ordering them he acted as agent of any one. When examined on the subject he says he ordered them on his own responsibility, after having some conversation with a man named Sutherland. There is nothing to show that Sutherland was an agent of the respondent. Rutherford had not taken any part in the election apart from ordering these dinners.

In the *West Simcoe* case, decided in August last, the dinner was ordered by one Howell, who was undoubtedly an agent of the candidate. There was some evidence, though it was contradicted, that the candidate partook of the entertainment and personally invited others to do so. The decision of the Court however, was based upon its being the act of an accredited agent.

But where is the evidence here of Wells being an agent of the respondent? He was a supporter of his and signed the nomination paper, but that alone would not constitute him an agent. The respondent frequently called at his shop and would ask how people felt in that neighborhood. Being a shop-keeper and his place of business one of common resort, he would no doubt hear the election and the merits of the respective candidates discussed, and thus be in a position to supply the information, but he says he did not ask one man for his vote, he did not wish to take either side very strongly.

No doubt, in election cases, agency has sometimes been formed upon slight circumstances. but there must be at least something from which it may be inferred.

Agency, it has been said, "Is a result of law to be drawn from the facts of the case, and from the acts of the individuals." C. J. Draper in the *East Peterborough* case, Hod. at p. 248, founding his conclusions upon English authorities said, "every instance in which, with the knowledge of the candidate, or his employed agent, say his expense agent, a person acts at all in furthering the election for him, or in trying to get votes for him, tends to prove that the person so acting was authorized to act as his agent. A repetition of such acts strengthens the conclusion."

In the *Welland* case, Hod. 47, in the case of a voluntary agent, it was held following the *Westminster* case, 1 O'M. & H. 89, that some recognition by the candidate of the voluntary agent's services must be proved.

In the *North Ontario* case, Hod. 304, Mr. Justice Wilson, now Chief Justice of the Common Pleas Division of the High Court of Justice, a careful and painstaking, as well as learned judge, reviewed at great length, the leading English authorities on the subject of agency, what will, and what will not, be sufficient proof of that. As the result, he says, (at p. 314) "all the cases show, and common sense requires, that authority from the alleged principal, the candidate, must be shown, creating or sanctioning a person to be his agent before the candidate can be made responsible for the acts of such person."

I find no evidence that the candidate ever formally authorized Wells to act as his agent, and I find no evidence of acts on his part from which authority to act can be inferred. If not an agent himself, he could not appoint Rutherford as a sub-agent. The dinner given at Balmoral on the day of the election seems to me to be exactly parallel to that given in the *North Victoria* (2) case, Hod. 671. In that case the party who gave the dinner was a supporter of the candidate, had been chairman at one of his meetings, and had distributed notices of the meeting. He paid for free dinners for 40 of the candidate's voters, yet the Court of Queen's Bench, affirming on appeal, the judgment of Mr. Justice Wilson at the original trial, held that he was not an agent, and that the giving of free dinners to a number of electors who had come a long distance in severe winter weather, in the absence of evidence that it was done for the purpose of influencing the election, either by voting, or not voting, or that such electors voted, was not a corrupt act.

I cannot find on the evidence, that the dinner was provided by the candidate, or any agent of his, nor is there anything to show that it was provided for the purpose of influencing votes.

There is a charge spoken of as the Jos. H. Wells' case. The charge is, that Wells supplied to various parties large quantities of whiskey which were paid for, or charged to the respondent, and that in so doing he was the agent of the respondent. Wells kept a shop at Balmoral, and the evidence is clear that a large quantity of liquor was supplied to various people who did not pay for it, the liquor so supplied being charged to the respondent. But what evidence is there that the respondent ever authorized these acts or that he was in any way cognizant of them. The question of whether Wells was, in a general way an

agent of the respondent, has already been dealt with. Was he in any way his agent, or acting for him in these liquor transactions? The most of it was given out by Robert Rutherford, the clerk. He says, when asked why he charged it to the respondent, "I cannot say why; I know I never got any authority from S. J. Jackson to do so." "Why did you do it?" "I expected probably the pay would come from Mr. Jackson." "Why?" "I guess Mr. Wells must have given me instructions to do so; I must have got instructions from some source, and I never got instructions from Mr. Jackson to do so."

The examination of Wells himself as to this matter is far from satisfactory, but he says he had no conversation with the respondent about this liquor, and it would appear that the liquor which at one time stood charged in his books was given out to people not all of whom were supporters of the respondent, one at least, Jefferson, being a supporter of the other candidate.

No doubt discredit is thrown upon Wells and this transaction by the alterations which have been made in his books, but is the respondent answerable for this, or is he in any way connected therewith. After the election was over, Wells happened to go to Winnipeg one day by train, the respondent was also in the train and mentioned, in a casual way, that the election was going to be contested. Thereupon Wells seems to have been frightened and sent a note to his clerk Rutherford to alter the books. Accordingly names were erased, others being substituted, and some pages were torn out altogether. He denies having any conversation with any one before the changes were made. No one spoke to him about the charges and no one said he had better take them out for fear they were discovered. He took the charges out, he says, because there was whiskey marked on it. He tore out the leaf in consequence of what respondent told him about the contest, but the respondent, he also says, did not know that the things were charged. He never said a word to him about it. It was all done, including the tearing and altering of the books, without his knowledge. In this he is corroborated by Rutherford, the clerk, who says he does not think respondent knew anything about the erasures; he never had any conversation with him about them.

It seems to me, that really, a number of people, knowing that it was the time of an election, took advantage of that to go to

this shop and obtain whiskey, saying to charge it to the respondent, and they would see that it was all right. Wells, or his clerk, upon this, gave them the liquor, supposing or hoping that in the end it would be paid for. The alteration of the books was a stupid foolish thing, but I can see nothing that connects the respondent, or any agent of his, with either the supplying and charging of the liquor, or the subsequent alterations.

In the *South Grey* case, Hod. 52, in which the destruction of accounts and books was commented upon so strongly, the destruction was the act of one of the respondent's committee, the person who acted as treasurer and handled the funds used during the election.

Another charge is the treating at Laycock's tavern, and Laing & Riley's tavern. From the evidence it appears, that after a meeting, at which both candidates were present, a number of the persons who had attended the meeting adjourned to first one of these taverns and then to the other. There was a large amount of treating and drinking carried on, in which supporters and agents of the respondent and perhaps the respondent himself took part. But the treating and drinking was by supporters of both parties. There was a large crowd, and while the drinking was going on, there were hurrahs for Jackson and hurrahs for Miller, showing that both parties were represented and taking part in the drunken orgie. There is nothing in the evidence to show that any treating on that occasion was done to influence voters, and unless that is shown it cannot be called corrupt treating. It was nothing more than promiscuous drinking by a large crowd of men, who had been attracted together by a political meeting.

The several cases specially referred to in the judgment at the original trial have now been dealt with. There are others of a similar kind, but these are no doubt the strongest against the respondent.

The case of George A. White is, if anything, a personal charge. It is the giving of an excessive amount for lodging and entertainment. The respondent and friends twice stayed all night at his house and on each occasion the sum of $10 was paid. On the first visit there were six persons with the respondent and a span of horses, on the second seven, and a span of horses. White swears there was no bribery about it. There was no

other place at which they could stay, and as they had supper, lodging for the night and breakfast in the morning, $10 can scarcely be said to have been extravagant payment. Certainly there was not a large margin left which could be considered as given for the purpose of influencing a vote.

I have perused the evidence, and considered the case long, and anxiously, the more so that I have been unable to arrive at the same result as the Chief Justice and my brother Dubuc.

The evidence discloses a melancholy state of things as existing in that part of the country. Men going from home, even for short distances, carrying liquor with them and offering it apparently to every chance traveller they meet. A number of persons happening to meet in a store or tavern, and all present being repeatedly called up to drink. Guests invited to parties and social gatherings, taking liquor with them to be consumed in the house of their entertainers. It is sad to think of such a state of society. Still, as a judge, I must deal with these things as they exist.

The difficulty I feel is, that in view of the mass of evidence before me, as to the habits and practice of the respondent, and others acting in his interest, and of the habits and customs in that locality as to the use of liquor and treating, I cannot consistently with the numerous cases decided in Ontario, as I read them, come to the finding that the treating was such corrupt treating as is forbidden by the statute. The respondent has positively denied any corrupt intent and there is no doubt that, for at least eight days before the election he abstained from treating.

In applying the provisions of a statute penal in its character I apprehend I must be clearly satisfied that it was so before I can set aside the election. The proper and indeed the only effectual remedy for such a state of things as existed here would be for the Legislature to forbid by statute all treating during the time of an election, and to declare all such to be corrupt.

In my judgment the petition should be dismissed, but under the circumstances, and following the precedents of the *East Elgin* case, Hod. 779, the *West Toronto* case, Hod. 128, and other cases, the dismissal should be without costs.

GALT v. GORE.

(IN CHAMBERS.)

Ca. sa. must be preceded by ca. re.

Held.—Under Con. Stat. Man. c. 37, s. 77, a *ca. sa.* can issue only against a defendant who has been held to bail under a *ca. re.*

Defendant was arrested on a writ of *capias ad satisfaciendum*, when an application was made to set aside the writ, or to have the defendant discharged from arrest.

The defendant resided at Rat Portage, in the Province of Ontario, but was at the time of the arrest in Winnipeg.

There were eighteen grounds of objections to the arrest taken, many of them technical, the main contention was that no writ of *ca. sa.* could be issued, not having been preceded by a *ca. re.*

H. M. Howell, Q. C., for the plaintiff showed cause.

W. R. Mulock and *W. E. Perdue* for the defendant.

[*7th April, 1885.*]

DUBUC, J.—The defendant contends that no *ca. sa.* could issue in this case. In England, under the Common Law Procedure Act, and until the 32 & 33 Vic. c. 62, a *ca. sa.* was issued against a judgment debtor as of course, on a præcipe, with only a few exceptions. No judge's order was required. But the 32 & 33 Vic. c. 62 abolished it altogether except in a few specified cases. This statute was in force here, and no *ca. sa.* could issue in this court until it was specially provided for by the Local Legislature. So the only *ca. sa.* which can be had here is under the Con. Stat. Man. c. 37, s. 77. The five preceding sections deal with *ca. re.* and the issuing of it before action, or where action pending, and section 77 coming immediately after, is worded thus: "After final judgment has been obtained against any defendant as aforesaid," and it goes on to state under what circumstances it can issue, and amongst the different grounds stated, no mention is made of leaving the country. The plaintiff must make it to appear that he will likely realize and make his debt, or that the judgment defendant hath parted with his property, or made some secret or fraudulent conveyance or disposition thereof, in order to prevent its being taken in execution, or

hath otherwise acted fraudulently in or about the premises. So the showing the intent to leave the country was not necessary. Has the plaintiff complied, in this case, with any of the other alternative provisions? He swore that he would likely realize his debts, and I think he has also shown sufficiently that the defendant had fraudulently disposed of his property, so as to satisfy a judge of the fact, and I doubt very much whether the facts shown since in the evidence adduced by the defendant were such as to remove the impression obtained from the plaintiff's affidavit.

But the more serious objection is, that by our statute, section 77 above mentioned, no *ca. sa.* can lie except when the defendant has been held to bail under a *ca. re.*

In Ontario, the Revised Statutes, c. 67, s. 7, have provisions like those in our own statute, for arresting after judgment a defendant who has been arrested under a *ca. re.*; but, in addition to that, there is an express provision for arresting a judgment defendant who has not been previously held to bail, but who is about to leave the Province, &c., &c.

From this we might infer that the Legislature considered that the statute was not, without such express provision, sufficient to authorize the arrest under a *ca. sa.* when no *ca. re.* had issued. But even without comparison of our statute with that of Ontario, I think it is clear, from the wording of our statute, that a *ca. sa.* can issue only against a defendant "*as aforesaid*" that is to say, a defendant who has been held to bail under a *ca. re.* And this is very likely the reason why the ground that the defendant intends to leave the country is omitted, because, that reason having been shown in the *ca. re.* and not having been disproved, is supposed to be still existing, and it need not be sworn to again, if the defendant secretly or fraudulently dispose of his property.

It has been contended by the counsel for the plaintiff that, while a judge might discharge a defendant arrested under a *ca. re.* he has no power to discharge a defendant in custody under a *ca. sa.* But I find in Archbold, p. 699, the following: "If a *ca. sa.* be sued out and executed when it does not lie, the Court or a judge will discharge the defendant." Again, at p. 703, of the same work: "If the defendant has been improperly arrested (under a *ca. sa.*) the Court or a judge will order him to be discharged. but an application for that purpose must, in general, be made without delay."

Under that authority, I think there can be no question on the power to discharge the defendant in this case.

But this being a new point, and the conduct of the defendant being more than suspicious, I think the order should go without costs.

KEELER v. HAZELWOOD.

(IN APPEAL.)

Arrest under ca. sa.—Evidence on application for discharge.—Construction of Statutes.

On an application for the discharge of the defendant, who had been arrested under a writ of *ca. sa.* plaintiff proposed to read in opposition to the motion, (1.) The cross-examination of the defendant upon his affidavit filed in support of the application; (2.) his examination as a judgment debtor; and (3.) certain affidavits.

Held, by the Full Court,(*a*) reversing the order of Wallbridge, C. J

That the evidence tendered should have been received.

Quære: Would depositions of the defendant taken at the trial of another action be admissible.

A statute prescribed that upon an application the judge "upon hearing read" certain material, might make an order,

Held, that the statute did not exclude the use of material other than that specifically mentioned.

G. B. Gordon for plaintiff.

W. H. Culver for defendant.

[*9th March, 1885.*]

DUBUC, J.—This is an application, by way of appeal from an order of the Chief Justice, for the discharge of the defendant who is detained in custody under a writ of *capias ad satisfaciendum*.

The Chief Justice came to the conclusion to discharge the defendant, but directed in his order that it should not take effect before the fourth day of the ensuing term.

(*a*) Present, Dubuc, Taylor, Killam, JJ.

The application to discharge the defendant was made under section 90, of the Administration of Justice Act, Con. Stat. Man. c. 37. It provides that a defendant detained in custody may, on giving to the judgment plaintiff ten day's notice in writing, apply to a judge in chambers to be discharged from custody. The plaintiff may, in the meantime, file and serve interrogatories to the defendant, or cause him to be examined *viva voce* upon oath. Section 91 provides that after the expiration of ten days, the defendant may make an affidavit that he is not worth $20; and if the judge find that the answers to the interrogatories or to the questions put *viva voce* have been answered satisfactorily by the defendant, he may order his discharge, either on or without terms.

In this case the plaintiff did not serve interrogatories to the defendant and did not cause him to be examined *viva voce*, but he had him cross-examined on his affidavit, and on the return of the summons for the discharge of the defendant he proposed to read and use the deposition of the defendant on such cross-examination, and also the evidence given by the defendant at the trial of the cause of *Nunn* v. *Keeler*, in October last, as taken by the court reporter.

The defendant's counsel objected to the reception of the said lastly mentioned evidence, on the ground that it was not evidence taken on this application, not even in this cause. He also objected to the cross-examination on the affidavit, because it is not such evidence as that contemplated by the statute above cited, and it should not be received and used on this application.

The question is, whether the answers to interrogatories and to a *viva voce* examination mentioned in the statute should be the only and exclusive evidence to be used by a plaintiff, in opposition to an application for the discharge of a defendant, as in the present case.

I am of opinion that, when the statute points out that a certain thing *may* be done, or certain proceedings *may* be taken in a certain instance, it does not follow that any other similar thing, or any other cognate proceeding is to be absolutely excluded. Otherwise, a party in custody, under a regular process of the court, as this defendant is, would always have it in his power, by fraud and perjury, to obtain his discharge, without fear of being contradicted by other and truthful

evidence. Section 94 of the statute already cited, provides that he may be re-arrested, but in the meantime he might be out of the jurisdiction of the Court.

The statute provides that the plaintiff *may* use the defendant's answers to interrogatories, and examination *viva voce*, to oppose his application for discharge, but it does not prescribe that he shall not use other evidence. If he had the defendant properly examined, as pointed out in the statute, he could not be debarred from using other evidence, for the purpose of contradicting the defendant's untruthful evidence. And if he had sufficient documentary or other evidence, to prove beyond doubt, that the defendant had acted fraudulently in disposing of his property, or has it, or the proceeds of it, still under his control, notwithstanding what the defendant might swear himself, it seems that under such circumstances he could dispense with using the defendant's answer; and if he could so dispense with using it, it is only reasonable to suppose that he could also dispense with the taking of it altogether.

In the present case, it may be doubtful whether the plaintiff can use the evidence given by the defendant in the case of *Nunn* v. *Keeler*; but I think that he can file and read the deposition of the defendant on his being cross-examined on the affidavit made on this application.

Besides this deposition, the plaintiff has used, on the return of the summons, his own affidavit, and also the affidavits of A. D. McLean, and of Margaret Rhind.

When he was cross-examined on his affidavit, the defendant, on the advice of his counsel, refused to answer most of the questions. But from some of the answers given, it is clear that the account given by the defendant of the proceeds of his barber shop, is far from being satisfactory. This, taken in connection with the facts sworn to in the affidavits filed by the plaintiff, would probably have induced the learned Chief Justice, if he had admitted the evidence tendered by the plaintiff, to refuse the application for the discharge of the defendant.

I think that the appeal to set aside the order discharging the defendant should be allowed without costs; and the summons for the discharge of the defendant should be dismissed with costs, without prejudice to a new application.

TAYLOR, J.—The defendant is confined in the gaol of the Eastern Judicial District upon a writ of *capias ad satisfaciendum* issued on the 31st of October, 1884, under the provisions of the Con. Stat. Man. c. 37, s. 77.

In December, 1884, he gave the plaintiff the notice provided for by section 90 of the same Act, and no interrogatories having been administered, or proceedings taken for his examination *viva voce*, made the affidavit mentioned in that section, and obtained a summons calling upon the plaintiff to show cause why he should not be discharged from custody. On the return of the summons an order was made for his examination upon the affidavit, and he was accordingly examined. Afterwards upon the argument of the summons, the learned Chief Justice held that the depositions so taken, certain affidavits filed on the part of the plaintiff, and the depositions of the defendant taken at a previous stage upon his examination as a judgment debtor, could not be used on opposing such an application, as was then before him, and he made an order for the defendant's discharge. He, however, stayed the order taking effect until the fourth day of Hilary term to give the plaintiff an opportunity of appealing.

The principal question argued upon the appeal was the right of the plaintiff to examine the defendant, and to use in opposition to his application the material rejected by the Chief Justice.

The statute gives the plaintiff the right to show cause against the defendant's application for his discharge, and to do so, he must have the right to use some material. I do not think the plaintiff can, on opposing such an application, be limited to such evidence as he may obtain from answers to interrogatories delivered, or evidence given upon the *viva voce* examination of the defendant, under the 90th section of the Act. If the plaintiff has, as in the present case, examined the defendant as a judgment debtor, why should he be compelled to examine him over again upon the same matters, instead of being at liberty to make use of the evidence he has already got, or he may have such an unfavorable opinion of the defendant, and place so little reliance upon what he may say in answer to interrogatories, or upon examination, as to prefer meeting the application by the evidence already in his possession, and the affidavits of third parties. Then the 94th section provides, that if the defendant obtains

his discharge through fraud or perjury, he may, on that being shown to the satisfaction of a judge, be re-arrested, and again committed to close custody. Now, if the plaintiff can, after a defendant has been discharged, show that his affidavit as to want of means is untrue, and so have him re-arrested, why may he not show it to be untrue on the application for discharge, and so prevent an order being made. The conclusion, therefore, to which I have come, is, that the evidence offered by the plaintiff in opposition to the defendant's application, and rejected by the Chief Justice, should have been allowed to be used. Perhaps, as my brother Dubuc seems to think, the evidence given by the defendant in the case of *Nunn* v. *Keeler* was properly rejected, although a good deal may be urged in favor of its reception as admissions by the defendant.

Reading the evidence offered by the plaintiff, and going even no further than the depositions of the defendant himself, I think he has by no means given a satisfactory account of his affairs. His conduct, as disclosed from his own lips, does not commend him to the favorable consideration of the Court. Indeed, it appears to me as if he has in a deliberate manner taken steps to prevent the plaintiff from reaping the fruit of his judgment. I am not at all satisfied that he has not now, if not in his own possession, yet held for him by others, and under his control, the means of paying the greater part, if not all, of the plaintiff's claims.

The appeal should be allowed, the order of the Chief Justice reversed, and the application for the defendant's discharge dismissed with costs.

As the appeal was caused by the learned judge refusing to allow evidence to be read, which I think should have been read, and the point was perhaps a new one, I am not inclined to allow any costs of the appeal.

The defendant cannot of course be left for ever in gaol, but he must remain there at present, leaving him to apply at some future time for his discharge.

SCOTTISH MANITOBA INVESTMENT & REAL ESTATE CO. v. BLANCHARD.

(IN EQUITY.)

Decree against Infants.—Reserving a day for Infants to show Cause.

Held, A decree against infants should not reserve a day to show cause after they come of age.

This suit was brought against the widow and infant heirs of a mortgagor for the purpose of foreclosing a mortgage. A motion for a decree was made before the referee in chambers under general order 425, when a question was raised as to the right of the infants to have a day reserved to them to show cause against the decree after attaining twenty-one years of age. The referee was of opinion that the decree should be absolute and need not contain any such reservation, but with his assent the question was spoken to in Court in order to have the practice settled.

E. H. Morphy for plaintiff.

J. H. D. Munson for the infant defendants.

[*21st April, 1885.*]

TAYLOR, J.—At one time the practice in England always was to give an infant defendant a day to show cause.

Thus in *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 102, decided by the Lords Commissioners of the Great Seal in 1722, it is laid down, (at p. 120,) "so in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age." Numerous other cases to the same effect may be found in the books, among which *Booth* v. *Rich*, 1 Vern. 295; *Gundry* v. *Baynard*, 2 Vern. 479; *Fountain* v. *Caine*, 1 P. W. 504; *Napier* v. *Effingham*, 2 P. W. 401; *Bennet* v. *Lee*, 2 Atk. 487; *Williamson* v. *Gordon*, 19 Ves. 114, may be referred to.

In 1830 the statute 1 Wm. 4, c. 47, was passed, and by the 10th section it was enacted that from and after the passing of the Act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by, or against, any infant under the age of twenty-one

years, either alone or together with any other person or persons, the parol shall not demur; but such action, suit or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of the Act be carried on or prosecuted against any infant, where, according to law, the parol did not demur. The expression as to the parol demurring may be strange to some of the present generation, but it was the term used where an infant sued upon an obligation of his ancestor, prayed that the pleadings might be stayed till he should attain full age. He was then said to pray that the parol, that is, the pleadings, might demur, or in other words, stand still.

It was not in every case that an infant could do so. On a bill for sale of real estate brought by simple contract creditors of a trader against his heir-at-law he might, *Lechmere* v. *Brasier*, 2 J. & W. 287, but where the land descended to him subject to a lien or equitable charge, in a suit instituted by other creditors, it was held that he could not. *Brookfield* v. *Bradley*, Jac. 632. For cases in which the infant could and could not pray that the parol might demur reference may be made to *Chaplin* v. *Chaplin* 3 P. W. 365; *Scarth* v. *Cotton*, Forester 198; *Uvedale* v. *Uvedale* 3 Atk. 117; *Plaskett* v. *Beeby* 4 East 485.

The first case I have found after the passing of the 1 Wm. 4, c. 47, is *Powys* v. *Mansfield*, 6 Sim. 637, decided by V. C. Shadwell in 1836. He said he had mentioned the point both to the Lord Chancellor (Brougham), and the Master of the Rolls (Sir John Leach), and they agreed with him in thinking that the plain meaning of the statute was, that the parol should not demur, and as a necessary consequence, that the six months should not be given in a decree, by reason of a defendant being an infant. The learned Vice-Chancellor went on to say, "the giving of the six months was founded on the circumstance that, in certain cases the parol has demurred; and it was properly observed by Mr. Jacob in the course of the argument, that it is not a general proposition that, in every case in which an infant is a defendant, the six months were given by the old practice; but the six months were given by decrees in this court which would have, in their operation, an effect similar to that which would take place in cases at law, where the parol would demur."

The following year the same learned judge had before him the case of *Scholefield* v. *Heafield*, 7 Sim. 669, in which a decree

was made for sale against the infant heir of an estate subject to an equitable mortgage, and counsel for the plaintiff contended on the authority of *Powys* v. *Mansfield*, that the infant was not entitled to be allowed six months. That he was not, would seem to have been already determined in *Brookfield* v. *Bradley*, before referred to. It was stated at the bar that the decision on the motion in *Powys* v. *Mansfield* had been appealed from, but that the appeal motion had stood over until after the decision of an appeal from the decree, and that the decree having been reversed, it had become unnecessary to proceed with the motion. Upon this being stated V. C. Shadwell said he would consult the Lord Chancellor (Lyndhurst), and the next day stated that he had conferred with the Lord Chancellor, and his Lordship was of opinion that, as the decree directed the estate to be sold, the infant ought not to be allowed the six months; but that if the decree had been for a foreclosure, the infant ought to have been allowed the six months.

In the subsequent case of *Price* v. *Carver*, 3 M. & C. 157, the question was again raised before Lord Chancellor Cottenham, and he there explained the distinction between the parol demurring in equity, and the giving of an infant defendant a day to show cause, and relying on *Fountain* v. *Cane*, 1 P. W. 504, *Chaplin* v. *Chaplin*, 3 P. W. 365, and *Uvedale* v. *Uvedale*, 3 Atk. 117, he held that these were not synonymous terms. The decree made in that case gave the infant a day to show cause; and the reporter's head note is as follows: "A decree of foreclosure against an infant must give the infant a day, to show cause against the decree, after he attains twenty-one, notwithstanding the provisions of the Act 11 Geo. 4 & 1 Wm. IV. c. 47, ss. 10, 11." The case is sometimes referred to as overruling, *Powys* v. *Mansfield*. But on reading it it will be seen that it was a case of an equitable mortgage in which, to perfect the plaintiff's title, a conveyance of the legal estate by the infant was necessary. The language of the learned judge was, "That they (the infants) would have had a day to show cause according to the practice hitherto pursued, is quite clear, the decree being both to foreclose, and to procure a conveyance from the infants." Then after referring to the 11th section, which enables the Court to take from the infant the legal estate of property decreed to be sold for payment of debts, he proceeded: "In all other cases in which a conveyance is required from an infant, the law remains as before, and the practice,

therefore, must remain the same. There must be a decree for the infant to convey at twenty-one, and he must have a day to show cause as before."

Accordingly Mr. Fisher, when remarking on the case, *Fisher on Mortgages*, p. 1086, 3rd Ed., says: "It is plain that he was not speaking of foreclosure suits where no conveyance of the legal estate was required, but of suits (such as that before him) relating to equitable mortgages, where it was necessary to wait for a conveyance until the coming of age of the infant heir or devisee." The late Chancellor Blake pointed out the same distinction when referring to that case in *Mair* v. *Kerr*, 2 Gr. at p. 235.

More recently in *Bennett* v. *Harfoot*, 19 W. R., 428, V. C. Stuart said it was no longer the practice to give a day to show cause, and made a decree for foreclosure absolute, following *Croxon* v. *Lever*, 12 W. R. 237, decided by the Master of the Rolls, Lord Romilly. The same course was still more recently followed by North, J., in *Wolverhampton & Staffordshire Banking Co.* v. *George*, L. R. 24 Ch. Div. 707, on the authority of these cases. But it should be noticed that in all these three cases the property was proved not to be worth the mortgage debt, and the plaintiff was willing to pay the infant's costs.

In none of them was any reference made to the 13 & 14 Vic., c. 60, (the Trustee Act 1850) which gives a general power to courts of equity when any decree shall be made for the conveyance or assignment of any lands to declare that any of the parties to the suit are trustees within the meaning of the Act, and to make such order as to the estates, rights and interests of such persons as are authorized by the Act to be made concerning the estates, rights and interests of trustees, and the Court may (sections 7 and 8) make orders vesting the estates or releasing or disposing of the contingent rights of infant trustees in such persons and manner as the Court shall direct, which orders are to be as effectual as if the infant trustee had attained twenty-one, and had duly conveyed or assigned the lands in the same manner, and for the same estate, or had released or disposed of the contingent right. In *Newberry* v. *Martin*, 15 Jur, 166, counsel for plaintiff proposed to take a decree, not reserving to the infant a day to show cause, relying on sections 7 and 8 of that Act, but Lord Cranworth was of opinion that the plaintiff had a right to the common decree of foreclosure, with a day for the infant to show cause. There was

nothing, he said, in the Trustee Act to alter the rights of the infant. But in a foreclosure suit, where the estate of the mortgagor was devised in trust for sale, and had become vested in an infant, who was also one of the persons beneficially interested, the Master of the Rolls, Sir George Jessel, held that the decree should contain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the Trustee Act, 1850. and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf. This case is referred to as unreported in *Seton* on *Decrees* (4th ed.) Vol. 2, at p. 1114, where the form of the decree pronounced is given.

In Ontario, the question of an infant's right to have a day reserved for showing cause against a decree was raised in 1851, in the case of *Mair* v. *Kerr*, 2 Gr. 223. It was then decided that in decrees of foreclosure against infants, a day to show cause after attaining twenty-one must be reserved to the defendants, but it was so only by a majority of the judges, the late Chancellor Blake giving a dissenting judgment.

This has continued to be the practice in Ontario ever since, but recently in *The London & Canadian Loan & Agency Co.* v. *Everitt*, 8 Ont. Pr. R. 489, the late Chief Justice Spragge, one of the judges who decided *Mair* v. *Kerr*, while he did not feel at liberty to change the practice which had prevailed so many years, said, "It would, in my opinion, be well that the Acts to which I have referred, (1 Wm. 4, c. 47, and the Trustee Act of 1850), should be followed by their legitimate consequences, the abolition of the right to an infant to show cause upon coming of age against a decree, or order, or judgment pronounced in a suit in which he has been a party." Here I am not, in disposing of the question, trammelled by a long prevailing practice, and I incline to adopt the view that a day need not be reserved to the infant to show cause after attaining twenty-one. It is desirable so to decide, "for the sake of putting an end to litigation and to the evil of having estates tied up," as it was expressed by Chief Justice Spragge. Besides, the benefit to the infant is of the most shadowy kind. It has been decided, that in cases of foreclosure the only cause which can be shown by the defendant is error in the decree; he may not, to use the old expression, unravel the account, nor is he so much as entitled to redeem the mortgage by paying what

is due. This was so held one hundred and fifty years ago by Lord Chancellor Talbot, in *Mallack* v. *Galton*, 3 P. W., 352, and has been recognized law ever since.

The argument of the late Chancellor Blake in *Mair* v. *Kerr*, founded upon the Statute 5 Geo. 2, c. 7, as construed by the Court in *Gardiner* v. *Gardiner*, 2 U. C. O. S. 520, seems to me to have great force. The Legislature of this Province has, by 47 & 48 Vic., c. 30, s. 10, given legislative sanction to the construction which was in *Gardiner* v. *Gardiner* put upon the 5 Geo. 2. c. 7, so that the reasoning of the learned judge is applicable to the case now before me, and I cannot express my views better than by using his language. Referring to a former proceeding before the Court, when the cause was re-heard he said: "On that occasion I adopted the reasoning of the late Vice-Chancellor of England in *Powys* v. *Mansfield*, considering it peculiarly applicable to the state of the law in this Province, whatever might be its value as an English decision. Real estate here being assets for the satisfaction of simple contract debts, under the Statute of Geo. 2; all creditors—even those by simple contract—being enabled to obtain immediate payment from the real estate, notwithstanding the infancy of the heir; a decree for sale in a foreclosure suit, without giving an infant defendant a day to show cause, being confessedly proper; the equity of the infant heir of the mortgagor being bound by a failure to pay the debt at the day appointed in a redemption suit; such being the state of the law, it seemed to me, then, that it would be repugnant to reason, and directly contrary to the intention of the Legislature, to hold an infant defendant entitled to this peculiar privilege, as against creditors of a class generally supposed to occupy an advantageous position—having specific security for their debts, and seeking the relief peculiarly appropriate to that security. * * * * Simple contract creditors are empowered not only to establish their right to recover, but to obtain satisfaction of their debts, by sale of the real estate during the infancy of the heir, and in a proceeding to which he is not a necessary party. Can we suppose that the Legislature, while making these extraordinary provisions for the protection of creditors in courts of law, intended to leave the equitable rights of mortgagees in the unsatisfactory position in which the present argument would place them,—not only denying them the relief appropriate to their contract during the minority of the infant mortgagor but keeping the whole ques-

tion of the defendant's liability under the contract open during the same period?"

The question with which I have been dealing, was the only one raised before me, and I assume that the referee found the plaintiffs entitled to a decree. There should be the usual decree in a mortgage suit against infants, but there should be no clause reserving to the infant a day to show cause against the decree after attaining twenty-one.

ONTARIO BANK v. SCOTT.

(IN CHAMBERS.)

Bills of Exchange Act.—Time to move for leave to appear.

Held. That in an action under the Bills of Exchange Act a judge in chambers has no power to extend the time within which a defendant should apply for leave to defend.

Defendant applied for further time within which to apply for leave to appear to the writ, and for stay of proceedings in the meantime. The summons was granted upon an affidavit of W., an attorney in the city, stating that he was agent for B., an attorney in the country; that he had received a letter from B. stating that he (B.) had been instructed by letter from the defendant to appear for him to the writ, and that he was instructed and believed that the defendant had a good defence on the merits, and that further time was required to obtain affidavits from the defendant disclosing the nature of the defence.

J. W. E. Darby for plaintiffs showed cause to a summons to extend the time for appearance, to permit of an application being made for leave to appear.

T. O. Townley, (*Ewart, Fisher & Wilson*) for defendant.

[*23rd January, 1885*]

TAYLOR, J.—A judge in chamber has no power to extend the time for a defendant to appear to a writ under the Bills of Exchange Act, beyond the twelve days fixed by the statute. The terms of the statute are imperative, that the application must be made within twelve days after service of the writ. Summons dismissed, but without costs.

PEARSON v. THE SCHOOL TRUSTEES OF THE CATHOLIC SCHOOL DISTRICT OF ST. JEAN BAPTISTE CENTRE.

School trustees.—Action by teacher.—Contract.—Pleading.

The first count of the declaration set out that in consideration that plaintiff would enter into the service of defendants and serve them for one year . . . . in the capacity of school-teacher, at $300 a year, to be paid, &c., and lodgings, fuel and light to be furnished, &c., the defendants promised to retain the plaintiff in the capacity, &c. It further alleged the plaintiff's entry into the service, &c., and wrongful dismissal.

The second count was an *indebitatus* count for work done, as a school-teacher and otherwise.

The defendants demurred.

Held. 1. The wrongful dismissal of a teacher is a "matter connected with his duty," within the Manitoba School Act, s. 93, and consequently not the subject of an action, but of arbitration only.

2. The first count was bad, inasmuch as it did not allege the agreement to be in writing and under seal or excuse the want of a seal.

3. The second count was bad because the moneys, although under the direction of the trustees, are not in their hands, but in those of the secretary-treasurer.

N. D. Beck for plaintiff.

It ought to be alleged that the plaintiff is certificated. See Man. School Act, 1881, s. 39, sub-sec. (c.) *Wright* v. *School Trustees*, 32 U. C. Q. B. 545. This objection goes to the first count and to the second in part. It ought also to be alleged that the contract is in writing, and also under seal, or at least the want of the seal accounted for; sec. 76. *Crisp* v. *Bunbury*, 8 Bing., 394, 398. The contract of the trustees to supply lodging, fuel and light is *ultra vires*; sec. 39. *Quin* v. *School Trustees*, 7 U. C. Q. B. 130, 137. The chief ground of demurrer, however, is, that except what may be covered by the words "and otherwise," in the second count, the plaintiff's claim is matter for arbitration only—no action lies; sec. 93, *et seq.* *Crisp* v. *Bunbury*, 8 Bing. 394, 398. *Indebitatus assumpsit* does not lie against the school trustees; the money for the payment of teachers is not in their hands, but in that of their secretary-treasurer—s. 55, sub-sec. (c); the plaintiff's remedy might,

under certain circumstances, be by *mandamus* or special action. *Quin* v. *School Trustees*, 7 U. C. Q. B. 130, 136; *Wright* v. *School Trustees*, 32 U. C. Q. B. 541, 544.

R. Strachan contra.

The right to sue school trustees is given by sec. 34. An action for wrongful dismissal is not within sec. 93. The contract need not be alleged to be in writing, though it may be necessary to prove a writing at the trial. *Tilson* v. *Warwick Gas Co.*, 4 B. & C. 962. *Hartley* v. *Harman*, 11, A. & E. 798; *Thames Haven Dock Co.* v. *Brymer*, 5 Ex. 694.

[*21st March, 1885.*]

WALLBRIDGE, C.J.—In my opinion the demurrer must be allowed. Section 93 and the following sections give a remedy by arbitration, and I think this case is one which comes within that part of section 93, which provides that in case of any difference between school trustees and teacher (which this is) in regard to his salary, &c., or any other matter connected with his duty, the same shall be referred to arbitration. This wrongful dismissal is a matter connected with the teacher's duty. The word "shall" is imperative, and I hold the teacher is bound to take that remedy. *Crisp* v. *Bunbury*, 8 Bing. 394. The trustees can legally contract with a teacher only in writing. This should be stated in the declaration, otherwise the plaintiff shews no *locus standi*, and if there be no seal the want of one should be excused; see section 76. The *indebitatus* count is not sustainable, as the moneys though under the trustees' direction are not in their hands, but in those of the secretary-treasurer. *Quin* v *School Trustees*, 7 U. C. Q. B. 130, 138.

In my opinion the demurrer should be allowed with costs. The plaintiff to have leave to amend, as he shall be advised.

Demurrer allowed.

THE SCHOOL TRUSTEES FOR THE PROTESTANT SCHOOL DISTRICT OF THE CITY OF WINNIPEG v. CANADIAN PACIFIC RAILWAY COMPANY.

Demurrer. — School taxes. — Assessment. — Collection. — Construction of Statutes imposing taxation.

Held, Upon demurrer, 1. The rule that upon the argument of a demurrer, only the pleadings can be looked at, does not apply where statutes which affect the question raised, have to be considered.

2. The power of taxation must be expressly conferred, it cannot be given by implication.

3. There is no power given in the school Acts to a board of school trustees in a city or town, to assess, levy or collect a tax or school rate, except that given to levy a small rate upon the parents or guardians of the children attending school.

In this action the plaintiffs sought to recover from the defendants certain moneys, arrears of taxes, for school purposes for the years 1883 and 1884.

The first count in the declaration was as follows:—For that a tax or assessment for school purposes amounting to $1,500, was duly assessed by the plaintiffs, against the defendants, for the year of our Lord 1883, of which the defendants had due notice, yet the defendants, although said sum had been duly demanded of them, refused, and neglected to pay the same, whereby an action accrued to the plaintiffs to recover the sum so assessed against the defendants as aforesaid with interest thereon, as a debt due to the plaintiffs. The second count was the same, except that the amount claimed was $3,500, and it was claimed for the year 1884.

To this declaration the defendants demurred, and the principal ground argued was, the right of the plaintiffs to assess and collect moneys for school purposes. It was contended that if the plaintiffs claimed to have made the assessment under the statute, they were not by statute given any power to assess,—if they claimed to have done so under any other authority or power, it should have been set out.

J. A. M. Aikins, Q. C., for defendants in support of the demurrer.

A. Monkman for plaintiffs *contra.*

[*21st March, 1885.*]

TAYLOR, J.—The rule that upon the argument of a demurrer only the pleadings can be looked at, does not apply where statutes which affect the question raised, have to be considered. This was so decided in *Kiely* v. *Kiely*, 3 Ont. App. R. 438, and on the argument the provisions of the School Acts were discussed by the learned counsel on both sides.

I have, since the argument, perused again and again, the School Act, and the various statutes amending or altering it, and find them in a very confused and unsatisfactory state. I have also examined two Manuals of School Law issued in 1883 and 1884, referred to, and handed to me by counsel. These, however, only make the confusion greater. They are said to be "Printed by authority," but in them, different sections of the School Acts are grouped together under general headings, to sanction which I can find nothing in the Acts as they stand in the statute book. The Manitoba School Act as it stood in the Con. Stat. Man., c. 62, after providing for the election of school trustees, and the holding of annual school meetings, provided in the 27th section that, "At any annual school meeting it shall be the duty of the electors to decide upon the amount of money to be raised in their school district for common school purposes to supplement the government grant for the year; and such sum shall in every case be raised by assessment on real and personal property within the school district." The 29th section said that "corporations situated in a locality where different school districts are established, and persons who are neither Protestants nor Catholics, shall be assessed only by the trustees of the school district of the majority," provision being then made for payment of a proportion of such assessment to the trustees of the school district of the minority.

The 52nd section declared that boards of trustees in cities and towns should have power among other things, to "levy at their discretion any school rates upon the parents or guardians of children attending the schools of the town or city," not exceeding certain specified amounts, "and to employ the same means of collecting such rates, as by the city collector are possessed for the collection of property tax."

The next section, the 53rd, provided that, "In case the board of school trustees of any city or town deem it advisable so to do, they may make out an estimate of the sum required in any year for educational purposes, and on or before the first day of March in each and every year they shall provide the clerk of the city or town with such estimate accompanied with a list of the names of the persons liable to be assessed for the support of the public school, or schools, of which the board applying are trustees, and it shall be the duty of the council of such city or town to levy and collect the amount demanded, with the corporation taxes and to pay over the same to the board of school trustees when collected, or the council may, from time to time, advance to any board of school trustees within their municipality any sum or sums which they may think proper, pending the collection of the school taxes: provided that nothing in this Act shall prevent the boards of school trustees from levying and collecting the school rates and taxes themselves if they shall think proper so to do." Then the 57th section provided that, the trustees shall appoint as secretary-treasurer one of their own number, or some other competent person, whose duties shall include, "The collecting, receiving and accounting for, of all school moneys, whether from the government or otherwise." The 59th section provided for the secretary-treasurer receiving from the assessors the assessment roll and notifying each person whose name appears upon the roll, of the amount for which he is assessed. A subsection of that 59th section says, that "the secretary-treasurer shall, within one month after receiving the assessment roll from the assessors, lay the same before the board of trustees, and after the said board have struck the rate, he shall receive the roll from them for the purpose of collection." In incorporated cities and towns the board may, under the 62nd section, appoint one of their number, or some other person secretary-treasurer, and may by by-law impose additional duties.

The 70th section constitutes the school trustees a board of revision for hearing and deciding any complaints that may be made against any assessment.

The 72nd section provides for the trustees appointing assessors and the 74th section for their appointing a collector of school taxes.

In 1881 this Act was repealed by the 44 Vic. c. 4, which made numerous alterations. The sections which provide for the

holding of annual school meetings make no mention of the school meeting deciding upon the amount to be raised for school purposes, as the 27th section of the Act in the Con. Stat. Man. did, but, on the contrary, provides in the 25th section that it shall be the duty of the boards of trustees of all school districts, the whole territory of which is comprised within the limits of a single municipality, from time to time to prepare and lay before the municipal council, an estimate of such sums as may be required for school purposes, during the current school year. The section then goes on, that this estimate shall be laid before the council by a certain day, and that the council, employing their own lawful authority, shall forthwith levy and collect.

Then the 28th section is the same as the 29th in the Con. Stat. Man., except that instead of the words used being that corporations "shall be assessed only by the trustees of the school district of the majority," the words are, "shall be assessed only for the school district of the majority." The 50th, 55th, 57th and 60th sections of the Act of 1881 correspond exactly with the 52nd, 57th, 59th and 62nd sections of the Act in the Con. Stat. Man. The section constituting the board a court of revision stands in the Act of 1881 as the 68th section.

The 51st section of the Act of 1881 is the same as the 53rd section of the Con. Stat. Man. with two exceptions. The time for sending the estimate to the council is made the first of September, and this again has by the 47 Vic. c. 37, s. 16, been changed to the first of May. The other and most important exception is, that the proviso in the Con. Stat. Man. "provided that nothing in this Act shall prevent the boards of school trustees from levying and collecting the school rates and taxes themselves, if they shall think proper so to do," has been entirely left out. Other Acts, the 46 & 47 Vic. c. 46, and 47 Vic. c. 54, make changes in the School Act, but none of them are, so far as I can see, material to the question now at issue.

The whole tendency of the amendments seems to be to take from the boards of school trustees, in organized municipalities, the power of levying taxes, and to require them to resort to the council of the municipality for that purpose.

It is true that the 51st section of the Act now in force only says that an estimate is to be made out and sent the council, "if the board of trustees deem it advisable so to do," but prac-

tically the Legislature has given them Hobson's choice in the matter. If they do not deem it advisable so to do, the statutes do not, so far as I can find, confer upon them any power to assess, levy, or collect taxes themselves, and they must go without a revenue. No doubt there are sections left standing as to the secretary-treasurer obtaining the assessment rolls, the board being a court of revision, and the appointment of collectors, which are wholly out of place, unless the trustees were intended to have more extended powers, and these provisions are not limited by the Act to the cases of school boards in unorganized municipalities. But the power of taxation must be expressly conferred, it cannot be given by implication. It is said in *Cooley on Constitutional Limitations*, at p. 641, "It is essential to valid taxation that the taxing officers be able to show legislative authority for the burden they assume to impose in every instance."

In *Partington* v. *Attorney-General*, L. R. 4 H. L. at p. 122, Lord Cairns thus expressed himself, "If there is admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

So Baron Parke in *Re Micklethwait*, 11 Exch. 456, said, "It is a well established rule that the subject is not to be taxed without clear words for that purpose."

The same opinion was expressed by C. J. Wilde in *Daines* v. *Heath*, 3 C. B. 941, "A statute imposing a tax upon the subject should always receive a strict interpretation, and should not be allowed to operate as a charge, unless the words are plain and unambiguous." As then I cannot find in the School Acts any power given to a board of school trustees in a city or town, to assess, levy, or collect a tax or school rate, except that given to levy a small rate upon the parents or guardians of children attending school, under which the present demand of the plaintiffs cannot fall, I must give judgment for the defendants upon their demurrer with costs.

The plaintiffs do not allege any specific authority to tax, and any they have must be derived from the statute, and none can be found there.

REGINA v. McKENZIE.

Commitment.—Two offences in same charge.

The charge against the prisoner, who was brought up on a *habeas corpus*, was "for keeping a bawdy house for the resort of prostitutes in the City of Winnipeg." "Keeping a bawdy house" is in itself a substantive offence, so is "keeping a house for the resort of prostitutes."

Held, nevertheless, that there was but one offence charged, and that the commitment was good.

H. J. Clarke, Q.C., appeared for the prisoner, and contended that the charge as laid contained two offences: one for keeping a bawdy house, and another for keeping a house for the resort of prostitutes.

L. W. Coutlee for the Crown.

[*24th March, 1885.*]

WALLBRIDGE, C.J.—To keep a house for the resort of prostitutes is an offence, does it change it into two offences by adding the word "bawdy." If the word "house" had been repeated a second time then two offences would have been charged. The Act makes it an offence to keep a house for the resort of prostitutes. It is contended because the house in the commitment is called a bawdy house that there is of necessity two offences in the same commitment. To keep any house for the resort of prostitutes is an offence, and to call that house a bawdy house does not render keeping it less a crime.

In my opinion there is but one offence charged in the commitment. The commitment is good, and prisoner stands committed according to the magistrate's commitment.

MERCER v. FONSECA.

(IN EQUITY.)

Commission.—Objections to leading questions.

Leading questions appearing in a foreign commission may be objected to at the trial, although counsel appeared upon the execution of the commission and made no objection.

At the hearing of the cause the plaintiff put in evidence taken upon commission. Several questions were objected to as leading questions. All parties had been represented at the execution of the commission, and the questions had not been objected to at that time.

J. S. Ewart, Q. C., Patterson and *Baker*, for plaintiff.

F. Beverley Robertson for defendant Schultz.

D. Glass and *Chester Glass* for defendant Fonseca.

J. A. M. Aikins, Q. C. for the Attorney-General.

The following authorities were cited:—*Hutchinson* v. *Bernard*, 2 Moo. & R. 1; *Small* v. *Nairne*, 13 Q. B. 840; *Robinson* v. *Davies*, L. R. 5 Q. B., Div. 26.

WALLBRIDGE, C. J.—My own impression was, that if the questions were not objected to upon the execution of a commission, counsel being present, no objection could be taken at the trial. The authorities, however, seem to be the other way; and I will disallow the questions and the answers must not be read.

WATEROUS ENGINE WORKS CO. v. HENRY.

Fixtures.—Hire and sale receipt.—Misrepresentations.

McD. & McP. ordered from plaintiffs certain planing mill machinery, at an agreed price, part of which was paid down, and notes were given for the balance. The agreement provided that notwithstanding the payment, and giving notes, the property in the machinery should not pass to McD. & McP., but should remain in the plaintiffs until payment in full had been made. The machinery was placed in a building which was then used as a planing mill.

Afterwards McD. & McP. mortgaged to the defendants the land upon which the mill stood.

Afterwards McD. & McP. mortgaged the same land to the plaintiffs to secure the balance then remaining due to them. The parcels, after describing the land, specified the machinery in detail, and concluded, "which are attached to the freehold and are to be considered as fixtures and not as chattels." The plaintiffs took this mortgage upon the representation of McD. & McP., that there were no encumbrances upon the property, and it was not intended by the plaintiffs to give up their first claim to the machinery.

Held. 1. That as between the plaintiffs and McD. & McP. the machinery remained chattels, such being the intention expressed in their agreement, and the declaration to the contrary in the mortgage was confined to the purposes of that mortagage, and in any event, was not binding by means of the misrepresentation.

2. That the defendants' mortgage was subject to the plaintiffs' agreement and that the defendants could not avail themselves of the declaration in the plaintiffs' mortgage.

3. The question whether articles are fixtures or not depends entirely upon intention.

4. The intention, object and purpose for which articles for the purpose of trade or manufacture, are put up by the owner of the inheritance, is the true criterion by which to determine whether such articles become realty or not.

J. S. Ewart, Q. C., and *L. G. McPhillips* for plaintiffs.

F. Beverley Robertson and *Colin H. Campbell* for defendants.

At the original hearing, a verdict was entered for the plaintiffs when the following judgment was delivered by—

WALLBRIDGE, C. J.—The facts I find to be as follows:—On the 15th of February, 1883, John McDougall and Finlay McPherson, ordered from the plaintiffs a quantity of machinery, part of that now in litigation, and the plaintiffs agreed to supply it, and although the plaintiffs are styled vendors in the agreement, and McDougall & McPherson are styled purchasers, I do not find words importing a sale. It is in words an agreement on the one side, to supply this machinery, and on the other side an agreement to pay the price agreed on, $2,590, of which $865 was paid down. This agreement contains a clause, which provides that, notwithstanding the payment and giving notes, the property in the engine, boiler, and machinery, should not pass to McDougall & McPherson, but should remain in the plaintiffs. It is in the form of that usually called a hire receipt. It is under seal and signed by both McDougall & McPherson. On the 27th of July, 1883, McDougall & McPherson mortgaged the land in

the pleas mentioned to the defendants, for the sum of $4,244.32 payable within two months, and in this mortgage it is declared that part of the land is already mortgaged to Arthur R. Boswell and Charles Richie, for $2,900, by a mortgage of the 3rd of March, 1883. The mortgage to the defendants is registered the 25th of July, 1883. No mention is made in this mortgage of the machinery, and if it pass under that mortgage it must so pass as part of the freehold. On the 27th of July, 1883, McDougall & McPherson executed a mortgage on the same land, to the plaintiffs, to secure them in the payment of the money due under the hire receipt mentioned; this mortgage, besides granting the land and describing the parcels, stated as follows:—"Including a one twenty-five horse power engine and thirty-five horse power boiler, one number two Eureka band saw, one Frank and Company planer and matcher, one number two moulder, shafting, pulleys, boxes, and belting, which are attached to the freehold, and are to be considered as fixtures and not as chattels." Proviso to be void on payment of $1,944.90, as follows,—$648.25, on the 3rd of November, 1883; $648.25 on the 3rd of May, 1884; and $648.20 on the 3rd of November, 1884, with interest from the 3rd of May, 1883, on all unpaid principal. The mortgagors covenant for payment of the money, and that in default of payment the mortgagees shall have quiet possession of the said lands free from all encumbrance. This constitutes the whole paper title on both sides.

For the defence it is contended, that the property now in question are fixtures, and pass to the defendants by the mortgage to them, or by the words of the mortgage from McDougall & McPherson to the plaintiffs, are so made fixtures as to become the defendants' property, having become fixtures after the mortgage to them. It is clear to me that such was not the intention of McDougall & McPherson, and if such be held to be the effect of the mortgage to the plaintiffs, it must be so entirely by operation of law, and in the absence of intention, either of the mortgagors, or of the plaintiffs in this suit.

The question whether articles of this description are fixtures or not depends entirely upon the question of intention, and whatever goes to show that intention is evidence. The intention, object and purpose for which articles for the purpose of trade or manufacture are put up by the owner of the inheritance, is the

true criterion by which to determine whether such articles become realty or not. *McDonald* v. *Weeks*, 8 Gr. 297; *Schreiber* v. *Malcolm*, 8 Gr. 433. These cases have been followed down to the last case, *Dickson* v. *Hunter*, 29 Gr. 73, in which the law is again reviewed.

That hire receipts are valid, and do not pass the property to the vendee, is held in England, *Exparte Crawcour, in re Robertson*, L. R. 9 Ch. Div. 419, and in Ontario in *Nordheimer* v. *Robinson*, 2 Ont. App. R. 305.

The property remained therefore in the plaintiffs, until after McDougall & McPherson had given the mortgage to the defendants. The defendants did not, by virtue of their mortgage, when it was executed, gain a title to the property now in question. It was then the plaintiffs by virtue of the hire receipt. The mortgage by McDougall & McPherson to the defendants bears date the 24th of July, 1883, and says nothing of the property now in litigation, and the plaintiffs' witness, Erb, states that he only took the mortgage to the plaintiffs on the lands, containing the words above quoted, upon the assurance that these articles had been excepted from the effect of the mortgage to the defendants. This legal effect may have been in the mind of Mr. McPherson when he so stated it to Mr. Erb, because no mention of them is made in the mortgage to the defendants. The real question in the case is, did that acceptance of a mortgage made by McDougall & McPherson to the plaintiffs so unequivocally make the property fixtures that the plaintiff has lost them. It is certain the plaintiffs did not so intend, for the plaintiffs expressly provide for the continuance of this security by the insertion of the words, in inverted commas in the mort gage to the plaintiffs, of 27th July, 1883. If the plaintiff has lost them, it must be not only without intention so to suffer, but contrary to expressed intention.

Mr. Erb says, that except for the express declaration of Mr. McPherson, that this property had been excepted from the mortgage to the defendants, he would not have taken the mortgage to the plaintiffs, and Mr. McPherson may have been fully of that opinion that they had not passed to the defendants, knowing of the hire receipt, and also of the absence of any provision in the mortgage to the defendants. Besides, I hold it was not in the power of McDougall & McPherson to convert these articles into

realty, without the consent of the plaintiffs. *Meux* v. *Jacobs*, L. R. 7 H. L. 481, does not help the defendants. That case proceeds on the question of intention. The plaintiffs' hire receipt is under the hands and seals of both McDougall & McPherson. The plaintiffs, when they took the mortgage, did not give the hire receipt up to them. There is no privity between plaintiffs and defendants, either of estate or contract, and I cannot see how the defendants can avail themselves of what at best is a mistake in the plaintiffs, through their clerk, Mr. Erb, committed, as he says, through a misrepresentation, though made unintentionally by McPherson.

McDougall & McPherson not being parties to the suit, I do not see how the mortgage can be reformed. I find, however, that the mortgage to the plaintiffs containing the clause treating the articles as fixtures, was inserted by mistake, and without the plaintiffs' knowledge and through the misrepresentation of McPherson.

On the argument before the Full Court in term, the following judgments were delivered:—

[*31st October, 1884.*]

TAYLOR, J.—The property in the machinery sold by the plaintiffs to McDougall & McPherson did not pass to the purchasers at the time of the sale, the contract upon which it was sold expressly providing that it should not pass until paid for. At the time when the defendants took their mortgage upon the land on which the mill stood, wherein the machinery had been placed, it had not been paid for, and it was therefore under the terms of the contract still the property of the plaintiffs.

Had the plaintiffs taken a chattel mortgage upon the machinery and then the defendants taken a mortgage upon the land, the right of the plaintiffs as chattel mortgagees would not thereby have been prejudiced. This does not seem to depend at all upon the filing of the chattel mortgage being notice to the mortgagee taking a subsequent mortgage upon the land, but entirely upon the circumstance that the mortgagor had thereby treated them as not annexed or as severed. Here the position of the plaintiffs seems to me quite as strong as if they had been chatte mortgagees. The contract was one which did not, as the law then stood, require any filing or registration to preserve the right or priority of the plaintiffs.

The fact that the plaintiffs afterwards took from McDougall & McPherson a mortgage subsequent to that of the defendants, in which this machinery was described as fixtures and attached to the freehold cannot, in my opinion, enure to the benefit of the defendants. The plaintiffs and the mortgagors might agree that as between themselves, they should be considered as fixtures, without thereby making them so as to all the world.

On the best consideration I have been able to give this case, I am satisfied that the learned Chief Justice came to a correct conclusion, and that his verdict should stand.

SMITH, J.—The judgment of His Lordship the Chief Justice at the trial fully discloses the facts and the grounds on which he found a verdict for the plaintiffs. This verdict is now moved against, and the court is asked to nonsuit the plaintiffs or enter a verdict for the defendants.

It was urged, in the first place, that each machine, as it became attached to the building, lost its chattel character and became a fixture for the benefit of the freehold. This, it was contended, took place, in respect of the goods of the plaintiffs. Under the general rule expressed in the maxim, "*Quicquid plantatur solo solo cedit*," this is the case. If there is no explanation at variance with that inference, the rule prevails. Evidence, however, can be received that such was not the intention, and, if satisfactory, it displaces the presumption expressed in the maxim. *Wood* v. *Hewett*, 8 Q. B., 913. *Lancaster* v. *Eve*, 5 C. B. N. S. 717. In the first case, a fender used in connection with a mill, to confine and let out water, had been fitted into solid masonry for 43 years. It is true it could be removed without injury to the freehold, but during all these years it had been used for the benefit of the owner of the land, and apparently considered his. To a large extent the judgment turns upon the facility of removal; but the general rule is referred to.

Lord Denman, C. J. says: "The question is, whether because the fender in this case had been placed on the defendant's soil, it became his property as a necessary consequence of its position. I am of opinion that such a consequence never follows of necessity where the chattel is *separable*." He does not here speak of its being separable, without damage to the freehold; but seems to refer to the suggestion in the argument of a tree planted, or a

wall built on the land of another, distinguishing them from chattels attached, but capable of removal without destroying their usefulness or character. He concludes his judgment in the following words:—"The rights in such a case must always be subject to explanation by evidence." In the same case, Patteson J. gives this short judgment propounding the same doctrine: "This question does not turn upon any general doctrine of law, but upon the evidence in the case. The general rule respecting annexations to the freehold is always open to variation by agreement of parties; and if a chattel of this kind is put up so that the owner can remove it, I do not see why it should necessarily become part of the freehold, or why it should not be removable when the owner thinks fit, if it appears to have been so agreed."

In *Lancaster* v. *Eve*, this case was approved and followed. The facts in this case were, that the plaintiffs, who owned a wharf on the River Thames, had for twenty years used a pile driven into the bed of the river adjoining their wharf. The defendants displaced this pile and for this displacement the action was brought, and a verdict rendered for the plaintiff, which the Court refused to disturb, holding that they would presume an easement in favor of the plaintiff to have his pile there. The pile was driven solidly into the bed of the river and firmly attached to the freehold. Nor is the case of *Rose* v. *Hope*, 22 U. C. C. P. p. 482, less favorable to the plaintiff. There, the owner of the land gave a chattel mortgage on his fixtures. He then mortgaged the land and afterwards sold land and fixtures to a purchaser who gave a new chattel mortgage, which the Court held was a continuation of the former. The chattel mortgagee was held entitled to the fixtures as against the mortgagee of the real estate. It is to be observed that the chattels were originally fixtures, that, without interfering with their character as such, they were mortgaged as chattels, that the property passed to the mortgagee, conferring on him the right to enter and remove. The doctrine of the two English cases above cited is in fact extended by this case, which recognizes, apparently without qualification, the right of the parties to determine whether chattels shall be fixtures or not by simple agreement.

On the law thus laid down, it is clear the plaintiffs and McPherson had a right to make the agreement contained in the hire receipt, and that it governed the character of the articles

embraced in it. If they had this right, the defendants as subsequent mortgagees, cannot dispute it. They took the land under their mortgage but not the chattels, because they were chattels at the time of its execution. But they urge that, by the subsequent mortgage to the plaintiffs, the articles lost their original character, and became fixtures. This was put partly on the ground of estoppel and partly of intention. There is no privity between the plaintiffs and the defendant, nor was the defendants' position at all changed by this subsequent mortgage which only covered the equity of redemption. Was there then an intention on the part of the plaintiffs and McPherson to make the articles in dispute fixtures? It is said this can be gathered from the words inserted in the mortgage, immediately after the description of the machinery. These are, "which are attached to the freehold, and are to be considered as fixtures, and not as chattels." They were attached to the freehold. The first part of the sentence, therefore, merely states a fact. "Are to be considered." These are not words of grant, or operative words of any kind having power to alter the nature of the articles. Between whom and for what purpose were they to be so considered? Clearly between the parties to the instrument, and for the purposes it expresses alone.

Let us, however, assume that these words do express such an intention, as would render the articles fixtures for all purposes, the question rises how they came to be inserted. The plaintiffs show they were employed under a misapprehension of the true facts, caused by a misrepresentation of McPherson, who alleged that the articles were specially excepted from the defendants' mortgage. Unless, therefore, the defendants can safely contend that the result arrived at under a mistake of facts, is the result intended to be arrived at, and that which the plaintiffs must be bound by, they can hardly call this doctrine to their aid.

In fact, however, the parties were simply dealing with an equitable interest; and, considering the words just as they stand, can any one doubt that they should be confined to the equitable freehold they were dealing with? Is it reasonable to suppose they intended to hand the property over to the defendants?

Again, the plaintiffs kept the hire receipt, which is under seal, and might well run concurrently with the mortgage. In effect the mortgage was taken with the view of obtaining the additional

security of the land and the right to pay off the defendants, and then either to sell the whole as a going concern, or take out the machinery and sell it separately as the plaintiffs might think most advantageous.

Further, in order to settle the question of intention, not only the words of the instrument must be looked at, but the whole transaction from first to last, and the defendants must be prepared to show on a survey of the whole case, that the plaintiffs intended to abandon their right to treat the articles in question as chattels. In this, in my opinion, they fail.

Rule discharged with costs.

MANITOBA ELECTRIC LIGHT AND POWER CO. v. THE MAYOR AND COUNCIL OF THE CITY OF WINNIPEG.

Dependent or independent Covenants.

C. agreed with the city of W. to provide electric lights for street lighting in W., and up to the expiration of six years to keep them lighted from darkness to daylight. In consideration thereof the city agreed to make monthly payments; that C. should have the sole right and privilege of lighting the streets, and that the city should not contract with any other person, for lighting the streets, during the said period.

Held. 1. That the agreements were dependent, and that if C. failed to perform his part of the agreement, and the city made a new contract, with other persons, he could not recover against the city.

2. Whether covenants are dependent, or independent, is determined by the intention of the parties and the application of common sense to each particular case.

The plaintiffs declared on an agreement made between P. V. Carroll and the defendants, which contract was averred to have been assigned by Carroll to the plaintiffs. By this agreement Carroll undertook for the consideration thereinafter mentioned to provide not less than thirteen electric lights for street lighting, in Winnipeg, and place the same upon posts, and up to the expira

tion of six years, to keep the lights lighted in a proper and becoming manner, from darkness to daylight, for which payments were to be made monthly on the certificate of the city engineer. The city agreed that Carroll should have the sole right and privilege of lighting the streets of the city by electricity or otherwise, and all rights appertaining thereto; that the city should not contract with any other person, or become bound in any way by which the rights of Carroll should be prejudicially interfered with, and alleged as a breach that the defendants granted such right to other persons and corporations, and refused to allow the plaintiffs to light the said streets. The plaintiffs also alleged that they were the assignees of Carroll, and that they did and performed all things proper and necessary to entitle them to bring this suit. The defendants pleaded, by setting out the agreement *verbatim*, and alleged that the plaintiffs did not faithfully, diligently and with despatch, provide the lights as in the agreement mentioned, but made default, and after commencing upon the said work, neglected and refused to light the said lights, and keep the same lighted as in the contract provided. To this plea the plaintiffs demurred, and assigned for cause, that the covenants were independent, and that the plaintiffs might recover upon the count set out in the declaration, although it might be true, that the defendants could by suit recover against the plaintiffs for the breach of any other covenant committed by the plaintiffs.

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

H. M. Howell and *E. M. Wood* for defendants.

[*25th October, 1884.*]

WALLBRIDGE, C. J., delivered the judgment of the Court. (*a*.)

The question presented to the Court for decision, is simply whether the covenant, the breach of which is complained of, is an independent covenant or not. In our opinion the covenants fall within that class of covenants which are known as mutual conditions to be performed at the same time, in which, if one party were ready and willing to perform his part, and the other neglected or refused to perform his, he who was ready and willing to perform his, may maintain an action for default in the other. The defendants allege as a reason for the breach of the condition

(*a*) Present, Wallbridge, C. J., Dubuc, Taylor, JJ.

complained of as committed by them, that the plaintiffs did not faithfully, diligently and with despatch provide the lights, but made default, and after commencing the work neglected and refused to light the lights, and to keep the same lighted, as in the contract provided. Are these covenants independent or are they mutual conditions to be performed at the same time?

The rule of construction to ascertain this point is this:—The Court are to consider the sense and meaning of the parties, and, however transposed the covenants may be in the deeds, their precedency must depend on the order of time, in which the intent of the transactions require performance. *Cutter* v. *Powell*, 2 Sm. L. C. 1; and in *Stavers* v. *Curling*, 3 Bing. N. C. 368, it is thus expressed:—"The rule having been established by a long series of decisions, that the question whether covenants are to be held dependent, or independent, of each other, is to be determined by the intention of the parties as it appears in the instrument, and by the application of common sense to each particular case, to which intention when once discovered all technical forms of expression must give way. It appears to us that the two acts, the permission of the city, and their refraining to permit others to light the streets must, in the very nature of things, be concurrent with the plaintiffs themselves performing their contract, and lighting the streets themselves. The plea alleges that the plaintiffs did make default, and neglected and refused to light the streets, and charges that neglect and refusal as the reason for their permitting others to do it. This, in our opinion, is a good answer to the plaintiffs' complaint, that the city had permitted others to light the streets. If this be not true, the plaintiffs could take issue upon that fact, and submit it for trial. In our opinion the demurrer should be overruled, with costs. If the plaintiffs desire to amend they can do so, by paying costs in ten days.

BURNHAM v. WALTON.

(IN APPEAL.)

Interpleader.—Costs.—Discretion of Judge.

Held. 1. In an interpleader issue, where each party succeeds as to part of the goods, there should be a division of costs, and the ratio of that division is for the discretion of the judge.

2. The Court has power to review the discretionary order of a judge, but does not exercise it, unless in a strong case, or where the discretion has been exercised on a wrong principle.

This was an appeal to the Full Court against a judge's order disposing of the question of costs, after the trial of an interpleader issue, between the claimant of goods seized under execution, and the execution creditors. The order disposing of the costs recited "That the execution creditors shall be barred as to the following goods, claimed by William Connor, namely:—A piano, piano stool, cover, large rocking chair, and two parlor chairs, and that the claim of William Connor be barred as to the remainder of the goods seized by the sheriff and claimed by him, that there be no costs to either the execution creditors or to the said William Connor, of the interpleader order or issue herein, or of this order." Against this order so disposing of the costs an appeal was made by the execution creditors.

J. S. Ewart, Q. C. and *A. E. McPhillips* for the claimant, the appellant.

W. E. Perdue and *P. A. Macdonald* for respondents,

[*9th March, 1885.*]

WALLBRIDGE, C. J., delivered the judgment of the Court (*a*). The Administration of Justice Act, Con. Stat. Man. c. 37, relative to sheriff's interpleader cases in section 57 enacts as follows: "The costs of all such proceedings shall be in the discretion of the Court of Queen's Bench, or a judge thereof."

We have no intimation, in any way, as to what goods Connor was barred, or of what proportion those goods bear to the goods in respect of which the execution creditors were barred.

The costs of such proceedings are, by the statute above cited, in the discretion of the judge. Is this case such as that the Court will review the discretion which the judge has exercised?

(*a*) Present—Wallbridge, C. J., Dubuc, Killam, JJ.

The Court has the power to reverse discretionary orders of a judge, but does not exercise it, unless in a strong case, or when the discretion has been exercised on a wrong principle.

In *Golding* v. *Wharton*, L. R. 1 Q. B. Div. 374, the Court says:—"On a question which depends on the discretion of the judge the Court of Appeal does not in general interfere, not that it has not complete jurisdiction, nor that the decision of the court below would not be overruled where serious injustice would result from the decision, but as a general rule the Court declines to interfere."

We cannot say that serious or any injustice results from the disposition made in this order. Such a result could only be ascertained from a full disclosure of facts, with which we have not been furnished.

In *Watson* v. *Rodwell* L. R. 3 Ch. Div. 380, it is clearly laid down, "except in extreme cases, or when the judge has acted on a wrong principle, the Court should not interfere with his discretion."

And in *Huggons* v. *Tweed*, L. R. 10 Ch. Div. 359, Jessel, M. R., says: "The Court of Appeal in a strong case would interfere with the exercise of the discretion, but it ought only to do so in a strong case, when injustice is likely to be done, if it does not interfere."

When each party succeeds as to part of the goods, the costs are not given wholly to the claimant, or to the opposite party. The only principle deducible from the cases is, that there should be a division of costs, and the ratio of that division is for the discretion of the judge as above explained. *Dempsey* v. *Caspar*, 1 Ont. Pr. R. 134.

In this case the judge has exercised his discretion as to the principle by which the costs should be apportioned, and I cannot say that he is wrong. He had before him the evidence in the cause, a full opportunity of being informed what portion each claimed, and the grounds for making the claim. I can see no reason for saying he has acted on a wrong principle, or that a serious or any injustice will result from his decision. This matter was discussed in *Segsworth* v. *Meriden Silver Plating Co.*, 3 Ont. R. 413. In my opinion, the appeal for the reasons above given, should be dismissed with costs.

STEWART v. TURPIN.

(IN EQUITY.)

Motions in Court and in Chambers.—Practice.

Held, An application to take a bill *pro confesso* for breach of an order to produce, must be made in court.

The plaintiff applied for an order in Equity, under general order 123, to take the bill *pro confesso* against one of the defendants, for failure to obey an order to produce. The motion was made in court, and it was objected that it should have been made in chambers.

G. Patterson for plaintiff.

G. G. Mills for defendant.

[*8th April, 1885.*]

KILLAM, J.—By the latter part of general order 123 "the party who desires the examination, or production, in addition to any other remedy to which he may be entitled, may apply to the Court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances."

And under general order 124, "The Court, upon such application, may if it thinks fit, order either that the bill be taken *pro confesso* or that it be dismissed, as the case may be; or make such order as seems just."

Under the wording of these two orders by themselves, it appears that the application should be made in court.

Certain general orders, such as numbers 142, 259, 276, 279, 315, &c., provide for applications in various matters to "a judge," or to "the court or a judge," and in such cases it is to be supposed that the applications may be made in chambers. Others, such as numbers 85-90, 93, 94, 126, etc., assign subjects specifically to the jurisdiction of the referee in chambers. Others again, as numbers 178, 288, 365, 367, etc., provide merely that certain business be transacted in chambers

General order 196 provides "That the referee in chambers is hereby empowered to do any such thing and to transact any such business and to exercise such authority and jurisdiction in respect of the same as, by virtue of any statute or custom, or by the practice of the said court, is now transacted by a judge

of the court sitting in chambers, except," etc., (certain excepted matters being enumerated.)

This order simply follows, with slight changes in words, the power given the Court by the statute 44 Vic., c. 16, s. 3, to give jurisdiction to the referee, adding a few more exceptions. And under it the referee in chambers would have jurisdiction in such matters as by different orders and statutes may come before "a judge," or "the court or a judge," or be entertained "in chambers," (saving such of them as come within the excepted subjects), as well as those matters which by particular orders may be brought before the referee in chambers.

A judge may hear in chambers applications in matters which, by specific orders and statutes, may come before "a judge," or "the court or a judge," or be entertained "in chambers," and by general order 181, "The following business *shall* be disposed of in chambers, together with such other matters as the court, from time to time, thinks may be more conveniently disposed of there, than in full court, viz.: That designated in general order 196 as being withdrawn from the jurisdiction of the referee in chambers."

The matter in question is not one of those designated in general order 196 as being withdrawn from the jurisdiction of the referee in chambers; it is not one anywhere mentioned to be entertained in chambers, or by "a judge," or by "the court or a judge," or by the referee in chambers.

I cannot see that any "custom or practice" can have grown up here, within the meaning of general arder 196, which could warrant such an application except under general order 123 "to the court." I think, therefore, that the motion could not be made in chambers, either before a judge or before the referee.

Reference has been made to the Ontario practice, but this cannot guide us, as there, many classes of subjects are mentioned in the orders as matters to be taken up in chambers, which are not so mentioned in our orders.

FERGUSON v. CHAMBRE.

(IN CHAMBERS.)

Examination of judgment debtor.—Discretion of judge.

Held. 1. An order to examine a judgment debtor may, in the discretion of the judge, be refused.

2. An order to examine a judgment debtor will not be made *ex parte*.

P. Ferguson, plaintiff, appeared in person.

J. W. H. Wilson for defendant.

[*27th December, 1884.*]

TAYLOR, J.—The plaintiff on the 30th of September, 1884, recovered a judgment against the defendant for $3,159.66, the amount, with interest and costs, of a loan made to the defendant on the 1st of June preceding, payable in three months, with interest at eighteen per cent. per annum. At the time of making the loan the plaintiff had assigned to him, by way of collateral security, two mortgages for $7,000 and $2,000, respectively. Since the recovery of the judgment and the placing of execution in the sheriff's hands, the sheriff has seized two mortgages belonging to the defendant and securing respectively $1,800 and $600. The plaintiff has also by means of a garnishing order attached three debts of $1,500, $2,000 and $2,800 due to the defendant. He now applies under Con. Stat. Man. c. 37, s. 43, as amended by 47 Vic. c. 17, for an order to examine the defendant as a judgment debtor. He states in affidavits which he has filed that the defendant has been making promises to pay the debt by means of a loan which he was effecting, but has failed to do so, and that such promises and statements were made for the purpose of gaining time and enabling the defendant to make away with property to his prejudice. This the defendant denies. He admits having spoken of a loan from which he hoped to pay the plaintiff, but says he was unable to carry it through, owing to the course adopted by the plaintiff in seizing some mortgages and garnishing the amounts due on others.

The mortgage for $7,000 assigned at the time of the original loan is subject to a prior mortgage for $4,000, and the plaintiff swears that neither the property on which it is secured, nor that

on which the $2,000 is secured would, at a sale, realize the amounts due. Against this, however, there are affidavits from disinterested persons who place the value of the property on which the $7,000 mortgage is, at from $10,000 to $12,000, and of that covered by the $2,000 mortgage at $6,000.

None of these mortgages are due for some time, but interest will be payable on some of them in March next.

If I have any discretion about granting or refusing the order, I do not feel inclined to grant it. It seems to me I have such a discretion. The statute, as amended, does not in absolute terms say that a judgment creditor shall be entitled to an order for the examination of the debtor. It only says, that he "may apply to said Court or a judge thereof for a rule or order that the judgment debtor shall be orally examined . . . . and the Court or judge may make such rule or order, &c." Then the judges have determined not to make such orders *ex parte* but only upon summons duly served. For what purpose is such a summons to be served? Surely that the debtor may have notice of the application, and an opportunity of showing cause against it. This is quite inconsistent with the plaintiff's contention that he is, under any circumstances, entitled to the order.

Looking at the amount of security held by the plaintiff, seized by the sheriff, or attached under the garnishing order, and all the circumstances disclosed in the affidavits, I think I should refuse the order. The costs of the application should be set off *pro tanto* against the debt due.

FERGUSON v. CHAMBRE.

(IN CHAMBERS.)

Proceedings at law and in equity. — Election. — Statutes. — Construction.

Plaintiff, after recovering judgment at law against defendant, placed *fi. fa.* goods and lands in the hands of the sheriff, and issued garnishing orders. Under the *fi. fa.* goods the sheriff seized certain mortgages. The plaintiff also registered the judgment against certain lands, and filed a bill for a sale. Upon an application, at law, to compel the plaintiff to elect between the proceedings at law and in equity,

Held. 1. The case was not within the provisions of the Con. Stat. Man., c. 37, s. 83.

2. There is no practice outside the statute applicable to the case. At most the question would be one of costs.

3. The statute can only apply to proceedings at law and in equity, against lands—and probably the same lands—not to proceedings at law against goods, and in equity against lands. *Alloway* v. *Little*, 1 Man. L. R. 316 considered.

4. In any case the application was premature, the answer in equity not having been filed.

The defendant applied in chambers for an order calling upon the plaintiff to elect between proceeding at law, and in equity, upon a judgment against defendant.

The plaintiff had issued writs of *fieri facias* against both goods and lands of defendant, upon his judgment, and placed them in the hands of the Sheriff of the Eastern Judicial District, and under the former he had caused the sheriff to seize certain mortgage deeds of defendant. He had also issued garnishee attaching orders, attaching several debts due defendant. He had also filed a bill in equity upon the judgment asking a sale thereunder of certain lands, formerly held by defendant, and conveyed to others who were also parties to the suit in equity. No proceedings had been taken under the *fi. fa.* lands, save placing it in the sheriff's hands. It appeared also that the judgment was recovered against the defendant for money borrowed by him from the plaintiff, for which he had transferred to the plaintiff certain mortgages, and that proceedings were being taken against the mortgagors by the plaintiff upon those mortgages, and that

additional securities had been given by those mortgagors to the plaintiff.

W. E. Perdue for plaintiff showed cause to a summons calling upon the plaintiff to elect beteen the proceedings at law, and in equity, upon the judgment obtained against the defendant.

J. W. H. Wilson for defendant supported the summons.

[*4th May, 1885.*]

KILLAM, J.—I fail to see what connection the proceedings against the original mortgagors, and the taking of other securities from them, have with this application. If the plaintiff has obtained satisfaction of his claim, or done anything, whereby the defendant is released, this can be set up in answer to the bill in equity, and by application to stay the proceedings at law or enter satisfaction. No such case, however, is made, and this is not an application upon any such ground. The only possible reason the defendant can have for setting up the proceedings against the mortgagors, is the hope, that thereby the court or a judge may be influenced by a feeling of sympathy for the defendant and the other parties, and be led to a decision upon other considerations than the strict rights of the parties. The bringing in of this extraneous matter is exceedingly improper. The only question for consideration is upon the right of the plaintiff to pursue his remedies at law against defendant upon the *fi. fa.* goods, and the attaching orders, and, at the same time, to proceed with his bill in equity against the lands referred to. This question must be viewed in two ways:—First, under the wording of the statute giving the right so to proceed in equity upon a judgment; and, secondly, under the principles upon which a party may be compelled by a court of equity to elect between proceedings at law, and in equity, in respect of the same subject matter.

Section 82 of the Administration of Justice Act, Con. Stat. Man., c. 37, provides for the issue of an execution against lands simultaneously with the issue of one against goods. Section 83 provides the method of procedure in selling lands under execution, and prescribes the nature of the estate or interest in lands that may be sold under execution, and then proceeds as follows: "and immediately upon any judgment being entered in the Queen's Bench a certificate or certificates of such judgment, in

such form as the prothonotary shall prescribe, and signed by him under the seal of the court, may be recorded, in any and all the registry offices for the registration divisions of this Province, and, from the time of the recording of the same, the said judgment shall bind and form a lien and charge on all the estate and interest aforesaid in the lands of the judgment defendant, in the several registration divisions in the registry offices of which such certificate is recorded, the same as though charged in writing by the defendant under his hand and seal; and after the recording of such certificate the judgment plaintiff may, if he shall elect to do so, forthwith proceed in equity upon the lien and charge thereby created."

Section 84 provides that, in all cases in which executions are issued against personal and real estate, the sheriff, or other officer, shall sell first, the personal property.

The statute plainly points to an election between a proceeding upon the lien created by the registered judgment, and some other course. The clause as to proceeding in equity must be considered to be added for the purpose of indicating this, as without it there would undoubtedly be a right to proceed in equity upon the lien created, under the previous provision by the registration. I do not think, however, that an election between proceeding upon the execution against goods and the registered judgment can be intended. The whole section has reference merely to proceedings against lands, and any election referred to therein can only be between two courses of proceeding against the lands of the debtor. The proviso in the 84th section does not appear to affect the matter, as it has reference only to proceedings under executions. It may seem unreasonable that a party should be prohibited from selling lands under execution, before he has exhausted the goods of the debtor, and yet at the same time be allowed to proceed against the lands in equity; but this is no more unreasonable than that certain lands should be exempt from sale under execution, but be subject at the same time to proceedings in equity upon a registered judgment, and yet it has been decided in *McLean* v. *Gillis*, 2 Man. L. R. 113, that such is the law. It is abundantly clear that a court cannot supply a provision which may appear to it necessary to prevent legislation from being inconsistent, but it is limited to the interpretation of the provisions inserted by the Legislature.

Nor does it appear that the defendant is entitled to the order he asks, upon the principles on which a court of equity acts, in compelling a party to elect between proceedings at law, and in equity. The judgment creditor, who has registered his judgment, is placed by the statute in the position of a mortgagee of the lands of the debtor within the registration division. It is a received principle that a mortgagee may pursue all his remedies at once. He is not put to an election. *Palmer* v. *Hendrie*, 27 Beav. 349; *Schoole* v. *Sall*, 1 Sch. & Lef. 176; *Booth* v. *Booth*, 2 Atk. 343. He may, under general order number 457, be deprived of the costs of one suit, if he be considered to be unnecessarily taking proceedings both at law, and in equity. There appears to be less reason to put a judgment creditor to an election in a case of this kind, when it is considered that it is not a question as to carrying on two separate suits or actions, but only as to issuing executions and other process on the judgment, while proceeding in equity thereon. By the practice in equity we issue decrees for foreclosure, or sale of lands under mortgages, and include therein orders for immediate payment by the mortgagor, upon which executions can issue, and be enforced, at the same time that the proceedings under the decree for foreclosure, or sale, are being carried on.

It does not seem any more objectionable to allow executions to be issued, directly upon the judgment, and enforced while a suit is proceeding in equity, upon the lien of the judgment creditor. It is true, that in the bill in this case, the plaintiff prays for a decree for payment by the judgment debtor of the amount of the judgment. This seems unreasonable, and unnecessary, as such a clause in the decree would amount only to another judgment, and in several instances in granting decrees upon such bills, I have refused to add such a clause, unless some good reason could be given for it. Upon consideration, however, I do not see that such a decree could well be refused, if insisted upon. The plaintiff would have a right to sue at law upon his judgment debt, and he would be entitled to a fresh judgment thereon, the court having power only to refuse him costs. There might be a case for putting the plaintiff to an election, if he were suing at law upon his judgment, while bringing such a suit in equity, though upon the practice in regard to mortgages, even this seems hardly probable.

The conclusion to which I have come is, that there is nothing in the principles or the practice of a court of equity, to entitle the defendant to the order he asks, but that any election can be considered as called for only by virtue of the statute. I think that the election there called for can only be between proceedings under the executions against lands and by bill in equity. It may even yet have to be considered whether a party can be called upon to elect unless both proceeding are against the same lands, and distinctions may arise, according as the lands taken in execution lie in the same registration division as that in which the judgment is registered, or a different one. I do not regard the proceedings under the attaching orders as of importance, as it is a constant practice to issue such orders while proceeding upon executions issued on a judgment in the same cause, and it has been held that such an order may be issued upon, and it might, therefore, at any time be issued upon, a decree in equity in a mortgage suit, in which payment by the mortgagor is ordered. *Cameron* v. *McIlroy*, 1 Man. L. R. 198.

It has been held in *Alloway* v. *Little*, cited in the judgment in *Arnold* v. *McLaren*, 1 Man. L. R. 316, that the mere issue of writs of execution is not inconsistent with proceedings in equity upon the registered judgment, so that the mere issue and delivery to the sheriff of the execution against lands is no ground for the application.

This decision may seem at first sight to be inconsistent with that of my brother Taylor in the case mentioned, as he there says:—"The bill does not show that proceedings have been taken under the writs, and also to enforce the lien. If plaintiff doing both, the court would stay one or the other." I do not, however, so regard it, as he had not in that case to consider the distinction I have made between proceedings under the executions against goods, and that against lands, or what proceedings under the writs should be deemed inconsistent with the proceedings in equity, as there no proceedings had been taken at all upon the writs.

Nor do I think the judgment in *Arnold* v. *McLaren* inconsistent with the conclusion at which I have arrived, that upon the principles and practice in equity, apart from the statute, the plaintiff is not to be compelled to elect between proceedings at law upon the judgment, and the proceedings in equity. The

decision there is only that, where the plaintiff is put to his election, the method of compelling him to elect is under the practice in equity by which a plaintiff can be forced to elect between an action at law, and a suit in equity upon the same subject matter.

There is another answer to the present application. Under the practice in equity, an order directing the plaintiff to elect between proceedings at law, and in equity, can only be obtained after the defendant has filed his answer in the suit in equity. *Fisher* v. *Mee*, 3 Mer. 45; *Jones* v. *Earl of Strafford*, 3 P. W. 90; *Browne* v. *Poyntz*, 3 Mad. 24; *Coupland* v. *Bradock*, 5 Mad. 14; *Vaughan* v. *Welsh*, Mos. 210; *Carwick* v. *Young*, 2 Swanst 243; *Mocher* v. *Reed*, 1 Ball & B. 319. Here, the plaintiff applies in the common law suit, claiming that there is only the one court, and that it matters not in which cause the proceedings are entitled. There is an objection to this course, as the order under the practice in equity is obtained on praecipe, unless there are special circumstances, and then the application is made to the court and not in chambers. *Hogue* v. *Curtis*, 1 J. & W. 449; *Kerr* v. *Campbell*, 17 W. R. 155; *Royle* v. *Wynne*, Cr. & Ph. 252. Whatever it may be proper to hold on this point, it appears clear, at least, that the application should not be made before such time as it could properly be made in equity—that is, before the defendant has answered the bill. Here it does not appear whether he has filed his answer.

The application must be refused with costs.

LEE v. SUMNER.

(IN CHAMBERS.)

Garnishing proceedings.—Affidavit by "Servant or Agent."

Held, An affidavit for a garnishing order must be made by the plaintiff himself, or by his attorney, or by some one in the plaintiff's employment, conducting his business, and in that way having a knowledge of his affairs.

The plaintiff obtained on the 24th of January, 1885, an order attaching any debts due from C. J. Brydges to the defendant. On the 26th he obtained another order attaching debts due from certain persons, naming them, trading as the American Plumbing

Co., and the Ontario Bank. The action in which these orders were made was one of *Lee* v. *Summers*. Afterwards the plaintiff ascertained that the defendant's name was not "Summers," but "Sumner," and on the 28th of January he obtained an order to amend the writ of summons which had not then been served.

On the 29th of January a new order attaching debts due the defendant from all the parties named in the two previous orders was obtained. This order was granted on an affidavit made by a student at law, who swore, "That I am a clerk in the office of the attorney for the plaintiff herein."

W. E. Perdue showed cause to a summons to discharge the order.

Ghent Davis contra.

[*9th February, 1885.*]

TAYLOR, J.—The attaching order made herein is now moved against on a number of grounds, one being that an affidavit made by a clerk of the attorney is not sufficient for obtaining such an order. In Ontario it has been so held in *Builder* v. *Kerr*, 7 Ont. Pr. R. 323, and *Boyd* v. *Haynes*, 5 Ont. Pr. R. 15. It is however sought to distinguish these cases because in Ontario the statute (R. S. O. c. 50, s. 307), says, the judgment creditor may apply "on his affidavit or that of his attorney," while here the words are (Con. Stat. Man. c. 37, s. 44), "upon the affidavit of himself, his attorney, servant or agent."

I think the objection is fatal. It cannot be held that a clerk in the office of the attorney is the agent of the client for such a purpose. The words "servant or agent," put together as they are, satisfy me that the meaning of the Act was, that the affidavit should be by the plaintiff himself, or his attorney, or by some one in the plaintiff's employment, conducting his business, and having in that way a knowledge of his affairs.

Holding that there was no sufficient affidavit to justify the making of such an order, it is unnecessary to consider the other objections to it. The order is set aside with costs.

WELLBAND v. MOORE.

(IN EQUITY.)

Dismissal of bill by plaintiff without costs.—Court motions.

Held, 1. A motion to dismiss for want of prosecution must be made in court.

2. The incidence of costs of a suit, the further prosecution of which has become unnecessary, cannot be discussed upon a motion to dismiss for want of prosecution.

3. Where the further prosecution of a suit becomes unnecessary the plaintiff may move to dismiss his bill without costs; and the court may so order, where the investigation of doubtful questions of fact is not necessary to the decision.

E. H. Morphy for plaintiff.
J. J. Robertson for defendant.

[*25th April, 1885.*]

KILLAM, J.—The defendants, Moore and McDonald, applied to the referee to dismiss the plaintiff's bill, as against them, for want of prosecution.

The plaintiff has not proceeded with the cause, as is required by the practice of the court, and the defendants are entitled to have the bill dismissed. The plaintiff, however, thinks that he should not be ordered to pay the costs of these defendants, and has made a separate motion before the referee that his bill be dismissed without costs.

This course is sanctioned by *Lyon* v. *Dumbell*, 11 Ves. 608; *Bligh* v. ————, 13 Ves. 455; *Steadman* v. *Ellis*, 4 Mad. 240, *Goodday* v. *Sleigh*, 3 W. R. 87; *Sutton Improvement Co.*, v. *Hitchens*, 15 Beav. 161, S. C. (on appeal) 1 De G. M. & G. 169; *Wright* v *Barlow*, 5 De G. & Sm. 43; which show that, where there are exceptional circumstances which may be considered to justify a dismissal without costs, they cannot be shown on the defendant's application to dismiss for want of prosecution, but they must form the ground for a substantial application by the plaintiff for dismissal without costs.

The referee made an order, upon the defendants' application, dismissing the bill with costs, and dismissed the plaintiff's application. The plaintiff has appealed from these orders.

In accordance with the views expressed by me in *Stewart* v. *Turpin*, (*a*) I do not think that the referee had jurisdiction to entertain either of these motions.

The orders as to dismissing for want of prosecution, just as the order in question in *Stewart* v. *Turpin*, authorize an application to the Court, and not in Chambers; and there is no authority for entertaining in Chambers an application such as that made by the plaintiff. The appeal against the order dismissing the bill must be allowed, and the defendant's application dismissed, and the order dismissing plaintiff's application must be affirmed. No costs of the appeals or of the proceedings before the referee can be allowed in either case.

The parties now desire that I shall entertain both motions, and dispose of them upon the material before the referee, and upon the arguments adduced for and against the appeals. As, at the instance of the judge in chambers, the appeals were argued before me in court, I think that I can do this.

The suit was brought to have a conveyance from the defendant Moore to the defendant McDonald, of a half interest in certain lands, set aside as being fraudulent and void as against the plaintiff. It appears that the plaintiff is entitled to a third interest in the lands, which were purchased in the name of the defendant Moore, who first conveyed a half interest to the defendant Ashdown and, a short time afterward, made the conveyance now complained of.

The latter conveyance is made for an expressed consideration of $5,000, but is said by the defendants to have been given as security only, for the sum of $1,000 advanced by the defendant McDonald to the defendant Moore.

The plaintiff charges fraudulent collusion between these defendants to deprive him of his interest in these lands, but the defendant McDonald denies all notice of the plaintiff's claim before this suit began. The plaintiff claims that the registration of the conveyance expressed to be in consideration of $5,000 was calculated to mislead him, and that he should now, after these defendants have answered and have been examined, be allowed to withdraw without paying costs.

I cannot see why the defendant McDonald should be refused his costs. Even if I had jurisdiction upon such an application

(*a*) ante, p. 182.

to determine upon his claim of want of notice, there is nothing to show that he had any notice of the plaintiff's claim; and if, as he says, he thought that the land belonged to Moore, he had a right to take the security in such form as they agreed upon.

Moore's position, however, is different, and if I had the power, I would not merely deprive him of costs, but also make him pay at least the costs which the plaintiff must pay to McDonald. The jurisdiction of the court, if it appears equitable, not merely to refuse costs to a successful party, but even in a good many cases to allow costs to an unsuccessful party, is clearly established. Thus in *Fenton* v. *Browne*, 14 Ves. 144, while plaintiff was successful, as his representations had caused defendant to believe there was a probable ground of defence, no costs were allowed to plaintiff; in *Blunt* v. *Cumyns*, 2 Ves. Sr. 331, as defendant's conduct had given occasion for litigation, the plaintiff's bill was dismissed without costs; and in *Coppard* v. *Harrison*, 2 Cox, 320, as misstatements of some defendants caused litigation, they were ordered to pay not only the plaintiff's costs but also costs which the plaintiff was ordered to pay to other defendants.

What is necessary now to be determined is the principle upon which the court acts in deciding, upon applications such as that now made by the plaintiff, whether the dismissal should be with or without costs.

In *Troward* v. *Attwood*, 27 Beav. 85, it was considered that where, pending a suit, the matters in litigation have been disposed of by an independent proceeding, as by an Act of Parliament or otherwise, the plaintiff may apply to the court and stop proceedings, and the court will then look at the record and the other facts and dispose of the costs.

In *Lister* v. *Leather*, 1 De G. & J. 361, the plaintiffs were allowed to have the bill dismissed without costs, as they had been misled by the court.

In *Sutton Harbor Improvement Co.* v. *Hitchens*, 15 Beav. 161, on motion of plaintiff, the bill was dismissed without costs, as a similar case on which plaintiffs relied to maintain the suit was overruled after bill was filed. On appeal (1 De G. M. & G. 161) this decision was upheld. A directly contrary decision was given, however, in *South Staffordshire Railway Co.* v. *Hall*, 16 Jur. 160.

In *Pinfold* v. *Pinfold*, 16 Jur. 1081, a suit to stay waste pending an ejectment suit, it was shown that the plaintiff had obtained judgment in the ejectment suit and possession thereunder, and that the object of the suit was therefore attained, and also that the defendant was a pauper, and the bill was dismissed on motion without costs.

In *Goodday* v. *Sleigh*, 3 W. R. 87, a suit to obtain specific performance of an agreement, the defendant's motion to dismiss for want of prosecution was ordered to stand over to enable plaintiff to move to dismiss without costs, upon which the conduct of the defendant before suit with reference to the subject matter of the suit, appeared so vexatious that the plaintiff's application was granted.

In *Knox* v. *Brown*, 1 Cox, 359, a suit to compel defendant to assign to plaintiff a lease, pursuant to agreement, it being shown on motion by plaintiff, that defendant had surrendered the lease and absconded, the plaintiff was allowed to dismiss the bill without costs.

In *Broughton* v. *Lashmar*, 5 My. & Cr. 130, the bill being filed by plaintiff as administrator of the estate of a deceased person, and a will of the deceased being discovered afterwards, the bill was dismissed, on motion, without costs.

In *Wright* v. *Barlow*, 5 De G. & Sm. 43, a suit for tithes, the plaintiff's bill was dismissed without costs, on his application, because the defendant had at first denied plaintiff's title, but in his answer admitted it and showed that defendant was a quaker, and that therefore the wrong course was taken.

In *Tompson* v. *Knights*, 7 Jur. N. S. 704, it was held that, where the object of the suit has been attained, the court, on plaintiff's application, will stay proceedings, and if a proper case be made out, will even make defendant pay costs. And here, on the motion, the court looked into the merits, to determine the question of costs.

In *Woodard* v. *Eastern Counties &c., Railway Company*, 1 Jur. N. S. 899, an injunction suit to restrain defendants from entering upon lands without payment of purchase money, the defendants having, on motion for injunction, paid money into court, an order was made on separate motion by plaintiff, that defendant should pay the costs.

And in *Andrews* v. *Morgan*, 3 W. R. 145, it was said that the court will frequently entertain the question of costs upon a motion to dismiss; and in *Van Sandau* v. *Moore*, 1 Russ. 441, it was held, that the court may dismiss without costs an application by the plaintiff. See also remarks in *Elsey* v. *Adams*, 2 De G. J. & S. 147.

On the contrary we have the case of *Stagg* v. *Knowles*, 3 Ha. 241, where it is held that the court will not on summary application, enter into the merits to see if the bill should be dismissed without costs, but on the question of costs it will consider only the conduct of the parties with reference to the prosecution; and *Wilde* v. *Wilde*, 10 W. R. 503, where it was held that, on defendant's satisfying plaintiff's claim pending suit, the plaintiff cannot, upon motion to stay proceedings, make the defendant pay the costs of suit. In the latter case it was stated that there was at least one disputed question, the decision of which might determine the right to costs, and the difficulty of deciding upon the merits, on such a motion, in order to determine whether costs should be given or refused, is very fully considered in the judgment of the court. There are also the following authorities against the propriety of ordering defendant, on a summary application, to pay plaintiff's costs, where the defendant has submitted in other respects to the plaintiff's demands:—*Burgess* v. *Hills*, 26 Beav. 246; *Langham* v. *Great Northern Railway Co.*, 1 De G. & Sm. 503; S. C. 16 Sim. 173. *McNaughton* v. *Hasker*, 12 Jur. 956; and the following cases are against the right to dismiss without costs on a summary application, *Anon*, 1 Ves. 140; *Dixon* v. *Parks*, 1 Ves. 401.

It is evident that it is quite different to order a defendant to pay costs on a summary application by plaintiff, from dismissing a bill without costs on such an application.

It usually happens that costs are refused, when a bill is dismissed, on grounds collateral to the actual merits of the suit itself; and though some remarks in the judgment in *Stagg* v. *Knowles*, and in some other cases, appear to go so far as to exclude the consideration of anything but the conduct of the parties with reference to the prosecution of the suit, in determining upon the question of costs on such applications, and though I quite agree with the reasons against deciding upon the merits on affidavit in order to give or refuse costs, yet it appears that

there is abundance of authority in favor of the plaintiff's application, where it is not necessary to the deciding of the same, that doubtful questions be tried on affidavit. Taking the answer of the defendant Moore and his own statements upon examination, his wrongful acts appear to me to be so clear that, upon the same facts, I would refuse him costs if dismissing the bill after fully hearing the cause. I do not see, however, that I can allow the plaintiff any costs even if he asked for them. I cannot agree with the contention that the letter of the plaintiff's solicitors amounts to an undertaking that the bill was to be dismissed with costs, if the cause should not be proceeded with.

Upon the plaintiff's application the bill will be dismissed as against the defendant Moore without costs, and no costs of that motion will be allowed to any party.

Upon the defendant's application, the bill will be dismissed with costs as against the defendant McDonald. The plaintiff must pay all costs of the defendant's motion to dismiss. Under the authority of *Sutton Harbor Improvement Co.*, v. *Hitchens* 1 De G. M. & G. 169, this would be required of plaintiff, even if his application had been allowed as to both of these defendants.

WOOD v. WOOD.

(In Equity.)

Alimony.—Custody and maintenance of children.

Held, 1. A father cannot, except under Con. Stat. Man. c. 39, s. 11, be ordered to pay a sum for maintenance of his child in another's custody.

2. A decree cannot be made against a father for past maintenance of his children, although payments might be made for that purpose out of funds of infants in court.

The plaintiff brought this suit to recover alimony from the defendant, and prayed also for a decree declaring her entitled to

the custody of a child borne by her to the defendant, and for an allowance for maintenance of the child.

G. B Gordon for plaintiff.

H. M. Howell, Q. C. and *J. S. Hough* for defendant.

[*8th April, 1885.*]

KILLAM, J.—It has already been determined in this cause, on demurrer, (1 Man. L. R. 317), that the decree for alimony may be made upon the case made by the plaintiff, and as the bill has been taken *pro confesso*, the plaintiff is entitled to the decree for alimony, but from the date of the decree only. Her counsel asks me to fix the amount in the decree without a reference to the master and is willing, as I understand, to take the amount ordered to be paid as interim alimony. Upon the statements in the bill, which are admitted by the bill being allowed to be taken *pro confesso*, the sum so ordered, $50 a month, appears to be a very reasonable sum, and the decree will provide for payment of that amount monthly on the days fixed by the order for interim alimony. Leave must, however, be reserved to either party to apply to increase, or decrease that allowance according to any change in defendant's circumstances.

The plaintiff may, if she prefer, take a reference to ascertain the proper amount now to be allowed.

As the defendant appeared by counsel at the hearing and raised no objection to a declaration that the plaintiff should have the custody of the child, who has always been with the mother, the decree may provide for the child remaining in the custody of the mother until it shall attain the age of twelve years and thence until further order, and for payment of a monthly sum by defendant for its maintenance.

A father could not, except under our Statute, Con. Stat. Man. c. 39, s. 11, be ordered to pay a sum for maintenance of his child in another's custody.

Lord Eldon says in *Wellesley* v. *Duke of Beaufort*, 2 Russ, 29, "I am not aware of any case, in which the court, where it has taken away from the father, the care and custody of the children, has called in aid of their own means, the property of the father." If I allow the decree to go for payment by the father of moneys for the maintenance of the child, I do not wish to be understood as deciding in favor of the right of a mother having the custody

of a child which the father has not attempted, and is not attempting, to claim from her, to take proceedings to obtain an order that the child shall remain in her custody, that she may get as incidental thereto an order on the father to pay for its maintenance. It was held in *Re Eves*, 15 Gr. 580, under a statute similar to ours, that the order for maintenance could only be made incidentally along with an order transferring the custody from the father, and this is clearly in accordance with the wording of the Act.

In *Re Tomlinson*, 3 De G. & Sm. 371, V. C. Sir J. L. Knight Bruce held that it was "within the equity" of the English statute, containing provisions very similar to ours, for delivery of a child under the age of seven years to the custody of its mother, that it should be ordered that a child already in its mother's custody should remain there. But there the father had sought to take the child from the mother, and there was ground for the interposition of the court. Here I make the decree as no objection is made thereto on the part of the defendant, but I desire at the same time to guard against any implied decision in favor of, or against, the right, under such circumstances as exist in the present case. The decree may provide for an allowance of $10 per month for maintenance of the child, until it attains the age of twelve years, and thence until further order, unless the plaintiff shall prefer to take a reference as to the sums to be allowed for alimony and maintenance, the leave to apply for increase or decrease to refer to the allowance for maintenance as well as to that for alimony.

Although there are cases in which payments have been ordered to be made out of funds of infants in court for their past maintenance, I do not think the statute wide enough to authorize such a decree against the father.

The defendant must pay the costs of the suit.

GRANT v. HEATHER.

(IN APPEAL.)

Promissory note.—Presentment.—Place of payment not named. Nonsuit.—Granting a new trial.

Held. 1. A note not payable at any particular place, need not be presented for payment as against the maker.

2. On a motion to set aside a nonsuit, the Court will not enter a verdict for the plaintiffs unless leave was reserved at the trial, even in a non-jury case.

This action was brought on three promissory notes made by the defendant in favor of the plaintiff.

At the trial (without a jury) the evidence produced was the depositions of one of the plaintiffs, and of one Archibald, taken under a commission: such evidence proved the making of the notes by the defendant, the consideration, and that the amount was due.

The defendant's counsel moved for a nonsuit, on the ground that the plaintiffs had not alleged in their declaration, and had not proven, the presentment of the notes for payment, and a nonsuit was granted.

Colin H. Campbell for plaintiffs appeared in support of a rule to set aside the nonsuit, and enter a verdict for the plaintiffs.

No one appeared for the defendant.

[*9th March, 1885.*]

DUBUC, J. delivered the judgment of the Court. (*a.*)

This rule calls upon the defendant to show cause why the nonsuit entered should not be set aside, and a verdict entered for the plaintiff.

The notes are not payable at any particular place; such being the case, no presentment for payment was necessary. In *Williams* v. *Waring*, 10 B. & C. 2, and *Exon* v. *Russell*, 4 Mau. & Sel. 505, it is held that, when no place where the note is payable, is mentioned in the body of the note, though it may

(*a.*) Present, Wallbridge, C. J., Dubuc, Killam, JJ.

be written at the bottom of it, the presentment for payment is not necessary. Had the attention of the learned judge who tried the case been drawn to the fact that the notes were not payable at any particular place, he likely would not have granted the nonsuit.

On the return of the rule, the plaintiff's counsel asked that the nonsuit be set aside, and a verdict entered for the plaintiff. In support of his contention, he cited *Herbert* v. *Park*, 25 U. C. C. P. 57, and *Treacher* v. *Hinton*, 4 B. & Ald. 413. But both were cases in which leave had been reserved at the trial to enter a verdict for the plaintiff. Without such leave, the Court can only grant a new trial. And the reason is obvious. The defendant has not been called upon to adduce any evidence, or to state whether he had any to adduce. We have nothing before us to show that, had the nonsuit been refused, the defendant might not have adduced evidence to make a good defence. When the nonsuit was granted, if the plaintiff had asked for leave to move to set it aside and enter a verdict for him, the defendant would likely have stated whether he intended to adduce evidence or not, and the judge, after hearing both parties, might have granted such leave. But without such leave, I do not consider that a verdict should be entered for the plaintiff. A new trial only should be granted, and the rule should be amended accordingly.

The 54th section of 44 Vic. c. 11, of the Provincial Statutes, provides that the Court may pronounce the verdict which in their judgment the judge who tried the case ought to have pronounced; but this can apply only when both parties have completed their case, or when leave has been reserved.

Rule absolute for a new trial, with costs.

KELLY v. McKENZIE.

(IN EQUITY.)

Amendment of decree after rehearing.

A bill filed to enforce a mechanic's lien was dismissed at the hearing, on the ground that the lien had ceased to exist, and upon rehearing the decree was affirmed. The question of the personal liability of the defendant, although raised by the pleadings, and therefore concluded by the decree, was not, in reality discussed at the hearing. Plaintiff having afterwards sued at law, the defendant pleaded the decree by way of estoppel. Upon a petition by the plaintiff, praying that the decree might be amended by inserting a provision, that the dismissal of the bill should be without prejudice to the plaintiff's right to proceed at law,

Held, That the decree should be so amended upon terms as to costs.

The bill in this case was filed to enforce a mechanic's lien, and for payment of a large sum as due in respect thereof. The defendant, by his answer, set up, that the plaintiff was not entitled to the relief prayed, because the suit was not begun within the time limited in that behalf, that he had sustained loss and damage by reason of the noncompletion of the work according to the terms of the contract, and he claimed to be entitled to set off a large sum for such damage against the plaintiff's claim.

At the hearing of the cause it was held, that owing to delay in the institution of the suit, the lien had ceased to exist, and the bill was dismissed with costs. See 1 Man. L. R. 169.

Sometime after, the plaintiff presented a petition for leave to give further evidence and for a new hearing, the prayer of which was refused. The cause was then set down for rehearing before the Full Court, and after argument the decree was affirmed.

The plaintiff then brought a common law action to recover the amount which he said was due to him under the contract, to which the defendant pleaded the decree in this suit by way of estoppel. A petition was then presented by the plaintiff, that the decree might be amended by inserting therein a provision, that the dismissal of the bill should be without prejudice to the plaintiff's right to proceed upon the common law side of the court, for the recovery of the money. The granting of this relief was strenuously opposed by the defendant, who, besides raising other objections, took the ground, that even at the hearing

of the cause, such a reservation for the plaintiff's benefit could not have been inserted in the decree. Such a reservation, he contended, could only be made in a suit for specific performance where the Court, declining to decree specific performance, left the parties to their legal remedies.

T. D. Cumberland for plaintiff, in support of petition.

H. M. Howell, Q. C., and *J. S. Hough* for defendant, the respondent.

[*1st May, 1885.*]

TAYLOR, J.—No doubt it was at one time the constant practice to insert in a decree dismissing a bill for specific performance, that it should be without prejudice, &c. But Mr. Daniell says: *Dan. Pr.* vol. 2, p. 1200, (Perk. ed.) that the only use of introducing such words, would appear to be to prevent an unfavourable impression being made against the plaintiff upon the trial at law, and whether introduced or not, the plaintiff, after his bill for specific performance had been dismissed, was always at liberty to bring his action at law upon the contract, unless the court specifically restrained him, by injunction, from so doing. In support of these statements he cites *Mortlock* v. *Buller*, 10 Ves. 292, and *McNamara* v. *Arthur*, 2 Ball & B. 349.

That the court has, in suits, other than those for specific performance, been, for the last two hundred years in the practice, in proper cases, of reserving in decrees dismissing bills, liberty to the plaintiff to institute a new suit, there seems no doubt,

Indeed some such power would seem necessary. At common law, if a plaintiff fails to prove his case, a non-suit is entered, and he is not precluded from bringing his suit afresh. But in equity the bill would be dismissed, and the questions in issue finally concluded against him, unless leave to take further proceedings is reserved. So Daniell says, *Dan. Pr.* p. 855, (5th ed.), "Directions of this sort are inserted where the dismissal is occasioned by slip or mistake in the pleadings or proof. Thus, formerly where a bill was dismissed for want of parties, it was expressed to be without prejudice: and so, where a bill was dismissed, in consequence of facts not having been properly put in issue."

Seymor v. *Nosworthy*, 1 Chan. Ca. 155, decided in 1670, was a case in which the plaintiff by original bill in chancery

sought to establish a will. It appeared there had been a former suit in the Exchequer in which, although two issues *devisavit vel non*, had been decided in the plaintiff's favour, yet the bill had been dismissed. The defendants pleaded the dismission in the Exchequer, but "the plaintiff insisted that this was a special dismission, it being without prejudice either in law or equity, which words must be considered to signify something, but they did not signify anything, unless it were meant that the dismission should not hinder the plaintiff from seeking his relief in any other court of law or equity. And so the court did conceive, and ordered that the plainiiff might examine any witnesses," and so on.

Mr. Daniell, speaking of final decrees, *Dan. Pr.* p. 1199, (Perk ed.)& p. 855, (5th ed.), says "of this nature is a decree dismissing the plaintiff's bill, which may be pleaded in bar to a new suit, unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill."

In *The Mayor of Gloucester* v. *Wood*, 3 Ha. 131, a suit begun for an account against the executors of a will, the bill was dismissed. At the close of his judgment, V. C. Wigram, after setting out the reasons why he had with great regret come to the conclusion that the bill should be dismissed, proceeded thus, "there is one other point to which my attention was directed, and which I have very anxiously considered; I was asked * * * to dismiss the bill without prejudice to the right of the plaintiff to file a new bill, * * * but I have, after much consideration, come to the conclusion that I ought not to insert that reservation." The learned Vice Chancellor then went on to state his reasons, but nowhere does he even hint that the practice would not permit of his having done so. In *McNeill* v. *Cahill*, 2 Bli. 316, the decree was amended in the House of Lords by inserting a clause reserving the plaintiff's rights as to certain matters.

All that was decided by the cases of *Gwynne* v. *McNab*, 2 Gr. 124, and *Gardner* v. *Brennan*, 4 Gr. 199, was, as I understand them, what is expressed in the head note to the latter case, that the plaintiff is not entitled, as of course, to an order dismissing his bill, with leave to file another.

None of these cases except *Seymour* v. *Nosworthy* are cases in which leave to proceed at law was reserved, or in which the pro-

priety of reserving leave to proceed otherwise than by another bill was in question, but if the Court has power to reserve leave to file another bill, there can be no doubt it has power to reserve leave to proceed at law, where that would be an appropriate remedy. It was because I conceived the Court to have such a power that on the 16th of January 1884, when dismissing the bill in *Robertson* v. *McMeans* I reserved to the plaintiff leave to proceed either at law or in equity, as he might be advised.

In the present case it does seem as if great injustice may be done the plaintiff by allowing the decree to stand in its present form. He filed his bill claiming a large sum to be due under his contract, and that for this sum he had a lien on certain property. The question of whether he had a lien or not having been gone into, it was decided against him, and the bill dismissed. But the question of whether there is, or is not, a large sum of money due to him, and his right to recover something against the defendant, although not out of the particular property under any lien, has never been investigated, or disposed of. When giving judgment I said (1 Man. L. R. at p. 174,) "As there is, however, a cross claim made by the defendant, and a dispute between the parties, as to the one in whose favour the balance is, if they desire it, there may be a reference to the master, to take the account between them." It seems that upon settling the decree the plaintiff wished such a reference, but the defendant would not agree to it. Had the minutes been spoken to before me, I would under such circumstances most certainly have directed a reference whether the defendant desired it, or not, or I would have given the plaintiff leave to take other proceedings for ascertaining the amount which he claims to be due to him and recovering it.

The plaintiff not having spoken to the minutes, nor got the decree varied upon rehearing, there may be a technical difficulty in the way of giving relief now, but the Court cannot allow its decree to stand in the way of justice being done, or allow it to be made an instrument of injustice.

O'Connell v. *McNamara* 3 Dr. & War. 411, was a case in which a decree made in 1814, in a former suit declared certain consolidated sums to be well charged upon certain lands and directed interest to be thenceforth calculated upon the consolidated amount. On a bill filed by a person in whom the charge

had become vested, coming on for hearing before Lord St. Leonards, then Lord Chancellor of Ireland in 1843, the error in the former decree, in charging interest upon the whole sum instead of a part only, was pointed out. His Lordship said, "As this case now comes before the Court, I cannot order the decree to be amended, but as I am not bound to carry on or perpetuate error, I will not give the plaintiff the benefit of the former proceedings, unless he consents to take the proper decree." In *Hamilton* v. *Houghton*, 2 Bli. 169 there was an error in the decree made in 1780, but it was not appealed against. Afterwards in 1820, there was an appeal against a decree which carried the original decree into execution, when Lord Eldon advised the House of Lords, that the original decree was one the benefit of which could not be had in that suit, and that under the circumstances the House could do no more than displace all those decrees with liberty to the party to go before the court again. Accordingly the cause was remitted back to the Court of Exchequer.

In 1871, one Strathy filed a bill in the Court of Chancery for Ontario, for the foreclosure of his mortgage, which the defendant answered, denying that she had executed the mortgages in question, and praying that the bill might be dismissed. At the hearing in October, 1872, the plaintiff failed to prove the execution of the mortgages by the defendant, and the bill was dismissed with costs, but without prejudice to another bill being filed by the plaintiff within a year. No bill was filed under the leave reserved, and a number of years after, the defendant in the first suit filed a bill against the plaintiff in that suit, setting up the decree in that suit as final and conclusive upon the question of the execution of the two mortgages, and praying that the mortgagee, who was in possession of the land, might be ordered to deliver up possession, and to account for the rents and profits, and that the mortgages might be delivered up to be cancelled. The defendant answered, insisting that the bill in the first suit was dismissed, not on the ground that the mortgages were not executed by the plaintiff, but on the ground that the evidence was insufficient to establish the *factum* of the execution of the said mortgages. The case (*Mitchell* v. *Strathy* 28 Gr. 80), came before a very eminent judge, the late Chief Justice of Ontario, then Chancellor, and on the ground that in the original suit the find-

ing of the Court had not been that the mortgages were not executed by the defendant to that suit, but merely that the plaintiff had so failed to prove their execution, he refused to give effect to the decree then made, and dismissed the second bill with costs. There was, he said, no lack of authority to show that the Court will not carry out an erroneous decree.

The decree in this case, which was for a dismissal of the bill, and which was made solely upon a failure by the plaintiff to establish that he had a lien upon a particular property for money claimed to be due to him, is now being used as a bar to his attempt to enforce, apart from any question of lien, payment of this money, his right to which has never been enquired into, or adjudicated upon by the Court. If the decree as it stands is a bar to his so proceeding, and I have no doubt it is, then it is erroneous, and a remedy must be found.

Mason v. *Seney*, 2 Ch. Ch. R. 30; *Eadie* v. *McEwen*, 14 Gr. 404; *Summers* v. *Erb*, 21 Gr. 289, and general order 326 would all seem to warrant my giving relief by way of amending the decree on the present petition.

I have already said, that, had the plaintiff spoken to the minutes upon the defendant declining to agree to a reference, I would either have ordered a reference, or have given the plaintiff leave to take other proceedings. It seems to me the proper course to take is, to amend the decree by adding a clause to that effect now.

The decree should be amended by adding these words, "This decree is without prejudice to the right of the plaintiff to take such other proceedings for the recovery of the amount claimed by him to be due from the defendant under and by virtue of the contract in the pleadings mentioned, as he may be advised, other than proceedings to enforce a lien upon the lands and premises also in the pleadings mentioned."

But as the plaintiff did not speak to the minutes, when the matters now disposed of, might have been disposed of at small expense, the amendment can be allowed only upon terms of paying the costs of this petition, and the proceedings thereunder, together with any costs at law occasioned by changes in the pleadings, rendered necessary by the amendment now allowed.

KIEVELL v. MURRAY.

(IN APPEAL.)

Mechanic's lien.—Priority as against Mortgage.

Held, A mechanic's lien does not "exist unless and until" his statement is filed in the registry office; and the mere fact that the work was done before the execution, by the owner of the land, of a mortgage upon it will not give the mechanic priority as against the mortgagee.

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

J. B. Mc Arthur, Q. C., and *F. B. Robertson* for defendant Martin.

[*18th May, 1884.*]

DUBUC, J., delivered the judgment of the Court :—(*a.*)

What we have to determine here is a question of priority between a mechanic's lien and a mortgage.

The plaintiff commenced to work on the building erected on the property in dispute, in July, 1882. He went on with his work until March or April, 1883. He filed his first lien against the property on the 26th of April, and his second lien on the 8th of May. He filed his bill of complaint to enforce his liens on the 8th of June.

The defendant, Martin, was advancing money from time to time for the construction of said building, and on the 13th of October, 1882, took a mortgage on the property, and continued to advance money; the last money being advanced on the 31st of October.

The decree to enforce the plaintiff's lien was made on bill and answer on the 3rd of January, 1884. The defendant Martin was, on the 6th of May, 1884, made a party in the master's office by notice, schedule S, under order 435 of the equity orders of this court. On the 21st of May, the master made an order setting aside the notice, schedule S. An appeal from said order was had before my brother Taylor, and by order dated the 23rd of May, he dismissed the appeal. The present appeal is from such order of my brother Taylor.

(*a*) Present—Wallbridge, C.J.; Dubuc, Killam, JJ.

The mechanic's lien herein is under Con. Stat. Man. c. 53. The plaintiff claims that, as half of his work was done when the mortgage was made, his lien should, under section 3 of the Mechanic's Lien Act, attach and form an incumbrance upon the property from the beginning of the work, and prior to the mortgage of the 13th of October. This contention would likely be maintainable under a recent Ontario decision, *Makins* v. *Robinson*, 6 Ont. R. 1, if section 3 was alone and not modified by section 5 of the same statute. Section 3 says that every mechanic doing work upon, or furnishing materials in the construction of any building, shall, by virtue of being so employed or furnishing have a lien for the price of such work and materials upon such building, and the lands thereby occupied or connected therewith. Section 5 enacts that no lien under this Act shall exist *unless and until* a statement of claim is filed in the proper registry office, before or during the progress of the work aforesaid, or within two months from the completion thereof, &c.

What is the real meaning of these two enactments? Is section 3 to be construed independently from section 5, or in connection with it. If independently, the lien must have under it its full existence with its full effect, and section 5 would only be considered as the mode by which it could be enforced. But that construction cannot be reconciled with the wording of section 5 which says: "no lien under this Act can *exist* unless and until," &c. This shows that the filing in the registry office is necessary to give existence to the lien. Then the two sections must be read together. Now the query is whether the existence given to the lien by section 5 takes effect from the filing of the claim in the registry office, or whether it relates back to the beginning of the work. I think this latter construction would be a proper one to adopt, if the wording of section 5 was not so positive and so peremptory. And this was the meaning given in *Makins* v. *Robinson*, *supra*; but it was under the R. S. O. c. 120, which provides also for the filing of the claim in the registry office; but there is no such provision as the one in our statute declaring that no lien shall exist *unless and until* a statement of claim is filed in the registry office.

The case of *Hynes* v. *Smith*, 8 Ont. Pr. R. 73 decided under the Ont. Stat. of 1873, 36 Vic. c. 27, which had the same words *unless and until* as our statute, is in point. The work was commenced

in December 1877 ; the mortgages registered on 1st and 8th of June, 1878, respectively ; the contractor registered his lien on the 18th of June and filed his bill on the 28th of August. The Court held that the mortgages were prior, not subsequent incumbrances to the lien ; though the work had been commenced more than five months before the mortgage was made.

In *Richards* v. *Chamberlain*, 25 Gr. 402, the owner of the land created a mortgage for $20,000, to be advanced from time to time. Part of the money was advanced after the execution of the work. Notwithstanding that, the mechanic was not held entitled to any lien in priority to the mortgage.

These decisions are consistent with the well known principle laid down in our registration laws. Priority of registration gives priority of right. The mechanic working upon a building is not bound to wait until his work is completed, before he can file his claim ; he can do so from time to time as the work progresses. The filing of his claim would be a warning and notice to any subsequent purchaser or incumbrancer. But if he neglect to avail himself of the protection the law affords him, how can a purchaser or mortgagee, advancing money on the property discover or ascertain whether every mechanic or laborer working on the building, or every person having furnished materials in the construction thereof has been, or has not been paid, intends, or does not intend, to put a mechanic's lien on the property ? The statute has been made for the protection of the mechanics and workmen against unscrupulous owners or contractors ; but they must comply with the requirements of the statutes, as long as the statute contains such requirements.

I think the appeal should be dismissed with costs.

ASHDOWN v. DEDERICK.

(IN APPEAL.)

Setting aside judgment—No costs.

Upon an appeal from an order setting aside an execution—

Held. That the execution was issued contrary to good faith and in violation of an agreement, and the appeal must be dismissed, but without costs, unless the defendant would undertake not to bring an action for the seizure and sale of his stock-in-trade under the execution.

Hon. S. C. Biggs and *A. E. McPhillips* for plaintiff.
J. S. Ewart, Q. C., and *C. P. Wilson* for defendant.

[*18th May, 1885.*]

TAYLOR, J., (After discussing the affidavits)—The writs of execution, I am satisfied from the evidence, were, as stated in the order by my brother Dubuc, "issued contrary to good faith and in violation of an agreement," so the appeal should be dismissed but without costs, unless the defendant will undertake to bring no action.

KILLAM, J.—I agree that the appeal should be dismissed.

The plaintiff's counsel contended very strongly that it was a case of oath against oath upon the affidavits, and that the defendant should be left to his action against the plaintiff for breach of the alleged agreement not to issue execution, or that in granting the application the defendant should be obliged to undertake not to bring an action for anything done under the execution.

The judgment of my brother Taylor shows that it is not a case of oath against oath, but one in which, upon all that is shown by affidavit, taking certain statements from the affidavits filed by one party and others from those filed by the other party, it is clear that the execution was issued in violation of an agreement and against good faith. The defendant is therefore entitled *ex debito justitiæ* to the order against which the plaintiff appeals, and the Court or a judge in granting it can impose no terms upon him.

In *Cash* v. *Wells*, 1 B. & Ad. 375, Bayley, J., says, as to imposing terms on the defendant seeking to set aside a judgment, "We cannot impose them without the defendant's consent He

applies to us *ex debito justitiæ* to have proceedings set aside which are against good faith. We are not compelled, however, to give him costs of his rule, and unless he will consent not to bring any action we make this rule absolute without costs."

In the present instance I think that the execution must have been issued by mistake, and I would like to see the course followed which was taken in *Cash* v. *Wells*. As, however, the defendant was entitled to the order, we cannot interfere with the disposition of the costs made by the learned judge.

We have power only over the costs of the appeal. I think that if the defendant will not undertake to forego any action for anything done under the execution he should not be allowed the costs of the appeal.

[The Court gave the defendant ten days to elect, if he would undertake to forego any action for anything done under the execution. The defendant having declined to give the undertaking the rule was issued dismissing the appeal without costs.]

PRATT v. WARK.

(IN CHAMBERS.)

Equitable defences.—Payment into Court.—Striking out plea.

Held, 1. To an action upon a covenant in a mortgage, a plea of payment into court may be joined with a plea of *non est factum*.

2. In such an action an equitable plea as to the amount sued for, except a certain sum, and as to that sum, payment into court was struck out as embarrassing, not being contemplated by the form of plea prescribed by the C. L. P. Act.

3. A plea of payment into court must be an answer to the whole count to which it is pleaded, or if to a part only of the money claimed, then it must be confined to answering that part, and any answer, legal or equitable, to any other portion of the cause of action must be set up in a separate plea.

H. M. Howell, Q. C., for defendant, showed cause to a summons which had been issued to strike out a plea as embarrassing, on the following grounds:—

That the plea was in effect two pleas, and should be pleaded separately. That a plea good in law, could not be pleaded as

one upon equitable grounds. That payment into court could not be pleaded with other pleas going to the whole cause of action. That it did not comply in form to section 71 of the Common Law Procedure Act, 1852.

F. H. Phippen, (*McArthur & Dexter*,) supported the summons.

[*20th April, 1885.*]

KILLAM, J.—The first count of the declaration is upon a covenant contained in a deed of mortgage for payment of moneys secured by the mortgage. The mortgage is alleged to have been expressed to be made in pursuance of the Act respecting Short Forms of Indentures, and to contain the proviso, that "in default of payment of the interest hereby secured, the principal hereby secured shall become payable." The mortgage is alleged to be dated the 5th day of December, 1883, and the principal to be payable at the expiration of two years from that date, with interest at 10 per cent per annum, payable half yearly. It is alleged that none of the interest payable on the fifth days of June and December, 1884, respectively has been paid, and the plaintiff claims to recover both principal and interest under the proviso mentioned.

The second count is upon a covenant contained in a mortgage deed for payment of moneys secured thereby. The principal and interest are alleged to be payable as in the first count, and the same two instalments of interest to remain unpaid, but no proviso for making the principal payable upon default of payment of interest is alleged. Both counts also allege provisoes for making interest payable upon arrears of interest at the same rate as upon the principal.

The plea objected to is pleaded as an equitable defence to both of these counts. It alleges that the mortgage referred to in the first count, is the identical mortgage referred to in the second count; that the mortgage was made to secure moneys then to be advanced by the plaintiffs to the defendant; that at the time the lands mortgaged were subject to an incumbrance for the sum of $1,360, or thereabouts; that it was agreed between the parties that the plaintiffs should pay off the amount of this incumbrance out of the money to be advanced, and procure a discharge thereof, and should also retain out of the mortgage moneys, and charge to the defendant the costs of examining the title and pre-

paring the conveyances; and that the balance going to the defendant out of the mortgage moneys upon this basis was $420, which was all that was paid over to the defendant; that the mortgage in question was executed solely for the purpose of carrying out this arrangement; that the amount necessary to procure a discharge of the prior incumbrance was, by the agreement between the plaintiffs and the defendant, to be paid over at once upon the execution of the mortgage to the party holding the incumbrance, and that such party was then, and has ever since been ready and willing to receive the same and discharge the incumbrance; that the plaintiffs have not so applied the moneys retained for this purpose, but still retain of the mortgage moneys a large sum which they have not paid over either to the holder of the prior incumbrance or to the defendant, or for his use, and the defendant has not received any benefit thereof; that by reason of the plaintiffs not having paid off the prior incumbrance, the defendant has been compelled to pay a large sum for interest thereon; that except under the proviso contained in the first count, the principal is not yet payable; that no judgment has yet been recovered against the defendant for the mortgage moneys, and no proceedings, except this suit, have been taken against the defendant or any other person upon the mortgage. The plea then concluded by alleging payment into court of $108, alleged to be sufficient to pay all arrears of interest upon all moneys advanced by the plaintiffs upon the mortgage and all interest upon the loan, and the compound interest thereon, and the lawful costs and charges in that behalf, including all the plaintiff's costs of this suit up to this plea, with costs of taking the same out of court. The defendant submits by the plea, that the mortgage is a security only for the moneys actually advanced by the plaintiffs, and that the defendant is liable to pay interest only upon that sum, only from the dates of the various advances.

The defendant also pleads *non est factum* to both counts.

It is objected that the defendant cannot plead the general issue along with a plea of payment into court; and in support of this contention are cited *Thompson* v. *Jackson*, 8 Dowl. 591; *Hart* v. *Denny*, 1 H. & N. 609. Defendant replies that, under general rule 5 of this court, "the defendant may plead one or more pleas to each count," that if the payment into court be pleaded concurrently with the general issue, neither plea is "calculated to embarrass or delay the proceedings."

The same question has on several occasions come before the courts in England, since the introduction of the Judicature Acts. It was at first held in *Spurr* v. *Hall*, L. R. 2 Q. B. Div. 615, that such defences could not be joined; but the Court of Appeal afterwards decided, in *Beraan* v. *Greenwood*, L. R. 3 Ex. Div. 251, and again in *Hawkesley* v. *Bradshaw*, L. R. 5 Q. B. Div. 302, that they should be allowed together. The former action was for moneys alleged to be due to the plaintiff as commission upon orders received by defendant from the Russian Government for machines &c., for manufacturing plaintiff's guns. The statement of defence denied the agreement under which the commission was claimed, and also pleaded payment into court of £130, alleged to be sufficient to satisfy plaintiff's claim. Thesiger L. J. points out that, under the Judicature Acts and Orders, it is "open for the defendant, as a general rule, to raise by his statement of defence, without leave, as many distinct and separate, and therefore inconsistent defences as he may think proper, subject only to the provision contained in rule 1, order xxvii," which (so far as it affects this point), is in these terms: "The court or a judge may . . . . . order to be struck out or amended, any matter . . . . which may tend to prejudice, embarrass, or delay, the fair trial of the action."

This appears to place the matter in the same position as under our rule 5. Under the English practice, the course to be followed after the payment into court is the same as under the Common Law Procedure Act, and the court held in *Berdan* v. *Greenwood*, that the sum paid in is absolutely appropriated to the purpose of satisfaction or amends.

It is suggested in this case, that there may be instances in which such defences ought not to be allowed to be joined, but one instance suggested, was an action "to establish character which has been assailed," and in *Hawkesley* v. *Bradshaw*, an action of libel, the Queen's Bench Division, under this suggestion, refused to allow an apology with payment into court under Lord Campbell's Act, to be set up along with a defence amounting to the general issue, but on appeal the Court of Appeal allowed both defences. This latter decision was followed in this court on one occasion in the year 1881, by Wood, C. J., who, in a case of *Rogers* v. *Rowe*, in which I was then engaged, refused to strike out either of these defences. I fail to see how it can be "calculated to embarrass or delay the proceedings" to plead

payment into court with the general issue, any more than to plead the ordinary plea of payment with that defence. If the result be that, in the event of the defendant succeeding upon the general issue, he loses the amount paid into court, which by withholding it he might have saved, no one can be embarrassed thereby but himself; and I see no reason why he should not be entitled to run this risk if he see fit to do so.

The other objection to the plea is, that it does not comply with the provisions of the Common Law Procedure Acts as to pleading payment into court.

The defendant's counsel contends that, as this is a court of equity as well as a court of law, the defendant should be allowed to set up such a defence. Without attempting to consider whether the equitable defence set up in the plea to a portion of the plaintiff's claim could have been pleaded to such portion under the Common Law Procedure Acts, or whether in an action at law in this court, a defendant can set up an equitable defence, not admitted under the Common Law Procedure Acts, it is sufficient for the purposes of this application to say that, whatever equitable defences may be here pleaded in an action at law, must be pleaded and set up according to the practice of this court at law. Section 71, of the Common Law Procedure Act, 1852, gives a form of plea of payment into court, and says that "when money is paid into court, such payment shall be pleaded in all cases, as near as may be," in that form, *mutatis mutandis*.

In *Astor* v. *Perkes*, 15 M. & W. 385, it was laid down that "the provision that the plea is to be based as near as may be in that form, *mutatis mutandis*, is only to authorize such alteration as may be necessary in order to adapt the plea to the names of the parties, to the form of action, to the sum paid, and the like."

The same principle is adopted in *Key* v. *Thimbleby*, 6 Exch. 692, in these words, "The form given by the new pleading rules allows, no doubt, of changes to adapt it to the facts of each case, as for instance where it is pleaded to part, or in debt, or to the damages as well as the debt, but no further." The latter case was an action of trover for the conversion of cattle, in which the plea was, that the conversion mentioned in the declaration was the sale of the cattle by the defendant after they had been seized by him, as surveyor of certain highways, and concluded by payment into court of £10 with the usual averment of no damages

ultra. Pollock, C. B. there says:—"We are satisfied that it never was intended to admit such a variation as is attempted in this case, which would lead to long and embarrassing pleadings. According to the new rules the plaintiff is to be at liberty either to take the money out of court, with his costs, or to reply damages *ultra*. They do not contemplate any other replication, and no plea is therefore contemplated which would lead to one of these results, whereas this may lead to a new assignment and pleadings thereon." It follows, necessarily, that the plea of payment into court must be an answer to the whole count to which it is pleaded, or, if to a part only of the money claimed, then it must be confined to answering that part, and any answer, legal or equitable, to any other portion of the cause of action must be set up in a separate plea.

Mr. Howell suggests that the defence of payment of money into court, as to part of the cause of action, could not be here pleaded, because the plea given by the Common Law Procedure Act does not contemplate payment into court of costs as well as of the debt or damages claimed, and here he requires to pay the costs as well as the interest overdue, in order to avoid being compelled to pay the principal. This is sufficient to show that payment of the money into court under a plea, is not the proper course in this instance, The same difficulty was met in *England* v. *Watson*, 9 M. & W. 333, where the action was upon a common money bond, and the defendant sought to avail himself of 4 Anne, cap. 16, sections 12 and 13, by bringing the money into court under a plea. Under that Act, where an action is brought upon a bond, with a defeasance to make void the same, on payment of a less sum than the penalty at a day certain, the defendant may bring into court the principal, interest and costs, and this is to be deemed and taken to be in full satisfaction of the bond. In *England* v. *Watson*, it was held that the plea of payment into court, given by the Common Law Procedure Act, 1852, could not be adapted to give the defendant the relief under the statute, and by the Common Law Procedure Act, 1860, sec. 25, provision was made for such payment into court to be made and pleaded by leave of the court or a judge; but even that section is not sufficiently wide to meet the present case. It is not necessary to determine upon this application whether the relief sought by the defendant can be obtained in this action, without recourse to a bill in equity.

The plea must be struck out with costs.

If the defendant desire, he may have an amendment so as to plead the equitable defence without the payment into court as to the $1,360 not advanced, and the interest thereon, with leave to plaintiffs to reply and demur thereto, if he be so advised. He may also plead payment into court of the interest admitted to be due, confining the plea to answering that portion of amount claimed.

ST. BONIFACE v. KELLY.
THE CITY OF WINNIPEG, GARNISHEES.

(IN CHAMBERS.)

Affidavit for garnishee order.—Locus standi of judgment debtor. —Affidavit—Sufficiency of.

An affidavit for a garnishing order stated :—"I have reason to believe that the City of Winnipeg is indebted to, liable to, or under some obligation to the defendants."

Held. 1. Sufficient.

2. That all objections to the validity of garnishee orders are open to the judgment debtor.

Ghent Davis for defendants obtained a summons to set aside a garnishing order made herein on the 9th April, on the grounds, (1.) That the affidavit goes beyond the words of the statute in the use of the words; "under some obligation to" the defendants. (2.) That the garnishees' liability is not stated positively, and the defendants are not shewn to be unaware as a fact of the garnishees' indebtedness.

N. D. Beck for plaintiffs showed cause.

Ghent Davis in support of the summons.

[*13th April, 1885.*]

KILLAM, J.—I think all objections to the validity of a garnishee order may be taken advantage of by the defendant.

I think the objections taken to the affidavit in this case are not tenable; and I will dismiss the summons with costs which I will fix at $5.00.

O'CONNOR v. KYLE.

(IN CHAMBERS.)

Application for ca. re.—Sufficiency of affidavit.

Held, The Statute Con. Stat. Man. c. 37, s. 73, does not require that any particular words should be contained in the affidavit used on an application for a *ca. re.*, but only that such facts and circumstances be shown, as will satisfy a judge that the case is one proper for a writ to issue.

E. C. Goulding, for plaintiff, showed cause to a summons to set aside a writ of *ca. re.* for non-compliance with the statute.

C. H. Allen, for defendant, in support of summons.

[*8th February, 1885.*]

DUBUC, J.—This is an application to set aside a writ of *capias ad respondendum*, on the ground that the affidavits on which the order for the writ was issued, did not comply with the statute, in not stating in express words that unless the defendant be forthwith arrested he will quit Manitoba, with intent to defraud his creditors, &c.

The statute does not prescribe that such statement should be formally and literally contained in the affidavits.

The plaintiff is only bound to show, by the affidavit of himself, or some other person, such facts and circumstances as satisfy the judge, that there is good and probable cause for believing, and that the deponent doth believe, that unless such person be forthwith arrested, etc., etc. Con. Stat. Man. c. 37, s. 73.

As one can see, the statute does not require that such and such particular words should be contained in the affidavits; but only that such facts and circumstances be shown as will satisfy the judge.

This is also the interpretation adopted in *Swift* v. *Jones*, 6 U. C. L. J. O. S. 63, and *Damer* v. *Bushy*, 5 Ont. Pr. R. 356.

In this case my brother Taylor, who granted the order, was satisfied, on the affidavits produced, including an affidavit of the

defendant himself, that the requirements of the statute had been complied with. He having exercised his discretion in granting the order, it might be sufficient for me to refuse to set aside the order. But I may add, that I am disposed to give to the statute the same construction that he did; and I also think that the statements contained in the affidavits were such as to entitle the plaintiff to such order.

The summons should be dismissed with costs.

LANDED BANKING AND LOAN CO., v. DOUGLAS.

(IN CHAMBERS.)

Local action.—Ejectment.—Moving against irregularity.

Held, 1. A writ of ejectment must be issued in the district in which the land lies.

2. A party objecting to a proceeding on the ground of irregularity, must move within the time allowed to take the next step in the cause.

C. H. Campbell for plaintiffs, showed cause to a summons to set aside the writ, on the ground that the lands, possession of which the plaintiff sought to recover, were situated in the Western Judicial District, and the writ had been issued out of the office of the Prothonotary of the Eastern Judicial District.

G. G. Mills for defendant, supported the summons.

[*26th January, 1885.*]

TAYLOR, J.—The writ commencing this action has been issued out of the office of the Prothonotary in the Eastern Judicial District, while the lands possession of which the plaintiffs seek to recover, are situated within the Western District. The 4th section of the Ejectment Act, 44 Vic. c. 5. provides that, the writ "shall be issued out of the proper office in the Judicial District wherein

the lands lie. To comply with that enactment the writ in this action should have been issued from the office of the Deputy Prothonotary at Brandon. The provision contained in the Administration of Justice Act, 1883, section 14, that the venue in any action in the Court of Queen's Bench may be laid in any Judicial District in the Province does not affect the question. The Ejectment Act is imperative in its terms when requiring that the writ "shall be issued" in the district in which the lands lie. The defendant is not too late in moving. His summons was taken out before the day on which the appearance was due. As I understand the practice, a party objecting to a proceeding, on the ground of irregularity, must move within a reasonable time, but he has all the time to move, that he is allowed to take his next proceeding. Thus, in moving against a writ of summons, he has till the time of appearing, or in the case of a declaration until the time for pleading. *Child* v. *Marsh*, 3 M. & W. 433; *Tyler* v. *Green*, 3 Dowl. 439; *Edwards* v. *Collins*, 5 Dowl. 228; *Hinton* v. *Stevens*, 4 Dowl. 283; *McLean* v. *McDonald*, 3 U. C. Q. B. 126.

The writ must therefore be set aside with costs.

GRANT v. KELLY.

BLANCHARD, GARNISHEE.

(IN CHAMBERS.)

Affidavit for garnishing order.—Evidence of indebtedness.

Held. An affidavit for a garnishing order must either state positively that the garnishee is indebted or liable to the defendant, or it must follow the exact wording of the amending statute, 46 Vic. c. 49, s. 12, that deponent "has reason to believe." It is not sufficient to state that the deponent is "informed and verily believes."

This was an application on the part of the defendant to set aside a garnishing order obtained by the plaintiff, on the ground

that the affidavit did not sufficiently state that the garnishee was indebted or liable to the defendant.

A. Howden showed cause to the summons, and contended that the words used in the affidavit, which were, "I am informed and verily believe" that the garnishee is indebted to the defendant, &c., while not the exact words of the statute, 46 Vic. c. 49, s. 12, were yet in substance the same, and should be construed as a sufficient compliance with the statute.

T. D. Cumberland, in support of summons, argued that before the passing of the statute 46 Vic. c. 49, s. 12, the affidavit must have stated positively that there was a debt or liability, and that the last mentioned statute only permitted that practice to be departed from when the very words of the statute, "has reason to believe," are used. The legislature showed that such was the intention of the statute by italicising those words. Besides, there is very considerable difference between the meaning of the expressions, "have reason to believe" and "am informed and believe."

[*12th December, 1884.*]

TAYLOR, J.—The affidavit must either follow Con. Stat. Man. c. 37, s. 44, and state positively that the garnishee is indebted or liable to defendant, or follow the exact words of the amending statute. The Court is inclined to construe the statute strictly in the case of garnishee proceedings before judgment. Order set aside with costs, which in this case I liquidate at $2.00

BANK OF NOVA SCOTIA v. BROWN.

(IN CHAMBERS.)

Similiter.—Jury notice.

Held, After plaintiff joins issue on defendant's plea, the defendant cannot file a *similiter* containing a jury notice.

In this case the defendant filed his pleas on the 2nd of April, 1885, and on the 11th of April plaintiff joined issue. On the 21st of the same month, plaintiff gave notice for the regular Tuesday trials on the following Tuesday, the 28th of April. On the 22nd of April, defendant filed and served a *similiter* and a jury notice.

W. E. Perdue for the plaintiff obtained a summons to strike out the *similiter* and the jury notice.

C. H. Allen showed cause, citing *Quebec Bank* v. *Gray*, 5 Ont. Pr. R. 31; *Young* v. *Stockdale*, 5 U. C. Q. B. 332; *Seabrook* v. *Cave*, 2 Dow. 691.

W. E. Perdue, in support of the summons, pointed out the distinction between the Statute 32 Vic. c. 6, s. 18, Ont. which provides that the jury notice must be filed with the last pleading, and the Manitoba Statute, Con. Stat. c. 31, s. 14, which provides, that a defendant in his plea, or rejoinder, shall state that he requires a jury, otherwise the cause shall be tried by a judge.

A similiter is not a rejoinder.

[*28th April, 1885.*]

TAYLOR, J.—Made the summons to strike out the *similiter* and jury notice absolute, upon the facts disclosed. He further held that under the Manitoba Statute above cited, in no case can a defendant after joinder of issue by plaintiff, file a similiter, and a jury notice.

LUNN v. WINNIPEG.

Nul Tiel Record.—Issue.—New Assignment.

Upon an issue of *nul tiel record*, the only question is whether the record upon its face, shews that the present cause of action *may* have been the same as that for which judgment was recovered.

If the plaintiff desire a closer examination of the former action, he should file a new assignment, or a replication denying the identity of the causes of action.

To an action (1) upon the common counts (2) in trover (3, 4, 5, & 6), upon a special contract for two years services, at $1,000 a year; the defendant pleaded to all the counts, except that in trover, judgment recovered in the County Court. The plaintiff replied *nul tiel record*. The record, when produced, showed that the plaintiff had recovered for debt, $83.33.

Held, That the existence of the alleged record sufficiently appeared.

Per Killam, J.—(1.) The test as to the identity of causes of action is, whether the same evidence will support both actions.

(2.) A writ of *certiorari* to bring up papers from the County Court, should be directed to the clerk of that court—either by name, adding the name of his office, or by the name of his office alone.

(3.) It is no objection to a return to a writ of *certiorari* that more papers than directed are returned.

(4.) The record of a judgment of the County Court is the entry thereof in the procedure book.

A. Monkman for plaintiff.

David Glass and *Chester Glass* for defendants.

[*18th May, 1885.*]

DUBUC, J.—The plaintiff, in his declaration, alleges: First, the common counts; then that he was employed by, and has served, the defendants as an assessor for the period of two years, at a salary of $1,000 per year, and that he has not been paid; the fourth, fifth, and sixth counts are for wrongful dismissal.

To these different counts, the defendants pleaded that the plaintiff has recovered in the County Court of the County of Selkirk a judgment for the same cause of action, which said judgment has been duly paid by the defendants to the plaintiff.

The plaintiff replied: *nul tiel record*, and called upon the defendants to have said record in court on the 10th day of February, 1885, being a day during Hilary Term.

The record of the judgment in the County Court, pleaded by the defendants, was brought before us, under a writ of *certiorari*. The record and particulars of claim showed that the plaintiff recovered judgment against the defendants for one month's salary, up to the 31st of August, 1884, at $1,000 per year, being $83.33.

The question of plea or replication of *nul tiel record* comes up either by demurrer, or by way of trial by record.

In *Few* v. *Backhouse*, 8 A. & E. 789, the defendants pleaded judgment recovered for the same cause of action. The plaintiff replied that the causes of action were not the same. On demurrer to the replication, judgment was given for the plaintiff.

In *Nelson* v. *Couch*, 15 C. B. N. S. 99, the plea was, that the plaintiff had recovered in the High Court of Admiralty, for the same cause of action. Replication, that the damages sustained were greater than the amount received from the proceeds of the sale awarded by the Admiralty Court, and that the present action was for residue of the damages so sustained. On demurrer, it was held that the plea was insufficient, and judgment was given for the plaintiff.

In *Beasly* v. *Beasly*, 10 U. C. Q. B. 367, on the plea of a former recovery, the plaintiff replied that the promises in this action were not the same as those in the former action; on demurrer, the replication was held to be good.

In *Munkenbeck* v. *Bushnell*, 4 Dowl. 139, on trial by record, the declaration showed an action of debt, while from the record produced it appeared that the former action was one of promise; it was held to be a fatal variance, and that the defendant was entitled to judgment for a failure of the record.

In *Hopkins* v. *Francis*, 2 D. & L. 664, it was held that the manner in which the former judgment had been recovered was no variance, and if there was a variance, it could be amended. The Court would not allow the record to be questioned by affidavit. Park. B. says: "It is very necessary to show a recovery by a judgment." The same seems to have been held in *Hodgson* v. *Chetwynd*, 3 D. & L. 45.

In *Wadsworth* v. *Bently*, 23 L. J. Q. B. 3, there was only a replication of *nul tiel record*; and the Court held that the record must show on its face that the cause of action in the second case *may* be the same as that for which judgment has been recovered.

In *Phillips* v. *Smith*, 2 D. & D. 688, Williams, J., said: "Upon the pleadings, the judgment alone is in issue. The issue is simply whether or not there is a record of the judgment which was recovered remaining in this court."

From these cases it appears that when, to a plea of a former recovery, the plaintiff replied by denying the identity of the cause of action, the Court examined the former record, and if the cause of action was found to be different, judgment was given in favor of the plaintiff for failure of the record.

But when there is only a plea, or replication of *nul tiel record*, it seems that the Court would only ascertain whether there is a record of a judgment, and nothing more.

In the present case, the record, if we look at the particulars as part of it, shows a former recovery by the plaintiff for one month's salary, up to the 31st of August, 1884, at $1,000 per year.

According to *Hopkins* v. *Francis*, *Hodgson* v. *Chetwynd*, and *Phillips* v. *Smith*, above cited, as a former recovery was ascertained by the Court, the defendant should be entitled to judgment for having perfected the record. But if I was to go further and examine the record, I would be disposed to hold, according to *Wadsworth* v. *Bently*, that the cause of action in the former recovery may be the same as in this case, and on this ground also to give judgment for the defendants on all the pleas of former recovery, except, perhaps, the sixth plea, which being a plea of former recovery for wages, could hardly be considered a good plea to the common counts, unless it would apply to that part thereof which alleges work and labor.

I therefore think that the plaintiff's third, fourth, fifth, sixth and seventh replications, denying the existence of the record, are bad; and the defendant's sixth, seventh, eighth, ninth and tenth pleas, alleging the record, are good.

KILLAM, J.—The record of the judgment of the County Court, is the entry in the procedure book of the clerk. It shows merely that upon the 13th day of November, 1884, the present plaintiff recovered a judgment against the present defendants for $83.33, for debt, together with $14.55 costs. I do not think that upon this issue the court can look beyond that record. See *Regina* v. *Rowland*, 1 F. & F. 72; *Dews* v. *Riley*, 11 C. B. 443.

In *King* v. *Hoare*, 13 M. & W. 494, it is said: "In the case of a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue on the plea. If the judgment were recovered for another cause, there must be a new assignment."

It appears from *Bain* v. *Bain*, 10 U. C. Q. B. 572, that the plaintiff is not confined to a new assignment, but may reply that the causes of action are not identical. Robinson, C. J., says: "The defendant asserts what is open to be traversed, when he avers that both actions were for the same cause."

It appears from these cases, as well as from *Parker* v. *Thompson*, 3 Pick. (Mass.) 429, and many other cases that might be cited, that the question of the identity of the causes of action is a question of fact, upon which the parties must go to the country, either upon a new assignment, or upon a replication denying such identity.

It is true, that in *Wadsworth* v. *Bentley*, 23 L. J. Q. B. 3, a failure of record was found, upon a difference of the causes of action appearing on the face of the record, but the difference was there so palpable that it had to be noticed by the Court. Crompton, J., however, says in that case, "the record when produced must be such as to show on its face that the cause of action in the second case *may* be the same as that for which the judgment was recovered in the former action." But a similarity in the form of action is not necessary. The causes of action may be identical, while the forms in the two cases are quite different; and the forms may be identical and the causes of action quite different.

In *Kerbey* v. *Siggers*, 2 Dowl. 659, an action of trespass, where there was a plea in abatement of a prior action pending for the same cause, concluding with a *prout patet per recordum*, upon replication of *nul tiel record* plaintiff ruled defendant to produce the record, upon which there was brought in upon *certiorari*, out of the Exchequer, a record of the entry of an award of a writ of summons out of the Common Pleas between the same parties, to show that the two actions were for the same cause; and the plaintiff objecting that there was nothing on the roll to show that the two actions were for the same cause, Park. B, says: "The question is whether, if any writ is produced it is not a sufficient compliance with the

plea." From *Kitchen* v. *Campbell*, 3 Wils. 304, and *Bain* v. *Bain*, 10 U. C. Q. B. 572, it appears that the test as to the identity of the causes of actions is, whether the same evidence will support both the actions, although the actions may happen to be grounded on different writs.

The former of these two actions was brought by the assignees of a bankrupt for money had and received by the defendant to their use. The defendant had recovered a judgment against the bankrupt on a warrant of attorney, which the assignees claimed to be void under the bankruptcy laws, and had levied upon the bankrupt's goods under a writ of *fieri facias*, and made a considerable sum. The plaintiffs had previously brought an action of trover against the defendant and the sheriff, for conversion of the goods seized under the writ, and the defendant and the sheriff had recovered a verdict and a judgment in that action, against the plaintiff. It was held that the action for money had and received would lie, but that trover would also lie, and that the judgment in the action of trover was a complete bar; for the plaintiffs, having brought their action of trover against the sheriff and the defendant to recover the value of the goods had made their election. The fact that the same evidence would support both actions showed that the causes of action were identical, though the plaintiff had at first elected to proceed in a different form of action.

The same point is illustrated fully in *Rice* v. *King*, 7 Johns (N. Y.) 19; *Johnson* v. *Smith*, 8 Johns, 383; *Miller* v. *Manice*, 6 Hill, (N. Y.) 114; *Goodrich* v. *Yale*, 97 Mass. 15; *Wood* v. *Jackson*, 8 Wend. (N. Y.) 19.

Following the judgment of Williams, J., in *Phillips* v. *Smith*, 2 D. & D. 688, "the issue is simply whether or not there is a record of the judgment which was recovered remaining" in the County Court. "That is established in law by the production" of the transcript of the entries in the procedure book. All this transcript shows, of the nature of the cause of action, is that $83.33 was recovered for debt.

Goodman v. *Pocock*, 15 Q. B. 576, shows that where a servant is wrongfully dismissed he has his election, to rescind the contract for hiring and proceed for wages for the broken period, or to affirm the contract and sue for damages for the wrongful dismissal; just as in *Kitchen* v. *Campbell*, the assignees had their

election to avoid the sale and proceed in trover for the conversion of the goods, or to affirm the sale, and proceed in *assumpsit* for the proceeds. But both cannot be done.

Here the sum recovered for debt may have been recovered for the broken periods ending at the times of the dismissals set up in the different counts, as *indebitatus assumpsit* may be brought for the sums claimed under such circumstances, and it may also include sums for each of the causes of action covered by the common counts. Whether this is so or not is a question that can only be raised upon a new assignment, or a proper replication.

The record of the County Court, or rather a transcript thereof, is brought up on a *certiorari*, and the plaintiff makes several objections to the writ and the return. The writ is directed to "John J. Betournay, Clerk of the County Court of the County of Selkirk." The plaintiff says that it should be addressed to the judge of the County Court, &c., or to the clerk of the County Court, &c., and not to the clerk by his name.

In *Archbold's Practice*, (12th Ed.) p. 940, it is said, that it "must be directed to the Chief Justice, judge, or other officer of the court below, in whose custody the record is supposed to be." By the statute, the clerk of the County Court has the custody of the procedure book, and I think that the writ should be directed to him. In the forms given in *Chitty's Forms*, pp. 485, *et seq.*, it appears that the writs may be directed indifferently to the judge, or officer, by name , adding the name of his office, or by the name of his office alone, some of the forms being in the one way and others in the other. As no authority in favor of the objection was cited, I think the direction in the present case must be held sufficient.

The plaintiff also objects to the form of the writ itself; but as it differs from that given by Chitty for a *certiorari* to an inferior court, only in such particulars as are necessary where it is directed to the clerk, instead of the judge of the court, (the form in that particular instance being of a writ addressed to the judge), I cannot see any valid objection to it.

An objection is also made to the return, but the return also appears quite satisfactory. It is true that the clerk returns with the transcript of the record in his procedure book the original writ, statement of claim, dispute note, evidence and other docu-

ments, and that the Court cannot look at these. What he has to return is a transcript or exemplification of the record (*Archbold's Pr.* 12th Ed. p. 940), and this is given in the transcript from the procedure book. The addition of the other papers does not alter the fact that this is returned.

It has been assumed by all parties that the County Court is a court of record, and it is not necessary for us to consider that question. If the point were to be taken it should have been done in some other way.

In my opinion judgment must be for defendants upon the issue before the Court.

CAMERON v. PERRY.

Amendments at trial.—New defences if declaration amended.

Action upon a note. Upon a motion being made at the trial for a non-suit, on the ground of variance, the plaintiff asked to amend his declaration by alleging that the note was payable at the Ontario Bank, Winnipeg.

J. S. Ewart, Q. C. for plaintiff.

F. B. Robertson for defendant.

The amendment was allowed, as the defendant could not be prejudiced but

KILLAM, J. HELD, that the defendant had thereupon the same right to plead to the amended declaration, as he had to plead to the declaration if originally filed as amended; that he was not limited to the defences set up to the original declaration, and that the Court had no discretion in the matter.

BURRIDGE v. EMES.

Nul Tiel Record.—Proof.

Held, (following *Lunn* v. *Winnipeg*, ante p. 225) that the only question upon an issue on a plea of *nul tiel record* is whether there is remaining in the court in question the record of such a judgment as the pleading sets up.

To a declaration in covenant for payment of money, and for use and occupation, the defendant pleaded a number of pleas, alleging that both causes of action were in respect of rent, and setting forth various circumstances shewing a termination of the tenancy. The plaintiff replied that formerly he brought an action in the County Court for other rent under the same lease, in which action the same defences were set up, and the plaintiff had judgment; a transcript to the Court of Queen's Bench; and that the judgment thereby became a judgment of the Court of Queen's Bench. Rejoinder, *nul tiel record*. Upon trial of this issue, the plaintiff produced a transcript of the procedure book of the County Court, from which it appeared that on a certain day the plaintiff recovered against the defendant judgment for $135, for debt, together with $20.10 for costs, and also produced the transcript of this judgment, in the statutory form from among the records of the Court of Queen's Bench.

Held, the existence of the record as alleged was sufficiently proved by the production of the transcript filed in the Court of Queen's Bench, and that the only judgment subsisting was that recovered in the Court of Queen's Bench by the filing of the transcript there.

A. Monkman for plaintiff.

W. H. Culver for defendant.

[*26th May, 1885.*]

KILLAM, J.—The plaintiff sues in covenant for $540 as being due and unpaid on a covenant by the defendant to pay to the plaintiff $135, on the first days of each of the months of October, November and December, 1884, and in *indebitatus assumpsit* for the use and occupation, by the defendant, of lands and messuages of the plaintiff.

The defendant pleads to the first count *non est factum*, and to both counts, several pleas which allege that the covenant declared on in the first count is for payment of rent for the lands mentioned in the second count, under a lease from the plaintiff to the defendant, containing the covenant, and that the causes of action in the two counts are the same, and various sets of circumstances which would show a determination of the lease and of the defendant's possession, before the accrual of the rents sued for or

the commencement of the periods for which they were payable, and (in other pleas) transfers of the reversion by way of mortgage and various sets of circumstances which would disentitle the plaintiff to recover the rents.

To all these pleas the plaintiff replies separately by way of estoppel, that the plaintiff brought an action in the County Court of the County of Selkirk, for the rent payable in September, 1884, under the lease in question; that the other matters set up in the respective pleas by way of avoidance occurred before the first day of September, (if at all); that in such action it was adjudged that these several defences were untrue, and that the plaintiff was entitled to recover of the defendant the rent accruing on the first day of September; that judgment was entered in the County Court for the plaintiff for the amount of the rent due on the first day of September; that a transcript of such judgment was filed in this court, and it thereby became a judgment of this court, which still remains in force. The defendant rejoins *nul tiel record*, and the issue comes up before me sitting in court, for trial by record.

This issue was first brought up before the court in Hilary Term, and the trial was adjourned to come up before a judge sitting in court out of term. Since that adjournment the defendant has filed with the prothonotary a rejoinder by way of estoppel, setting up that, in another action between the same parties in this court, it has been determined by the verdict of a jury that it was not adjudged in the action in the County Court, as claimed by the plaintiff, that these several defences are untrue. The defendant has filed this pleading with an affidavit, as a defence arising since the last pleading, and within eight days previous to this pleading, but such a course appears to me wholly unwarranted. The defendant asks, then, that it be treated as a plea *puis darrein continuance* to both counts, instead of as a rejoinder. This, however, could not be done, as it would require to be considered as a plea embodying all the replications and the pleas to which they are pleaded in addition to the matter set up in the rejoinder itself, and would thus involve the joining together in one plea of a large number of defences. Besides, it is not pleaded to the counts but to the replications.

However, the only issue now before the court is upon the original rejoinder of *nul tiel record*, and upon this the plaintiff

has the transcript filed in this court, of the judgment of the County Court brought in, and has also the proceedings in the County Court brought up under a writ of *certiorari*.

A great many objections are made to the writ of *certiorari* and the return, but these do not appear to be of importance. As was shown in *Lunn* v. *Winnipeg* (*a*), decided by the Court during the present term, the question under such an issue is, whether there is remaining in the court in question the record of such a judgment as the pleading sets up. The transcript from the County Court of the judgment there recovered, which is filed in this court is, when filed, the record of a judgment of this court. It is contrary to the policy of the law that there should be at the same time two judgments for the same cause of action, so that it must be considered that the only judgment that could be now subsisting, is that recorded in this court by the filing of he transcript. What was the judgment of the County Court, or the nature of the action or the questions adjudicated upon therein, is not now of importance, except in so far as the same appears by this transcript. Upon these questions may be raised issues which should be tried as ordinary issues of fact. The rejoinder by way of estoppel, if properly pleaded, might also give rise to issues upon which the parties should go to the country, or to another issue for trial by record, but it cannot in any way affect the judgment upon the issue now before me.

The production of this transcript from among the records of this court shows that there is remaining in this court such a record as the plaintiff sets up in his several replications, and judgment upon the present issue must be for the plaintiff.

(*a*) ante, p. 225.

QUEEN v. CONNOR.

North West Territories.—Grand Jury.—Coroner's Inquest.

In the Territories it is not necessary that a trial for murder should be based upon an indictment by a Grand Jury, or a Coroner's inquest.

This was an appeal from the North West Territories. The prisoner had been convicted of the murder of one Mulaski, and he appealed from the procedure adopted by the stipendiary magistrate. The principal objection was, that there had been no preliminary investigation before a grand jury or by 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 was 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 of 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 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.

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 & 23 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 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*, 2 Colorado, 186, and *Clinton* v. *Englebrecht*, 13 Wall. 434, are authorities for this position. It is clear however, that the institutions of grand jury 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.

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.

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: See 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.

[*29th June, 1885.*]

WALLBRIDGE, C. J.—The prisoner, John Connor, was tried at Regina, in the North West Territories, on the first 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 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 subsections 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 without the intervention of a jury.

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 Act now under consideration, and many of the cases now triable 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 therein 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 of 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 this 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. 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*, L. R. 4, H. L. 171; *Laurie* v. *Rathbun*, 38 U. C. Q. B. 255.

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

uninhabited country are said to take the Common Law of England with them. Although 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 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 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.

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 & 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."

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 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 that 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.

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 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 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 of 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.

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.

ANLY v. HOLY TRINITY CHURCH.

Mechanic's Lien Act.—Assignment of consideration by contractor.—Priority.

Held, 1. A sub-contractor is entitled to assert a mechanic's lien, even although the contract between the owner and original contractor provides that no workman should be entitled to any lien.

2. An assignee of the contract price for the erection of a building, is not entitled to the money as against the lien of a sub-contractor, unless the owner has in good faith bound himself to pay the assignee.

By a building contract dated the 25th day of June, 1883, made between J. G. McDonald of the first part, the defendants the Church of England Parish of Holy Trinity, Winnipeg, of the second part, and J. H. Ashdown and W. W. Macalister, sureties, of the third part, it was agreed that said McDonald should erect a church for the said parties of the second part, at the sum of $59,890, payment thereof to be made fortnightly, as the work

progressed, to the amount of the value of 90 per cent. of the work done, and the balance of ten per cent. within thirty days after the completion of the building.

It was further agreed that neither the said party of the first part, nor any person working in and about, or having anything to do with the carrying out of the contract, nor any person furnishing materials to be used in and about the said building, should have the right to any mechanic's lien on the said building, or the lands connected therewith, notwithstanding any statute to the contrary, and the registration of any such lien should be, and the same was thereby declared to be utterly null and void to all intents and purposes.

McDonald being indebted to one Ashdown, on certain promissory notes given for a running account incurred on contracts, other than the church contract referred to, gave Ashdown an order for $2,000 in the words following:—

Winnipeg, April 19th, 1885.

F. B. Ross, Esq.,
People's Warden,
Holy Trinity Church, City.

Please pay to Jas. H. Ashdown, Esq., Two thousand ($2,000) dollars from the percentages held back on completion of contract Holy Trinity Church.

Yours truly,
Jas. G. McDonald.

This order was delivered to said F. B. Ross, who in his evidence said, "it was presented to me and a copy of it left with me about the 21st of April, 1884. I read it, and as it read that it was to be paid at the completion of the contract, I simply filed it away. I said nothing about when it would be paid."

This order was in no way further dealt with, until Ashdown proved his claim in the master's office, under the decree in this cause.

On the 19th of July, 1884, McDonald, not having prosecuted the work with sufficient diligence, the churchwardens took the work out of his hands, and completed the building, charging McDonald with their outlay; after which there remained due to him a sum in their hands of about $3,000.

The plaintiffs, who were sub-contractors, filed their lien for work done for McDonald prior to the work being taken out of

his hands, but subsequent to the date of the order given by McDonald to Ashdown, and obtained a decree for payment out of any monies remaining in the hands of the church coming to McDonald on his contract.

On claims being proved in the master's office, the master allowed the claim of Ashdown for the $2,000 mentioned in the order as a first charge on the monies in the hands of the church, holding that the order constituted an equitable assignment of $2,000, part of the monies coming to McDonald, and took priority over the liens.

From this report the plaintiff appealed.

F. S. Nugent, for the plaintiff, the appellant.

W. R. Mulock, for defendant.

J. B. McArthur, Q. C., for lien holders other than the plaintiff.

Hon. S. C. Biggs, Q. C., and *J. H. Brown* for the respondent Ashdown.

[*12th May, 1885.*]

DUBUC, J.—The order of McDonald to Ashdown was, no doubt, a good equitable assignment, of what McDonald could then assign. The church had the right to accept the order, or to refuse to accept it. If they had accepted it unconditionally, they could be forced to pay it, whether they had any money in their hands at the completion of the building, or not. And in case of no money remaining in their hands, they would no less be bound to pay such order, and would be left to their remedy against the sureties. It is true that when the order was made and presented, there were then moneys earned by McDonald in the hands of the church, kept by them to insure the completion of the building, But it was kept for the very purpose of having the building completed,, in case they should take it from the hands of McDonald.

However, the church did not accept the order. The evidence shows that it was only filed away. This might amount to a conditional acceptance, and the implied condition would be, that the order would be paid, provided there would be funds enough to complete the building, after satisfying all just claims against the same.

If the church had paid the order at the time, or if they had accepted it unconditionally, it might be considered as payment

made in good faith under the 18th section of the Mechanic's Lien Act, Con. Stat. Man. c. 53.

The question here is whether the order given, but not paid, nor accepted unconditionally, can have priority over liens of mechanics under the Mechanic's Lien Act. Ashdown, who holds the order, seeks to invoke the 19th paragraph of the contract between the church and McDonald, which declares that no person working on, or furnishing materials for, the building, shall have a right to any lien. This covenant, no doubt binds the covenantor McDonald, but can it bind any other person having absolute rights under the statute?

We find in text books mention of some American cases, in which it appears to have been held, that the right of the sub-contractor and others, is subject to the terms of the original contract between the owner and the contractor. These are particular cases in the California Courts. But they must be under a particular statute of the State, and we do not know what that statute is.

In Ontario, *Mr. Holmested* in his work on *The Mechanic's Lien Act* page 8, says: "To disentitle a contractor to a lien, it is clear the agreement must be made between the contractor and the owner. But whether such an agreement between a contractor and the owner, would bind a sub-contractor, is not so clear." But our statute is somewhat different from that of Ontario, and its provision is more forcible in favor of the mechanic. The Ontario statute reads: "Unless there is an express agreement to the contrary, every mechanic, machinist, &c., doing work upon, or furnishing materials to any building, shall have a lien or charge for the price of such work, machinery, &c." Our own statute is as follows: "Unless he shall have agreed to the contrary, every mechanic, machinist, &c., shall have a lien," &c.

So in Ontario, if there is an agreement to the contrary, notwithstanding that the agreement might be made with the contractor only, every mechanic and working man might be bound by it; while in the Manitoba statute, he is not bound by such agreement, unless he, the mechanic, or workman, has himself agreed to it.

With this statute before them, if the church wished to have the provisions of paragraph 19 of the contract binding on mechanics and workmen, they should have seen that no mechanic or work-

man was employed on the building unless he consented to agree to such provision.

I suppose that Ashdown was acting in good faith; he may have thought that the 19th paragraph of the contract was absolute, and would be binding on all persons working on the building; but he had the means of knowing how matters stood by looking at the statute; while the plaintiff Anley, relying on his right under the statute, had no means of knowing that McDonald had given such an order. So, on the question of good faith and merits, the plaintiff is on the right side.

It was agreed that the order should be protected as payment made in good faith under section 18 of the Mechanic's Lien Act. But section 18 affords protection only to payment made in good faith. And an order not accepted, or at least not accepted unconditionally, cannot amount to payment. It was also contended that the right of Ashdown to the money depended on a condition which happened. It is clear that there was no expressed condition; the implied one was that the order would be paid, provided there remained in the hands of the church sufficient funds to complete the building; and to complete the building, means to satisfy all just claims upon the same. The fact that the plaintiff's lien has not been satisfied, shows that the condition did not happen.

Besides that, the protection afforded by section 18 appears to be in favor of the owner. The owner here, not having paid the money nor become absolutely liable for it, does not require such protection, and it is not invoked in his favor. Can a third party for whom such protection was not created, who was not contemplated by the statute, who has only an order not amounting to payment, invoke in his favor the protection of *bona fide* payment under the said section 18? I do not think so.

If a contractor, by giving orders such as the one in question here, could anticipate the payments which might become due under his contract, he would have the means of entirely defeating the liens of every mechanic or laborer working on the building. But the statute is made for the very purpose of protecting the mechanics, and others working upon the building, and the contractor cannot be permitted to so elude or defeat the statute to the prejudice of the mechanics and laborers, without their consenting or agreeing to it.

I think the appeal should be allowed with costs.

FREEBORN v. THE SINGER SEWING MACHINE CO.

(IN APPEAL.)

Corporation.—Libel.—Malice.

The manager of one branch of the defendant company wrote certain letters to another branch, which might have constituted a libel on the plaintiff. There was no evidence that the corporation, or the directors, or the managing board authorized, or had any knowledge of the letters being written.

Held, That the defendants were not liable.

Quære.—Can a corporation be guilty of malice.

N. F. Hagel for plaintiff.

A. C. Killam, Q. C., for defendants.

[*18th May, 1885.*]

TAYLOR, J., delivered the judgment of the Court. (*a*)

The defendants are a foreign corporation, doing business in Canada. The chief office of the company in Canada is in the city of Toronto, with a manager and assistant manager. There is a branch in the city of Winnipeg, which is subordinate to the Toronto office. The plaintiff was for a few weeks employed in connection with the Toronto branch, which is, as I understand it, distinct from the chief office in that city. After leaving the Toronto branch he came to Winnipeg in search of employment, and very soon after his arrival he was engaged as city collector by Mr. Gage, the manager of the defendants' Winnipeg branch.

This was about the end of April, 1883. On the 9th of June following, the assistant manager in Toronto wrote a letter to Mr. Gage with reference to the plaintiff, and on the 19th of the same month, Mr. Marshall, the Toronto manager, wrote another letter to Mr. Gage, which also had reference to the plaintiff. Those letters, he alleges, were a libel upon him, and on that account he brings the present action against the company.

His counsel admits that written, as they were, from one servant of the company to another, respecting a subordinate servant, they are *prima facie* privileged communications, but he claims that the language used was such as to furnish evidence of express malice, or putting it more correctly, that such excess was not privileged.

In the recent work of *Mr. Odger* on *Libel*, it is stated at page 368, that "a corporation will be liable to an action for a libel

(*a*.) Present—Dubuc, Taylor, Smith, J.J.

published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication." But in *Roscoe's Nisi Prius Evidence* (15 Ed.) p. 810, it is said, the question is hardly yet finally settled.

Mr. Odger also says, (p. 368) "whether a corporation can be guilty of express malice, so as to destroy a *prima facie* privilege arising from the occasion of publication, has not yet been decided: but *semble* it can."

The authority cited in support of this is *Whitfield* v. *The South Eastern Railway Co.*, E. B. & E. 115. But that case scarcely supports so wide a statement of the law. It came before the court upon demurrer. The declaration averred that the plaintiffs carried on business as bankers, under the firm of The Lewes Old Bank, and the defendants were proprietors of, and managed by their servants and agents, a system of electric telegraph upon, along, and over, their line of railway, and the defendants, while the plaintiffs were such bankers, wrongfully, falsely and maliciously, by means of said telegraph, transmitted and sent and published, from a certain station to another station, and there falsely and maliciously caused to be written, printed, copied, circulated, and published, the false, malicious and defamatory words and message following: "The Lewes Bank," thereby meaning the said Lewes Old Bank, "has stopped payment." Then followed three similar counts for transmitting to different stations telegraphic messages of a similar purport. The fifth count averred, that the defendants, while the plaintiffs were such bankers, &c., by their servants and agents in that behalf, falsely and maliciously wrote and published, and caused to be written and published, of and concerning the plaintiffs &c., the false, malicious and defamatory words, "The Lewes Old Bank has stopped." In giving judgment on the demurrer, Lord Campbell, C. J., after remarking that the demurrer could only be supported on the ground that the action would not lie without proof of express malice, said, "But if we yield to the authorities which say that in an action for defamation, malice must be alleged, this allegation may be proved by showing that the publication took place by order of the defendants." And his Lordship referred to *The Eastern Counties Railway Co* v. *Broom*, 6 Exch. 314, in which it was held, that an action of trespass might be

maintained against a corporation aggregate, for an assault committed by their servant authorized to do the act.

In *Reg.* v. *The Great North of England Railway Co.*, 9 Q. B. 315, which was the case of an indictment against a corporation for cutting through and obstructing a highway, Lord Denman, C. J., after citing a case in which it had been held that a corporation might be sued in trespass, proceeded, "But nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing the[illegible] and are violations of the social duties that belong to men and subjects. A corporation, which as such has no such duties, cannot be guilty in these cases; but they may be guilty as a body corporate, commanding acts to be done to the nuisance of the community at large."

In *The Philadelphia, Wilmington & Baltimore Railway Co.* v. *Quigley*, 21 How. 202, the libel for the publication of which the company was held answerable, and which was originally contained in a report to the shareholders, was subsequently published by order of the board of directors. And so in *Holliday* v. *The Ontario Farmers Mutual Insurance Company*, 33 U. C. Q. B. 558; 38 U. C. Q B. 76; 1 Ont. App. R. 483, in which the Court of Appeal, reversing the judgment of the Court of Queen's Bench held the defendants liable for the publication of a libel, the advertisement which was held libellous, was prepared and published, by a committee named by resolution of the board of directors for that purpose.

We were referred to the case of *Tench* v. *The Great Western Railway Co.*, 32 U. C. Q. B, 452, in which the defendants were held liable for a libel on the plaintiff, published by their general manager.

The Court there held that had copies of the document complained of been distributed only among the employées, or put up in the private offices of the company, where they alone had a right to be, it would have been privileged, but that the putting of it up in offices and stations open to the public, was not justified, and was evidence of malice.

In *Stevens* v. *The Midland Counties Railway Co.*, 10 Exch. 352, where the plaintiff had obtained a verdict against the defendants the company, and one Lander, one of their servants, in an action for malicious prosecution, the Court made absolute a rule to enter a verdict for the company, on the ground that there was no

evidence against the corporation. The Court did not think it necessary to give any opinion on the question whether this form of action would lie against a Corporation, but Alderson, B. expressed the opinion that it would not. His language was, "It seems to me that an action of this description does not lie against a corporation aggregate; for in order to support the action, it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind."

But in *Edwards* v. *The Midland Railway Co.*, L. R. 6 Q. B. Div. 287, the Court declined to adopt or follow this judgment of the learned Baron. And in *Abrath* v. *The North Eastern Railway Co.*, L. R. 11 Q. B. Div. 440, when, in the Court of Appeal, the Solicitor General proposed to argue that a corporation could not be guilty of malice, Fry, L. J., cited (see note on page 446), the case of *Edwards* v. *The Midland Railway Co.*, as an authority to the contrary, but it became unnecessary to decide the point.

In neither of these cases was reference made to the case of *Henderson* v. *The Midland Railway Co*, 20 W. R. 23. That was an action brought against the company for malicious prosecution, in which the plaintiff was non-suited at the trial, the judge holding that want of reasonable and probable cause had not been shown. In Term the non-suit was set aside. No objection was taken at the trial that the corporation could not be liable for malice. Cleasby, B., said, "As to the question whether an action will lie against a body corporate for malicious prosecution it is unnecessary for me to say anything." Bramwell, B., was of opinion that this form of action would not lie against a corporation. He said "I cannot understand how malice can exist in a body corporate; a corporation aggregate must necessarily be destitute of malice. * * * The defendants are not capable of acting maliciously." Chief Baron Kelly said "If the question were brought before us in a proper form, I might or might not agree with my brother Bramwell."

In this case, there is no evidence that the defendants, a corporation, or the directors or managing board of the corporation, authorized, or had any knowledge of, the letters in question being written. And in the present state of the law, it would in my judgment, be unsafe to hold, in the absence of any such evidence, that the defendants can be made liable for express malice, so the rule should be made absolute to enter a nonsuit.

FEDERAL BANK OF CANADA v. THE CANADIAN BANK OF COMMERCE.

(IN APPEAL.)

Interpleader.—Money paid to sheriff, by purchaser from trustee, upon fi. fa. against trustee.—Rights of cestui qui trust.

Upon a sale of lands by a trustee, the purchaser paid a portion of the price to a sheriff who held a *fi. fa.* against the trustee. There was no evidence that the payment to the sheriff was other than in his official capacity. On the contrary there was evidence that he refused to give a certificate to the purchaser, that there were no executions in his hands until the money was paid to him.

Held, That the *c. q. t.*, was not entitled to the money so paid as against the execution creditor.

Per Wallbridge, C. J.—The money could not properly be the subject of an interpleader issue.

H. M. Howell, Q. C., for plaintiffs.
W. H. Culver for defendants.

[*2nd June, 1885.*]

WALLBRIDGE, C. J.,—The facts in this case appear to be, Adamson purchased certain lands in block 4, lot 9, from the Hudson's Bay Company, and entered into an agreement therefor, dated 29th April, 1881. Neither the agreement nor the copy was produced in Term, though the original was produced from the Registry Office, at the trial.

On the 3rd of March 1883, Adamson conveyed this land by deed to Thomas Renwick, the date of registration is the 22nd of March, the year uncertain. This deed purports to convey the land to Thomas Renwick in fee simple. At the close of the *habendum*, it is declared, that Renwick shall hold the land subject to the limitations and provisoes in the grant from the Crown, and "to the balance unpaid to the Hudson's Bay Company." The covenants for quiet possession and for freedom from incumbrance conclude with the words "except as aforesaid." It may, I think, be fairly gathered from this deed, that Renwick was to pay a balance to the Hudson's Bay Company.

A deed was produced from Renwick to Adamson, dated the 26th of July 1883, and registered the 16th of August, 1883, for

the same land; also a deed from Adamson to the trustees of Knox Church, dated the 4th of August, 1883.

Mr. Mackenzie, called as a witness, says, the reason for conveying to Adamson, was, that he contracted originally with the Hudson's Bay Company, and they would not recognize any one else. I am not convinced by this reason, if they would not recognize any one else, I suppose they could be made to do it.

This land was reconveyed to Adamson, that he might get a deed from the Hudson's Bay Company, and then convey to the trustees of Knox Church. Adamson paid nothing, and the consideration named in the deed is nominal, namely, $1.

This was done in order that the title from Renwick, the bank agent, might be perfected in the trustees of Knox Church.

Adamson conveyed to the trustees of Knox Church on the 4th of August, 1883; on that same day, and presumably before the execution of the deed, (though not proved) the Canadian Bank of Commerce placed their executions against goods and lands in the sheriff's hands, at 11.30, a. m.

The case has been argued upon the assumption that the executions were in the sheriff's hands before the execution of the deed.

The date of Adamson's deed from the Hudson's Bay Company is not proved, nor that he ever had a deed. What kind of title had Adamson then on the 4th of August, 1883.

I think he had the equitable fee simple. But of this he was seized in fee as trustee only.

If the trustees of Knox Church have not got a title, then the money is yet theirs. The plaintiff's only claim to it, is upon the supposition that they, the trustees, have a title, and as against the plaintiffs, who seek to recover the consideration money, I can assume that Adamson had a title when he conveyed to the trustees of Knox Church. I think the plaintiffs are bound to admit that, as it is part of their case.

It is proved that on the 4th of August, 1883, at 11.30 a. m., the sheriff of the Eastern Judicial District, (in whose district the lands lie,) received executions against goods and lands against Adamson.

On the 14th of September, 1883, Messrs. Bain, Blanchard & Mulock, acting for Knox Church, paid the sheriff $3,648.15 on the *fi. fa.* against lands not on the *fi. fa.* goods. The sheriff then gave a certificate that the land was free from execution. And immediately afterwards the sheriff received notice from plaintiffs' solicitors, Messrs. Archibald, Howell, Campbell & Hough, that this money was claimed by them for plaintiffs as the money of Renwick. The deputy sheriff says that he had taken no action to realize under the execution against lands, and was not in a position to do so.

Early in March, 1883, Renwick was manager of the Federal Bank, (the plaintiffs) and Adamson owed them on the first of that month over $10,000, and he gave this deed to Renwick to secure the Bank (plaintiffs). Renwick says he re-conveyed it to Adamson to facilitate the transfer from the Hudson's Bay Company so that a title could be made through Adamson to the trustees, and this money which the trustees were to pay, was to go to the Federal Bank.

It was upon this express understanding that the plaintiffs were to get this money, that Renwick conveyed the lands to Adamson. Renwick held this land apparently for the plaintiffs, the Federal Bank.

It may, however, be immaterial whether they have a title or not. Adamson either had received a deed from the Hudson's Bay Company, or had a right in equity to call upon them for one, and whatever right he had, he conveyed to the trustees of Knox Church on the 4th of August, 1883.

In my opinion, Adamson never had any title which was subject to execution after the 3rd of March 1883, (the date of his conveyance to Renwick,) excepting to such sum as the property might sell for, above what Adamson owed the Bank, and this appears greater than the money now sought to be recovered. Was Adamson anything more than trustee for the Federal Bank, and what beneficial interest had he?

The evidence shows that this land was conveyed to him for a special purpose, to comply with some regulation in the Hudson's Bay Company's office, and upon no valuable consideration whatever.

While the legal or equitable estate was thus in Adamson, the defendants placed an execution against lands in the sheriff's

hands the effect of this was in the words of the statute, "and under it, the land shall be bound."

The execution creditor could do nothing, until the expiration of a year from the receipt of the writ by the sheriff. The same section of the Act provides for the registration of the judgment, and declares that the registration of such judgment shall create a lien or charge upon all the estate and interest of the defendant. Adamson had no estate except as trustee, and had no beneficial interest whatever in the land. He could have declared the trusts himself at any time. Even a bankrupt may declare them after his bankruptcy, *Bates* v. *Graves* 2 Ves. 288.

A purchase from a trustee for value without notice is protected, so the trustees of Knox Church acquired the title freed from any trusts.

In my opinion the estate thus vested in Adamson was not liable to seizure. *Hamilton Provident Society* v. *Gilbert*, 6 Ont. R, 439; *Blackburn* v. *Gummeson* 8 Gr. 331.

But the solicitor for the trustees of Knox Church has paid off the execution against lands, and this appears to me to have been a voluntary payment; and this is the money the plaintiffs are trying to recover back. One effect of paying this money into the sheriff's hands was to prevent the defendants in this issue from enforcing their execution against Adamson's other property, if he had any, and this gives them a just cause to complain and to resist the plaintiff's efforts to recover it.

There is no evidence of negotiation with the plaintiffs or notice to them, or reservation of the payees right, as in *Doe Dem Morgan* v. *Boyer*, 9 U. C. Q. B. 318, there is nothing to show the money was not voluntarily paid. Besides this is not an action to recover back money paid by the person who paid it. It is an action to recover money paid into the hands of the sheriff by a purchaser of land to satisfy an execution which he believed (though erroneously as I hold,) formed a charge upon it, and this action is brought by another, the Federal Bank, who claim the land was theirs or held for them by Renwick, and by him conveyed upon trust to Adamson. This action really is to try the title to the land, and the plaintiffs only right to demand this money arises from the title they thus assert. *Linden* v. *Hooper*, 1 Cowp. 414; *Gingell* v. *Purkins*, 4 Exch. 725.

But this is not an action for money had and received. It is an interpleader issue. Can we try a title to land under an interpleader issue? The same reasons which determine that a title to land cannot be tried in an action for money had and received, are equally cogent to prevent that title being tried in an interpleader issue. The judge's order directing this issue was made under Con. Stat. Man. c. 37, s. 53, and upon reference to that Act, it is there enacted "that in case any claim is made to the proceeds or value of any lands or tenements taken and sold under any such process by any person not being the person against whom such attachment or proceedings or execution issued the court or judge may order, &c."

The money here claimed is not the proceeds of any lands or tenements taken and sold &c. This land was not in fact either taken or sold.

The Interpleader Act applies only to lands or tenements taken and sold and is not as wide as section 58 of c. 37, Con. Stat. Man. respecting seizures which permits equitable interests to be seized and sold. The interests bound in this case, I think are legal, for it must be presumed, to entitle these plaintiffs to the money, that the trustees of Knox Church have got a title.

I think this a case not provided for by the sheriff's Interpleader Act.

If the action were framed in contract, the court in that form would not try the title to lands.

Neither the sheriff nor these defendants have agreed to hold this money upon any understanding as to its application, and even if the money were in the sheriff's hands paid in, as it has been done, he never has agreed to hold it to, or for these plaintiffs' use, and the trustees might in any ordinary case and before they had entered into any engagement with the execution plaintiffs, have recalled the money, if it had been paid into his hands as an agent, and not as sheriff. *Baron* v. *Husband*, 4 B. & Ad. 611; *Brind* v. *Hampshire*, 1 M. & W. 365. So that in no event can I see that the plaintiffs are entitled to this money.

Rule discharged. Verdict for defendants stands.

KILLAM, J.—I agree that the rule should be discharged and that the verdict for the defendants should stand. I desire that it be understood that I have come to this conclusion altogether with-

out reference to the question of the plaintiffs' interest in the lands referred to in the evidence. I have not fully considered the points involved in that question, and I do not desire to express any opinion upon it.

The issue is whether "the moneys in the hands of the sheriff of the Eastern Judicial District, being part of the proceeds of the sale of Lots Nos. 9, 225 and 226 in Block 4 Hudson's Bay Co's Reserve, all or some part thereof are the property of plaintiffs as against the defendants."

In considering the question here raised, it is advisable to collect all the evidence relating to the payment of the money to the sheriff. There is so little that I will state it in full.

The first, that of Robertson, is as follows:—

Q. You are deputy sheriff? *A.* Yes.

Q. You produce executions against Robert Adamson?

A. The Canadian Bank of Commerce, *fi. fa.* goods and lands, dated the 4th day of August, 1883, received same day at 11.30 a. m.

Q. Did you ever receive any moneys on any executions, or this, against Mr. Adamson, and if so, from whom?

A. We received from Bain Blanchard & Mulock, $3,648.15 on the 14th of September, 1883.

Q. Why was that paid to you?

A. I was informed at the time it was paid as owing on some land in the city, being Mr. Adamson's land.

Q. It was received as against lands, not against goods?

A. We had no goods received, it was understood at the time that it was some land that got into his name in some way.

Q. And upon receiving that you gave a certificate that that money was free from execution?

A. Yes.

Q. You refused to give that certificate until that money was received?

A. Yes.

Q. Did you, or not refuse to give that certificate until that money was paid?

A. Yes, and immediately after we were notified by you or your firm that Mr. Renwick claimed that money in our hands as trustee or agent or something.

Cross examined.

Q. Had you taken any action to realize under lands?

A. No.

Q. Were you in a position to take action to realize under lands?

A. No.

Mr. Renwick, after reference is made to the proceeds of the sale of the lands is asked:

"Did you know why it was not paid?" and replies, "Because there had been some executions got in before the transfer had been made."

Mr. McKenzie, after stating that he had purchased certain lands from Adamson, and had reconveyed them to him, and that they had been purchased by the trustees of Knox Church, with other lands of Adamson's the lands claimed by the plaintffs, is asked:

"Do you know what became of the purchase money of that land? and replies,

"The completion of the sale lasted for a long time by reason of the Knox Church obtaining a loan from the Building Society, represented by Mr. F. B. Robertson, and finally the money was obtained, I believe, and the title was passed by Mr. Robertson; then proceedings were, I believe, taken against Mr. Adamson; the money to Mr. Adamson, namely the proceeds, were taken by the Bank of Commerce; there was a good deal of contention as to how the different rights to the property should be decided and finally the moneys were paid into court."

Q. What moneys?

A. The whole of the moneys.

Q. Where is your share now?

A. I got mine.

Q. Then the money that is in court now, to what lot does it appertain?

A. To the other lot.

Q. Mr. Adamson's lot?

A. Yes.

Q. You got your land originally from Mr. Adamson?

A. Yes.

On cross-examination, Mr. McKenzie admits that personally he knows nothing of the payment to the sheriff, but that he believes that Mr. Blanchard, acting for Knox Church, paid the money which was paid to the sheriff.

This is all the evidence that is given, that can bear in any way upon the circumstances of the payment to the sheriff.

What is there shown amounts to no more than this, that the solicitors for the trustees of Knox Church chose to pay to the sheriff upon an execution against Adamson, a portion of the proceeds of the sale to that church of certain lands, and that the sheriff or his deputy, until such payment was made, refused to give a certificate that there were in the sheriff's hands no executions against Adamson's lands. It is uncertain whether Mr. McKenzie refers to this payment to the sheriff when he speaks of a payment into court, but even if he does it is clear that he speaks without any real knowledge of the circumstances, and his evidence adds to our information only the fact that there was a contention as to how the different rights to the property should be decided.

There is nothing to show that there was any arrangement with the defendants, the sheriff, or even with the plaintiffs, that the purchase money or any portion of it should be paid to the sheriff as agent or trustee for the plaintiffs, if they were beneficially entitled to the lands.

The plaintiffs, if vendors of and entitled to the lands, could have no right to the purchase money in the hands of the solicitors for the purchasers, or in the hands of any one to whom the solicitors chose to pay it, unless the payment was made to a party as stakeholder or bailee, agent or trustee, for the plaintiffs; or, in other words, it was in some way appropriated by the payment to the use of the plaintiffs.

Here the appropriation, whether rightly or wrongly, was made to the use of the defendants, or upon their execution, and, if the plaintiffs were entitled to the purchase money, their only recourse is just what it would have been if the purchasers or their solicitors still held the money, a proceeding to recover the balance of their unpaid purchase money.

MINAKER v. BOWER.

(IN APPEAL.)

Trover and trespass.—Plaintiff's right to sue for goods in custodia legis.

The sheriff having an execution against A. & B., seized their stock in trade and made an inventory. Nothing was removed and no one was left in charge, but with a notification to the debtors not to remove anything, the sheriff left them in possession, their business proceeded and they made payments to the sheriff from time to time. Afterwards A. & B. executed to the plaintiffs a chattel mortgage upon their stock. Subsequently the defendant placed an execution in the sheriff's hands against A. & B., and at a sale by the sheriff became the purchaser.

Held,—In an action for trespass and trover, that the goods were at the date of the mortgage under seizure, and that the plaintiff could not succeed. Nor could he recover for goods sold or money received to his use.

H. E. Henderson for plaintiff.

A. C. Killam, Q. C., for defendant.

(*18th May, 1885.*)

TAYLOR, J , delivered the judgment of the Court :—(*a*)

The plaintiff who was in the employment of Beaubier & Ferguson, on the 31st of July, 1883, received from them a chattel mortgage covering a portion of the furniture and household stuff in their hotel, and securing payment in one month of $270, the balance of wages due her at the date of the mortgage. On the 4th of August following, an execution at the suit of the defendants against Beaubier & Ferguson was lodged with the sheriff of the Western Judicial District. When the chattel mortgage was given, the sheriff had an execution of one McLean on which Beaubier & Ferguson had from time to time been making payments, and on which there was then unpaid a small balance amounting to $15.15. He had also another execution at the suit of Birchell for $110. Besides these the County Court bailiff had in his hands an execution which required $57.67 to satisfy it.

(*a*)—Present—Dubuc, Taylor, Smith, JJ.

The sheriff, having on the 8th of August received notice of the plaintiff's mortgage, at first declined to proceed with the seizure of the goods under the defendant's execution, but on being indemnified by them he finally did so. The goods in the hotel were valued at $1,092 and were bought *en bloc* by the defendants at fifty cents on the dollar. They paid the amounts necessary to satisfy the prior executions and sheriff's fees, the balance $306,67 they retained, and that sum was credited on their execution.

The plaintiff now sues the defendants to recover the amount of her mortgage, the declaration containing one count in trespass for taking the goods and another in trover. To these are added the common counts, for goods sold and delivered by the plaintiff to the defendants, for money received by the defendants for the use of the plaintiff, and for interest. The defendants plead to the first and second counts, that the goods and chattels were not the goods and chattels of the plaintiff, and not guilty. To the common counts they plead never indebted and payment.

The action was tried at the Western District Assizes, before the Chief Justice, with a jury, who found a verdict in favor of the plaintiff for $288. The defendants now move against the verdict to enter a non-suit, or for a new trial on a number of grounds.

At the trial and also in Term the defendants impeached the validity of the plaintiff's mortgage as having been made for the purpose of giving her a preference over the other creditors of Beaubier & Ferguson, at a time when they were insolvent. Beaubier, who was examined as a witness for the defendants said the mortgage was executed for the purpose of giving her "a preference a head of the rest." "I gave it," he said, "to prefer her to the other creditors." But this evidence, given as it was with an evident leaning in favor of the defendants, and met as it was so fully by the evidence of the plaintiff and of her solicitor, Mr. Peterson, was not believed by the jury. In answer to questions left with them by the learned judge, they found that the mortgage was given for a real debt, and given under pressure from Mr. Peterson for the purpose of securing payment of that debt. After a careful perusal of the evidence I quite agree with the finding of the jury. The *bona fides* of the transaction seems proved beyond all doubt.

But the question remains, can the plaintiff succeed in this form of action?

For the plaintiff it is urged that although her mortgage was not due, yet under it she had the property in the goods, and as it contained no re-demise clause, she had also the right to immediate possession of them, and so can maintain trespass and trover. To this it is answered for the defendants that the plaintiff had neither the property in the goods nor the right to possession because they were at the time of the execution of her mortgage, *in custodia legis*, having been seized by the sheriff under the prior executions. This argument is met by the plaintiff's allegation that no seizure under the prior executions has been shown, and even if there had been any seizure, there was an abandonment. Her counsel relies upon *Castle* v. *Ruttan*, 4 U. C. C. P. 252, and *Hart* v. *Reynolds*, 13 U. C. C. P. 501 as authorities for his position.

From the evidence of the sheriff, and his son, it appears that a seizure had been made under the McLean and Birchell executions before the giving of the chattel mortgage, and an inventory of the goods made, although nothing was removed, nor was any one left in charge. The debtors were notified not to remove anything and were then left to continue their business, which they did, making payments from time to time to the sheriff, which were credited upon the executions. Now in this respect the case differs from those which have been cited. In *Castle* v. *Ruttan* the sheriff had taken a bond for the goods, and the court held that having done so any remedy he had was on the bond, and he could not say that he still held the goods under that execution to the prejudice of an execution received subsequently and long after the prior one should have been returned. *Hart* v. *Reynolds*, was a case in which the sheriff having seized, took an inventory of the goods and left them in the hands of the debtor, after which the landlord distrained for rent, and the court held that as against the landlord the goods were in the possession of the tenant and not in the custody of the law. *McIntyre* v. *Stata*, 4 U. C. C. P. 248 was also a case in which the landlords right to distrain was upheld. *Craig* v. *Craig*, 7 Ont. Pr. R. 209 was another case in which the question arose with reference to the rights of a landlord.

The question of abandonment is one of intention, and there is no evidence here that the sheriff intended to abandon the seizure made under the prior executions.

In *Hincks* v. *Sowerby*, 4 Ont. App. R. 113, a bailiff, on the 24th February, went with an execution against Ralph Hincks to the house of one Salkeld, and there wrote "seized" on part of a sewing machine belonging to Hincks, but did not remove it owing to the roads being blocked with snow. The rest of the machine was at another house, and the bailiff went there and told the parties that he seized it, but did nothing more until the 23rd of June, when he took it into his possession. The court held that there was no abandonment by the bailiff, and that a purchaser at the sale by him had acquired a good title as against a mortgagee under a chattel mortgage made by the debtor on the 18th of June.

Under the common counts the plaintiff cannot recover. No money was received by the defendants for the use of the plaintiff, nor were any goods sold and delivered by her to them.

Reluctantly I am compelled to come to the conclusion that the plaintiff cannot maintain this form of action and that a non-suit must be entered. I have come to the conclusion most unwillingly because I believe the plaintiff's claim is an honest *bona fide* one, and the defendants have obtained a most undue advantage over her.

The rule must be made absolute to enter a non-suit.

FORTIER v. SHIRLEY.

Vendor and Purchaser.—Rescission.—Time of the essence.—Notice to complete.—Reasonable notice.

Where time is of the essence of the contract the condition may be waived by the purchaser by paying a portion of the money on the day named for completion and consenting to wait for production of title.

The 1st July, 1882, was fixed for completion. At this time the title was vested in the C. P. Ry. Co., but the vendor had a right of purchase under a contract covering other lands, in which other persons had a similar interest. The vendor had, at the time for completion, paid to the Co. the purchase money for his lands, but others not having paid, the Co. would not convey On several occasions between the 1st July, 1882, and the 12th January, 1883, the purchaser asked the vendor to complete the title, but did not press him to do so or threaten to rescind if it was not done. On the 12th January, 1883, the purchaser served the vendor with a notice, requiring him to complete the title by the 1st of February, otherwise he would declare the sale off. After receiving this notice the vendor used reasonable diligence to procure the title, but inasmuch as six weeks was the shortest time within which a deed could be procured from the Railway Co., it was not obtained by the day named.

Held.—That the notice was too short, and the purchaser was not entitled to recover his deposit.

Colin H. Campbell, for plaintiff.

A. C. Killam, Q.C., for defendant.

[*October, 1883.*]

DUBUC, J.—Action for recovery of money paid on an agreement to purchase land, on account of failure to complete title when requested so to do.

On the 1st of April, 1882, plaintiff agreed to purchase four lots, at Brandon, from defendant. He paid on them $1,000 on 1st April, 1882, $11.66 on 1st May, $380 on 1st June. The last payment of $375 was to be made on 1st July. On said date he went to see defendant to make payment and get a deed; but defendant had not completed his title. The plaintiff however consented to wait, and gave him $75 on account of said payment. Defendant expected to get his title perfected soon, and told plaintiff so. During the rest of the year plaintiff saw defendant several times, and spoke about the title to the property, defendant always answering, he expected the title to be completed soon. Plaintiff asked him for his title, but never intimated that he would consider the sale rescinded unless the

title was produced within a certain time. On 12th January, 1883, plaintiff served defendant with a notice to complete title by 1st February next, or he would declare sale rescinded. On 1st February plaintiff went with money to defendant to pay him, a deed to be executed, and a letter declaring sale off unless deed executed. Defendant was not at home. Plaintiff left letter at his place. Next day they met in the street, when defendant said he was expecting to complete title very soon.

The land had been owned by the C. P. Railway Co, and had passed through several hands before being transferred to defendant. Defendant had fully paid, in June, 1882, for the lots purchased by him; but he could not get his title, because there was a certain sum due on another lot, in same section, which had not been fully paid for. And during the summer defendant did not know which lot was so unpaid, and what amount was due. It appears, he never inquired about it, until January, 1883, after he had received the notice of the 12th January. He found out, paid $151 and some cents, and then application was made to the C. P. Railway Co. for title for his property, which came only after action commenced.

The agreement has a provision that time is of the essence of the agreement, and unless the payments are punctually made, vendor may re-sell. And the time so fixed was to expire on 1st July, 1882. But on said date plaintiff waived his right under agreement, by paying part of the last instalment and agreeing to wait an indefinite time. And until the 12th January following, he asked defendant several times to complete his title, but it does not appear that he either pressed or urged him to have it completed. He never, during said period, told him that he would declare sale rescinded.

When he asked defendant to have his title completed, he seemed to have been satisfied with the answer of the defendant, that he expected to complete it in a short time. This conduct of the plaintiff amounted to a continued waiver. *Cutts* v. *Thodey*, 13 Sim. 206; *Nokes* v. *Lord Kilmorey*, 1 De G. & Sm. 444.

Where time is of the essence of the contract, the purchaser should not be content with merely asking the vendor to take the necessary steps towards completing the purchase, but should diligently press him to do so. *Dart* on *Vendors and Purchasers*, 5th Ed. 421, and authorities cited.

The condition in agreement as to time having been so waived, the plaintiff could still make it of the essence of contract, by notice. But the notice should allow a reasonable time for completion. The question to consider here is, whether the notice served on defendant on the 12th January gave a reasonable time? What is a reasonable time depends on the circumstances in each case. A six weeks' notice was held insufficient: *Pegg* v. *Wisden*, 16 Beav. 239. So in *McMurray* v. *Spicer*, L. R. 3, Eq. 527, a two months' notice was held too short.

In this case it was established that six weeks was the shortest time within which a deed as the one required by defendant could be procured, as the title had to come from the C. P. Ry. Co., and the deed had to be sent to Montreal, P.Q., to be executed there. And the time given by plaintiff was only nineteen days. It appears in the evidence that the defendant, after such notice, used reasonable diligence. He had to find out what amount was due on a certain lot in same section not fully paid for, and paid said amount, $151, in January. Then he had to wait that the deed should be sent to Montreal and returned. I must hold that the time given in notice was too short, as the deed could not possibly be procured within said time.

The plaintiff tried to establish that defendant admitted, before the notice was given, that he had no title. But what was said, and what was meant, was not that the title was defective, or could not be perfected, but that the deed which was expected, had not been executed, and there was no regular or insuperable obstacle in the way. The defendant was entitled to it, as he had paid, in proper time, all money due on the land in question. But the C. P. Railway Company were refusing to give a deed, until some other lot, in same section, was fully paid for. The plaintiff could have himself obtained a complete title on paying the amount due to the C. P. Railway Co., and could deduct said amount from the balance due to the defendant. The defendant did afterwards complete his title, and notify the plaintiff of it, in what I must hold to be a reasonable time after the notice.

On the above grounds, and for the above considerations, I I think that the sale could not be rescinded.

Verdict should go for defendant.

BIGGS v. WOOD.

(IN APPEAL.)

Promissory note.—Presentment.—Endorsee against maker for money paid to his use.

Held. 1. Evidence is admissible to prove that words now appearing over an indorsement were placed there after delivery and that the true indorsement was not, therefore, restrictive.

2. A note payable at a particular place must be presented there for payment. As against an indorser, it must so be presented upon the due date. As against the maker, any subsequent presentment will suffice if he have not by the delay been damnified.

3. If a note be at the place for payment upon the due date, no further presentment is necessary.

4. An indorser suing the maker, upon the note, need not prove presentment and notice to himself, but if he sue for money paid to the use of the maker he must show that he was legally liable, or an express request, to pay.

5. Evidence not objected to at the trial cannot be objected to in Term.

6. The plaintiff—an indorsee of a note—may even at the trial strike out the names of prior indorsers.

A. C. Killam, Q.C., for plaintiff.

H. M. Howell, Q.C., for defendant.

[*18th May, 1885.*]

TAYLOR, J., delivered the judgment of the Court: (*a*)—The plaintiff, as indorsee of a promissory note, sues the defendant as the maker.

The declaration contains a count: That the defendant, on the 27th day of March, 1883, by his promissory note, now overdue, promised to pay to the order of M. B. Wood, at the Imperial Bank of Canada, Winnipeg, $2,000, two months after date, and the said M. B. Wood indorsed the said note to the plaintiff, and the said note was duly presented for payment at the Imperial Bank of Canada, Winnipeg, aforesaid, and was dishonoured, whereof the defendant had notice, but the defendant did not pay the same. To this count are added the common counts. The pleas are—First, *non fecit*. Second, that M. B. Wood did not

(*a*)—Present—Wallbridge, C.J., Taylor, Smith, JJ.

indorse the note as alleged. Third, that the note was not duly presented for payment. Fourth, that the defendant accepted the note for the accommodation of the plaintiff, and there never was any value or consideration for the acceptance or payment of the note by the defendant. Fifth, that the defendant accepted the note for the accommodation of M. B. Wood, and there never was any value or consideration for the acceptance or payment of the note by the defendant, and the same was indorsed to the plaintiff, and he always held the same without any value or consideration. And sixth, that the defendant before action satisfied and discharged the plaintiff's claim by payment.

The action came on for trial by a jury on the 5th of April, 1884, when a nonsuit was moved for upon two grounds,—That the note has upon it a restrictive indorsement, "pay to the order of the Imperial Bank of Canada," through whom the plaintiff must claim title, and evidence should not have been admitted to vary that. Also, that the plaintiff had not proved presentment of the note for payment. The motion for a nonsuit was granted, leave being reserved to move in Term.

In Easter Term the plaintiff obtained a rule, calling upon the defendant to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff, or why a new trial should not be had, on the grounds,—That there was sufficient evidence of presentment to bind the defendant, and upon the evidence the defendant was liable to the plaintiff on the note; that there was sufficient evidence under the common counts to justify a verdict for plaintiff; that the evidence showed that the plaintiff incurred a liability for the defendant at his request, and was obliged to pay money in liquidation thereof, and that the defendant was liable to him therefor; and that evidence was improperly admitted at the trial: namely, evidence of a conversation between the defendant and M. B. Wood, with respect to the note being made or indorsed for the accommodation of the plaintiff.

The note produced and proved at the trial is signed by the defendant, and bears the indorsements of "M. B. Wood" and "S. C. Biggs." Above the signature of M. B. Wood there appears, in coloured ink, printed or apparently impressed with a stamp, the words, "Pay to the order of the Imperial Bank of Canada."

The evidence of M. B. Wood proves that when he indorsed the note that printed matter was not on it. The plaintiff also proves that these words were not on the note when it was indorsed by him. He says that when he received it from the defendant it had on the back of it the signature of M. B. Wood, and nothing else. He further says that he discounted the note with the Imperial Bank, and at that time these words were not on it, but they were so when he received it back from the bank. This evidence was objected to on the ground that the plaintiff was seeking by parol evidence to vary the terms of a written document. In my opinion the evidence was properly received. The plaintiff offered it, not to vary the terms of a written contract, but for the purpose of showing that after the contract with him was complete by the indorsement of the note in blank by M. B. Wood, some third party had attempted to vary it by turning the indorsement in blank into a restrictive one. The plaintiff discounted the note with the Imperial Bank. On maturity he paid it, and if the other grounds taken by the defendant, and still to be considered, fail, and the plaintiff is entitled to recover on the note, he has, I think, a right to treat the note as in the state in which it came to his hands—a note indorsed in blank by M. B. Wood, the original payee, and to declare upon the note as indorsed to him by M. B. Wood. Where there are a number of successive indorsers, a subsequent one suing the earlier indorsers, or the maker, and who is unable to prove the intermediate indorsements, may strike them out if he pleases; and this may be done even at the trial, and after the plaintiff's case is closed.

The first and second pleas are disproved by the evidence of M. B. Wood.

The fourth and fifth pleas are also disproved. It appears that the note bearing the indorsement of M. B. Wood was handed by the maker to the plaintiff, who discounted it with the Imperial Bank, and the defendant received the proceeds of the discount.

No evidence was offered in support of the sixth plea.

It only remains to consider the questions raised under the third plea, which alleges that the note was not duly presented for payment.

There seems no doubt that it is necessary, even in an action against the maker of a promissory note, to aver presentment,

and if that is met by a plea denying presentment, to prove that it was duly presented. Where in the body of the note it is made payable at a particular place, presentment at that place must be proved. In *Spindler* v. *Grellett*, 1 Exch. 384, where the question arose upon demurrer, Pollock, C.B., said, "This is a case in which a note is made payable at a particular place, and the declaration contains no allegation of a presentment or demand; our judgment must therefore be for the defendant." And Alderson, B., added, "As there is no averment of presentment or demand, the plaintiffs ought not to succeed." *Sands* v. *Clarke*, 8 C. B. 751, was also a case upon a demurrer. The note was payable at a particular place, but the declaration contained no averment of presentment. Maule, J., said, at page 758, "It is clear that the presentment of the note at No. 11, Old Slip, is by the note made a condition precedent to the defendant's liability to pay, and equally clear that it must be performed before he can be charged, unless the defendant has himself discharged the condition or dispensed with its performance." And at page 763 the learned judge said further, "The declaration is defective, and fails to show a cause of action by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shown for the omission."

As against an indorser the note must be presented strictly according to its exigency, that is, at the particular place and on the very day upon which it falls due. But as against the maker it would seem to be sufficient if presentment be made before action brought, unless, indeed, he can show that he has suffered loss or damage by the delay.

In *Rhodes* v. *Gent*, 5 B. & Ald. 244, Abbott, C.J., said, "The question is whether a mere omission to present the bill at the bankers on the day when it is due will discharge the acceptor, and it seems to me that if we were so to decide, it would produce most mischievous consequences."

Mr. Chitty, in his work on *Bills of Exchange*, dealing with this point says, at page 248, "As regards the necessity for presentment, there is a material difference between its effect on the liability of an acceptor or maker, and its effect on that of a drawer or indorser. For with respect to the former, though presentment for payment may be essential, he is not discharged

by any delay in such presentment, short of the period fixed by the Statute of Limitations." And again at page 255, "Bills and notes payable at a time certain must be presented on the very day they fall due, and delay in presenting, even for one day after maturity, would discharge all the parties primarily liable."

In an American work of recognized authority, *Daniels on Negotiable Instruments*, the law is thus stated, in section 597, "Even when a note is payable at a certain place, as respects the maker, it makes no difference that the presentment was not punctually made on that very day, unless the maker should suffer loss or damage by the delay."

In the present case presentment is properly averred in the declaration, but it is alleged that none has been proved. The evidence given on the subject is that of the plaintiff. He says he discounted the note with the Imperial Bank, and that, "when the note became due it was still in the Imperial Bank; the defendant did not pay it, and it was protested and subsequently charged up to my account in the Imperial Bank. In other words, I paid it and took it out of the bank after it was due." This evidence is now objected to, as it refers to a fact, its being still in the bank when it became due, which is not shown to be within the witness's own knowledge, and is one which he can state only from hearsay; but no objection was taken to this evidence at the trial; and under the authority of *Watson* v. *Whalen*, 1 Man. L. R. 300, and cases there cited, it cannot now be objected to.

That the note being, when it became due, at the place where payable, is sufficient presentment has been frequently decided. It was so held in *Saunderson* v. *Judge*, 2 H. Bl. 509, and in *Bailey* v. *Porter*, 14 M. & W. 44, counsel for the defendant arguing that presentment to the acceptor should have been shown, referred to that case as one which might appear to the contrary, but said, "that the decision may be doubted;" upon which Pollock, C. B., replied, "We think the case cited an express authority on this point, and we are not disposed to question it."

In Ontario the Court of Common Pleas held in *Harris* v. *Perry*, 8 U. C. C. P. 407 that a note payable "at the residence of D., at Strathroy, only, and not otherwise or elsewhere," did

not require any special form of presentment; it being proved to have been on the day it matured at that place with D.

In the United States the authorities on this point are numerous, all holding that the note being, on the day it matures, at the place where it is payable, is sufficient presentment. Among these authorities, *United States Bank* v. *Smith*, 11 Wheaton 172; *Bank of the U. S.* v. *Carneal*, 2 Peters 543; *Jenks* v. *Doyleston Bank*, 4 Watts & Serg. 505; *Merchants Bank* v. *Elderkin*, 25 N. Y. 178; *Nichols* v. *Goldsmith*, 7 Wend. 160, and *Woodin* v. *Foster*, 16 Barb. 146, may be referred to. In *Daniels on Negotiable Instruments* the result of the authorities is thus summed up in section 656, "When a bill or note is made payable at a bank, it is considered a sufficient presentment of it, if it is actually in the bank at maturity, ready to be delivered up to any party who may be entitled to it on payment of the amount due, and nothing more than the mere presence of the paper there is necessary."

But it is further urged for the defendant that no evidence has been offered showing that notice of dishonour was given to the plaintiff, so that he was discharged from all liability as an indorser, and his subsequent payment of the note was a mere voluntary payment on his part and does not entitle him to have recourse against the defendant the maker. In support of this the defendant relies upon *Sleigh* v. *Sleigh*, 5 Exch. 514. That case may be an authority against the plaintiff's right to recover under the common counts, but seems to me to support the plaintiff's claim under the first count, which is upon the note itself. In that case the plaintiff drew and indorsed a bill of exchange for £100 for the defendant's accommodation. The defendant negotiated the bill and when due failed to pay it, but the plaintiff paid £25 to the holder in part. The bill remained in the hands of the holder that he might receive the balance from the defendant and other parties. The plaintiff sued for the £25 he had paid, the form of action being, *assumpsit* for money paid to the defendant's use, and the plea, *non assumpsit*. At the trial there was no proof of the presentment nor of notice of dishonour. The judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit. In Term a rule to enter a nonsuit was made absolute on the ground that the plaintiff could not recover in this form of action.

To do so it was necessary for him to show, not merely that the money paid discharged *pro tanto* the defendant's liability to the holder, but also that it was paid at the request, express or implied, of the defendant. There was no express request, and the Court held that as the payment had been made with the knowledge on the part of the plaintiff that he was not bound to pay for want of notice of dishonour, it could not be considered as made at the implied request or with the implied authority of the defendant. But Parke, B., who delivered the judgment of the Court went on to say, "It is very true, that, if the plaintiff here had voluntarily paid the whole bill he might have sued the defendant; but this is on another principle, viz., that the plaintiff becomes the holder of the bill after it is paid by him; and a holder so situated may, according to the law-merchant, sue the acceptor upon the bill itself; for the holder may always waive the want of due presentment and notice, and sue the acceptor who is not discharged by the want of it. But the holder in such case does not sue him as for the money paid to his use, nor is a request, express or implied, in such case at all material to his recovering the amount."

Now that is the case here, the plaintiff has paid the whole bill, and is now the holder, so he can sue the maker upon it as he does in the first count of his declaration.

The evidence shows sufficiently that the note when due was at the place where it is payable, and that is under the authorities a sufficient presentment.

The nonsuit should be set aside, and the rule made absolute for a new trial without costs.

THE WATEROUS ENGINE WORKS CO., LIMITED, v. McLEAN.

(IN APPEAL.)

Promissory note.—Alteration.—Recovery upon note in original condition.—Variance in corporate name.

A company being indebted to the plaintiffs, the company's manager agreed to procure and deliver to the plaintiffs a note signed by some of the officers of the company. He delivered the note sued upon. It was proved that after the note had been signed, but before its delivery, the manager altered the note by inserting the words "jointly and severally." The plaintiffs were ignorant of this fact at the time.

Held, that the note might be sued upon in its original condition.

A note was made by filling up an engraved form. Between the words "after date" and "promise to pay" the space left for the usual words "I" or "we" was very small, and the words "jointly and severally" could not have been written in the space.

Held, that in such a case the mere fact that the words "jointly and severally" are plainly interlined by being written over the place where they are intended to be read, but in the same handwriting as the rest of the note, is not sufficient notice of an alteration.

A note was made payable to The Waterous Engine Works, but was declared upon as payable to The Waterous Engine Works Company, Limited.

Held, no variance.

The word "Limited" is no part of the name of a company incorporated under the Dominion Joint Stock Company's Act.

J. S. Ewart, Q.C., and *L. G. McPhillips* for plaintiffs.

W. R. Mulock and *W. E. Perdue* for defendants.

[*18th May, 1885.*]

TAYLOR, J., delivered the judgment of the Court:(*a*)—The plaintiffs sue M. A. McLean, H. N. Ruttan and Peter McCarthy upon a promissory note. The declaration contains only one count, averring, that the defendants by their promissory note now overdue, jointly and severally promised to pay to the order of the plaintiffs $632.48, fifteen days after date for value received, but did not, nor did any or either of them, pay the same. The pleas of the defendants Ruttan and McCarthy, are,

(*a*) Present: Dubuc, Taylor, Smith, JJ.

non fecit, and payment. Those of the defendant McLean, are, *non fecit*, that the note was made for the accommodation of the plaintiffs, and payment. The action was tried on the 2nd of May, 1884, before the Chief Justice without a jury. At the trial leave was given to amend the declaration by inserting allegations that the note was payable at the Bank of Montreal, Winnipeg, and that it was presented there for payment. After hearing all the evidence, the learned Chief Justice entered a verdict for the plaintiffs for $670.48, and reserved leave for the defendants to move in Term to enter a nonsuit.

In Easter Term last the defendants Ruttan and McCarthy obtained a rule calling upon the plaintiffs to show cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved, or a verdict entered for the defendant Ruttan, on the following grounds: That the plaintiffs are not the payees of the note sued on; that the note was indorsed by the payees, and the plaintiffs are not the lawful holders thereof; that the note was altered materially after being signed by the defendant Ruttan, so that the liability thereunder was varied and increased; that the plaintiffs took the note with notice of such alterations unaccounted for; that the insertion of the words "jointly and severally" in the note after the signature thereto by the defendants rendered the same void as against the defendant Ruttan.

Upon the argument of the rule in Michaelmas Term, counsel for the defendants asked leave to amend it, by taking the grounds as to the effect of the note being altered after signature, on behalf of McCarthy as well as Ruttan. To this, counsel for the plaintiffs consented, upon the terms of his being allowed to amend the declaration by adding a count declaring upon the note as a joint note. Both amendments were allowed by the Court.

The facts of the case were, that Ruttan was Vice President of the Argyle Mining Company, McCarthy was Secretary, McLean a director, and one Stephen Knight, now deceased, the Managing Director. The plaintiffs had supplied the Company with machinery, and money was owing to them on that account. The Company being unable to pay cash, Knight offered to give the Company's note for the amount, which Erb, the bookkeeper and agent of the plaintiffs, declined to take. Knight then

asked Erb if he would accept a note signed by certain members of the Company, which he agreed to do, and in pursuance of this agreement, the note in question was handed to him by Knight. The note was in its present form, containing the words "jointly and severally," when Erb first saw it, and received it. The defendants allege that the note was never intended to be the note of the individuals signing it, but only the note of the Company. Ruttan says he signed it as Vice-President, and gave it to Knight for the purpose of his affixing the seal of the Company. The note had not in it when signed by him, the words "jointly and severally," and that Knight had authority to alter it by inserting these words, is denied.

Now, if the note was intended to be the note of the Company only, it might have been signed by Ruttan the Vice President, and perhaps by McCarthy the Secretary, but as we find it, it has also the signatures of McLean and Knight. The facts clearly proved, that Erb, the plaintiff's agent, had declined to take the note of the Company, but was willing to take the note of these individuals; that these additional names are on it, and that the same parties had been in the habit of giving their individual notes for the indebtedness of the Company, all go a long way to discredit the allegations made on the part of the defendants.

That the note came to the hands of the plaintiff's agent in its present shape, and that neither he nor the plaintiffs had any thing to do with any alteration of it, is abundantly clear from the evidence. I cannot say that there was anything suspicious on the face of the note itself, which could lead the plaintiff's agent to suspect that it had been altered after signature. The note is produced, and is one made out on a partly engraved form. Between the engraved words "after date" and "promise to pay," the space left for writing "I" or "we," is a very small one. The words, "we jointly and severally," could not possibly have been written on the space. The note as it now stands has the word, "we" written in the space, and beginning partly above the space, and extending over the words "promise to pay," the words, "jointly and severally" are interlined, in handwriting the same as the other written portions of the note. In *Leslie* v. *Emmons*, 25 U. C. Q. B. 243, where exactly the same thing was found, and the Court said, that for a note

intended to be joint and several, it was absolutely necessary to interline the words, it was added, "this would seem to lessen the presumption of anything being wrong."

The evidence supports the plaintiffs' contention that Knight was the agent of the defendants in dealing with this note. But even if his authority was limited, so that he could not make the alteration, or if he was an entire stranger, can the plaintiffs in any event recover on this altered note, in its original form.

The law, as to the effect of an alteration in a written instrument, seems to have been first laid down in *Pigot's case*, 11 Coke 27, where it was resolved, "When any deed is altered in a point material by the plaintiff himself, or by a stranger, without the privity of the obligee, be it by interlineation, rasing or by drawing a pen through a line, or through the midst of any material word, that the deed thereby becomes void." Since then the law seems to have been considerably modified, as appears in several text-books. *Leake* says, at page 806, "If a deed or contract in writing, be altered in a material point by a stranger whilst the instrument is in the care or possession of the promissee, although without his knowledge, it is thereby avoided as to his rights under it, but an alteration by a stranger while the document is not in the care or custody of a party, does not affect the legal validity, beyond creating a difficulty of proving its original condition." *Anson* at page 320, states the law thus, "If a deed or contract in writing be altered by addition or erasure, it is discharged, subject to the following rules:—The alteration must be made by a party to the contract, or by a stranger while in his possession, and for his benefit; the alteration must be made without the consent of the other party, and it must be in a material part." So *Addison* at page 1237 (8th Ed.) says, "If the alteration has been made by the defendant or some third party without the plaintiff's consent, whilst the contract was out of the plaintiff's hands, the alteration will have no effect, and the contract will remain as it originally stood, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed." The statements of these text-writers seem borne out by such cases as the following,—*Henfree* v. *Bromley* 6 East, 309, where an award, in which the umpire, after execution, altered the sum awarded, was held void as so altered,

but good for the original sum awarded, which was still legible; *Waugh* v. *Bussell*, 5 Taunt. 710; *Hemming* v. *Trenery*, 9 Ad. & E., in which at page 934, Lord Denman speaking of an altered guarantee said, "If the alteration was made by the plaintiff without the consent of the defendants (though for their benefit), it would according to the authorities put an end to the original agreement. If it was altered by the defendants without the consent of the plaintiff, it would have no effect, and would remain as it was originally;" and *Pattinson* v. *Luckley*, L. R. 10 Ex. 330, in which, Cleasby B. said, "The contract remains; the disability is on the party who has altered it; it would be ridiculous to suppose that his act has destroyed the rights of others."

The decision in the case of *Davidson* v. *Cooper*, 11 M. & W. 800; 13 M. & W. 352, seems to have turned upon this fact, proved in evidence, that the alteration, which was the affixing a seal to the signature of the defendant, was made while the document was in the possession of the plaintiff. *Mr. Taylor* in his work *on Evidence*, after reviewing that case and a number of others, says at page 1521, "It may perhaps be still questioned whether the sound rule of law can be carried further than this, that any party seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made, either before its execution, or at a time when the instrument was not in his possession, or under his control, and that unless he can establish one or other of these facts the instrument will be vitiated."

In *Swiney* v. *Barry*, 1 Jones Ex. R. 109 the Irish Court of Exchequer held, that an alteration in a material part of a deed, made by a stranger, does not avoid the deed, and the Court will look at the deed as it was before it was altered. Joy C. B. in dealing with the argument of counsel that, the alteration of a deed in a material part, even by a stranger, will avoid it, said, "*Pigot's case* is the foundation of all these positions, and that case has been denied to be law in subsequent cases."

The case of *Perring* v. *Hone*, 4 Bing. 28, relied upon by the defendants, seems to have turned mainly upon the authority of one partner to make his co-partner liable upon a joint and several note. In *Byles on Bills*, 45, it is cited for that purpose, and in

Dan. Neg. Inst. s. 361, it is referred to as deciding that, one partner cannot without special authority make a joint and several promissory note in the partnership name.

No doubt there are cases which favor the defendants' contention. In *Samson* v. *Yager*, 4 O. S. 3, the defendant and one Wells made a promissory note payable to one Zwich, who indorsed it to the plaintiff. The plaintiff then indorsed it to give the note credit, and it was sent to the bank. By the bank it was returned to an agent in the country, with the remark that the note must be made joint and several. Wells, being informed of this, procured a stranger to insert the words "jointly and severally," after which the note was returned to the bank, and discounted. Wells received the proceeds of the discount and absconded. The note was not paid when due, so the plaintiff as an indorser took it up, and sued Yager, one of the makers. The alteration had been made without his knowledge, and indeed against his consent; that is, Wells when he got the stranger to make the alteration admitted that Yager had refused to allow it. At the trial the plaintiff was nonsuited, but leave was reserved to move to enter a verdict for the amount of the note and interest. In Term the court held that the bank could not have sued Yager, since they lent him no money, and knew nothing of him except as his name appeared on the note, and the plaintiff could acquire no right of action against him, by paying for him a note which he was no longer liable to pay. Whether the court was right in deciding the case on the ground it did, may be questioned, but the non-liability of Yager might be upheld on the ground that the alteration was made while the note was in the possession of the bank, or of some one on its behalf, for the bank sent the note back to the agent in the country, for the express purpose of having it altered and made joint and several.

The case of *Draper* v. *Wood*, 112 Mass. 315, went much further. There, one of the promissors made a material alteration in a note before its delivery, without the knowledge of the other, and it was held that the note was void against that other, although the alteration was found to have been made without the knowledge of the payee, and without any fraudulent intent. The case was so decided upon the authority of *Fay* v. *Smith*, 1 Allen, 477, in which the facts of the alteration being made without the knowledge of the payee, and without fraud, were held not ma-

terial, and the case was disposed of upon the ground that the alteration destroyed the identity of the contract into which the defendant entered. That the declaration contained a count upon the note as it was before the alteration, was held immaterial, and had no effect upon the decision. In *Draper* v. *Wood*, a count had been added, suing upon the note in its original form.

There are, however, numerous American cases which support the view of the law taken by *Leake*, *Anson* and *Addison*, and which agree with the English cases relied on by these writers. I have been able to examine only a few of these cases. In *Rees* v. *Overbaugh*, 6 Cowen, 746, the Supreme Court of New York held, that a stranger tearing off the seals from a deed, did not vitiate it. In *Lewis* v. *Payn*, 8 Cowen, 71, the same court held a deed avoided, the alteration having been made by the party who claimed a benefit under it, but adhered to their decision in *Rees* v. *Overbaugh*, that alteration by a stranger would not have avoided it. *Vanbrunt* v. *Eoff*, 35 Barb. 501, was an action on a promissory note. As made by the defendant it was dated 13th September, after which a person acting as the defendant's agent, in the presence of the plaintiffs, but in the absence of the defendant, changed the date to 5th September. It was sued upon as a note of that date. On the trial the suit was dismissed, on the ground that the note had been altered. Against this the plaintiffs appealed, and the court ordered a new trial, holding that the alteration made by the agent of the maker, under the supposition that he had authority to make it, did not render the note void, and that if there was no authority to make the alteration, it would still be a subsisting obligation as it was before it was altered.

In *Vogle* v. *Ripper*, 34 Ill. 100, it was said, "An alteration by a stranger ought not to destroy the rights of innocent parties. * * * We are unable to perceive any good reason why such an alteration should cancel a debt of which the instrument was merely evidence. It ought to be regarded as a spoliation." In *Thompson* v. *Massie*, 2 Am. L. J. 109, decided in October last by the Supreme Court of Ohio, an alteration in a note made by one of three joint makers at the instance of the payee and holder, was held to avoid the note as to the other joint makers, who were mere sureties, and who did not assent to the alteration. But the judgment turned entirely upon the alteration having been

made, not by a stranger, but by parties to the instrument, one of whom had a beneficial interest in it. And the Court distinctly held, that if the alteration had been made by a stranger, the law in the United States would reject it, and enforce the note according to its original terms. The ground upon which *Fay* v. *Allen* was decided, that the alteration destroyed the identity of the contract into which the defendant entered, was not approved of by the Court. The language used on that point was, "Such an alteration is regarded as a mere spoliation, and parol evidence is admissible to ascertain the true tenor of the contract, and thus the identity of the instrument is preserved, and full effect given to it."

To my mind, it is unreasonable and unjust, to hold, that an alteration in a deed or other instrument should render it void against, and so prejudice, an innocent person who was no party to the alteration, and against whom no fraud in connection with it can be charged. That the unwarranted alteration of a writing by a stranger should avoid the instrument, was spoken of by Mr. Justice Story, in the case of *The United States* v. *Spaulding*, 2 Mason, 482, as repugnant to common sense and justice, as inflicting upon an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by Providence, and as a rule which ought to have the support of unbroken authority, before a court of law should feel bound to surrender its judgment to what, he said, "deserves no better name than a technical quibble." The opinion, thus expressed, of such an eminent judge, is supported by the language used by Baron Alderson, in *Hutchins* v. *Scott*, 2 M. & W. 814, "It is difficult to understand why an alteration by a stranger should in any case avoid the deed; why the tortuous act of a third person should affect the right of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, or what the party meant."

There is no difficulty in ascertaining what the note in question here originally was; the evidence shows that the alteration was not made with any fraudulent intent, and that the plaintiffs had nothing to do with the altering of it. They are therefore, so far, entitled to recover upon it.

The further objection is taken by the defendants, that the plaintiffs declare upon a note made to the Waterous Engine

Works Company, Limited, while the note produced and proved is one payable to the order of the Waterous Engine Works.

There are many cases in which variances quite as great, if not greater, in respect to the names of corporations, have been held immaterial. Chief Justice Macaulay, when delivering the judgment of the court in *Re Hawkins* v. *The Municipal Council of Huron, Perth and Bruce*, 2 U. C. C. P. 72, said, at page 83, "Many cases show that literal variances in the use of corporate names, if substantially correct, are immaterial." And again, at page 123, "The question is reduced to this: Is there any ambiguity produced by the misnomer?" There the by-law in question was enacted by "The Warden and County Council of the said United Counties, &c.," when it should have been "Municipal Council."

In *The Brock District Council* v. *Bowen*, 7 U. C. Q. B. 471, the plaintiffs, by the name of "The Council of the District of Brock," declared on a bond "to the said plaintiffs." The bond when produced was one made to "The Municipal Council of the Brock District," but the variance was held not fatal.

In *The Trent and Frankford Road Co.* v. *Marshall*, 10 U. C. C. P. 329, the bond sued upon by the plaintiffs in the name of The Trent and Frankford Road Company, was one to The President and Directors of the Trent and Frankford Road Company; and Draper, C. J., dealing with the objection taken by the defendant, that there was a variance, said, "The decisions in *The Brock District Council* v. *Bowen*, and in *Re Hawkins*, in both which the English authorities are referred to and considered, afford a complete answer to the defendants' objection, and render it unnecessary to discuss it." So in *The Provisional Corporation of the County of Bruce* v. *Cromar*, 22 U. C. Q. B. 321, where the plaintiffs, as the Provisional Corporation of the County of Bruce, which was the proper corporate name, sued upon a bond as made to them, when the bond was to the Provisional Municipal County Council of the County of Bruce, it was held sufficient. Here the objection is, that the words "Company, Limited," are not on the note. Really, however, only the word "Company" is left out, the word "Limited" forms no part of the name. That is the difference between the English Joint Stock Act and the Acts of the Dominion and Ontario. The English Act, 25 & 26 Vic. c. 89, provides (sections 8 & 9),

that the memorandum of association shall contain certain things, the first being "The name of the proposed company, with the addition of the word 'limited,' as the last word in such name." The 41st section enacts that the company "shall paint or affix, and shall keep painted or affixed, its name on the outside of every office," etc. The 42nd section imposes a penalty if the company does not "keep painted or affixed its name in manner directed," etc., and subjects any officer of the company who on its behalf uses any seal whereon its name is not engraven, or who signs on behalf of the company any bill of exchange, etc., wherein its name is not mentioned in manner aforesaid, to a penalty, and also to personal liability to the holder of any such bill of exchange, etc., unless the same is duly paid by the company.

The Dominion Statute, 40 Vic. c. 43, provides, in section 4, that applicants for letters patent shall give notice in the *Gazette*, stating, amongst other things, "the proposed corporate name of the company, which shall not be that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith." Section 9 says that, "from the date of the letters patent, the persons therein named, and their successors, shall be a body corporate and politic by the name mentioned therein." Sections 11, 12 and 13, relate to a change of the name. In none of these is any mention made of the word "limited." Then come sections 78 and 79. Section 78 requires the company to paint or affix, and keep painted or affixed, "its name, with the word 'limited' after the name, on the outside of every office," etc. Section 79 imposes a penalty if the company does not "keep painted or affixed, its name, with the word 'limited' after it," and subjects to a penalty any officer of the company who on its behalf uses a seal "where its name with the said word 'limited' after it," is not engraven, and to a penalty and personal liability any officer who signs on behalf of the company any bill of exchange, etc., "wherein its name, with the said word after it, is not mentioned."

The provisions of the Ontario Acts, R. S. O. c. 149, s. 39, and c. 150, s. 4, are similar to those of the Dominion Act.

Upon the whole case, I have come to the conclusion that the plaintiffs are entitled to recover upon the added count, declaring upon the note as originally made, and that the defendants' rule should be discharged with costs.

TAIT v. CALLOWAY.

Specific performance.—Strict proof of contract.

The certainty of proof in a suit for specific performance is greater than in an action for damages.

The bill was for foreclosure. The answer set up an agreement for cancellation of the mortgage upon certain terms, and prayed by way of cross-relief for specific performance. At the hearing the cross-relief was refused (the learned judge holding that the agreement was not proved), and the usual decree was made for foreclosure.

The defendant re-heard.

J. S. Ewart, Q.C. and *David Glass* for defendant Calloway, *Hon. S. C. Biggs, Q.C.* and *H. M. Howell, Q.C.*, for plaintiff.

[*18th May, 1885.*]

WALLBRIDGE, C. J., delivered the judgment of the Court (*a*). After an examination of the evidence he proceeded,—

The answer by defendant Calloway asks for specific performance of this agreement. The certainty required in proceedings for specific performance is greater than in an action for damages. *Marsh* v. *Milligan*, 3 Jur. N. S. 979. *Brealey* v. *Collins*, Younge, 327, cited in *Gough* v. *Bench*, 6 Ont. R. 707, with approval. Specific performance is an appeal to the discretion of the Court, and uncertainty itself is a good answer for relief. *Higginsen* v. *Clowes*, 15 Ves. 516; 1 Ves. & Bea. 524, and when there are two differing contracts the court refuses specific performance to both. *Callaghan* v. *Callaghan*, 8 C. & F. 374. *Howe* v. *Hall*, Ir. R. 4 Eq. 252.

This is not an action for damages, but is a claim made by the defendant to have the supposed agreement specifically performed, in answer to a suit for foreclosure of the mortgage, and this by way of cross-relief.

If Mr. Calloway feels that a jury would look more favorably upon his claim to the existence of that agreement, I think it is open to him to sue for damages, but the very existence of such agreement is too uncertain for a court of equity to act upon it as proved.

Present: Wallbridge, C. J., Dubuc, Smith, JJ.

CAREY v. WOOD.

(IN APPEAL.)

Staying proceedings.—Action brought without authority.

An action was commenced and carried to trial without the authority of the plaintiff. During or immediately preceding the trial the plaintiff first learned of its existence, and then told the defendant that he (the plaintiff) had nothing to do with it. The plaintiff took no steps to stay the action, and, the defendant having had a verdict, a motion for a new trial was made on the plaintiff's behalf, which was refused. After judgment and execution the plaintiff moved to stay all proceedings.

Held, That the plaintiff was entitled to the rule as asked.

Semble. A defendant at common law may call upon the plaintiff's attorney to produce his authority for instituting the action. It is not so in equity.

Hon. S. C. Biggs, Q. C., for plaintiff.

J. Martin for defendant.

[*27th June, 1885*.]

TAYLOR, J.—In 1883, an action of ejectment, Patrick Carey against Maria L. Wood, was begun. It came on for trial at the Autumn assizes of that year for the Central Judicial District, and the Chief Justice, before whom it was tried, entered a verdict for the defendant. In Hilary Term, 1884, a rule which had been obtained in the preceding Michaelmas Term calling on the defendant to show cause why that verdict should not be set aside, was argued. In the following Easter Term, judgment was given discharging the rule. Thereafter, the defendant's costs were taxed, judgment for her entered up, and execution issued thereon. On the 6th of September, 1884, the plaintiff obtained a summons in chambers calling upon the defendant to show cause why all proceedings should not be stayed upon the writs of execution, or why the judgment and writs of execution should not be set aside, or such other order made as the presiding judge might see fit to grant under the circumstances. The ground upon which it was sought to stay proceedings or set them aside, was, that the action had been begun and carried on without authority from, or the knowledge of, the plaintiff. The summons was returnable before the Chief Justice, who, after hearing read the affidavits then filed, and after hearing partial argument, referred the whole matter to the full court.

In Trinity Term last, a rule was accordingly taken out calling upon the defendant to show cause why the judgment entered against the plaintiff, and the executions issued thereon, should not be set aside, and all proceedings stayed, upon the ground that the name of the plaintiff was used without his authority, knowledge or consent, and upon the ground that he had no interest in the suit, and also upon the further ground that the defendant had notice of the fact that he had not instituted, authorized or consented to the bringing of the suit herein, and that the defendant was aware that the plaintiff had no interest in the said suit.

In Michaelmas and Hilary Terms the matter was several times mentioned in court, and the question of certain further affidavits being admitted was discussed. There were also applications in chambers for the purpose of having certain witnesses examined and for compelling their attendance before an examiner. It is, however, unnecessary to refer more particularly to these.

During the present Term the rule was argued, and judgment was at the close reserved.

From the evidence it appears that the plaintiff purchased from Watson & Black the property in question, with a frontage of 66 feet on Main Street in the Town of Portage la Prairie. On the purchase, Mr. Boultbee, then an attorney practising in that town, acted as his attorney in investigating the title, and after the deed was executed by Watson & Black, conveying the land to the plaintiff, and the transaction completed, the title deeds and other evidences of title remained in Mr. Boultbee's hands. Instead of 66 feet, the plaintiff got only 64 feet, and the contention being that a building erected by the defendant upon an adjoining lot had encroached two feet on the land sold to the plaintiff, the ejectment suit of *Carey* v. *Wood* was brought against her. There seems no doubt that the action was begun by Watson and Black in the name of the plaintiff, and without authority from him. He says in his first affidavit filed on the present rule, "I never gave any authority, directly or indirectly, for the issue of the writ herein." And in a second affidavit, "I never authorized Messrs. Watson & Black or any other person or persons to use my name as plaintiff or otherwise in the said suit, nor did I sanction the use of my name herein." He was not called as a witness, nor was he even present in the Court House during the trial.

Mr. Robertson, formerly the partner of Mr. Boultbee, in an affidavit, says, "I was not aware of anything in connection with this suit until I saw the same entered for trial, and then saw that my then partner, Mr. Boultbee, was the attorney for the plaintiff. Very shortly before the case was tried, finding that I would have to hold the brief, I made some inquiries as to who had given instructions for the suit, and I was told that W. R. Black and Robert Watson, gentlemen, of the Town of Portage la Prairie, had done so, not the plaintiff, and that they would instruct me, and they did instruct me on the trial herein, and obtained the attendance of witnesses. The plaintiff never instructed me with regard to trial, whatever, and was not present at said trial, and had nothing to do with same." When cross-examined on this affidavit, he says, "According to the best of my knowledge the late firm of Boultbee & Robertson did no business for the plaintiff; Mr. Boultbee did business with parties without my knowledge in some instances. I have no recollection of having seen Mr. Carey in the office during the time I was in partnership with Boultbee. He might have been in the office without my seeing him, but I do not think it possible that he could have been there transacting business unknown to me." Then, after saying that Boultbee, the day before the trial, wished him to hold the brief at the trial, he says, "I then asked him the nature of the action. He said it was one of ejectment and boundaries. I then asked who the witnesses were, and if he had subpœnaed them, and who would be able to give me the facts. He told me that Black & Watson would instruct me and I asked what they had to do with it. He told me that they had given the instructions to bring the action, and that they would assist me in explaining the facts and getting the witnesses, but as Bemister had made the survey, he would point out the measurements, as he had made plans. I saw Bemister in the barrister's room, and went over the case with him. On second thoughts, I think this was the morning of the trial, which commenced early in the afternoon. At the time of the adjournment, finding that I required witnesses to prove certain points, I sent word to Black and Watson that I required those witnesses, and the attendance of Black and Watson on the following morning with witnesses, and they instructed me during the progress of the remainder of the trial, and procured the attendance of witnesses. I remember stating to Black particularly, and I think to Watson also, that as they were the parties

interested, that if they did not attend to the case they could not expect me to do it. I said this immediately after luncheon, for they were not on hand at the opening of the court."

Against the positive statement of the plaintiff and this evidence of Mr. Robertson's, there is no evidence that the plaintiff instituted or in any way authorized the bringing of the suit.

He, however, became aware of the suit while it was in progress, although at what stage is by no means clear. The defendant says in her affidavit, that she had a conversation with him about the suit three or four days before it was tried. The trial began on the 5th of November, and was continued on the 6th. Tucker says he had a conversation with him about it before the trial. He is positive it was some days before, for he had himself a case at the same assizes, and the conversation was before his own case was tried. That, he says, was tried on the 2nd of November, and he left Portage la Prairie to return home the same evening. Little, who was a witness examined on the trial, says, that when returning from the Court House the plaintiff met him and asked how the suit was going on, and they had some conversation as to the merits of the suit, but he does not seem certain whether this was on the first or second day of the trial. O'Reilly says he was intimate with the plaintiff, and they were accustomed to discuss their business matters together. He then proceeds to say, "When the assizes were being held in the Town of Portage la Prairie, in the month of October last, I happened to be in the court room during the progress of the trial, and upon my return asked him, the alleged plaintiff, why he had not told me about the suit that he had at the assizes. He answered that he had no suit. That he had noticed in the list of cases published in the newspaper about the time the assizes were held, a suit of *Carey* v. *Wood*, but that he could not have been the person represented by Carey. A short time after our conversation and during the same day, Carey entered into conversation with the defendant, and told her that he had nothing to do with the action, to which she replied she believed that, because Watson had gone that morning to look up witnesses, and I am satisfied, from the remark then made, that that was the first conversation that Mr. Carey had with the defendant about the said action."

The plaintiff himself says, "After the trial had been proceeded with, and after all the evidence had been given, as I verily believe,

John O'Reilly informed me that a case was heard in the Court House on that day, in which my name appeared as plaintiff. I then told him that he must be mistaken, inasmuch as I was totally unaware that an action was being carried on in my name. On the evening of the same day the defendant called into the store in which the said O'Reilly and I were, and she then said that she believed I had nothing to do with this suit, and that other parties had told her so before. This was the first conversation I had with the defendant about the said action." The conversation spoken to by the defendant's attorney was some time after the trial, although he does say that from the conversation he then had with him, "I am sure the plaintiff was well aware of the use of his name, and he gave me no reason to suppose that it was done without his sanction."

As already said, there is no evidence that the plaintiff began or authorized the beginning of the action; on the contrary, it seems abundantly clear that he did not. It is, however, argued that having become aware that the suit was being carried on in his name, and having taken no steps to have proceedings stayed, he must be assumed to have acquiesced, and so made himself liable for the costs.

It may be that a plaintiff in an equity suit so acting would be liable. The rule in equity seems correctly laid down in *Smith's Pr.*, 2nd ed. p. 107, "A plaintiff so circumstanced," that is, whose name has been used without his authority, "applies immediately by notice of motion (supported by an affidavit, stating that his name had been used without his knowledge or consent, and also stating at what time he first became acquainted with that circumstance), that his name may be struck out of the record, and that the plaintiff's solicitor, so acting without authority, may pay the costs of the application. If the party neglects to apply with due diligence after he has made the discovery, the Court will consider he has acquiesced, and refuse his application." Or as it is put in *Daniel's Pr.* (Perk ed.) p. 353, "If a solicitor files a bill in the name of his client without having a proper authority from him for so doing, the course for the client to pursue, if he wishes to get rid of the suit, is to move that the bill may be dismissed, and that the costs of the suit as between solicitor and client may be paid not by the plaintiff, but by the solicitor filing the bill. * * * * The motion should be

made as soon as possible after the plaintiff has become acquainted with the fact of the suit having been instituted in his name." *Wilson* v. *Wilson*, 1 J. & W. 457; *Allen* v. *Bone*, 4 Beav. 493; *Miller* v. *Hill*, 4 C. L. J., N. S. 78, are authorities supporting the statement of the proper practice. But none of the recognized works upon practice seem to lay down the same rule as prevailing at common law. In *Archbold's Pr.* (12th ed.) p. 76, it is said, "As to the course to be pursued when an attorney brings or defends an action without authority, it seems that, in a clear case, the court or a judge will interfere, and set aside or stay the proceedings, at the instance of either party."

It is true that in *Reynolds* v. *Howell*, L. R. 8 Q. B. 398, Blackburn, J., concluded his judgment by saying, "In my opinion if a plaintiff, after action brought in his name by an attorney without authority, hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's act." But here the plaintiff when he did hear of the action told the defendant that he had nothing to do with the action. No doubt he did not, as he might have done, apply to stay the proceedings, but neither did the defendant, and that course was equally open to her.

Possibly the difference in the practice in equity and common law may be accounted for thus: at common law a defendant can call upon the attorney for the plaintiff to produce his authority for instituting the action, and proceedings will be stayed until he does so. *Robe* v. *Reid*, 1 C. L. Cham. 98; *Smith* v. *Turnbull*, 1 Ont. Pr. R. 88; *Shaw* v. *Ormiston*, 2 Ont. Pr. R. 152. On the contrary, in equity a defendant has no right to call on the plaintiff's solicitor for his authority to use the plaintiff's name. *Chisholm* v. *Sheldon*, 1 Gr. 294. The question, therefore, remains for consideration, is a plaintiff whose name has been used without authority, and who has remained passive, liable to the defendant for the costs of the action?

In *Anon*, 1 Salk, 88, where an attorney appeared without authority, and judgment was entered against his client, the judgment of the court is thus reported: "If attorney be able and responsible, we will not set aside the judgment * * * * but if the attorney be not responsible, or suspicious, we will set aside the judgment, for otherwise the defendant has no remedy, and any man may be undone by that means."

Lorymer v. *Hollister*, 1 Stra. 693, was a case in which the bailiff took the writ to an attorney, saying the defendant desired him to appear for him. In truth the defendant had given no such instructions and countermanded the order for appearing. The attorney gave an undertaking to appear. The plaintiff's attorney served the declaration on him and afterwards signed judgment in default of plea. The Court ordered the attorney to fulfil his undertaking and enter a common appearance, so as to make the proceedings regular. But there the attorney had given an undertaking, and the plaintiff's attorney was not bound to inquire whether he had authority or not.

Robson v. *Eaton*, 1 Term, 62, is a case quite inconsistent with the case in Salkeld. The defendant was sued for a debt and pleaded that plaintiff by an attorney sued the defendant for the same moneys which were paid into court and afterwards paid out to the attorney. The plaintiff replied that the attorney was never retained. To this the defendant demurred, and on the argument of the demurrer the Court overruled it, holding the defendant still liable to the plaintiff.

Dundas v. *Dutens*, 1 Ves. 196, was a suit in chancery by the creditors of a man named Callender, and it appeared in reality to be a combination between Callender and certain creditors, by means of the suit, to get rid of a settlement and rob his children. A motion was made by one of the plaintiffs, Dundas, who was also a creditor, to have his name struck out of the record as used without authority. The solicitor said he had been deceived by Callender, who had promised to get an authority from Dundas, and that he had offered, and was now ready, to indemnify him. The motion was ordered to stand until the hearing, which was to take place the next day. At the hearing the bill was dismissed, with costs to all the defendants, except Callender, to be paid by the plaintiffs. The decree also was, that the Master should compute all the expenses Dundas had been put to, and the solicitor was ordered to pay that. Counsel pressed that Dundas' name having been used without authority it should be struck out, and that he should not be ordered to pay defendants' costs. But Lord Eldon said, "I cannot deprive the defendants of their right, they are entitled to this judgment. The defendants must have their remedy against the plaintiffs, and this plaintiff against him who pretended to be his agent." He added,

"But it is a mere question of form, for he will have his expenses against the solicitor who offers to pay into court immediately £200 to answer the costs."

In *Davies* v. *Eytin*, 3 B. & Ad. 785, attorneys were employed to prosecute an action of ejectment. A power of attorney, which was a forgery, was produced to them. The person by whom it purported to be executed was at the time abroad, and on his return he disavowed the proceedings, and obtained a rule calling on the attorneys to show cause why they should not pay the costs. This rule was served on the defendants also. The attorneys were ordered to pay the costs, on the plaintiff giving security to refund, if they should succeed on an issue in which they were to be plaintiffs, and he defendant, to try the question whether or not the action was commenced or carried on with the authority or privity, directly or indirectly, of the plaintiff.

In *Mudry* v. *Newman*, 1 Cr. M. & R. 402, a rule was obtained by defendants for judgment as in case of a nonsuit for not proceeding to trial. The plaintiff's attorney could not be found, and the rule was personally served. Affidavits were filed on the part of the plaintiff, showing that his name had been used without authority, and that he never knew of the existence of the action until served with the rule. Parke, B., feared that his only remedy was by action against the attorney, but as the case was one of great hardship he enlarged the rule to give plaintiff an opportunity of finding the attorney, and on re-filing his affidavits, he was to have a rule calling on him to show cause why he should not pay the defendant's costs, both rules to come on together. Two years afterwards, *Barber* v. *Wilkins*, 5 Dowl. 305, also the case of a rule for judgment as in case of a nonsuit, came before the same learned judge. Cause was shown on the affidavit of the plaintiff, that he knew nothing of the proceedings, and had never instructed any one to prosecute an action against the defendant, but Parke, B., said, "The rule must be absolute unless plaintiff consents to give a peremptory undertaking."

Hoskins v. *Phillips*, 16 L. J. Q. B. 339, was an action on a bill of exchange. The attorney was called on for particulars of the plaintiff's abode and occupation, which he gave. After verdict, the defendant learned that the plaintiff was dead before the action was brought, and he obtained a rule calling on the attorne

to pay the costs. The attorney had never seen the plaintiff personally, and a person of the same name now made an affidavit that he was the plaintiff. The rule was made absolute with costs, although the judge said the attorney might have been deceived by the person who brought him the bill, but from the part he had acted, there might be no other person to whom the defendant could look for his costs.

Hood v. *Phillips*, 6 Beav. 176, is undoubtedly a strong authority in favor of the defendant. A bill was filed in the name of two plaintiffs, the solicitor having no authority from one of them, Sanders. The bill having been dismissed with costs, Sanders was taken under an attachment. Lord Langdale ordered the solicitor to indemnify him, but refused to release him from the claim of the defendants. They, however, afterwards consented to his discharge from custody.

The case of *Hall* v. *Laver*, 1 Ha. 571, was cited, and relied upon by counsel upon both sides, but the judgment of Vice-Chancellor Wigram contains nothing more important as bearing on the question now before us than what is shown in the head note: "The fact that a party knowing that his name has, without authority, been introduced as plaintiff by the solicitor of some of the other plaintiffs in a suit, does not take any active steps to have his name expunged as plaintiff from the record, is not as between that party and the solicitor, equivalent to a retainer or an adoption of the latter as his solicitor."

The chief, if not the only point, decided in *Hubbart* v. *Phillips*, 13 M. & W. 702, was, that a defendant may apply to have proceedings stayed in an action brought without authority from the plaintiff, counsel instructed by the attorney for the plaintiff contending that only the plaintiff himself could so apply.

In *Hambridge* v. *De la Crouée*, 3 C. B. 744, the point decided was that while the court will in general, where a defendant is prejudiced by the act of an attorney in appearing for him without authority, leave him to his remedy against the attorney if solvent; that rule does not apply if the defendant is in custody by reason of the unauthorized act, or where the plaintiff or his attorney is a party to the wrong. That case is not consistent with *Hood* v. *Phillips*, already referred to as decided by Lord Langdale.

In *Bayley* v. *Buckland*, 1 Exch. 1, in which a defendant sought to be relieved against a judgment in an action in which he had

been served with no process, and to which an attorney had appeared without authority from him, the judgment of the court was delivered by Baron Rolfe. The learned Baron, after referring to the facts and to the anonymous case in Salkeld, proceeded thus: "We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought against him. When, therefore, a defendant has been served with process, and an attorney without authority appears for him, we think the court must proceed as if the attorney really had authority, because in that case the defendant, having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence. But even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms if he had a defence on the merits. If the attorney were solvent, it would not be unjust to leave the defendant to his remedy by summary application against him. On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for him, he is not wholly free from the imputation of negligence. The defendant there is wholly free from blame, and the plaintiff not so, and upon the same principle upon which we before proceeded, we must set aside the judgment as irregular with costs, and leave the plaintiff to recover those costs, and the expenses to which he has been put, from the delinquent attorney, by summary proceedings."

If the case of a defendant who has not been served with process so as to receive notice of the pending action, is placed upon a different footing from that of one who has by service received notice, it is difficult to see why a plaintiff whose name is used without authority, and who has had no knowledge of the institution of the suit, should not receive the same consideration.

The case of *Shaw* v. *Ormiston*, 2 Ont. Pr. R. 152, was an action which had been begun without authority from the plaintiff, and on the defendant's application proceedings were stayed and the attorney ordered to pay the costs. In *Kerr* v. *Malpus*, 2 Ont. Pr. R. 135, an appearance was entered for the defendants without authority, of which they were aware, but they made no applica-

tion to the court until after trial and judgment. It was held that they were too late in moving, but there seems to have been something more in their case than the mere delay. Mr. Justice Burns, when disposing of the application, said, "The whole conduct of the defendants and their attorney shows that they have been endeavoring to trap the plaintiff's attorney, and they thought that by remaining silent till after judgment they might succeed in setting it aside."

In *Robinson* v. *Hutchins*, in which an application was made to this Court to stay proceedings, and that the plaintiffs attorney might pay the costs, we refused relief, but we did so because it was by no means clear on the evidence before us that the attorney had not authority, or at all events the action having been begun under instructions from the plaintiff's son, that he had not adopted what had been done.

Of late years the courts in England seem more inclined than formerly to relieve a man whose name is used without authority, instead of leaving him to any relief he may have against the attorney, and to discard from consideration the question of the attorney's solvency. They seem inclined to apply to such a case the ordinary rules affecting the relation of principal and agent.

The two most recent cases seem to be *Reynolds* v. *Howell*, L. R. 8 Q. B., 398, and *Nurse* v. *Dunsford*, L. R. 13 Ch. Div. 764.

In *Reynolds* v. *Howell*, the plaintiffs never authorized the bringing of the action, and never heard of its having been brought until they received the twenty days notice to proceed to trial, under the Common Law Procedure Act. Upon a rule obtained by them calling upon the defendant to show cause why the proceedings should not be stayed, they were stayed without payment of costs. It appeared that the attorney was insolvent, but Archibald, J., expressed the opinion that in the cases which lay down the rule that where the attorney is solvent the Court will not interfere to set aside or stay the proceedings which have been instituted without authority, sufficient attention had not been paid to *Robson* v. *Eaton*. That case was said by Blackburn, J., to be perfectly inconsistent with the anonymous case in Salkeld, and there can be no doubt that it is so.

Nurse v. *Dunsford* was decided by the late Master of the Rolls, Sir George Jessel. The plaintiff's name had been used without

his knowledge, consent or authority. Two motions came on together, one made by the defendant to dismiss the bill for want of prosecution; the other by the plaintiff, of which the solicitors had notice, to have his name struck out. The learned judge declined to follow the form of order made in *Dundas* v. *Dutens*, and followed *Reynolds* v. *Howell*, holding that the solicitors who had purported to act for the plaintiff were liable to pay his costs of the motion as between solicitor and client, and to pay the defendants their costs of the action and of all the motions. The Master of the Rolls said, "The rule adopted by the common law courts, as laid down in *Reynolds* v. *Howell*, appears to have been, that where an attorney brought an action in the name of a plaintiff without authority, the plaintiff was entitled to an order to stay the proceedings without payment of costs. That seems to me to be the more sensible practice and one more in accordance with the law relating to principal and agent, than to leave the plaintiff to his own remedy against the solicitor who has improperly joined him as plaintiff."

In neither of these cases was the question of whether the solicitor is solvent, or not, considered material. Even if that were still a material element, the plaintiff in this case can rely upon that in his favor, as he has sworn, and the statement is not contradicted, that the attorney who professed to act for him has absconded.

Those recent cases furnish ample authority for disposing of this case as the Court disposed of *Reynolds* v. *Howell*, by staying all the proceedings without costs.

DUBUC, J.—I concur in the judgment of my brother Taylor. From the affidavits produced in support of the rule, we have the undisputed fact that the plaintiff never gave any instruction nor authorization to bring the suit, nor to prosecute it in his name. The most that can be said is that he heard of it during the progress of the trial, or perhaps one or two days before; and that he remained passive and took no steps to prevent its being proceeded with. He himself swears that he told the defendant, about the time of the trial, that Black and Watson were the parties who brought the action in his name, and that she answered she believed he had nothing to do with it. From the fact that Black and Watson commenced and prosecuted the suit, and from the evidence adduced in support of the rule, showing that the

plaintiff was not even consulted about it, it can be easily inferred that they, Black and Watson, would have had the real benefit of the ju gment, if they succeeded in the suit, and were the real beneficial plaintiffs while Carey was the nominal plaintiff.

Under the circumstances, it would be difficult to make Carey liable for the costs in a suit which he had not authorized, and which was not for his benefit.

And, without prejudicing the determination of any action which may be brought in the matter, it is probable that the defendant will be able to find redress for the wrong she has sustained herein.

QUEEN v. RIEL.

Appeal from North West Territories.—Presence of prisoner.—Production of papers.

The Court of Queen's Bench in Manitoba has no power to send a *habeas corpus* to the North West Territories, and will hear an appeal in the absence of the prisoner.

Upon a criminal appeal from the N. W. T. the original papers should be produced. If the prisoner cannot procure them, the Court will act on sworn or certified copies.

This was an appeal by a prisoner who had been convicted of treason before a stipendiary magistrate and a justice of the peace in the North West Territories. By 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," 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*, 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*, 28 U. C. Q. B. 108, the Court of Error and Appeal refused to proceed with an appeal until the papers were properly brought before it.

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.

[*2nd September, 1885.*]

WALLBRIDGE, C. J., delivered the judgment of the Court (*a*):—

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, sec. 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.

(*a*) Present—Wallbridge, C. J.; Taylor, Killam, JJ.

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.

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 to 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.

McINTYRE v. UNION BANK OF LOWER CANADA.

(IN APPEAL.)

Chattel Mortgage.—Blank in affidavit of bona fides.

The affidavit of *bona fides* attached to a chattel mortgage contained the following: "the mortgagor in the foregoing bill of sale by way of mortgage is justly and truly indebted to me this deponent Alexander McIntyre, the mortgagee therein named, in the sum of ——— dollars mentioned therein." *Held*, insufficient.

F. McKenzie, Q.C., and *J. Rowe* for plaintiff.

A. E. Richards and *J. W. E. Darby* for defendants.

[*27th June, 1885.*]

DUBUC, J.—The defendants seized the goods of one Joseph Carey under a writ of execution. The said goods were afterwards claimed by the plaintiff under a chattel mortgage. At the trial of the interpleader issue directed to determine the ownership of the goods, a verdict was entered for the defendant.

The question is whether the affidavit of *bona fides* to the chattel mortgage is sufficient to make the instrument valid as against subsequent execution creditors. In said affidavit the amount secured by the mortgage is left in blank. The allegation states that the mortgagor is indebted to the mortgagee in "the sum of ——— dollars mentioned therein." The authorities agree on the point that affidavits of *bona fides* and of execution should be accurate, complete, and unambiguous. But the decisions differ somewhat as to what should be considered a sufficient variation or omission to render the instrument void as against the execution creditors.

In *Hamilton* v. *Harrison*, 46 U. C. Q. B. 127, the affidavit of *bona fides* purported to have been sworn before "F. B. F.," without any addition; but the affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R., &c." It was held to be sufficient.

In *Walker* v. *Niles*, 18 Gr. 210, the statement annexed to the copy of the chattel mortgage did not distinctly give all the information required by the Act; but the statement and affidavit

together contained all that was necessary, and this was considered sufficient. The same was held in *Jones* v. *Harris*, L. R. 7 Q. B. 157.

In *Blount* v. *Harris*, L. R. 4 Q. B. Div. 603, the attesting witness stated that he resided at Acton, in the City of London, while Acton was in the County of Middlesex; and in *Hewer* v. *Cox*, 3 E. & E. 428, the grantors were stated to reside at New Street, Blackfriars, in the County of Middlesex, while Blackfriars is in the City of London. It was held in both cases that the variation was immaterial.

In *Nisbet* v. *Cock*, 4 Ont. App. R. 200, the signature of the commissioner to the affidavit of *bona fides* was omitted through inadvertence, although it was satisfactorily proved that the oath was in fact administered. The instrument was held invalid as against a subsequent execution creditor.

In *Re Andrews*, 2 Ont. App. R. 24, and in *Davis* v. *Wickson*, 18 C. L. J. N. S. 241, the omission of the word "him" at the end of the affidavit of *bona fides* was considered fatal, and the instrument held void as against subsequent execution creditors.

In *Murray* v. *MacKenzie*, L. R. 10 C. P. 625, the grantor was described in the bill of sale as residing at No. 37 Malpas Road, Deptford, and the attesting witness as residing at 2 South Terrace, Hatcham Park Road, while in the affidavit filed with it the deponent stated that the grantor resided at No. 73 Malpas Road, Deptford, and he, himself, resided at 3 South Terrace, Hatcham Park Road. This was held to be a fatal misdescription, not in compliance with the requirement of the statute.

In *Ex parte Hooman*, in *Re Vining*, L. R. 10 Eq. 63, the assignor was described as "Esquire," while he was lessee and manager of a theatre. The description was declared insufficient, and the bill of sale, notwithstanding registration, held null and void as against his assignee in bankruptcy.

In *Castle* v. *Downton*, L. R. 5 C. P. Div. 56, the affidavit describing the grantor in bill of sale stated that he "was until lately" a commercial traveller, while he was in fact a commercial traveller at the date of the execution of the bill of sale; it was held that the description of his occupation was insufficient.

In *Larchin* v. *The North Western Deposit Bank*, L. R. 8 Ex. 80, the grantor was described in bill of sale as an accountant,

while he was a clerk in an accountant's department, the variation was held fatal. This decision was affirmed in appeal in L. R. 10 Ex 64.

If such a great accuracy is necessary in affidavits as to the occupation and residence of the grantor, and even of the attesting witness, *a fortiori* should it be required in the statement of the amount due by the mortgagor to the mortgagee, which might be considered as one of the most important and most material statements of the affidavit of *bona fides*.

In the present case, the amount secured by the mortgage was left in blank. Of course, by referring the statement in the affidavit to the consideration of the mortgage, one might infer what the amount is; but according to the line of authorities on the subject, the only conclusion to be arrived at is that such a particularly important feature of the affidavit should be stated with great strictness and accuracy, leaving nothing to inference, vagueness or ambiguity.

I think the blank left in the affidavit is a fatal omission, and the instrument void as against execution creditors. The verdict should stand, and the rule should be discharged with costs.

TAYLOR, J.—The plaintiff in this interpleader issue claims the goods seized, under a chattel mortgage as against the defendants who are execution creditors of the mortgagor. At the trial before the Chief Justice a verdict was entered for the defendants. The question now presented for decision by the Court is the sufficiency or insufficiency of the affidavit made by the mortgagee, and which is required by Con. Stat. Man. c. 49, s. 1.

That section requires that every mortgage or conveyance of goods and chattels shall be filed within a specified time, together with an affidavit of execution, "and also with the affidavit of the mortgagor or his agent, that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage," &c. In the present case the affidavit used is the ordinary printed form on the back of the mortgage, with blanks intended to be filled up in writing for the particular case. As it stands sworn to, the mortgagee is made to swear that "the mortgagor in the foregoing bill of sale by way of mortgage is justly and truly indebted to me this deponent Alexander

McIntyre, the mortgagee therein named, in the sum of ——— dollars mentioned therein."

The plaintiff contends that the statute is in fact complied with, as the mortgagee swears that the mortgagor is indebted to him in the sum of dollars, that is, in the amount of dollars mentioned in the mortgage.

It is not easy, in view of the numerous decisions both in Ontario and in England in which apparent defects in bills of sale and chattel mortgages and in affidavits connected with these have been held in some cases fatal and in others immaterial, to come to a perfectly satisfactory conclusion upon the point now presented. I incline, however, to the opinion that this affidavit cannot be supported. From the whole of the authorities I think the conclusion must be drawn that the Courts deal with such instruments with considerable strictness. The form of affidavit which has long been in use in Ontario, and which has also been in use in this Province, has been one in which the mortgagee has been made to swear, not in general terms, that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, but that he is indebted in a particular amount mentioned in the mortgage, and which sum is set out in the affidavit. No doubt there is an advantage in having the attention of the mortgagee when making the affidavit specifically called to the sum in which he is swearing that the mortgagor is indebted to him.

In the affidavit in the present case it was clearly intended that he should swear to the specific amount, but as we find it, what he swears to is, that the mortgagor is justly and truly indebted to him "in the sum of ——— dollars mentioned therein." An affidavit sworn to with such a blank in it does seem objectionable.

Upon the best consideration I have been able to give this case I have come to the conclusion, although I confess with some hesitation, that the affidavit in question is insufficient, and that the verdict in favor of the defendants entered by the learned Chief Justice should stand.

The rule will therefore be discharged with costs.

UNION BANK OF LOWER CANADA v. DOUGLASS.

(IN APPEAL.)

Confessing judgment.—Fraudulent preference.

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

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

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

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

Upon a bill filed by a subsequent judgment creditor—

Held, upon re-hearing reversing the judgment of Taylor, J., (*a*) and following *McDonald* v. *Crombie*, (Sup. Ct. not yet reported) that the judgment was not void as a fraudulent preference.

J. S. Ewart, Q.C., and *G. F. Brophy* for plaintiffs.

F. B. Robertson and *H. E. Crawford* for defendant Douglass.

G. B. Gordon for defendant Hodder.

[*27th June, 1885.*]

WALLBRIDGE, C. J.—The judgment obtained by the defendant Douglass was obtained upon a writ issued, specially indorsed, which was personally served upon the defendant Hodder; declaration was filed and pleas put in by the defendant; application was then made to examine the defendant upon his pleas; and upon application to a Judge in Chambers for leave to strike out

(*a*) 1 Man. L. R., 135.

the pleas and to sign judgment—the order was made permitting this to be done.

A bill was filed attacking this judgment so obtained as void, in giving priority to preferred creditors and as coming within the Con. Stat. Man. c. 37, s. 95, prohibiting the giving a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment with intent in giving such confession, *cognovit actionem* or warrant of attorney to confess judgment to hinder, defeat or delay creditors, wholly or in fact, or with the intent thereby to give one or more of the creditors of such person a preference or priority over other creditors; this statute enacts that any such confession, *cognovit actionem*, or warrant of attorney to confess judgment shall be deemed and taken to be null and void against the other creditors of the person giving the same. This statute differs from the statute of Elizabeth only in this, that it renders preferences void when given by a creditor who is in insolvent circumstances, or on the eve of insolvency, when given by certain means set forth in the statute and there called confession of judgment, *cognovit actionem*, or warrant of attorney. This statute, after mentioning the different means by which the judgments were to be obtained, declares these instruments so mentioned void and ineffectual to support a judgment. It is to be remarked, that it is the instruments known by the name of confession of judgment, *cognovit actionem* or warrant of attorney to confess judgment which are declared void, and these instruments are declared ineffectual to support a judgment. It is desired by the plaintiff to have this statute so read that all cases within the mischief pointed at by it shall be declared within the statute. If the statute had declared giving a preference void, without naming the means by which the preference was given then the Court might, and undoubtedly would, have disregarded the means, but the statute has not done so, but has declared certain means void, that is confession of judgment, *cognovit actionem* and warrant of attorney to confess judgment. If we declared any other means than those mentioned in the statute void we should be legislating, not interpreting the statute. It has been argued that the statute is a beneficial one, and might be liberally construed. I cannot look upon it in that light. The debtor prefers one creditor by one of the forbidden means. This is wrong, because it is a *malum pro-*

hibitum, not morally wrong. The debt is due to this preferred creditor, and the statute of Elizabeth permits this preference. *Hurst* v. *Jennings*, 5 B. & C. 650. The statute permits a judgment creditor, whose debt is not a whit more just, successfully to attack the preference given by the debtor; and then, as if to make the absurdity more glaring, gives a preference itself to the creditor successfully attacking. That is, the law does itself exactly what it forbids others to do. I cannot see how the cause of justice is advanced by this legislation, but if the bill attacking the preferred creditor were filed in behalf of a creditor and all other creditors, then the statute might be said to accomplish some good object. But it is argued that this giving a preference by the Court is inflicting a penalty on the creditor obtaining the preference through the debtor, and compels the debtor to assign for the benefit of all creditors, agreeable to the first proviso in section 106. This would be an unworthy method of enforcing compliance with a statute—first declare a preference to be wrong; then, to correct that wrong, do another yourself, and by this means cause obedience to a statute—this is too glaring. It is best simply to say, it is a statute and must be obeyed, and not try to find an excuse for what cannot be justified. It is the means by which preference is given the statute condemns, and not the preference itself, or, as Mr. Robertson tersely puts it—"A statute evaded is not a statute broken." *McDonald* v. *Crombie*, lately decided in the Supreme Court at Ottawa, is, in my opinion, in point for the defendant. I think the appeal should be allowed, and the bill dismissed with costs.

TAYLOR, J.—When this case was before me I made a decree declaring the judgment recovered by the defendant Douglass against the defendant Hodder fraudulent and void as against the plaintiffs.

I then took the same view of the clause in our statute as to fraudulent preferences which was taken of the corresponding clause in the Ontario statute by Mr. Justice Armour in *Turner* v. *Lucas*, 1 Ont. R. 625, and which in the same case on the trial of the interpleader issue Mr. Justice Burton said that but for the Ontario authorities he would have taken. The argument upon the re-hearing has not shaken my conviction that the conclusion I then came to was the correct one.

But since then the case of *McDonald* v. *Crombie* has been decided by the Supreme Court. In that case a majority of the Judges in the Queen's Bench Division of the High Court of Justice, held the corresponding clause of the Ontario statute must be confined to judgments obtained by means of the instruments therein mentioned. By the appeal to the Supreme Court this point was therefore directly raised, and that Court has plainly decided that the proper view to be taken of the statute is that only judgments obtained directly by one or other of the three modes named in the statute are invalidated.

That judgment of the Supreme Court is binding upon me as a judge of this Court, and in submission to it I concur in holding that the decree in this case should be reversed and the bill dismissed.

During the argument on the re-hearing the learned counsel for the defendant seemed to take exception to the expression in my judgment that in the interests of commercial morality and plain honest dealing it was to be regretted that the Courts in Ontario should have taken the view of the statute which they did. When I so expressed myself I felt as a judge presiding in a Court of Equity, the full force of what said of a Court of Equity by a distinguished English judge,—"The view taken by this Court as to morality of conduct among all parties is one of the highest morality. The standard by which parties are tried here, is a standard I am thankful to say far higher than the standard of the world."

[The decision in the case of *Bank of Nova Scotia* v. *McKeand* 1 Man. L. J. 175, was upon the same grounds also reversed.]

TAIT v. CALLOWAY.

Decree for specific performance refused, but without prejudice to remedy at law.

Bill filed for foreclosure. Defendant set up a special agreement postponing time for maturity of mortgage, and a reduction of the amount of principal. This agreement was lost, and the

only evidence of its existence was that of an alleged compared copy and the parol evidence of several witnesses. Defendant asked specific performance of this agreement. At the hearing Taylor, J., held that the agreement set up by defendant had never been executed.

On re-hearing, Wallbridge, C. J., delivered the judgment of the Full Court, and held that the agreement set up by defendant had not been proved with that certainty and clearness which was required in a suit for specific performance, but remarked in his judgment that the defendant might sue at law for damages.

The minutes of the order on re-hearing affirming the decree of Taylor, J., as settled by the registrar, contained a proviso that the defendant might pursue his remedy at law for damages.

H. M. Howell, Q.C., on motion before the Chief Justice spoke to the minutes of the above order, and asked that the provision as to the defendant pursuing his remedy at law for damages be struck out as an improper condition, and having nothing to do with the case now before the Court.

Chester Glass supported the minutes. If an action were brought at law for damages and this proviso were not in the order the plea of estoppel by judgment could be effectually pleaded, and we would be driven to then make an application to vary the order.

The judgment of Taylor, J., in *Kelly* v. *McKenzie* (*a*) was cited, in which an application to vary the original decree was successfully made, some time after re-hearing, and to insert a similar condition to that asked for in this case.

WALLBRIDGE, C. J., held that the minutes should stand as settled by the registrar.

(*a*) *Ante* p. 203.

SMITH v. GROUETTE.

Principal and Agent.—Agreement made by manager of a store.

When a party deals with an agent supposing him to be the sole principal, without the knowledge that the property involved belongs to another person, that party is to be protected.

When a party allows his agent to act as though he were principal, and a third party deals with him as owner, the principal is bound by the act of his agent, even if he exceeded his authority.

If a purchaser purchases goods from an agent, without any notice that the goods are not the goods of the agent, he is entitled to set off the amount due to him from the agent against the price of the goods.

The above principles applied to the purchase of goods from the manager of a store upon an agreement by him for payment by set off of his personal debt.

T. H. Gilmour for plaintiff.

L. A. Prudhomme for defendant

[*13th March, 1885.*]

DUBUC, J.—The plaintiff brings this action for the balance of an account for goods sold to the defendant out of his store in St. Boniface.

The defendant contends that whatever goods he had from said store were purchased from John A. Smith, plaintiff's son, who kept said store, and against whom he has a set off.

The evidence shows that the plaintiff opened the said store at St. Boniface, in May, 1878, and put his son John A. Smith in charge of the same, he, the plaintiff, carrying on business in the City of Winnipeg. The St. Boniface store was kept exclusively by the plaintiff's son from May, 1878, until the 2nd November, 1880, when the plaintiff closed his business in Winnipeg and went over to the St. Boniface store, his son remaining at the store and acting as he had previously done up to May, 1881.

In June, 1880, the defendant went to the store, and entered into a contract with Smith, Jr., to cut wood on the line of the Canadian Pacific Railway Company, the supplies to carry out said contract to be taken from the store. The young Smith was in partnership with a man named Hubert to have wood cut and delivered on the C. P. R. line about Monmouth and Shelly. Hubert was conducting the wood operation on the railway line, and young Smith was sending out men and provisions from the store, and was to pay for the work.

It is admitted by the plaintiff that the defendant had a contract with John A. Smith, to cut wood for him, John A. Smith, and Hubert, and that he cut and delivered on the railway line, according to contract, 210 cords of wood, for which he is entitled to $1.25 per cord, and 15 cords left in the bush, for which he is entitled to 80 cents per cord. But he says that he has nothing to do with said contract of his son, and he claims to be entitled to be paid for the goods sold at his store, notwithstanding said contract.

The defendant swears that his agreement with young Smith was, that the goods were to be paid out of the moneys earned on the wood contract, and that he has received nothing for his wood cut and delivered as above stated, and that the moneys due him on said wood amount to a higher sum than the amount claimed by the plaintiff.

The defendant swears also that he never knew the plaintiff at all in the transaction; that he was dealing with young Smith; that when he saw the plaintiff in the store, in November, 1880, he had no reason to think or believe that he was anything more than a clerk or assistant of John A. Smith, and nothing was ever said either by young Smith or the plaintiff to let him understand or suspect that young Smith, with whom he had been dealing since June previous, was not the real owner of the store.

The plaintiff says that he had a sign over the store door marked "A. Smith;" that his accounts were made in his, A. Smith's, name. But defendant says he only knew the store as Smith's store, and he did not know any other man but the younger Smith as owner of said store, as he never inquired what was his name, or what was the name written on the sign—he not being able to read—and that he had no reason to doubt or suspect that any other person might own the said store.

The goods were to be shipped by the railway to defendant's camp in the woods, through Hubert, and the plaintiff swears that he sent them to the railway station. The plaintiff admits that he was to pay the freight, and that the goods were to be charged to defendant, at Monmouth or Shelly, the same price that they were sold at the store in St. Boniface. The plaintiff says that some of the goods were consigned or addressed to Hubert for the defendant, and that some were addressed to the defendant himself.

The evidence shows that part of the goods ordered were not received by defendant's men, and that a certain quantity of the

goods charged in the particulars were not even ordered at all, and were not received.

As to the wood contract, the defendant and Raymond both swear that the agreement with John A. Smith was, that they were to cut the wood for Smith and Hubert, but that Smith was to pay for it, and that the defendant was to look to him for his pay. The question is, whether the plaintiff can recover the price of goods sold to defendant from the store, without any regard to the agreement made between defendant and his son when the goods were purchased.

The plaintiff claims that his son was only a clerk, and had no right to make for him any contract as the one alleged by defendant.

But the fact is, that the son was more than an ordinary clerk; he was at least the manager or general agent of the plaintiff at the store; and there can be no question that the plaintiff would be responsible for anything done by him in connection with the business of the store.

The contract made here by young Smith with the defendant, not being done in the usual course of business of the store, is the plaintiff entitled to disregard it altogether, or can he be bound by it?

It appears that when a party deals with an agent, supposing him to be the sole principal, without the knowledge that the property involved belongs to another person, that party is to be protected. And if a party adopts a certain person as his agent, he must adopt him throughout, and take his agency *cum onere*. *Hovil* v. *Pack*, 7 East, 166.

When a party allows his agent to act as though he was principal, and a third person deals with him as owner, the principal is bound by the act of his agent, even if he exceeded his authority. And if a purchaser purchases goods from an agent, without any notice that the goods are not the goods of the agent, he is entitled to set off the amount due to him from the agent against the price of the goods. *Ex parte Dixon*, L. R. 4 Ch. Div. 133; *Ramazotti* v. *Bowring*, 7 C. B., N. S. 851; *Dunlop* v. *Lambert*, 6 Cl. & F. 600.

In the present case, the plaintiff's son is there in charge of the store. He deals with defendant without telling him that he is not the owner. He knew, or must have known, that the de-

fendant considered him as the owner; and in the wood contract with defendant he agrees that he is the one to whom defendant should look for his pay. Some months afterwards, the plaintiff himself comes to the store; he sees the defendant ordering goods to be sent out to the woods, under his contract with his son; he knows that his said son is in that wood contract; he must know that the defendant expects to pay for the goods with work on the contract; yet he never intimates to him that he intends to have the store account kept independent of the wood contract, and that it has to be paid to him, whether his son pays for the wood or not. The defendant has a right to assume that Smith the storekeeper, and Smith the wood contract man is the same person, and that he can set off his claim on the wood contract against the store account.

The amount of the plaintiff's particulars is $353.37, and he gives credit to the defendant for $229.07, leaving a balance of $124.30, which he claims with interest. The defendant swears that the $100 item on the credit side of the account was paid by himself out of moneys received for work on another wood contract made with one Cameron, and that he has not been paid anything for the wood cut on the contract with the defendant's son. There are other cash items on the credit side of the particulars, and also a credit of wood, but it does not appear clearly where this is derived, though one might suppose that the wood credit of $37.50 might be on the wood cut under the contract with Smith and Hubert.

The quantity of wood cut by defendant, according to prices under the contract, entitles him to a credit of $224.50. Even taking off the sum of $37.50, already credited, the amount he is entitled to be credited would cover more than the $124.30 claimed by the plaintiff.

It is true that Smith, the younger, was not alone in the wood contract, and that he had Hubert as a partner; but the evidence shows that the bargain was made with Smith himself, and that it was one of the terms of the agreement that he, Smith, was to pay for the wood.

Without going into the details of the particulars, and examining whether the goods not received by defendant, or at least those proven not to have been ordered at all, should or should not be chargeable against the defendant, I consider that the defendant

is entitled to set off against the store account, the amount admitted to be due on the wood contract, and as it more than covers the amount claimed by the plaintiff, I think the verdict should be for the defendant.

GORDON v. THE TORONTO, MANITOBA AND NORTH WEST LAND CO.

(In Appeal.)

Corporation.—Employment.—Seal.

Held,—A timekeeper is not such a "superior officer" that his employment by a corporation must be under seal.

J. S. Ewart, Q.C., for plaintiff.

F. B. Robertson for defendants.

(*18th May, 1885.*)

Dubuc, J., delivered the judgment of the Court (*a*).

This action is for salary, under a contract for hiring, and for work and labor done for defendants, as per particulars.

The defendants were engaged in farming and milling operations in Souris City, Manitoba. W. H. Knowlton, as secretary and treasurer of the defendant's company, by letter of the 15th of September, 1882, instructed the manager, Wm. Scott, to employ the plaintiff as time-keeper of the men and teams working for the defendants, and stated in said letter what were to be his duties.

On the 16th of September Knowlton writes to the plaintiff and sends him books for himself, for the miller and for the surveyor, and instructs him as to what he has to do. On the 26th of September Knowlton writes again to the plaintiff and instructs him as to what the directors desired him to do, as expressed by them at their meeting of that day. By another letter of the same day, the 26th of September, Knowlton writes to the plaintiff

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(*a*) Present—Dubuc, Taylor, Smith, JJ.

that, on that day, the board of directors had confirmed his appointment and had fixed his salary at $55 per month. Other letters written to the plaintiff by Knowlton, and by G. B. Gordon, defendants' solicitor, were also produced at the trial.

Pursuant to the instructions contained in said letters, the plaintiff entered into the service of the defendants, at Souris City, and worked for them until the 16th of November, 1882, when he resigned. In his particulars, he claims four months' wages, because, as he says, his resignation was not accepted; but the judge who tried the cause allowed him two months and all the items for work and labor.

The points raised by the defence are, that there is no evidence of employment by the defendants, as the plaintiff, having shown himself to be an important officer, could not be employed, except by contract under seal; and that it was not even proven that Knowlton, who engaged the plaintiff, was secretary of the defendants, and authorized to employ the plaintiff.

Can the plaintiff, employed in the capacity of time-keeper, recover salary or wages against the defendant Company, on a contract not under seal?

In *Haigh* v. *North Brierly Union*, 28 L. J. Q. B. 62, the Court held that an accountant employed to audit the accounts of the defendants, was entitled to recover, although the contract was not under seal.

In *Bateman* v. *Mayor of Ashton-under-Lyne*, 3 H. & N. 323, the plaintiff was held entitled to recover for work done under contract which was not under seal, on the ground that the work so done, if not contemplated by the Act of incorporation, was not expressly prohibited by the said Act; and that the contract under which he claimed was not necessarily illegal and void, or otherwise incapable of being enforced against the Company in a court of law.

In *Reuter* v. *The Electric Telegraph Co.*, 6 E. & B. 341, the charter of incorporation provided that all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the Company, under the authority of a special meeting; the plaintiff sued the Company on an agreement above the prescribed value; the contract was a parol agreement made with the chairman; the plaintiff had done the

work and received payments by cheques for it. It was held that the contract was ratified, if not authorized by the Company, and binding.

In *Totterdell* v. *Fareham Brick Co.*, L. R. 1 C. P. 674, two men promoted a company, which was incorporated, and had five other persons with them to sign a memorandum of association, but filed no articles of association, and no shares were allotted, except those of the seven persons who signed the memorandum. The plaintiff entered into an agreement with the promoters, who signed respectively as chairman and managing director. The contract was not under seal. It was held that, in the absence of evidence to the contrary, the jury were justified in presuming that the two directors had authority to bind the company.

In the present case, there is ample evidence that the plaintiff was employed by the defendants. The letters of Knowlton, secretary of the defendants' Company, to the Company's manager, William Scott, and to the plaintiff himself, establish the employment beyond any doubt. The said letters have a printed heading, in which are found the corporate name of the defendants, the names of the president and vice-president, the name of W. H. Knowlton as secretary and treasurer, and the name of G. B. Gordon, of Winnipeg, as solicitor. Knowlton writes to the plaintiff to inform him of his appointment at a meeting of directors, and of the salary fixed by the said board of directors, at the same meeting. And the defendants recognized and ratified his appointment by paying him a large portion of his salary.

As to the objection that the contract was not under seal, the plaintiff, acting as time keeper, cannot be considered such a superior officer as could not be employed except by contract under seal, when in *Haigh* v. *North Brierly Union*, an accountant employed to audit the accounts of the defendants was held entitled to recover.

As to the items claimed under the common counts, they are for such work as is ordinarily done by laborers and teamsters; the plaintiff swore he did the work and it was not denied. The learned Chief Justice who tried the cause found that he was entitled to be paid for such work as well as for two months' salary, and I think his verdict should not be disturbed.

Rule discharged with costs.

THE QUEEN v. RIEL.

Treason.—Jurisdiction of North West Court.—Information.—Evidence in shorthand.—Appeal upon 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 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.

J. S. Ewart, Q. C., and *F. X. Lemieux* and *Chas. Fitzpatrick* 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.

[*9th September, 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 that 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."

Manitoba was erected into a separate Province by the Dominion Act 33 Vic. c. 3, (12th May, 1870,) [illegible]

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 person or 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 sec. 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 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 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."

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.

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, 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 there 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 *ultrà 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 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 the 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 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 7th May, 1880, the Dominion Government, by the N. W. T. Act, constituted the Court of Queen's 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 in writing 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 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 impannelling twelve, when the statute directs him to impannel six only?

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 this 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 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, whilst 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.

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. He was invited by a deputation, who went for him to Montana. 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 signs of either weakness of intellect or of delusions. Taking the definitions 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."

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 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 *McNaghten*

case, 10 Cl. & Fin. 200. 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 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.

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 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*, 4 Hill, at p. 144,—"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*, 2 Peters, 627, 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 which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms."

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*, L. R. 3 App. Ca., at p. 904, 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*, 3 Sup. C. R. 1, and *City of Fredericton* v. *The Queen*, 3 Sup. C. R. 505. So also, the Judicial Committee of the Privy Council have held, in *Hodge* v. *The Queen*, L. R. 9 App. Ca. 117, 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 plenitude 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 Parliament 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."

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.

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 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 32nd and 33rd Vic. c. 3, was assented to on the 22nd of June, 1869, and the 33rd Vic. c. 3, on the 12th of 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 subsections of section 76 provide for the mode of trial in certain classes of offences. Those specified in the first four subsections are to be tried by the stipendiary magistrate in a summary way without the intervention of a jury. Then the 5th subsection 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 subsection, 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 subsection. 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.

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 subsections 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*, 13 Q. B. 237, 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 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*, L. R. 1 Ch. Div. at p. 431. 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 circumstance that I am myself a stenographer. The statute does not specify 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 art 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, "στενος" and "γραφο," 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, 1 Man. L. R. 325, was an entirely different case. It was one under the Extradition Act, and the evidence was taken in short-hand, 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 32nd & 33rd 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.

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*, 14 U. C. C. P. 32, 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*, 23 U. C. Q. B. 255, 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 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*, 16 U. C. C. P. 340, 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 conclusion." So, in *Reg.* v. *Seddons*, 16 U. C. C. P. 389, 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*, 17 U. C. C. P. 205, 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 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 contradiction, 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.

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.

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 of 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*, 10 Cl. & Fin. 200, 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.

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 subsection 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*, 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 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 safeguards 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 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 statutes 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 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 power 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*, 4 Moore P. C. Cas. 296, "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."

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*, L. R. 6 Q. B. 20, 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 Gr. 382, Draper, 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*, L. R. 9 App. Cas. 117. In *Valin* v. *Langlois*, 3 Sup. C. R. 1, 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*, L. R. 3 App. Cas. 889, 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 circum-

scribe 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 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 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, 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-sections 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 showing the intention to give to the court jurisdiction over a 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 of 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.

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 "shorthand 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 præsumuntur 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 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 take 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 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. *McNaghten's* case, 10 Cl. & Fin. 204; *Regina* v. *Stokes*, 3 C. & K. 185; *Regina* v. *Layton*, 4 Cox C. C. 149. 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 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 *McNaghten's* case, 10 Cl. & F. 204. 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 were 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. 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 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 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 feeliugs 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 confirmed.

ARMITAGE v. VIVIAN.

(IN APPEAL.)

Account stated of money due but not payable.

A document which acknowledges a sum to be due at its date, but not payable until a future day is evidence of an account stated.

J. S. Ewart, Q.C. and *C. P. Wilson* for plaintiff.
T. D. Cumberland for defendant.

[*18th May, 1885.*]

TAYLOR, J., delivered the judgment of the Court:(*a*)—The plaintiff seems to me entitled to recover under the common counts upon an account stated. Under the counts upon the covenants in the various deeds I think the plaintiff cannot recover. The deeds containing the covenants sued upon were not executed by the defendant personally, but purport to be executed by him by his attorney, and the plaintiff failed to show that the attorney had an authority under seal. The Chief Justice held at the trial that the evidence of ratification offered was not sufficient. I do not differ from him as to the correctness of that ruling. But the error which, with all respect to the Chief Justice, it seems to me he fell into, was, first ruling that the agreements were not proved to be under seal, and then on the authority of *Middleditch* v. *Ellis*, 2 Exch. 623, ruling that the plaintiff could not recover under the common counts on an account stated, because the account stated referred to an indebtedness on a contract or agreement under seal.

The two letters of 26th and 29th July, 1882, seem to me to establish an account stated for the amount mentioned therein, $194.40. There was a debt then due from the defendant to the plaintiff, although the day for payment had not arrived, the money being payable on the 14th of August following. A document which acknowledges a sum due at the time of its date, but payable on a future contingency, has been held evidence of an account stated. *Russell* v. *Wells*, 5 U. C. O. S. 725. See also *McQueen* v. *McQueen*, 9 U. C. Q. B. 536; 10 U. C. Q. B. 359, and *Palmer* v. *McLennan*, 22 U. C. C. P. 258 & 565.

The nonsuit should stand as to the first six counts, but the plaintiff should have a verdict on the account stated for $194.40.

(*a*) Present: Dubuc, Taylor, Smith, JJ.

RE IRISH.

Real Property Act of 1885.—Unpatented lands.

Held, 1. By section 28 lands "when alienated" by the Crown, "shall be subject to the provisions of this Act." The word "alienated" means completely alienated—that is by patent.

2. Lands unalienated, by patent, on the 1st July, 1885, remain under the old law until brought under the provisions of the Act.

3. Lands brought under the Act become chattels real for the purpose of devolution at death, but are lands in other respects, and are not exigible under *fi. fa.* goods.

4. A person entitled to a patent for a homestead, or pre-emption, having received a certificate of recommendation for patent, countersigned by the Commissioner of Dominion Lands, may bring such lands under the operation of the "Real Property Act, 1885." *Taylor, J., diss.*

5. After application under the Act no deeds can be registered in the county registry offices.

6. Conveyances of lands, patented after the 1st July, 1885, in the statutory short form may be treated as substantially in conformity with the forms given in the Act.

S. Blanchard, Q.C., for the registrar general.

J. H. D. Munson, for Jane Irish.

[*26th October, 1885.*]

DUBUC, J.—Under section 110 of the Real Property Act of 1885, the registrar general has submitted to the Court certain statements of facts and certain questions arising from the application of one Jane Irish to bring under the Act the lands therein mentioned.

The facts are as follows:—

Jane Irish, on the 20th of October, 1884, obtained a certificate of recommendation of patent under the Dominion Lands Act, for S.-W. ½ section 10, township 11, range 19 west of the first principal meridian, in Manitoba.

On 2nd of July, 1885, the Crown Patent for S.-W. ¼ of said section issued to her.

On 11th of September, 1885, she paid the Dominion Government the pre-emption for the other quarter-section.

On 9th of September, 1885, she signed an application to bring the said half-section under "The Real Property Act of 1885."

On the same day she executed to The Western Canada Loan and Savings Company a mortgage of the said half-section for $600, in the form set out in the schedule "G" to the Act (with other special covenants.)

On 23rd of September, 1885, the application and mortgage were brought into the office of the registrar general, together with the certificate of recommendation and receipt for pre-emption money, whereupon he gave the Company mentioned a certificate which certificate was forwarded by the said Company to the Registrar of the County of Brandon (the division wherein said land lies).

Question 1.—Does the word "alienated" in section 28 of the Act refer to the date of the issue of the Crown Patent, or to the date the recommendation is countersigned by the Land Commissioner, or to a prior period when the party entitled has fully complied with the requirements of the Dominion Lands Act and has become entitled to demand his patent, without more?

The said section 28 reads thus:—"From and after the commencement of this Act all lands unalienated from the Crown in the Province of Manitoba shall, when alienated, be subject to the provisions of this Act. Provided, however, that this section shall not apply to any lands to which the parties may be entitled under the Manitoba Act or any amendment thereto."

Were it not for the proviso in section 36 of the Dominion Lands Act, 1883, no doubt whatever would arise as to the date referred to by the word "alienated"; it would unquestionably mean the date of the issue of the Crown Patent.

The said section 36 is as follows:—"Any assignment or transfer of homestead or pre-emption right, or any part thereof, and any agreement to assign or transfer any homestead or pre-emption right, or any part thereof, after patent, which shall have been obtained, made or entered into before the issue of the patent, shall be null and void; and the person so assigning or transferring, or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right, and shall not be permitted to make another homestead entry. Provided that a person whose

homestead, or homestead and pre-emption, may have been recommended for patent by the local agent, and who has received from such agent a certificate to that effect in the form M, in the schedule to this Act, countersigned by the Commissioner of Dominion Lands, may legally dispose of and convey, assign or transfer his right and title therein."

Before receiving from the Land Commissioner the certificate of recommendation for patent, the person having a homestead or pre-emption right cannot even legally dispose of and convey, assign or transfer his right and title therein. So that, even if he has fully complied with the requirements of the Dominion Lands Act, not only has he no fee in the said lands, but he has not even such right as can be legally disposed of and conveyed. Therefore the word "alienated" cannot refer to such bare compliance with the requirements of the Act.

Now, can it refer to the date of the recommendation countersigned by the Land Commissioner?

Section 62 of the Real Property Act says, that "every certificate of title granted under this Act, when duly registered, shall, except in case of fraud wherein the registered owner shall have participated or colluded, so long as the same remains in force and uncancelled under this Act, be conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever, that the person named in such certificate is entitled to the land included in such certificate, for the estate or interest therein specified, &c."

In the first place, the certificate of title under the Act has more solemnity and importance than the recommendation for patent in the Dominion Lands Act, the latter giving only to the holder of the certificate the power to dispose of his right and title, whatever they may be, while the former is to be conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever.

In the second place, the recommendation for patent might be cancelled before patent issues, if it is made to appear to the Dominion Land Department that it was obtained through mistake or fraud; and if it was so cancelled, the consequences might be very serious for the parties who would have relied on the Registrar General's certificate of title as conclusive evidence at law and in

equity. To avoid this, I think the word "alienated" should, in the construction of the Act, refer to the date of the issue of the Crown patent,

That construction can also be considered as the logical interpretation of the Statute. The word alienation should mean a complete alienation by patent, and not one which is incomplete and revocable.

Question 2.—Assuming that the word "alienated" refers to the date of the issue of the patent, are lands not patented on 1st July, 1885, subject to the old or the new law in the meantime?

The construction of the word "alienated," as above given, affords an answer to this question. The statute should have a strict interpretation. Section 28 says, that from and after the commencement of this Act, all lands unalienated from the Crown, shall, when alienated, be subject to the provisions of this Act. From this it follows that the lands not patented, *i. e.* unalienated, *shall* not, until alienated, be absolutely subject to the new law. They may be brought under the new law, by application under section 38 of the Act, which application may, or may not, be entertained by the registrar general. But in the meantime, until such application is entertained and granted, the said lands remain subject to the old law.

Question 3.—Are lands in the Province seizable under the *fi. fa.* goods, or *fi. fa.* lands?

This question is not derived from the case of *Jane Irish*, now before the court. It arises under section 21 of the Act, which says that all lands in this Province shall be held to be chattels real, and shall go to the executor or administrator of any person dying seized or possessed thereof. But the tenor of this section, as well as of the following up to section 27, shows clearly that this applies only to the mode of transfer of lands, and has not the effect of changing the nature of the property. The lands remain real estate, and, except for the purpose of transfer, they remain subject to the law relating to real estate. They are not seizable under *fi. fa.* goods.

Question 4.—Can unpatented land be properly brought within the provisions of the Act, as in the case of a homestead and pre-emption after recommendation for patent, under the Dominion Lands Act, and before the issue of the patent?

Without being absolutely subject to the provisions of the Act, as stated in the answer to the second question, I think that the unpatented lands can be brought within the provisions of the Act, under section 38. And the owner of any estate or interest in such lands may, in the discretion of the registrar general, obtain from him a certificate of whatever title or interest he has in the same. In such case, the certificate of the registrar general would not deceive the public, nor any party who might take a conveyance from the holder of the said certificate, because such certificate would not show an absolute title in fee simple; but only such title or interest as he appears to have at the time. And such grantee would know of whatever chances there may be that the patent, though recommended, might be refused.

Question 5.—In such a case, after filing an application by the homesteader with the registrar general, and notice to the registrar of the county where the land lies (by the registration in his office of the certificate of the filing of such application), can registration in the office of the latter be legally made? Must subsequent conveyances be filed in the office of the registrar general, to be of any effect?

After filing such application, if registration in the County Registry Office cannot be legally made, the applicant would, until the application has been finally disposed of, be prevented from dealing effectually with his lands. This may be a small inconvenience. But if the contrary proposition was entertained; if registrations could continue to be made in the County Registry Office, while the registrar general has the application under consideration, it might happen that, when the registrar general gives to the applicant his final certificate of title, the real title might be, by conveyance duly registered, in some other person. And the certificate which should be conclusive evidence at law and in equity that the person named in the same is entitled to the land in question, would not be true in fact. And if it was held to be true in law, that is to say, to have the legal effect intended by the Act, there would be a conflict of interest between the party having a conveyance legally registered in the County Registry Office and the holder of the registrar general's certificate. This would be a much greater inconvenience than the preventing of registration in the County Registry Office, while the application is under consideration. In fact, the registrar

general would not be justified in giving a certificate of title to one person while the real title might be in some other person; this would have the effect of frustrating the real object of the Act and rendering it inoperative.

I am, therefore, of opinion that the county registrar should be instructed by the registrar general, under section 11 of the Act, to stop making any registration in respect of the lands in question, after the registration in the office of the said county registrar of the certificate of application issued under section 43 of the Act, until the application has been finally disposed of. And every conveyance made in the meantime should be of no effect, unless filed in the office of the registrar general.

Question 6.—Are instruments and conveyances in the ordinary form of any effect where the land has been patented since the 1st July, 1885, bnt where no application under the Act has been filed, or before the issue of a certificate of title under the Act?

Under section 28, all lands shall, when patented, be subject to the provisions of the Act. Section 36 enacts that the registrar general shall not register any instrument purporting to transfer or otherwise to deal with or affect any land which is subject to the provisions of the Act, unless such instrument be in accordance with the provisions thereof. But the same section adds, that any instrument substantially in conformity with the schedule to the Act, or an instrument of like nature, shall be sufficient. I think it may properly be inferred from this that conveyances or other instruments in the ordinary form, made before an application is filed under the Act, might, for whatever interest they are dealing with, be considered as substantially in conformity with the schedule to the Act, or of like nature; and that they might be held to have the effect they purport to have, for whatever they are worth. And my opinion is, that they can be registered as such, subject always to the proviso in said section 36, empowering the registrar general to reject such instrument as he will think unfit for registration. These instruments would not, of course, have the definite and absolutely binding effect of instruments made in the forms prescribed by the Act; but only the usual effect they ordinarily purport to have.

Section 64 of the Act says that after the registration of the title to any land under the provisions of the Act, no instrument

shall be effectual to pass any interest therein, unless such instrument be executed in accordance with this Act, and be duly registered thereunder. This seems to confirm the above interpretation of sections 28 and 36, and leads naturally to the conclusion that *before* the registration of the title, although the land may, by the issue of the patent, be subject to the provisions of the Act, any instrument may be effectual to pass the interest therein, whether it be executed in accordance with the Act or otherwise.

I am, therefore, of opinion that before the issue of a certificate of title under the Act, instruments in the ordinary form should have the usual effect they purport to have.

TAYLOR, J.—This is a case stated by the registrar general for the opinion of the Court, under the 110th section of the Real Property Act of 1885.

The applicant, Jane Irish, on the 20th of October, 1884, obtained, under the 33rd section of the Dominion Lands Act, 1883, a recommendation for patent for the W. ½ sec. 10, township 11, range 19, west. On the 2nd of July, 1885, the Crown Patent for the S.-W. ¼ of the section issued to her. On the 11th September, 1885, she paid to the Dominion Government the amount payable upon the other quarter of the section for which she had made a pre-emption entry. On the 9th of September, 1885, she executed an application to bring the whole half-section under the Real Property Act of 1885. And on the same day she executed to the Western Canada Loan and Savings Company a mortgage of the half section in the form set out in schedule G to the Act, which also contained certain special covenants.

The main question raised is the meaning of the word "alienated" in the 28th section.

That section enacts, that "From and after the commencement of this Act all lands unalienated from the Crown in the Province of Manitoba, shall, when alienated, be subject to the provisions of this Act. Provided, however, that this section shall not apply to any lands to which the parties may be entitled under the Manitoba Act or any amendment thereof." The date of the commencement of the Act is fixed as the 1st of July, 1885, by the 2nd section.

The intention of this section plainly is to render compulsory the bringing under the Act all lands, except lands to which the Manitoba Act applies, which were at the commencement of the Act unalienated, and afterwards alienated, while the bringing in of other lands is optional with the owners.

At what time then does this compulsory section come into play? In my opinion, only when a Crown patent has actually been issued. The word "alienated" must bear the meaning of wholly and entirely parted with.

During the argument it was suggested that in the present case the taking steps to bring the land under the Act was a voluntary proceeding on the part of the applicant, and therefore the 38th section might apply. That section says the owner of any estate or interest in any land, whether legal or equitable, may apply to have his title registered, &c. On a careful consideration of that section I have come to the conclusion that a person who has performed the settlement duties which are required in the case of a homestead entry, or who has paid the purchase money on a pre-emption entry, and has obtained a recommendation for patent, or who has made an ordinary purchase of Crown lands, paying his purchase money in full, but to whom no patent has issued, cannot voluntarily bring the land under the provisions of the Act. He is not, in my opinion, the owner of an equitable estate or interest in the land within the meaning of that 38th section.

In Victoria, by the Act to simplify the title to, and the dealing with estates in land, provision is in express terms made for bringing under the Act in force there, in a qualified manner, land which has not been granted by the Crown. The 15th section provides for the case of lands unalienated at the time of the Act coming into force, and as to them when alienated, registering under the Act is compulsory. The 17th section provides that land alienated in fee by the Crown before that date may be brought under the operation of the Act. The 57th section provides that upon production of a receipt of the Treasurer of the Colony for the full purchase money of any land sold by Her Majesty in fee, together with an instrument dealing with such land signed by the purchaser, the registrar shall endorse upon such receipt such memorial as he is required to enter in the register book upon the registration of any dealing

of a like nature with land registered, and so on from time to time with respect to any other dealings before the registration of the grant. But it seems to be only after registration of the Crown grant that a certificate of title can be issued.

To say that a man is owner of an equitable estate or interest in land implies, that while the legal estate in the land is vested in some other person who is at law recognized as the owner, he has some right, interest or estate in the land which is recognized in equity, and which he can in a court of equity enforce against the owner of the legal estate. In other words, the owner of the legal estate must be, by the doctrines of a court of equity, a trustee for him. In the case now under consideration the legal estate is vested in the Crown.

In *Cruise's Dig.* vol. i., p. 403 it is stated, that "When trusts were first introduced it was held that none but those who were capable of being seised to a use could be trustees. This has been altered, and it is now settled that the King may be a trustee, but the remedy against him is in the Court of Exchequer." Mr. *Lewin*, in his work *on Trusts*, at p. 29, states it thus:—"The Sovereign may sustain the character of a trustee so far as regards the capacity to take the estate and to execute the trust, but great doubts have been entertained whether the subject can by any legal process enforce the performance of the trust. The right of the *cestui qui trust* is sufficiently clear, but the defect lies in the remedy." *Hill*, in his work *on Trustees*, at p. 30, says, "It does not appear to have been ever directly decided, whether a trust could be enforced against any property, either real or personal, in the hands of the Sovereign."

In *Penn* v. *Lord Baltimore*, 1 Ves. Sr., at p. 453, Lord Hardwicke said he would not decree a trust against the Crown. The dicta of several judges in favour of the existence of this equity against the Crown are all extrajudicial, and in the two cases of *Pawlett* v. *Attorney General*, Hard. 467, and *Reeve* v. *Attorney General*, 2 Atk. 223, in which it became necessary to decide the point, the relief was refused. As Lord Keeper Northington expressed it in the great case of *Burgess* v. *Wheate*, 1 Ed. 177, "The arms of equity are very short against the prerogative." In *Hovenden* v. *Lord Annesley*, 2 S. & L. 607, that eminent judge Lord Redesdale doubted whether the Court of Chancery had jurisdiction to bind the Crown. "The

subject," said he, "is involved in great obscurity," In *Hodge* v. *Attorney General*, 3 Y. & C., at p. 346, Alderson, B., said, "The legal estate is vested in the Crown, and I do not know any process by which this Court can compel the Crown to convey that legal estate."

Notwithstanding the language of text-writers and of some judges, the question of whether the Crown can be a trustee does not even at the present day seem definitely settled. In the recent case of *Rustomjee* v. *The Queen*, L. R. 2 Q. B. D. 69, in which the Court of Appeal held that in making and performing a treaty with another sovereign the Crown cannot be a trustee or agent for any subject, the expression Lord Coleridge, C.J., used is, "We do not say that under no circumstances can the Crown be a trustee."

Nor could the person who has obtained a recommendation for patent, or who as an ordinary purchaser has paid his purchase-money in full, enforce specific performance against the Crown. That a court of equity has no power to decree specific performance against the Crown has been decided in *Simpson* v. *Grant*, 5 Gr. 267, and *Crotty* v *Vrooman*, 1 Man. L. R. 151. He must rely solely upon what has been called the infallible justice of the Crown.

It is to my mind impossible to imagine that the Legislature ever intended that a person in that position, who may, in a sense, be said to be the owner of an equitable estate or interest in the land, but of one which he cannot enforce, should be able to come in under this Act and obtain a certificate which would, under section 62, be conclusive evidence both at law and in equity as against Her Majesty as well as all other persons.

Besides, the 29th section which seems to refer to compulsorily bringing land under the Act provides that patents shall be deposited with the registrar general, who shall upon the deposit of the patent take certain proceedings, and if the title is found to be in the applicant, register the same. Then the 39th section provides that every application for first registration under the Act, except by immediate grantees from the Crown, shall be accompanied by certain particulars. The mode of expression clearly implies that the application must be by the immediate grantee of the Crown or by some person deriving title from such grantee. Also by section 61 any certificate of title granted

under the Act shall, by implication, and without any special mention on the certificate of title, unless the contrary be expressly declared be deemed to be subject to, amongst other things, "Any subsisting reservations contained in the original grant of said land from the Crown."

It may be said that to so hold would prevent lands held under the Manitoba Act from being registered under the provisions of the Act. I do not see the force of that. The Manitoba Act provides in the 32nd section for granting of titles and assuring to the settlers of the Province the peaceable possession of the lands held by them. The class of titles dealt with by the 1st sub-section shall, if required by the owner, be confirmed by grant from the Crown. The classes dealt with by the 2nd and 3rd sub-sections shall, if required by the owner, be converted into an estate of freehold by grant from the Crown. The 31st section provides for the lands set apart for the extinguishment of the Indian title being "granted" to the persons entitled.

If any of the persons entitled to lands under either of these sections have not obtained patents to lands which it is desired to bring under this Act, there can be no obstacle to their applying for patents, and that seems to me the proper course to be pursued.

Even if it should be determined that lands held under the Manitoba Act cannot voluntarily be brought under the Act, there is no greater anomaly in that than is created by the 28th section, which provides that they shall not be subject to the compulsory clauses of the Act.

In regard to the other questions raised by the case stated, I am of opinion that after the registration of the certificate to be issued by the Registrar General upon the filing of the application under section 42, and which is by section 43 thereupon to be registered in the proper registry office of the division wherein the lands are situated, all further registrations in such registry office cease. If they continued, it would be impossible for the registrar general ever to grant a certificate of title with certainty that the grantee of it is the true owner. To so hold does no injustice to parties professing to deal with or purchase the lands pending the granting of a certificate of title, because the registration of the certificate under section 43 gives notice that

an application has been made to bring the land under the Act, and before dealing with the apparent owner they can acquire all necessary information at the office of the registrar general.

How the land is to be dealt with in the event of the title turning out defective, and a certificate of title being refused, does not appear from the Act.

The statement in the 21st section that after the commencement of the Act all lands which by the common law are regarded as real estate "shall be held to be chattels real," must, I think, be read as meaning that they shall be held to be so for the purpose of devolution on the death of the owner, that subject being dealt with in that, and some subsequent sections. Why these words were ever introduced it is difficult to say. The section would read as well, and would convey all the meaning it was intended to convey quite as well, without them. Their insertion only causes trouble and doubt.

Lands, in my opinion, continue subject to be seized and sold under writs of execution against lands, and cannot be seized or sold under writs against goods.

In the case of lands not brought under the Act a mortgage or other instrument, according to the forms given in the Act, can have no other effect than the words used have as ordinary words. The words used cannot derive any force, effect or meaning, from the provisions of the Act.

KILLAM, J.—I agree that the word "alienated" under the 28th section must refer to the date of issue of the patent from the Crown. I have come to this conclusion from a comparison of other sections of the Real Property Act with the 28th section.

I agree that the lands in respect of which a homesteader has a right to a patent are only to be considered as compulsorily subject to the provisions of the Act when the patent is issued; but I think that the party entitled in this way, at any rate after the recommendation for patent has been given and countersigned (which is all we need now consider), can apply for and can have his title registered under the Act, though the patent is not yet issued.

I agree, also, that lands are not made subject to seizure under *fi. fa.* goods.

I agree with my brother Dubuc in thinking that the right of the applicant to the pre-emption can be registered under the Act. I think that under the Dominion Lands Act the party having a right thereunder to a patent for a homestead or pre-emption by compliance with the provisions of the Act, and having obtained the recommendation for patent and the right therefore to dispose of his right, has acquired an interest or estate in the lands as against the Crown. The statute is binding upon the Crown, and I am of opinion that it should be presumed that the Crown will not refuse to acknowledge the right. What may be the remedy if the Crown should in a particular case refuse to recognize the right I do not deem necessary now to consider.

I think that when a party entitled to register his title under the Act has applied to do so he has brought the land under the Act, and after this is done it appears that no instruments can affect the title until they are registered under the Act itself. It follows that the ordinary registrars should not register transfers or instruments purporting to affect the land after such application has once been made.

As the instrument in question is in accordance with the form provided by the Act I do not think it necessary to consider what would be the effect of instruments in any other form.

None of the other questions asked appear to arise out of the case before the registrar general, and this being so I do not think that they should now be considered. I regret that I have not been able to discuss more fully the grounds upon which I have formed my opinion upon the points on which my brothers Dubuc and Taylor differ, as I feel that the views urged by my brother Taylor are well worthy of more full discussion than I have given them. Though I have considered carefully the authorities referred to by my brother Taylor, I am unable to come to the same opinion upon them; but with so many other matters claiming our attention I have not been able to express my opinions more fully in writing.

McMILLAN v. BARTLETT.

(In Appeal.)

Fraudulent preference.—Interpleader issue.—Act 47 Vic. c. 53.

Since the passing of the Act 48 Vic. c. 53, no chattel mortgage can, upon an interpleader issue, be declared void under Con. Stat. Man. c. 37, s. 96.

Circumstances surrounding the execution of a chattel mortgage, in their tendency to show a fraudulent preference, discussed; and the trial judge's finding thereon reversed.

A. Haggart for plaintiff.

J. W. H. Wilson for defendant.

[*27th June, 1885.*]

Taylor, J., delivered the judgment of the Court. (*a*)

This is an interpleader issue, the question to be determined being the validity of a chattel mortgage made by one Johnston to the claimant McMillan. The learned judge before whom the issue was tried without a jury found that the mortgage was made for the purpose of giving a fraudulent preference to the mortgagee, and he entered a verdict in favor of the defendant, the execution creditor.

Upon the argument of the rule to set aside this verdict, the objection was taken that since the passing of the 47 Vic. c. 53, no chattel mortgage can be declared void under section 96 of c. 37 Con. Stat. of Manitoba, except by bill in equity for the benefit of the plaintiff and other creditors of the person by whom it has been made. This appears to be a fatal objection to the verdict in favor of the defendant. It is true the verdict does not, in terms, set aside the mortgage or declare it void, but it was entered for the defendant on the ground that the mortgage was one which could not stand consistently with the 96th section of that Act. The learned counsel for the defendant, in answering this objection, urged that to give effect to it must be to hold that the judge finding, upon the evidence, the mortgage null and void, as giving, and intended to give, a preference or priority, must in the face of all that still hold it to be good. But that is not the proper way of looking at it. The result of the 47 Vic. c. 53, being passed, is to prevent a judge upon the trial of an interpleader issue from entertaining the question of whether the instrument is null and void or not under that section 96.

The cases cited to support the proposition that the claimant having submitted to the issue, drawn it up and served it, cannot

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Present: Wallbridge, C. J., Taylor, Killam, JJ.

now object that it was decided upon the ground it was, are not in point. Even if they go the length of holding, as it was claimed they do, that where the court has no jurisdiction, yet the proceeding having been submitted to, the question cannot then be raised, they do not apply here. The court had an undoubted jurisdiction to direct an issue for the purpose of determining whether the goods in question were the property of the claimant as against the execution creditor or not. The validity of the mortgage might have been impeached on many grounds. But on such a proceeding the ground that the mortgage was null and void, as giving the claimant a preference or priority, was not open to the execution creditor.

Apart, however, from this objection, we are unable to concur in the conclusion arrived at by the learned judge upon the evidence. With the greatest respect for his finding we are unable, upon a careful perusal of the evidence, to see that it establishes the existence of any intent to hinder, defeat, or delay the execution creditor, or to give the claimant a preference or priority over him. The claimant and the execution creditor were the only creditors of the mortgagor. It appears that the mortgagor was indebted to the claimant in $215 or $220, for moneys borrowed from time to time, and for oats which the claimant had purchased for him. This indebtedness was then due and owing. He was also indebted to the execution creditor in $275 upon a promissory note which was not due and payable for three months. The claimant had several conversations with the mortgagor and his wife, asking for security for the money due him, and after this the mortgage was given for $200, the balance of the indebtedness being paid in cash at the time. It is true the claimant knew of the existence of the note held by the execution creditor, for the mortgagor being an illiterate man he had drawn it up for him when given nine months before, but there is nothing in the evidence to show that the intent in making the mortgage was to give him a preference or priority, or to do otherwise than secure his debt.

Johnston, when examined, said, "He asked me for the money, and I said I had none. He told me he was bound to get his money or he would sue me. That is what I understood. He agreed to give me a year on the mortgage. I said I wanted that time * * * * * He did not speak about the note when I gave the mortgage. I did not tell him it was not paid. He

knew I had given a note, but he did not know whether I had paid it. He did not ask me." As a fact, on the transaction in respect of which the note held by the execution creditor was given, there was also given another note for $50, which had been paid with money borrowed from the claimant, and which forms part of the consideration for the mortgage. A small sum had also, before the giving of the mortgage, been paid upon the second note.

Johnston further says, "I did not go to Mrs. Bartlett to tell her I was giving the mortgage. I never thought of it. I calculated to pay the note, as I had a year to pay the mortgage."

It was further sought to defeat this mortgage, on the ground that it was a fraud upon the mortgagor, and therefore void as against him, and so also against his creditors. The evidence is wholly insufficient to establish this. What was relied on was a statement by Johnston in his evidence, "I had no idea to give McMillan the right to take the horses away from Mrs. Bartlett. It was not my intention. It was not explained to me that if I signed the mortgage McMillan would have priority over Mrs. Bartlett." From the evidence of a clerk in the office of the attorney where the mortgage was prepared, and who is one of the attesting witnesses to it, it is beyond all doubt that at the time of its execution the mortgage was explained to him. The utmost which can be said is, that the effect of the mortgage upon any claims the execution creditor might then have against him was not present to his mind. There is no evidence of any fraud or misrepresentation on the part of the claimant such as would vitiate the transaction.

The issue was to try whether certain goods seized and taken in execution by the sheriff were, at the time of the delivery of the writ to the sheriff, the property of the claimant against the execution creditor. From an exhibit put in at the trial it appears that the goods so seized and taken in execution, and which have since the issue was directed been sold by the sheriff, were a span of horses, a lumber wagon, a set of double harness, a neck yoke, a double tree, two whiffle-trees, and two blankets. The goods and chattels covered by the mortgage are, the span of horses, the wagon, and the set of double harness. As to these the verdict should be set aside and entered for the claimant. As to the other articles, it should stand for the defendant.

RE BANNERMAN.

Real Property Act of 1885.—Probate.

Held. Before executors can apply for registration as owners of the testator's land they must prove the will in the Surrogate Court.

S. Blanchard, Q. C., for applicants.
J. H. D. Munson, for registrar general.

[*26th October, 1885.*]

DUBUC, J.—The registrar general has submitted to the Court the following matter:—

George Bannerman, late of the Parish of St. John, in the Province of Manitoba, died on or about the 10th day of August, 1885, possessed of certain real estate situate in the said Province of Manitoba.

Under and by virtue of his last will and testament he devised his said real estate to his executors and trustees, Duncan MacArthur and Samuel P. Matheson, the applicants, upon trust to sell and convert the same into money and apply the proceeds as therein mentioned.

The said testator had not acquired in his lifetime a registered certificate of title under the provisions of the Real Property Act, 1885.

Probate of the said will has not yet been issued.

Question. Such being the case, are the executors compelled under section 97 of the said Act to obtain a certificate under the Act, and if so should probate issue before application is entertained.

In the present case, as stated, the first part of the question requires no answer. The executors having voluntarily made the application to obtain a certificate under the Act, it is not necessary, for the purpose of this case, to determine whether they are compelled to do so.

The said section 97 declares that whenever the owner of any lands dies, leaving a will, such lands shall, subject to the provisions of this Act, vest in the personal representatives of the deceased owner, and the executor or administrator shall, before dealing with such lands, make application in writing to the

registrar general to be registered as owner, and shall produce to the registrar general the probate of the will of the deceased owner, or letters of administration, &c,

Except for the provisions of the Real Property Act the executors would have no interest in the lands of the deceased. But under the Act the will vests the said lands in the executors. However, they cannot have and exercise their full powers as executors under the will until probate has issued. And the said section 97 declaring that the executors *shall* produce to the registrar general the probate of the will, it follows that the probate should issue and be produced to the registrar general before the application is entertained.

TAYLOR, J.—This is a case stated for the opinion of the Court by the registrar general under the 110th section of "The Real Property Act of 1885."

Two questions arise, which are—1st. Where the owner of land which has not been brought under the provisions of the Act, dies, is it compulsory by section 97 for his executors, before they can deal with the land, to register it under the Act? 2nd. Is it compulsory for executors, before they apply to be registered as owners, to prove the will in the Surrogate Court, and produce the probate to the registrar general?

The first does not properly come before us, for the executors have, in this case, voluntarily made application under the Act.

The second question must be answered in the affirmative. It is true that by section 50 the registrar general or examiner of titles in investigating the title may receive and act upon any evidence which is now receivable in any court of the Province. On a proceeding in court where the object is to establish a devise or testamentary disposition of real estate, the original will had to be produced, and its execution by the testator proved. *Sutherland* v. *Young*, 1 Man. L. R. 38. Although with conveyancers, if the title is derived under a will, the probate is ordinarily accepted as sufficient proof of the will as between vendor and purchaser. *Taylor on Titles 67, Cov. Con. Ev. 91, 92.* But the 97th section makes the production of the probate imperative. The words of the Statute are,—"The executor or administrator . . . shall produce to the registrar general the

probate of the will of the deceased owner, or letters of administration, or the order of the court authorising him to administer the estate of the deceased owner, or an office copy of the said probate, letters of administration, or order, as the case may be." Then the registrar general is to enter in the register a memorial of the date of the will and of the probate, or of the letters of administration or order of the court. He is also to note the fact of such registration by memorandum under his hand on the probate of the will, letters of administration, order, or other instrument as aforesaid. "Other instrument" cannot mean original will. The "aforesaid" plainly refers to office copy of the probate, letters of administration or order of court, already referred to. So in cases which come under that section the probate must be produced.

Where the executors voluntarily apply for a certificate of title, production of the probate is also, in my opinion, necessary. The title of the executor to the land, as executor, is what is to be established. Now the title of the executor, and his right to deal with the estate as such, is always established by the probate. If an executor could, without proving the will, obtain a certificate of title, there might be the curious result of his getting a certificate of title as owner, enabling him to deal with the land, and then his renouncing probate.

KILLAM, J.—Upon the first question asked in this matter I do not feel it necessary to express any opinion, as the executors have applied to bring the property under the Act, and the question does not necessarily arise under the facts presented.

I reserve my opinion until the necessity for expressing it shall arrive.

I agree that the letters probate should be produced as evidence of the title of the executor.

UNION BANK v. BULMER.

(IN CHAMBERS.)

Partners.—Liability on notes signed by co-partner.

Held, 1. The implied authority of one partner to sign the partnership name, or to make and indorse notes, is limited to doing so for the purposes of the partnership.

2. Where an individual takes a note made or indorsed by a partnership, knowing that it was not made or indorsed for the purposes of the partnership, the *onus* is cast upon the holder of proving that the partnership signature was given with the knowledge or assent of every member of the firm.

The plaintiffs sued upon a promissory note made by the defendant under the firm name of F. T. Bulmer & Co., and obtained a summons calling upon the defendants to show cause why the appearance should not be struck out, and final judgment signed for the amount claimed.

The defendant, Henry Bulmer the younger, resisted the application and filed his own affidavit, in which he set up that the note in question was made without his knowledge or consent, by his co-defendant, for the accommodation of the North West Lumbering Co., and that the plaintiffs discounted it, knowing these facts.

P. McCarthy, for defendant, H. Bulmer the younger, showed cause to a summons taken out by plaintiffs to strike out defendant's appearance and sign final judgment.

J. W. E. Darby for plaintiffs, in support of summons.

[*29th April, 1885.*]

TAYLOR, J.—When the affidavit of the defendant, Henry Bulmer the younger, was read on the application made before me, I understood from it that Boxer, the then agent of the plaintiffs, along with Carman, a director of the North West Lumbering Company, procured the making of the note by the co-defendant.

Mr. Darby insisted that in no case could the right of the plaintiffs be affected by anything which appeared in the affidavit, and I reserved the question to examine the affidavit more closely.

On reading the third paragraph attentively, it will be seen that it was Carman who is alleged to have procured the note to be made. It is only stated incidentally that Boxer, who was the agent of the plaintiffs, was also at the time a director of the North West Lumbering Company. There is nothing to show that the bank or Boxer had anything to do with the making of the note.

But the affidavit, standing uncontradicted as it does, discloses a complete defence to this action. The defendant in it alleges that the note in question was made by his co-defendant and late partner without his knowledge or assent, for the accommodation of the North West Lumbering Company, and that the plaintiffs discounted it knowing that it was an accommodation note. Now, if the plaintiffs discounted the note, knowing that it was an accommodation note for the North West Lumbering Company, they knew that it was not a note made for the partnership business of F. T. Bulmer & Co. But the authority of one partner to sign the partnership name, or to make and indorse notes, is limited to doing so for the purposes of the partnership. Where, therefore, a bank, or an individual, takes a note made or indorsed by a partnership, knowing that it was not made or indorsed for the purposes of the partnership, the *onus* is cast upon the holder, of proving that the partnership signature was given with the knowledge or assent of every member of the firm. If one of the partners denies that he gave such assent, or had such knowledge, the holder must prove affirmatively, the knowledge or assent, before he can recover.

It was so held in *Ex parte Agace*, 2 Cox, 312, where it was laid down that, while in partnerships both parties are authorized to treat for each other, in everything that concerns or properly belongs to the joint trade, yet, if the transaction has no apparent relation to the partnership, then the presumption is the other way. Or, as Justice Ashurst puts it, "One partner is bound by the acts of his co-partner in all acts referable to the partnership trade, but where a man takes a security from one partner in the name of the partnership, in a transaction not in the usual course of dealing, he takes such a security at his peril."

In *Kendal* v. *Wood*, L. R. 6 Ex. 251, Mr. Justice Blackburn stated the law to be, "that one partner is agent for the other partner, and it is an agency to do all the matters which are within

the ordinary scope of business which the partners carry on ; but when a partner does that which is beyond this *prima facie* authority with which he is entrusted, those who deal with him do so at their peril."

The point now in question had to be considered by the Court of Appeal in Ontario, in *Wilson* v, *Brown*, 6 Ont. App. R. 411, and it was there decided that the implied power of a partner does not extend to giving the partnership name to secure the debt of a third person, and without distinct evidence that there was an assent, authority, or recognition of such a making by the other member, he should not be bound.

The most recent case is *The Federal Bank* v. *Northwood*, 7 Ont. R. 389, and it is directly in favor of the defendant. There, John Northwood made and discounted with the plaintiffs two notes indorsed by Joseph Northwood & Son, a firm which consisted of Joseph and Andrew Northwood. Joseph Northwood defended the suit and resisted payment, on the ground that the notes had been indorsed by Andrew without his knowledge or assent, for the accommodation merely of John Northwood, and that the plaintiffs discounted the notes with knowledge of these facts. At the trial, the evidence of the bank manager proved that he knew the indorsers were mere sureties for John Northwood, and that he had no reason to suppose that the transaction was in connection with the business of Joseph Northwood & Son. In answer to a question from the judge, counsel for the plaintiffs said he was not prepared to prove affirmatively that Joseph Northwood was an assenting party, and he thought that he was not bound to do so. Thereupon the judge, Mr. Justice Burton, ruled, that the plaintiffs having notice that the partnership indorsement was not connected with the partnership business, they were bound to go further and show affirmatively that the partnership signature was given with the knowledge or assent of the other member of the firm, and without that additional evidence there was no case for the jury as against him, and he accordingly entered a judgment for Joseph Northwood.

In Term, a rule was moved to set aside the judgment and for a new trial, or to enter a judgment for the plaintiffs. After a full argument, the Court, in judgments reviewing the cases to which I have referred, and a number of others, unanimously discharged the rule and upheld the verdict.

I am quite clear that under the facts stated in the defendant's affidavit the plaintiffs cannot succeed against him. It is incumbent upon them to displace the case he has made and to prove either that the note in question was made with the knowledge or assent of Henry Bulmer, the younger, or that it was a note made for the ordinary business purposes of F. T. Bulmer & Co.

That being the case, this summons must be discharged, costs to be costs in the cause.

CALDER v. DANCEY.

(IN CHAMBERS.)

Computation of time.

Records which require to be entered "at least four days before" the trial, must be entered not later than Thursday for the following Tuesday.

In this case the question was raised as to whether a record, entered with the prothonotary on Friday for trial on the following Tuesday, was duly entered under Reg. Gen. 21. That rule requires all causes intended to be so tried to be entered "with the prothonotary, at least four days before such trial shall be had."

J. W. E. Darby for plaintiff.

P. McCarthy for defendant.

[*25th June, 1885.*]

TAYLOR, J.:—The expression "at least" so many days, has received judicial interpretation in a number of cases.

In *Zouch* v. *Empsey*, 4 B. & Ald. 522, a statute required that notice should be given to the creditor fourteen days at least before the petition for a prisoner's discharge was presented. Notice was served on the 19th of May, and on the 2nd of June

a motion was made to bring up the prisoner, counsel contending that the fourteen days must be reckoned inclusive of the day of service or of the day on which the petition was presented, but the Court were of opinion that fourteen days *at least*, must mean fourteen clear days, and refused the rule.

In *The Queen* v. *The Justices of Shropshire*, 8 Ad. & E. 173, it was held that where an act is required by statute to be done so many days at least before a given event, the time must be reckoned excluding both the day of the act and that of the event. See also *The Queen* v. *Aberdale Canal Co.*, 19 L. J. N. S. Q. B. 251.

In *Beard* v. *Gray*, 3 Ch. Ch. R. 104, V. C. Strong held, following the common law authorities, that where the general orders required a cause to be set down "at least fourteen days" before the commencement of the hearing term, the words "at least" required that in the computation of the fourteen days the day of entering and serving the notice should be excluded. He added, "If there was no decision in point, I should think it clear that the expression 'at least fourteen days' meant fourteen clear days." A case intended to be tried on a Tuesday must therefore be entered with the prothonotary not later than the preceding Thursday.

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A note was made by filling up an engraved form. Between the words "after date" and "promise to pay" the space left for the usual words "I" or "we" was very small, and the words "jointly and severally" could not have been written in the space. *Held*, that in such a case the mere fact that the words "jointly and severally" are plainly interlined by being written over the place where they are intended to be read, but in the same handwriting as the rest of the note, is not sufficient notice of an alteration. Waterous Engine Works Co., Limited, *v.* McLean 276

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———————— *Examination of officer.—Held.* That the chief officer in this Province of a foreign corporation can be examined for discovery. The Real Estate Loan Co. *v.* Molesworth 93

———————— *Libel.*—The manager of one branch of the defendant company wrote certain letters to another branch, which might have constituted a libel on the plaintiff. There was no evidence that the corporation, or the directors, or the managing board authorized, or had any knowledge of the letters being written, *Held*, That the defendants were not liable. *Quære:* Can a corporation be guilty of malice. Freeborn *v.* The Singer Sewing Machine Co 253

———————— *Name.*—A note was made payable to The Waterous Engine Works, but was declared upon as payable to The Waterous Engine Works Company, Limited. *Held.* No variance. The word "Limited" is no part of the name of a company incorporated under the Dominion Joint Stock Company's Act. Waterous Engine Works Company, Limited *v.* McLean 279

COSTS.—*County Court Suit.*—Action brought in the Queen's Bench for $225, for goods sold and delivered. *Held*, That the action might have been brought in the County Court, and that the plaintiff was not entitled therefore, to tax Queen's Bench costs. Parker *v.* Nunn 30

———— *Examination.—Held.* 1. Plaintiff is not entitled to the costs of an irregular examination of one defendant, to discover the address of his co-defendant, as costs in the cause. 2. Nor to the costs of an application to shorten the time for answer. McCaffrey *v.* Rutledge . . . 127

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——— *Postponement of hearing.—Held*, A trial being postponed because of the unavoidable absence of a material witness, the costs should be costs in the cause. Vivian *v.* Wolf 122

COVENANTS.—*Dependent.*—C. agreed with the city of W. to provide electric lights for street lighting in W., and up to the expiration of six years to keep them lighted from darkness to daylight. In consideration thereof the city agreed to make monthly payments; that C. should have the sole right and privilege of lighting the streets, and that the city should not contract with any other person, for lighting the streets, during the said period. *Held.* 1. That the agreements were dependent, and that if C. failed to perform his part of the agreement, and the city made a new contract, with other persons, he could not recover against the city. 2. Whether covenants are dependent, or independent, is determined by the intention of the parties and the application of common sense to each particular case. Manitoba Electric Light and Power Co. *v.* The Mayor and Council of the City of Winnipeg 177

CRIMINAL INFORMATION.—*Public officer.—Held.* A criminal information will not be granted except in case of a libel on a person in authority, in respect of the duties pertaining to his office. 2. Where the libel was directed against M., who was at the time Attorney-General, but alleged improper conduct upon his part when he was a judge, an information was refused. 3. The applicant for a criminal information must rely wholly upon the Court for redress, and must come there entirely free from blame. 4. Where there is a foundation for a libel, though it fall far short of justification, an information will not be granted. Regina *v.* Biggs 18

CRIMINAL LAW.—*Appeal.*—A finding of "guilty" will not be set aside upon appeal if there be any evidence to support the verdict. Queen *v.* Riel 321

——— Insanity, as a defence in criminal cases, discussed. Queen *v.* Riel 321

——— *Second valid commitment.*—Prisoner had been committed under a warrant, which was defective. Subsequent to the service on the jailor of a writ of *habeas corpus* he received another warrant which was regular. *Held*, That the second warrant of commitment was valid, and sufficient to detain the prisoner in custody. Regina v. House 58

——— *Two offences in one charge.*—The charge against the prisoner, who was brought up on a *habeas corpus*, was "for keeping a bawdy house for the resort of prostitutes in the City of Winnipeg." "Keeping a bawdy house" is in itself a substantive offence, so is "keeping a house for the resort of prostitutes." *Held*, nevertheless, that there was but one offence charged, and that the commitment was good. Regina *v.* McKenzie 168

——— ——— *See* N. W. T. CRIMINAL APPEAL.

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DAMAGES.—*Diminution of.*—1. In actions upon *quantum meruit* for work and labor, defective workmanship may be proved in mitigation of damages, although not pleaded. *Secus* if the action be upon a special contract. 2. In an action upon a special contract for the sale of a specific article, for goods sold and delivered, evidence of a breach of a warranty may be given in reduction of the contract price, although not pleaded. 3. In an action for goods sold and delivered, or for work and labor, evidence of damage for delay cannot be given unless under a counter-claim. *Semble.* In an action by a carrier for freight, evidence of damage to the goods cannot be given unless under a counter claim. Smith *v.* Strange 101

DECREE.—*Amendment after rehearing.*—A bill filed to enforce a mechanic's lien was dismissed at the hearing, on the ground that the lien had ceased to exist, and upon rehearing the decree was affirmed. The question of the personal liability of the defendant, although raised by the pleadings, and therefore concluded by the decree, was not, in reality discussed at the hearing. Plaintiff having afterwards sued at law, the defendant pleaded the decree by way of estoppel. Upon a petition by the plaintiff, praying that the decree might be amended by inserting a provision, that the dismissal of the bill should be without prejudice to the plaintiff's right to proceed at law, *Held*, That the decree should be so amended upon terms as to costs. Kelly *v.* McKenzie 203

DEMURRER.—*Held*, Upon demurrer, the rule that upon the argument of a demurrer, only the pleadings can be looked at, does not apply where statutes which affect the question raised, have to be considered. The School Trustees for the Protestant School District of the City of Winnipeg *v.* Canadian Pacific Railway Company 163

DISMISSAL OF BILL FOR WANT OF PROSECUTION.—*When further prosecution unnecessary.*—*Held.* 1. A motion to dismiss for want of prosecution must be made in court. 2. The incidence of costs of a suit, the further prosecution of which has become unnecessary, cannot be discussed upon a motion to dismiss for want of prosecution. 3. Where the further prosecution of a suit becomes unnecessary the plaintiff may move to dismiss his bill without costs; and the court may so order, where the investigation of doubtful questions of fact is not necessary to the decision. Wellband *v.* Moore 193

EJECTMENT.—*Local.*—*Held.* 1. A writ of ejectment must be issued in the district in which the land lies. 2. A party objecting to a proceeding on the ground of irregularity, must move within the time allowed to take the next step in the cause. Landed Banking and Loan Co. *v.* Douglas 221

ELECTIONS.—*Corrupt practices.*—*Appeal.*—*Held*, Upon an appeal by the petitioner, the respondent has no right to seek a reversal of the certificate dismissing counter charges against the defeated candidate. *Held*, (Taylor, J. dissenting), Although a successful candidate, at an election for the Legislative Assembly, may be found guilty of treating

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electors, with intent to influence their votes, he may be unseated only, and not disqualified. *Held*, Per Wallbridge, C. J. 1. Treating *per se* is not illegal. It is the corrupt intent of influencing voters by it that the statute condemns. 2. The word "corrupt" in the statute does not mean depraved, but rather that the act was done in so unusual and suspicious a way, that the judge ought to impute to the person a criminal intention in doing it. *Held*, Per Taylor, J. 1. The difficulty of finding the existence of corrupt intent in treating, where, according to the habits and practices of the respondent, and existing generally in the locality, treating is customary, discussed. 2. Payments to an elector not an hotel keeper for accommodation unless excessive, are not *prima facie* corrupt. 3. Treating, after a meeting, at taverns where supporters of both parties are present--promiscuous treating among a large crowd of men attracted together by a political meeting is not *prima facie* corrupt. 4. Much weight will be attached to the denial by the respondent of corrupt intent. 5. To prove agency, authority from the alleged principal must be shown. *Re* Rockwood election. W. J. Brandrith, petitioner, *v.* S. J. Jackson, respondent 129

———— *Municipal.—Held.* 1. A registrar and a county court bailiff are disqualified for the office of mayor and councillor respectively. 2. A returning officer must receive nominations for any candidate who appears to be assessed for $100, even if he be in fact disqualified upon other grounds. 3. The petitioner claimed the seat, but he appeared to be largely indebted to the Municipality, and a new election was directed. Reg. ex rel. Duncan *v.* Laughlin. Reg. ex rel. Stevenson *v.* Blanchard 78

———— *Municipal Acts.—Held*, That the procedure prescribed for the contestation of elections by the General Act relating to municipalities, 47 Vic. c. 11, s. 95, superseded that contained in the special charter of the City of Emerson, 46 & 47 Vic. c. 80. Reg. Ex. rel. Haight *v.* Nash 75

ELECTION OF REMEDIES.—Plaintiff, after recovering judgment at law against defendant, placed *fi. fa.* goods and lands in the hands of the sheriff, and issued garnishing orders. Under the *fi. fa.* goods the sheriff seized certain mortgages. The plaintiff also registered the judgment against certain lands, and filed a bill for a sale. Upon an application, at law, to compel the plaintiff to elect between the proceedings at law and in equity, *Held*. 1. The case was not within the provisions of the Con. Stat. Man., c. 37, s. 83. 2. There is no practice outside the statute applicable to the case. At most the question would be one of costs. 3. The statute can only apply to proceedings at law and in equity, against lands—and probably the same lands--not to proceedings at law against goods, and in equity against lands. *Alloway* v *Little*, 1 Man. L. R. 316 considered. 4. In any case the application was premature, the answer in equity not having been filed. Ferguson *v.* Chambre 186

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ESTOPPEL.—*Joint judgment.*—A judgment against a contractor and his surety may be pleaded, as an estoppel, against the contractor alone in an action by him against the other parties to the contract and their sureties. Smith *v.* Strange 101

——— *Payment.*—Payment for work and labor after action brought is no estoppel in an action by the employer for non-completion of the contract, or for delay. Smith *v.* Strange 101

EVIDENCE.—*Commission.*—Leading questions appearing in a foreign commission may be objected to at the trial, although counsel appeared upon the execution of the commission and made no objection. Mercer *v.* Fonseca 169

——— *Orders in Council.*—Judicial notice must be taken of Orders in Council bound up with the Dominion Statutes, in pursuance of 38 Vic. c. 1. *Re* Stanbro 1

EXAMINATION—*of Deponent.*—Upon a motion, defendant filed an affidavit of A., who afterwards made another explanatory affidavit at the instance of the plaintiff, *Held*, That defendant was not entitled to an order for the oral examination of A. Carey *v.* Wood 32

EXECUTION—*Fine for.*—A party entitled to costs may proceed to collect the same by execution immediately after taxation; the practice of the court does not require that any time be given for payment. Wood *v.* Wood 87

EXECUTORS. *See* REAL PROPERTY ACT, 1885.

EXEMPTIONS FROM SEIZURE. — *Land.* — *Held.* Land exempt from seizure under execution may be made available by bill upon a registered judgment. McLean *v.* Gillis 113

EXTRADITION — *Orders in Council.*— Prisoner was charged with committing forgery in the State of Minnesota. *Held.* 1. Upon the evidence, that a *prima facie* case had been made out. 2. Judicial notice must be taken of Orders in Council bound up with the Dominion Statutes, in pursuance of 38 Vic. c. 1. *Re* Stanbro 1

FIXTURES.—McD. & McP. ordered from plaintiffs certain planing mill machinery, at an agreed price, part of which was paid down, and notes were given for the balance. The agreement provided that notwithstanding the payment, and giving notes, the property in the machinery should not pass to McD. & McP., but should remain in the plaintiffs until payment in full had been made. The machinery was placed in a building which was then used as a planing mill. Afterwards McD. & McP. mortgaged to the defendants the land upon which the mill stood. Afterwards McD. & McP. mortgaged the same land to the plaintiffs to secure the balance then remaining due to them. The parcels, after describing the land, specified the machinery in detail, and concluded, "which are attached to the freehold and are to be considered as fixtures and not as chattels." The plaintiffs took this mortgage upon the

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representation of McD. & McP., that there were no incumbrances upon the property, and it was not intended by the plaintiffs to give up their first claim to the machinery. *Held*. 1. That as between the plaintiffs and McD. & McP. the machinery remained chattels, such being the intention expressed in their agreement, and the declaration to the contrary in the mortgage was confined to the purposes of that mortgage, and in any event, was not binding by means of the misrepresentation. 2. That the defendants' mortgage was subject to the plaintiffs' agreement and that the defendants could not avail themselves of the declaration in the plaintiffs' mortgage. 3. The question whether articles are fixtures or not depends entirely upon intention. 4. The intention, object and purpose for which articles for the purpose of trade or manufacture, are put up by the owner of the inheritance, is the true criterion by which to determine whether such articles become realty or not. Waterous Engine Works Co. *v.* Henry 169

FRAUDULENT PREFERENCE.—Circumstances surrounding the execution of a chattel mortgage, in their tendency to show a fraudulent preference, discussed; and the trial judge's finding thereon reversed. McMillan *v.* Bartlett 374

——————— *Consent judgment.* — The defendant N. being indebted to the defendants C. and S., they commenced an action against him to recover the amount due. An acceptance of service was given, appearance entered, declaration and pleas filed, an order to strike out the pleas obtained, judgment signed and execution issued all on the same day. Plaintiffs had also obtained judgment and execution against N., and now filed their bill to set aside the judgment and execution obtained by defendants C. and S. On an application to continue an interim injunction to restrain proceedings upon the judgment of the defendants C. and S., *Held*, That the injunction should be continued till the hearing. Whitham *v.* Cooper 11

——————— *Consent judgment.*—In pursuance of an agreement made between the defendant H. (who was then in insolvent circumstances) and certain of his creditors, two documents were executed. By the first the creditors released H. from all liability in respect of notes, held for his indebtedness to them, and undertook to indemnify him against the payment of any such notes as might be under discount. By the same instrument the original debts were revived, and became immediately payable. By the second instrument the creditors assigned all their claims to the defendant D. in order that an action might be brought for the recovery of all the claims. It was at the same time verbally agreed that such an action should at once be brought, and that defendant H. should facilitate the obtaining of the judgment. On the day after the execution of these documents, a writ was issued. Service was at once accepted by an attorney for H. Declaration and pleas were filed on the same day. On the day following, the defendant was examined on his plea, and on the next an order was made striking out

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the pleas, upon which judgment was signed and execution issued. Upon a bill filed by a subsequent judgment creditor, *Held*, Upon rehearing reversing the judgment of Taylor, J., and following *McDonald v. Crombie*, (Sup. Ct. not yet reported) that the judgment was not void as a fraudulent preference. Union Bank of Lower Canada *v.* Douglass 309

GARNISHING ORDER.—*Affidavit.*—An affidavit upon which a garnishing order issued, stated that the garnishees *reside*—not that they *are*—within the jurisdiction. *Held*, Sufficient. Hamilton *v.* McDonald. 114

———————— *Affidavit.*—*Held*, An affidavit for a garnishing order must be made by the plaintiff himself, or by his attorney, or by some one in the plaintiff's employment, conducting his business, and in that way having a knowledge of his affairs. Lee *v.* Sumner . . . 191

———————— *Affidavit.*—An affidavit for a garnishing order stated:—"I have reason to believe that the City of Winnipeg is indebted to, liable to, or under some obligation to the defendants." *Held*, 1. Sufficient. 2. That all objections to the validity of garnishee orders are open to the judgment debtor. St. Boniface *v.* Kelly, the City of Winnipeg, Garnishees 219

———————— *Affidavit.*—*Held.* An affidavit for a garnishing order must either state positively that the garnishee is indebted or liable to the defendant, or it must follow the exact wording of the amending statute, 46 Vic. c. 49, s. 12, that deponent "has reason to believe." It is not sufficient to state that the deponent is "informed and verily believes." Grant *v.* Kelly 222

INFANTS.—*Decree reserving day.*—*Held*, A decree against infants should not reserve a day to show cause after they come of age. Scottish Manitoba Investment and Real Estate Co. *v.* Blanchard . . 154

INJUNCTION.—*Ex parte.*—A motion for injunction to restrain a sheriff's sale was refused by a single judge after argument. Upon motion *ex parte* to the full court, the plaintiff's counsel stating his intention to appeal, an injunction was granted, until the re-hearing of the order or the hearing of the cause, whichever should first come on. Lewis *v.* Wood 73

INTERPLEADER.—*Costs.*—Plaintiff in an interpleader suit was allowed his costs although he might have brought the parties together in some garnishee proceedings; an injunction being necessary to protect his goods pending litigation. Henry *v.* Glass 97

———————— *Costs.*—*Held.* That where a plaintiff examines a claimant upon his affidavit, and the claimant subsequently abandons his claim and is barred, and ordered to pay the costs of the sheriff and the plaintiff, the proper order is, that the sheriff's costs be taxed to him and an *allocatur* served on the plaintiff, that the plaintiff add them to his costs, and upon receipt of the amount pay it to the sheriff. Patterson *v.* Kennedy 63

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——————— *Costs.—Held.* 1. In an interpleader issue, where each party succeeds as to part of the goods, there should be a division of costs, and the ratio of that division is for the discretion of the judge. 2. The Court has power to review the discretionary order of a judge, but does not exercise it, unless in a strong case, or where the discretion has been exercised on a wrong principle. Burnham *v.* Walton . . . 180

——————— *Examination.—Held.* That an order cannot be made for the examination of a defendant in an interpleader issue. McMillan *v.* Bartlett 62

——————— Upon a sale of lands by a trustee, the purchaser paid a portion of the price to the sheriff who held a *fi. fa.* against the trustee. There was no evidence that the payment to the sheriff was other than in his official capacity. On the contrary there was evidence that he refused to give a certificate to the purchaser, that there were no executions in his hands until the money was paid to him. *Held*, That the *c. q. t.*, was not entitled to the money so paid as against the execution creditor. *Per Wallbridge, C.J.*—The money could not properly be the subject of an interpleader issue. Federal Bank of Canada *v.* The Canadian Bank of Commerce 257

INTERPLEADER ISSUE.—Since the passing of the Act 48 Vic. c. 53, no chattel mortgage can, upon an interpleader issue, be declared void under Con. Stat. Man. c. 37, s. 96. McMillan *v.* Bartlett . . . 374

INSANITY.—*See* CRIMINAL LAW.

INSPECTION OF DOCUMENTS.—*Held*, Upon an application for inspection of documents, an affidavit of the party, as well as of the attorney, is not necessary. Merchant's Bank *v.* Murray 31

JUDGMENT, REGISTERED. *See* EXEMPTIONS.

JUDGMENT.—*Setting aside.—Costs.*—Upon an appeal from an order setting aside an execution—*Held*, That the execution was issued contrary to good faith and in violation of an agreement, and the appeal must be dismissed, but without costs, unless the defendant would undertake not to bring an action for the seizure and sale of his stock-in-trade under the execution. Ashdown *v.* Dederick 212

JUDGMENT DEBTOR.—*Examination.—Held.* 1. An order to examine a judgment debtor may, in the discretion of the judge, be refused. 2. An order to examine a judgment debtor will not be made *ex parte*. Ferguson *v.* Chambre 184

JURY NOTICE.—*Similiter.—Held.* After plaintiff joins issue on defendant's plea, the defendant cannot file a *similiter* containing a jury notice. Bank of Nova Scotia *v.* Brown 224

——————— *Striking out.*—Upon an application by the plaintiff to strike out a jury notice, *Held*, 1. Inquiry will be made into the facts to ascertain whether the case is one which ought to be submitted to a jury. 2. If the defendant has no defence he is not entitled to a jury. Coristine *v.* Menzies 84

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LEAVE TO PLEAD.—*Mistake of solicitor.*—A judge has no discretion to shut out a defendant from a *bona fide* defence, or a plaintiff from a right *bona fide* to press a claim upon a mere slip of a party or his attorney, unless other rights intervene, or there are aggravating circumstances. The discretion of a judge as to admitting new pleas not interfered with. Smith *v.* Strange 101

LIBEL. *See* CORPORATION, LIBEL.

MAINTENANCE OF CHILDREN. — *Held.* 1. A father cannot, except under Con. Stat. Man. c. 39, s. 11, be ordered to pay a sum for maintenance of his child in another's custody. 2. A decree cannot be made against a father for past maintenance of his children, although payments might be made for that purpose out of funds of infants in court. Wood *v.* Wood 198

MANDAMUS. — *Bridge over navigable waters.*—By an Act of the Legislature of Manitoba, 45 Vic. c. 41, the Brandon Bridge Company was incorporated and empowered to build a bridge across the Assiniboine River; and, by another Act, 45 Vic. c. 35, incorporating the City of Brandon, power was given to the Mayor and Council to purchase any bridge built, or being built, within the city. On an application by an adjoining land owner for a *mandamus* to compel the city to purchase the bridge, *Held*, 1. The Act authorizing the building of the bridge was *ultra vires* of the Local Legislature. 2. That the title of the Bridge Company was not such as wonld be forced upon an unwilling purchaser. *Re* Brandon Bridge 14

MASTER AND SERVANT.—*Dismissal.*—The plaintiff was engaged as a surveyor. The defendant furnished the instruments. In the morning of one day, while the plaintiff was pursuing his usual course, the defendant's son (who had authority to act for him) asked plaintiff for the key of the instrument box, which plaintiff gave him. The plaintiff remained at the camp during the day unoccupied, and unable to get the instruments, and the defendant's son did not complain of his conduct, or offer him the instruments, but, on the contrary, told the plaintiff to go and see the defendant, who was at another camp four miles away. *Held.* 1. It does not require any form of words to amount to a dismissal of a servant. 2. That plaintiff was justified in considering himself dismissed. 3. If a servant be engaged for a definite period at so much per month, the amount earned may be recovered, although the defendant subsequently be properly dismissed for misconduct. 4. A servant hiring for the performance of specified duties impliedly warrants that he is possessed of the requisite skill, and if he have it not he may be dismissed. Feneron *v.* O'Keefe 40

MECHANIC'S LIEN.—*Priority.*—*Held*, A mechanic's lien does not "exist unless and until" his statemcnt is filed in the registry office; and the mere fact that the work was done before the execution, by the owner of the land, of a mortgage upon it will not give the mechanic priority as against the mortgagee. Kievell *v.* Murray 209

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——————— *Priority over assignment.*—*Held.* 1. A sub-contractor is entitled to assert a mechanic's lien, even although the contract between the owner and original contractor provides that no workman should be entitled to any lien. 2. An assignee of the contract price for the erection of a building, is not entitled to the money as against the lien of a sub-contractor, unless the owner has in good faith bound himself to pay the assignee. Anly *v.* Holy Trinity Church . . 248

MISREPRESENTATION. *See* FIXTURES.

MORTGAGE SUIT.—*Notice of credit.*—*Held*, Where, in a mortgage suit, a payment is made during the time fixed for redemption, and no notice of credit is given, there should be an order referring it to the master to fix, or the order may itself fix, a new day for payment. Manitoba and North-West Loan Company *v.* Scobell 125

——————— *Redemption.*—*Held*, There should be only one period of six months allowed for redemption, for all parties, mortgagor and subsequent incumbrancers 137

——————— *Surety.*—On an assignment of a mortgage, the mortgagees covenanted to pay the assignee all moneys secured by the mortgage, according to its terms, in the event of default being made by the mortgagors. In a suit for sale the original mortgagees were made parties, and a personal order was asked as against them. *Held.* 1. That no order could be made against the original mortgagees for immediate payment, but only an order for payment of any deficiency after a sale. 2. That the original mortgagees were entitled upon payment forthwith after decree of principal, interest, and the costs of an undefended action at law against them upon their covenant, to be discharged from further liability; and to an assignment of the plaintiff's securities upon payment of any costs he might have against the other parties. Taylor *v.* Sharp 35

MUNICIPAL ACTS. *See* ELECTIONS.

NON-SUIT.—*Leave to enter.*—On a motion to set aside a nonsuit, the Court will not enter a verdict for the plaintiffs unless leave was reserved at the trial, even in a non-jury case. Grant *v.* Heather 201

NORTH-WEST TERRITORIES.—*Criminal appeal.*—In the territories it is not necessary that a trial for murder should be based upon an indictment by a grand jury, or a coroner's inquest. Queen *v.* Connor. 235

——————— *Criminal appeal.*—The Court of Queen's Bench in Manitoba has no power to send a *habeas corpus* to the North-West Territories, and will hear an appeal in the absence of the prisoner. Upon a criminal appeal from the N. W. T. the original papers should be produced. If the prisoner cannot procure them, the Court will act on sworn or certified copies. Queen *v.* Riel 302

——————— *Criminal appeal.*—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

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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. To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated but plenary powers of legislation. The Queen *v.* Riel 321

NOTICE OF TRIAL.—*By defendant.—Held*, That a defendant can give notice of trial, although plaintiff not in default. Moore *v.* Fortune. 94

NUL TIEL RECORD.— Upon an issue of *nul tiel record*, the only question is whether the record upon its face, shews that the present cause of action *may* have been the same as that for which judgment was recovered. If the plaintiff desire a closer examination of the former action, he should file a new assignment, or a replication denying the identity of the causes of action. To an action (1) upon the common counts (2) in trover (3, 4, 5 & 6), upon a special contract for two years services, at $1,000 a year; the defendant pleaded to all the counts except that in trover, judgment recovered in the County Court. The plaintiff replied *nul tiel record*. The record, when produced, showed that the plaintiff had recovered for debt $83.33. *Held*. That the existence of the alleged record sufficiently appeared. *Per Killam, J.* —(1.) The test as to the identity of causes of action is, whether the same evidence will support both actions. (2.) A writ of *certiorari* to bring up papers from the County Court, should be directed to the clerk of that court—either by name, adding the name of his office, or by the name of his office alone. (3.) It is no objection to a return to a writ of *certiorari* that more papers than directed are returned. (4.) The record of a judgment of the County Court is the entry thereof in the procedure book. Lunn *v.* Winnipeg. 225

———— *Proof.— Held* (following *Lunn* v. *Winnipeg*, p. 225) that the only question upon an issue on a plea of *nul tiel record* is whether there is remaining in the court in question the record of such a judgment as the pleadings set up. To a declaration in covenant for payment of money, and for use and occupation, the defendant pleaded a number of pleas, alleging that both causes of action were in respect of rent, and setting forth various circumstances shewing a termination of the tenancy. The plaintiff replied that formerly he brought an action in the County Court for other rent under the same lease, in which action the same defences were set up, and the plaintiff had judgment; a transcript to the Court of Queen's Bench; and that the judgment thereby became a judgment of the Court of Queen's Bench. Rejoinder, *nul tiel record*. Upon trial of this issue, the plaintiff produced a transcript of the procedure book of the County Court, from which it appeared that on a certain day the plaintiff recovered against the defendant judgment for $135, for debt, together with $20.10 for

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costs, and also produced the transcript of this judgment, in the statutory form from among the records of the Court of Queen's Bench. *Held*, the existence of the record as alleged was sufficiently proved by the production of the transcript filed in the Court of Queen's Bench, and that the only judgment subsisting was that recovered in the Court of Queen's Bench by the filing of the transcript there. Burridge *v.* Emes 232

PARTNERSHIP. *See* BILL OF EXCHANGE.

PATENT.—*Setting aside.—Held.* Where a patent is issued in error, through the false and fraudulent representations of the patentee, he may be declared to be a trustee of the land for the party legally entitled thereto, Keating *v.* Moises 47

PATENT, RECOMMENDATION FOR. *See* REAL PROPERTY ACT.

PLEADINGS.—*Date.—Service.—Held.* 1. Pleadings must be dated of the day of the month and the year when pleaded. 2. Pleadings must be filed as well as served. Walker *v.* Cameron 95

——— *Payment into Court.—Held.* 1. To an action upon a covenant in a mortgage, a plea of payment into court may be joined with a plea of *non est factum*. 2. In such an action an equitable plea as to the amount sued for, except a certain sum, and as to that sum, payment into court was struck out as embarrassing, not being contemplated by the form of plea prescribed by the C. L. P. Act. 3. A plea of payment into court must be an answer to the whole count to which it is pleaded, or if to a part only of the money claimed, then it must be confined to answering that part, and any answer, legal or equitable, to any other portion of the cause of action must be set up in a separate plea. Pratt *v.* Wark 213

——— *Puis darrein continuance.*—1. Leave may be given to withdraw pleas, and plead *de novo* to enable a defendant to plead matter arising subsequent to the last pleading, without thereby waiving his former pleas. Smith *v.* Strange 101

——— *Several pleas.—Held*, Under general rule 5 of the Court of Queen's Bench for Manitoba any number of pleas may be pleaded together without a judge's order. Allen *v.* Dickie 61

——— *Several breaches in one count.*—The declaration stated that in consideration that the plaintiff would let to the defendant a certain house and furniture therein for a certain period, at $60 a month, the defendant promised to enter on the said premises and occupy the same and keep the same in tenantable repair, and to use and take care of the said furniture for and during the said period, and to deliver the same up at the end of the said period, in good repair, reasonable wear and tear excepted, and to pay to the plaintiff the said sum of $60 a month, at the end of each and every month. The breaches alleged were, that "the defendant, after having entered on and taken possession of the said premises and furniture, and occupied and used them for a portion of the said term, wilfully and without reasonable cause or excuse, left

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the said premises and furniture unoccupied and uncared for, for a long time, and during the remainder of the said term, and refused to pay the plaintiff the said rent of $60 per month, whereby the plaintiff lost the use and profit of the said money and the said premises and furniture, and was put to great expense, cost and trouble, in caring for and storing the said furniture, and in insuring the same from injury and damage, and was otherwise greatly damaged." *Held*, That the count could not be objected to on the ground that it embraced two distinct causes of action. Hagel *v.* Starr. 92

——— *See* SCHOOL TRUSTEES.

PRACTICE.—*Court or Chambers.*— *See dismissal of bill.*—*Held*, An application to take a bill *pro confesso* for breach of an order to produce must be made in court. Stewart *v.* Turpin 182

——— *Irregularity.*—An irregularity may be waived in equity, as at law, by delay, or by taking a step in the cause after knowledge of the irregularity. Wood *v.* Wood 87

——— *Præcipe decree.*—*Held*. Where defendant is served by publication, it is necessary to move in court for a decree. 2. In other cases where there is no defence, or where the answer admits the facts entitling the plaintiff to a decree, or amounts to a disclaimer, and the defendants are *sui juris*, decrees may issue on præcipe. Manitoba and North West Loan Co. *v.* Harrison 33

——— *Setting aside order.*—*Held*. That upon new material it is competent for one judge to set aside the order of another. North-Western National Bank *v.* Jarvis 53

——— *See* TIME.

PRINCIPAL AND AGENT.—*Estoppel.*—When a party deals with an agent supposing him to be the sole principal, without the knowledge that the property involved belongs to another person, that party is to be protected. When a party allows his agent to act as though he were principal, and a third party deals with him as owner, the principal is bound by the act of his agent, even if he exceeded his authority. If a purchaser purchases goods from an agent, without any notice that the goods are not the goods of the agent, he is entitled to set off the amount due to him from the agent against the price of the goods. The above principles applied to the purchase of goods from the manager of a store upon an agreement by him for payment by set off of his personal debt. Smith *v.* Grouette 314

PROMISSORY NOTES. *See* BILL OF EXCHANGE,

RAILWAY COMPANY.—*Fences.*—*Negligence*,—Action for the value of an ox, killed by defendants' locomotive. The animal was on the prairie close to the track. The engineer reversed the engine and whistled, but, before the train could be stopped, the animal having got on the track, was run over and killed. *Held*. 1. That the evidence did not disclose such negligence as would entitle the plaintiff to

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recover. 2. That where the land adjoining the railway is unoccupied, the company is not bound to erect fences at that part of their line. McFie *v.* Canadian Pacific Railway Company 6

REAL PROPERTY ACT OF 1885.—*Held.* 1. By section 28 lands "when alienated" by the Crown, "shall be subject to the provisions of this Act." The word "alienated" means completely alienated—that is by patent. 2. Lands unalienated, by patent, on the 1st July, 1885, remain under the old law until brought under the provisions of the Act. 3. Lands brought under the Act become chattels real for the purpose of devolution at death, but are lands in other respects, and are not exigible under *fi. fa.* goods. 4. A person entitled to a patent for a homestead, or pre-emption, having received a certificate of recommendation for patent, countersigned by the Commissioner of Dominion Lands, may bring such lands under the operation of the "Real Property Act, 1885."—*Taylor, J, diss.* 5. After application under the Act no deed can be registered in the country registry offices. 6. Conveyances of lands, patented after the 1st July, 1885, in the statutory short form may be treated as substantially in conformity with the forms given in the Act. *Re* Irish 361

——————— *Executors.—Held.* Before executors can apply for registration as owners of the testator's land they must prove the will in the Surrogate Court. *Re* Bannerman 377

REGISTRY ACT. *See* REAL PROPERTY ACT.

SATISFACTION —*By subsequent contract.*—Plaintiffs sold goods to defendant, to be shipped upon a particular day. They were not shipped until afterwards. The defendant then wrote to the plaintiffs refusing to accept the goods unless upon extended terms of credit, to which the plaintiffs assented, and the defendant then accepted the goods. *Held*, that the defendant had waived any right to damages under the first contract, the second being a satisfaction of the breach and there being therefore no defence the jury notice should be struck out. Coristine *v.* Menzies 84

SECURITY FOR COSTS.—*Held.* That a defendant has no right to security for costs, unless he has a defence on the merits. The Western Electric Light Company *v.* McKenzie 51

——————— *Nominal plaintiff.*—A plaintiff having assigned his cause of action, the defendant is entitled, upon discovery of the fact, to security for costs, if he move promptly, notwithstanding that he may, by delay, be disentitled upon other grounds. Vivian *v.* Plaxton 124

SCHOOL TRUSTEES—*Action against by teacher.*—The first count of the declaration set out that in consideration that plaintiff would enter into the service of defendants and serve them for one year . . . . in the capacity of school-teacher, at $300 a year, to be paid, &c., and lodgings, fuel and light to be furnished, &c., the defendants promised

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to retain the plaintiff in the capacity, &c. It further alleged the plaintiff's entry into the service, &c., and wrongful dismissal. The second count was an *indebitatus* count for work done, as a school-teacher and otherwise. The defendants demurred. *Held*. 1. The wrongful dismissal of a teacher is a "matter connected with his duty," within the Manitoba School Act, s. 93, and consequently not the subject of an action, but of arbitration only. 2. The first count was bad, inasmuch as it did not allege the agreement to be in writing and under seal or excuse the want of a seal. 3. The second count was bad because the moneys, although under the direction of the trustees, are not in their hands, but in those of the secretary-treasurer. Pearson *v.* The School Trustees of the Catholic School District of St. Jean Baptist Centre . . 161

——————— *Taxation.*—There is no power given in the school Acts to a board of school trustees in a city or town, to assess, levy or collect a tax or school rate, except that given to levy a small rate upon the parents or guardians of the children attending school. School Trustees of Winnipeg *v.* C. P. R. 163

SHERIFF. *See* INTERPLEADER.

——————— SEIZURE. *See* TROVER.

SPECIFIC PERFORMANCE.—*Certainty of proof.*—The certainty of proof in a suit for specific performance is greater than in an action for damages. Tait *v.* Calloway 289

——————— *Finality of decree.*—Tait *v.* Calloway 312

SOLICITOR AND CLIENT.—*Authority.*—An action was commenced and carried to trial without the authority of the plaintiff. During or immediately preceding the trial the plaintiff first learned of its existence and then told the plaintiff that he (the plaintiff) had nothing to do with it. The plaintiff took no steps to stay the action, and, the defendant having had a verdict, a motion for a new trial was made on the plaintiff's behalf, which was refused. After judgment and execution the plaintiff moved to stay all proceedings. *Held*, That the plaintiff was entitled to the rule as asked. *Semble*. A defendant at common law may call upon the plaintiff's attorney to produce his authority for instituting the action. It is not so in equity. Carey *v.* Wood 290

STATUTES.—*Constitution.*—A statute prescribed that upon an application the judge "upon hearing read" certain material, might make an order. *Held*, That the statute did not exclude the use of material other than that specifically mentioned. Keeler *v.* Hazlewood 149

TAXATION.—The power of taxation must be expressly conferred, it cannot be given by implication. School Trustees of Winnipeg *v.* C. P. R. 163

——————— *Unnecessary affidavits.*—*Held*. A taxing officer has power to allow or disallow affidavits used on an application, without express direction. 2. A motion was refused upon a technical objection, and the master disallowed affidavits filed in answer to the motion. His discretion was not interfered with on appeal. Ogilvie Milling Co. *v.* Small 120

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TIME, COMPUTATION OF.—Records which require to be entered "at least four days before" the trial, must be entered not later than Thursday for the following Tuesday. Calder *v.* Dancey 383

TROVER.—*Goods in custodia legis.*—The sheriff having an execution against A. & B. seized their stock in trade and made an inventory. Nothing was removed and no one was left in charge, but with a notification to the debtors not to remove anything, the sheriff left them in possession, their business proceeded and they made payments to the sheriff from time to time. Afterwards A. & B. executed to the plaintiffs a chattel mortgage upon their stock. Subsequently the defendant placed an execution in the sheriff's hands against A. & B., and at a sale by the sheriff became the purchaser. *Held*, in an action for trespass and trover, that the goods were at the date of the mortgage under seizure, and that the plaintiff could not succeed. Nor could he recover for goods sold or money received to his use. Minaker *v.* Bower . . . 265

VARIANCE. *See* CORPORATION, NAME.

VENDOR AND PURCHASER.—*Rescission.*—*Notice to complete.*—Where time is of the essence of the contract the condition may be waived by the purchaser by paying a portion of the money on the day named for completion and consenting to wait for production of title. The 1st July, 1882, was fixed for completion. At this time the title was vested in the C. P. Ry. Co., bnt the vendor had a right of purchase under a contract covering other lands, in which other persons had a similar interest. The vendor had, at the time for completion, paid to the Co. the purchase money for his lands, but others not having paid, the Company would not convey. On several occasions between the 1st July, 1882, and the 12th January, 1883, the purchaser asked the vendor to complete the title, but did not press him to do so or threaten to rescind if it was not done. On the 12th January, 1883, the purchaser served the vendor with a notice, requiring him to complete the title by the 1st of February, otherwise he would declare the sale off. After receiving this notice the vendor used reasonable diligence to procure the title, but inasmuch as six weeks was the shortest time within which a deed could be procured from the Railway Co., it was not obtained by the day named. *Held*. That the notice was too short, and the purchaser was not entitled to recover his deposit. Fortier *v.* Shirley 269

VENUE—*Change of.*—*Held.* A judge in chambers has power to change the venue, notwithstanding a prior change in Term. Vivian *v.* Plaxton. 124