THE TERRITORIES LAW REPORTS

VOL. VI.

(CITED: VI. TERR. L. R.)

CONTAINING

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

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MEMORANDUM

On 3rd January, 1903, Honorable Thomas Horace McGuire resigned the office of Chief Justice and Honorable Arthur Lewis Sifton was appointed to fill the vacancy.

On 12th November, 1903, the Honorable Mr. Justice Richardson was superannuated and retired from the Bench.

On the 18th January, 1904, Honorable Henry William Newlands was appointed to fill the vacancy caused by the retirement of Honorable Mr. Justice Richardson.

On the 27th June, 1904, Honorable Horace Harvey was, under the authority of 3 Edward VII. Cap. 27, appointed a Judge of the Supreme Court of the North-West Territories.

TABLE OF CASES REPORTED

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TABLE OF CASES CITED

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OF THE

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VOLUME VI.

RE DONNELLY TAX SALE (No. 2.)

CALVERT, registered owner, appellant.

DONNELLY, tax purchaser, respondent.

Land Titles Act, 1894—*The Municipal Ordinance, ss.* 201 *and* 202 —*Effect of transfer—Grounds of questioning sale.*

Under ss. 201 and 202 of the Municipal Ordinance, (C. O. 1898, c. 70), a transfer of land, by secretary-treasurer of municipality, on sale for taxes, is conclusive after one year, and sale can only be questioned on grounds specified in s. 202.

The Courts are bound to give effect to unequivocal language of a statute.

O'Brien v. *Cogswell*,[1] distinguished.

Ord. c. 10 of 1900 does not affect proviso in s. 202 of the Municipal Ordinance.

Judgment of Richardson, J., affirmed.

[RICHARDSON, J., *November 14th, 1901.*

[*Court en banc, July 9th, 1903.*

Statement.

This was an application to RICHARDSON, J., on behalf of T. E. Donnelly, a tax purchaser, of N. E. ¼ of section 28, township 17, range 18, W. 2nd M., for an order confirming the sale and allowing the purchaser to register the transfer

[1] 17 S. C. R. 420.

Statement. to him from the municipality, heard 29th May, 1901. The facts are stated in the judgment of RICHARDSON, J.

Argument. *N. Mackenzie*, for the tax purchaser, the applicant.

Ford Jones, for the registered owner, Mrs. Calvert.

Judgment reserved.

[*November 14th, 1901.*]

Judgment. RICHARDSON, J.—An application on behalf of Thomas E. Donnelly was made 25th February, 1901, for confirmation of the sale to him of the above land for arrears of taxes due the municipality of Indian Head, on notice thereof previously given Elizabeth Jane Ray Calvert, to whom on the 20th March, 1896, a certificate of title had been granted. On the matter coming up for hearing Mrs. Calvert appeared by counsel who opposed the granting of the application and several adjournments occurred to enable the production of such evidence on both sides as might be procured, the hearing being completed 29th May, 1901. The material before me upon which the application is to de disposed of consists of: the transfer to Donnelly, dated 21st November, 1899, in the form prescribed by the Ordinance then in force, being ch. 70 of the Consolidated Ordinances, sec. 201, and made by H. H. Campkin, secretary-treasurer of the municipality of Indian Head, who, in consideration of $50 paid to him by Thomas E. Donnelly, the present applicant, being the price for which the said land was sold at a sale by him on 2nd November, 1898, for arrears of taxes due on said land to the said municipality, transferred to the said Donnelly the N.E. quarter section 28, township 17, range 13, W. ½, with its execution duly proved as required by the Ordinance, and shewn to have been executed on the date it bears. Extracts from assessors' and collectors' rolls, by-laws for levying taxes and notices of sale extending from 1893 to 1898, are brought in verified by affidavit, admitted in lieu of the

original ; besides several affidavits which in my opinion have no bearing in the matter. Judgment. Richardson J

Referring to these assessment rolls and also the collectors' rolls, it appears that while irregular for non-compliance by the assessors and collectors with the duties defined by the Municipal Ordinance in force during the several years, although appearing to have been accepted and dealt with by the council of the municipality as proper, the objection is raised on behalf of Mrs. Calvert that consequent upon the irregularities then made patent, the sale claimed under them is not one which should be confirmed. On the other side, it is argued that notwithstanding these irregularities, inasmuch as more than one year had expired between the giving of the transfer (20th November, 1899,) and the application to confirm (25th February, 1901,) they were cured by sec 208 of ch. 8 of the Ordinance of 1897, in force when the sale took place, and sec. 201 of ch. 70 of the Consolidated Ordinance re-enacting sec. 208 when the transfer was made.

Since the closing on 27th May of the hearing, my attention has been drawn to Ordinance 12 of 1901, and what remarks counsel for both sides have presented I have heard. For the applicant it is further contended that sec. 4 of this Ordinance is made applicable to this matter. I fail, however, to so view the section for the reason that the application for confirmation of tax sales referred to in it are those specially dealt with in the preceding sections, and do not cover those pending and heard prior to 12th June, when this Ordinance became law.

Referring to sec. 208 I have alluded to, it is by the proviso at the end enacted that "every such transfer" (i.e., transfer for arrears of taxes under sec. 207, now 201), "shall at the expiry of one year from the date thereof be conclusive evidence of the assessment and valid charge of the taxes on said land as therein described."

Judgment.

Richardson J

Applying those words to the transfer in question I construe them thus : its simple production is conclusive proof (1) that the land was duly assessed for taxes, and (2) that on the day of sale (2nd November, 1898,) there were arrears of taxes due on said land to the municipality which formed a valid charge on the same, for which the land could be sold, and (3) its production is also by the same section declared conclusive evidence that all the steps and formalities necessary to a valid sale, had been taken and observed as provided by the Ordinance.

The section further enacts that "thereafter," meaning the one year alluded to, said sale and transfer shall only be questioned or set aside on the following named grounds and no other : (a) that the sale was not conducted in a fair, open, and proper manner. The conduct of the sale, I may remark, is not questioned. (b) That there were no municipal taxes whatever in arrears for which the land could be sold.

As the transfer is conclusive evidence of assessment and of taxes being in arrears (forming a valid charge in the land), and that the steps and formalities necessary to a valid sale had been taken and observed, the onus then devolved upon the owner to prove that there were on 8th November, 1898, no municipal taxes whatever in arrears for which the land could be sold—in other words, that this valid charge in the land of which the production of the transfer is conclusive evidence, had been removed.

The other ground for questioning the sale and transfer is (c) that the land was not liable to assessment for municipal taxes.

From the evidence before me it appears that a number of years preceding 1898 this land has been put up for sale for arrears of taxes and bid in by the municipality.

There is no evidence that this sale was ever consummated, certainly no transfer of it was shewn to have been

made, and I do not find any of the exemptions under sec. 121 applicable to such a case. This objection is, therefore, untenable. The application in my judgment should be allowed, and the sale and transfer confirmed. Judgment. Richardson J

The registered owner appealed from the order made on the judgment given above. Questions of practice on the appeal were decided by the Court in banc, 4th June, 1902, 5 Terr. L. R. 271. Appeal.

The appeal was heard 1st June, 1903.

Ford Jones, for appellant.—The Ordinance must be construed strictly: *O'Brien* v. *Cogswell*.[1] As to the transfer being conclusive evidence, this provision must be construed as "only applicable to the case of a regular sale and legal deed, and not as having any reference at all to the effect of a deed following a void or irregular assessment:" *O'Brien* v. *Cogswell*, STRONG, J., at pp. 433 and 434. "It is only to a deed executed in pursuance of a valid sale that the section can be regarded as referring:" GWYNNE and TASCHEREAU, JJ., *ibid*, at 464. Defects in assessment or giving notice are fatal to the validity of the sale: *O'Brien* v. *Cogswell* at pp. 425 and 429, *Flannagan* v. *Elliott*,[2] *McKay* v. *Crysler*,[3] *Campbell* v. *Elma*,[4] *Grece* v. *Hunt*,[5] *DeBlaquiere* v. *Becker*,[6] *Chamberlain* v. *Turner*,[7] *Carson* v. *Veitch*.[8] By ch. 12 of 1901 the owner has the right of redemption denied her by the Judge. Argument.

N. Mackenzie, for respondent.—At the date of the transfer secs. 207 and 208 of Ord. 1897, ch. 8, were in force. These sections were re-enacted by 201 and 202 of ch. 70 of the Cons. Ord. 1898. Application for confirmation was made over a year from the date of transfer. Therefore, under sec. 202 it was conclusive evidence, not only of the assessment and valid charge of the taxes, but that every one

[2] 12 S. C. R. 435. [3] 3 S. C. R. 436. [4] 13 U. C. C. P. 296. [5] 2 Q. B. D. 389. [6] 8 U. C. C. P. 167. [7] 31 U. C. C. P. 460. [8] 9 O. R. 706.

Argument.

of the steps taken, including assessment, up to the sale proceedings, was regular, that taxes were in arrear forming a valid charge on the land, and that all the said proceedings were taken in accordance with the Ordinance, thus leaving only the three grounds for avoiding the sale stated in the proviso to sec. 202. The appellant has not attempted to avoid the sale under clause (*a*) and (*c*) of the proviso. In attacking it under clause (*b*) the onus is on the appellant to prove that there were at the date of sale no municipal taxes whatever in arrears for which the land could be sold. There is evidence that for a number of years taxes were in arrears. There is no evidence that the sale to the municipality in 1894 was ever consummated. The cases cited for the appellant do not apply or are distinguishable. In *O'Brien* v. *Cogswell*[1] there were two conditions necessary to establish conclusive evidence: STRONG, J., p. 425. In the Territories we have only one—production of the transfer, which covers everything: *Whalen* v. *Ryan*[9] is similarly distinguishable. In *Church* v. *Fenton*[10] under words of a statute providing that a tax sale should, unless disputed within two years, "be to all intents and purposes valid and binding," it was held that under these general words irregularities were cured. Sec. 6 of ch. 23 of 1901 applies to the present case.

Judgment reserved.

[*July 9th, 1903.*]

Judgment.

The judgment of the Court was delivered by

WETMORE, J.—This is an appeal on the part of Calvert from the judgment of RICHARDSON, J., confirming the sale of land for municipal taxes made by the secretary-treasurer of the municipality of Indian Head to the respondent Donnelly. The sale was made on the 2nd November, 1898. The transfer was made by the secretary-treasurer on the 21st

[9] 20 S. C. R. 65.

[10] 5 S. C. R. 239.

Judgment.
Wetmore, J.

November, 1899. The application to confirm the sale was made to RICHARDSON, J., on 25th February, 1901. The hearing was practically closed on the 27th May, 1901, as appears by the judgment of the learned Judge. But the Judge heard the parties after that date as to whether or not Ordinance, ch. 12 of 1901, especially sec. 4 thereof, was applicable to the matter in question. The learned Judge held that the Ordinance was not applicable.

The first question which arises in this appeal is as to the effect of the transfer to Donnelly, and that is to be gathered from the Ordinance in force at the time of its execution. According to secs. 201 and 202 of "The Municipal Ordinance" (Con. Ord. ch. 70) the Ordinance then in force, the effect was to vest in the purchaser all the rights of property of the original owner purged and discharged from all charges, mortgages, and encumbrances, except existing liens of the municipality or Crown. And then the proviso at the end of sec. 202 went on to provide "that every such transfer shall, at the expiry of one year from the date thereof, be *conclusive evidence* of the assessment and valid charge of the taxes on said land therein described; also that all the steps and formalities necessary for a valid sale, had been taken and observed as provided by the Ordinance in that behalf, and thereafter such sale and transfer shall *only be questioned* or set aside on the following grounds and no other:

"(*a*) That the sale was not conducted in a fair, open, and proper manner;

"(*b*) That there were no municipal taxes whatever in arrears for which the said land could be sold;

"(*c*) That the said land was not liable to be assessed for municipal taxes."

The language of this section seems to me to be as clear as it can be expressed, and no language occurs to us by which we can interpret it so as to render it more clear. The transfer in this case was made more than a year before the

Judgment. Wetmore, J.

application to confirm it, and is therefore under the proviso quoted "conclusive evidence of the assessment and *valid charge* of the taxes" on the land, and also "that all the steps and formalities necessary for a valid sale had been taken and observed as provided by the Ordinance." Can anything be clearer? And to emphasize this it goes on to provide that the sale and transfer shall only be questioned on the grounds above specified. When a party appears before the Judge to oppose the confirmation of a tax sale, he appears to question such sale and transfer. Calvert did not question this sale and transfer on any of the grounds specified in the proviso. The grounds on which the confirmation was opposed was that there were irregularities in the proceedings subsequent to the assessments, and as to one year, 1895, she claimed there was no assessment at all. These grounds were not open to her in view of the proviso that the transfer was conclusive evidence of the assessments and valid charge of the taxes on the land. It may be considered that this is drastic legislation. That is a matter in which, in our opinion, this Court is not concerned, and, moreover, it is a question open to considerable difference of opinion. The duty of the Court is to ascertain from the language of the Ordinance what the Legislature intended, and, having clearly arrived at that intention, to give effect to it. If it produces hardships, the Legislature must remedy it, not the Court. The appellant's counsel relied very strongly on the decision in *O'Brien* v. *Cogswell*.[1] Of course that decision is binding upon this Court and we would be obliged to follow it if it where conclusive on this question, no matter what the individual opinions of the members of this Court might be. This judgment, in our opinion, is not at all at variance with that case. The language of the Act under consideration in that case is quite different from that of the section of the Ordinance in question. There was a very decided difference of opinion among the Judges in *O'Brien* v. *Cogswell*. We do

Judgment.

Wetmore, J.

not propose to enter into a lengthy discussion of what was decided in that case, but will merely quote what was laid down by STRONG, J., at p. 431. He there says: "If the legislature has in unequivocal words said that a man's property may be sold for taxes and his title divested, although the tax for which it was sold was illegally imposed, and although the owner never had any notice of its imposition, the Courts are bound to give effect to what the law giver has so enacted." Now that language is applicable to the circumstances of this case. While we do not say that the legislature has in unequivocal words said as suggested by STRONG, J., in the above quotation, we do say that it has in unequivocal words said what is the conclusive effect of a tax sale transfer, and there is nothing, as there was held to be in *O'Brien* v. *Cogswell*, to limit or control the effect of those words. Therefore effect must be given to them. Taking all the judgments delivered in *O'Brien* v. *Cogswell* together, we are of opinion that the effect of them is to support the conclusion reached by RICHARDSON, J., in this matter.

It is unnecessary to discuss whether Ordinance ch 12 of 1901 is applicable to this case or not, because if it is sec. 4 of that Ordinance still applies, and the language of that section is, if anything, more clear as to the conclusiveness of this transfer than the proviso which we have been discussing. If ch. 12 is not applicable then the proviso on which we have based this judgment is applicable. Having arrived at this conclusion, it is not necessary to discuss this appeal any further. We may add, however, although the Ordinance was not brought under the notice of the Court at the argument, that our attention has been drawn to Ordinance ch. 10 of 1900, which was in force when the application was made to RICHARDSON, J., and it occurred to us whether the effect of that Ordinance was not to limit the effect of the proviso in sec. 202 of the "Municipal Ordinance" so as to make the transfer only conclusive in the case of no person

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Wetmore, J.

appearing to oppose the confirmation. We have, however, come to the conclusion that this Ordinance does not affect the proviso to sec. 202. The only effect of it is that the transfer is conclusive in this case even if not executed more than a year before the application, if no person appears to oppose. If executed more than a year, effect must be given to it as provided in sec. 202.

The appeal is dismissed with costs to be paid by the appellant to the respondent.

Appeal dismissed with costs.

REPORTER:
Reginald Rimmer, Advocate, Regina.

THE KING v. McELROY.

Criminal law— Theft— Art. 305, s.-s. 1, clause (a)— Criminal Code—Special property or interest in railway car—Manitoba Grain Act, 1900.

M. made application in order book kept at Moosomin Station under s. 58 of Manitoba Grain Act as amended, which provides "cars so ordered shall be awarded to applicants according to order in time in which said orders appear on the order book." Sec. 42 of the Act as amended by s. 5 of 2 Edw. VII. c. 19, provides (clause 5), "The railway company shall furnish cars to farmers, without undue delay, for the purpose of being loaded at said loading platform." The station agent intended a special car for M. and told one S. to notify M. He was not notified; and the accused took possession of and loaded the car. He was convicted of theft.

Held, that M. could not insist on any car being delivered to him; and he had therefore no special property or interest in the car in question within the intent of clause A. of s.-s. 1 of s. 305 of the Criminal Code. Conviction quashed.

[*Court en banc, July 9th, 1903.*

Statement.

Crown case reserved by WETMORE, J.

J T. Brown, for the Crown.

C. P. Wilson, for the prisoner.

[*July 9th, 1903.*] Judgment.

Scott, J.

SCOTT, J.—This is a case stated by WETMORE, J., under sec. 743 of "The Criminal Code."

The defendant was tried before him on the 17th December, 1902, upon the following charges, viz :

1. "For that the said Alexander McElroy did at Moosomin in the above Judicial District on, or about the first day of December, 1902, fraudulently and without colour of right, take a box car, the property of the Canadian Pacific Railway Company, of the value of five hundred dollars, with intent to deprive George Thomas Marsh, who had special interest therein, of such interest."

2. "For that the said Alexander McElroy at the time and place aforesaid did fraudulently and without colour of right convert to his own use the said car with the intent aforesaid."

The defendant was convicted on both charges.

The evidence shews that on 28th October, 1902, Marsh had entered in the order book required to be kept at Moosomin station, under sec. 58 of "The Manitoba Grain Act, 1900," as amended by 2 Edw. VII. ch. 19, an application for a grain car ; that on 1st December following there were at that station a number of cars suitable for carrying grain which were available for applicants, and one of which Marsh was entitled to have awarded to him under the section referred to. He was also entitled under sec. 42 of the first mentioned Act, as amended by the Act of 1892, to have it furnished to him without undue delay for the purpose of being loaded by him at the loading platform at that station.

The Station Agent an Moosomin states that the car in question being one of the cars referred to, was intended by him for Marsh and that he so informed one Sharp and told him to notify Marsh that the car was for him. The latter, however, did not receive any such notice nor did he become

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Scott, J.

aware that the car was intended for him until after the car was taken possession of and loaded by the defendant.

The learned trial Judge has found that Sharp was not the agent of Marsh, but was merely the agent of the Station Agent to inform Marsh, but he holds that this was sufficient setting apart or awarding of the car to Marsh to satisfy the section of the Act ; he also found that the car was not awarded to Marsh in any other way or manner.

Upon these findings he held that under the Act of 1892 Marsh has such a special interest in the car in question as is embraced by sub-sec. 1, paragraph (a) of sec. 305 of "The Criminal Code."

In my opinion the facts relied upon by him are not sufficient to create in Marsh any special or other property or interest in that particular car.

It is true that it was the duty of the railway company to supply him with one of the cars referred to, but the fact that the Station Agent merely formed the intention to deliver the car in question to him would not give him the right to insist upon having that car and no other delivered to him. The Station Agent might at any time up to the time Marsh had received notice that the car was delivered io him, have altered his intention and substituted another car for it. I cannot see that the fact of his having instructed an agent to notify Marsh can affect the question, as those instructions were not carried out or acted upon.

If it could be said at any time that an applicant had acquired under sec. 58 any property or interest in any particular car, I doubt whether such could be said before that car had been delivered to him for the purpose of loading, as it appears to me that up to that time the railway company would fulfil the requirements of the statutes by delivering any suitable car to him.

Judgment.

Scott, J.

One of the questions submitted by the learned Judge is: "Was the accused upon the findings referred to properly convicted of the offences charged or either of them?"

In view of what I have stated I am of the opinion that this question should be answered in the negative.

Such being my opinion it is unnecessary to answer the other question submitted.

SIFTON, C J., and PRENDERGAST, J , *concurred.*

Conviction quashed.

REPORTER :—

Reginald Rimmer, Advocate, Regina.

BEEBE v. TANNER.

Foreign judgment— Proof of— Seal—Certificate—Canada Evidence Act, 1893, s. 10.

A document purporting to be a transcript of the judgment roll of the Circuit Court for Walworth County, South Dakota, was tendered in evidence. The seal affixed was engraved "Clerk of the Circuit Court, Sixth Judicial District, South Dakota, Walworth County;" the certificate appended under the hand of the clerk of the Court stated, "I have hereunto set my hand and affixed the seal of the said Court."

Held, that the certificate, signed by the officer who would ordinarily have the custody of the seal of the Court, was *prima facie* proof that the seal was that of the Court, and that the judgment purported to be under the seal of the Court as required by s. 10 of The Canada Evidence Act.

[*Court en banc, July 9th 1903.*

Statement

The plaintiff sued on a judgment of the Circuit Court for the County of Walworth, State of Dakota, U.S.A., for $347.40. The defendants denied the judgment and alleged fraud. The action was tried by SIFTON, C.J., and on 28th February, 1903, judgment was given for the plaintiff for the amount claimed. The defendants appealed on the ground that the foreign judgment was not legally proved.

The appeal was heard 7th July, 1903, at Calgary.

Argument.

R. B Bennett, for appellants: To hold that the judgment in question is proved under our statutes the Court must hold that the seal of the Clerk of the Court is the seal of the Court: *Woodruff* v. *Walling*,[1] and *Junkin* v. *Davis*,[2] are authorities shewing that the seal of the Clerk was not sufficient compliance with sec. 10 of the Canada Evidence Act, 1903.

C. T. Jones, for respondent: The cases cited by the appellants' counsel are distinguishable from this case. They were decided under a statute which requires an exemplification of judgment "under the seal of the Court," whereas the Canada Evidence Act uses the words "purporting to be under the seal of such Court," which means "seeming to be." In *Junkin* v. *Davis*,[2] the Clerk certified that he had affixed the seal of his office. In *Woodruff* v. *Walling*,[1] the Clerk certified that he had affixed the seal of the county. In the present case the Clerk certifies that he has affixed the seal of the Court. The distinction is important. The judgment in *Junkin* v. *Davis*,[2] was affirmed on appeal principally on the ground of lack of such a certificate as has been given in the present case. Oral evidence is admissible to remove any ambiguity in the seal (*Junkin* v. *Davis*,[2] at p. 420). Any ambiguity in the seal in the present case is removed by oral evidence. There was no such evidence in the Ontario cases. The onus is on the defendants.

[*July 9th, 1905*]

Judgment.

The judgment of the Court was delivered by.

WETMORE, J.—This is an action brought by the plaintiffs against defendants upon a judgment alleged to have been recovered by him against them in the Circuit Court for the County of Walworth, in the State of South Dakota, in the United States of America. On the trial before the Chief Justice he gave judgment for the plaintiff and the defen-

[1] 12 U. C. Q. B. 501. [2] 6 U. C. C. P. 408. Affirmed 22 U. C. Q. B. 369.

dants appealed. The only question raised on the appeal is as to the sufficiency of the proof of the foreign judgment sued on. This judgment was attempted to be proved by a certified copy thereof alleged to be under the seal of the Court in which it was recovered.

Judgment.
Wetmore, J.

The certificate is intituled in the Court and cause, and the body of it reads as follows:

"I, E. G. Powell, Clerk of the Circuit Court in and for the County of Walworth and State of South Dakota, do hereby certify that the said Circuit Court is a Court of general jurisdictton having jurisdiction of all cases in law and equity triable in said county, and that the Hon. Loring E. Gaffy, is Judge of the Court.

"That the above and forgoing is a true, complete and perfect transcript of the judgment roll and docket entry of a judgment in a case wherein McAddison J. Beebe is plaintiff and Rupert D. Tanner and Ralph Tanner are defendants, as the same appears of record in my office.

"In testimony whereof I have hereunto set my hand and affixed the seal of the said Court at Banger, Walworth County, South Dakota, the 8th day of October, A.D. 1901.

"E. G. Powell,

"Clerk of the Circuit Court in and for Walworth
L.S. County, South Dakota."

The seal affixed to this certificate has engraved on it the following legend:

"Clerk of the Circuit Court, Sixth Judicial District, South Dakota, Walworth County," and that was the only engraving on it that is material. The objection raised to the sufficiency of the proof of this judgment is that the seal purports on its face to be the seal of the clerk of the Foreign Court, not the seal of the Court, and therefore does not comply with the provisions of sec. 10 of "The Canada Evidence Act, 1893." That section provides that "evidence of any

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Wetmore, J.

proceeding or record whatsoever of, in or before . . any Court of Record in the United Stated of America or of any State of the United States of America . . may be made in any action or proceeding by an exemplification or certified copy thereof purporting to be under the seal of such Court." We are of opinion that the certificate in question complies with the provisions of that section of the Act, at least so as to render the proof of the judgment as *prima facie* established. A certificate has to be signed by some officer. That is the usual practice. In this case it purports to be signed by the officer who would ordinarily have the custody of the seal of the Court, and he alleges in his certificate that in verification thereof he has affixed the seal of the Court. Therefore, according to the certificate, it, to use the language of the Act referred to, *purports to be under the seal of the Court.* The effect of this is not taken away because the legend of the seal has engraved on it that it is the seal of the Clerk of the Court. It may be, nevertheless, the seal of the Court, notwithstanding that legend, and in view of what the certificate purports, we must assume it to be the seal of the Court, at least until the contrary is proved by other testimony. *Woodruff* v. *Walling*,[1] and *Junkin* v. *Davis*,[2] were cited by counsel for the defendants as supporting his contention. The facts of those cases were entirely different. In *Woodruff* v. *Walling*,[1] the certificate purported to be "that of the Clerk of the County, not the Clerk of the Court," and he stated in the certificate that the seal he affixed was the seal of the county. Therefore the seal affixed did nor purport to be the seal of the Court, nor was the person who made the certificate and affixed the seal a person whom the Upper Canada Court could assume to be the proper officer who had the custody of the records or seal of the foreign Court. In *Junkin* v. *Davis*,[2] the judgment on which the action was brought was alleged to have been recovered in the District Court for the Tenth Judicial District of the

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Wetmore, J.

County of Nevada in the State of California. The seal attached to the certificate of the Clerk had the legend around the margin, "District Court, 14th District, Nevada County, California," and the Clerk stated in his certificate that he had signed his hand and affixed the seal of *his office* to it. He did not certify that he had affixed the seal of the Court to it. The Canadian Court in that case had nothing to guide them except the legend on the seal. In fact the certificate did not purport anything except what the legend purported, and Richards, J., who delivered the judgment of the majority of the Court in that case, at p. 419, draws attention to the fact that the Clerk did not certify that he had affixed "the seal of the Court, but merely the seal of his office." It is quite true that Richards, J., at p. 420, uses language from which it might be inferred that he was of opinion that the seal itself must, in such cases, on its face purport to be the seal of the Foreign Court in question. If he does so intend, we cannot agree with him. We think it quite sufficient if, under the certificate, it purports to be the seal of the Foreign Court; we do not know that it is necessary that the seal of the Court should have a particular or any legend. If a seal without a legend, but with merely some figures or characters engraved, is affixed, and the person whom we may assume to have the custody of the records and the seal, states that the seal so affixed is that of the Court, we think that the provisions of the Canada Evidence Act in question would be filled, the seal would purport to be the seal of the Court.

This appeal will be dismissed and the judgment of the learned Chief Justice affirmed with costs.

REPORTER:

Reginald Rimmer, Advocate, Regina.

THE SASKATCHEWAN LAND CO. v. LEADLEY

Practice—Action commenced in wrong sub-judicial district—Irregularity—Transferred—Irregular summons—Adjournment—Rules 538, 540.

Held, (1) That the entry of an action in wrong judicial district contrary to s. 4, s.-s. 2,* of the Judicature Ordinance (C. O. 1898, c. 21), is an irregularity, not a nullity, and the defect may be cured under Rule 538† by transferring it to the proper judicial district.‖ (2) That in case of an irregularity in a summons to set aside irregular proceedings in not stating the objections relied upon, pursuant to Rule 540‡, the summons should not be discharged, but on the objections being stated on the return of the summons it should be enlarged at the request of the party called upon.

Statement.

[SCOTT, J., *November 23rd, 1903.*

Application on the 30th of October by the defendants John T. Moore and Annie A. Moore to set aside the writ of summons, order for injunction and all proceedings upon the grounds, among others, that the action was improperly entered with the Deputy Clerk at Edmonton, as the cause of

* 4. Suits shall be entered and unless otherwise ordered tried in the judicial district where the cause of action arose, or in which the defendant or one of several defendants resides or carries on business at the time the action is brought.

(2). If in any judicial district there is a district of a deputy clerk established by Ordinance, suits in which the cause of action arose or the defendant resides in such deputy clerk's district, shall be entered in the office of the deputy clerk, and suits in which the cause of action arose or the defendant resides in the remaining portion of the judicial district shall be entered in the office of the clerk of the Court, and if in any suit the cause of action arose in the deputy clerk's district, and the defendant resides in the other portion of the judicial district, or vice versa, the suit may be commenced in either the clerk's or deputy clerk's office.

† 538. Non-compliance with any of the provisions of this Ordinance shall not render any proceedings void unless the Court or a Judge shall direct, but such proceedings may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court or Judge may think fit.

‡ 540. When an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion.

‖ Reversed on appeal to Court in banc.

Statement.

action did not arise nor do any of the defendants reside in his district; some of the defendants residing in the district of the Clerk at Calgary, and others in the Province of Ontario, and the lands in question being in the district of the Clerk at Calgary.

Upon the return of the summons, counsel for the plaintiff took the preliminary objection that the grounds shewn by the affidavit, filed on the application for the summons, are mere irregularities, and that the provisions of Rule 540, which requires that the irregularities relied upon shall be stated in the summons, had not been complied with. Judgment was reserved upon this objection, the application to be heard subject to it. Counsel for the defendants then stated the objections relied upon and the matter was adjourned until adjournment, the 13th of November, at the request of the plaintiffs, to procure affidavits in answer.

Argument.

N. D Beck, K. C., for the plaintiffs:—I rely upon the objection taken by me on the 30th of October as to the irregularity of the defendant's procedure. If there is any irregularity in plaintiff's procedure the Court may cure it on terms. The question as to whether the writ is issued in the wrong district is one that can only arise in the Territories, and is not one of jurisdiction, but rather of venue: *Moore v. Gamgee*.[1] Sec. 4, sub.-sec. 1 of the Judicature Ordinance has been complied with, as the writ was issued in the judicial district in which the defendants the Moores reside. Sub-section 2 of s. 4 does not provide for every case that may arise; it provides merely for cases where the cause of action arose or the defendant resides in a district of a deputy clerk; that means all the defendants. Here some of the defendants reside outside the Territories. If it was intended to refer to some or one of the defendants it would have the words of sub-sec. 1: "The defendant or one of the defendants;" See Hardcastle on Statutes, pp. 82 to 86. In any event if the

[1] 25 Q. B. D. 244; 59 L. J. Q. B. 505; 38 W. R. 669.

Argument.

action has not been commenced in the proper office, the defect should be cured under Rule 538, which is a power to validate invalid proceedings and stronger than power to amend. As to power of the Court to validate, see *Wright* v. *Wright*,[2] *Petty* v. *Daniel*,[3] *Reynolds* v. *Coleman*,[4] *Anthony* v. *Blain*[5] If the application were to succeed the action could be set aside only as against the Moores and not as against the Leadleys and the Registrar. The lands stand in the name of the Leadleys and therefore success in this application would be ineffective.

G. W. Green, for defendant, John T. Moore, and *O. M. Biggar*, for the defendant Annie A. Moore :—There is no casus omissus either in sub-sec. 1 or sub-sec. 2 of sec. 4. Sub-section 2 refers to the particular defendant referred to in sub-sec. 1. Rule 538 cannot be construed as a reference to sections of the Ordinance, but only to the Rules. If the action is set aside against the Moores, it must be set aside on the ground that the writ is void, and therefore must also fail as against the Leadleys ; as to the nullity of the proceedings, see *Sharples* v. *Powell*,[6] *Herr* v. *Douglas*,[7] *Brooks* v. *Hodgkinson*,[8] *Fountain* v. *MacSween*,[9] *Fuller* v. *MacLean*,[10] *Hanson* v. *Shackelton*,[11] *Hart* v. *Pacaud*[12]

[*November 23rd, 1903.*]

SCOTT, J.—(After referring to the facts set out, and disposing of the other grounds of the application), as to the third ground, I am of an opinion that the entry of the action with the Deputy Clerk at Edmonton was not authorized. In my view sub-sec. 2 of sec. 4 of the Judicature Ordinance applies, and the action, if entered in this judicial district, should have been entered with the Clerk at Calgary. It

[2] 13 P. R. 268. [3] 34 Ch. D. 172 ; 56 L. J. Ch. 192 ; 56 L. T. 745 ; 35 W. R. 151. [4] 36 Ch. D. 453 ; 56 L. J. Ch. 903 ; 57 L. T. 588 ; 35 W. R. 813. [5] 4 O. L. R. 48. [6] 4 Terr. L. R. 90. [7] 4 P. R. 102 [8] 4 H. & N. 716. [9] 4 P. R. 240. [10] 8 P. R. 549. [11] 4 Dowl. P. C. 48 ; 1 H. & W. 302 ; 46 R. R. 813. [12] 28 U. C. Q. B. 390.

Judgment.
Scott, J.

was contended by counsel for the plaintiff that, if I should find that the action was improperly entered I had power under Rule 538 to direct the removal of the proceedings to the office of the Clerk at Calgary, and he applied for such direction in case I should so find. Rule 538 is as follows: "Non-compliance with any of the provisions of this Ordinance shall not render any proceedings void unless the Court or a Judge shall direct, but such proceedings may be set aside, either wholly or in part, as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge may think fit." Counsel for the applicant contended that this rule cannot be construed as referring to the provisions of the Judicature Ordinance. If the words "this Ordinance" are not intended to refer to the Judicature Ordinance, it is difficult to conceive to what ordinance they are referable. The Rule is identical with sec. 540 of the Civil Justice Ordinance of 1886, which contained nearly all the provisions of the present Judicature Ordinance, including sub-sec. 1 of sec. 4 thereof. It was then undoubtedly applicable to these provisions, and there is nothing to indicate the intention that it should no longer be applicable to them. If applicable to sub-sec. 1 of s. 4 it must be applicable to sub-sec. 2. I think that the proper construction of this Rule is that it is applicable to both the Judicature Ordinance and the rules of Court. If it were held not to apply to that Ordinance I cannot see upon what ground it could be held to apply to the rules, as the latter are not referred to. It would therefore be meaningless.

In my opinion the entry of the action in the wrong district or with the wrong clerk in such district is not a nullity unless so directed by the Court or Judge under 538. There is a wide distinction between the entry of an action in a Court which has no jurisdiction to entertain it and its entry in the wrong office of a Court having such jurisdiction. The

Judgment.
Scott, J.

Supreme Court for each district is not a separate and distinct Court from the Court in other districts. They are all one and the same Court, and a suit, over which it has a jurisdiction, having been entered in it, though in the wrong district or sub-district, I fail to see why it or a Judge thereof cannot cure the defect in the procedure by directing that the suit shall be transferred to and carried on in the proper district. If such an order were made in the present case the applicant would not, as I can see, be in any prejudiced by it, and such being the case no object will be obtained by putting the plaintiffs to the unnecessary expense of commencing his action anew.

The order will, therefore, go, directing the transfer of the action and all proceedings therein to the office of the Clerk of the Court at Calgary, the plaintiffs having the right to enter their action there, the applicant to have the costs of his application in any event on final taxation.

As to the preliminary objection, I hold that the summons was irregular in that it did not state the objections relied upon. I think, however, that it should not be discharged on that ground, but the applicant should have been called upon to state his objections, and having stated them an enlargement should have been granted to enable the plaintiff to answer them. Upon the return of the summons the applicant stated his objections and plaintiffs obtained an enlargement for 14 days, which gave them ample time to answer.

REPORTER :

J. E. Wallbridge, Advocate, Edmonton.

DAYE v. H. W. McNEILL CO.

The Ordinance respecting compensation to the families of persons killed by accident (C. O. 1898, c. 48)—The Coal Mines Regulations Ordinance (C. O. 1898, c. 16)—The Workmen's Compensation Ordinance (1900, c. 13)—Negligence—Liability for non-performance of statutory duty—Contributory negligence of fellowworkmen or of mere strangers—Marriage, evidence of.

Action brought by administratrix of Prosper Daye, killed in explosion in defendants' mine, under C. O. 1898, c. 48. There was evidence of plaintiff's that she was married to Daye in Belgium, was living with him to time of death, and that he was the father of her children, oldest aged 17 years; that he was killed by explosion of gas in defendants' Canmore mine in June, 1900; that ventilation was defective and not as required by s. 39, rule 1 of C. O. 1898, c. 16; that mine was not inspected as required by rule 3 of last cited section; that the mine was gaseous; that on morning of the accident there was gas present in explosive quantities for two or three hours prior to the explosion; that the manager knew of the presence of gas; that two fellow workmen of deceased had opened their safety lamps; there was no evidence to rebut presumption of marriage, and no evidence of inspection of the lamps as required by rule 8 of s. 39 above, or that the explosion arose from any act or default of deceased.

Held, (per McGuire, C.J., trial judge), (1) That the oral evidence of the widow was sufficient proof of marriage according to the general rule that cohabitation and reputation is sufficient evidence of marriage, though in cases of bigamy, divorce and petitions for damages for adultery stricter proof is required. (2) That having found the effective and proximate cause of death to be an explosion due to the fault and negligence of the defendants and their breach of duty imposed by the Ordinances C. O. 1898, c. 16, they were not relieved if there was contributory negligence on the part of a fellow workman of accused or of a mere stranger. (3) That by reason of Ord. c. 13 of 1900, if negligence was proved there was no reason to enquire whether it was that of a fellow workman.

On appeal to the Court *en banc*.

Held, (1) That marriage was sufficiently established by Mrs. Daye's evidence; that strict proof was not required; that the fact that the alleged marriage took place in a foreign country did not affect the question, as the lex fori governs questions of proof.

(2) That there was sufficient evidence to support the findings of the trial judge; that the findings were sufficient to render the defendants liable. Appeal dismissed with costs.

[McGUIRE, C. J., *December* 29th, 1902.
[*Court en banc, January* 16th, 1904.

Statement. The action was tried by McGUIRE, C.J., without jury, at Calgary, 10th to 12th December, 1902. The facts are sufficiently stated in the judgment of the learned trial Judge.

C F. P. Conybeare, K. C., for the plaintiff.

J. A. Lougheed, K. C., and *R. B. Bennett*, for the defendants.

Judgment was reserved.

[*29th December, 1902.*]

Judgment. McGUIRE, C.J.—This is an action brought by Mary Daye, as personal representative of the estate of Prosper Daye, who was killed by an explosion in the Canmore mines operated by the defendant company, on June 13th, 1900. Mary Daye claims to be the widow of the deceased. She says in her evidence that she was married to him "in the old country." The deceased and she had six children living, the oldest being now 17 years old, the youngest 4 years old. "We had been living together as man and wife up to his death," and later on she said "Daye and I lived together as husband and wife ever since we were married, on date of exhibit A (1883)."

There was a document tendered in evidence, and which I admitted subject to objection, which purported to declare that Prosper Daye, born 13th of January, 1861, and Mary Dubois, born in 1866, had "contracted marriage before us the 10th November, 1883." This purported to be signed by "L. J. Wantriez," "Officer de l'Etat Civil," and the document is headed Royaume de Belgique, Province de Hainaut Arrnodissement de Charleroi Commune de Chatelineau. At the foot of this are the names of certain persons "in testibus." The objections to the admission of this document are not specified.

Assuming, however, without deciding that this document is not admissible, there is, I think, ample evidence of the marriage of the deceased to the plaintiff apart from it.

Judgment.

McGuire, C.J.

There is her own statement that she was married to deceased in 1883, and that she lived with him till his death in 1900, nearly 17 years, as his wife, and had by him 7 children, all of whom, except the first born, are living and resided with their parents at Canmore up to his death.

In *Kidd* v. *Harris*,[1] the oral evidence of the widow was deemed sufficient evidence of the marriage.

In *Doe. Fleming* v. *Fleming*,[2] it was said, "According to the general rule, and it has never been doubted, reputation is sufficient evidence of marriage." In *Nichol* v. *Lambert*,[3] Earl, C.J., said: "Mere cohabitation and reputation are sufficient." See also *Piers* v. *Piers*,[4] *Goodman* v. *Goodman*,[5] *Collins* v. *Bishop*,[6] *Fox* v. *Bearblock*.[7] In some of these cases there was evidence given tending to disprove a marriage, whereas here there is not a tittle of testimony offered to question the plaintiff's statement, or the fact of the marriage. In cases of bigamy, divorce and petitions for damages by reason of adultery, it is true, stricter proof of marriage is required. Phipson, last edition, 339, and see also Taylor on Evidence (last edition) 172, where the reasons for these exceptions from the general rule are given. There was also in this case some evidence of reputation and treatment of Mrs. Daye as the wife of deceased by several witnesses who knew them well.

I have no hesitation in finding this issue in favour of the plaintiff.

The only other issue that was seriously raised was whether the death of the deceased was due to actionable negligence of the defendant company. At the close of the plaintiff's case, counsel for the defence moved for a nonsuit which I then reserved, and evidence was gone into for the defendants. I

[1] 3 O. L. R. 60, 277. [2] 4 Bing. 266; 12 Moore 500; 5 L. J. O. S. C. P. 169; 29 R. R. 562. [3] 15 C. B. N. S. 781; 33 L. J. C. P. 137; 10 Jur. N. S. 617; 9 L. T. 687; 12 W. R. 312. [4] 9 H. L. Cas. 331; 13 Jur. 569. [5] 28 L. J. Ch. 745; 5 Jur. N. S. 902. [6] 48 L. J. Ch. 31. [7] 44 L. T. 508; 29 W. R. 661; 45 J. P. 648.

Judgment.

McGuire, CJ.

was at the time inclined to refuse the motion for nonsuit on the evidence then before me, and on more careful consideration I think the motion was not entitled to succeed and should be dismissed.

To deal then with the question of negligence.

There is practically no doubt that the death of Prosper Daye was due to an explosion in the defendants' mine on the 13th June, 1900, and I think the explosion was of "gas," from its coming in contract with flame. If the explosion was due to negligence, I am not concerned to enquire whether it was due to the negligence of a fellow-workman, for cap. 13 of 1900 became law on May 5th, 1900, and it enacts that "it shall not be a good defence in law to any action against an employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer, that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee, any contract or agreement to the contrary notwithstanding."

There is evidence that there was gas to a dangerous extent in the part of the mine where the deceased was working, namely, in chute one, seam four, on the morning of the 13th June. There is no suggestion and no evidence that the explosion was due to any negligence on the part of the deceased himself. The defence offered evidence to shew that two other miners, working in cross-cut No. 3 of the same chute one, and some 25 feet or thereabouts from where Daye was working, had opened their safety lamps presumably because the lamp of one of these two miners had in some way been extinguished, and the other miner had opened his lamp to relight the other. To establish this, evidence was given that some hours after the explosion, and on the arrival of the first person to reach the spot thereafter, two lamps were found with the tops separated from the bottoms in a way to warrant the inference that both had been intentionally

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McGuire,CJ.

opened. The opening of one of these lamps, while still burning, would probably cause an explosion of gas if it was present in a sufficient quantity. The safety lamps used in the Canmore mine were of the pattern known as "The Bonnetted Clanny," and consisted substantially of two parts, a "top" (partly glass and gauze netting protected by a sheet iron covering) and a "bottom," containing the oil and wick. The top is attached to the bottom by screwing the one into the other. This can readily be done or undone by hand by any one, but to prevent this being done where gas exists there is a device intended to operate as a "lock." A short projection of the brass work of the top has a screw hole in it and a small screw pin, when turned in, engages with a groove in the bottom, so that when screwed in firmly it would prevent the "top" being un-screwed from the "bottom," but if carelessly or insufficiently screwed in would present little or no obstacle to the opening of the lamp. But assuming the screw of the lock to have been tightly screwed in, the mode of opening would be by means of a key or something answering purpose of key. The head of this small screw pin is flattened longitudinally.

One of the lamps so found in cross-cut No. 3, and which was in use by one of the two miners working there, was produced at the trial, and put in as an exhibit, No. 3. No key was produced, but the lamp was in an unlocked condition. On examining the lamp in the presence of the Clerk of the Court, I find that the screw of the "lock" turns very easily, and can be turned with any hard substance—a nail, a toothpick. I turned it with a straight piece of wire, locked and unlocked it inside of half a minute from taking the lamp in my hand. No doubt if when locked the screw was turned in very hard the friction between the end of the screw and the brass against which it engages would make it a little stiffer to unscrew, but even then a small cut nail would probably be sufficient to open it with, and at any rate any hard

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McGuire, CJ.

substance having a slot in the end, or two flat nails, would serve the purpose of a key. I shall deal with this later on.

There is evidence that one Emerson, who has a certificate as pit boss under The Coal Mines Ordinance, cap. 16 C. O. made an inspection of a portion of the mine on the morning of the explosion, including chute No. 1, seam 4. He says he began inspecting between 4 and 5 o'clock, and concluded his inspection before the men went to work, and he says "he found them in good working condition," that he tested for gas by turning down the lamp to reduce the size of the flame, then agitating the air to bring down some of the gas which, being lighter than air, floats on the top, and when the result shews it may be risked they test to the top of the space. He says, "As soon as a blue flame shews we test no further, but would not let men go there to work." He adds, "I remember distinctly I did not find gas in chute No. 1, or in the connecting cross-cuts; the 'blue flame' test is the only test I used." He says, "I continued my inspection in other parts." He then went to the lamp-house and posted a copy of his report outside. "Men began coming for lamps. I handed out the lamps for this particular district. They were all locked after being lighted by the lamp boss before being handed to the men. After breakfast I went to the mine," which, he says further on, would be a little after 8 a. m. The explosion took place about 11.30, so that probably 5 or 6 hours may have elapsed between his inspection of chute No. 1, seam 4, and the explosion. He says, "It is quite possible and sometimes happens that a mine may be free from gas so as to be safe, and pass inspection, and in two hours thereafter become unsafe."

For plaintiff the evidence of the inspector of mines under the Territorial Government, Mr. Dan Evans, taken by commission, was put in. He says he was in the mine inspecting it on the 8th, 9th and 10th of June, just before the explosion, and afterwards on 14th and 20th of same month.

Judgment.

McGuire, CJ.

He says on the 8th, 9th and 10th June he found a certain amount of gas prevailing in the mine." Asked as to the ventilation, he answers: "I had occasion to complain of the ventilation on the grounds "that there was no thorough system of ventilation, but a system which we condemn according to law," and he answers to the next question, "the law calls for an inlet and outlet to every district, and there was only one inlet into that district, only one way of letting air in and out. I mean by that there was only one way by which people could enter and leave the district. The whole system of ventilation depended upon brattice." Question: "Do you consider that also a defect?" Answer: "I do." He says: "There were unqualified fire bosses employed, that is, without certificates. I drew the attention of the manager, Mr. Morris, to the lack of ventilation at that time and subsequently. By 'that time' I mean the 8th, 9th and 10th June. I next visited the mine on the 14th of June I think." Q.: "Had any of the defects which you had before noticed been remedied?" Answer: "No." Q.: "If this mine had been properly provided with openings how would it have affected the ventilation?" A.: "It would have affected the ventilation by improving it." Q.: "Would the accumulation of gas have been affected?" A.: "Yes, it would have the effect of clearing away the gas." Q: "Did you notice that the gas was worse in any particular district than in others?" A.: "Yes. In a district, I think it was No. 4, it was a new district." He later on explains that he is referring to the district where the explosion occurred. Q.: "From what you saw on the 8th, 9th and 10th of June did you consider the mine dangerous?" A.: "I would not have complained about the mine if I had not considered it dangerous." He had made "a report to the Department of Public Works" after his visit on 8th, 9th and 10th June, and he says that his visit to the mine on 14th of June "was under the instructions from Mr. Ross, the Commissioner of Public Works." In cross-examination he says

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"The complaints I had with the working of the mine on the 8th, 9th and 10th of June I communicated to the Government in writing. I sent the complaint down from Canmore on the 10th of June by mail. The complaints which I sent in on the 10th of June were on account of alleged non-compliance with the provisions of the ordinance. The Canmore mine was a mine with narrow workings." To Mr. Conybeare: Q.: "Apart from the number of men underground, is there any reason why the number of cubic feet in the mine should be different on the 10th and 13th?" A.: "No." Q.: "Between the 10th and 20th was there any change of condition that could have increased the supply of air?" A.: "Not to my knowledge." Evans went down into the mine on the 20th of June.

Albion Flies, a miner of 22 years' experience, and who said he held a diploma (not produced), and who said he had attended a mining school in Belgium for seven years, but on Sundays only, was a witness for the plaintiff. He was working in the Canmore mine at the time of explosion. He had occasion to go to the upper end of chute No. 1, where the explosion happened at 8.30 or 9 o'clock of that morning. He says there was gas in that chute then; by "gas" meaning what is usually known as "gas" in a coal mine. It is explosive . . . is "dangerous." He says that happening to hold his lamp higher than usual the gas extinguished his lamp. He says "he could feel it on his eyes and also smell it. It would cause one to fall down if breathed long enough. I could not have stood the gas in No. 1 chute where my lamp went out more than 10 or 15 minutes without working." He says that in order to relight his lamp he went down to the level to where Mr. Morris was and got him to light it for him. "Had I tried to light it at upper end of chute 1, vein 3, there would have been an explosion." He says: "I knew there was gas when I had been there that morning, and I said to Mr. Morris that there was gas there, and he said

there was no gas where I was going." Witness was working in a different part of the mine, so far off that he did not hear the explosion. Judgment. McGuire, C.J.

William Dufort, another miner called by the plaintiff, said, "The ventilation of seam No. 4 was, I suppose, not of the best so far as I know." Why? "I noticed gas that morning before the explosion in chute No 1, seam 4." He was up the chute as far as crosscut No. 3, between 11 and 11.30, which was very shortly before the explosion. He says boards were in the habit of being put across the chute to prevent the coal sliding down, and he went to have these boards removed and the coal let down. He says: "I found gas there as far as that top crosscut. . . . I detected the gas by the safety lamp I had by the flame above the light, a 'blue flame.'" Referring to the presence of a blue flame in the lamp he says: "It would indicate that the gas was inflammable. I would consider it unsafe to open my lamp when blue flame shews." From this and other evidence given I find that there was for a considerable time before the explosion on that morning, some three hours, gas to a dangerous extent in the upper part of chute No. 1, seam 4, where Daye was working. It was there at 8.30 or 9o'clock when Flies' lamp was extinguished by it, and it was there between 11 and 11.30, "nearer 11 than 11.30," when Dufort was there. It was admitted by Emerson, a pit boss in the mine, that when "blue flame" shews there is danger, so much so that men would not be allowed to go in.

By rule 1 of sec. 39 (Coal Mines Ordinance), "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places . . . of such mine . . . shall be in a fit state for working and passing therein." On the foregoing evidence it is impossible to find that this rule was observed, for the gas was not so "diluted and rendered harmless" as thereby required, and an

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"adequate amount of ventilation" was not "constantly produced," as required by that rule. Mr. Little, defendants' manager, admitted that this mine was one in which "inflammable gas had been found within the preceding twelve months" before the 13th June, 1900, and by rule 3 there should be one inspection at least every 24 hours (and if two shifts are working once in every 12 hours) by a "fire-boss." That does not mean, as I take it, that having complied with this rule (had it even been complied with) there was no further duty required of the company. The adequate ventilation is to be "constantly produced" etc. (Rule 1), so that while it may be that the chute 1, seam 4, was early in the morning, say about 5 o'clock, in safe condition, that was not evidence that it was safe at 11.30. Mr Morris, who is described by Evans as "manager," was told about 9 o'clock that morning by Flies that there was gas there (meaning chute No. 1, seam 4), and his reply is worthy of note. He said, "there was no gas where I was going." This in effect seems to be equivalent to, "That is no concern of yours, there is no gas where you are going." Morris knew Flies' lamp had been extinguished. Had he then taken steps to improve the ventilation, or had he writhdrawn the men from the part so "found dangerous," (see Rule 7), the lives of eight human beings might not have been snuffed out less than three hours later. I may mention here that Evans had also complained of the ventilation on the 10th June. Emerson, a pit boss, and acting fire boss, says there was gas reported on the 11th. So that it cannot be said that the evidence of gas in that chute was a sudden thing, an unusual thing, a matter of which the officers in charge of the mine were unaware, or had not time after becoming aware of it to remedy the condition or withdraw the men. There was no reason, too, why it should have been considered not unreasonable or surprising that the gas should be there to an unsafe extent. The crosscuts two and three had not been cut through to communicate with chute No.2, Flies says, and there is no

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contradiction, that if these crosscuts had been cut through to the adjoining chutes the air would have been better in No. 1. Crosscut No. 3 was cut through after the explosion, and then he says the air was better; he could not smell gas there after that. Emerson tells us that chute No. 1 was intended to be continued to form an air passage, but "whether it was to connect direct with the open air or not" he didn't know. He tells us also that after the explosion a tunnel was driven from some underlying seam at right angles to the stratum of coal to seam 4, and he knew of no reason why this might not have been done before. Dufort also speaks of this tunnel to improve the ventilation. Knowing as they must or ought to have known that this was a chute to which there was no outlet at the top or at the sides after passing crosscut No. 1, and therefore the only mode of ventilation was by the brattice system which Inspector Evans condemns except as an auxiliary means of ventilation, it was the duty of the company and its officers in charge to take more than ordinary precautions to see that the air was in a safe condition, reasonably safe. Emerson tells us that two hours may change a safe condition to an unsafe one; yet there was no inspection for more than twice two hours, not even after Morris, the manager, had been notified by Flies, about three or four hours prior to the explosion. It is the duty of those in charge of dangerous works where human beings are risking their lives, even apart from any legislation on the subject, a fortiori where their duties are so provided, to take a high degree of care that the conditions are made reasonably safe: Lord Herschell's judgment in *Smith* v. *Baker*,[8] cited by DAVIES, J., in *Grant* v. *Acadia Coal Co.*[9] The maxim volenti non fit injuria does not apply in case of breach of duty imposed by statute. In *Groves* v. *Lord Wimborne*,[10] the

[8] 60 L. J. Q. B. 683; (1891) A. C. 325; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660; [9] 32 S. C. R. 427. [10] 67 L. J. Q. B. 862; (1898), 2 Q. B. 402; 79 L. T. 284; 47 W. R. 87.

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doubts cast on *Gray* v. *Pullen*,[11] by Lord Chelmsford in *Wilson* v. *Merry*,[12] are here declared to be a mere dictum of no authority. RIGBY, J., says: "Where an absolute duty is imposed upon a person by statute it is not necessary in order to make him liable for breach of that duty to shew negligence." See also *Baddeley* v. *Earl Granville*.[13] It is clear to my mind, reading Evans's evidence and the other evidence adduced, part of which I have specially referred to, that the defendants did not discharge their duty, either imposed by the Ordinance or apart from the Ordinance, the duty they owed to the men employed there, and that it was due to their negligence in not discharging that duty that there was the dangerous and explosive condition of the gas which prevailed in the upper part of chute No. 1, seam 4, on the 13th June, and so far as they were guilty of a breach of the duty imposed by the Ordinance they are liable without proof of negligence.

There is evidence of only one inspection during the 24 hours, and also that there were two shifts working in a part of this mine, in the gangway, No. 4 seam (Emerson's evidence). Rule 3 requires an inspection every 12 hours in that case; or if this cannot be done, withdrawal of the men (rule 7).

Rule 3 further requires that the inspection shall be by a "fire boss," and "fire boss" means "a fire boss holding a certificate as such under the provisions of the Ordinance." Sec. 2 (10) ch. 16 C. O. The evidence is that the only inspection was made by Charles Emerson who does not "hold a certificate as" a fire boss. The result of this is that there was no inspection as required by Rule 3. Emerson appears to hold a certificate as pit boss, and he tells us that a pit boss is higher than fire boss, and requires to have all

[11] 5 B. & S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257.
[12] (1868) L. R. 1 H. L. Sc. 326; 6. Macph. H. L. 84; 2 Paterson Sc. App. 1597. [13] 56 L. J. Q. B. 501; 19 Q. B. D. 423; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822.

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the qualifications of a fire boss and somethiug in addition. He also says that he "could have got a certificate as fire boss." Well, the ordinance has provided who shall decide who is entitled to a certificate as fire boss—and it is not the applicant who is to so decide. Emerson says he was acting as fire boss. But s. 21 of the Ordinance says no one must act as pit boss or fire boss "unless he is the holder of a certificate issued by the board authorizing him to act in such capacity." It would appear even from Emerson's own evidence that he was not entitled to even the certificate he holds, for s. 20 (3) requires as one of the conditions that the applicant produce a certificate from the manager of the mine in which he is employed stating that he is filling the position of pit boss or fire boss. Now he could not have obtained a certificate of that kind because it was not as pit boss that he was employed at the time of or prior to his application. See his own evidence on this point.

This, however, may not be material; I merely mention it en passant. The fact, however, is that he held no certificate as fire boss, and it is not sufficient to say that he held a certificate of higher grade, for the Ordinance Rule 3 does not say "a fire boss or person holding a certificate of higher degree." The inspection on the morning of 13th June was a matter of great importance. Who is to say that, had the Ordinance been complied with, a duly authorized 'fire boss' might not have detected the dangerous character of the gas, if it were dangerous at that time, and for want of the inspection required by law we cannot say how the gas was early on that morning when Emerson assumed to inspect it. Here, then, was another breach of the duty cast by the Ordinance.

There is evidence in Dufort's testimony pointing to an obstruction to the ventilation in chute 1 by the putting up of boards to stop the coal sliding down the chute. The obstruction caused by a miner piling up the coal he is taking out and

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by use of wings made of boards to guide the coal to the centre of the chute, "thus obstructing the circulation of air," is one of the six causes enumerated by Emerson for the change of safe air to unsafe air in two hours, and from Dufort's evidence this stopping "by boards" would seem not to have been an isolated occurrence but a matter of practice. Now this would be a negligent act by a servant of the company, and one in the course of his employment, and for which the defendants would be responsible.

Dealing with the safety lamps: These were furnished by the defendants for use by the miners, and with the defendants' knowledge that this was a gas producing mine where it was necessary to use safety lamps, it was their duty in supplying such lamps, knowing they were to be used in that kind of a mine, to furnish the best that could be had, and at least lamps that would be reasonably safe—they were bound to use a high degree of care in the kind of lamp so supplied. Not only was this a duty towards the miners to whom they supplied it, but even in a higher degree to the other persons who might lawfully come in and upon the premises. Now Rule 8 requires, under the circumstances there mentioned, that "no light other than a locked safety lamp shall be allowed and used, and in any part of a mine in which safety lamps are required to be used they shall not be used until they have been examined and found secure and securely locked. The only evidence before me on this point is that of Emerson. He says: "Men began coming for lamps. I handed out the lamps for this particular district. They were all locked (after being lighted by the lamp boss) before being handed to the men." He does not say by whom they were locked—by himself or by the lamp boss who lighted them. If by the latter the witness could hardly tell how securely they were locked—and he does not in fact undertake to say they were "securely" locked, and he does not say the lamps were examined and found "secure" by any one. There is no evidence

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that there was a "competent" (or any) person . . . appointed for the purpose of examining a safety lamp immediately before being taken into the works for ascertaining it to be (a) secure and (b) securely locked, and there is no evidence that any one made such examination on the morning of the 13th of June, 1900. Again "securely locked" must mean something more than merely "locked," and it seems to mean something better—more secure—"in the way of a lock" was required than on an examination of exhibit No. 3, I find as already stated to be the device which takes the place of a lock. From the whole of Rule 8 it is a fair interpretation that the locking device must be something that cannot be opened even intentionally by the miner using it, except by a key or contrivance of a like nature. A "lock" that can be opened with a straight nail or wire, or tooth pick, or bit of hard wood, would not be entitled to the name of a "lock" within the meaning of the rule. The lock is to be a safeguard, not only against blows or falls or other accidents of a similar nature, but as against the wilful acts of the miner himself—for he is not to have in his possession a key or contrivance for opening it (rule 8). Whether the locks of other safety lamps in the defendants' mine may have been one of the two that the defendants say caused the explosion is in evidence (exh. 3), and it matters little whether this was the one that (on defendants' theory) was opened to light or be relighted, for unless this one could be opened there would be no intelligent object in opening the other. I think this particular lamp was not provided with a secure lock, and there was negligence in the company in furnishing the miner with this lamp if it was originally as it now is, or if worn loose from use, there was negligence in respect of rule 8. Anyone would at once say (apart from rule 8) that a company that furnished a miner with, say matches, to take into the mine would be negligent, even though the matches were capable of being lighted only by using some process a little different

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from the ordinary one, or exceptionally difficult to light, but which nevertheless might be lit by a simple device which any miner could obtain possession of in the mine. And that is what I find to be the nature of the alleged "lock" on exhibit 3. There is the evidence of Flies also that there is a better lamp in Europe, one so constructed that any attempt to open it extinguishes the light. Opening this lamp will not extinguish the lamp.

Had the lamp been properly locked and examined as required by rule 8, I am of opinion that the opening of the lamp to light another lamp was not an act done "in the course of the employment." *Limpus* v. *London Gen. Om. Co.*,[14] particularly Lord Blackburn's judgment, also *Englehart* v. *Farrant*,[15] per Lord Esher at p. 245; *Ward* v. *The General Omnibus Co.*[16] see also *Storey* v. *Ashton*,[17] *Mitchell* v. *Crasweller*[18] of the miner who would do such a thing, for it was against his instructions, and would be contrary to rule 8 and would be an illegal act done for the miner's own private ends, or to convenience another miner and save him a journey down the chute to find some one who had authority to relight the lamp in a secure place. The miners in this chute were working by the piece and not by the day, and loss of time would prejudice the miner, not the defendants, and on the authorities I think the employer would not be responsible for such an act. I am assuming, however, contrary to the fact, that there was no negligence in respect of the lamp or non-compliance with rule 8. Had the explosion been due to the opening, as suggested, of the lamp and if such act had been done by a servant in the course of his employment, I think there would be no question of the defendants' liability by reason

[14] 1 H. & C. 526; 32 L. J. Ex. 34; 9 Jur. N. S. 333; 7 L. T. 641; 11 W. R. 149. [15] 66 L. J. Q. B. 122; (1897) 1 Q. B. 240; 75 L. T. 617; 45 W. R. 179. [16] 42 L. J. C. P. 265; 28 L. T. 850. [17] 10 B. & S. 337; 38 L. J. Q. B. 223; L. R. 4 Q. B. 476; 17 W. R. 727. [18] 13 C.B. 237; 22 L. J. C. P. 100; 17 Jur. 716; 1 W. R. 153.

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of such acts. Other acts, however, of carelessness or negligence, carelessness in locking or examining the lamps, neglect to close the doors or traps in the bulkheads, negligence in obstructing the passage of air by piling coal or using boards as already referred to, all these and such like acts would be acts done in the course of the work, and would be the negligent acts of servants of the defendants for which they would be liable, being done in the course of their employment.

I find that there was gas in dangerous and explosive quantity and condition in the upper end of chute No. 1, seam 4, on the morning of the 13th June, 1900, at the time of the explosion, and for some two or three hours previously, and that this was due to the negligence of the defendants, and I also find that the defendants did not do their duty and were guilty of a breach of their duty, as imposed by rules 1, 3 and 8, or either or any of them. But the presence of gas in dangerous or explosive condition would not have caused the damage—the explosion—had not in some way flame been brought in contact with it. If the bringing of flame so in contact with it was owing to a breach of duty and negligence of or attributable to the defendants, then they would certainly be responsible for the effective cause of the death of Prosper Daye.

But assuming without deciding so that the defendants were not responsible in any way for the bringing of a flame in contact with the gas, but that this was solely and wholly the fault of a third party, a miner—or, say, a stranger—still the defendants would be liable.

Burrows v. *March Gas and Coke Co*,[19] affirmed on appeal; *Illidge* v. *Goodwin*,[20] *Myers* v. *Sault Ste Marie Pulp and Paper Co.*,[21] C. J. Armour's judgment.

"The fault of a mere stranger, however much it may contribute to the injury, is no defence to one whose negli-

[19] 41 L. J. Ex. 46; L. R. 7 Ex. 96; 26 L. T. 318; 20 W. R. 493.
[20] 5 Car. & P. 190. [21] 3 O. L. R. 600.

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gence helped to bring the accident about." Shearman & Redfield on Negligence, 27, 10.

Clark v. *Chambers*;[22] *The Bernina*,[23] cited in *Myers* v. *Sault Ste. Marie P. & P. Co*, *supra* *Engelhart* v. *Farrant*,[15] L. J. Lindley's judgment in *The Bernina*,[23].

The liability of a person for non-performance of a statutory duty is established by cases such as *Pullen* v. *Gray*, *Hardaker* v. *Idle District Council*.[24]

I find that the effective and proximate cause of the explosion and the death of Prosper Daye was the presence of explosive gas in dangerous and unsafe quantity where Daye was working in the defendants mine at time of the explosion and prior thereto on the morning of June 13th, 1900, and that this was due to the fault and negligence of the defendants and their breach of duty imposed by the Ordinance and that the plaintiff is entitled to a verdict against the defendant company for damages proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit this action has been brought. These are the plaintiff herself as wife of the deceased and their six children. How much should their damages be in the aggregate? It was admitted and agreed at the trial between counsel for both parties, and was, I think, warranted by the evidence, that the deceased Prosper Daye was earning $70 a month. In the Workman's Compensation Act, 1897, in England, in the schedule it is provided where the deceased leaves any dependents wholly dependent upon his earnings the compensation shall be a sum equal to his earnings durings the three years preceding the injury. If I were to consider that as a fair basis the damages should be $2,520, and this is about the amount I had in mind, taking into account the dangerous character of Daye's occupation, and that the rate of wages earned was no doubt paid having regard to the

[22] 47 L. J. Q. B. 427; 3 Q. B. D. 327; 38 L. T. 454; 26 W. R. 613; [23] 56 L. J. Adm. 38; 12 P. D. 36; 56 L. T. 450; 35 W. R. 214; 6 Asp. M. C. 112. [24] 65 L. J. Q. B. 323; 1896 2 Q. B. D. 335.

danger and character of the work. Daye was a healthy man of 39 years of age (Mrs. Daye's evidence) at the time of the explosion, and according to the most approved tables of longevity his expectation of life, apart from the special danger of his employment, would be some 27 years. His chances of life as a coal miner would, I have no doubt, be very much less than that, and as he grew older his earning powers would diminish. Judgment. McGuire, C.J.

I think $2,500 would be a reasonable amount of damages and I assess the damages at that sum.

I am not clear whether under our Ordinance I would apportion this among the persons for whose benefit the action has been brought. There is no express direction as to apportionment in our Ordinance as there is in England and Ontario and as there was in Lord Campbell's Act, but the words "resulting from such death to the parties respectively" in sec. 3 of ch 48 C O. seem to point to distribution.

If I am right in this view I shall now distribute—The eldest child, a boy, is 17 years old and has been earning $1.25 a day, and is therefore presumably self supporting; the second child, also a boy, has been earning 75 cents a day for two months. The four other children, so far as the evidence shews, have not been earning, and are in fact too young to earn anything, the youngest being only four years old.

I would apportion or divide the verdict as follows:

To Mary Daye, the widow of deceased Prosper Daye.	$ 600
To Horace Daye, the eldest son of said deceased	100
To Bernard Marie Joseph Daye, the next eldest son of said deceased	200
And to the four other children of said deceased, namely, Adele Joseph Daye, Prosper Daye, Alexander Daye and Auguste Daye, the sum of $400 each, making for these four	1,600
	$2,500

Judgment.

McGuire,CJ.

This distribution or apportionment to be subject, so far as apportionment is concerned, to further order of Court or Judge upon motion or petition on behalf of any of the foregoing persons, the widow or children aforesaid, and if it should be held that I sitting in place of a jury or as Judge should not apportion the damages among said several persons, with power to a Judge or Court to direct the whole sum to be paid to the plaintiff or other persons on such terms as may be just.

The said $2,500 is to be paid into Court to the credit of the person or persons entitled to the same, and be paid out upon order of a Judge.

The plaintiff is to be paid by the defendant company the costs of this action, i.e., the verdict is for the plaintiff with costs.

Appeal.

The defendant company appealed.

The appeal was heard at Calgary 3rd July, 1903.

Argument.

R. B. Bennett, for the appellant company. The evidence does not establish that the respondent was the wife of Prosper Daye or that the children were the children of the respondent and Prosper Daye. "Child" under Lord Campbell's Act, 9-10 V. c. 93, similar in terms to C. O. 48, does not include an illegitimate child. The onus lies on respondent to establish marriage by direct and positive testimony. The evidence before the Court creates no legal liability : *Myers* v. *Sault Ste. Marie Pulp and Paper Co.*[21] is distinguishable. The Coal Mines Regulation Ordinance (C. O. 1898 ch. 16) contemplates that in a gaseous mine explosions occur in spite of efforts of owners ; sections 25 and 39. To create liability non-compliance with statutory rules and regulations must be the direct and proximate cause of death ; *Groves* v. *Wimborne*,[10] *Hardaker* v. *Idle District Council*.[24] There is no proof of negligence within the scope of the most

recent decisions: *The Dominion Cartridge Company* v. *McArthur*,[25] *The Canadian Coloured Cotton Mills Company* v. *Kervin*,[26] *Grant* v. *The Acadia Coal Company*,[9] is distinguishable from the present one. Argument

C. F. P. Conybeare, K.C., for the respondent. Parol evidence is sufficient to prove marriage. Taylor on Evidence, 1897 p. 294. *Goodright* d. *Stevens* v. *Moss*,[26] *Kidd* v. *Harris*,[1] *Evans* v. *Morgan*,[27] *Collins* v. *Bishop*,[6] *Piers* v. *Piers*[4] *Fox* v. *Bearblock*,[7] *Doe A. Fleming* v. *Fleming*,[2] *Sichel* v. *Lambert*,[3] *Goodman* v. *Goodman*,[5] *Lyle* v. *Elwood*[28] The rule as to strict proof only applies in cases of divorce, bigamy and petitions for adultery. Phipson on Evidence, 1902, at p. 339; Taylor on Evidence, 1897, p. 172; Abbott's Trial Evidence, pp. 102, 103; *Rex* v. *Brampton*,[29] *Limerick* v. *Limerick*.[30] The proximate cause ot the accident was the pressure of explosive gas. There is evidence of appellant's knowledge and of non-complia nce with a statutory duty. Where there isevidence of breach of a statutory duty it is not necessary to prove negligence: *Grant* v. *Acadia Coal Company*,[9] *Grey* v. *Pullen*,[11] followed and approved in *Groves* v. *Lord Wimborne*,[10] *Baddley* v. *Lord Granville*.[13] *Smith* v. *Baker*,[8] per Lord Watson at p. 353. The company is liable if the accident was due to the wrongful act of another person in its employ: *Whitman* v. *Pearson*,[31] Whether the wrongful act was in the course of employment or not is immaterial: *Burrows* v. *March Gas and Coke Co.*[19] The respondents are liable if accident was due to negligence of a mere stranger: *Sheraman & Redfield on Negligence*,[32] 27, 10; *Myers* v. *Sault Ste. Marie P. & P. Co.*,[21] *Engelhart* v. *Farrant*,[15] *In re The Bernina*,[23] per Lindley, J., at pp. 84 and 93.

Judgment reserved.

[23] 31 S. C. R. at 398. [26] 29 S. C. R. 478. [27] Cowper, 593. [28] 2 C. & J. 453; 2 Tyr. 396. [29] 44 L. J. Ch. 164; L. R. 19 Eq. 98; 33 W. R. 157. [30] 10 East, 288; 10 R. R. 289. [31] 32 L. J. Mat. 92; 11 W. R. 503. [32] 37 L. J. C. P. 156; L. R. 3 C. P. 422; 16 W. R. 619.

Judgment.

[*15th January, 1904*]

Scott, J.

SCOTT, J.:—I am of opinion that this appeal should be dismissed with costs.

The marriage of the plaintiff with the deceased Prosper Daye is sufficiently established by her evidence.

For the purposes of an action such as this, strict proof of the marriage is not required. It may be proved by parol testimony: (Taylor on Evidence, page 416), or by the evidence of the parties to it: *Goodright* d. *Stevens* v. *Moss*,[26] or even by repute: *Collins* v. *Bishop*.[6] I cannot see that the fact that it is a foreign marriage affects the question of the proof, as the *lex fori* governs upon all questions of proof: Taylor on Evidence, p. 49.

There is in my view sufficient evidence to support the finding of the trial Judge that there was gas in dangerous and explosive quantity and condition at the time of the explosion, and for some time previous thereto in the place where it occurred, that this state of affairs was due to the negligence of the defendant Company and that such negligence was the effective and proximate cause of the explosion, which resulted in the death of Prosper Daye. It appears to be well settled that these findings are sufficient to render defendant company liable. If the ignition of the gas resulted from the act of a fellow servant, the maxim *respondeat superior* would apply by virtue of a recent ordinance. If from the act of a stranger or trespasser, defendant company would be liable under the principle laid down in *Clark* v. *Chambers*,[22] (p 337). See also *McDowall* v. *Great Western Railway Company*.[33]

The application for a new trial on the ground of surprise was abandoned on the hearing of the appeal.

SIFTON, C.J., WETMORE, J., NEWLANDS, J., and HARVEY, J., concurred.

[33] 72 L. J. K. B. 652; (1903) 2 K. B. 331; 88 L. T. 825.

SAWYER AND MASSEY CO. v. WADDELL.

Land Titles Act—T. R. P. Act—Execution—Equitable mortgage —Unregistered charge—Priority.

Notwithstanding that by the Land Titles Act, 1894 (†), differing in this respect from the Territories Real Property Act, an execution is declared to be an "instrument," the principle established in *Wilkie* v. *Jellett* [1] still applies; and therefore an unregistered equitable mortgage takes priority over a writ of execution against lands delivered to the Registrar subsequently to the creation of the equitable mortgage.

[NEWLANDS, J., *March 25th, 1904.*

Statement.

By agreement in writing dated 20th March, 1899, defendants agreed to purchase from plaintiffs certain threshing machinery for $1,500, and on 19th October, 1899, they entered into another written agreement to purchase machinery from plaintiffs for the sum of $377.05. Each of the agreements contained the following clause:

. . . "And the purchasers hereby further agree with the said company that they shall have a charge and specific lien for the amount of the said purchase money and interest, or the said amount of the said purchase price less the amount realized by the said company after deducting the costs, charges and expenses aforesaid, should they take and resell the said machinery under the foregoing powers or any of them, whether such amount be considered liquidated damages or the purchase money or price or the balance thereof upon the said lands or any other land the purchasers now own or shall hereafter own or be interested in until the said purchase money and any and all notes or renewals thereof shall have been fully paid, and the said lands are hereby charged with the payment of said purchase money, notes and all renewals thereof and interest as herein mentioned. . . ."

† 57-58 Vic. (1894) c. 28.

[1] 2 TERR. L. R. 133; 26 S. C. R. 283.

Statement

The machinery was delivered to defendants, who paid part of the purchase price ; and this action was brought to recover a balance of $665.45 due under the two agreements, and also for an order for sale of defendants' lands under the liens and for the application of the proceeds in discharge thereof. On 21st April, 1903, an order was made for judgment against the defendants for the amount of plaintiff's claim and costs, reserving, however, the plaintiff's rights should they see fit to further prosecute the action. Judgment was entered and writs of execution issued next day, pursuant to the order ; and on 18th of January, 1904, a summons was granted for the defendants to shew cause why the lands of the defendant W. J. Waddell should not be sold (subject to a prior registered mortgage), and the proceeds applied in satisfaction of the plaintiff's judgment. The Registrar's certificate as to executions, filed, showed in the order of their date, first, the plaintiff's execution herein, and second, an execution for $189.91, wherein the Jones Stacker Co. were named plaintiffs, and the defendants herein, defendants.

On the return of the summons defendants failed to appear, but the Jones Stacker Co., the subsequent execution creditor, showed cause.

Argument.

D. J. Thom, for plaintiffs, cited Robbins on Mortgages, ch. 7, sec. 1, par. 2, and *Eyre* v. *McDowell*.[2] The agreements in question created an equitable mortgage : *Wilkie* v. *Jellett*.[1] The mortgage, being prior to the execution, took precedence notwithstanding the Land Titles Act. In Errat's case, decided in *Wilkie* v. *Jellett*,[1] the execution creditor had given only an agreement for sale of the land, and not a transfer, yet the execution was held to come in after the agreement.

Alex. Ross, for the subsequent execution creditors, submitted that *Wilkie* v. *Jellett*,[1] was no longer applicable. When

[2] 9 H. L. C. 619.

that case was decided the Territories Real Property Act was in force, and an execution took effect as a caveat only; but since the passing of the Land Titles Act, 1894, every writ of execution has become an "instrument" under the Act, while, by sec. 36, all instruments are to take priority according to the date of their registration, and not in accordance with the date of their execution. Argument.

[*March 25th, 1904.*]

NEWLANDS, J.—The plaintiffs obtained judgment in this action under an order of Mr. Justice Richardson dated 21st April, 1903, for $665.45, with interest and costs. The order reserved the rights of the plaintiffs should they see fit to prosecute the action on the further grounds set out in the statement of claim. Judgment was entered and execution issued on April 22nd, 1903, under this order. Judgment.

The plaintiffs now apply under this order for the sale of the land under a lien which they claim to have, which is set out in sec. 5 of their statement of claim, free from an execution filed subsequent to the date of their lien. Section 5 is as follows:

"5. To secure the payment of the said chattels the plaintiffs by the said contract created a further charge or lien on the land of the said defendants hereinbefore more particularly mentioned, which said lien is still in full force and effect," and they pressed for "a direction of this Honourable Court directing the sale of the said lands, and for the application of the proceeds of the sale on the payment of the said notes, and the discharge of the said lien."

The lien claimed is set out in the agreement referred to in the following words:

"And the purchasers hereby further agree with the said company that they shall have a charge and specific lien for the amount of the said purchase money and interest, or the

Judgment. Newlands, J.

said amount of the said purchase price less the amount realized by the said company after deducting the costs, charges and expenses aforesaid, should they take and re-sell the said machinery under the foregoing powers or any of them whether such amount be considered liquidated damages or the purchase money or price or the balance thereof upon the said lands or any other land the purchasers now own or shall hereafter own or be interested in until the said purchase money and any and all notes or renewals thereof shall have been fully paid, and the said lands are hereby charged with the payment of said purchase money, notes and all renewals thereof and interest as herein mentioned."

This language in my opinion creates an equitable mortgage on the land described in this document. In Robbins on Mortgages, p. 50, it is stated, "any agreement in writing and properly signed, however informal, by which any property real or personal is to be a security for a sum of money owing or advanced, is a charge and amounts to an equitable mortgage," and the defendant having parted with an equitable interest in his land that interest can not be affected by an execution subsequently issued against this defendant. The authorities on this question are all collected in the decision of Mr. Justice McGuire in *Wilkie* v. *Jellett*. [1]

It was argued on behalf of the execution creditor that the decision in *Wilkie* v. *Jellett*, did not apply on account of the changes made in the Land Titles Act. Under the Territories Real Property Act, under which that case was decided, an execution took effect only as a caveat, while under the Land Titles Act it is an "instrument," and by sec. 36 of that Act all instruments are to take priority according to the date of registration, and not according to the date of execution. Section 92, however, provides what the effect of an execution is to be. No land is to be affected by it until it is received by the Registrar, but after that receipt no transfer,

&c., executed by the execution debtor is to be effectual except subject to the rights of the execution creditor under the writ, and the registrar on granting a certificate of title, etc., shall by memorandum upon the certificate of title express that such certificate is subject to such rights. As the execution when issued did not affect the equitable interest of the plaintiffs and the execution creditor had no right as against them, they are not given any more by the Act. I think, therefore, that the decision in *Wilkie* v. *Jellett* applies equally under the present Act as the former Act. Judgment. Newlands, J.

Even if this decision did not apply this execution is not yet registered, as is shewn by the abstract of title produced. Under sec. 35 an instrument is only registered when a memorandum of it is made on the certificate of title, and this memorandum is only made in the case of an execution when an instrument signed by the execution debtor is produced for registration, and from the abstract no such instrument has been produced for registration.

I therefore hold that the plaintiffs have a lien on the land described, and that they are entitled to a sale of it subject only to the mortgage of R. W. Gibson, registered as No. 36467, after six months, with costs.

REPORTER :

C. H. Bell, Advocate, Regina.

MASSEY-HARRIS v. SMITH.

Statute of Limitations—Part Payment—Re-sale of Goods the subject of conditional sale.

Plaintiff sued for the balance due upon two lien notes which were more than six years overdue at the time of suit. He had retaken possession of the goods for which the notes were given and had resold them, crediting defendant with the amount obtained.

Held, not to be a payment by the party chargeable or his agent, sufficient to take the case out of the Statute of Limitations.

[NEWLANDS, J., *June 13th, 1904.*

Statement

Plaintiffs sued under the Small Debt Procedure for the balance due upon two lien notes, one for $30 given for a plow, and the other for $39, given for a binder. The notes had become due more than six years before action brought, and no acknowledgment or payment on account of the debt was shewn to have been made by the defendant. The plaintiffs had, however, retaken possession of the goods for which the notes were given, and had resold them less than six years before commencement of the action, the proceeds being applied in reduction of the debt sued upon. Defendant entered a dispute note, setting up the Statute of Limitations (21 Jac. I. ch 16, and Cons. Ord. 1898, ch. 31). Plaintiffs obtained a summons to strike out the dispute note and for judgment, contending that the money obtained on the resale was virtually money paid on behalf of the defendant, and was therefore sufficient to take the case out of the statute.

Argument.

D. J. Thom, for plaintiff.

W. M. Martin, for defendant.

Judgment.

NEWLANDS, J.—Under a lien note the plaintiffs seized the property for which the note was given, sold same, and applied the proceeds in part payment of the note. They now claim that these circumstances take the note out of the Statute of Limitations.

Judgment. Newlands, J.

A payment to take the case out of the statute must be made by the party chargeable or his agent: *Chinnery* v. *Evans*.[1] It was not so made in this case, as the plaintiff only took what was his own under the lien note. This is a similar case to that of a mortgagee entering into possession, receiving the rents, and applying them in payment of interest. It was held in *Cockburn* v. *Edwards*,[2] that "the receipt of rents by the mortgagee is not a payment by the mortgagor or by any one on his behalf. The mortgagee receives rents that are his own, subject of course to the right of redemption; he is not receiving interest or principal, but receiving the rents of property which belongs to him, subject to the right of the mortgagor to redeem it."

The summons for judgment is therefore discharged with costs.

[1] 11 H. L. C. 115; 4 N. R. 529; 10 Jur. N. S. 855; 11 L. T. 68; 13 W. R. 20; [2] 18 C. D. 457; 51 L. J. Ch. 46; 45 L. T. 500; 30 W. R. 116 C. A.

VIENNA v. ROSZKOSZ

School Assessment Ordinance—Meeting of trustees—Recording proceedings—Invalid assessment.

A rate of taxation not struck at a regular or special meeting of a school board, but at an informal meeting of which no minutes were kept, was *held* to be invalid.

Quære, whether the rate would have been validly struck, even if the meeting had been a regular or special meeting, if a proper minute were not then made. [SCOTT, J. *September 15th, 1904*

Statement.

Trial of action brought by the trustees of the Vienna School District against the defendant to recover amount alleged to be due for arrears of taxes for the year 1903. Among the defences raised was that no rate had been struck by the trustees for that year. The facts sufficiently appear from the judgment.

O. M. Biggar, for plaintiff.

C. de W. Macdonald, for defendant.

Judgment.

Scott, J.

[*15th September, 1904.*]

SCOTT, J.—The secretary of the district, who gave evidence for the plaintiffs, produced the minute book of the district which had been kept by him and which contains the only record of the proceedings of the board There is no entry in it containing any reference to a rate having been struck for that year. The secretary states, however, that a Court of Revision was held, though no minute of it was entered in the books; that an estimate of the expenditure for the year was made by the trustees, and they found that even the assessment of 10 cents per acre would not be sufficient to provide for it; that there were informal meetings of all the trustees between 28th May, 1903, and 15th January, 1904, of which no minutes were entered, and that at one of these meetings, which he thinks was held in or about August, the rate of assessment was agreed upon.

Section 12 of the School Assessment Ordinance (c. 30 of 1901) provides that after the expiration of 15 days from the posting of the roll, if no notices of appeal have been given, or after all appeals have been decided, the board shall make an estimate of the probable expenditure of the district for the current year, and shall strike such a rate not exceeding 10 cents per acre on the number of acres of land in the district shewn on the assessment roll as shall be sufficient to meet such probable expenditure.

Section 90 of the School Ordinance provides that every regular or special meeting of the board shall be called by giving two clear days' notice in writing, but that the board may by resolution fix the day, place and hour for holding regular meetings, in which case no notice of such meetings shall be necessary; also that the board may, by unanimous consent, waive notice of meeting and hold a meeting at any time, which consent shall be subscribed to by each member of the board and shall be recorded in the minutes of the meeting.

Judgment.

Scott, J.

Section 91 provides that no proceeding of any board shall be deemed to be valid or binding which is not adopted at a regular or special meeting at which a quorum of the board is present.

Further provisions of the last mentioned Ordinance which may be referred to are s.-s. 4, s. 91, which requires the board to keep a record of the proceedings of each meeting, signed by the chairman and secretary, and s.-s. 1 of s. 97, which requires the secretary to keep a full and correct record of every meeting in the minute book provided for that purpose, and to see that the minutes, when confirmed, are signed by the chairman.

The fixing of the rate of taxation for the year is one of the more important acts of the board, and it appears to me that in order to render it valid some record of it should have been made. I doubt whether a mere verbal understanding, arrived at by all the members of the board, that a certain rate should be struck, even if it were arrived at during a regular or special meeting duly held, would be sufficient in the absence of any such record. The evidence shews, however, that if any rate was struck or agreed upon it was not struck or agreed upon at a regular or special meeting, and, therefore, by virtue of s. 91 it is an invalid proceeding.

I give judgment for the defendant with costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

BISHOP v. SCOTT

Practice—Service out of jurisdiction—Contract by correspondence—Non-resident—Sale of land within the jurisdiction—Damages—Rule 18.

A contract made by correspondence between a resident purchaser and a non-resident vendor for sale of land in the Territories—the acceptance of the vendor's offer to sell having been mailed in the Territories—is one which, according to the terms thereof, ought to be performed within the Territories.

In an action for damages for breach of such a contract—

Held, that service out of the jurisdiction was properly allowed.

The question, where it is doubtful, whether there was a completed contract should not be determined on an application to set aside the order for service *ex juris*.

[SCOTT, J., *September 24th, 1904.*

Statement. Application by defendant to strike out writ of summons and for disallowance of all proceedings in the action as one in which an order for service out of the jurisdiction, under s. 18 of the Judicature Ordinance, should not have been made.

The facts sufficiently appear from the judgment.

Argument. *C. F. Newell*, for the motion.

J. R. Boyle, contra.

[*24th September, 1904.*]

Judgment. SCOTT, J.—In his statement of claim the plaintiff, who resides in Edmonton, alleges that the defendant, who resides in Hamilton, Ont., contracted to sell to him a certain lot in Edmonton upon certain terms as to the price and the terms of payment thereof; that the contract was made and concluded by correspondence between the parties by means of certain letters written and mailed by them, the plaintiffs being written and posted at Edmonton, and those of the defendant at Hamilton, Ont. The plaintiff claims damages for breach by the defendant of the contract in refusing to convey, as he alleges that the defendant has already conveyed the lot to another person.

Judgment.
Scott, J.

The correspondence is not set out in the statement of claim, but it is before me on this application. The material portion of it, so far as this application is concerned, consists of a letter written by the defendant to the plaintiff on 4th October, 1903, offering to sell the lot for $500 on certain terms of payment; a letter from plaintiff to defendant, dated 17th October, in which, after referring to defendant's offer and specifying the lot he says: "I accept your offer as stated and will forward you the agreement for sale on Monday;" a letter from the plaintiff to the defendant dated October 20th, enclosing the down payment under the agreement and an agreement for signature by the defendant, and a letter from defendant to the plaintiff, dated 28th October, repudiating the contract on the ground that it provides for the payment by the latter of the taxes to the end of 1903, and stating that he had received a letter from a Mr. Henry informing him that he had sold the lot for $500.

It was contended on behalf of the defendant that the contract is one which should be performed where he lived, as the purchase money must be paid to him there, and the transfer executed by him there or tendered to him there for execution.

The plaintiff's letter of acceptance of defendant's offer to sell having been mailed here by the former, the contract must be taken to have been made here. (See *Empire Oil Co.* v. *Vallerand*,[1] and *Household Fire Insurance Co* v. *Grant*.[2] Such being the case I cannot see that this case is distinguishable from *Reynolds* v. *Coleman*.[3] There the defendant, who resided in the United States, was sued for specific performance of a contract made by him in England with the plaintiff who carried on business there, to transfer to the plaintiff certain

[1] 17 P. R. 27. [2] 48 L. J. Ex. 577; 4 Ex. D. 216; 41 L. T. 298; 27 W. R. 858. [3] 56 L. J. Ch. 903; 36 Ch. D. 453; 57 L. T. 588; 35 W. R. 813.

Judgment.
Scott, J.

shares in an English joint stock company, and it was held by the Court of Appeal that the contract was one which ought to be performed in England.

Cotton, L.J., says:[3] "The contract was to transfer shares. It was said that such a contract might be performed by the defendants executing a deed of transfer in the United States. But that would not perform the contract. It would not be enough to execute in the United States or out of the jurisdiction a deed of transfer, because the transferor must deliver that deed of transfer to the transferee, that is to say, to the plaintiff, and having regard to the fact that the contract to transfer the shares was a contract made in England and with the plaintiff, who was at that time carrying on business in and resident in England, the contract in this case ought, in my opinion, according to its terms, to have been performed within the jurisdiction."

A distinction was sought to be drawn by defendant's counsel between a contract to transfer shares and a contract to convey lands, his contention being that in the latter case it would be the duty of the purchaser to tender a transfer for execution before seeking specific performance of the contract, and the transfer in this case would have to be tendered to the defendant at Hamilton.

Mooney v. *Prevost*[4] seems to imply that the omission to tender the transfer before action would, at most, be merely a question of costs of the action. But apart from that the plaintiff, in his statement of claim, alleges that the defendant refused to perform the contract, and has since conveyed away the lands. Also the correspondence put in by the defendant on this application shews that he did so refuse. It appears to me that, under these circumstances, the tender of a transfer to the defendant would have been an entirely useless and unnecessary proceeding.

[4] 20 Grant, 418.

Judgment.

Scott, J.

It was also contended by the defendant that the correspondence shews that there was no completed contract between the parties, and there being no contract there was not one which ought to be performed within the jurisdiction.

The ground of this contention is that plaintiff's acceptance of defendant's offer was conditional, viz., that the construction which must be placed upon the portion of the letter which I have quoted, is that the acceptance was subject to the defendant entering into the agreement for sale which plaintiff said he would forward, and that the agreement when forwarded contained conditions other than those stated in defendant's offer. A number of authorities were cited in support of this contention. Reference to them shews that the question is not free from doubt. Such being the case, and as the question is one which goes to the root of the action, I think I ought not to dispose of it on this application.

I dismiss the application with costs to the plaintiff in any event on final taxation.

REPORTER :

J. E. Wallbridge, Advocate, Edmonton.

THE KING v. PERRAS.

Sale of diseased horses—Scienter—Mens rea—Animals' Contagious Diseases Act, 1903—Evidence—Objections to.

Section 7 of the Animals' Contagious Diseases Act, 1903, provides "that every person who sells . . . any animal affected or laboring under any infectious or contagious disease . . . shall for such offence incur a penalty not exceeding $200."

Held, that knowledge on the part of the defendant that the animal sold was diseased was not necessary to make him liable to conviction. *Betts* v. *Armstead* [1] and *Pain* v. *Boughtwood* [2] referred to.

Objections to evidence discussed.

[SCOTT, J., *September 29th, 1904.*

Statement. Application for a writ of certiorari upon a conviction of the defendant for selling eight horses infected with mange. The grounds of the application sufficiently appear from the judgment.

Argument. *C. F. Newell*, for the motion.

O. M. Biggar, for the Crown, *contra.*

Judgment. SCOTT, J.—This is an application for the issue of a writ of certiorari to bring up a conviction made by R. Belcher and C. H. Wade, Justices of the Peace, on 26th April 1904, upon the information of W. H. McKee, whereby the defendant was convicted, "for that the said Joseph Perras, on the 4th day of February, 1904, at or near Morinville, in the North-West Territories, did sell to the said W. H. McKee certain animals to wit, eight horses infected by and labouring under an infectious or contagious disease, to wit, mange;" together with the information, process, depositions, evidence, minute of adjudication, and all other things touching the same.

[1] 57 L. J. M. C. 100; 20 Q. B. D. 771; 58 L. T. 811; 36 W. R. 720; 16 Cox C. C. 418; 52 J. P. 471. [2] 59 L. J. M. C. 45; 24 Q. B. D. 353; 62 L. T. 284; 38 W. R. 428; 16 Cox C. C. 747; 54 J. P. 469.

Judgment.

Scott, J.

The grounds of the application are :—

1st. That there is no evidence to shew that the appellant knew the horses sold by him were in any way diseased or affected with mange.

2nd. Nor any evidence to shew that all of the eight horses were so diseased or affected.

3rd. The Justices should have allowed the objection to the examination of C. H. Sweetapple on the following grou ds :—

(a) Part of the re-examination is on matters not mentioned in either the examination-in-chief or in the cross examination.

(b) The remainder of the re examination is not to explain any matters brought out on cross-examination.

4th. When W. H. McKee was recalled for the purpose of discrediting the evidence given by Henry Wolfe, the objection that the foundation for bringing evidence to discredit was not sufficiently laid, should have been allowed.

The conviction is made under s. 7 of "The Animals Contagious Diseases Act, 1903," which provides as follows:—

"Every person who sells or disposes of, or puts off, or offers, or exposes for sale, or attempts to dispose of, or put off any animal infected with or labouring under any infectious or contagious diseases, or the meat, skin, hide, horns, hoofs or other parts of an animal infected with or labouring under any infectious or contagious disease at the time of its death, whether such person is the owner of the animal or of such meat, skin, hide, horns, hoofs or other parts of such animal or not, shall, for every such offence, incur a penalty not exceeding two hundred dollars."

Judgment.

Scott, J.

It was contended, on the part of the defendant, that knowledge on the part of the defendant is a necessary ingredient of the offence, and that as there is no evidence that he knew that the animals were affected with mange, the conviction is bad.

The Act referred to is substituted for and repeals c. 69 R. S. C. s. 7 of which is similar to s. 7 of the present act, except that the former expressly provides that in order to constitute an offence the animal must be known by the person selling or attempting to sell or put it off, to be diseased.

In construing the amended section some weight must be attached to this important change in the definition of the offence. The change cannot be considered to be without meaning, and if not meaningless it appears to me that it can only mean and intend that such knowledge is to be considered as no longer an ingredient of the offence.

Again s. 6 of the present Act provides that any person who brings or attempts to bring in to any market any animal *known by him to be* infected with or labouring under any infectious or contagious disease shall, for every such offence, incur a penalty not exceeding two hundred dollars.

Here then is one section of a statute providing that certain acts done with respect to diseased animals by a person knowing them to be diseased shall constitute an offence, and another section immediately following it providing that certain other acts done with respect to such animals shall constitute an offence, no reference being made to the knowledge, on the part of the person doing the acts, of their diseased state.

To my mind this affords a strong indication of intention that, in offences under the latter section, such knowledge should not be a material element.

Betts v. *Armstead*[1] and *Pain* v. *Boughwood*,[2] which were cited by counsel for the prosecution on the argument, shew

Judgment. Scott, J.

that, although a penal clause in a statute may not expressly provide that knowledge on the part of the person charged shall not be an element of the offence, yet it may by implication have that effect.

As to the second ground :—

In my mind there was evidence to support the finding of the Justices, that all of the eight horses were diseased. It is true that only seven of them were examined by the veterinary surgeon and pronounced by him to be diseased, but McKee states that he had sold the other one, but that as soon as he found out what the disease was the purchaser bought the horse back and he (McKee) returned him his money.

As to the third ground :—

Upon refering to the depositions I find that upon the re-examination of the witness, Sweetapple, counsel for the prosecution, opened up new matter not touched upon in the cross-examination and that defendant's counsel objected thereto. I cannot see, however, that the defendant is in any way prejudiced by this.

It was undoubtedly in the power of the Justices to permit the witness to be recalled for the purpose of giving such new matter in evidence, and their allowing such new matter to be given in the re-examination has the same effect. The defendant might have been prejudiced if he had not been permitted to cross-examine upon such new matter, but it does not appear that such permission was applied for or refused.

As to the fourth ground :—

It appears from the depositions that after the horses were examined by the veterinary at Morinville, and about three weeks after the purchase from defendant, the veterinary and McKee went to the defendant's farm, near Morinville, where they saw Wolfe and had a conversation with him. So far

Judgment.

Scott, J.

as appears from the depositions, that was the only occasion upon which the three were together.

In his cross-examination Wolfe states that he did not tell McKee and Sweetapple that when defendant got those horses they had mange, nor that he told defendant that they had mange. In his evidence in reply McKee stated that when he was at defendant's farm he saw Wolfe, that the veterinary surgeon had most of the conversatson with him in his (McKee's) presence, and that Wolfe then stated that, as far as he knew, the mange was in the horses when defendant bought them. It is noted that counsel for the defendant objected to this question on the ground that a foundation for it was not sufficiently laid, and it is open to question whether the objection was not well taken, but even if the evidence were on that ground improperly admitted, I doubt whether that alone would justify me in quashing the conviction on that ground. In this case, however, owing to the opinion I have formed that it is unnecessary to prove that defendant was aware that the horses were diseased, the evidence objected to is, in my view, immaterial.

I dismiss the application with costs.

REPORTER :—

J. E. Wallbridge, Advocate, Edmonton.

RUMLEY v. SAXAUER.

Practice—Garnishee summons—Defect in affidavit—Irregularity—Rules 384 and 539.

Held, (1) that the affidavit of an advocate, which on its face shewed that he had no personal knowledge of the facts, and which did not contain a positive statement of an indebtedness by defendant to plaintiff, is not a sufficient affidavit upon which to issue a garnishee summons under Rule 384,* and a garnishee summons so issued was set aside.

(2) That a garnishee summons so issued cannot be treated as a mere irregularity so as to be waived under Rule 539† by taking fresh step.

[SCOTT, J., *30th September, 1904.*

Statement. This was an application to set aside a garnishee summons on the ground, among others, that the plaintiff's advocate, who made the affidavit upon which the garnishee summons issued, did not swear positively to the indebtedness of the defendant to the plaintiff.

Argument. *J. E. Wallbridge*, for the application.

C. F. Newell, for the plaintiff, contra.

Judgment. SCOTT, J.—This is an application to set aside the garnishee summons issued herein, the service thereof and all proceedings thereunder, on the ground, among others, that the plaintiff's advocate, who made the affidavit on which the summons issued, did not and could not swear positively to the indebtedness of the defendant to the plaintiffs as required by Rule 384.

The affidavit upon which the garnishee summons issued was made by C. F. Newell, who alleges that he is a member

* Set out in full in judgment.

† Rule 539. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

Judgment.

Scott, J.

of the firm who are the plaintiff's advocates and has a personal knowledge of the matters therein deposed to; that about February last the plaintiffs sent said firm the notes referred to in the statement of claim, that several times since that date said firm demanded payment of the balance due on the said notes by letters addressed to the defendant and that the defendant has not denied his liability therefor and the letters have not been returned by the postmaster; that from the notes and letters received from the plaintiffs he (the deponent) believes that the defendant is justly and truly indebted to the plaintiffs in the amount set out in the statement of claim, viz., $1,000.74, and that according to the best of his information and belief, the corporation of the village of Fort Saskatchewan, the proposed garnishee, is indebted to the above named defendant.

Rule 384 is as follows:—"Any plaintiff in an action for a debt or liquidated demand before or after judgment, and any person who has obtained a judgment or order for the recovery or payment of money, may issue a garnishee summons in the form or to the effect of form C, in the schedule hereto . . . such summons shall be issued by the Clerk upon the plaintiff or judgment creditor, his advocate or agent filing an affidavit.

(a) "Shewing the nature and amount of the claim or judgment against the defendant or judgment debtor, and swearing positively to the indebtedness of the defendant or judgment debtor to the plaintiff or judgment creditor."

(b) "Stating to the best of the deponent's information and belief that the proposed garnishee (naming him) is indebted to such defendant or judgment debtor."

Upon hearing the application, I held that if the defects relied upon could be treated as mere irregularities, I would dismiss the application on the ground of delay in making it, I reserved the question whether they could be so treated.

Judgment.
Scott, J.

I now hold that the garnishee summons was improperly issued, as the affidavit upon which it issued does not contain a positive statement that the defendant is indebted to the plaintiffs. The deponent does not appear to have any personal knowledge of any such indebtedness, and his belief as to its existence was founded upon communications received by him from the plaintiffs, and the fact that defendant made no reply to repeated demands upon him by letter for the payment of an amount claimed by the plaintiffs.

This falls far short of swearing positively to the indebtedness as required by Rule 384, and that such a positive statement is required there cannot, to my mind, be any reasonable doubt, as the rule itself draws a clear distinction between a positive statement and one founded upon information and belief. (Compare sub-rules (a) and (b).

Another objection raised by the applicant is that the affidavit does not shew the nature of the plaintiffs' claim. There appears to me to be some ground for this contention, as the affidavit merely states that the defendant is indebted in the amount mentioned in the statement of claim and omits to state that the indebtedness is that which is set out in the statement of claim. It is, however, unnecessary for me to decide that question.

The garnishee summons and all proceedings thereunder will be set aside. Cost of this application to be costs to defendant in any event on final taxation.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

IRELAND v. ANDREWS ET AL.

Foreign Companies Ordinance — Unlicensed company — Right of action of indorsee of note made to the company.

The Foreign Companies Ordinance, 1903 (c. 14 of 1903, 1st session), provides (s. 3), that no foreign company having gain for its object, or a part of its object, shall carry on any part of its business in the Territories unless it is duly registered under the said Ordinance, and imposes a penalty for breach of this provision; it further provides (s. 10) that any foreign company required by the said Ordinance to become registered shall not while unregistered be capable of maintaining an action or other proceeding in any Court in respect of any contract made in whole or in part in the Territories, in the course of or in connection with business carried on without registration, contrary to the provisions of s. 3.

Held, that an indorsee with notice of a promissory note made to a foreign company in the course of and in connection with business carried on in contravention of the above provisions, could not recover.

Plaintiff was the indorsee of a promissory note made by defendants in favour of The Sawyer & Massey Co., Ltd., to secure the price of certain threshing machinery. Defendants, with other defences, set up by the 3rd paragraph of their defence that the note in question was given to an unregistered foreign company engaged in selling machinery for gain within the Territories by resident agents, of which facts the plaintiff had notice when he became the holder of the note, and that they would rely upon the provisions of the Foreign Companies Ordinance.

On argument of the question of law thus raised, the facts above set out were admitted.

Held, a good defence in law.

[NEWLANDS, J., *December 15th, 1904.*

Statement

This action was brought upon a promissory note made by defendants in favour of the Sawyer & Massey Company, Limited, to secure the purchase price of certain threshing machinery, and which said note had been endorsed to the plaintiff before action brought.

Statement.

The statement of defence filed alleged that defendants did not make the note in question; that if they did make the note, the goods for which it was given were not delivered, and the note was endorsed to the plaintiff without consideration and with notice of the non-delivery, and when overdue; and "3. The said Sawyer & Massey Company are a foreign company engaged in the sale for gain of separators and engines and horse-powers in the North-West Territories by resident agents, and are not a registered company under the provisions of the Foreign Companies Ordinance, being ch. 22 of the Ordinances for the North-West Territories for 1901, and the said note was endorsed to the plaintiff with notice of the facts mentioned in this paragraph, and the defendants will take the benefit of the provisions of the said Foreign Companies Ordinance."

The plaintiff obtained a chamber summons to strike out this defence upon the grounds that it was frivolous and vexatious, and disclosed no reasonable answer to the claim. Upon the return of the summons, it was held that the defence could not be struck out upon these grounds. Counsel for plaintiff then asked leave to argue the question of law raised by paragraph 3 of the defence, and cited *Hubbuck* v *Wilkinson*,[1] to shew that such an argument could be heard on the present application. Counsel for defendant consenting, the argument was allowed to proceed, it being admitted for the purposes thereof that plaintiff, at the time he became holder of the note, had notice of the facts alleged in that paragraph, and that they were true.

Argument.

D. J. Thom, for plaintiff:—An unlicensed company is prevented by s. 10 of the Ordinance respecting Foreign Companies from maintaining any action in respect of business carried on within the Territories without a license; but the

Argument. contract itself is not rendered void. The remedy only is taken away. An endorsee of a promissory note given in connection with such business may, therefore, sue and recover in his own name.

J. F. L. Embury, for defendants:—By s. 3 of the Ordinance every unlicensed foreign company is prohibited from carrying on business within the Territories, and a penalty is provided for every day during which such business is carried on. The note was, therefore, given for an illegal consideration and plaintiff cannot recover because (as is admitted) he had notice of the defect and was hence not a holder in due course. Any other construction would leave the way open for the most palpable evasions of the Ordinance.

[*15th December, 1904.*]

Judgment. NEWLANDS, J.—This is an application on the part of the plaintiff to strike out the defendant's statement of defence on the ground that it is frivolous and vexatious, and discloses no reasonable answer to the plaintiff's claim. When the summons came up for hearing, I informed the plaintiff's advocate that I considered the defence a good one, and one that could not be struck out on the grounds mentioned. The plaintiff's advocate then asked to argue the legal question raised by paragraph 3 of the statement of defence, and cited *Hubbuck et al.* v. *Wilkinson et al.*,[1] to shew that such an argument could be made on a motion to strike out the defence. The defendant being willing to argue this question, I allowed them to proceed.

Section 3 of the statement of defence was to the effect that the note sued on was given to a foreign company engaged

[1](1899) 1 Q. B. 86; 15 Times L. R. 29; 68 L. J. Q. B. 34; 79 L. T. 429.

Judgment. Newlands, J.

in the sale of separators, etc., for gain in the Territories, which was not registered under the Foreign Companies Ordinance, and was endorsed to the plaintiff with notice.

Section 29, s.-s. 2 of the Bills of Exchange Act, provides that the title of a person who negotiates a bill is defective when he obtained the bill (amongst other things) for an illegal consideration.

The foreign company that took the note sued on was prohibited, by statute, from doing business in the Territories. See s. 3 Foreign Companies Ordinance. The consideration was, therefore, illegal, and the plaintiff is not a holder in due course, because he took the note with notice of the illegality.

I am of opinion that this case is governed by the case of *Jennings* v. *Hammond*.[2] In delivering the judgment of the Court in that case, Mr. Justice Cave said: "If, as we hold in the case, the association is forbidden by the Act in question, it follows that all contracts made directly for the purpose of carrying on the business of the society are illegal. In this case the business of the society is to lend money, and consequently the loan to the defendant was made in pursuance of an illegal object, and the note sued on was given for an illegal consideration and cannot be sued upon either by the society or by anyone suing as trustee for the society, or even by anyone suing for his own behalf if he took the note with a knowledge that it was given for an illegal consideration."

After the argument the plaintiff's advocate asked me if I found in favour of the defendant on paragraph 3 of his statement of defence, not to dismiss his action, but merely to dismiss the summons to strike out said statement of defence on the ground that the question was before the Supreme Court en banc as to whether the Foreign Companies

[2] 51 L. J. Q. B. 493; 9 Q. B. D. 225; 31 W. R. 40.

Judgment.
Newlands, J.

Ordinance was ultra vires of the legislature, but as this question was not raised by the pleadings, and as I called his attention at the hearing to the consequence of his arguing this question on this summons, I think that I must give effect to my opinion that paragraph 3 of the statement of defence is in law a good defence to the action, and I therefore order that judgment be entered for the defendant with costs.

REPORTER:
C. H. Bell, Advocate, Regina.

MASSEY-HARRIS v. LOWE.

1 W. L. R. 213.

Conditional sale of goods—Retaking possession on default in payment of price—Chattel mortgage—Rescission of contract—Failure of consideration.

The defendant ordered from the Massey and Company, Ltd., machinery, for the price of which he gave three promissory notes, which provided "the title, ownership and right to the possession of the property for which this note is given shall remain in Massey and Company, Ltd., until this note or any renewal thereof is fully paid with interest, and if default is made in payment of this or any other note in their favour, or should I sell or dispose of or mortgage my landed property, or if for any good reason Massey and Company, Ltd., should consider this note insecure, they have power to declare it and all other notes made by me in their favour due and payable at any time, and to take possession of their property, and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price."

The defendant gave two chattel mortgages as collateral security for the notes. The notes were afterwards indorsed by Massey and Company, Ltd., to the plaintiffs, who on default took possession of and sold the property mentioned in the notes and applied the proceeds upon the amount unpaid.

The plaintiff sued for the balance $487.45 as due under the chattel mortgages.

Held, (1) That, in the absence of provision in the notes that the plaintiff could after sale recover the balance, the original agreement was rescinded by the sale;

(2) That as the plaintiff had no right to recover on the notes, they could not recover on the collateral security.

[NEWLANDS, J., *March 21st, 1905.*

This was an action tried at Moose Jaw by NEWLANDS, J., without a jury. The facts are sufficiently stated above. Statement.

W. B. Willoughby, for the plaintiffs:—The defendant cannot treat the contract for the sale of the goods as rescinded, and refuse to pay the price secured by the chattel mortgages: *Chapman* v. *Morton*.[1] The retaking of the goods under the Argument.

[1] 11 M. & W. 539.

Argument.

terms of the conditional sale did not operate as a rescission of the contract, and there was no failure of the consideration for the chattel mortgages: *Watson Manufacturing Company* v. *Sample*.[2] The mortgages contain a provision that the plaintiffs may take possession of the property, sell the same, apply the proceeds on the amount due and sue for the balance. This provision brings the case within the judgment in *Sawyer* v. *Pringle*[3] at p. 222.

T. C. Johnstone (*Grayson* with him).—A conditional sale is rescinded if the vendors avail themselves of the power reserved by the contract to retake or retain the goods under certain contingencies: *White* v. *Smith*.[4] There may be a right of action and the relation of debtor and creditor may exist for the price of the goods, although the property has not passed, if the parties have made an agreement to that effect: *Waterous Engine Co.* v. *Wilson*.[5] Where as in the present case there is no such agreement, a vendor who retakes has no right of action: *Perkins* v. *Grobben*,[6] *Leanor* v. *McLaughlin*.[7] The agreement should not only give the right to resume possession, but to sell either with or without notice, and to credit purchaser with the proceeds, and it should expressly leave him liable for any difference between the proceeds and the contract price: *Sawyer* v. *Pringle*,[3] *Sawyer* v. *Baskerville*,[8] *Discher* v. *Canada Permanent L. & S. Co.*[9]

[*25th March, 1905.*]

Judgment.

NEWLANDS, J.—This is an action on two chattel mortgages given by the defendant to the plaintiffs to recover a balance due thereon amounting to $487.45.

[2] 12 Man. L. R. 373. [3] 20 O. R. 111; 18 O. A. R. 218. [4] 28 N. S. R. 5. [5] 11 Man. L. R. 460. [6] 39 L. R. A. 815 (Mich. Sup. Ct.). [7] 32 L. R. A. 467; 165 Pa. 150. [8] 10 Man. L. R. 652. [9] 18 O. R. 273.

Judgment. Newlands, J.

These chattel mortgages were given for a mower and rake and a press drill sold by the plaintiffs to the defendant, on the conditions that "the title, ownership and right to the possession of the property for which the notes were given, should remain in Massey & Co., Ltd. (who afterward assigned to plaintiffs), until the notes or any renewal thereof are fully paid, with interest, and if default is made in payment of this or any other note in their favour, or should I sell or dispose of or mortgage my landed property, or if for any good reason Massey & Company, Limited, should consider this note insecure, they have power to declare it, and all other notes made by me in their favour, due and payable at any time, and take possession of the property and hold it until this note is paid, or sell the property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price."

Under this condition the plaintiffs took possession of the property mentioned therein, sold the same and applied the receipts upon the notes, and now seek to recover the balance due upon the mortgage given as collateral security.

There being no proviso in the notes that the plaintiffs can, after a sale of the property for which they were given, recover the balance due from the defendant, I am of the opinion that by the resale the original agreement was put an end to, and that as the plaintiffs have no right to recover on the notes, they have no right of action on the collateral security given for the payment of these notes.

Sawyer v. *Pringle*,[9] *Arnold et al.* v. *Player et al., The Waterous Engine Works Co.'s Claim*.[10]

It is contended by the plaintiff that in the mortgages given as collateral security there is a provision that the plaintiffs may take possession of the property for which the notes

[10] 22 O. R. 608.

Judgment.
Newlands, J.

were given and sell the same, apply the proceeds on the amount due and sue for the balance, and that they are entitled to recover in this action under that provision; but I am convinced, on a careful study of that provision in the mortgage, that it does not apply to the machinery sold by the plaintiffs to the defendant for which the notes were given, but only to the chattels mentioned in said mortgages, viz., the grain sown by the defendant on his farm.

Other defences were raised by the defendant at the trial, but it is unnecessary for me to consider them as under the above. I think judgment should be entered for him.

Judgment for defendant with costs.

REPORTER:

Reginald Rimmer, Advocate, Regina.

MASSEY-HARRIS v. J. MOORE—W. H. MOORE, CLAIMANT.

1 W. L. R. 215.

Interpleader — Crops raised by claimant on land alleged to have been transferred by defendant fraudulently.

The sheriff seized crops grown on property of the claimant, son of the defendant. Part of the property was the defendant's homestead transferred to the claimant, and part was the property of defendant's wife, leased by him verbally to the claimant, under authority from the wife.

The claimant purchased the seed grain, hired and paid for the help, and paid for twine and harvesting. The defendant did a small amount of work on the farm.

Held, that the question of *bona fides* of the transfer from father to son did not materially affect the ownership of the crops; that on the evidence the claimant was entitled to the crops.

Kilbride v. *Cameron*,[1] followed.

[NEWLANDS, J., *27th March, 1905.*

Statement. This was an interpleader issue tried by NEWLANDS, J. The facts are sufficiently stated above and in the judgment.

W. M. Martin, for claimant and sheriff.

D. J. Thom, for execution creditors.

[*27th March, 1905.*]

Judgment. NEWLANDS, J.—Under an execution issued in the above suit the sheriff seized a certain quantity of grain grown on the N.-E. and S.-E. ¼ of 6-10-15 W2 Meridian, which W. H. Moore, the son of the defendant, claims to be his property.

The N.-E. ¼ was the defendant's homestead, and he transferred same to the claimant on the 4th December, 1903. The S.-E. ¼ belonged to the wife of the defendant and was leased by him to the claimant verbally for the season of 1904.

The evidence shews that the claimant purchased the seed, grain, hired and paid for the help, and paid for the twine and harvesting. The defendant did a small amount of work on the farm but not sufficient, in my opinion, to affect the ownership of the crop.

[1] 17 U. C. C. P. 373.

Judgment. Newlands, J.

In *Kilbride* v. *Cameron*,[1] it was held by A. Wilson, J., in a case similar to the present, that "the question of bona fides between the father and son as to the land does not very materially enter into the merits of the subject of this suit, because it might be considered for the purpose of this inquiry that these transactions as to the land were not valid as against the creditors of the father, and yet that admission would by no means determine the right of property of the crops in question. The evidence shews that the father did not raise the crops or furnish the means for doing so; the labour and means were contributed by the son alone. Unless, therefore, it were to be held that when the land was fraudulently transferred, the crops, which were raised upon it for and at the sole expense of the fraudulent vendee, could be seized as the goods and chattels of the vendor. I would not be able to say that the property in dispute was the property of the execution debtor and was liable to be taken for his debts. . . . The crops, I think, were upon this evidence, the sole property of the creditor."

This decision disposes of the question of the ownership of the crops raised on the N.-E. ¼ which was transferred by the defendant to W. H. Moore, as I think that the evidence shews that the claimant alone contributed the labour and means for raising the same.

As to the crop raised on the S.-E. ¼, this section was never the property of the defendant, and I think he had authority to lease it to the claimant as the agent of his wife, and as the claimant also contributed the labour and means for raising the crop on this ¼ section, I think that the grain raised on it, as well as the N.-E. ¼, is the sole property of the claimant as against the executing creditor.

Execution creditors to pay the costs of this interpleader.

REPORTER:

Reginald Rimmer, Advocate, Regina.

THE KING v. LOUGHEED.

Criminal law—Seduction of female under promise of marriage —Meaning of previous chaste character — Sufficiency of promise of marriage.

The words "previously chaste character" as used in sec. 182 of *The Criminal Code, 1892*, do not mean previous reputation for chastity, but mean those acts and that disposition of mind by which the morals of an unmarried woman may be judged, and therefore when an unmarried woman under the age of twenty-one years, who, previous to the date of the seduction under promise of marriage in respect of which the charge is laid, has had illicit sexual intercourse with the accused, she cannot be said to be of "previously chaste character" unless between the date of such illicit intercourse and the seduction complained of there is evidence of reform and self-rehabilitation in chastity.

[*Court* en banc, *7th, 9th July, 1903.*]

Statement

This was a case reserved by SIFTON, C.J., under sec. 743 of *The Criminal Code, 1892*, the prisoner having been convicted by him without the intervention of a jury. The charge, laid under sec. 182 of the Code, was that the accused, at or near the town of Medicine Hat, in or about the month of September, 1902, being then above the age of twenty-one years, did then and there under promise of marriage seduce and have illicit connection with Kate McCutcheon, then being an unmarried female of previously chaste character and under twenty-one years of age.

The questions reserved were as follows:—

1. Was I justified from the evidence in holding that the witness, Kate McCutcheon, was a woman of previously chaste character in September, 1902?

2. Does the evidence maintain a charge of seduction "under promise of marriage," even though there was a pre-existing promise of marriage between the parties dating from June, 1901?

3. Was the evidence given as to the age of the accused sufficient for the purposes of sec. 182?

Statement

The prosecution produced as witnesses at the trial Kate McCutcheon, her father and her sister.

No witnesses were called by the defence.

Upon the first two questions, there was only the evidence of Kate McCutcheon, which was in substance that after keeping company with her for a month or two, the accused had for the first time illicit connection with her under promise of marriage in the month of June, 1901; that the illicit connection was renewed about once a week, each time under a separate and distinct promise of marriage, from June, 1901, to December 24th, 1902; and that as a consequence of one of such occurrences of illicit connection, which happened in September, 1902, she became pregnant with child of which she was delivered in due course. She further asserted under oath that she never at any time had illicit connection with anyone but the accused.

Argument

The case was argued before WETMORE, SCOTT and PRENDERGAST, J.J.

C. R. Mitchell, for the Crown.

P. J. Nolan, for the accused.

[*9th July, 1903.*.]

The judgment of the Court was delivered by

Judgment

PRENDERGAST, J.:—The first point to be determined seems to be: what constitutes "previous chaste character"?

It is first to be observed that sec. 182, on which the charge is based, is contained in Part XIII. of the Code, headed "Offences against Morality,"—from which it is reasonable to assume, at least in a general way, that the object of this enactment is to protect the morality or chastity of female minors.

Bouvier[1] defines character as "the possession by a person of certain qualities of mind or morals distinguishing him

1 Law Dictionary (2nd ed.) p. 308.

Judgment
Prendergast, J

from others." It is true he says further on that the distinction between character and reputation is not regarded in the Statutes or in the decisions of the Courts; but this is in a sub-division of the commentary dealing with character only with respect to evidence. In the American & English Encyclopœdia of Law,[2] also under the word "character" the following is laid down: "Under all the Statutes as to seduction, the previous good character for chastity of the woman alleged to have been seduced, is one essential element of the offence and is always in issue;" and reference is made to foot-note 4, which is to the effect that the Statutes of many States of the American Union—amongst others Alabama, Indiana, Iowa, Kentucky, Michigan and New York—have been held to require that the injured female should be actually chaste and not merely have a good reputation in that respect.

Of course, this is not law creating a precedent here and binding on this Court as such; at the same time, and more particulary as we cannot turn for more light to the English law, which does not recognize such an offence, it represents the opinion of men of legal training on statutory enactments similar or practically similar to the one which is now being reviewed.

As to the word "chaste" in connection with character, its meaning is made clear enough by the context.

The Court is of the opinion on the foregoing, considering particularly the part or division of the Code in which sec. 821 is incorporated, that the words "previously chaste character," do not mean previously chaste reputation, but point to those acts and that disposition of mind which constitute an unmarried woman's virtue or morals. Can it be said, that, in this sense, the woman here in question was in September, 1902, of "previously chaste character." The fact

[2] (2nd ed.) vol. 5, p. 871.

Judgment

Prendergast, J

that she had had illicit connection with the accused from week to week for the space of fifteen months previous to the said date precludes this Court from reaching an affirmative conclusion.

I do not mean to infer that there cannot, under particular circumstances, be a second seduction of the same woman, by the same, and possibly even another, man. I would rather incline towards the affirmative, and it has, in fact, been held by the American Courts,[3] that a woman may have been guilty of unchaste conduct, and subsequently become chaste in legal contemplation and be the subject of seduction. And it does seem reasonable to hold that an unfortunate woman who has once surrendered herself should not, on that account alone, irrevocably be deprived of the protection of the Statute. But there must be, at all events, between the two acts of seduction, such conduct and behaviour as to imply reform and self-rehabilitation in chastity, which the behaviour of the young woman in this case leaves no room to infer.

The second question bears on the sufficiency of the promise of marriage at the time of the act complained of, when there had already been a first promise made in June, 1901, and many others subsequently. In view of the finding of the Court on the first question, this one does not callf or any further consideration.

It does seem, however, that this young woman's faith in the accused should have been shaken long before the occurrence in question, and it is rather difficult to believe that this particular promise of September, 1902, repeated for the sixtieth or seventieth time under the very same circumstances, was really and truly the inducement to which she allowed herself to yield on that day.

There does not seem to be any doubt, and the learned Chief Justice seems to have felt, that were it not for the limitation of time prescribed by the Code to enter prosecu-

[3] Am. & Eng. Encyc. of Law (2nd ed.), vol. 5, p. 871.

tion, the accused might have been found guilty on the charge with respect to the first occasion of illicit connection in June, 1901, which constitutes really the seduction, but confined as we are within this limitation of time, the charge cannot be sustained. Judgment Prendergast, J

The third question, which simply bears on a rule of evidence, need not be considered.

In the opinion of this Court the conviction should be quashed and the accused discharged.

REPORTER :
Alex. Ross, Regina.

Conviction quashed.

MAXFIELD v. INSKIP.

Legal Profession Ordinance—Annual Certificate—Disqualification of Advocate for non-payment of annual fee.

Held, that an advocate who neglects to pay his annual fee to the Law Society becomes disqualified from practising only after the expiry of the service of time limited in the notice required to be given by the rules.

[*Court* en banc *16th January, 1904.*]

Statement

One D. was enrolled as an advocate of the North-West Territories in May, 1903, and in October, 1903, issued the writ of summons on behalf of the plaintiff in this action. It appeared that D. had at the time of his enrolment paid his call fee, which was all that had been demanded of him, and had not paid the annual fee required to be paid by practising advocates. The defendants took out a summons to set aside the writ on the ground that it was issued by an advocate who was not entitled to practise. No notice of default had been served upon D. by the Law Society as provided by the rules. On the return of the summons before SIFTON, C.J., the application was dismissed. The defendants appealed.

Statement The appeal was heard before WETMORE, SCOTT, and PRENDERGAST, JJ.

R. B. Bennett, for appellant.

C. A. Stewart, for respondent.

[*16th January, 1904*]

The judgment of the Court was delivered by

Judgment SCOTT, J.:—This appeal must be dismissed with costs, the Court being of the opinion that Rule 60 of the Rules of the Law Society must be construed as being subject to the provisions of Rules 61, 62, and 63, and that such being the case the non-payment of the prescribed annual fee on the day fixed for the payment thereof does not disqualify an advocate from practising. Such disqualification ensues only upon his being in default, after the notice prescribed by Rules 61 and 62, has been given.

The Court is unable to accept the construction of the appellant's counsel that Rule 60 is applicable only to advocates who have failed to take out their first certificate under Rule 59 after their admission.

Appeal dismissed with costs

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

Practice—Issue of writ in wrong district—Setting aside.

Where the provisions of *The Judicature Ordinance* fix the judicial district in which a writ must issue in any action, a writ issued in the wrong judicial district is a void, not merely an irregular, proceeding, which cannot be cured by an order transferring the cause into the proper district. Judgment of SCOTT, J., reversed.

Remarks by SCOTT, J., on the proper practice where a summons to set aside proceedings for irregularity is itself irregular in omitting to give the grounds relied upon.

[SCOTT, J., *23rd November, 1903.*]

[*Court* en banc, *12th January, 15th April, 1904.*]

Statement This was a summons on behalf of the defendant John T. Moore, to set aside the writ and all other proceedings in the

Statement

action on the grounds that he was served within the jurisdiction with a writ to which was attached an order for service out of the jurisdiction; that the copy of the writ served upon him did not show that the original was under the seal of the Court, and that the writ was improperly issued from the office of the Deputy Clerk of the Court of Edmonton, since the cause of action did not arise and none of the defendants resided or carried on business within the district of that Deputy Clerk, but some of them did reside in the district of the Clerk of the Court at Calgary.[1]

The action was brought for relief in respect of the dealings by the defendants with certain lands, some situate in the district of the Clerk of the Court of Calgary, some in Assiniboia and some in Saskatchewan, which were claimed by the plaintiffs. Of the four defendants, two resided at Toronto, Ontario, and the remaining two, of whom the applicant was one, resided at the time the action commenced at Red Deer, likewise in the district of the Clerk at Calgary. The plaintiff's advocates being under the impression that all the defendants resided in Toronto, issued the writ at Edmonton, and having obtained an order restraining the Registrars of the proper Land Titles Offices from registering any documents affecting the title to the lands, applied for and obtained an order for leave to issue a con-

[1] Section 4 of *The Judicature Ordinance*, Con. Ord. (1898), c. 21, provides that "(1) Suits shall be entered and, unless otherwise ordered, tried in the judicial district where the cause of action arose or in which the defendants or one of several defendants, resides or carries on business at the time the action is brought. (2) If in any judicial district there is a district of a deputy clerk established by ordinance, suits in which the cause of action arose or the defendant resides in such deputy clerk's district, shall be entered in the office of the deputy clerk, and suits in which the cause of action arose or the defendant resides in the remaining portion of the judicial district, shall be entered in the office of the clerk of the Court, and if in any suit the cause of action arose in the deputy clerk's district, and the defendant resides in the other portion of the judicial district or *vice versa*, the suit may be commenced in either the clerk's or the deputy clerk's.

At the date of the issue of the writ the north boundary of Township 42 constituted the dividing line between the districts of the clerk of the Court at Calgary and the deputy at Edmonton.

Statement current writ of summons for service upon all the defendants at Toronto, the time limited for appearance being thirty days. Copies of the concurrent writ were served upon the two defendants found in Toronto, the Red Deer defendants being served with copies of the original writ in which the time for appearance was limited to twenty days, but the applicant was at the same time served with a copy of the order for service out of the jurisdiction. He was also served with a copy of the interim injunction order.

O. M. Biggar, for defendant John T. Moore.

N. D. Beck, K.C., for plaintiffs, objected that the summons was defective in that the grounds of the application being, as shewn by the affidavits, merely certain irregularities, they should under Rule 540 have been set out in the summons.

[*November 23rd, 1903*]

Judgment SCOTT, J.:—The applicant having being served with a copy of the writ of summons for service within the jurisdiction, could not have been in any way misled or prejudiced by the fact that, apparently by inadvertence, he was served with a copy of an order for the service of another writ upon him. That objection can not, therefore, be sustained.

The second objection, that the copy of the writ served did not show that the original was sealed, does not constitute a ground for setting aside the original writ or, in fact, any of the proceedings except perhaps the service of the writ, and I entertain a doubt whether it afforded a sufficient ground for setting aside even the service since it does not appear to me to be an irregularity which would prejudice or affect the applicant.

As to the third ground I am of opinion that the entry of the action with the Deputy Clerk at Edmonton was not authorized. In my view sub-sec. 2 of sec. 4 of *The Judicature Ordinance*, applies, and the action, if entered in this judicial

district, should have been entered with the Clerk at Calgary. I think, however, that the entry of the action in the wrong district, or with the wrong clerk in a district, is not a nullity unless so directed by the Court or a Judge under Rule 538 [2] There is a wide distinction between the entry of an action in a Court which has no jurisdiction to entertain it and its entry in a wrong office of a Court having such jurisdiction. The Supreme Court for each district is not a separate Court from the Court in other districts. They are all one and the same Court, and, a suit over which it has jurisdiction having been entered in it, though in the wrong district or sub-district, I fail to see why it or a Judge thereof cannot cure the defect in the procedure by directing that the suit shall be transferred to and carried on in a proper district. If such an order were made in the present case the applicant would not, so far as I can see, be in any way prejudiced by it, and, such being the case, no object will be obtained by putting the plaintiff to the unnecessary expense of commencing his action anew.

Judgment

Scott, J

The order will, therefore, go directing the transfer of the action and all proceedings therein to the office of the Clerk at Calgary, the plaintiffs having the right to enter their action there, the applicant to have the costs of his application on final taxation.

As to the preliminary objection I hold that the summons was irregular in that it did not state the objections relied upon, but I do not think that it should be discharged on that ground. The applicant should have been called upon to state his objections, and, having stated them, an enlargement should have been granted to enable the plaintiffs to answer them. Upon the return of the summons

[2] Rule 538 is as follows:—"Non-compliance with any of the provisions of this Ordinance shall not render any proceedings void unless the Court or a Judge shall direct, but such proceedings may be set aside, either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court or a Judge may think fit."

Judgment Scott, J

the applicant stated his objections and the plaintiffs obtained an enlargement for 14 days, which gave them ample time to answer.

The defendant John T. Moore appealed, and the appeal was heard before SIFTON, C.J., WETMORE, and PRENDERGAST, JJ., on 12th January, 1904.

Appeal

The same counsel appeared.

[*April 15th, 1904.*]

The judgment of the Court was delivered by

Judgment

WETMORE, J.:—According to sec. 48 of *The North-West Territories Act*,[3] the Supreme Court of these Territories is, within the Territories, clothed with all the jurisdiction, power and authorities that the Courts of Common Law at Westminster or the Court of Chancery in England were clothed with on the 15th July, 1870. I can quite understand, therefore, that a case might arise where neither the cause of action would arise within the Territories or any defendant reside there, and yet this Court might have jurisdiction. In such case sec. 4 of *The Judicature Ordinance* would not apply. Probably when such a case does arise it may afford an opportunity for a very interesting discussion as to in which clerk's or deputy clerk's office the cause is to be entered. I do not consider it necessary to consider that question at present, because this is a case when sec. 4 can be worked out. Two of the defendants, and two only, resided in the Territories at the time the action was brought, and they resided in the district of the principal clerk for the Judicial District of Northern Alberta. There is no pretence that any of the defendants carried on business in the district of the deputy clerk. It is clear, therefore, that this action ought to have been entered and commenced in the office of the principal clerk. Whenever a case arises in which this

[3] Rev. Stat. (1886) c. 50.

Judgment

Wetmore, J

section of the Ordinance is applicable, it ought to be observed, and it is no answer to an objection that it has not been to set up that a case may arise which that section would not cover. Neither is it any answer to show that the action was entered and commenced in the wrong office by mistake or under a wrong impression. I presume that some excuse of that sort might be set up in pretty nearly every instance when an unauthorized procedure has been taken.

The order appealed against was made under Rule 538, quoted *supra*, which is the same to all intents and purposes as Rule 1 of Order LXX of the English Rules. The learned Judge no doubt came to the conclusion that the omission to enter this action in the office of the principal clerk was a non-compliance with sec. 4 of the Ordinance. With very great respect for my learned brother's opinion, I think this error went further than a mere non-compliance with the Rule. The plaintiff did not merely omit to do something that he ought to have done under the Rule, but he did something which under the Rule he ought not to have done. The proceeding was bad *ab initio*, and is open to similar remarks as those made by the Judges in *Anlaby* v. *Praetorius*.[4] In that case a judgment against the defendant had been prematurely entered. The defendant applied to set it aside and the Divisional Court ordered it to be set aside on the terms of the defendant paying the sum of £34 into Court by a day specified. The defendant appealed, claiming that the judgment having been wrongfully obtained, and it was held that he had a right to have it set aside *ex debito justitiae*. Counsel for the plaintiff attempted to support the order of the Divisional Court on the ground that the Court had power to set the judgment aside on terms under Order LXX, Rule 1. But the Court of Appeal upheld the contention for the defendant. Fry, L. J.,[5] dealing with the rule referred to, says: "In the present case we are not concerned with an in-

4 (1888) 20 Q. B. D. 764; 57 L. J. Q. B. 287; 58 L. T. 671; 36 W. R. 487. 5 20 Q. B. D., at p. 769.

Judgment
Wetmore, J

stance of non-compliance with a rule or an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all." So in this case, we are not concerned with an act of non-compliance with a rule or with an irregularity in acting under a rule. The plaintiff had no right to issue the writ of summons in question at all, and, to paraphrase the language of Lopes, L.J.,[6] "the issue of writ was not an act done within the Ordinance."

While I do not wish, as Lopes, L.J., did, to go so far as to lay down to what extent Rule 538 was meant to apply, I do hold that that rule was not intended to apply to a case like the one now under consideration here. Not only has there been a non-compliance with the Ordinance, but the whole proceeding is entirely unauthorized and bad and I cannot see how any order of a judge can make it good. I am also very much impressed with an argument presented in the factum of the appellant that this unauthorized process and procedure cannot be made good and valid by the simple process of transferring the proceedings to the principal clerk's office. It is true that this case has been complicated by the Leadleys having appeared. By doing so I conceive that they have submitted to the jurisdiction, but I cannot see how that can affect John T. Moore, who has not submitted to the jurisdiction and has a right to have the proceedings set aside *ex debito justitiae*.

In my opinion, the order of my brother SCOTT should be set aside and the writ of summons and all subsequent proceedings and the injunction order set aside as regards the defendant John T. Moore, with costs, and that the plaintiff should pay John T. Moore his costs of this appeal.

Order accordingly.

REPORTER:

Alex. Ross, Esq., Regina.

[6] 20 Q. B. D., at p. 771.

KING v. TOTO.

Criminal law—Appeal from refusal of trial judge to reserve case —Application not made at trial—Discretion of trial Judge.

On the trial of the accused before a judge without a jury his counsel objected that the accused was entitled to be tried by a jury, but the objection was overruled and the trial proceeded, no application being made for a reserved case. The accused was convicted and sentenced, and two days afterwards an application was made to the trial Judge to reserve a case for the Court of Appeal. The application was refused.

Held, that an appeal from the refusal of the trial Judge to reserve a case on a question of law arising during a criminal prosecution lies only when the application is made at the trial, and although after the trial the Judge might still, in his discretion, reserve a case, yet if he refused, no appeal lay.

[*Court* en banc, *11th October, 15th October, 1904.*]

Statement

This was an application under sec. 744 of *The Criminal Code*, 1892; as amended by chap. 46 of 63-64 Vic , for leave to appeal from the decision of HARVEY, J., on an application made two days after the conviction and sentence of the prisoner by him, refusing to reserve for the decision of the Court of Appeal the question whether he had the right to try the prisoner summarily without the latter's consent.

The accused was charged under sec. 241 of the Code: (1) With having, with intent to do grievous bodily harm to one Christina McLeod, unlawfully wounded the said Christina McLeod ; and (2) with having with the like intent unlawfully caused grievous bodily harm to the said Christina McLeod.

Appeal

The appeal was heard before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

[*October 15th, 1904.*]

R. Rimmer, for prisoner.

No one for Crown.

Judgment

Wetmore, J

The judgment of the Court was delivered by

WETMORE, J.:—The facts upon which this application is based are not set forth by any material whatever except the statement of counsel for the accused. No person appeared to oppose the application. I have some doubts, therefore, whether the facts have been properly brought before the Court. However, we have, upon inspecting the charge and consulting with the learned trial Judge, been able to arrive at the facts material to this application, and possibly that may be sufficient and according to practice. I may say that the facts as stated by the learned Judge are substantially the same as stated by the counsel. The ground upon which the application is based is that the accused had a right under sec. 67 of *The North-West Territories Act*,[1] to be tried with a jury, and that he did not consent to be tried by the Judge in a summary way as provided for in that section. At the trial and before any evidence was given the counsel for the accused drew the attention of the Judge to secs. 66 and 67 of *The North-West Territories Act*, and asked him how the accused was to be tried, and he replied that he had power to try him in a summary way. The trial then proceeded without further remark or comment. Neither counsel for the accused nor any person on behalf of the accused at any time during the trial claimed or insisted that the accused had a right to trial by jury, and the learned Judge was not at any time during the trial applied to to reserve the question or any question. A couple of days after the accused was convicted and sentenced his counsel applied to the Judge to reserve the question, which application he refused on the grounds that it had not been made during the trial. This application is therefore made to this Court.

I am of the opinion that it is not open to the accused to

[1] R. S. C. (1886) c. 50.

make this application. Section 743 of the Code provides for reserving questions of law arising in criminal cases.[2]

Judgment

Wetmore, J

I have no doubt that the trial Judge has the power to reserve a question of law under sec. 743 (2), even after the trial and after sentence and although no application has been made to him to do so. *Reg.* v. *Paquin*,[3] and *Reg.* v. *Brown*,[4] in effect lay that down, but they go no further than that so far as the question now before the Court is concerned.

The "party applying" in sec. 744, is the party who has applied under sec. 743 (3), and his application is to be made "during the trial." It must be assumed, therefore, that it cannot be made at any other time for the purpose of founding a motion such as the one now under consideration. No such application was made during the trial of this case. Upon the application made to reserve the question after the trial the learned Judge might, if he saw fit, have then reserved the question, but he did not see fit in the exercise of his discretion, and no application having been made to him during the trial this motion cannot be entertained.

Application refused.

REPORTER:

Alex. Ross, Esq., Regina.

[2] *The Criminal Code, 1892*, s. 743, provides that "(2) The Court before which any accused person is tried may either during or after the trial reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent or incidental thereto or arising out of the direction of the Judge for the opinion of the Court of Appeal,"

"(3) Either the prosecutor or the accused may during the trial either orally or in writing apply to the Court to reserve any such question as aforesaid and the Court, if it refuses to reserve it, shall nevertheless take a note of such objection."

Section 744 provides that, "If the Court refuses to reserve the question, the party applying may move the Court of Appeal as hereinafter provided."

[3] (1898) 2 Can. C. C. 134. [4] (1889) 16 Cox C. C. 715.

PATTERSON v. LANE.

Half breed scrip certificate—Acquisition of rights in—Purchase.

The payment of money to a half-breed entitled to land scrip, and the delivery of the scrip certificate by the half-breed to the person paying conveys to the latter no right in the certificate, the transaction being no more than an agreement by the half-breed to exercise his rights under the certificate as he may be directed, and the delivery of the certificate being merely to protect the person paying the money against the exercise of such rights adversely to him.

An assignee of the person who made the original agreement with the half-breed has, therefore, no rights against an innocent purchaser from the half-breed of the land allotted to him under the certificate.

[*Court* en banc, *11th July, 18th October, 1904.*]

Statement

This was an appeal from the judgment of SIFTON, C.J., at the trial, dismissing the plaintiff's action. The facts appear in the judgment.

C. A. Stuart, for plaintiff (appellant.)

James Muir, K.C., for defendant (respondent.)

[*18th October, 1904.*]

The judgment of the Court (WETMORE, SCOTT, PRENERGAST, NEWLANDS and HARVEY, JJ.) was delivered by

Judgment

HARVEY, J.:—Sometime prior to the 7th day of November, 1900, one P. J. Nolan, an advocate of Calgary, had a transaction with a certain half-breed named Justine Rouselle, of Lacombe, with reference to some land scrip, which transaction is referred to in the evidence as a purchase of the scrip, and at such time Nolan appears to have received from her a document known as a scrip certificate. This document is not in evidence nor is there any evidence as to its exact nature, but it appears from the evidence that it is a document certifying that the person named therein is entitled to a certain quantity of land which he may select or locate by presenting himself at the proper government land office and

signing a formal application in which the particular land is described and making a statutory declaration as to certain facts.

On the 25th of March, 1901, the said Nolan received from the defendant the sum of $200, for which he gave a receipt in the following words :

Calgary, Alta., Mar. 25, 1901.

Received from George Lane, Esq., the sum of two hundred dollars ($200), the same to be applied on purchase of half interest in two parcels of Dominion land scrip ; returns to be made at the expiration of 30 days from date, and Mr. Lane to receive half of net profits of sale of same.

P. J. NOLAN.

Subsequently, on the 2nd day of July, 1901, the said Nolan received from the plaintiff the sum of $150, for which he gave a receipt in the words following :

Received from J. D. Patterson, Esq., the sum of $150.00 (one hundred and fifty dollars) in trust to be applied in the purchase of an additional land scrip which I agree and undertake to locate (on lands to be named by said J. D. Patterson) within two weeks from this date. The balance to be paid on location of said scrip and execution of transfer to said J. D. Patterson, and I also agree and undertake to locate the Charles Anderson land scrip already secured without further expense to said J. D. Patterson.

P. J. NOLAN.

Calgary, July 2nd, 1901. Advocate.

In November and December, 1902, the defendant paid to Nolan further sums amounting to $700, which are alleged to have been paid for the remaining half interest in the land scrip mentioned, the defendant claiming that the first payment of $200 made by him had paid for a one-half interest

Judgment
Harvey, J

in the said scrip (which Nolan swears to have been the case), and a few months later Nolan procured the attendance of the half-breed Justine Rouselle the person named in the scrip certificate, at the Dominion lands office at Calgary, where she complied with the requirements of the office, delivering up her scrip certificate and making the necessary application and statutory declaration to have her rights under the scrip certificate applied on a certain parcel of land which she on the same day transferred to the defendant.

The plaintiff in his statement of claim alleges that the scrip certificate of Justine Rouselle was purchased by Nolan for him in pursuance of the agreement between them partly set out in the receipt dated July 2nd, 1901, and that Nolan thereafter held the same as trustee for him, and he claims to be the owner of the scrip certificate and entitle to the benefit of it and to the benefits of the rights and interests of Justine Rouselle under and by virtue of it, and asks to be so declared.

The Chief Justice, before whom the case was tried, dismissed the action, and from his judgment the plaintiff now appeals to this Court.

At the close of the argument before this Court the plaintiff's counsel for the first time applied for an amendment of his statement of claim so as to allege, instead of the purchase of the said scrip after and in pursuance of the agreement between him and Nolan, the appropriation by Nolan of the scrip certificate then in his possession and the assent thereto by the plaintiff. In my view of this case it is not necessary to consider whether this amendment should be permitted or not, since I am of opinion that the plaintiff cannot succeed on the facts under any pleadings. The plaintiff's whole case is based on the view that the scrip certificate is a valuable security and can be transferred by delivery so as to confer on the person to whon it is delivered the rights of the person named in the certificate. With this view, on the evidence

Judgment

Harvey, J

before us, I wholly disagree. The evidence of the Dominion Lands Agents shows that no rights to any lands will be recognized under the scrip certificate unless and until the person named in the certificate presents himself in person at the proper Lands Office and indicates in the proper way the particular lands which he wishes to receive and have appropriated to the scrip. It would appear, therefore, that what is commonly spoken of as a sale of scrip is nothing more than an agreement on the part of the person named in the scrip certificate to appear at the proper office and comply with the regulations and requirements necessary to obtain title for the purchaser to the lands he may select, and the delivery of the scrip certificate merely secures the purchaser against its use by the person named in it to the prejudice of the purchaser. In this view it is immaterial whether Nolan intimated to the plaintiff his intention of having the scrip certificate appropriated to meet his obligation to the plaintiff or not, for even if he did the plaintiff could acquire only such rights as Nolan had or could dispose of, and, as pointed out, Nolan did not acquire Rouselle's rights by becoming holder of the scrip certificate, and those rights continued in Rouselle until exercised in the manner indicated. Whatever rights the plaintiff had were against Nolan, and, the scrip certificate having now passed out of his possession to an innocent third party for value, it cannot be reached by the plaintiff.

For the reasons mentioned I am of opinion that the judgment of the Chief Justice is correct, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

REPORTER:

Alex. Ross, Esq., Regina.

GASS v. McCAMMON.

Landlord and tenant—Holding over after expiration of tenancy for a year—implied tenancy from year to year—Rebuttal of.

A letter from the landlord posted to the tenant before the expiration of a lease for a year, proposing that after its expiration the tenant should hold from month to month, is not sufficient, if the letter is not received by the tenant, to displace the tenancy from year to year which arises by implication from the tenant's holding over and paying rent after the expiration of his term.

[*Court* en banc, *11th, 18th Oct., 1904.*]

Statement

This was an appeal from the judgment of NEWLANDS, J., discharging an originating summons issued by the landlord to recover possession of the premises in question.

These had been leased to the tenant for a year, which expired on 8th August, 1903. The tenant continued in possession after that date and paid rent. On 6th October, 1903, the landlord gave him a month's notice to quit, and on 4th December following obtained his summons for possession. The tenant relied upon his holding over, having made his tenancy a tenancy from year to year, and in answer to this the landlord produced a letter from the tenant under date of 20th July, 1903, referring to a proposal by the landlord to sell the premises to him and adding "in case I do not purchase, are you willing to renew the lease for one year?" and a copy of his reply thereto as follows:

Moose Jaw, July 26th, 1903.

T. J. McCammon, Esq., Moose Jaw:

DEAR SIR:—Yours to hand *re* leasing the store you now occupy of me on lot 2, block 111, for a term of one year longer. I will not re-lease building to you for one year, as I want to sell same, but you can remain in building as a monthly tenant, until I sell same, and I will give you a month's notice to get out.

Yours truly,

(Sgd.) E. Gass,

Per Attorney C. A. Gass.

It was sworn that this reply was posted at Moose Jaw on the day of its date, addressed to the tenant at that place. Statement

The tenant positively denied having received it, stating that the notice of 6th October was the first notice of the kind advising him that he would not be permitted to continue as tenant.

NEWLANDS, J., dismissed the application, holding that, as the letter of 27th July was not an acceptance of the tenant's offer, but contained a new proposition, it did not affect the tenant until he received it, and that there was consequently no new tenancy or anything to rebut the presumption that the tenant held over as tenant from year to year.

The landlord appealed and the appeal was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST and HARVEY, JJ.

W. B. Willoughby, for landlord.

Alex. Ross, for tenant.

[*Oct. 18th, 1904.*]

The judgment of the Court was delivered by

SIFTON, C.J.:—The letter of 27th July is an apparent answer to a portion of a letter of the tenant of July 20th, but, without any further letter from tenant, two other letters were mailed and received, dated August 8th and August 10th, referring to same letter of July 20th, but saying nothing about the lease. This might raise a suspicion that the letter of July 27th was an after-thought for the purposes of this proceeding, since it is sworn positively that it never was received by the tenant. In my view of the case, however, this is immaterial. Judgment

Unless the landlord can prove a new contract for a monthly tenancy, the legal presumption is absolute in favour of the contention of the tenant and in this the landlord has failed. The letter of July 27th, in so far as it might be

Judgment
Sifton, C J

considered a notice to quit, was entirely unnecessary, as the tenancy expired on 8th August without any action on his part, and therefore the only material part of the letter was an offer to rent the premises to the tenant on a monthly basis, an entirely new contract, never previously discussed, and one which could under no circumstances be considered binding on the tenant until received and accepted by him. The appeal should be dismissed with costs.

Appeal dismissed with costs.

REPORTER :
Alex. Ross, Esq., Regina.

LEADLEY v. GAETZ.

Trespass—Cancellation of agreement for sale of land—Plaintiff not in possession—Amendment of pleadings.

An action for trespass cannot be maintained unless the plaintiff has been in actual possession of the land.

An application to amend the pleadings by adding a claim for recovery of possession of the land was refused on the ground that to do so would give the plaintiff an entirely new action.

[*Court* en banc, *26th July, 18th October, 1904.*]

Statement

This was an appeal from the judgment of SIFTON, C.J., at the trial, dismissing the plaintiffs' action for trespass to their lands.

The plaintiffs were the registered owners of the *locus in quo*. On the 15th April, 1899, The Saskatchewan Land and Homestead Co. and the defendant entered into an agreement in writing whereby the company agreed to sell and the defendant to purchase the land in question. The purchase price was payable by instalments. The agreement contained a clause whereby it was provided that time was to be of the essence of the agreement, and that unless the payments were punctually made the company would be at liberty to re-enter upon and sell the lands, and that all payments made on ac-

count of agreement would be forfeited. The defendant at the time of the execution of the agreement paid the first instalment of the purchase money and immediately afterwards entered into possession of the land, and continued in such possession. Further instalments of the purchase money fell due on the first days of January in the years 1900, 1901, 1902 and 1903, and were not paid. The plaintiffs took the land subject to the agreement. About 1st December, 1902, the plaintiffs caused the defendant to be served with a notice that owing to his repeated defaults in making the payments they had cancelled the agreement, and that they entered upon and repossessed themselves of the land, but no other re-entry or re-possession of the land was ever made by the plaintiffs or on their behalf. On the 28th or 30th April, 1903, one Hogg, the plaintiffs' inspector of lands, acting under the instructions of the plaintiffs' duly constituted agent, went with a man named Butler to the land in question. They found the defendant there. He had a fence post in his hand and told Hogg that he had been advised to hold possession if he had to do so by force. Hogg asked him if he intended to follow that advice. He said he did. He also said that the gates were locked going into broken land and he would by force prevent Hogg's entering. Nothing more was done by either party. This was the trespass complained of. Statement

The appeal was heard before WETMORE, SCOTT, PRENDERGAST, and NEWLANDS, JJ.

O. M. Biggar, and *Geo. W. Green*, for plaintiffs.

Jas. Muir, K.C., and *J. L. Crawford*, for defendant.

[*October 18th, 1904.*]

The judgment of the Court was delivered by

WETMORE, J.:—I am of opinion that the plaintiffs had no actual possession of the land to enable them to maintain Judgment

Judgment
Wetmore J

an action for a trespass of this character. The defendant was the plaintiffs' tenant and had the actual possession. It is true that he may have only been a tenant at sufferance, and an action of ejectment, or rather an action to recover possession of the land, might have been brought against him without notice to quit or demand of possession, but the defendant was nevertheless a tenant and an action of trespass would not lie against him under the circumstances until the plaintiffs had actually re-entered. In *Litchfield* v. *Ready*,[1] Parke, B., in delivering the judgment of the Court, lays down the following : "Indeed it is common learning that an action of trespass cannot be maintained without an actual possession by entry on the land." That has always been my understanding of the law. There is no evidence in this case that the plaintiffs had re-entered before the alleged trespass.

Having reached this conclusion, it is not necessary for me to discuss the other questions raised on the appeal except that of the application to amend the statement of claim by adding to the prayer for relief a claim for possession of the land. This application ought not to be granted. It would involve a recasting of the whole statement of claim. The statement of claim asserts that the plaintiffs were in possession of the land in question, and that the defendant entered upon the possession. In order to support the proposed amendment it must be alleged that the defendant was in possession. To grant the amendment would practically give a new action altogether. In my opinion, the judgment of the Chief Justice should be affirmed and this appeal dismissed with costs.

Appeal dismissed with costs.

REPORTER :

Alex. Ross, Esq., Regina.

[1] (1850) 5 Ex. 939, at p. 944 ; 20 L. J. Ex. 51.

KING v. CORNELL.

Crown case Reserved—Extorting money by accusing a person of offence—Admissibility of documents as part of res gestæ*—Sufficient statement of offence.*

On the trial of a charge for extorting money by threatening to accuse of an offence a letter written to a third party by the person threatened at the time of the threats and at the instigation of the accused, but not read by him, is not admissible in evidence as part of the *res gestæ* or otherwise.

A summons issued by a justice of the peace citing the accused to appear and answer a criminal charge is a "document containing an accusation" within the meaning of s. 406 (c) of *The Criminal Code, 1892.*

A summons issued as above need not have been issued at the instigation of the informant with the intent aforesaid, but the offence is complete if the summons is issued by a third person for the purpose of extortion.

A charge that A. B. "did unlawfully abuse a mare the property of C. D., contrary to the Statutes of Canada, s. 512," is sufficiently stated.

[*Court* en banc, *11th, 18th October, 1904.*]

Statement

This was a case reserved by WETMORE, J., before whom, sitting with a jury, the defendant Cornell was charged jointly with one Clement, on two counts, with (1) having, with intent to extort or gain money from one Geo. Olmstead, accusing the said Olmstead of unlawfully abusing a mare, and (2) having with the said intent, caused the said Olmstead to receive a summons containing the said accusation, knowing the contents of such summons. Clement was acquitted and Cornell convicted.

It appeared that Cornell had gone to Olmstead for the purpose of collecting an account for $70, alleged to be due by Olmstead to Clement. He had, according to the Crown witnesses, before presenting the account, delivered to Olmstead a summons from a justice of the peace directing Olmstead's attendance at a named time and place to answer a charge, based on an information sworn by Clement, of having unlawfully abused "a mare belonging to Herman Clement, contrary to the Statutes of Canada, sec. 512."

Statement There was some evidence for the defence that before presenting the summons, Cornell tried to obtain a settlement of the account, and that if Olmstead saw the summons at the same time as the account, he did so by accident. The result, however, of the interview was that Olmstead gave to Cornell a letter as follows :—

"Mama and Grandma.

"Clement has sent Cornell out here with a summons for me, if I accept the summons I will have to appear before the Justice and the only way out of it would be fifty dollars and sixty days at hard labor. Clement is willing to settle for 70 Dollars. Please pay it without any more trouble as Clement will have me shoved if I don't, so please pay him and save me from coming in and having any trouble with Clement, give him the $70 out of the money I left there. I have got your garden all harrowed up, and started to break this afternoon with Rosses plow. The Black Mare drives single fine.

Geo. M. Olmstead."

This document Cornell, without becoming acquainted with its contents, delivered to Olmstead's mother, and, after some discussion obtained from her the sum of $70.

At the trial this letter, the summons, the account delivered by Cornell to Olmstead, and the information sworn by Clement, (which was in the same terms as the summons) were admitted in evidence, but the trial Judge reserved the following questions for the opinion of the Court *en banc* :—

1. Whether the letter from Olmstead to his mother was properly received against Cornell.

2. Whether the summons was a document containing an accusation within sec. 406 (c) of *The Criminal Code, 1892.*

3. Whether the information mentioned in that paragraph must have been made or laid with intent to extort or gain something from some person, and

4. Whether the information stated any offence within sec. 406 of the Code. Statement

The case was argued before SIFTON, C.J., SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ. Argument

J. T. Brown, for the Crown.

No one for the prisoner.

[*18th, October, 1904.*]

The judgment of the Court was delivered by

PRENDERGAST, J.:—It seems to me that the letter from Olmstead to his mother stands in the same position as would a conversation between them. It is as if Cornell had told Olmstead, "Go inside and tell your mother to pay me the $70, after which I will see her alone and ask her for the money." Of course, it is heresay, and if admissible at all, it must be so by virtue of one of those positive rules which, by way of exception, make heresay evidence sometimes receivable. But what was the letter put in to prove? It could not be put in to prove the mental feelings, whether of fright or otherwise, of Olmstead, because such are not material here,[1] the gist of the offence charged being the causing George Olmstead to receive a summons, etc., with intent, etc. It is immaterial whether he was frightened or not. Of course it would be different if the charge was for obtaining money by means of threats, and so it is in petitions for damages on the ground of adultery where the mental feelings of the petitioner may be shown by what they naturally expressed at the time.[2] Judgment

Can the letter be considered as part of the *res gestæ*? I do not think that it is so connected with the other facts of the case that it should be so considered. Given Cornell's instructions to Olmstead to write the letter, Olmstead's writing

[1] Taylor on Evidence, 9th ed. (1895) p. 374, par. 580. [2] *Op. cit.* p. 375, § 382.

Judgment
Prendergast, J

of the letter, its delivery by Olmstead to Cornell, and by Cornell to Mrs. Olmstead, the contents of the letter are in a way necessary to follow up the chain of particular events which constitute the transaction as a whole. The letter at at all events could not have any weight against Cornell except inasmuch as it kept within his instructions, and his instructions speak for themselves.

Of course, even if admissible as part of the *res gestæ*, the letter would only be evidence of the writer's knowledge or belief of the facts which it mentions, but no proof whatever of the facts themselves.[3] But what knowledge or belief can the letter be put in to prove? The writer's belief or impressions are wholly immaterial in the present case, as already stated, and as to knowledge he should prove it in the usual way by direct testimony and not by a letter in which, not being under oath, he barely asserts that he has such knowledge.

I do not see, in short, that the contents of this document fall within any of the exceptions to the rule governing hearsay evidence, and am of opinion, with all due deference to the learned trial Judge, that it should not have been received.

The second question should, in my opinion, be answered affirmatively. Not particularly that the summons, on account of setting out in the preamble that Olmstead is charged with an offence therein specified, is made thereby "a document containing an accusation," but a citation by a justice to answer a specific criminal charge which this summons is, must I think be taken, by its very nature and object, to constitute an accusation. Obviously it is not so to all intents; but it seemingly is for the purpose of sub-sec. (c), which appears to contemplate documents of this nature.

As to the third question, it does not seem to me that the accusation mentioned in such paragraph (c) of sec. 406 must

[3] *Op. cit.* p. 378.

Judgment

Prendergast, J

have been made or laid with intent to extort or gain something from some person? In sub-secs. (a) and (b) of the same section, the words "with intent to extort or gain anything" clearly qualify the offences therein provided for, *i.e.*, the accusing, the threatening to accuse, and the threatening that somebody else shall accuse. But with reference to sub-sec. (c), the context seems to make it plain that the qualification bears, not upon the accusation contained in the document, but upon the act of causing such document to be received. It is easy to conceive that a charge laid by one person in perfect good faith, and in furtherance of the ends of justice can fall into the hands of another who, actuated by motives of extortion, might deliver it to the party charged, and this would clearly constitute an offence.

The information does in my opinion accuse George Olmstead of an offence within the meaning of sec. 406 of the Code. It has been held in the case of *Reg.* v. *Dixon*,[4] that the word "offence" in the section comprises offences under a Provincial law as well as under the Code or other Dominion law; but in the present case the offence as charged in the information, seems to be provided for by sec. 512 (a) of the Code itself. It is true that the information has only the words "did unlawfully abuse a mare," but while the words "wantonly, cruelly or unnecessarily" in sec. 512 must be taken as a qualification of the beating and binding therein provided, they add really nothing to what is conveyed by the word "abuses," and may well be considered idle in this respect. But even if the said words are necessarily a qualification of the word "abuses," I think the offence as charged is still sufficient under sec. 611 of the Code, and it moreover contains that reference to the section creating the offence and to that "the Court shall have regard . . . in estimating the sufficiency of a count."[5]

4 (1895) 2 Can. C. C. 589. 5 *Crim. Code, 1892*, s. 611 (5).

Judgment

Prendergast, J

The answers to the questions reserved are : to the first "No ;" to the second, "Yes ;" to the third, "No," and to the fourth, "Yes."

In my opinion, the conviction should be quashed and a new trial ordered.

Conviction quashed.

REPORTER :

Alex. Ross, Esq., Regina.

STEVENS v. OLSON ET AL.

Foreign judgment—Proof of—Canada Evidence Act—Imp. Stat. 14 & 15 Vic. c. 99—Exemplification of judgment—Re-opening plaintiff's case — Examination for discovery after adjournment of trial.

On the trial of an action upon a foreign judgment the plaintiff, without giving any notice under *The Canada Evidence Act*, s. 19, tendered in evidence a copy of the judgment sued on certified under the hand of the clerk and by the seal of the Court in which it was recovered, and this was received subject to objection. The defendant adduced no evidence and judgment was reserved. The trial Judge held that the document was improperly admitted, no notice having been given, but adjourned the case to give the plaintiff an opportunity of proving his judgment.

Held, that the copy of judgment tendered was not an exemplification and notice of intention to use it should have been given under s. 19 of *The Canada Evidence Act* before it could be admitted, in spite of the provisions of s. 11 of Imp. Stat. 14 & 15 V. c. 99, to which *The Canada Evidence Act* in not repugnant, but only adds a condition.

Held, further, that the trial Judge properly exercised his discretion in giving the plaintiff a further opportunity to prove his judgment by adjourning the trial.

Held, further that the similarity of the name of the defendant in this action and that of the defendant named in the foreign judgment taken with the present defendant's pleas in confession and avoidance was sufficient *prima facie* evidence of the identity of the two defendants.

After the adjournment of the trial the plaintiff had secured an order for the examination of the defendant for discovery.

Held, that the trial having been commenced and adjourned the plaintiff was not entitled to examine the defendant for discovery.

[*Court* en banc, *12th July, 18th October, 1904.*]

Statement

This was an action upon a judgment recovered in the District Court of the County of Polk in the State of Min-

Statement

nesota. The defendant traversed the judgment, and also pleaded in confession and avoidance. At the trial, without giving any notice under *The Canada Evidence Act*,[1] the plaintiff endeavoured to prove the judgment by a document certified, under the hand of the clerk and the seal of the Court in which such foreign judgment was recovered, to be a true copy of such judgment. This document, which was received subject to objection, was all the evidence tendered by plaintiff. The defendant adduced no evidence, and moved for judgment on the grounds that : (1) the documents did not of themselves constitute an exemplification of a judgment, and at most were only a certified copy of one, and that, therefore, they were not admissible in evidence in the absence of notice under the provisions of *The Canada Evidence Act* ;[1] and (2) that there was no evidence of the identity of the defendant in this case with the defendant named in the foreign judgment.

The learned trial Judge reserved judgment and subsequently held that the documents were not admissible in the absence of notice, but adjourned the trial to give the plaintiffs an opportunity of giving the necessary notice and proving their case.

The plaintiffs appealed from that portion of the judgment holding the documents inadmissible, and the defendant from the order adjourning the trial and giving the plaintiffs leave to re-open.

After the adjournment the plaintiffs applied for and obtained an order for the examination of the defendant for discovery ; from this order also the defendant appealed.

C. de W. MacDonald, for the defendant.
O. M. Biggar and *E. D. H. Wilkins*, for the plaintiffs.

1 56 Vic. c. 31.

[*October 18th, 1904.*]

The judgment of the Court (SIFTON, C.J., WETMORE, PRENDERGAST, and NEWLANDS, J.J.) was delivered by:

Judgment

NEWLANDS, J.—As to the cross-appeal by the defendant I am of the opinion that the document produced does not constitute an exemplification of judgment, but only a certified copy of one, and that before it could be given in evidence the notice required by sec. 19 of *The Canada Evidence Act* must be given.

It was contended by the plaintiff's counsel that *The Canada Evidence Act* did not apply to this document, but that its admission as evidence was regulated by sec. 11 of Imp. Stat. 14 and 15 Vic., chap. 99, which provides that every document admissible in any Court in England without proof of the seal authenticating it, shall be deemed evidence to the same extent in any Court of Justice in the British Colonies, that as this document would, under sec. 7 of that Act, be admissible as evidence in the Court in England, it is admissible here, and that so far as *The Canada Evidence Act* alters the extent to which such judgment is admissible, it is repugnant to express provisions of sec. 11 of the said Act and void by *The Colonial Laws Validity Act, 1865*.[2] Secs. 10 and 19 of *The Canada Evidence Act* are not in my opinion repugnant to ss. 7 and 11 of 14 and 15 Vic., chap. 99, as they do not alter the method of proving a foreign judgment. Sec. 19 provides that reasonable notice shall be given of the intention of the other party to put in such evidence, and as is stated in sec. 20 of the same Act, its provisions are in addition to, not in derogation of, any powers of proving documents given by the existing law, and the notice required being a reasonable precaution to prevent the other side from being taken by surprise. If it is not repugnant to the Im-

[2] Imp. Stat. 28 and 29 Vic. chap. 63.

perial Act it is not rendered void by *The Colonial Laws Validity Act*, and the plaintiff's cross-appeal must fail. Judgment Newlands, J

The defendant appeals from the judgment of the trial Judge on the ground that the case being closed the Judge had no authority to adjourn the trial for further evidence.

If the learned trial Judge had decided at once that the document produced was inadmissible as evidence without the notice required by sec. 19 of *The Canada Evidence Act* there is no doubt but that he had the power under Rule 258 of *The Judicature Ordinance*[2a] to adjourn the trial to allow the plaintiffs to give the required notice. This was was the course taken by DRAKE, J., in *Boyle* v. *Victoria Yukon Trading Co.*[3] HUNTER, C.J., in discussing the question says in that case:[4] "Another objection raised was that the defendant had not given long enough notice of the plaintiff's intention to put in an exemplification of the Yukon proceedings. The notice was given on the 13th of February, 1902, for the trial which commenced on the 17th March. The learned trial Judge considering the time was insufficient, granted an adjournment at the instance of the plaintiff until the 4th of April; but if the original time was insufficient then perhaps in strictness it should have been neglected in fixing the time of the adjournment. At the same time, assuming that there was error in this, the defendants knew as early as December, 1901, that they were being sued on the Yukon judgment, and on February 5th, 1902, that the plaintiff was going to trial, and they must also have known that the proper way for the plaintiff to prove his case was by producing an exemplification of the proceedings, so that they are not in a position to say that they have been taken by surprise. At any rate, I think the error, if there was any, is immaterial, as I am unable to see how it caused any substantial miscarriage of justice."

[2a] Con. Ord. (1898), chap. 21. [3] (1902) 9 B. C. R. 213. [4] At page 224.

Judgment

Newlands J

As the learned Judge reserved his decision he could, I think, at any stage of the proceedings, allow the plaintiff to prove his judgment. In *Budd* v. *Davison*,[5] after the defendant closed their case the plaintiffs asked leave to produce further evidence to rebut the scientific evidence produced by the defendant. MALINS, V.C., in giving a decision said: "I therefore come to the conclusion that it is doubtful whether the plaintiffs are entitled to call further evidence or not, but that there is no doubt the Judge may allow them to do so to assist himself. It will greatly assist me to hear further evidence and I shall therefore allow the plaintiffs to call a scientific witness as they desire." The defendant's counsel then said: "If that is so, I shall also ask to be allowed to call a further witness to rebut the evidence of the one to be called by the plaintiff." MALINS, V.C., said: "I cannot, in fairness, refuse that request."

In *Bigsby* v. *Dickenson*,[6] the Court decided that where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he thinks right at any stage of the trial, allow him to produce rebutting evidence, and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal. BAGGALLAY, L.J., in giving his judgment, said: "I also think that, having regard to the course pursued by the parties at the hearing of the cause—the course pursued as well by the plaintiff as by the defendant—neither of them had any right or title to ask of the Court to have further examination of the plaintiff or of any of the other persons who had given evidence on his side. But it appears to me that this is exactly the case in which it was, I will not say the duty, but the right of the Court to require that a further witness or further witnesses should be called."

In *Hamilton* v. *Broatch*,[7] which was an action for false arrest and malicious prosecution, the plaintiffs put in a

[5] 5 (1880) 29 W. R. 192.
[6] (1876) 4 Ch. D. 24; 46 L. J. Ch. 280; 35 L. T. 679; 25 W. R. 89.
[7] (1889) 17 Ont. R. 679.

Judgment

Newlands, J

certified copy of the information, but it was objected that the original information should have been produced and it was further objected that no exemplification of the judgment of acquittal had been proven. Leave was given to supply such evidence as might be necessary to cover these objections. The jury found against the defendants and the learned Judge[8] reserved his decision on the objections taken and subsequently delivered his judgment allowing the plaintiffs to produce this evidence. In giving judgment he said: "I do not think the plaintiffs' case should be wrecked if their contention should not be upheld, for there is no doubt that the certified copy put before the Court the exact statement of fact, and if for any purpose the original should be referred to, the plaintiffs ought, in my opinion, at any stage be allowed to produce if for the inspection of the Court. No injustice can possibly be done to the defendant from the acceptance of a certified copy, and if the merits are not with him technicalities must not be allowed to defeat justice."

In *Densmore* v. *Shackleton*,[9] it is stated by MOSS, J., in giving judgment, [10] that the Court has full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court by affidavit or by deposition taken before any person whom the Court may direct. It is manifest there must be some practical difficulty in making use of this power where, as in this case, the trial is by jury. It may be usefully employed in such a case where by accident or oversight a party has been or has failed to prove some fact or document essential to his case of the existence or authenticity of which there is no reasonable doubt or no room for serious dispute."

In this case the defendants knew at the commencement of the action that the plaintiffs would have to prove the for-

[8] Rose. J. [9] (1876) 26 U. C. C. P. 604. [10] At p. 613.

Judgment

Newlands J

eign judgment by an exemplification or certified copy thereof, and a certified copy was produced at the trial and its admission as evidence was only prevented on technical grounds. No injustice can be done the defendant by the plaintiffs being given the opportunity to give the notice required by *The Canada Evidence Act* and prove their judgment by the certified copy produced at the trial. The learned trial Judge properly exercised the discretion given him by the *Judicature Ordinance*, and as he has also given the defendant the right to make a full defence, I do not see how the defendant can be prejudiced, and therefore he should not be allowed to defeat the plaintiffs' claim by a mere technical objection. The plaintiffs should, however, only be permitted to prove this judgment and should not be allowed to give any other evidence.

The defendant's counsel at the argument also raised the question that even if the judgment was proved there was no evidence of the identity of the defendant with the defendant mentioned in that judgment. I am of the opinion that the similarity of names, together with the fact that the defendant has pleaded in confession and avoidence of the judgment, is *prima facie* evidence of identity. In *Hennell* v. *Lyon*,[11] LORD ELLENBOROUGH, C.J., said: "But it is said that the evidence wants a further link to connect it with the defendant, and that it ought to be shown that the Charles Lyons in the answer is the present litigant. I do not know of any way by which that circumstance can be supplied, but by the description in the answer itself, which tallies in almost every particular. Still, however, it may be shown that he is not the same person. The question then is whether public convenience requires that the proof should be given by the plaintiff or by the defendant, and I rather think that public convenience is in favour of the admissibility of this proof, giving the other party an opportunity of showing that he is not

[11] (1817) 1 B. & A. 185.

the individual named in the answer. It should be taken as proof that he is the person named in the answer until the contrary is shown. I do not say that it is conclusive, but that it is *prima facie* evidence." This case is followed in *Spafford* v. *Buchanan*,[12] *Wilson* v. *Thorpe*,[13] and *Hasketh* v. *Ward*,[14] which last was an action on a foreign judgment in which the existence of the judgment was in issue. WILSON, J., held that the identity of the name and the fact that the defendant had pleaded pleas in confession and avoidance might be some evidence to go to the jury of the identity.

Judgment
Newlands, J

The defendant also appealed in this case against the judgment of Mr. Justice SCOTT, allowing the plaintiffs to examine the defendant for discovery before the adjourned hearing, but, as I am of the opinion that the plaintiffs should only be permitted at the adjourned hearing to prove the judgment upon which the action was brought, I do not see that any useful purpose could be served by such an examination, and I am also of the opinion that the application for such examination was too late. Sec. 201 of *The Judicature Ordinance* only provides for the examination "before the trial." This case is distinguishable from a case where a new trial has been ordered. If the first trial proved abortive, the new trial would then be a trial of the action and the parties could be examined for discovery before it commenced, as was held in *Leitch* v. *Grand Trunk Railway Co.*,[15] but in this case the trial has been commenced and has been adjourned, and, therefore, no such examination should be allowed.

I am, therefore, of the opinion that the order of Mr. Justice SCOTT should be varied in accordance with this judgment and that the plaintiffs should be allowed to prove their judgment upon which their action is brought at the adjourned

[12] (1824) 3 U. C. Q. B. O. S. 391.
[13] (1859) 18 U. C. R. 443.
[14] (1866) 17 U. C. C. P. 190.
[15] (1890) 13 P. R. 369.

Judgment Newlands, J

hearing of this case, and that the defendant should be allowed to make a full answer thereto, the costs of this appeal to abide the event of the trial, that the plaintiffs' cross-appeal should be dismissed with costs, and that the defendant's appeal from the order for discovery should be allowed with costs.

Judgment accordingly.

REPORTER:

Alex. Ross, Esq., Regina.

PETERSON v. HULBERT.

Chattel Mortgage—Removal of goods to new district—Sale within three weeks—Omission to refile mortgage—Subsequent purchaser.

Where chattels have been mortgaged in one registration district, a purchaser from the mortgagor within three weeks after their removal to another district acquires a good title if the mortgagee omits within the three weeks to refile his mortgage. (SCOTT, J., *dissentiente.*)*

[*Court* en banc, *18th July, 18th October, 1904.*]

This was an appeal by the defendant from the judgment of SIFTON, C.J., in favour of the plaintiff. The action was brought for the conversion of chattels which had been mortgaged by one Macdonald to the defendant while they were in the Edmonton Registration District, and the mortgage had been duly filed, as required by the Bills of Sale Ordinance with the Clerk of that District. A short time afterwards, Macdonald removed the goods into the Calgary Registration District, where, within three weeks after their removal he sold them to the plaintiff, in whose hands they were seized by the defendant under the chattel mortgage. The seizure was not made until after the lapse of three weeks from their removal from the Edmonton District, and the mortgage was not refiled in the Calgary District.

*An appeal by the defendant to the Supreme Court of Canada was allowed, 36 S. C. R. 324.

Appeal

The appeal was heard before WETMORE, SCOTT, PRENDERGAST and NEWLANDS, JJ.

Argument

F. C. Jamieson, for defendant (appellant).

C. de W. Macdonald, for plaintiff (respondent).

[*October 18th, 1904.*]

Judgment

WETMORE, J.:—The mortgagee having permanently removed the property in question in this action from the registration district in which it was at the time of the execution of the mortgage, and in which the mortgage was properly registered, to another registration district, and having within three weeks from such removal sold it to the plaintiff, who purchased it in good faith and for valuable consideration, no certified copy of the mortgage having been filed at any time with the registration clerk of the district to which the property was so removed, the question arises whether or not the plaintiff has acquired a valid right of property therein as against the defendant Hulbert, the mortgagee. The point turns upon whether the words "subsequent purchasers" must be construed as meaning purchasers subsequent to the removal of the property or purchasers subsequent to the expiration of the three weeks prescribed in sec. 29 of *The Bills of Sale Ordinance*,[1] for the filing of the copy of the mortgage in the district to which the property was removed. If the judgment in *Hodgins* v. *Johnston*,[2] lays down the law correctly, the sale to the plaintiff was invalid, and would remain invalid even if a certified copy of the mortgage was never filed with the registration clerk of the district to which the property had been so removed. That case was decided by an exceedingly strong bench, and I cannot help but feel very doubtful as to any contrary conclusion I may reach. Nevertheless, I cannot agree that it lays down the law correctly, and as it is not binding upon this Court, I am free

[1] Con. Ord. (1898(c. 43. [2] (1880) 5 Ont. A. R. 449.

Judgment
Wetmore, J

with all due respect, to express my opinion. I am of opinion that the words "subsequent purchasers or mortgagees in good faith," used in secs. 9 and 11 of the Ordinance, mean purchasers or mortgagees subsequent to the execution of the instrument which has not been registered as required by the Ordinance, and similar words in sec. 29 of the Ordinance mean purchasers and mortgagees subsequent to the removal into the district in which there has been no registration. That has always been my opinion of the meaning of the words, and I do not see my way clear to accept a judgment that interferes with it.

With all respect too, I must say that I think *Hodgins* v. *Johnston*,[2] although it follows the American authorities, is quite at variance with the *ratio decidendi* of what had been previously decided in Upper Canada in *Martin* v. *McDougall*,[3] and *Curtis* v. *Webb*,[4] and what was laid down by DRAPER, C.J., in *Boynton* v. *Boyd and Arthurs*.[5] These cases seem to me to more correctly lay down the law, and I accordingly follow them.

I call attention to the fact that there is a very marked difference between the Ontario Act and the Ordinance under consideration. At the end of sec. 6 of the Ordinance I find the following words: "And every such mortgage or conveyance shall operate or take effect upon, from and after the day and time of the filing thereof." I can find nothing corresponding to that in the Ontario Act. Nor can I find any provision there corresponding to section 10 of the Ordinance. I do not feel called upon in this case to express any opinion as to the effect of these provisions.

It was urged on behalf of the defendant that to hold that the plaintiff had acquired the title to the property in question by the sale to him would lead to an absurdity. That is it would lay it down that when the property was removed

[3] (1853) 10 U. C. R. 399. [4] (1860) 25 U. C. R. 576. [5] (1862) 12 U. C. C. P. 334.

to the other district the mortgage became void, but would be revived by a filing of a certified copy within the three weeks. I prefer to put it this way. Sec. 29 keeps the mortgage valid for three weeks, but it becomes invalid from the time of the removal if a certified copy is not filed within that period, and I am of opinion that the section bears that construction out, because it says that the mortgage shall, in case the certified copy is not filed, "be null and void as against subsequent purchasers and mortgagees in good faith for valuable consideration as if never executed." In my opinion the judgment of the learned Chief Justice should be affirmed and the appeal dismissed with costs.

Judgment

Wetmore, J

PRENDERGAST, J., and NEWLANDS, J., concurred with WETMORE, J.

SCOTT, J. (*dissenting*) :—Sec. 29 of the Ordinance provides that in the event of the permanent removal of the mortgaged goods from the district in which they were at the time of the execution of the mortgage to another district, a certified copy of the mortgage shall within three weeks of such removal be filed in the office of the registration clerk of the district to which they have been removed, otherwise the goods shall be liable to seizure and sale under execution, and in such case the mortgage shall be null and void as against subsequent purchasers and mortgagees in good faith for valuable consideration. The same consequences follow the non-registration of the mortgage in the first instance under sec. 6 and 11, and its non-renewal before the expiration of two years from its filing under sec. 17. That is, in the one case it shall be null and void, and in the other it shall cease to be valid as against subsequent purchasers and mortgagees in good faith for valuable consideration.

In *Clark* v. *Bates*,[6] HAGARTY, C.J., commenting upon a provision in the Ontario *Bills of Sale Act*, similar to sec.

[6] (1871) 21 U. C. C. P. 349, at p. 352.

Judgment
Scott, J

29 of the Ordinance, says: "The intention of the statute was doubtless to protect purchasers in the county to which they [the goods] might be removed, and for that purpose directed a registration there allowing two months from the time of removal. The mischief could, of course, be done within two months."

In *Hodgins* vs. *Johnston*,[7] it was held that the subsequent purchasers and mortgagees referred to in the section of the Act corresponding with sec. 11 of the Ordinance are those becoming such after the expiration of a year from the filing of the mortgage. In that case the plaintiff purchased the chattels before the expiration of a year from the filing of the mortgage. The mortgagee failed to duly renew it before the expiration of the year. It was held that the mortgagee was entitled to the goods as against the plaintiff. Moss, C.J., says:[8] "What was the object of requiring the refiling with an appropriate statement sanctioned by an oath? Clearly to prevent mortgages, which had been wholly or partially satisfied, from remaining as apparent charges to their original extent. There was no intention of protecting persons who purchased or took mortgages, while the mortgage appeared to be in full vitality. Then what is the language used to effect this object? That unless refiled, the mortgage shall cease to be valid as against creditors, and subsequent purchasers and mortgagees for valuable consideration. Until the end of the year it is to remain in force; then unless refiled it is to cease to be valid. Then the statute opens the door to creditors, whenever their claims arise, and to persons who subsequently become purchasers or mortgagees. The mortgage is not to be treated as null and void from its inception; it simply then expires. But that penalty upon neglect cannot deprive the mortgagee of his right against a purchaser from a mortgagor during the full validity of the

[7] (1880) 5 Ont. A. R. 449. [8] At page 452.

mortgage. . . . In this case, when the appellant took the goods in question they were in law the respondent's property, and there was immediately vested in him a right of action for their recovery. If, after the expiration of a year from the original filing, he commenced proceedings, he would have to rely upon his title as it stood at the time of the wrongful taking, not as it was against a creditor, or a subsequent purchaser at the date of issuing his writ."

Judgment
Scott, J

BURTON, J., says:[9] "So far as persons in the position of the plaintiff are concerned, they suffer no detriment from this omission to renew. He had full notice of the defendant's mortgage, and that it was validly registered; and that the person in possession therefore, from whom he purchased, was not the owner. I think it would be a strained and forced construction, opposed to what I conceive to be the policy of these statutes, to hold the word 'subsequent' to apply to any but purchasers becoming such after the time when the mortgage should, in order to preserve its validity, be renewed."

And later, he says: "If the defendant had become aware of the sale to the plaintiff within the year and had at once brought an action to recover it, he must have succeeded. . . The cause of action accrued when the purchaser took possession. The rights of the parties would have to be determined as they stood at the time, and it must be immaterial whether the action to enforce the plaintiff's right commenced one day before, or one day after the expiration of the year. And the cause of action once vested could not be defeated by an omission to do what in that case would have been a meaningless form." . . "What[10] did the plaintiff at most purchase when he bought from the mortgagor? Certainly, he could not expect to be in a more favourable

[9] At p. 455. [10] At p. 456.

Judgment
Burton, J

position that the person through whom he claimed, as to whom no renewal was necessary, and unless we are compelled to hold that the statute clearly gives him a different position, I should be most unwilling to decide that he can avail himself of an omission to do what, as regards him, would have been a mere idle ceremony,"

I cannot see that any distinction can be drawn between the effect under the Ordinance of a purchase from a mortgagor within a year from the filing of the mortgage and one made from him in another district during the currency of the mortgage, and within three weeks after the removal of the goods to that district. To my mind the language I have quoted from the reasons for judgment in the latter case apply with equal force to each, and I cannot see how the omission of the mortgagee to file within that period a copy of his mortgage in the district to which the goods have been removed could possibly affect one who purchased before the expiry of that period.

Our Ordinance appears to have been taken from the Ontario Act, and to have been passed after *Hodgins* v. *Johnston*,[7] was decided. Such being the case it is reasonable to assume that the statute was adopted subject to the judicial construction which, prior to its adoption here, had been placed upon its provisions by the Ontario Courts. At all events only strong reasons should warrant a departure from such construction.[11]

It was contended that, as sec. 10 of the Ordinance provides that the registration of a mortgage shall have effect only in the registration district where the registration was made, the mortgage in this case was never a valid security as against the plaintiff in the district to which the goods were removed and in which he purchased. That provision is not contained in the Ontario Act, and I cannot understand

11 See Endlich on the Interpretation of Statutes, ss. 371, 372.

the reason for its enactment here. It first appears in the Ordinances passed in 1881. The provisions of sec. 29 were not contained in that Ordinance nor was any provision made by it for cases where the goods should be removed to another district. Such being the case I doubt whether it could have been held under that Ordinance that, in case of such removal, the claim of the subsequent purchaser therein would prevail over the mortgage. Judgment Burton, J

It may be open to question whether sec. 10 is not inconsistent with section 29, which undoubtedly gives the registration an effect for a limited period in another district to which the goods comprised in the mortgage may be removed. Even if they are inconsistent provisions I doubt whether any construction which may be given to sec. 10 could affect the plain intention of sec. 29, *viz*, to preserve the rights of the mortgagee and maintain the validity of his security for that period as against subsequent purchasers and mortgagees.

In my opinion the appeal should be allowed with costs.

Appeal dismissed.

REPORTER:

Alex. Ross, Regina.

KING v. MAH KEE.

1 W. L. R. 37.

Criminal law—Keeping a common gaming house—Evidence.

On the premises of the accused a number of persons unconnected with the premises had been observed playing games involving the use of money, dice and dominoes, and the accused had stated to the Chief of Police that he was having a game of *fan-tan* at his place, and that he was willing to pay for the privilege as he was doing well out of it.

Held, sufficient evidence to sustain a conviction for keeping a common gaming house.

[*Court* en banc, *10th, 18th January, 1905.*]

This was an appeal from the refusal of SIFTON, C.J., at the trial to reserve for the opinion of the Court the question Statement

Statement whether the evidence was sufficient to justify a conviction. The accused was tried summarily and was convicted of keeping a common gaming house under sec. 198 of *The Criminal Code, 1892.*

The accused had a building in Edmonton in which he carried on a laundry business. On the evening of the 20th June, when the police visited the premises, a man was standing guard at the door, but the police entered and found six or eight Chinamen sitting around a table on which were dice, dominoes, checkers, and cards. The following evidence was given by the Chief of Police:—

Q. What else did you see there? A. They had some coins, there were some American silver dollars, Canadian one dollar bills and quite a lot of small silver, each one having their own pot in front of them. The accused was holding a little tin box, it was a cigar box, which I supposed to be a bank; they seemed to be getting their chips from him. I stood for some fifteen or twenty minutes watching the game, and the accused dealt out of this box.

Q. Did you ask what the game was? A. Yes, sir, I asked the accused and he said it was *fan-tan.*

Q. Well, did you see anything else to show you what the character of the game was? A. Nothing more than seeing the accused at the head of the table, or I mean at the head of the game.

Q. Now about this pile of money that was in front of each player? A. The accused was taking in his share.

Q. What do you mean by taking in his share? A. The accused was taking in certain amounts of coin and pocketing it and then dishing out more chips after each hand had been played.

Q. Now how many times in all did you visit that place do you remember? A. Some three times, sir.

Q. Was this time on the 20th June the first or second time? A. It was the first time, I think. Statement

Q. Now did you ever have any conversation with Mah Kee between this visit on the 20th June and the visit when you arrested him? A. Yes.

Q. Where did you meet him, tell me that first? A. The accused met me on Jasper Avenue about midnight.

Q. What did he say to you? A. He said he was having a game of *fan tan* at his place, he said he guessed it was all right, and that he would pay me if I would allow him to go on with the game, and that he would make it all right with me.

Q. Well, did he say anything about the kind of a game this *fan-tan* was? A. He said he was doing pretty well out of it, and he would make it right with me.

Q. Now, on the occasion of the arrest, that was on what day? A. On Sunday evening, sir.

Q. Do you remember the day of the month? A. The 10th of July.

Q. About what time in the evening? A. I really cannot say, it was after dark, somewhere around nine o'clock I would think.

Q. It was after dark on the night of the 10th July? A. Yes, sir.

Q. What did you see on that occasion? A. I saw two tables occupied with Chinamen.

Q. How many Chinamen? A. About four at one and six of them at another.

Q. Now tell us what else you saw on that occasion? A. I saw the table covered with dice, checkers and dominoes.

Q. Any money? A. Yes, sir.

Q. Now what did you do? A. There was quite a little scramble; we made a little noise and there was quite a little

Statement scramble picking up the money from the table and putting it in their pockets. I got one man when he was reaching for his and took it from him.

Q. Was this dice, money, etc., on the table in front of each man? A. Yes, sir.

Q. Now do you know who was the proprietor of this place? A. The accused told me he was.

Q. Do you know if those Chinamen who were there were employed in his laundry business? A. Some of them may have been, but most of them were not. I know most of them to be employed in other places in the town, in fact, part of the staff was working there that night.

Appeal The appeal was heard before WETMORE, SCOTT, PRENDERGAST, HARVEY and NEWLANDS, JJ.

Argument *C. de W. MacDonald*, for the Crown.

O. M. Biggar, for accused.

[*18th January, 1905.*]

Judgment HARVEY, J.:—Under sec. 196 of the *Criminal Code, 1892*, a common gaming house is, amongst other things, a house, room or place, kept by any person for gain, to which persons resort for the purpose of playing at any game of chance.

In *Rex* v. *James*,[1] the accused kept a cigar store with a room in the rear where persons resorted for the purpose of playing poker, and out of the stakes of the game sums were taken from time to time from which to buy cigars from the accused. The question was whether he kept the place for gain, there being nothing to show that the accused derived any profit except what might arise from the sale of the cigars. The Court of Appeal unanimously held that that was sufficient evidence to convict—indeed the reasons for judg-

1 (1903) 6 O. L. R. 35.

ment appear to justify the conclusion that the mere fact of the accused keeping the place lighted and heated would be sufficient evidence that he expected to get some profit, or in other words keep the place for gain. Judgment Harvey, J

In the case before us there is unquestionably evidence that the accused was the proprietor or keeper of a room or place, and that he kept it for gain, since he stated that he was having a game of *fan tan* at his place, and was willing to pay for the privilege of continuing it, because he was doing well out of it.

It was suggested on the argument that this might mean merely that he was having good luck, but in my opinion that would make no difference; the game was going on and he was making money out of it, and consequently wanted to be allowed to continue it. This is clearly evidence that the purpose was one of gain.

The evidence of the Chief of Police of the character of the game in progress when he visited the accused's place, a game the accused told him was *fan tan*, shows it was a game of chance, and that money was changing hands on the game.

I have had some doubt as to whether there was evidence that the place was one to which persons resorted, but after consideration I am of opinion that the statements of the Chief of Police that several persons, some of whom did not belong on the premises, were present on two occasions playing the game, and the statement of the accused that he was having a game of *fan tan*, is clearly evidence that it was a place of resort, and such being the case there appears to be evidence of the existence of all the elements necessary to constitute a common gaming house and of the fact that it was kept by the accused.

The weight of that evidence is of course a matter for the trial Judge.

In my opinion the appeal should be dismissed.

Judgment
Harvey, J

SCOTT, J., and PRENDERGAST, J., concurred with HARVEY, J,

WETMORE, J. (dissenting): I regret I am unable to concur with the judgment just delivered.

I am of the opinion that the evidence does not establish that the game being played was a game of chance. I am therefore of opinion that the application should be allowed.

NEWLANDS, J., concurred with WETMORE, J.

Appeal dismissed, WETMORE and NEWLANDS, JJ., *dissenting*.

REPORTER:
Alex. Ross, Esq., Regina.

REX. v. MASSEY-HARRIS COMPANY

1 W. L. R. 45.

Foreign Company—Ordinance respecting—Power of Territorial Legislature.

The Foreign Companies Ordinance is *intra vires* of the Territorial Legislature, and extends to companies incorporated by the Dominion to carry on throughout Canada a business which the Territorial Legislature might have authorized it to carry on in the Territories.

[*Court* en banc, *10th, 20th January, 1905.*]

Statement

This was a case stated under sec. 900 of *The Criminal Code, 1892*, by the justice of the peace before whom the Massey-Harris Co., Ltd., was convicted for that, being a foreign company under the terms of *The Foreign Companies*

Ordinance, 1903,[1] having gain for its object, it carried on its business in the North-West Territories without having been registered under such Ordinance. The company was a joint stock company incorporated by letters patent under the provisions of *The Companies Act*, R. S. C. (1886) ch. 119, for the purpose of manufacturing and dealing in all classes of agricultural implements, and it did carry on its busines in the Territories between the dates mentioned in the conviction. The conviction was objected to on the grounds that the Ordinance was never intended to apply to companies incorporated under the Dominion Companies Act, and that if it was so intended it was *ultra vires*. Statement

The appeal was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and NEWLANDS, JJ. Appeal

Norman McKenzie, for the appellant company. Argument

N. D. Beck, K.C., for the Crown.

[*20th January, 1905.*]

WETMORE, J.:—As to the first ground of objection, the contention is that the appellant is not a "foreign company" as defined by the Ordinance. It is urged that the definition of foreign company only embraces companies which the Legislative Assembly had power to incorporate, and inasmuch as the appellant company was incorporated to carry on its business throughout the whole Dominion, it could not be incorporated by the Assembly for that purpose, and therefore it does not come within the definition. I do not so read the Judgment

[1] No. 14 of 1903, 1st sess., which provided as follows: "2. In the construction of this Ordinanee and of any rules or forms made in pursuance thereof, 'foreign company' shall mean any company or association incorporated otherwise than by or under the authority of an Ordinance of the Territories for the purpose of carrying on any business to which the legislative authority of the Legislative Assembly of the Territories extended. . . .

"3. Unless otherwise provided by any Ordinance, no foreign company having gain for its object shall carry on any part of its business in the Territories unless duly registered under this Ordinance."

Judgment
Wetmore J

paragraph. In order to hold that a company or association comes within the definition it must be proved that it is incorporated for the purpose of carrying on some business to which the legislative authority of the Territories extends. It is not necessary to prove that the Assembly would have power to incorporate it and invest it with all the powers it possesses under the charter which created it.

Was the appellant company then incorporated for the purpose of carrying on some business to which the legislative authority of the Assembly extends? I am of opinion that it was. It is quite true that the Assembly could not incorporate a company for the purpose of carrying on the business of manufacturing and dealing in all classes of agricultural implements throughout the whole Dominion, but it could, under the power conferred on it by sec. 6 (7) of ch. 22 of 54-55 Vic. (1891) (Ca.), to legislate with respect to "the incorporation of companies with territorial objects," incorporate a company for the purpose of carrying on such a business within the Territories. Moreover, under the powers conferred by para. 9 of the same section to legislate with respect to "property and civil rights in the Territories," I can conceive that the Assembly would have power to enact Ordinances dealing with business of that nature within the Territories, and under the powers conferred by para. 2 of that section to legislate with respect to "direct taxation within the Territories in order to raise a revenue for Territorial or municipal or local purposes," it would have power to pass taxing Ordinances with respect to such a business. This is so well settled by decisions of the Judicial Committee of the Privy Council, and so well understood, that it is only necessary to cite two of the cases decided by that Court on that point, without any discussionof them. I refer to *Bank of Toronto* v. *Lambe*,[1] and *Brewers and Malsters' Association* v. *Attorney-General of Ontario*.[2] The legislative authority of

[1a] (1887) 12 App. Cas. 575. [2] (1897) A. C. 231.

Judgment

Wetmore, J

the Assembly, therefore, *quoad* the Territories, extends to the business for the purpose of carrying on which the appellant was incorporated, and the company is embraced by the definition of "foreign company" given by the Ordinance. That, in my opinion was the intention of the legislature, and I think that the language of that paragraph is capable of the construction I put on it.

With respect to the Ordinance being *ultra vires*, I will assume that the Ordinance is a taxing Ordinance providing direct taxation in order to raise a revenue for territorial purposes. Such an Ordinance is on general principles within the powers of the Legislative Assembly by virtue of the provision above quoted, giving authority to legislate with respect to direct taxation, and this authority may be exercised with respect to corporations created by Act of the Dominion Parliament. Parliament creates the corporation, but the local authority may impose the direct tax upon it. This is clearly established by the cases decided by the Judicial Committee, which I have already cited.

Now while the Ordinance in question may be essentially a taxing Ordinance, it is possible that it may in some respects have gone further than it is necessary for a taxing Ordinance to go, and may contain provisions that are at variance and inconsistent with *The Companies Act*, or with the rights and privileges conferred by virtue of it, and unnecessarily, so far as the purpose of taxing is concerned, impose duties of an onerous character not contemplated by the Act. If it does contain such provisons, and if the procedure prescribed is of such a character that these duties have to be performed before the tax can be received or become payable and the company is prohibited from doing business unless the tax is paid, the Ordinance may, *quoad* such companies, be *ultra vires*. Now I quite concede that the only question this Court has to decide on this appeal is whether the conviction against the appellant is valid or not. And I also concede that the

Judgment

Wetmore, J

mere fact that there were provisions of the Ordinance which were *ultra vires* would not in itself make the whole Ordinance *ultra vires*. If there are portions of the Ordinance which are *ultra vires* and which, independently of the other portions, would support the conviction, that would be sufficient.

I must say that I had very serious doubts whether sec. 5 of the Ordinance did not require the company, as a condition precedent to registration, to do some acts that were not within the powers of the local legislature to require them to do. I have reference to the provisions of paragraphs (*a*), (*c*), and (*d*) of that section.[3] On mature consideration, however, I have reached the conclusion that paragraphs (*a*), and (*c*) are *intra vires* the Assembly, for the reasons stated by my brother NEWLANDS in his judgment, namely, that they are reasonable provisions for the filing of such information in the place specified by the Ordinance for the purpose of affording information of the character specified to residents within the Territories, and therefore they do not conflict with the provisions of *The Companies Act*, which require information of a somewhat similar character to be filed with the Dominion officer at Ottawa, and that in view of the general trend of the decisions of the Privy Council on the subject, it is open to the Assembly to enact such provisions.

With respect to paragraph (*d*) of the section referred to, it was urged that the section was *ultra vires* the Assembly, and *Lamont* v. *Canadian Pacific Railway Company*[4] was relied upon in support of that contention. Sec. 62 of *The Companies Act* provides a method for serving summonses, notices and other documents on a company incorporated under that Act. The language of that section is generally to

[3] No. 14 of 1903, 1st Session, s. 5, required a company before it could be registered to file (*a*) copies of its charter and regulations, (*b*) evidence of its continued existence, (*c*) a copy of its last balance sheet, or certain information in substitution therefor, and (*d*) a power of attorney to some person in the Territories upon whom process might be served.

[4] (1901) 5 Terr. L. R. 60.

Judgment

Wetmore, J

the same effect as that contained in the section under discussion in the case cited, that is, it provided that the process might be served at a specified place and in a specified manner, but that case was decided upon the grounds, and only upon the grounds, that inasmuch as a specified method of serving the railway company had been provided by the Act, and the plaintiffs had sought to effect a service upon them by virtue of the general provisions contained in *The Judicature Ordinance*, that the special provisions of the Act prevailed and a service could not be effected under the general provisions of the Ordinance, and that the maxim *generalia specialibus non derogant* applied. No question of *ultra vires* was decided in that case. It was not held that the Assembly could not, notwithstanding the provision in the Act, by special legislation have provided other methods for the service of the company. That question was not raised. It is, in my opinion, raised now, and assuming the provisions of sec. 62 of *The Companies Act* to be a special provision relating to the companies incorporated under that Act, I have no hesitation in holding that the North-West Legislative Assemby, in pursuance of the powers given them to legislate upon the subject of the administration of justice, could by special legislation provide other and more convenient methods for the service of process upon any such company. I take it that by paragraph (*d*) of section 5 of the Ordinance in question, the Assembly has in effect so provided as regards companies incorporated under *The Companies Act* applying for registration in the Territories, and therefore, that the provision that they should file the power of attorney and the declaration therein provided for is within the power of the Assembly. I have consequently come to the conclusion that the judgment should be given in favour of the respondent and the conviction confirmed.

HARVEY, J., concurred with WETMORE, J.

Judgment
Scott, J

SCOTT, J.:—I agree that the conviction should be upheld for the reason stated by my brother WETMORE, but I desire to state that I think it may be open to question whether a distinction may not be drawn between sec. 62 of *The Companies Act* and the clause in the schedule to *The Act respecting the Canadian Pacific Railway Company*, which was considered by this Court in *Lamont* v. *Canadian Pacific Railway Company*.

The latter might be considered as legislation more in the interest of the railway company than in that of persons having claims against it, since the intention might be to entitle the company to require that process for service upon it in the Territories should be served only in a certain manner, while sec. 62 of *The Companies Act* may be held to be legislation in the interest of persons having claims against companies incorporated under the provisions of that Act, that is that the intention was to provide a means by which process might be served upon such companies, but not to exclude such other means of service as might be provided by Provincial or Territorial legislation. If that is the proper construction to be placed upon these enactments, and I entertain doubts as to whether it may not be, it may follow that Territorial legislation providing for other modes of service would be *ultra vires* with respect to the Canadian Pacific Railway Company and *intra vires* with respect to companies incorcorporated under *The Companies Ordinance*.

NEWLANDS, J.;—The power of the Legislative Assembly of the North-West Territories to pass the legislation in question if they have that power, is conferred upon them by *The North-West Territories Act*,[5] and the various amendments, and its powers are similar to those of the provinces, with the exception that all the powers conferred upon it are subject to the provisions of that Act and of any other Act of the

[5] R. S. C. (1886) c. 50.

Parliament of Canada. *The Companies Act* being a general Act applicable to the whole of Canada, would have no greater operation in the Territories than in the Provinces. Judgment Newlands, J

STRONG, J. (afterwards Chief Justice of the Supreme Court of Canada), in the opinion he gave in *The Severn* v. *The Queen*,[6] laid down a principle of construction as applied to Provincial Statutes which has evidently been adopted by the Privy Council in construing all such Acts. It is as follows: "I do not consider it out of place to state a general "principle which, in my opinion, should be applied in deter- "mining questions relating to the constitutional validity of "Provincial Statutes. It is, I consider, our duty to make "every possible presumption in favour of such legislative acts "and to endeavour to discover a construction of *The British* "*North America Act* which will enable us to attribute an "impeached Statute to a due exercise of constitutional au- "thority before taking upon ourselves to declare that, in "assuming to pass it, the Provincial Legislature usurped "powers which did not legally belong to it; and in doing this "we are to bear in mind that it does not belong to Courts of "Justice to interpolate constitutional restrictions; their "duty being to apply the law not to make it."

Acting on this principle it should be conclusively shown by the parties attacking the constitutional validity of this Ordinance that it is *ultra vires* of the local legislature.

By sec. 13 (2) of *The North-West Territories Act*, the Territorial Legislature has power to pass Ordinances for direct taxation within the Territories in order to raise a revenue for Territorial, municipal or local purposes, and by sub-sec. 9 of said section it has control over property and civil rights in the Territories. Does this Ordinance come under one or both of these sub-sections? The Parliament of Canada is the only legislature that has power to incorporate a company to

[6](1878) 2 S. C. R. at p. 103.

Judgment
Strong, J

do business in all parts of Canada, but, as was stated in the *Colonial Building and Investment Association* v. *Attorney-General of Quebec*,[7] what such an Act does is "to create a "legal and artificial person with capacity to carry on cer- "tain kinds of business, which are defined, within a defined "area, *viz.*, throughout the Dominion. Among other things "it has given to the Association power to deal in land and "buildings, but the capacity so given only enables it to ac- "quire and hold land in any Province consistently with the "laws of that Province relating to the acquisition and ten- "ure of land. If the company can so acquire and hold "it the Act of incorporation gives the capacity to do so."

In this case too, they cited with approval the hypothetical case given by way of illustration in the *Citizens' Insurance Company* v. *Parsons*,[8] where they showed that a company incorporated by the Dominion might be unable to do business in any of the Provinces on account of the provincial laws.

The power of the Provinces to impose a direct tax on any company incorporated by the Parliament of Canada is now a well settled proposition, and I only need cite in support of that proposition the cases decided by the Privy Council of *Bank of Toronto* v. *Lambe*,[9] and *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario*.[10]

The only question that has been raised as to the right of the Provinces to legislate as to property and civil rights is where such legislation comes into conflict with one of the powers conferred upon the Parliament of Canada by sec. 91 of *The British North America Act*, and the one it comes oftenest in conflict with is sub-sec. 2, sec. 91, for the regulation of trade and commerce. The construction that has generally been put on the regulation of trade and commerce does not include minute regulations affecting the terms and condi-

[7](1884) 9 App. Cas. 157, at p. 166. [8](1881) 7 App. Cas. 96.
[9](1887) 12 App. Cas. 575. [10](1897) A. C. 231.

tions on which persons or corporations carrying on particular trades are to be allowed to do so in particular localities, but rather to matters of a general *quasi*-national importance. Judgment Strong, J

In *Bank of Toronto* v. *Lambe*, their Lordships said that where they say in *Citizens' Insurance Company* v. *Parsons*,[11] "that it was found absolutely necessary that the literal "meaning of the words shall be restricted in order to afford "scope for powers which are given exclusively to the Pro- "vincial Legislatures, it was there thrown out that the "power of regulation given to the Parliament meant some "general or interprovincial regulation. No further at- "tempt to define the subject need now be made because "their Lordships are clear that if they were to hold that "this power of regulation prohibited any provincial taxa- "tion on the persons or companies regulated, so far from "restraining the expressions as was found necessary in "Parsons' case, they would be straining them to their "widest conceivable extent."

The Parliament of Canada can over-ride by legislation any Ordinance passed by the Territorial Legislature, but if they have not done so in this case and if the provisions of *The Foreign Companies Ordinance, 1903*, which are before this Court, fall under either of the two enumerated sub-sections of sec. 13 of *The North West Territories Act*, and do not conflict with the provisions of *The Companies Act*, I am of the opinion that that Ordinance is *intra vires* of the Territorial Legislature.

Section 4 of the Ordinance requires the payment of a fee of the same amount as would be required on the registration of a company under *The Companies Ordinance*. This provision is of course within the powers of the legislature.

Section 5 provides, first, for the filing of a copy of the charter. As the above mentioned fees are regulated by the capital stock of the company, this seems a reasonable provi-

[11] 7 App. Cas. at p. 111.

Judgment
Strong, J

sion to enable the Registrar to fix the fee. Sub-sec. (b) requires the filing of an affidavit or statutory declaration that the company is still in existence and legally authorized to transact business under its charter. This seems to be a proper and reasonable provision to show that the company sought to be registered has still a legal existence, as otherwise it would not be subject to a tax.

Sub-sections (c) and (d) would, I think, more properly come under the Territorial Assembly's power to pass Ordinances relating to property and civil rights, and the fact that *The Companies Act* has also made provision for the filing of certain information at Ottawa and for the service of process, is no reason why in addition to that the Legislature should not provide for the filing of the same kind of information with the Registrar for the information of residents in the Territotries, or for an additional mode of service. There being no conflict between the enactments, the one being merely in addition to the other, I think these provisions are all within the powers of the Territorial Legislature.

It is true that in *Lamont* v. *Canadian Pacific R. W. Co.*,[12] this Court decided that service of a writ on the railway company could not be made in any other way than that provided in the Act of the Parliament of Canada incorporating the company. That decision put it on the ground that the railway company's Act of incorporation was special legislation. That is not the case here ; I do not think it applies to this case.

For the above reasons I am of the opinion that the appeal should be dismissed.

SIFTON, C.J., concurred.

Conviction affirmed.

[12] (1901) 5 Terr. L. R. 60.

REX EX REL. PARK v. STREET.

1 W. L. R. 87. See 1 W. L. R. 202.

Quo warranto—Validity of election.

The practice in the Territories providing for a writ of summons in the nature of a *quo warranto*, differs from that in England. There the question raised is the right of the respondents to use and exercise the office. Here, what is to be decided is whether there was an election. If so, whether the respondent was elected, and, if so, whether his election was valid. Consequently it is not necessary in proceedings here that the material should show that the respondent has accepted the office or the term for which he was elected.

[WETMORE, J., *1st, 2nd February, 1905*]

Statement

This was the return of a summons in the nature of a *quo warranto* to try the matter of the election of the respondent as Mayor of the Town of Whitewood.

Argument

J. T. Brown, for the respondent, objected that the material filed did not disclose the fact that the respondent had accepted, or taken the oath of, office, or the term for which he was elected.

E. L. Elwood, for relator.

[*2nd February, 1905.*]

Judgment

WETMORE, J.:—I am of opinion that the objections are not well taken.

The writ in question was issued under the provisions of sec. 56 of *The Municipal Ordinance*.[1] It is quite clear to my mind that the object and intention of that writ is entirely different from that of the common law writ of *quo warranto* or from an information in the nature of a *quo warranto* filed under the ordinary practice relating to such matters. In Short & Mellor's Crown Practice,[2] it is set out that "The ancient writ of *quo warranto* was in the nature of a writ of right for the King against him who claims or usurps any office, etc., to enquire by what authority he supports his claim

[1] Con. Ord. (1898), chap. 70. [2] At p. 279.

Judgment

Wetmore, J

in order to determine his right. That writ is now obsolete, and the modern information in the nature of a *quo warranto* is now used and has the same object in view as the writ." Later [3] we find the form of an information in the nature of a *quo warranto* against municipal corporate officers: "And it is alleged that the party against whom the information is laid did use and exercise, and continued at the time of the laying of the information to use and exercise, the office without legal warrant or right," etc. Under such a practice I can well understand that the material should disclose the fact that the party against whom the information was laid was at the time it was laid exercising the functions of the office, and it was upon that practice that *Reg.* v. *Slatter*,[4] and *Reg.* v. *Quayle*,[5] were decided.

The writ issued under sec. 56 of *The Muncipal Ordinance* [5a] is not issued merely to enquire as to by what right the respondent holds or exercises the office, but it is to try out the validity of the election. In the first place, that section and the following sections down to and inclusive of sec. 82 are headed "Controverted Elections." The provisions of secs. 56, 57 and 75 clearly show that the object of the writ is not merely to try the right of the person in possession, but to try the validity of the election. The observations of BURNS, J., in *Rex* v. *Stephenson*,[6] are pertinent, and I entirely concur with them.

The statement filed in this matter contains all that it is required to contain by sec. 56 of the Ordinance, and no more seems to me to be necessary. It will be observed also that the form of writ prescribed by the Rules of the Supreme Court,[7] commands the respondent to appear on the proceeding instituted to try the validity of his election, not to enquire by what right he exercises the office. Evidently in drawing

[3] At p. 601. [4] (1840) 11 A. & E. 505. [5] (1840), 11 A. & E. 508. [5a] Con. Ord. (1898) chap. 70. [6] (1851) 1 Chy. Cham. R. 271. [7] Rules of the Supreme Court, p. 6.

this form of summons the Judges must have seen the distinction between the writ required by the Ordinance and the old writ of *quo warranto*, or the information in the nature of a *quo warranto*. Judgment Wetmore, J

The other objection, that the statement or material filed does not disclose the term for which the respondent was elected is, in view of what I have held, not material. The questions to be decided are: Was there an election? Was the respondent declared elected at such election? And, was that election valid? The objections are therefore overruled, and the case must proceed upon the merits.

REX v. KING.

1 W. L. R. 348, 576.

Murder—Proof of corpus delicti — Identity — Right to reply by Crown counsel—Comment upon prisoner's failure to give evidence—New trial.

On a charge of murder, the death of a human being having been once established the identity of the deceased, and the fact that his death was caused by the prisoner, may be established by circumstantial evidence, which should, however, be cogent and convincing.

Held, (WETMORE, J., *dissentiente*), that in this case the evidence of the identity of the deceased and of the prisoner's having caused his death was sufficient to warrant the prisoner's conviction.

The prosecution was conducted by the Crown Prosecutor, having general instructions from the Department of Justice in all criminal cases, and particular instructions in this case.

Held, (WETMORE, J., *dissentiente*), that although no evidence was given on behalf of the deceased, the Crown Prosecutor had the right to reply. *Rex* v. *Martin* (1905), 5 O. W. R. 317, *followed*.

The Crown Prosecutor in the course of his address to the jury referred to the fact that the prisoner might have given evidence on his own behalf, and expressed the opinion that "his counsel took the very best and wisest course in not having him go on the stand," adding "I think it was wise for himself."

Held, that the prisoner was entitled to a new trial, these remarks constituting an improper comment, by which substantial wrong and injustice was caused.

[*Court* en banc, *12th, 19th April, 1905.*]

This was a case reserved by HARVEY, J., after the trial at Edmonton, with the intervention of a jury, by whom the Statement

Statement

prisoner was found guilty of the murder of one Edward Hayward at Lesser Slave Lake, on the 18th September, 1904.

The evidence was to the effect that the prisoner and Edward Hayward had arrived in Edmonton together on the 14th August, 1904, had then purchased a packing outfit there and had set out overland by way of the Swan Hills for Lesser Slave Lake. They arrived at the Sucker Creek Indian Reserve, on the border of Lesser Slave Lake, on or about the 16th September, 1904, and went into camp at a point not far from the houses of the Indian settlement and close to the main travelled road from it to the English settlement and Hudson's Bay Fort, along which were some eight or ten houses in which there was a population of some sixty or seventy Indians. They remained there for at least three days, on the first two of which they were visited by several Indians, who saw there many of the articles purchased in Edmonton. On the night of the day preceding the prisoner's departure from the camp a sound as of a gun shot was heard apparently from the direction of the camp. Between the afternoon of that day and such departure there did not appear to have been any Indians at the camp, but two paid a visit to the locality and were at the camp fire shortly after they had seen the prisoner leaving with the horses and the outfit. On that evening the prisoner camped opposite the main settlement, where the traders' stores are, and shortly after went across to that settlement, where he remained until the 9th October, without being in any way molested. He disposed of the outfit, and while waiting for a boat to Athabasca Landing and for payment of the purchase money, except $55.75 paid on account, was interviewed on the 9th October by the police with regard to the disappearance, which they stated that the Indians had suggested, of his partner, and on the 10th October was taken into custody. He then had in his possession some $60.

Statement.

On the 8th October search was made, under the direction of the Sergeant of Police at the camp on the Reserve, and there were found the traces of a very large fire. In it were discovered on that and subsequent days, many pieces of charred bone, of which four, fitting together and constituting a piece about five centimetres by seven centimetres, were identified as the upper posterior angle of the right parietal bone of a human skull, and a fifth as the jugular process of a human occipital bone. There were also found portions of various organs, heart, lung, liver, pancreas, *etc.*, which were shown to be similar in structure and corresponding to human organs, though not positively identified as human. It was, however, stated in the medical evidence that the fact that each of these fleshy structures did resemble human organs and that they were found together, and with the human bones, was almost convincing evidence that they had all been human. In addition there was found in the ashes a considerable number of what appeared to be eyelets of boots, buttons, buckles and other metal parts of clothes. In the slough, distant four hundred and fifty feet from the camp fire in question, was found a pair of miner's hob-nailed boots, identified by witnesses as those the prisoner's companion had previously worn, and tied up in a rag, stuffed in the toe of one of those boots, which was laced up and tied to the other, were a number of articles, including a gold sovereign case, a set of miner's scales and weights, a gold nugget necktie pin, an exploded forty-five calibre rifle cartridge and a number of other smaller articles. The necktie pin, the sovereign case, the miner's scales and weights were identified by the brother of the supposed deceased as having been his property. There was also evidence of contradictory statements by the prisoner as to the name of the man who was with him, and as to what had become of him. A search was made in the direction in which the prisoner said he had gone, but no trace of him was found.

Statement.

No evidence was adduced by the defence, and counsel for the Crown first addressed the jury. After the address of counsel for the defence the Crown counsel claimed the right to reply, stating that he had general instructions from the Department of Justice in all criminal cases, and special instructions in regard to this prosecution. He was permitted by the trial Judge to address the jury in reply.

In the course of his first address he said to the jury:—

"Now we are confronted with another aspect of the "case here, which I shall have to handle in a gingerly way. "It is familiar, I suppose, to you, gentlemen of the jury, "that the Crown is expressly forbidden, as a matter of good "ethics, to comment upon the prisoner not giving evidence. "Nowadays prisoners are allowed to give evidence on their "own behalf, and the fact that they do not give evidence in "their own behalf is sometimes used against them by juries. "I think his counsel took the very best and wisest course "in not having him go on the stand, and I think it is wise "for himself."

The following questions were reserved for the opinion of the Court *en banc* :—

First.—Whether there was evidence which should have been allowed to go to the jury, there being no direct evidence either of an act of the prisoner's likely to cause death, or of the fact of death itself, and no convincing presumption of death being raised.

Second.—Whether counsel for the Crown should have been allowed the right to reply, no evidence having been tendered on behalf of the prisoner.

Third.—Whether the comment by counsel for the Crown in the course of his address to the jury with regard to the prisoner's not giving evidence in his own behalf was proper.

The case was argued before SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS and HARVEY, JJ. Argument.

C. de W. MacDonald, for Crown.

O. M. Biggar, for prisoner.

[*19th April, 1905.*]

NEWLANDS, J.:—The first question is a very serious one, and is founded upon the general rule that the fact that an offence has been committed must be fully established before anyone can be held to answer for it. This rule, as applied in murder cases, is laid down by Sir MATTHEW HALE,[1] where he says: "I would never convict any person of murder or manslaughter, unless the fact was proved to be done or at least the body found dead." Judgment.

This rule is said by MAULE, J., in *R.* v. *Burton*,[2] to be a rule of caution rather than of law or evidence, and circumstances may be sufficiently strong to show the fact of the murder though the body has never been found. In *R.* v. *Hindmarsh*,[3] where the prisoner, the mate of a vessel, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, that the witness being afterwards alarmed in the night by a violent noise, went upon deck and there observed the prisoner take the captain up and throw him overboard into the sea; that the captain had not been seen or heard of afterwards; that near the place on the deck where the captain was last seen a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood, the Court, though they admitted the general rule of law, left it to the jury to say on the evidence, whether the deceased was not killed before his body was cast into the sea, and the jury being of that opinion the prisoner was convicted and the conviction sustained.

[1] Hale's P. C. 290. [2] (1855) Dears C. C. 282. [3] 2 Leach 569.

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In *R.* v. *Cleverton*,[4] the prisoner was indicted for murdering an infant child, and the evidence was the prisoner's statement to a police officer that the father of the child had written for it and she had sent it to him at Ipswich by a woman at the railway station, Colchester. There was also evidence that she had been seen on the 4th day of July going in a direction which might be towards the river or towards the station with something which, to the witnesses, seemed like a child of about the age of the missing infant, and that on the next morning a body of an infant child of the same sex (and so far as appeared), about the same age, was found dead in the river. It appeared that this child had died from drowning, but there was no other evidence, otherwise than before mentioned, to identify it with the prisoner's child. ERLE, C.J., left the case to the jury on this evidence, and after telling them the rule laid down by Sir MATTHEW HALE, asked them: "On the whole evidence, are you satisfied that the body found in the river was the prisoner's child and that it was put there by her?" The jury brought in a verdict of not guilty.

In *R.* v. *Hopkins*,[5] where a girl was indicted for the murder of her infant child by drowning, LORD ABINGER, C.B., directed the jury to acquit, as the child found drowned was proved not to be the child of the prisoner, and he said, with respect to the child which was really the child of the prisoner, she cannot, by law, be called upon either to account for it or to say where it is, unless there be evidence to show that her child is actually dead.

In *R.* v. *Clowes*,[6] the alleged murder took place in 1806, and in 1829 bones were found buried under a barn which the prisoner had occupied. The finding of the bones was proved, and the wife of the deceased identified a carpenter's rule and the remains of a pair of shoes which were found in the place

[4] (1860) 2 F. & F. 833. [5] (1838) 8 C. & P. 591. [6] (1830) 4 C. & P. 221.

where the bones were discovered, and she also identified the skull of the deceased by something remarkable about the teeth. LITTLEDALE, J., left this evidence to the jury, who brought in a verdict of acquittal. Judgment Newlands J.

The same rule is followed by the Courts in the United States. In *People* v. *Palmer*,[7] the Court reviews the principal English and American decisions and comes to the conclusion that the rule is the same in both countries, and that the penal code of that State, which provided that, "No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are each established as independent facts, the former by direct proof and the latter beyond a reasonable doubt," did not change the rule of the common law, but was only for the purpose of declaring that rule in explicit terms. In that case the defendant was indicted for the murder of one Peter Bernard. A dead body was found, alleged to be that of Bernard. There was no direct proof of that fact, and it was sought to be established by circumstances, among others, that articles were found on or near the body which resembled articles shown to have been the property of and in the possession of Bernard before he disappeared. One witness testified that he made for Bernard a boot taken from the foot of the dead body. A satchel was found near the body in which was an almanac on which the name of "Bernard" was written. A witness identified it as Bernard's, and testified that he had seen Bernard write, and thought the same was in his handwriting. Keys on the body fitted the lock of the satchel. Various articles of clothing found on the body were also identified as belonging to Bernard. The body was in a decomposed and unrecognizable condition. Upon this evidence the jury convicted the prisoner of murder and this conviction was reversed by the Court of General Term because there was no direct evi-

7 119 N. Y. 110.

Judgment Newlands, J.

dence which identified the body found as that of the person alleged to have been murdered. This decision was reversed by the Court of Appeals, and the verdict of the jury sustained. The learned Judge who delivered the decision of the Court, said : "The question is a very grave one ; not merely to the prisoner, whose liberty may depend upon the issue, but to the people and the administration of justice, for, if the law be as the General Term has declared it, a murderer may always escape if only he shall so mutilate the body of his victim as to make identification by direct evidence impossible ; or shall so effectually conceal it that discovery is delayed until decomposition has taken away the possibility of personal recognition ; and it will follow that the tenderness of the penal code has opened a door of escape to that brutal courage which can mangle and burn the lifeless body, and has put a premium upon and offered a reward for that species of atrocity. . . . That some one is dead is directly proved whenever a dead body is found. Its identity as that of the person alleged to have been killed, is a further fact to be next established in the process of investigation. If it be the meaning of the penal code that both of these facts, identity as well as death, are to be proved by direct evidence, it establishes a new rule which never before prevailed, and of which no previous trace can anywhere be found. It has always been the rule, since the time of Lord HALE, that the *corpus delicti* should be proved by direct, or, at least, by certain and unequivocal evidence. But it never was the doctrine of the common law that, when the *corpus delicti* had been duly established, the further proof of the identity of the deceased person should be of the same direct quality and character. And this becomes quite evident from a consideration of the history and philosophy of the rule. . . . But the *corpus delicti*, the existence of a criminal fact, may be completely established, and the need of direct proof satisfied before the question of identity is reached. There may be direct proof of a murder,

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though no one knows the person of the victim. A dead body is found with the skull smashed in upon the brain under circumstances which exclude any inference of accident or suicide. There we have direct evidence of the death and cogent and irresistible proof of the violence; the latter the cause and the former the effect; both obvious and certain, and establishing the existence of a criminal fact demanding investigation. These facts proved, the *corpus delicti* is established, although nobody, as yet, knows, and nobody may ever know, the name or personal identity of the victim. Beyond the death and the violence remain the two enquiries to which the ascertained criminal fact gives rise; who is the slain and who is the slayer; the identity of the one and the agency of the other. These may be established by circumstantial evidence which convinces the conscience of the jury, and because a basis has been furnished upon which inferences may stand and presumptions have strength. That I have correctly stated what is meant by the *corpus delicti*, requiring direct proof, and that it never did include the identity of the victim, but left that open to indirect, or circumstantial evidence, is shown by an unbroken and unvarying concurrence of authority."

The evidence shows that the remains of a human being had been destroyed by fire at the camp fire where the prisoner and Hayward had camped on the Indian Reserve. The finding of two portions of a human skull, a part of the right parietal bone, and the jugular process of the occipital bone, is absolute proof of the fact that the human being to whom they belonged is dead. There is therefore direct proof of the death of a human being, and once having established the fact of death by direct evidence, it would be a monstrous doctrine if circumstantial evidence could not be given as to who that dead person was simply because the murderer has so destroyed the remains that identification was impossible. The cases I have cited show that that is not, and never was, the law, but that once the fact of death is established, circumstantial evi-

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Newlands, J.

dence can be given to prove the identity of the remains, and also the identity of the person who caused the death. Besides the evidence which I have referred to there was considerable other evidence, all of which tended to prove that the dead man was Hayward, and that he was murdered by the prisoner. It was, I think, properly left to the jury, and on this ground their verdict should not be disturbed.

Had the counsel for the Crown the right to reply, no evidence having been tendered on behalf of the prisoner? Generally the Crown prosecutors in the Territories act under general instructions from the Department of Justice, over which the Attorney-General for Canada presides. The administration of criminal law in the Territories is in his hands and the Crown prosecutors act for him in prosecuting. This case is made stronger by the fact that the Crown counsel had express instructions to act. This same question was decided in favour of the right to reply under the same circumstances in *Rex* v. *Martin*,[8] and I am of opinion that it should be so decided in this case.

We must therefore decide whether the comment by the counsel for the Crown in the course of his address to the jury, with regard to the prisoner not giving evidence on his own behalf, was proper.

The Canada Evidence Act,[9] provides that "The failure of the prisoner charged or of the wife or husband of such prisoner to testify shall not be made the subject of comment by the Judge or by the counsel for the prosecution in addressing the jury.

By his remarks, the Crown counsel not only pointed out to the jury that the prisoner had the right to give evidence and did not, but that any evidence he could have given would have been unfavorable to him. It is certainly a direct comment on the fact of his not having given evidence, was un-

[8] (1905) 5 O. W. R. 317. [9] (1893) 56-57 Vic. chap. 31, sec. 4 (2).

favourable to the prisoner and is directly contrary to the Statute.

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Newlands, J.

In the *Queen* v. *Corby*,[10] decided in the Supreme Court of Nova Scotia, WEATHERBE, J., said: "While the Statute remains as it is, I see no effectual remedy for the prisoner against the violation of it unless we hold the trial to be irregular in all such cases. I see no other mode of interpreting the Statute." RITCHIE, J., says: "When once the comment is made the mischief which the law was designed to prevent, has been done, and nothing can afterwards be said by either counsel or Judge that will be calculated entirely to remove the effect of that comment upon the minds of the jury. The accused is entitled to the protection the law has thus afforded him, and it can only be done by granting a new trial."

In the *Queen* v. *Coleman*,[11] decided by the Court of Appeal for Ontario, Chief Justice MEREDITH said (at p. 532): "The prisoner had the right to have the case submitted to the jury without comment on his failure to testify, either by the Judge or the counsel for the prosecution in addressing the jury, and he has been deprived of that right. The Legislature must have deemed it of importance to accused persons that no such comment should be made and the deprivation of that right must, I apprehend, be held to be a substantial wrong to the accused." ROSE, J., said: "It is not our duty in this case to direct a new trial notwithstanding 'that something not according to law was done at the trial,' unless in our opinion 'some substantial wrong or miscarriage' was thereby occasioned on the trial. It is certainly clear that something not according to law was done at the trial; and in my opinion a substantial wrong was occasioned, for the prisoner was entitled to a trial free from comment or observation upon the fact that he did not tender himself as

[10] (1898) 1 Can. C. C. 457. [11] (1898) 2 Can. C. C. 523.

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Newlands, J.

a witness. He had the right to refrain from giving evidence without his failure to testify being made the subject of comment. He had a statutory right. That right he was deprived of, and being deprived of that right by the learned Judge, a wrong was occasioned, and, I think, a very substantial wrong, and a wrong that, in my opinion, could not be removed or remedied by the learned Judge calling back the jury and telling them that he had done wrong, as he did do ; for in stating what he did to the jury, he of necessity repeated the offence of which complaint has been made. So in the *King* v. *Hill*,[12] the Supreme Court of Nova Scotia decided that the provision of the law that no comment should be made was mandatory.

King v. *Aho*,[13] decided by the Supreme Court of British Columbia, was cited by the respondent's counsel, but in that case the Court only held that what was said did not amount to a comment on the failure of the accused to testify.

In the case before us I am of opinion that what the counsel said to the jury was a comment forbidden by the Statute and one that was distinctly unfavorable to the prisoner. This comment having been made, his explanation afterwards does not improve matters, but would rather impress on the mind of the jury the fact that the prisoner offered no explanation of the facts brought out in evidence against him.

It is contended by the counsel of the Crown that the Court should not set aside the conviction unless some substantial wrong or miscarriage of justice was thereby occasioned on the trial. All the Judges whose opinions I have cited were of the opinion that such a comment was a substantial wrong to the prisoner. This opinion is also supported by the decision of the Privy Council in *Makin* v. *Attorney General for New South Wales*.[14] A provision in *The Criminal Law (Amendment) Act, 1883*,[15] provided that no conviction should

[12] (1903) 7 Can. C. C. 38. [13] (1904) 8 Can. C. C. 453. [14] (1894) A. C. 57. [15] 46 Vic. chap. 17, sec. 423, N. S. W.

be set aside unless for some substantial wrong or miscarriage of justice. Evidence that was inadmissible had been allowed to go to the jury, but it was contended that without that evidence there was sufficient evidence to convict, but the Court held that the jury might have been influenced by the evidence improperly admitted and that substantial wrong would be done to him if he were deprived of a verdict of the jury and there was substituted for it the verdict of the Court founded merely upon the perusal of the evidence.

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Newlands, J.

It is impossible for us to say how the jury were affected by the comment made by the Crown counsel, and it would be doing substantial wrong to the prisoner to deprive him of a trial by jury as provided by law entirely uninfluenced by any such comment.

I think the conviction should be quashed and a new trial ordered.

SIFTON, C.J., and HARVEY, J., concurred with NEWLANDS, J.

PRENDERGAST, J.:—With regard to the first question, it seems to me that it rests, partly at least, on an erroneous assumption of the facts of the case, in so far as it states that there is no direct evidence "of the fact of death itself." It is true that in the great mass of testimony given at the trial, there is no direct evidence of Hayward's death; but there is undoubtedly direct evidence of a death lying in the production of charred remains of part of a human skull found in the ashes of the camp some time before occupied by the accused and Hayward. The question then becomes one of identification of the remains, rather than one of death which the remains prove by themselves, and might resolve itself in this; whether, when there is no direct evidence of an act of the prisoner likely to cause death, it is necessary that a human body or part of a human body be not only produced, but moreover identified by inspection as that of the person

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Prendergast, J.

alleged to have been killed, and whether if this is not necessary, and the remains of a human body having been produced at the trial, there was a convincing presumption of the death of Hayward raised on the circumstantial facts of the case.

The first rule governing the matter seems to be that in criminal matters there must be clear and unequivocal pooof of the *corpus delicti* [16] which, however, does not mean at all that this clear and unequivocal proof of the *corpus delicti* need necessarily be direct.

In homicide, the *corpus delicti* is composed of two elements; a criminal agency as the means or cause, and death as the result or effect.

SIR MATTHEW HALE[17] pronounces himself as follows: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." But this, it seems to me, does not go to the extent of saying that, where a body is found, it must moreover be shown by direct proof—which here must mean identification by inspection—to be the body of the person alleged to have been killed.

STARKEY, in his book on evidence,[18] says in the same broad terms, that 'It is an established rule, upon a charge of homicide, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact"—which I suppose means of the killing—"or by inspection of the body"—which inspection, I think, need not result by itself in identifying the said body as that of Y. Z.'

It is true that in *Ruloff* v. *People*,[19] it was held that "in order to warrant a conviction of murder, there must be direct proof either of death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death." But as far as I can see, the words "and identification of the

[16] Best on Evidence, 8th Ed., 1893, p. 390. [17] 2 Hale P. C. 290.
[18] Starkey on Evidence, 4th Ed., p. 862. [19] 18 N. Y. 179.

corpse," are absolutely unwarranted under either English or Canadian precedent or best American authorities. Judgment Prendergast, J.

In the case of *R.* v. *John Miles*,[20] and *R.* v. *Hindmarsh*,[21] commented on by BEST,[22] and in a number of others reviewed by RUSSELL,[23] the point in question was not one of identification by inspection, but whether there had been death of a human being at all.

In *Greenleaf on Evidence*,[24] it is expressly laid down that "even in cases of homicide, though ordinarily there ought to be testimony of persons who have seen and identified the body, yet this is not indispensably necessary," and BEST says as explicitly,[25] that "when a body is in a state of decomposition, or is reduced to a skeleton, or is for any other reason in such a state as to render identification impossible, it should be identified by dress or circumstances"—the last word being exactly in point in the present case.

It seems to me that with the safeguards of our judicial system and jurymen conscious of the gravity of their functions as they should be, the rule, as I interpret it here, is yet quite wide enough to assure a fair trial to the accused; while on the other hand, in the words of BEST,[26] it would seem "a startling thing to proclaim to every murderer that in order to secure immunity to himself he has nothing to do but to consume or decompose"—he does not say merely disfigure—"to consume or decompose the body by fire or lime, or to sink it in an unfathomable part of the sea."

It is my opinion, then, that the production of the charred remains of part of a human skull was a sufficient proof of death under the authorities, that it was open to the prosecution to show by circumstantial evidence that such remains were those of Henry Hayward, and that the evidence so

[20] Cited in Best on Evidence, at p. 394. [21] 2 Leach C. C. 569. [22] Best on Evidence, 8th Ed. p. 394. [23] Russell on Crimes & Misdemeanours, 4th Ed. Vol. 3, pp. 158, 159 and 160. [24] 16th Ed. Vol. 3, sec. 30. [25] *Op. cit.*, p. 373. [26] *Op. cit.*, p. 395.

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Prendergast, J.

given was "strong and intense" enough to leave it open to the jury to consider that it contained a "full assurance of moral certainty." [27]

With respect to the second question, it seems to me that the late case of *Rex* v. *Martin* [28] is quite in point, and that the Counsel of the Crown had the right to reply under the circumstances.

As to the third and last question, it is quite evident to me that the remarks of the learned counsel for the Crown on the fact that the accused did not testify on his own behalf were a comment within the meaning of *The Canada Evidence Act*,[29] sec. 4 (2), and a comment unfavourable to the prisoner as defined in *Queen* v. *Corby*.[30]

The cases of *Queen* v. *Coleman*,[31] *Queen* v. *Weir*,[32] *King* v. *Hill*,[33] and *Commonwealth* v. *Scott*,[34] amongst a great many others, are all clearly to the effect that where the least doubt exists that the jury may have been influenced even in the slightest degree by such comment on the part of the prosecution, the conviction should be quashed.

Of course, when the onus is thrown on the accused to prove certain facts, it is quite competent for the Judge and counsel for the Crown to point out to the jury that while it rests with the accused to prove these facts, he has failed to do so; but this must be done, it seems, without any special reference to the fact that the accused himself has not testified.

In *King* v. *Aho*,[35] it was held that the trial Judge (and the same must apply to the Crown prosecutor) had a right to charge the jury upon the question as to when the onus shifts. In delivering the judgment of the Court, HUNTER, C.J., said: "In my opinion, to hold that a direction to the

[27] Greenleaf on Evidence, 16th Ed. Vol. 3 sec. 30. [28] (1905) 5 O. W. R. 317. [29] 56-57 Vic. ch. 31. [30] (1898) 1 Can. C. C. 457. [31] (1898) 2 Can. C. C. p. 525. [32] (1899) Can. C. C. 262. [33] (1903) Can. C. C. 38. [34] 123 Mass. 241. [35] (1904) 8 Can. C. C. p. 453.

jury that the accused has failed to account for a particular occurrence when the onus has been cast upon him to do so, amounts to a comment of the failure to testify, would paralyze the action of the Crown in the discharge of its most essential function, *viz*, to charge the jury on all questions of law which have any relevant bearing on the case, including the question as to when the onus shifts."

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Prendergast, J.

Here, however, the Crown prosecutor went very far beyond this. It was quite in order for him to say as he did, "I think that onus is thrown upon the defendant, and I think that onus should have been acted up to." But in my opinion it was contrary to the letter and spirit of *The Canada Evidence Act* to use the Words, "I think his counsel took the very best and wisest course in not having him go on the stand, and I think it is wise for himself." This is surely a comment unfavourable to the prisoner. It is impossible to say that such remarks did not influence the jury; they were moreover intended to do so, and it is probable that they did.

In my opinion the conviction and sentence should be quashed, and a new trial ordered.

WETMORE, J.:—I am of opinion that there was not any evidence of the *corpus delicti* to go to the jury. The text writers almost uniformly refer to what was stated by Sir MATTHEW HALE in his Pleas of the Crown,[36] that he never would convict any person of murder or manslaughter unless the fact were proved to be done or at least the body found dead. In this case the evidence established that bones were found in the fire which were those of a human being, and there was other evidence such as the finding of metal portions of clothing in the fire which tend to show that the body of a man was burned in that fire. But that fact, even taken with the fact of other property of the deceased being found in the slough, does not seem to me to do sufficient to establish

[36] At p. 290.

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Wetmore, J

with the degree of moral certainty required that the body was that of the man Hayward. Possibly if the evidence had completely established that the deceased had not gone away from the place where he and the accused camped, it might have been sufficient, but that was not established, because there were ways by which the deceased might have got out of country which were not examined by any of the witnesses. I do not mean to lay down that the fact of the death of the party alleged to have been murdered may not be establshed by circumstantial evidence, but the evidence to establish that fact as stated by Mr. GREENLEAF,[37] ought to be strong and cogent. It ought to be so strong and intense as to produce the full assurance of moral certainty." The case of *Rex* v. *Hindmarsh*[38] is cited by Mr. GREENLEAF as a case establishing such proof of death. I have not been able to lay my hands upon that report, but it is noted in BEST on Evidence.[39] There the accused was a seaman and was charged with the murder of his captain at sea by blows with a large piece of wood, and secondly by throwing deceased into the sea. The evidence was that the prisoner was seen to take the captain up and throw him into the sea; after which he was never heard of. There the fact was deposed to of an act which to a moral certainty would cause death. In the case before the Court now, there is no direct proof that these bones were the bones of Hayward. The evidence is altogether circumstantial.

In *Rex* v. *Clews*, [40] bones were found and the deceased's wife identified a carpenter's rule and the remains of a pair of shoes which were found at the place where the bones were discovered ; and she also identified the skull of the deceased by something remarkable about the teeth. There was evidence which pointed directly to the fact that the bones found were those of the deceased. There is no evidence of

[37] Greenleaf on Evidence, Vol. 3, p. 37. [38] 2 Leach C. C. 751.
[39] 8th Ed. p. 394. [40] (1830) 4 C. & P. 221.

that character which points to the fact that these bones were those of Hayward. Judgment. Wetmore, J.

In *Regina* v. *Chiverton*,[41] the accused was charged with the murder of her child. The evidence was that she had been seen on a specified date going in a direction which might be towards the river or towards the station, with something which, to the witness, seemed like a child, and about the age of the missing infant, and that on the next morning the body of an infant child of the same sex, and so far as appeared, about the same age, was found dead in the river. It appeared that this child died from drowning, but there was no evidence other than that before mentioned to identify it with the prisoner's child. The learned Chief Justice in charging the jury laid the law down as follows: "It is no doubt essential that you should be satisfied that the body found in the Colne was the body of the prisoner's child, and put there by her. It is most important, as laid down by Lord HALE, that on an indictment for murder, it should be shown that the body found is the body of the murdered person, as otherwise persons might be convicted for the murder of a person who was alive." It is true that he left to the jury the question whether they were satisfied that the body found in the river was the body of the prisoner's child, and was put there by her. The jury returned a verdict of not guilty. I must say that while agreeing with what was laid down in that case as to what was essential to be proved, I am of the opinion that there was not in that case evidence to leave to the jury that the body found was the prisoner's child.

In *Regina* v. *Hopkins*,[42] which was also a case of the alleged murder of an infant child, the accused left the place where she was at service with the alleged intention of going to her father's on a specified date. She crossed the Severn

[41](1860) 2 F. & F. 833. [42](1838) 8 C. & P. 591.

Judgment.

Wetmore, J.

in a barge and landed at Chepstow, she then having a child, and she was seen with the child in her arms on the road from Chepstow to Tintern as late as six o'clock in the evening, but between eight and nine o'clock she arrived at her father's without the child, and five days afterwards the body of a child was found in the Wye near Tintern. Now there was evidence in that case which tended to show that the child found was not that of the accused ; that it was older ; that its clothes were different ; and that the child had an eruption on its face and legs which the prisoner's child did not have. It was held in that case that the jury must acquit the prisoner, and Lord ABINGER, in delivering judgment, laid it down that the prisoner could not be called upon to account for her child or to say where it was unless there be evidence to show that the child was actually dead.

I come to this conclusion with very great hesitation, but I think the Courts should be specially careful that the evidence is of such a character as to exclude every possibility of an innocent man being deprived of his life at the hands of the law. I am, therefore, of the opinion that the conviction in this case should be quashed.

Another question is raised by the case. No evidence was called on behalf of the prisoner, and the Crown Prosecutor, having addressed the jury, the counsel for the prisoner followed on his behalf, and addressed the jury. The Crown Prosecutor claimed the right to reply which was accorded to him, he stating that he acted in all criminal cases under the instructions of the Department of Justice, and that he had special instructions from the Department with regard to this case. I am of opinion that this also was erroneous. Sec. 661 (2) of *The Criminal Code, 1892*, provides that upon every trial for an indictable offence, if no witnesses are examined for the defence, the counsel for the accused shall have the privilege of addressing the jury last, otherwise such rights shall belong to the counsel for the prosecution, provided that the right of reply shall be always allowed to the

Attorney-General or Solicitor-General or to any counsel acting on behalf of either of them. It is on the latter part of this provision that the counsel for the Crown claimed the right to address the jury in reply. Judgment. Wetmore, J.

In these Territories criminal prosecutions are generally, I may say invariably, conducted by Crown Prosecutors. They are appointed by the Department of Justice, are under its control, and receive their instructions generally from that Department. Sometimes they may be specially instructed from the Department with respect to cases, but as a rule they act under general instructions which are issued to all Crown Prosecutors alike. Now that, to my mind, does not constitute them as acting either on behalf of either the Attorney-General or the Solicitor-General within the meaning of the paragraph. A person to so act must be instructed to appear and act on behalf of one of them. That has always been my interpretation of that provision. The case of *Rex* v. *Martin*,[43] seems to bear out the contention on behalf of the Crown Prosecutor. It is a matter of note, however, that Mr. PROUDFOOT, who appeared for the Crown, in that case is stated to have represented the Attorney-General. That being the case I am quite in accord with the result of the decision, but if the Court intended to go so far as to hold that in all Crown cases where the prosecution was not a private one, the right of reply was in the counsel acting on behalf of the Crown, I cannot go that far. If the Legislature intended to give the Crown counsel the right of reply in all cases that were not private prosecutions, I think they would have used language which would have more clearly expressed that intention. The section evidently contemplates that the rule shall be that counsel for the Crown shall not have the right of reply, and the exception is for the Attorney-General or Solicitor-General, or counsel acting on behalf of either of them. The language also, "Counsel acting on behalf of either

[43](1905) 5 O. W. R. 317.

Judgment.

Wetmore, J.

of them," I think indicates that it is intended to refer to counsel who have been retained specially to act on the behalf of some one of them. I am of opinion, however, that no substantial miscarriage was occasioned in this respect, and that no ground is afforded thereby for a new trial.

Another ground has been presented by the case. In addressing the jury, counsel for the Crown referred to the right of persons generally to give evidence in their own behalf, as stated in the Crown case reserved. I am of opinion that the comment was unfavourable to the prisoner, and was unwarranted, and for the reasons stated in *R.* v. *Corby*,[44] *R.* v. *Colman*,[45] and *R.* v. *Hill*,[46] in which I concur, there ought at least to be a new trial.

Conviction quashed and new trial ordered.

[44](1898) 1 Can. C. C. 457. [45](1898) 2 Can. C. C. 523. [46](1903) 7 Can. C. C. 38.

PLISSON v. DIEMERT.

1 W. L. R. 359, Rev. 36 S. C. R. 647.

Receiver and manager—Liability for deficit arising during management—Default—Reasonable care.

Held, that the law requires of a receiver and manager the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs.

Held, *per* SIFTON, C.J., and HARVEY, J., WETMORE and PRENDERGAST, JJ., *dissentiente*, that as it appeared upon the facts that the receiver and manager had exercised such supervision over the business as was possible for one in his position, he should not be held responsible for the deficit which had occurred under his management. The Court being equally divided, judgment of NEWLANDS, J., affirmed.

[*Court* en banc, *14th, 19th April, 1905.*]

Statement.

This was an appeal by the plaintiff and defendant from the judgment of NEWLANDS, J., on the passing of the receiver's accounts, holding that, under the circumstances, the receiver was not responsible for the loss incurred by him in carrying on the hotel business formerly carried on by the plaintiff and defendant in partnership.

[On appeal to the Supreme Court of Canada, the judgment of NEWLANDS, J., was reversed: 36 S. C. R. 647.]

The appeal was heard before SIFTON, C.J., WETMORE, PRENDERGAST and HARVEY, JJ. Appeal.

Alex. Ross, for plaintiff.

Norman MacKenzie, for defendant.

James Balfour, for receiver.

[*19th April, 1905*]

WETMORE, J.:—The plaintiff and the defendant were in partnership at Francis, as hotel keepers, and the former brought an action against the latter for dissolution of the partnership, an account, and the appointment of a receiver. A summons was taken out for the appointment of a receiver, and Duncan, the Sheriff of the Judicial District of Western Assiniboia, was appointed receiver and manager, that is, he was appointed receiver and was to carry on and manage the business at Francis. I wish this fact borne in mind, because I think that the fact that he was appointed a manager to some extent increases his responsibility. The distinction between a mere receiver, and a receiver and manager, is pointed out by JESSEL, M.R., in *Re Manchester & Milford Railway Company*.[1] The receiver entered into possession of the hotel business at Francis and put one Neil N. McLean in to manage it. The parties to the action settled between themselves, and the receiver proceeded to have his accounts as such passed. The matter of passing his accounts came before my brother NEWLANDS. The management of the hotel business by the receiver was not a success. There was a deficit of $1,367.16 up to the time of the enquiry before the learned Judge, although there ought not to have been a deficit if the business had been properly managed. The plaintiff and the defendant, who appeared by counsel, claimed that the deficit was due to the neglect of his duties by the receiver, and that he should be responsible Wetmore, J.

[1](1881) 14 Ch. D. 645, at p. 653, 45 L. T. 129.

Judgment Wetmore, J.

for and charged with this deficit. The learned Judge below held that he was not so responsible, and the plaintiff and defendant appeal.

I may add that the Indian Head Wine & Liquor Company, and some other persons, creditors of the plaintiff and defendant, appeared by counsel before the learned Judge, and are mentioned as appellants in this appeal. I am unable to perceive what *locus standi* they had to appear either before the Judge or as appellants herein. They are not parties to the action.

My brother NEWLANDS has held that the deficit was not caused by the wilful default of the receiver. Now, that a receiver in the proper sense of the word is responsible for any loss occasioned by his own wilful default seems to be quite settled by authority as far back as *Knight* v. *Lord Plymouth*.[2] I am of opinion that a receiver and manager is *a fortiori* liable for the consequences of his own wilful default; he is not relieved any more than any other manager from his duty of exercising ordinary care such as a prudent business man in the position of a manager would exercise.

I am unable to find anything laid down specifically in the authorities as to what constitutes "wilful default" on the part of a receiver or manager. The matter has received, however, considerable attention in cases arising out of contracts, especially with respect to land, as to the meaning of wilful default where the contract contains a clause for the payment of interest on purchase money from the day of payment, if from any cause whatever other than wilful default on the part of the vendor, completion of the purchase was delayed beyond the time prescribed for its completion. In *Re Young and Harston's Contract*,[3] BOWEN, L.J., defines "wilful default," saying: "Default is a purely relative term,

[2] (1747) 3 Atk. 480, 26 Eng. Rep. 1076, Dick. 120. [3] (1885) 31 Ch. D. 168, at page 174.

Judgment.
Wetmore, J.

just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances —not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is 'wilful' . . . It generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing and intends to do what he is doing, and is a free agent." *In re Hetling & Merton's Contract*,[4] the meaning of wilful default as above defined by BOWEN, L.J., was approved in so far as what I conceived would be its application to this case is concerned. In *Re Woods & Lewis' Contract*,[5] the definition given by BOWEN, L.J., was again approved by COLLINS, L.J. In *Bennett* v. *Stone*,[6] this definition was approved by VAUGHAN WILLIAMS, L.J., and by STERLING, L.J., but STERLING, L.J., states that he does not think "it was intended to lay down that every case of honest mistake lies without that rule." I can quite conceive there may be cases of honest mistake or inadvertence where a party would not be liable who was in the position of a receiver and manager, where that rule did not apply, but in *Rae* v. *Meek*,[7] dealing with the responsibility of a trustee, Lord HERSCHELL is reported as follows: "The law bearing upon the liability of trustees has been recently considered by your Lordships in the cases of *Whitely* v. *Learoyd*,[8] and *Knox* v. *Mackinnon*,[9] the one coming from the English, the other from the Scotch Courts. I think that these cases establish that the law in both Courts requires of a trustee the same degree of diligence that a man

4 (1893) 3 Ch. 269, at page 281. 5 (1898) 2 Ch. 211, at page 215.
6 (1903) 1 Ch. 509, at pages 515, 520. 7 (1889) 14 A. C. 558, at p. 569.
8 (1887) 12 A. C. 727; 56 L. T. 846. 9 (1888) 13 A. C. 753.

Judgment of ordinary prudence would exercise in the management of
Wetmore, J. his own affairs."

Now, a receiver and manager such as was appointed in this case is in the same position as a trustee, and as such he will be required to exercise in the matter of his trust as manager the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs. I am of opinion that the receiver and manager in this case has not done this. It seems to me that about all he did was to accept the position of receiver, appoint MacLean to manage the hotel, and then just let it run as MacLean saw fit to run it. All that he required from MacLean was simply a remittance of the proceeds to him. His instructions to McLean were to engage all the help, buy all the things required for the hotel, pay for the goods as he got them, pay for the help monthly as it became due, send the balance to the receiver, who would pay the liquor account. He instructed him to keep a proper account of all receipts and disbursements, and to remit the balance monthly with proper statements and vouchers. But the receiver does not seem to have paid any attention to seeing that MacLean carried out his instructions. He had *carte blanche* to purchase what he pleased, even liquors, and from the month of September, when apparently everything was going right, down to about the middle of December, the receiver was not keeping any supervision of the matter at all, he was not exercising the degree of diligence required, as it was his duty to do. Apparently the deficit or loss in running the business commenced after September, or just at the time that the receiver ceased to exercise the supervision I speak of. I may say that from the last of September down to the middle of December, the business was being run just as Mr. MacLean chose to run it, for all the receiver concerned himself in the matter. I cannot see that the fact that the receiver was a sheriff, and that it was known to the parties

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Wetmore, J.

that he could not assume the personal management of the hotel, or keep the same under his presonal supervision, affects the question, nor do I see that the fact that he went to Francis as often as his duties as sheriff permitted him affects the question either. I am of opinon that the sheriff was not a proper person to be appointed manager of this business, or of any business of a like character. He could not, owing to his official duties, give his attention to the proper management of the business, and I should judge that he would probably be inexperienced in a business of this character. But when a person is appointed to, and accepts such a position, he is bound to give attention to it, at least a fair supervisory attention. It will not do for him, when there is a prospect of getting remuneration for the work, to accept the appointment, omit to give the work proper attention, and when losses occur through his negligence claim that he was prevented from attending to the matter by his official duties as sheriff. He has to take the bitter with the sweet, and if he expects to be paid, the Court and the parties for whom he is in effect acting as trustee will expect him to stand the consequences of his own negligence. If the official duties of the sheriff or any other officer are of such a character that they will prevent him given proper attention to an appointment such as receiver, he should decline to accept it, or if after having accepted it, he discovers that he cannot give it attention, he should bring the matter under the notice of the Court, and not let the matter drift as was done in this case. In this case if the receiver had attended to his duties, I think he would have discovered that there was a leakage, and he should either have been able to stop it, or else have brought the matter under the notice of the Court, and had the business of carrying on the hotel stopped. I do not wish to be understood as intimating that a sheriff would not be a proper officer to appoint as a mere receiver in some cases, but I must say that I think he is not a proper

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person to be appointed as manager of a business which requires more personal attention. The appointment, however, in this case, was not the act of the Judge ; it was made through the parties interested consenting.

I am of opinion that the judgment of my brother NEWLANDS should be reversed and the matter referred to the Clerk or some other officer, to take an account of what the profits of managing the said business should be without any negligence on the part of the receiver ; or, if the appellants are satisfied, that the receiver should be charged with the amount of the deficit.

PRENDERGAST, J., concurred with WETMORE, J.

Harvey, J.

HARVEY, J.:—The facts of this case are stated in the judgment of my brother WETMORE, which I have had the opportunity of reading, but with the conclusions of which I find myself unable to agree. I am quite satisfied with the law as cited by him in his judgment as applicable to this case which is shortly set out in the words of Lord HERSCHELL in *Rae* v. *Meek*,[10] that "the law requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs." I am, however, unable to see from the evidence in this case, that the sheriff, who was acting as trustee, in his capacity as receiver and manager failed to exercise the ordinary prudence which would have been exercised by a man in his own business. It is not to be overlooked that the sheriff was appointed receiver by the consent of all parties, who were fully aware of the fact that he was sheriff of the district, and as such could not personally manage the business which was being carried on at a distance of some 70 or 80 miles ; he could give no more than a general oversight to it. In the appointment of a manager he appears

[10](1889) 14 A. C. 558, at page 569.

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to have appointed a man who had had considerable experience in the class of business which was required to be carried on, and one who, as shown by the evidence filed, had been manager in Regina for some months for one Nash, who states that he conducted his business properly, and that he had every reason to believe that he was both capable and trustworthy. In addition to this the sheriff appears to have made visits from time to time as far as his duties permitted to see that the business was being carried on properly. The books were kept in a very primitive method, although there was nothing to indicate from the manner of their keeping that there was anything improper; but on the other hand, with such books, it would have been hard for the sheriff to have ascertained at any time whether the business was making a profit or not, and for some months he apparently had no suspicion that the business was being carried on at a loss, as the evidence shows to have been the case.

In considering what a man would have done with his own business it is worth observing that for some six months previous to the appointment of the sheriff as receiver the business was being carried on by the defendant as partner and manager of the plaintiff, and that during that time the plaintiff suffered a very considerable loss in the management of the business. It appears clear from this fact that either the business was and had been an unpaying one, or else that notwithstanding the care the owner himself might have taken leakages existed, and it seems to me that it would be a very unfair conclusion to say that because that condition of affairs continued, therefore the sheriff, who could not give the matter any direct personal attention, and was not himself a person familiar with that class of business, which facts were fully known to all parties when he was appointed, should be held liable for the loss which actually occurred.

In my opinion the appeal should be dismissed and the judgment of the learned trial Judge affirmed.

Judgment

Harvey, J.

SIFTON, C.J., concurred with HARVEY, J.

The Court being equally divided, appeal dismissed.

REPORTER: Alex. Ross, Esq., Regina.

EGGLESTON v. CANADIAN PACIFIC RAILWAY CO.

1 W. L. R. 356; Rev. 36 S. C. R. 641.

Animals trespassing upon railway track—Duty of railway company—Negligence.

A number of horses belonging to the plaintiffs were turned loose to range unattended near the defendants' railway track, on a bright moonlight night. A train overtook the band and killed 44 of them, the bodies being found along several hundred feet of the line, which the railway company were under no obligation to fence at that point and which was not fenced.

Held (WETMORE, and PRENDERGAST, JJ., *dissenting*), that although the animals were trespassers, the trial judge's finding, on the evidence, that the horses were killed through the negligence of the defendants' engineer, should not be disturbed.*

Leave to appeal to Sup. Ct. of Can. 1 W. L. R. 570.

[*Court* en banc, *11th, 12th January, 19th April, 1905.*]

Statement.

These were appeals by the defendants from the judgments of SCOTT, J., at the trial, the actions having been tried together without a jury at Wetaskiwin. The plaintiffs claimed damages for the destruction of a number of horses by one of the defendants' trains through the negligence of the defendants' engineers in failing to keep a proper look out, the evidence showing that bodies of horses had been found along the track for several hundred feet behind the forward part of the engine, most of them being wounded in the hind legs, indicating that they had been overtaken by the train while fleeing from it, a hypothesis of which there was confirmatory evidence. The number of horses killed was forty-four out of a band of two hundred and fifteen which were being brought in from the United States. It appeared that the band was under the charge of servants of the two

[*On appeal to the Supreme Court of Canada, this judgment was reversed. See 36 S. C. R. 641.]

plaintiffs, who on the night in question had allowed the horses to range at large on the prairie, close to the unfenced track of the defendants, without anyone being left in charge of them. They had wandered upon the track, and although the night was brilliantly moonlight, so that objects at a distance of from one-quarter to one-half a mile distant were clearly visible, had been run down and destroyed by the train. The trial Judge found the defendants guilty of negligence, and gave judgment in favour of the plaintiffs respectively for the value of the horses belonging to each, at the place where they were killed, disregarding their cost. Statement.

The defendants appealed and the appeal was argued before SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

Hon. James A. Lougheed, K.C., for appellant.

C. de W. MacDonald, for respondents.

HARVEY, J.—At the trial, thirty-four witnesses were examined, and there was a great deal of conflicting testimony. The rule as to the reviewing of the findings of the trial Judge by a Court of Appeal is laid down in *Village of Granby* v. *Menard*, [1] where GWYNNE, J., says: "In a case like the present where the trial Judge, who has heard all the witnesses give their evidence before him and who has thus had an opportunity which no Court of Appeal can have of estimating the credibility of the several witnesses and the value of all their evidence, has rendered his judgment, no Judge sitting in review of, or in appeal from that judgment, upon matters of fact, ought to reverse that judgment unless it is shewn to be clearly wrong upon the evidence so taken." It appears perfectly clear from this case that if there is any reasonable evidence to sustain the findings of the trial Judge as to the facts. they should not be disturbed by this Court. Judgment.

[1] (1900) 31 S. C. R. 14.

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Harvey, J.

The trial Judge has found that there was negligence on the part of the engineer and that that negligence was the cause of the accident. It appears to me, then, that the only questions for this Court to consider, are, whether there was any reasonable evidence to support this finding and, if so, and it is thus established, whether the defendants are thereby liable. I am of opinion that the evidence clearly warrants the findings of the trial Judge, and that therefore they should not be disturbed.

It was contended by counsel for the defendants that the animals in question being trespassers, there was no duty on the part of the defendants to look out for them. Even if such a rule of law were established in England or in the eastern provinces where the railways travel through a country which is fenced, and where they have a right to expect that by reason thereof their track will be free from trespassers, I apprehend that such a rule might not be applicable to the conditions existing here where the railway passes through a country where large numbers of cattle and horses have the right to, and do roam at large, and the railway company makes no provision by fencing to keep them off their track.

I may say, however, that I find no authority for the proposition thus baldly laid down. On the contrary, it appears to be established by many cases, of which I need cite only *McMillan* v. *M. & N. W. Ry. Co.*[2]; *Bender* v. *Canada Southern Ry. Co.*[3]; and *Campbell* v. *Great Western Ry. Co.*[4], that notwithstanding that the plaintiffs may be negligent or may be wrong doers, yet the defendants are bound to use reasonable care, and if they fail to do so, and damage results, they are liable.

As regards the question of damages, I am of opinion that the trial Judge adopted the proper basis of assessing

[2](1887) 4 M. R. 220, [3](1873) 37 U. C. Q. B. 25, [4](1858) 15 U. C. Q. B. 498.

them by reference to the value and not the cost of the horses, and that the defendants have no cause of complaint by reason of the amount. Judgment. Harvey, J.

For these reasons, I am of opinion that the appeal should be dismissed with costs.

SIFTON, C.J., and NEWLANDS, J., concurred.

WETMORE, J. (dissenting):—I have no hesitation in saying that the plaintiffs, through their servants, were guilty of gross negligence, in allowing these animals to wander in such close proximity to a railway track without being herded, there being no duty on the part of the defendants to fence the right of way. Notwithstanding, however, this neglect on the plaintiffs' part, the defendants are liable if they could by the aid of ordinary care and skill have avoided the accident, the onus of proving the want of this ordinary care and skill being upon the plaintiffs. In *Whitman* v. *Windsor & Annapolis Railway Co.*,[5] which was an action for killing a cow, and which is cited in the plaintiffs' factum, the following is laid down: "By our *Act respecting Railways*, the cow in question was illegally on the highway, and by the express provision of that Act, if killed at the point of intersection of the highway with the railway, the owner is expressly precluded from his action. Though not being killed at that point there is no doubt, as between the plaintiff and the defendant, the cow was unlawfully on the highway. . . . The damage not having been done at the point of intersection, the plaintiff is not absolutely precluded, but is subjected to the onus of showing that the defendant might, in the result, by the exercise of ordinary care and diligence, have avoided the mischief. That the plaintiff has failed to make apparent, and consequently his verdict cannot stand." This case therefore

5(1885) 18 N. S. R. 271, at pp. 273, 274.

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Wetmore, J.

shows, and I think correctly, that the onus of showing that the accident under circumstances such as arise in this case could not be avoided by the exercise of ordinary care and skill, is on the plaintiff. I fail to see why any duty was cast upon this engineer, in so far as the defendants are concerned, of keeping a specially careful look out. The strongest case in favour of the plaintiffs is *Campbell* v. *Great Western Railway Co.*[6] In that case the company was held liable, but it was established that the engineer saw the cattle, and that notwithstanding that, the speed was not slackened and no precaution was taken, except sounding the whistle ; the engineer went recklessly ahead. BURNS, J.,[7] says : "Now, if the defendants' servants had not seen the colts upon the track, then it could not be said they were the proximate cause of the accident in that sense, which would give the plaintiff a cause of action ; because the colts, being wrongfully upon the defendants' property and that property being acquired for the purpose of exercising a dangerous business, sanctioned by the Legislature, the defendants are not bound to keep watches upon their own property to protect that of others, and the plaintiff, if such had been the case, could have maintained no action." And later,[8] he says : "Applying this principle to this case, though the plaintiff's colts were wrongfully upon the defendants' track of the railway, yet, when the defendants' servants saw them there, I think they were bound to exercise such kind of ordinary care and skill to have avoided the accident of killing them." As I understand the authorities that lay down the law correctly as applicable to this case—the duty to exercise ordinary care and skill to avoid the accident only arises after the party becomes aware of the fact that circumstances have arisen by the wrongful act of the other party which is likely to cause an accident if such care and skill are not exercised. There is no duty cast upon a person in the position of the

[6](1838) 15 U. C. R. 498. [7] At page 506. [8] At page 507.

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Wetmore, J.

defendants, or his servants, to be on the look out to see whether some person has committed a wrongful act, and such care and skill is only to be exercised under such circumstances when he perceives that the emergency has arisen. Some of the authorities upon the question refer to *Davies* v. *Mann*.[9] That is a case where the plaintiff left an ass fettered by the forefeet in the highway, and unable to get out of the way, and the defendant's waggon driven by his servant too fast, ran into it and killed it. It was held that the plaintiff was entitled to recover. At the first glance that case would seem to be an authority in favour of the plaintiff's right to recover, because the neglect on the part of the plaintiff was driving too fast and it does not appear by the case that he was aware that the ass was in the highway so fettered, and, therefore, the neglect was not in the exercising of ordinary care and skill after he had discovered the fact that the ass was fettered. But in that case it will be observed that the declaration alleged that the ass was lawfully in the highway, and that fact was not controverted by the pleading, and in giving judgment the Court laid stress upon the fact that the lawfulness of the ass being there was not controverted, and that it must, therefore, be assumed that he was lawfully there. That raises a very different question, because it seems to me quite clear that the party alleged to be in fault must be on the lookout, and carefully on the lookout, for whatever might lawfully be in the way so as to avoid an accident in consequence of what might so lawfully be there. In this case the horses were not lawfully where the accident occurred, and they had no right to be there at all, and their lawful right to be there was never admitted by the pleadings or otherwise. The evidence does not establish as clearly as I think it ought to, in order to enable the plaintiffs to recover, that the train was not stop-

9 (1842) 12 L. J. Ex. 10, 6 Jur. 954, 10 M. & W. 546.

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Wetmore, J.

ped as soon as it could be stopped with reasonable care and skill after the horses were discovered, and I am, therefore, of opinion that this appeal should be allowed, the judgment of the trial Judge reversed, and judgment entered in the Court below for the defendants, with costs. And that the defendant should have the costs of this appeal.

It was urged on behalf of the plaintiff that the fact that forty-four head of horses were either killed or so crippled that they had to be killed, was in itself a fact from which a presumption of neglect should be inferred ; that the phrase *res ipsa loquitur* should be applied. I may say that this question has caused me to have graver doubts than any other question that has been raised as to the correctness of the conclusion I have reached. It would seem almost incredible that such an accident involving injury to so many animals might not have been avoided by the exercise of ordinary care and skill. Nevertheless, in view of the fact of the time when the party complained against has to bring into operation his care and skill, and of the fact that the engineer has testified that he only saw the horses when he was practically right upon them,and that they were bunched, by having reached the culvert which was almost at the time in front of the engine, I think it is possible that the accident could not be avoided after the engineer made the discovery that the horses were on the track, and the onus of showing that what the engineer has sworn to was erroneous was on the plaintiffs, and that they failed to do so.

PRENDERGAST, J., concurred with WETMORE, J.

Appeal dismissed with costs, WETMORE *and* PRENDERGAST, JJ,, *dissenting.*

REPORTER : Alex. Ross, Esq., Regina.

CHAN DY CHEA v. ALBERTA RAILWAY & IRRIGATION CO.

1 W. L. R. 371.

Common carrier — What is personal baggage — Liability for — Contract.

The plaintiff was one of fifty-four Chinamen travelling over the defendants' railway on one ticket purchased on their behalf by an employment agent, who received the price of his passage from each of the Chinamen, out of the wages earned by him after reaching his destination. The plaintiff's baggage, consisting of personal effects and bedding, was destroyed by the burning of the baggage car, the cause of the fire being unknown.

Held, that the contract was with each Chinaman, to carry him and his baggage safely, and that the defendants were liable in damages.

Held, also, that the defendants having accepted the bedding as personal baggage were liable for it as such, and *semble*, that it would have been held under the circumstances to be personal baggage, even without such acceptance.

[HARVEY, J., *2nd May, 1905.*]

Statement.

This was the trial of an action for damages for the loss on 15th April, 1904, of the plaintiff's baggage, consisting of personal effects and some bedding, while being transported by the defendants, a railway company carrying on business as common carriers. The plaintiff was one of fifty-four Chinamen, hired by one Sam Kee, a merchant in Vancouver, to grow beets for a sugar refining factory at Raymond, the arrangement, which was carried out, being that a representative of Sam Kee's firm should receive from the factory the money to which the Chinamen individually became entitled, and that he should, after reducting any money advanced, including the railway fare from Vancouver to Raymond, pay over to each the balance to which he was entitled. The party of fifty-four Chinamen travelled from Vancouver under the charge of one Shun Moon, a partner of Sam Kee's, and arrived in Lethbridge, twenty-six miles from Raymond, after the defendants' regular train had left there being no other until after an interval of three days. In anticipation of their arrival, but without the knowledge of the plaintiff or any one on his behalf, and only for the purpose of giving the Chinamen the benefit of a reduced rate, the defendants'

Statement. general manager had issued an order to the defendants' ticket agent at Lethbridge, directing him to issue to Chinamen fifty-four tickets from Lethbridge to Raymond at the rate of seventy cents each. Shun Moon, after the arrival of the party, obtained from the agent a single ticket marked "Good for one continuous passage from Lethbridge to Raymond," the words "54 Chinamen" being written across it in two places, and at the request of the plaintiff, arranged with the defendants' train dispatcher for a special train that afternoon. At the dispatcher's request, and because the defendants had no men available, the Chinamen, under the supervision of the defendants' station agent, loaded their baggage into a box car placed for the purpose, the station agent having first removed the Canadian Pacific Railway checks, and when the loading was completed, having closed and fastened the door of the car. There was no further interference with the baggage until the special train had proceeded out of Lethbridge towards Raymond some two or three miles, when the car containing the baggage was discovered to be on fire. The car and most of the contents were consumed. Some half burned matches were found after the fire in one of the pieces of baggage, but this was in the part of the car least affected by the fire, and the plaintiff denied having had any matches in his baggage.

Argument. *L. M. Johnstone*, for plaintiff.

James Muir, K.C., and *C. F. P. Conybeare*, K.C., for the defendants.

[*22nd May, 1905.*]

Judgment. HARVEY, J.:—Carriers of passengers appear to be only liable for injury caused by their negligence, while carriers of goods (including the personal baggage of passengers) are liable as insurers for all injuries not caused by the act of God or the King's enemies, unless the injury is caused by some act of

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Harvey, J.

the party himself : *G. W. Ry. Co.* v. *Talley*,[1] or is due to some defect or inherent vice in the goods carried : *Lister* v. *Lancashire & Yorkshire Ry. Co.*[2] It is quite clear also that as regards personal luggage the liability is the same whether the luggage is carried in a baggage car or elsewhere, provided that the loss or injury is not occasioned by any act of interference with the control of the luggage on the part of the passenger. For this proposition I refer to the Ontario case of *Gamble* v. *Great Western Railway Company*,[3] and a case decided by the House of Lords, *Great Western Railway Company* v. *Bunch*.[4] In the case of *Forward* v. *Pittard*,[5] in which the carrier was held liable for loss occasioned by the burning of the goods being carried, the fire having been communicated from an out side source and not caused by lightning, Lord Mansfield said : "It appears from all the cases for one hundred years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract he is liable for all due care and diligence ; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is by the common law ; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God or the King's enemies." In *Marshall* v. *York, etc., R. Co.*,[6] the plaintiff was the servant of Lord Adolphus Varre, who had purchased tickets for both. The plaintiff's portmanteau, which had been put on the train, was lost, but so far as the report indicates, there was no evidence of negligence. The action was for the value of the portmanteau. It was contended that the contract being with the master and not with the servant, the servant could not succeed. This contention was, however, overuled, and judgment given for the plaintiff. In

[1] (1870) 40 L.J. C.P. 9. [2](1903) 72 L.J. K.B. 385. [3] 24 U. C. R. 407. [4](1888) 57 L. J. Q. B. 367. [5](1783) 1 T. R. 27; Campbell's Rul. Cas, vol. 1, p. 216. [6](1851) 21 L.J. C.P. 34.

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Tattan v. *Great Western Ry. Co.*,[7] which was an action to recover the value of goods shipped but not delivered, the question was whether the action was one of contract or of tort. All of the Judges, following the Marshall case, were of opinion that it was an action of tort. COCKBURN, C.J., says:[8] "Whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on parties entering into a contract, it has been established that the present case is one of duty imposed on the contract being entered into independently altogether of the contract of the parties. *Austin* v. *Great Western Ry. Co.*[9] was an action brought by an infant for damages for injury through defendants' negligence in carrying it. No fare was paid for the carriage of the child (which was accompanied by its mother who had purchased a ticket), though it was over the age under which children were carried free. The Court unanimously decided that the Company was liable. SHEE, J., says: "I think that there was an entire contract to carry both the mother and her child, and it would have made no difference if she had taken two tickets instead of one. The contract was made by her on behalf of herself and her child, and the Company who have had the benefit of it by receiving the fare cannot escape from the liability which attaches to them as carriers of passengers."

In the same year the case of *Martin* v. *Great Indian Peninsula Ry. Co.*,[10] was decided by the Court of Exchequer. This was an action brought by an officer in the Government service who was a passenger on the defendants' railway in India, for personal luggage destroyed by fire. The defence was that the plaintiff and his luggage were being carried under a contract with the Government, one of the terms of which was that "the baggage shall remain in charge of a guard provided by the troops, the Company accepting no re-

7(1860) 29 L.J.Q.B. 184. 8 At p. 186. 9(1867) 36 L.J.Q.B. 201. 10(1867) 37 L. J. Ex. 27.

sponsibility." It was held that the plaintiff had no right of action merely for non-delivery as that was simply a breach of the contract which was not made with the plaintiff, but that for negligence the defendants would be liable to the plaintiff, the non-liability clause being merely "a limitation of the responsibility for a loss arising from due care not being taken of the luggage by the guard." On the first branch this case seems to be slightly at variance with some of the preceding cases, but in view of the fact that in this case there was an express contract, and that none of the preceding cases are mentioned in any of the judgments, but, on the contrary, the defendants' counsel in his argument contended that the Marshall case "is not an authority in the plaintiff's favour here, for it was decided upon the custom of the realm which does not extend to India," it scarcely seems proper so to consider it.

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The defendants' counsel cited also *Alton* v. *Midland Ry. Co.*,[11] in which it was held that the employer could not maintain an action against the defendants because of injuries done to his servant while travelling on his business, and *Becher* v. *Great Eastern Ry. Co.*,[12] in which it was held that the employer could not maintain an action for the value of his personal luggage which was taken by the servant on his own ticket, but, as is pointed out by POLLOCK in his work on Tort,[13] both of these cases have been virtually overruled and they need not, therefore, be considered.

In *Foulkes* v. *Metropolitan District Ry. Co.*,[14] the Court of Appeal held that the defendants were liable to the plaintiff for injuries received by him on their train through negligence, though the ticket was purchased from another company, the liability being independent of any contract. THESIGER, L.J., cites as authorities the Marshall and Austin cases and says:[15] "He (defendants' counsel) attempts to

[11] (1865) 34 L.J. C.P. 292. [12] (1870) 39 L.J.Q.B. 122. [13] 7th Ed. p. 533. [14] (1880) 49 L. J. Q. B. 361. [15] At p. 369.

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draw a line in a case like the present between the commission of an act which is in itself wrongful and the omission of some act to which the company would admittedly be bound if the passengers were carried by them under a contract. It is, however, very difficult to see how such a line can be reasonably drawn;" and again, "I think that the true principle in such a case as the present is that the carrying company so far as concerns its own lines and its own acts or omissions, is under the same obligations in reference to the security of the passenger as it would have been if it had directly contracted with him."

In *Meux* v. *Great Eastern Ry., Co.*,[16] it was held that the plaintiff could recover for the loss of her goods, consisting of a servant's livery, which were destroyed by the negligence of the defendants while being carried as personal luggage of the servant, notwithstanding that there was no contract between the plaintiff and the defendants.

Were it not for some of the reasons given in the last mentioned case, the conclusions I should draw from all the foregoing cases would be that the relation of carrier and carried having been established, the obligation on the part of the carrier arises out of that relation irrespective of any contract, and is the same, whether the person who or whose goods are being carried is or is not the person who entered into the contract out of which the relation arose. The Judges in this case, as well as Lord BRAMWELL in the Foulkes case, although it was not necessary to do so for the determination of the case, express the view that while the carrier is liable to the owner for misfeasance regardless of contract, yet for nonfeasance, *e.g.*, non-delivery, he would be liable only to the person with whom he contracted. This view appears to me scarcely consistent with the decisions in *Forward* v. *Pittard*, and the Marshall case already cited,

[16](1895) 64 L. J. Q. B. 657.

but on the facts of the present case I do not think that it is necessary to choose between the two. Judgment Harvey, J.

It was contended by the defendants' counsel that the contract for carriage was with Shun Moon, who was the employer of the plaintiff and the other Chinamen. Even if this were so it would appear to be on all fours with the Marshall case, but I am of opinion that it is not so. Though the price of the ticket was paid by Shun Moon in the first place, it was so paid on behalf of the plaintiff and the others who subsequently repaid him, and they were not in reality his employees at all.

Then it was urged that if the contract were not with Shun Moon alone, it was a joint contract with all the fifty-four Chinamen, and the plaintiff cannot sue alone. I cannot arrive at this conclusion. The fact that only one ticket was issued seems to me to have no significance whatever as regards either of these contentions. The direction to the agent was to issue fifty-four tickets, not one, but evidently to save himself labour, since they were all going by one train, he issued only one, thinking one ticket would answer the purpose as well. The contract in my view was, in consideration of seventy cents paid by each Chinaman, to carry such Chinaman and his baggage, safely. To hold that it was simply a joint contract would lead to the singular conclusion that if one of the Chinamen alone had been injured or his baggage damaged, he would have no right alone under the contract against the Company.

It was also urged that the circumstances that the baggage was loaded in a box car without being checked, and without a servant of the defendants in charge of it, was such as to relieve the defendants from liability in respect of it as personal baggage. I confess myself unable to see how this can help the defendants. It is perfectly clear on the evidence that the defendants proposed to carry this baggage to Raymond for the consideration paid

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for the fares, and whether they proposed to deal with it as ordinary freight or as personal luggage, appears to me to be of no consequence whatever, the liability for either being exactly the same. It was put into a car specially provided by the defendants for the purpose, and I think they must accept the responsibility for its safe keeping and carriage. I may say, however, that I consider it was received as personal luggage.

I have not come to a conclusion as to the cause of the fire, or whether it was due to the defendants' negligence, because it has not appeared necessary for me to do so in arriving at my decision, but I do not hesitate to say that I do not consider that the evidence warrants the conclusion that it was caused by the presence of matches without the intervention of some outside agency. The matches which were discovered clearly could not have been the cause of the fire, for they were found only partially consumed in a bundle in a part of the car where the fire was the least fierce. Beyond this fact the plaintiff has testified that there were no matches whatever in his baggage, so that even if the fire had been started from matches in some baggage it could not have been in that of the plaintiff.

On the authorities cited and on the facts as I find them I come to the conclusion that the defendants are liable to the plaintiff for the loss sustained in the destruction of his personal baggage.

Statement.

Some of the articles for the loss of which the plaintiff claims compensation consisted of blankets, pillows, and other bedding material which the plaintiff intended for his personal use while in Raymond, and of somewhat inconsiderable value. In *Macrow* v. *The Great Western Ry. Co.*,[17] it was held that similar articles to these taken by a passenger intending to use them for household purposes were not

[17] (1871) 40 L. J. Q. B. 300.

personal baggage. The true rule is there stated by COCKBURN, C.J.,[18] to be "that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purposes of the journey, must be considered as personal baggage." Under this rule the same class of goods as were then declared to be not personal luggage would under other circumstances, and in reasonable quantities, be deemed personal luggage. It is perhaps a little hard to decide on which side of the line such cases as the present should fall. I am rather disposed to the view that, having regard to the circumstances of the present case, these goods should be considered as personal luggage, but I prefer to base my conclusion on another ground, *viz.*, that the defendants had knowledge of what the plaintiff was taking as luggage and made no objection. In *Great Northern Ry. Co.* v. *Shepherd*,[19] Lord WENSLEYDALE says: "If the plaintiff had carried these articles exposed. . . so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss." In the present case, the defendants' station agent assisted in taking the C. P. R checks off all the baggage of all the Chinamen, and watched it all being put into the car. The baggage of the plaintiff now under consideration, was tied up in one of the blankets without any other covering, and the evidence shows there were other bundles of the same sort in different colored blankets. Under these circumstances, I think the defendants cannot now be allowed to deny liability.

The only remaining question to consider is the value of the baggage destroyed. The evidence on this point is not by any means complete, but it appears that the articles in-

[18] At p. 304. [19] (1852) 21 L. J. Ex. 286.

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tended and required for use at Raymond had been just purchased and were new, and that the others had been in use for some time. As nearly as I can determine, the new articles at the purchase price sworn to, cost $34.05, and the remaining articles cost $50.40. It appears to me that a deduction of one-third from the cost of these last mentioned articles would probably give a fair estimate of their value at the time. That will fix the value of them at $33.60, and the value of all at $67.65. Judgment will therefore be for the plaintiff for $67.65 with costs, which, by reason of the important questions of law arising, and the amount indirectly involved, I direct to be taxed on the higher scale.

Judgment for plaintiff.

McNICHOL v. BRUCKS.

1 W. L. R. 478.

Sale of Chattels—Actual and continued change of possession.

At the time of the sale of certain cattle they were in a pasture belonging to the vendor, but on the same day the vendor's right to the field passed to a third person with whom the vendee made an arrangement under which the cattle continued in the field where they were looked after by the vendee and his servants.

Held, that there had been a sufficient actual and continued change of possession to support the sale.

Remarks as to the application of Item 95 of the tariff providing for set off of costs in certain cases.

[WETMORE, J., *4th and 5th May, 10th June, 1905.*]

Statement.

This was an action for taking and detaining seven cows and a calf alleged to be the property of the plaintiff. The cattle in question had been bought from the defendant by one Walters, by whom they were placed in a pasture which he had rented. There remained due $185 of the price. Walters sold the cattle to the plaintiff, the only delivery made being that they went together to the pasture, when Walters said: "Now the cattle belong to you, John, and you have got to look after them." On the same day one Klump

bought from Walters the lease of the pasture, and on the following day the plaintiff obtained from Klump, who was in possession of the pasture, permission to leave the cattle there. They were thereafter cared for as far as was necessary, which was no more than watering them, by the plaintiff, his man, and Klump, at his request. Subsequently, Walters, being unable to pay the balance due upon the cattle, sold them back to the defendant who went to the pasture and took the cattle away. At the time the defendant had no notice of the sale to the plaintiff. Statement.

E. L. Elwood, and *James F. MacLean*, for plaintiff.
H. A. Robson, and *W. R. Parsons*, for defendant. Argument.

[*10th June, 1905.*]

WETMORE, J.:—In the view I have taken of this case, the whole question narrows down to whether the sale and delivery to the plaintiff was accompanied by an actual and continued change of possession. It was not set up that the sale to the plaintiff was not accompanied by immediate delivery, but it was urged on the part of the defendant that it was not followed by an actual and continued change of possession of the animals in question, and *Doyle* v. *Lasher* [1], was cited in support of that contention. The authority does not seem to me to support the defendant's contention. There, there was no change in possession at all; all that was done was to mark the sheep and move them from one field belonging to the vendor to another field belonging to him. The question of change of possession is one of fact; that is well established by the authorities. Judgment.

I have, I must say after considerable hesitation, arrived at the conclusion that there was an actual change of possession in this case. In doing this I have not lost sight of what was laid down in *Danford* v. *Danford*,[2] namely, that "in

[1] (1865) 16 U. C. C. P. 263. [2] (1883) 8 Ont. A. R. 518.

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order to create a change of possession under the Statute there must be such a change that would be visible and apparent to the public." In the case now under consideration, although the cattle remained in the same pasture field that they were in when the contract of sale was made, the possession of that pasture field had passed out of the vendor, in whom it was at the time of the sale, into the hands of a third person, and that third person at the request of the vendee, the plaintiff, had given him the privilege to keep the cattle there, was retained to look after them to some extent, and in so far as the real looking after them was concerned they were looked after by the plaintiff and his employees. The vendor, Walter, never went back there at all. The cattle, therefore, passed out of the possession of the vendor and into the actual possession of the vendee, and they could not in any sense that I can conceive of be considered under such circumstances in the vendor's possession. They must, therefore, be considered in the actual possession of the vendee. I think this was a change that would be visible and apparent to the public; the public would see that the vendors were no longer looking ofter them, but that the vendee was doing so. This is all that it is necessary to decide for the purpose of this case, and there must be judgment for the plaintiff for $190 and costs.

The plaintiff will only be entitled to costs on the lower scale, as he has not recovered $200. The clerk will act under item 95 of the tariff, and tax the defendant's costs of defence and set off the excess against the plaintiff's costs as provided in that item. I may say that I am quite at a loss to understand why advocates will so persistently bring actions on the higher scale which clearly and palpably ought to be brought under the lower, as in this case. The value of the property in dispute was $185, fixed upon by the very written instrument under which the plaintiff claims, and why in the world they should have asked for damages for

$300 I am quite at a loss to understand. The only way to stop operations of this sort is to insist in every case where it is done that this item 95 shall be acted on. That is the intention of the item, and I for one do not feel disposed in the exercise of any discretion I may have to relax it in any way unless some very plain exceptional circumstances are made apparent. Judgment. Wetmore, J.

Judgment for plaintiff.

VICTORIA LUMBER CO. v. MAGEE.

2 W. L. R. 1.

Motion for speedy judgment—Filing of defence — Accounting for delay.

Upon a motion for speedy judgment launched after the statement of defence has been delivered, it is not essential that the delay in moving should be accounted for.

McLardy v. *Stateum* (1890) 24 Q. B. D. 504, 60 L. T. 151, 38 W. R. 349; 59 L. J. Q. B. 154, not followed.

[WETMORE, J., *7th July, 8th July, 1905.*]

This was an application on the part of the plaintiffs under Rule 103 of *The Judicature Ordinance* to strike out the appearance and defence entered by the defendant Gregory, and for leave to sign final judgment for the amount of the plaintiffs' claim. The appearance was entered on the 25th of April, and a summons in this matter was granted on the 17th of June. A previous application made on the 22nd of May was withdrawn upon an intimation by the Judge that the plaintiffs' claim was not verified as required by the Rule. Statement.

J. T. Brown, for defendant Gregory, objected that there had been too great delay in making this application, and contended that application should have been made before the defence was delivered, and not having been so, that the delay should be accounted for. He referred to *McLardy* v. *Stateum*.[1] Argument.

E. L. Elwood, for plaintiffs.

[1] (1890) 59 L. J. Q. B. 154, 24 Q. B. D. 504, 60 L. T. 151, 38 W. R. 349.

[*8th July, 1905.*]

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WETMORE, J.:—*McLardy* v. *Stateum* certainly supports Mr. Brown's contention. It seems to have been considered by Mr. Justice FIELD, whose judgment was being appealed from, that the intention of the rule was that the application should be made before the defendant delivered his defence. While the Divisional Court was not of that opinion, they laid down the rule that if the application was made after the delivery of the defence the delay should be accounted for. That decision is not binding upon me; it was made in 1890, and after the Supreme Court of the North-West Territories was constituted, and, while I have great respect for decisions of English Courts and Judges, I must say that I am unable to see why any such rule should be laid down as was laid down in that case. I can gather nothing either in Rule 103 or the English Rules from which it was taken,[2] from which I can gather that that was its intention. I am quite at a loss to understand why, if a party pleads to an action for debt a defence which is not true, his defence should not be struck out under the Rule at any time, provided, of course, that it is not shown that the defendant has been in some way prejudiced by the delay. I think to hold as was held in *McLardy* v. *Stateum* would to a very great extent do away with the utility of that Rule, which to my mind serves a most excellent purpose, and I am specially impressed with that idea because the judicial districts are of such a large extent, and the Judge resides so far from many of the advocates, that to adopt the rule laid down in *McLardy* v. *Stateum* would, to my mind, be quite unsuitable to the conditions of this country. With all due respect, therefore, I cannot follow that case.

The defendant here has filed no affidavit or given any meritorious reason why his defence should not be struck out.

[2] Ord. XIV., Rule 1.

I will therefore order that the appearance and defence of the defendant Gregory be struck out, and that the plaintiffs be at liberty to sign judgment for the full amount of their claim with costs. Judgment.

Order accordingly.

WAINWRIGHT v. VILLETARD.

2 W. L. R. 242.

Malicious Prosecution—Malice—Reasonable and probable cause.

In an action for malicious prosecution the Court must decide whether, upon the facts, the defendant had reasonable and probable cause for his proceeding, and it will be held that he had if he took reasonable care to inform himself of the facts and honestly, though erroneously, believed such a state of facts to be true as would, if actually true, have constituted a *prima facie* case for the prosecution complained of.

Held, (reversing the judgment of SIFTON, C.J.), that the defendant in this case had reasonable and probable cause for his proceeding.

[*Court* en banc, *19th, 13th, 18th July, 1905.*]

Statement.

This was an appeal by the defendant from a judgment of SIFTON, C.J., in an action for malicious prosecution, allowing the plaintiff $250 damages and costs.

On 13th April, 1899, the defendant bought a waggon through Carscaden & Wainwright, the plaintiff's firm, which was acting as agent of the Deering Implement Company, the defendant giving in payment a lien note for $37.50 and interest, payable on January 1st, 1900, in favor of the Deering Implement Company. In the month of March following, when this note was about three months overdue, the defendant settled for the same in full with the plaintiff, but the note was not returned, the plaintiff, on the occasion of the payment, and twice subsequently, making to the defendant various excuses for its non-production. In March, 1901, the connection between the Deering Implement Co. and the firm of Carscaden & Wainwright was severed, the firm obtaining from

Statement. the company a release which referred specially among other items to this note. The plaintiff then went over to the United States, where he remained twenty-three months, and during his absence, in May, 1902, the defendant's waggon was seized by the Company, under the note which remained in their hands. After, however, coming to see the company's agents in Edmonton and threatening them with legal proceedings on the strength of the receipt which he held from Wainwright, the defendant prevailed upon them to accept $26.35 in settlement, and upon payment of this amount the waggon was released.

Upon the plaintiff's return in May, 1902, the defendant met him at Strathcona, and he assured the defendant that he had turned the money into the company, whereupon the defendant went over to Edmonton and interviewed the two principal officials of the company there. They told him that the money had not been paid in, and at his earnest solicitation, the Company's book-keeper was made to go over the books minutely without being able to find trace of any such payment. The defendant then went to see his solicitor, and finally to a police magistrate, before whom he laid an information pursuant to which the plaintiff was arrested, put in jail, and the next day made to answer to a charge of theft, which, however, was withdrawn by the defendant in the course of the preliminary investigation, upon getting word from the Company's officials that they had just found in the books the entry of the settlement made by Carscaden & Wainwright, of which it did not appear that the defendant had been informed either by the plaintiff or the Company.

Appeal. This appeal was heard before WETMORE, SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ.

Argument. *F. C. Jamieson*, for (appellant) defendant.

N. D. Mills, for (respondent) plaintiff.

Judgment.

[*18th July, 1905.*]

The judgment of the Court was delivered by

PRENDERGAST, J.:—I gather from the judgment of the learned Chief Justice, read together with his statements made in reply to two questions put by defendant's counsel as they appear in the appeal book, that he did not find that malice, as a separate element, was proven by any part of the evidence bearing distinctly thereon, but that he inferred the same, as there is no doubt may be done in some cases, from what he considered an absence of cause. For that reason, and on account of the general nature as well as the special circumstances of the case, it is not necessary to enter at all into the question of malice, as the matter can be fully disposed of on the question of whether there was reasonable and probable cause for the laying of the information. It is fully settled that in an action for malicious prosecution, both the want of reasonable and probable cause, and malice, must be shown ; and the rule is as clear that although such want of reasonable and probable cause constitute a negative, yet the onus of proving the same rests on the plaintiff: *Lister* v. *Perryman*,[1] *Albrath* v. *North Eastern Ry. Co*.[2]

The findings of a jury or of a trial judge sitting as a jury, should not, of course, be disturbed by the Court of Appeal except in extreme cases where there is absolutely no evidence to reasonably support such findings. In an action like the present one, on the other hand, there are certain questions of fact which belong to the jury, while certain other questions which are in no way questions of law are left to the judge to determine. The jury find the facts on which the question of reasonable and probable cause depends, but the Judge determines whether those facts do constitute reasonable and probable cause: *Hilliar* v. *Dade*.[3]

[1] (1870) L. R. 4 H. L. 521 ; 39 L. J. Ex. 177 ; 23 L. T. 269 ; 19 W. R. 9, [2] (1886) 11 App. Cas. 247, [3] (1898) 14 Times L. R. 534.

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Prendergast, J.

In *Lister* v. *Perryman*, which is one of the same nature, it is said that "the verdict in cases of this description, therefore, is only nominally the verdict of a jury."[4] "The existence of reasonable and probable cause is an inference of fact . . . it is an inference to be drawn by the Judge and not by the jury,"[5] and "it appears to be settled law in this country that want of reasonable and probable cause is a matter for the Court."[6]

Here it does seem, with all due deference, that the inference that the defendant did not act with reasonable and probable cause, which is within this Court's province to review, was not warranted.

Perhaps it does not matter, although it seems an extraordinary circumstance, that the plaintiff never showed the defendant his release from the company or told him of the existence of such a document; but it does matter that the plaintiff did not account for the money in question as he should have done, that the defendant was prejudiced by the seizure of his waggon, and being made to pay $26.35 in excess, and that repeated inquiries and an earnest search of the Company's books only confirmed his suspicions. He sought information from the most reliable sources at hand. If we are to judge his conduct from such information only as the evidence shows he actually had, his course was quite justifiable; and should we suppose that he was cognizant of all the facts leading up to the settlement and release of 24th June, 1903, it would even be more so. Even for the fact that the entry in question could not at first be found in the books, the plaintiff seems to be in a way responsible; for it was probably all due to the fact that the funds collected having been irregularly accounted for and that an entry altogether out of the ordinary was made of the same, which could not be readily found

[4] *Per* Lord Chelmsford, L. R. 4 H. L., at p. 535. [5] *Per* Lord Wesbury, at p. 538. [6] *Per* Lord Colonsay, at p. 539.

when looked for under the headings of accounts kept in the regular course of business. Judgment. Prendergast, J.

"The defendant will be deemed to have had reasonable and probable cause for the prosecution where he took reasonable care to inform himself of the true facts, and he honestly, although erroneously, believed in his information, and that information, if true, would have afforded a prima facie case for the prosecution complained of:" *Albrath* v. *North Eastern Ry. Co*, *supra*. "Absence of reasonable and probable cause could not be held to have been shown, simply because further inquiries might have been made or further facts shown:" *Malcolm* v. *Perth F. I. Co.*[7] "If a reasonable amount of credible information has been received, that appears to me to be all that is required:" *Lister* v. *Perryman*.[8] In the last case, which is one where the defendant acted partly on information obtained from people speaking merely by heresay, Lord CHELMSFORD[9] said: "The question was not whether the defendants might have obtained more satisfactory or surer grounds of belief by applying to Robinson for direct information, but whether the facts brought to his knowledge furnished reasonable and probable cause for believing that the plaintiff had dishonestly possessed himself of his gun, and justified him in acting on that belief without further inquiry."

Here, from all the circumstances of the case, it seems that the facts brought to the defendant's knowledge, furnished reasonable and probable cause for believing that the plaintiff has misappropriated the money in question and justified him in acting on that belief without taking the further step of going with the plaintiff to again inspect the books of the Company.

7 (1898) 29 Ont. R. 406. 8 (1870) L. R. 4 H. L. at p. 539. 9 L. R. 4 H. L. at p. 540.

Judgment.

Prendergast, J.

In the opinion of this Court, the appeal should be allowed with costs, the judgment of the learned Chief Justice set aside, and judgment entered for the defendant also with costs.

Appeal allowed and action dismissed with costs.

REPORTER :

Alex. Ross, Esq., Regina.

MEUNIER v. DORAY.

2 W. L. R. 231.

Fraudulent transfer of Land—13 Eliz. c. 5—Homestead—Exemption

Held (SCOTT, J., *dissentiente*), that a transfer of a homestead exempt from seizure under execution was not by reason of the exemption a fraudulent transfer of property under the Statute 13, Eliz. c. 5.

Semble, the right to claim the benefit of an exemption is not confined to the execution debtor, but extends at least to members of his family.

[*Court* en banc, *13th July, 18th July, 1905.*]

Statement.

This was an appeal from the judgment of HARVEY, J., at the trial, refusing to set aside a transfer made by the defendant to his wife of certain lands which were, at the time of the transfer, the defendant's homestead. The facts appear in the judgment.

Appeal.

The appeal was heard before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and NEWLANDS, JJ.

Argument.

J. R. Boyle, for plaintiff (appellant).

A. F. Ewing, for defendant (respondent).

Judgment.

[*18th July, 1905.*]

Wetmore, J.

WETMORE, J.:—The defendant is the wife of one Marcel Doray. About the 29th August, 1899, a certificate of title was issued to him for the S.E. ¼ 10-55-23 W. 4. By instrument dated the 19th August, 1899, duly registered. Marcel Doray transferred this property to his wife, Marie Doray the defendant. The plaintiff on the 2nd June, 1893, obtained a judgment against Marcel Doray and one Martineau for two hundred and twenty-three dollars and seventy-five cents and costs. A writ of execution against lands and goods was issued and placed in the hands of the Deputy Sheriff on 26th May, 1904. This execution was issued on the judgment referred to. The return "nulla bona" was made by the Deputy Sheriff to this writ, and the writ against lands at the time of the commencement of this action was a valid writ as against Marcel Doray's lands. The application in this case was made to have the transfer by Doray to his wife declared void under the Statute 13 Elizabeth, chap. 5, and that it should be declared that Marcel Doray was entitled to an interest in such land, and that the defendant should be declared to be merely a trustee, and that it should also be declared that the land was subject to the execution of the plaintiff, and for an order for the sale of the same to realize the amount of such execution. The matter came on for hearing before my brother HARVEY, who dismissed the application with costs, and the plaintiff now appeals to this Court from that judgment.

Section 2 of *The Exemption Ordinance*,[1] provides that "the following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, viz.: . . .(9) The homestead, provided the same be not more than one hundred

[1] Con. Ord. (1898) c. 27.

Judgment.

Wetmore, J.

and sixty acres; in case it be more the surplus may be sold subject to any lien or encumbrance thereon."

The property in question did not consist of more than one hundred and sixty acres, and it is conceded that at the time of the transfer in question, it was the homestead of Marcel Doray. No execution was issued until long after the transfer was made as I have in effect hereinbefore stated. At the time of the transfer, therefore, there was no charge against this land. It is urged, however, that as Marcel Doray was in embarrassed circumstances (and I will assume for the purposes of this case such to be the fact) that the conveyance was fraudulent as against the creditors under the Statute of Elizabeth. Now it is quite clear under the provisions of the Ordinance, the property was not at the time of the transfer liable to seizure under any execution. That being so, I am quite unable to understand how it can be made available for the payment of creditors by the transfer. If it was not available for the payment of creditors at the time of the transfer, it could not be made available the instant it passed into some other person's hands, because up to the very minute of the execution of that deed it was unavailable for that purpose. The effect of the Statute of Elizabeth is to make a transfer void as against creditors, but if creditors had no interest in it while the title was in the name of the debtor, I cannot see how they can be held to have an interest after he ceases to have any interest in it.

In *Sims* v. *Thomas*,[2] DENMAN, C.J., is reported as follows: "We are of opinion that the Statute of Elizabeth only extends to the assignment of such effects as are liable to be taken in execution." The same principle would apply to real property. The plaintiff, however, relied strongly in support of his contention upon two Manitoba cases, *Frost* v. *Driver*,[3] and *Roberts* v. *Hartley*.[4] The state of the law in

[2] (1840) 9 L. J. Q. B. 399, at p. 404. [3] (1895) 10 Man. R. 319.
[4] (1902) 14 Man. R. 284.

the North-West Territories is very materially different from what it is in Manitoba. In Manitoba a registered judgment is, by statutory enactment,[5] made a lien against the land and they have held there that it is a lien against all of the land, including property exempt from seizure under execution. I can quite understand under such circumstances the lien being there, that when the property ceases to be a homestead that the lien would attach and can be enforced. We have no such provision in the Territories.

By way of supporting what I now hold, namely, that in order that the Statute of Elizabeth should apply to the property it must, at the time of the transfer, be subject to execution, I will just in passing call attention to what was stated by BAIN, J., in his judgment in *Roberts* v. *Hartley*,[6] where he remarks that, "In saying, as many of the cases do, that the Statute applies only to such property as can be taken in execution, this expression must be taken to be equivalent to property that can be compulsorily applied to the payment of the debts of the grantor, whether by execution or otherwise."[7] Granted that the lien is established the very moment the land ceases to be a homestead, I can understand how it could be enforced by compulsory sale.

For these reasons I am of opinion that the plaintiff had no right to go against this land, and in so deciding, I am assuming that the transfer was voluntary and without consideration. The learned Judge has, however, found that it was not a voluntary conveyance, but was made for valuable consideration. I do not wish to be understood as impeaching that finding, I merely express no opinion with respect to it.

It was urged that no one but the execution debtor could claim the exemption provided for by the Ordinance. I am

5 R. S. M. (1902) c. 91. s. 3. 6 14 Man. R. at page 291. 7 *Warden* v. *Jones*, (1857) 2 DeG. & J. 76; 27 L. J. Ch. 190; 4 Jur. (N.S.) 269; 6 W. R. 180.

Judgment
Wetmore, J.

not prepared to accede to that proposition. There is a very material difference between the Manitoba Act and the Territorial Ordinance. The Territorial Ordinance provides that the "real and personal property of an execution debtor and his family is declared free from seizure." The Manitoba Act makes no such provision as to the property of the debtor's family being free from seizure, and I am disposed to think that, the property in question being in a member of the family, and being practically used by her for the benefit of the family, she would, under the provisions of the Ordinance, be in the position to claim the exemption. I make no authoritative decision upon this question, however, as I do not consider it necessary to so do, in view of the opinion I have expressed on the other question.

The application also asked for similar relief in respect to the N.E. ¼ 3-55-23 W. 4. That property was purchased from the Canadian Pacific Railway Company, and the learned Judge held that it was practically purchased by the wife and that the payments which had been made upon it had been made by the earnings of Marie Doray from this homestead, these earnings being hers, and the result of her labour. It was practically conceded that if it is found that the transfer of the homestead to her was valid as against the creditors, the Canadian Pacific Railway lot was not available to the creditors either. The evidence, I think, establishes clearly that this must be conceded.

The result is that in my judgment this appeal fails. The judgment of my brother Harvey should be affirmed and this appeal dismissed with costs.

SIFTON, C.J., NEWLANDS, and PRENDERGAST, JJ., concurred with WETMORE, J.

Judgment.

Scott, J.

SCOTT, J.:—I agree that the appeal should be dismissed with costs, but on grounds different from those stated by my brother WETMORE.

The learned trial Judge has found that the transfer of the homestead to the defendant by her husband, was not made for the purpose of defeating, delaying or prejudicing the plaintiff or the defendant's creditors generally, or with that intent, and, as there appears to be evidence upon which he could reasonably have arrived at that conclusion, his judgment should be upheld.

It may be open to doubt whether the conveyance was made for valuable consideration, but, even if it were voluntary, it should not be deemed fraudulent under the Statute 13 Elizabeth, chap. 5, merely because it has the effect of defeating or delaying creditors. It seems to have been at one time held that where a voluntary conveyance had that effect, the intent to defeat or delay creditors must be presumed,[8] but, since *Ex parte Mercer, In re Wise*,[9] its having effect is no longer to be deemed conclusive evidence of such intent. Lord ESHER, M.R., in his judgment in that case says[10]: "In order to make this deed void under the Statute of Elizabeth (however far that Statute may be stretched), we are bound in the present case to find that there was an actual intent in the bankrupt's mind to defeat or delay his creditors, and there is no evidence of such an intent."

To my mind it is open to doubt whether the fact that the lands conveyed to the defendant formed the homestead of her husband, and were, therefore, while such, not exigible under an execution against him, would prevent a creditor setting aside under the Statute, 13 Elizabeth, chap. 5, a conveyance made

[8] See *Barling* v. *Bishop*, (1860) 29 Beavan 417; 6 Jur. (N.S.) 812; 8 W. R. 631; and *Freeman* v. *Pope* (1869) L. R. 5 Ch 538; 39 L. J. Ch. 148, affirmed 39 L. J. Ch 689; 21 L. T. 816; 18 W. R. 906. [9] (1886) 17 Q. B. D. 290; 55 L. J. Q. B. 558 54 L. T. 720. [10] At p. 309.

Judgment Scott, J.

by him with the intent referred to. I am inclined to the view that *Frost* v. *Driver*, and *Roberts* v. *Hartley*, *supra*, referred to by my brother WETMORE, are well decided, and that the principles there laid down are applicable to the Territories, notwithstanding the difference which exists between the Manitoba Act respecting exemptions from seizure and our Ordinance respecting them. It appears to me that here, as in Manitoba, the right of the grantor to claim exemption may be forfeited by him during his lifetime, and that the right of members of his family to claim it after his death may also be forfeited, and that, in either case, the land would be rendered liable to the claims of his creditors.

The fact that in the present case the plaintiff had not an execution in the sheriff's hands at the time of the conveyance to the defendant does not, in my view affect the question, as the right of a creditor to set aside the conveyance is not dependent upon his having a lien upon the land by execution or otherwise.

Appeal dismissed with costs.

REPORTER : Alex. Ross, Esq., Regina.

NYBLETT v. WILLIAMS.

Libel—Improper joinder of parties—Separate causes of action—Right of plaintiff to elect.

Where it appears in the course of the trial that two or more defendants have been joined in an action for two separate torts, one of which has been committed by both, but the other only by one, the plaintiff should be allowed to elect upon which cause of action he will proceed and the necessary amendments as to parties made accordingly.

[*Court* en banc, *15th April, 18th July, 1905.*]

Statement.

This was an appeal from the judgment of NEWLANDS, J., dismissing the action.

Statement.

The plaintiff was a medical man and the defendant Williams was the editor and publisher of a newspaper of which his co-defendant Robinson was the correspondent in the district where the plantiff practised. In the course of a weekly letter, the correspondent wrote and the defendant Williams published a paragraph reflecting on the plaintiff's performance of his professional duties, and subsequently a further item appeared in the defendant Williams' paper to the same effect. The plaintiff sued for damages in respect of both the alleged libels. At the trial it appeared that the correspondent had nothing to do with the writing or publishing of the second of the two items, and the trial Judge dismissed the action on the ground that the libels being separate and distinct torts, and the correspondent not being a party to the second, he was improperly made a party. The plaintiff appealed.

Appeal.

The appeal was heard before SIFTON, C.J., WETMORE, PRENDERGAST, and HARVEY, JJ.

Argument.

Norman Mackenzie and *H. G. W. Wilson*, for plaintiff (appellant.)

H. M. Howell, K.C., and *W. H. Martin*, for defendants.

[*8th July, 1905.*]

The judgment of the Court was delivered by

Judgment.

WETMORE, J.:—The plaintiff contends that he has the right to maintain his action in the form in which it is laid, and as it devoloped at the trial, and that under Rule 29 of *The Judicature Ordinance*,[1] he is entitled to judgment against

[1] Con. Ord. (1898) c. 21. Rule 29 is as follows:—All persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment.

Judgment.

Wetmore, J.

both of the defendants upon the alleged libel of the 18th April, and against the defendant Williams alone upon the alleged libel of the 2nd May. I am of opinion that his contention is not correct. Rule 29 merely deals with joinder of parties. The Rule with respect to joinder of causes of action is Rule 79. Rule 29 is word for word the same as Rule 4 of Order 16 of the English Rules; and that part of Rule 79 which is applicable to the question raised in this case is practically the same as Rule 1 of Order 18 of the English Rules. The question of the right to join causes of action where the causes of action against different defendants are separate has been discussed to a very considerable extent in English cases. It is only necessary for me to refer to *Sadler* v. *The Great West Railway Co.*,[2] where it was held in effect that "claims for damages against two or more defendants in respect of their several liabilities for separate torts cannot be combined in one action." That was stated to be the effect of the judgment in that case by CHITTY, L.J., in *Gower* v. *Couldridge*.[3] The learned trial Judge, therefore, was correct in holding that as the case developed under the evidence at the trial these rights of action ought not to have been joined. But I am of opinion that he was in error in dismissing the action upon that ground. He ought to have given the plaintiff the right to elect upon which cause of action he might proceed. It was urged that this right ought not to be given because of the circumstances of the case, which were that sometimes before the action was brought on for trial, the defendants were examined for discovery, and the plaintiff was then aware of the fact that the article of the 2nd May was not written by the defendant Robinson, and that, knowing that, he should have applied to amend by

[2] (1896) A. C. 450; 65 L. J. Q. B. 462; 74 L. T. 561; 45 W. R. 51. [3] (1898) 1 Q. B. 348, at p. 351.

striking out one of the causes of action. *Hipgrave* v. *Case*,[4] *Clark* v. *Wray*,[5] and *James* v. *Smith*,[6] were cited in support of this contention. Those cases proceeded principally upon the ground of delay in applying for an amendment. This is not a case of amendment, it is a case of election, and I am of opinion that, notwithstanding that the plaintiff did not make an application to strike out one of the causes of action before the trial, he ought to have been given the right to elect at the trial. Judgment. Wetmore, J.

The judgment of the learned trial Judge should, therefore be set aside, and a new trial ordered.

The defendants will pay the costs of the appeal, but costs of the proceedings in the Court below will be in the discretion of the trial Judge.

Appeal allowed with costs.

[4] (1885) 28 Ch. D. 361; 54 L. J. Ch. 399; 52 L. T. 242—C. A. [5] (1885) 31 Ch. D. 68; 55 L. J. Ch. 119; 53 L. T. 485; 34 W. R. 69. [6] (1891) Ch. 384; 63 L. T. 524; 39 W. R. 396; affirmed on other grounds, 65 L. T. 544.

KING v. THOMPSON.

Resulting trust — Intention of purchaser at time of conveyance— Pleading.

Held, that when it appears that the actual purchaser by whom the purchase price is paid directs that the conveyance be made to a third party, intending that a beneficial interest in the land should pass to the person to whom it was conveyed, no trust results to the real purchaser by presumption of law, although no value is given by the third party.

Semble, per WETMORE, J., that while a question of law may be raised without being pleaded, yet the facts upon which such question of law is raised must be pleaded, and therefore it is not open to a defendant who has not pleaded fraud to set up that the plaintiff is precluded from obtaining the relief asked for by reason of fraud, evidence of which is brought out at the hearing.

Semble, that undue delay in the bringing of an action to have a resulting trust declared is strong evidence of an intention to convey a beneficial interest.

[*Court* en banc, *15th January, 18th July, 1905.*]

Statement. This was an appeal by the defendant from the judgment of SIFTON, C.J., at the trial of the action, declaring that the defendant held certain lands in trust for the plaintiff.

The plaintiff came to Canada in the year 1898 and in May of that year purchased three quarter sections of land. By his direction one of these quarter sections was conveyed to the defendant, his nephew. The plaintiff caused a certificate of title covering the land to be issued in his nephew's favour, but this the plaintiff retained in his possession. It did not appear that any consideration passed from the defendant to the plaintiff, or that the defendant was at the time even aware of the transfer being made, but the plaintiff admitted that he had put the land into the defendant's name because the defendant was to do certain things for him, which, however, the defendant, as the plaintiff said, failed to do. The action was commenced in August, 1903.

Appeal.

The appeal was heard before WETMORE, PRENDERGAST, HARVEY and NEWLANDS, JJ.

Argument.

R. B. Bennett, for appellant.

James Short, for respondent.

[*18th July, 1905.*]

Judgment.

WETMORE, J.:—I am of opinion that the evidence does not establish that the transfer to the defendant was made with intent to protect the plaintiff's property from his creditors. No doubt the evidence is very suspicious in that direction, but it does not go far enough. I am further of the opinion that, if it did, it is not open to the defendant to take advantage of it, because he has not pleaded the fraud. The learned counsel for the defendant may be correct in stating that a question of law may be raised without being pleaded, but he must plead the facts upon which he intends to raise the question of law. This rule seems to me to be quite clear that fraud must always be pleaded. *Day* v. *Day*,[1] and *Haigh* v. *Kaye*,[2] are in point so far as this case is concerned.

I am of opinion, however, that there was no resulting trust in this case, that the plaintiff had no intention of putting the title to the land in the defendant as trustee, but that his intention was to put it in him because he thought he was coming to Canada to live. That was clearly his intention at the time that the title was placed in the defendant's name. It therefore seems to me that at the time he so had the title made, his intention was that the defendant should have the property provided he did so, and consequently, a resulting trust was not created at the time the transfer was made. It

[1] (1889) 17 Ont. A. R. 157. [2] (1872) L. R. 7 Ch. 469; 41 L. J. Ch. 567; 26 L. T. 675; 20 W. R. 597.

Judgment.

Wetmore, J.

not being in his mind to create a resulting trust at that time, a resulting trust would not arise because his expectations were not carried out. And I am also doubtful whether the plaintiff has not, by his laches, that is, by allowing a long time to elapse between so placing the title and his bringing this action, put himself out of court.

I concur in the judgment of my brother Harvey.

Harvey, J.

HARVEY, J.:—The basic principle of a resulting trust, such as is claimed in the present case, is an intention, implied or presumed by the law, on the part of the person paying the purchase money, that he should have the beneficial interest, or, as it is put by Mr. LEWIN:[3] 'The trust results to the real purchaser by presumption of law which is merely an arbitrary implication in the absence of reasonable proof to the contrary.'' Consequently it would follow that if there can be shown to have been in fact an intention on the part of the purchaser that the beneficial interest should go to the person to whom the property is conveyed, the presumption is entirely removed and no trust would result.

In *Groves* v. *Groves*,[4] the Lord Chief Baron says:[5] "There can be no doubt that when one man pays for an estate and has it conveyed to another that the grantee who has the legal estate is a trustee by operation of law for the purchaser.'' The judgment continues, "But the conversations on which the plaintiff relies introduce a circumstance which ought, also, as it seems to me, to defeat his equity, *viz.*, that the plaintiff's conduct showed that at the time of the transaction he did not understand that his brother Simon was bare trustee for him. . . . Now, if such were his views

[3] Lewin on Trusts (9th [Ed.). p. 178. [4] (1853) 3 Y. & J. Ex. 163; 1 Kay (App.) xix.; 23 L. J. Ch. 199; 2 W. R. 86. [5] 3 Y & J. at page 170.

at that time, he could not afterwards, by a change in his intention, turn Simon into a trustee for himself."

Judgment.

Harvey, J.

In *Standing* v. *Bowring*,[6] decided in the Court of Appeal, the plaintiff had purchased some consols which she had had transferred to herself and the defendant, the knowledge of the transfer, however, being kept from the defendant. COTTON, L.J.,[7] says: "The rule is well settled that when there is a transfer by a person into his own name jointly with that of a person who is not his child or his adopted child, then there is *prima facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted by showing that at the time the transferor intended a benefit to the transferee." LINDLEY, L.J.,[8] says: "Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions expressed or implied."

Applying the principle laid down in the above-cited cases, I am of opinion that the plaintiff should not succeed in having a declaration that there was a resulting trust, for the admissions made by himself satisfy me that at the time he intended to give the beneficial interest to the defendant.

Without considering the question of whether the plaintiff should be refused relief simply on the ground of delay, if for no other reason, yet the length of time which elapsed from the time of the transfer till action was brought, appears to me very strong evidence, as in the case of *Groves* v. *Groves*, above cited, of the intention of the plaintiff when he purchased the land, and, as stated in that case, it is the intention at that time which is material.

I am therefore of opinion that the appeal should be allowed with costs, the judgment of the learned trial Judge

[6] (1885) 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204. [7] 31 Ch. D. at page 287. [8] At page 289.

Judgment. Harvey, J.

set aside, the judgment entered in the Court below for the defendant with costs.

PRENDERGAST and NEWLANDS, JJ., concurred.

Appeal allowed.

REPORTER:
Alex. Ross, Esq., Regina.

Re GREENSHIELDS, LIMITED, AND RITCHIE

2 W. L. R. 421, Aff. post. 359; 3 W. L. R. 324.

Land Titles Act — Production of duplicate certificate of title — Priority of registration

Where a mortgage had been registered as to some of the lands comprised therein, but remained unregistered as to one parcel owing to the non-production of the certificate of title.

Held, that a subsequent mortgage of the remaining parcel was entitled to priority of registration when the duplicate certificate was sent to the Registrar at the instance of the subsequent mortgagee, and he made the first request for registration after its receipt by the Registrar.

[SCOTT, J., *22nd July, 3rd October, 1905.*]

Statement.

This was a reference by the Registrar of the North Alberta Land Registration District. The facts stated were that on the 29th December, 1903, the Registrar received from the solicitors of Greenshields, Limited, a mortgage made by A. Davies upon lots 21 and 22 in block 81, Strathcona, and other lands. The mortgage was registered as to the other lands, but was not registered as to these lots, because the certificate of title covering them was not produced, it being in the possession of the Dominion Permanent Loan Company of Toronto, the mortgagees. At the time of the production of the mortgage in question the Registrar wrote the Dominion Permanent Loan Company to send the duplicate certificate of title for registration purposes, and on the 22nd of Febrû-

Statement.

ary, 1904, he received from that Company the duplicate tificate, accompanied by a letter from the Company, stating that it had been forwarded at the request of Messrs. Rutherford & Jamieson, advocates of Strathcona, by whom, on the same day, a mortgage upon the lots in question in favour of a client of theirs, Robert Ritchie, was handed to the Registrar, this mortgage being later in date than the mortgage in favour of Greenshields, Limited. The question submitted was, which of these two mortgages should, under the circumstances, be registered first.

Argument.

O. M. Biggar, for Greenshields, Limited.

F. C. Jamieson, for Robert Ritchie.

[*3rd October, 1905.*]

Judgment.

SCOTT, J.:—In view of sub-sec. 2 of sec. 33 of *The Land Titles Act*,[1] the Registrar could not receive either of these mortgages for registration as to lots 21 and 22 unless accompanied by the duplicate certificate of title to these lots. The fact that the mortgage to Greenshields, Limited, comprised other lands, for which a duplicate certificate of title was produced, obliged him to receive, enter in his day book and register it in so far as it related to other lands, but he could not be taken to have received or entered it in so far as it related to lots 21 and 22, even although he received it and filed it in his office; in my view, his duty was to treat it as a mortgage upon the other lands alone.

If I am correct in this view, the question to be considered is, whether it should be held to be in his hands as a mortgage upon lots 21 and 22 immediately upon the receipt by him of the duplicate certificate of title to those lots, without regard to the person by whom or at whose instance it was produced.

[1] 57-58 Vic. c. 28 (Ca.).

Judgment.

Scott, J.

In my opinion the subsequent production to him of the duplicate certificate, by or on behalf of another person than that mortgagee, and for a purpose other than the registration of that mortgage, would not have that effect. What leads me to that conclusion is, that there is not, or at least there should not be, on the page of the register relating to lots 21 and 22, or elsewhere in any of the Registrar's books, any entry or memorandum to show that any mortgage on these lots was on file in his office, and it is absurd to suppose that he should depend upon his recollection alone as to such being the case.

There can be no doubt that the duplicate certificate was produced at the instance of Ritchie for the purpose of procuring the registration of his mortgage, and he, being the first to apply for registration after its receipt, is, in my opinion, entitled to priority, and I therefore hold that his mortgage should be first registered.

Direction Accordingly.

DAKOTA LUMBER CO. v. RINDERKNECHT.

1 W. L. R. 481; 2 W. L. R. 275.

Foreign judgment—Jurisdiction of foreign Court — Citizenship.

In an action to enforce a personal judgment obtained in a State Court of the State of Dakota, where it appears that the defendant had been born in the State of Wisconsin, had been living, at the time of the judgment, and for many years previously, in the North-West Territories, and had not appeared in the Dakota Court or submitted to its jurisdiction.

Held, that the defendant was not bound by the judgment, although the covenant sued upon had been executed in Dakota, when defendant was resident there.

Judgment of WETMORE, J., reversed.

[WETMORE, J., *3rd and 4th May, 10th June, 1905.*]
[*Court* en banc, *12th October, 16th October, 1905.*]

Statement.

This was an action brought on two promissory notes made by the defendant in favour of the plaintiffs, a covenant in

Statement.

a mortgage made to secure the same debt, the mortgage being payable at the same time as the notes, and upon a judgment of a Court of the State of South Dakota, in an action brought upon the mortgage in which the mortgaged premises had been sold, and judgment given against the defendant for the deficiency after applying the proceeds of the sale upon the debt. The defendant was born in the State of Wisconsin, but at the time the mortgage was executed he was resident in the State of South Dakota, in which the notes and mortgage were executed, and the mortgage lands lay.

After their execution, and about fourteen years before this action was brought, the defendant moved to Yorkton, in the North-West Territories, where he had since resided continuously, never having returned to the United States. It did not appear that he had ever become naturalized in Canada. He was served in Canada with process issued regularly out of the Dakota Court, and regularly served upon him. He did not appear, but according to the practice of that Court, judgment was given against him by default.

Argument.

Giffard Elliott, for plaintiff.

H. A. Robson (Winnipeg) and *W. H. Parsons*, for defendant.

[*10th June, 1905.*]

Judgment.

WETMORE, J.:—I find that the notes in question were signed by the defendant, but that recovery upon these notes is barred by *The Ordinance respecting Limitations of Actions.*[1] No question arises with respect to this, because the right of action is barred not only by that Ordinance but also by the law of the State of South Dakota..

[1] Con. Ord. (1898) chap. 31, sec. 1.

Judgment.

Wetmore, J.

A question was raised whether the alleged covenant was a covenant at all. The mortgage was made by the defendant and his wife, in the State of South Dakota, in respect of land situated there. It sets forth that the parties thereto had set their hands and affixed their seals thereto, and the attestation clause states that it was "signed, sealed and delivered in the presence of" certain witnesses who have signed their names to it ; but the only seal on the document is a printed scroll that was put on it by the printer opposite the place where it was intended that the parties should sign it, and opposite which they have signed. The only way they constituted these scrolls their seals, was by signing the instrument. They acknowledged them to be their seals in no other way. It was contended that this was not a sealed instrument, and therefore that the alleged covenant was no covenant at all. It was established by the evidence that this constituted a sealing, according to the laws of South Dakota, and that the covenant contained in this mortgage was a covenant according to the laws of that State. I am inclined to the opinion that the law of the country where the contract was made, or the instrument was executed, must govern, but I express no decided opinion upon that question, because it is not necessary.

I have come to the conclusion that the right of action, in so far as this covenant is concerned, is barred by the 8th section of *The Real Property Limitation Act, 1874*,[2] which is in force in the Territories.[2a] This action was commenced on the 25th of October, 1904, and therefore more than twelve years had then elapsed since the monies secured by the mortgage and payable under the covenant became due. Under the law of South Dakota the Statute of Limitations only barred the right of action upon a covenant after the expiration of twenty

[2] Imp. Stat. 37 and 38 Vic. chap. 57 ; [2a] By Con. Ord. (1898) c. 31, s. 2.

years from the time the money became payable. The question, and the only question, raised in so far as the right of action under the covenant is concerned, is which statute governs, the Dakota statute or the Imperial Statutes, 3 and 4 Wm. IV., chap. 42, sec. 3, or 37 and 38 Vic., chap. 57. I hold that the Dakota law does not apply here. *Don* v. *Lippman*,[3] is decisive upon that point is so far as the Statute of Limitations is concerned. Lord BROUGHAM, in delivering judgment in that case,[4] lays down the following: "Governing all these cases is the principle that the law of the country where the contract is to be enforced must prevail in enforcing such contract, though it is conceded that the *lex loci contractus* may be referred to for the purpose of expounding it." As to the sec. 8 of *The Real Property Limitation Act, 1874*, being applicable, I refer to *Kirkland* v. *Peatfield*,[5] where the action was brought to recover principal and interest due under a covenant in the mortgage deed. It was held that that section "applies to an action by a mortgagee against a mortgagor on his covenant, as well as to the other remedies of the mortgagee." And that judgment follows *Sutton* v. *Sutton*.[6] The defendant, therefore, is entitled to judgment in so far as this action is based upon the promissory notes and the covenant. Judgment. Wetmore, J.

The only remaining question is whether the plaintiffs are entitled to recover upon the judgment recovered in the South Dakota Court, or, in other words, whether that Court had jurisdiction to award the judgment, and whether it should be recognized by the Courts of the North-West Territories.

3 (1837) 5 Cl. & F. 1; Scott's Revised Reports, House of Lords, 6. 4 5 Cl. & F. at page 20. 5 (1903) 1 K. B. 756. 6 (1882) 22 Ch. D. 511.

Judgment

Wetmore, J.

In Vol. II. of the Am. & Eng. Ency. of Law (2nd ed.)., at p. 148, is set forth what constitutes allegiance ; it is there stated that : "Allegiance is of four kinds, namely : 1. "Natural allegiance—that which arises by nature and birth," continuing by defining what the other kinds of allegiance are, which for the purpose of this case it is unnecessary to specify. In the note there appears the following : "Natural allegiance is such as is due from all men born within the King's dominions, immediately upon their birth, for immediately upon their birth they are under the King's protection." I have not been able to lay my hands upon any other authority (if this may be called an authority) on the question of allegiance, or as to what constitutes allegiance, but this is in accord with what my understanding of it is. What would constitute natural allegiance in the British Dominions would constitute natural allegiance in the United States. The defendant, therefore, was by natural allegiance a subject of the United States.

It was urged that this judgment was not binding upon the defendant in this country because at the time the action was commenced, and for many years previous thereto, he was not a resident of South Dakota, but was a resident of these Territories, and that he had not submitted to the jurisdiction in any way. This would be correct beyond all question if the defendant was a foreigner, and not a subject of the United States. Quoting again from the encyclopædia above mentioned, "Natural allegiance he [Blackstone] says is perpetual." Unless something is established to the contrary, therefore, the defendant being a natural born subject of the United States, remains so. Possibly if he had been naturalized a British subject since coming to Canada, treaty relations between Great Britian and the United States might release him from his citizenship to the United States. No such treaty has been brought to my

notice, but, assuming there was such a treaty, it is not necessary for me to decide what the effect of it would be in this respect, because it has not been established to my satisfaction that the defendant ever was naturalized in Canada. It was urged that the fact that he had held the office of Councillor of Yorkton and had voted at the elections was *prima facie* evidence that he had been naturalized here. That, to my mind, is not sufficient. It is true that the defendant swore that he took out naturalization papers, but on cross-examination it clearly appeared that he was not in a position to swear to that fact. He never saw the certificate of naturalization; all that he would swear to was that he instructed an advocate to prepare the papers, and take out a certificate, and that he swore to the necessary papers for that purpose. If as a matter of fact he was naturalized it would have been very easy to have established that fact through the office from which the certificate of naturalization issued. I therefore hold the defendant still to be a subject of the United States.

Judgment.
Wetmore, J.

It was further urged that assuming him to be a subject of the United States, the South Dakota Court had no jurisdiction. *Deacon* v. *Chadwick*,[7] and *Sirdar* v. *Faridkote*,[8] were relied on as part of that contention. *Deacon* v. *Chadwick* seems to support that contention, and that case was decided by an exceedingly strong Court, but if it is intended to lay down that a foreign Court has not jurisdiction in an action of this sort over a person owing allegiance to the country in which the Court exercises its jurisdiction, because such person resides in Canada, I am, with great respect, unable to follow it. The authorities are, in my opinion, all the other way. I will refer to some of them and take them up in their order. In *Douglas* v. *Forest*,[9] the question was

7 (1900) 1 Ont. L. R. 346. 8 (1894) A. C. 670. 9 (1828) 4 Bing. 686.

Judgment
Wetmore, J.

whether an action lay in the English Courts on a Scotch judgment against a Scotchman born, and the judgment in that case was a judgment *in personam* as the judgment in this case is. The Court held that the action would lie, and BEST, C.J., in delivering the judgment of the Court, is reported[10] as follows: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him from being born in it, and by the laws of which country his property was at the time those judgments were given protected." In *Cowan* v. *Braidwood*,[11] the action was upon a decree for the payment of money obtained against the defendant in the Court of Session in Scotland. The defendant pleaded that he was not at the time of the commencement of the suit or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of the Court. The Court gave judgment for the plaintiff, holding the plea bad. TINDAL, C.J.,[12] says: "But here there is no statement that the defendant was not resident in Scotland, or that he was not subject to the laws of that country during the time that these proceedings were had against him." BOSANQUET, J.,[13] says: "The plea does not allege that the defendant was not *born* or domiciled in Scotland, or that he had not property there." In *Schibsby* v. *Westenholz*,[14] which is a leading case upon the question, it was attempted to enforce in an English Court a judgment obtained in a French Court against a person who was not at the time the suit commenced a subject of or resident in that country. The Court held that the judgment could not be enforced in the English Courts; but BLACKBURN, J.. in delivering the judgmemt of

[10] At page 703. [11](1840) 1 M. & G. 882; 2 Scott N. R. 138; 10 L. J. C. P. 42; 9 D. P. C. 27. [12] At page 891. [13] At page 893. [14](1870) L. R. 6 Q. B. 155; 40 L. J. Q. B. 73; 24 L. T. 93; 19 W. R. 587.

the Court lays down the following:[15] "Now, on this we think some things are quite clear on principle; if the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them." In *Rousillon* v. *Rousillon*,[16] the question there was whether the Court could enforce a foreign judgment on a contract against a defendant who was not a subject of the country where the judgment, was obtained, or a resident in that country when the action was begun. The Court held that the judgment could not be enforced in that case, but in delivering judgment, FRY, J., after commenting upon *Schibsby* v. *Westenholz*, is reported [17] as follows: "What circumstances are there which have been held to impose on a defendant the duty to obey the decision of a foreign Court? Having regard to this case and a subsequent case of *Copin* v. *Adamson*, that may, I think, be stated as these: the Courts of this country consider a defendant bound when he is a subject of the country in which the foreign judgment has been obtained."

Judgment.

Wetmore, J.

Now, that is all that is necessary to cite for the purposes of this case. I may say that in these cases the party sued had not submitted to the jurisdiction of the Court by appearing. *Sirdar* v. *Faridkote*,[18] cited as an authority for the defendant, does not, in my opinion, bear out his contention. In that case the defendant was not and never had been a subject of Faridkote, but he was a subject of the State of Jhind, where he was when he was served with the process and where he had been ever since leaving Faridkote; and while the Court held that the judgment was not binding in the Court of the Assistant Commissioner of Lahore, it

[15] At page 161. [16] (1880) 49 L. J. Ch. 338; 14 C. D. 351; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663. [17] 49 L. J. Ch. at page 344. [18] [1894] A. C. 670; 11 R. 340.

Judgment.

Wetmore, J.

intimated in the course of the judgment that where the defendant owed allegiance to the State in which the Court delivering the judgment was, that it would be binding, because the Earl of Selborne lays down as follows:[19] "No territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the Power which so legislates." That the Court would have jurisdiction where the defendant owed allegiance to the State in which the Court exercises its jurisdiction is also held in *Fowler* v. *Vail*.[20]

It was set up, however, that the judgment was contrary to natural justice because the property had been sold under the decree, and was purchased on behalf of the plaintiffs. In the first place the evidence does not establish that to be the case. It is true it was purchased by the president of the plaintiff company, but it is by no means clear that this purchase was for the benefit of the company. But, supposing it was for the benefit of the company, the evidence establishes that it is the practice in the Courts of South Dakota for the plaintiff in foreclosure suits to purchase the property in. Now, I can discover nothing in this which is contrary to natural justice. I know that in Canada it is not allowable without the leave of the Court; but on application and leave of the Court obtained it is allowable; so much is that so, that the application for leave appears to me to take upon it rather the character of a farce. I have known in my experience, both as Judge and while practising at the bar, a number of cases where mortgaged property was sold on foreclosure proceedings, and in every instance it was usual to apply for leave for the plaintiff to bid, and I never knew it to be refused. It seems to me that it is quite a prudent step to take to enable the plaintiff to pro-

[19][1894] A. C. at page 684. [20](1878) 4 Ont. A. R. 267.

tect his security, and I see nothing contrary to natural justice in the practice being adopted in South Dakota by which a plaintiff has leave to bid as a matter of course, and without application to the Court. Judgment. Wetmore, J.

There will be judgment, therefore, for the plaintiffs on the issues joined to the first, second, third, fourth, and fifth paragraphs of the statement of defence, for $490, and the general costs of the action. There will be judgment for the defendant on the issues joined to the sixth and eighth paragraphs of the statement of defence, and on the second paragraph of the replication, with costs solely applicable to such last mentioned issues. There will be one taxation of costs, and one judgment will be set off against the other, and the plaintiff will have execution for the balance remaining after such set off.

The defendant appealed and the appeal was heard before SIFTON, C.J., SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ. Appeal.

H. A. Robson, for defendant (appellant). Argument.

C. C. McCaul, K.C., for plaintiffs (respondents.)

[*16th October, 1905.*]

SCOTT, J.:—*Schibsby* v. *Westenholz*,[21] and *Rousillon* v. *Rousillon*,[22] which are referred to by the trial Judge as supporting his judgment, were actions upon judgments recovered in France against persons who were neither resident in nor subjects of that country. BLACKBURN, J., in the first mentioned case, and FRY, J., in the last mentioned case, lay down the principle, deduced from the authorities referred Argument.

[21](1870) L. R. 6 Q. B. 155; 40 L. J. Q. B. 73; 24 L. T. 93; 19 W. R. 587. [22](1880) 49 L. J. Chy. 338; 14 Ch. D. 351; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663.

Judgment.
Scott, J.

to by them, that if a defendant was at the time of the judgment a subject of the country whose judgment is sought to be enforced, he would be bound by it. It is important to consider what is meant by the term "country" which appears in the definition of this principle.

In *Dicey on Conflict of Laws*,[23] the following is stated: "The word 'country' has among its numerous significations the two following meanings which require to be carefully distinguished from one another:—(1) A country, in what may be called the political sense of the word, means the whole of the district or territory subject to one sovereign power, such as France, Italy, the United States, or the British Empire. (2) A country, in what may be called the legal sense of the word, means a district or territory which (whether it constitutes the whole or a part only of the territory subject to one sovereign), is the whole of a territory subject to one system of law, such for example as England, Scotland, or Ireland, or as each of the States which collectively make up the United States.

"For the term 'country' in the legal sense of the word there is no satisfactory English substitute. If the use of a new term be allowable a country might in this sense, be called a 'law district.'

"Thus France, Italy and Belgium each constitutes one separate country in both senses of the term. France (including, of course, in that term French dependencies) is one country in the political sense of the word, and, is also one country, or law district, in the legal sense of the term. On the other hand the British Empire, while constituting one country, realm, or state in the political sense of the term 'country,' consists of a large number of countries in the legal sense of the word, since England, Scotland, Ireland,

[23] 1st Am. Ed. at pp. 66, 67.

the Isle of Man, the different colonies, &c., are in this sense separate countries or law districts."

Judgment.

Scott, J.

Douglas v. *Forrest*,[24] was an action brought in England against the executor of one Hunter upon a judgment recovered in Scotland in 1802 against the deceased, a Scotchman, who left Scotland for India in 1799, where he remained until his death in 1817. It was held that the action would lie, but BEST, C.J., in his judgment says, at p. 703: "We confine our judgment to a case where a party owed allegiance to the country in which the judgment was so given against him from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected."

In *Cowan* v. *Braidwood*,[25] which was an action upon a judgment recovered in Scotland, a plea was held bad because it did not allege that defendant was not resident in Scotland, or was not subject to the laws of that country during the time the proceedings there were had against him. TINDAL, C.J., says:[26] "But here there is no statement that defendant was not resident in Scotland, or that he was not subject to the laws of that country during the time that these proceedings were had against him."

To my mind it is apparent that in the cases last referred to the term "country" was not intended to refer to the whole of the British Empire, but merely to one of what Mr. Dicey terms the "law districts" thereof. If the other meaning were intended it would follow that a British subject, so long as he remained such, could be sued in any of His Majesty's Courts in any part of the Empire. It could not be reasonably contended that a person who had always

[24] (1828) 4 Bing. 686; 1 M. & P. 663; 6 L. J. (O. S.), C. P. 157; 24 R. R. 695. [25] (1840) 1 M. & G. 882; 2 Scott N. R. 138; 9 D. P. C. 27; 10 L. J. C. P. 42. [26] 1 M. & G. at p. 891.

Judgment
Scott, J.

resided in England would be subject to the laws applicable to Scotland alone, except perhaps in respect of any property he might possess there. As well might it be said that being a subject of His Majesty, and owing allegiance to him, he would be subject to the local laws in force in every district of the Empire; or, to bring the illustration nearer home, that a British subject residing in this province is subject, not only to the laws of each province of the Dominion, but also to those of all parts of the Empire.

Turnbull v. *Walker*,[27] shews that such a contention could not be upheld. The action was upon a judgment recovered by the plaintiff in the Supreme Court of New Zealand, against the defendant who resided in England. WRIGHT, J., in his judgment[28] says: "No merely local Statute could in my opinion enable the Court to entertain the action against the absent Englishman, who was neither a native of New Zealand nor domiciled there, nor present there when the action was begun or at any time during its continuance, and who had not appeared or in any way submitted to its jurisdiction. . . *Schibsby* v. *Westenholz* (*supra*) is in accordance with the authorities collected in *Story's Conflict of Laws*." It would thus appear that a British subject is subject only to the laws affecting the Empire as a whole, and those of the particular law district in which he resides, and perhaps also (according to *Douglas* v. *Forrest*) those of the law district in which he was born. By analogy a citizen of the United States would be subject to the federal laws, and those of the States in which he resides, but not to those of any other State except, perhaps, that in which he was born.

In *Pennoyer* v. *Neff*,[29] it was held that no State can exercise direct jurisdiction or authority over persons or property without its territory, and that no tribunal established by it

[27](1892) 67 L. T. N. S. 707. [28]At p. 709. [29](1877) 95 U. S. Rep. 748.

can extend its process beyond its territory so as to subject either person or property to its decisions, and that (quoting *Story on Conflict of Laws*), "any exercise of authority beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunal."

Judgment. Scott, J.

This case in deciding that a State Court cannot under any circumstances exercise any authority over any person who is beyond the limits of its territory, or bind him by its judgments, is not in accord with our laws respecting the powers of the Courts, of the different law districts of the Empire. It may be that the decision rests upon limitations contained in the contitution of the State.

In a recent Ontario case, *vix.*, *Deacon* v. *Chadwick*,[30] it was held that an action would not lie upon a judgment recovered in Manitoba, against a defendant residing in Ontario, who had not appeared in the action or submitted to the jurisdiction of the Court. ARMOUR, C.J., who delivered the judgment of the Court, relied upon *Schibsby* v. *Westenholz*, *Turnbull* v. *Walker*, and *Pennoyer* v. *Neff*, as supporting this conclusion.

In *Fowler* v. *Vail*,[31] the Court of Appeal in Ontario would appear at first sight to have reached a different conclusion, but a careful perusal of the judgment leaves it open to doubt whether such was the case. The action was upon a judgment recovered in the State of New York. A plea that the defendant was not at the commencement of the action, or at any time from thence to the recovery of the judgment, resident or domiciled within the jurisdiction of the Court, or within the jurisdiction of the United States, was held bad because it did not allege that the defendant was not a subject of the foreign country. It is true that PATTERSON, J. A., refers to the fact that it did not negative the position.

[30] (1891) 1 O. L. R. 346. [31] (1878) 4 Ont. A. R. 267.

Judgment.

Scott, J.

that the defendant may have been a citizen of the United States, but he agrees with GWYNNE, J., in the Court below, who held that it was bad in that it did not allege that defendant was not a subject of the foreign country. What is meant by the term "country," *i. e*, the State of New York, or the United States, does not clearly appear from the judgment. If the latter, the judgment would be, to my mind, at variance with the principle laid down in the cases to which I have referred or which may reasonably be deduced therefrom.

It was contended on behalf of the plaintiffs that the judgment bound the defendant because he had impliedly submitted himself to the jurisdiction of the Court. The ground of this contention is that the defendant at the time he gave the mortgage which contains a stipulation that it may be enforced in the manner provided by the Statutes of the State, he must be taken to have been aware of the fact that those statutes provided that in a proceeding upon the mortgage the plaintiff would be entitled to a personal judgment against him for any deficiency arising from the sale of the lands. One answer to this contention is that it is not shown that the Statutes referred to were in force at the time the mortgage was given. Apart from that I doubt whether such a stipulation could be taken to confer upon the Courts jurisdiction which it would not otherwise possess.

As the judgment sued upon was that of a State Court, and as the defendant was residing out of its jurisdiction at the time the proceedings in the action were carried on, and the judgment obtained against him, the fact that he was at that time a citizen of the United States would not, in my opinion, for the reasons I have stated, give the Court jurisdiction.

I am, therefore, of opinion that the appeal should be allowed with costs.

Appeal allowed with costs

BOCZ v. SPILLER.

1 W. L. R. 366; 2 W. L. R. 280.

Homestead—Exemption—Proceeds of sale under mortgage—Practice—Originating summons

An execution against lands does not bind the homestead of the execution debtor, and mortgagees of the land subsequent to the executions are entitled to sell it free from the executions.

Such a mortgage may invoke the provisions of *The Exemption Ordinance* for the purpose of securing his priority.

The sale of a homestead under a mortgage is a compulsory sale and consequently the proceeds after payment of the mortgages are exempt from seizure under execution to the same extent as the land.

The rights of the parties appearing to be interested in the land may be determined upon an originating summons for sale under a mortgage.

[NEWLANDS, J., *11th May, 1905.*]
[*Court* en banc, *16th October, 1905.*]

Statement. This was an originating summons for an order for the sale of 160 acres of land belonging to one Edward Spiller under a mortgage given by him to the Imperial Bank of Canada for $425. The summons also asked that it be declared that the mortgage was a charge upon the lands in priority to certain executions against Spiller which had been filed in the Land Titles Office prior to the issue to him of the patent for the land by McCarthy & Co., Willoughby & Duncan, Simbert, Paul, Smith & Ferguson Co., Ltd., and the Union Bank of Canada. The land in question had been homesteaded by Spiller under *The Dominion Lands Act*,[1] and he filed an affidavit stating that the land was his homestead, that he was actually residing upon it and that he did not own any other lands.

Argument. *A. L. Gordon*, for plaintiff.

D. J. Thom, for the International Harvester Co., second mortgagees.

J. F. L. Embury, for defendant.

Alex. Ross, for McCarthy & Co.

W. M Martin, for Willoughby & Dun.

[1] R. S. C. (1886) c. 54.

Judgment.

[*11th May, 1905.*]

NEWLANDS, J.:—Upon the argument several cases decided by the Court of Queen's Bench in Manitoba were cited, but I find they are of very little assistance to me in coming to a conclusion in this case because the Statute of that Province relating to exemptions is different from our own. There the judgment is a lien upon the exempted land, although no proceedings can be taken to enforce it so long as the property retains the character which entitles it to such exemption. In the Territories a judgment is not a lien upon land; whatever effect it obtains is through the filing of the execution in the Land Titles Office.[2] As the execution creditors could not seize this land under their writs of execution, I do not think they have any rights thereunder with which this land would be charged under *The Land Titles Act, 1894*, and, therefore, although registered against it these executions are not encumbrances to which it is subject, and on the sale of the same under the mortgage the land would vest in the purchaser free from encumbrances.

The execution creditors claim that the sale under said mortgage is a voluntary one, that on the homestead being converted into money it will lose its character as such, that the

[2] The provisions which were in question were

Con. Ord. (1898) c. 27. s. 2, which provided that "The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution. . . .

"(9) The homestead, provided the same be not more than one hundred and sixty acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon"; and

Section 92 of *The Land Titles Act, 1894*, 57 & 58 Vic. c 28 (Ca.) which provided that no land should be bound by any writ of execution until the receipt of a copy thereof by the Registrar, "but from and after receipt by him of such copy no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force."

proceeds will not then be exempt, and that consequently they are entitled to receive the amounts due them therefrom. Judgment. Newlands, J.

Although a debtor has a right to do as he likes with his property, which is exempt from seizure,[3] if he voluntarily converts it into other property which is not exempt from seizure, that property would not be entitled to the protection given by *The Exemption Ordinance*.[4] In *Massay-Harris Co.* v. *Schram*,[4] SCOTT, J., said: "The provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily sold and disposed of it the language of the provision is not wide enough to extend the exemption to the proceeds of such sale." The debtor having the right to mortgage his property, he, to that extent, waives his right of exemption, but it is not an unconditional waiver—it only entitles the mortgagee to subject the property to the satisfaction of his claim in like manner and to the same extent as if it were not exempt; but with respect to other creditors the property is exempt to the same extent as before the mortgage was given. See *Freeman on Executions*, p. 1167.

If the sale is not a voluntary one, the proceeds would, I think, be exempt from seizure, because a debtor, who by a forced sale of his property, loses his homestead, should not on that account be deprived of the right of acquiring another one from the surplus proceeds of the sale, if any: *Re Demaurez*.[5] If his house is burned down and he has it insured, insurance money is exempt from seizure, and he is entitled to receive the same to restore his home: *Osler* v. *Muter*.[6]

The sale in this case was not, in my opinion, a voluntary one, but a forced sale. It is true it is under a mortgage given

[3] *Temperance Insurance Co.* v. *Combe*. (1892) 28 C. L. J. 88 *Re Beatty and Finlayson*, (1896) 27 Ont. R. 612; Freeman on Executions, p. 1165. [4] *Thompson on Homesteads and Exemptions*, p. 746; *Massey-Harris Co.* v. *Schram* (1901), 5 T. L. R. 338. [5] (1901) 5. T. L. R. 84. [6] (1892) 19 Ont. A. R. 94.

Judgment. Newlands, J.

by him, but, as I have said, he had a right to mortgage it, and it is probable that at the time he gave the mortgage he expected to be able to pay it, and that the property would not have to be sold. It is no more a voluntary sale than in *Re Demaurez*, where the land, including the exemption, was sold under the order of the Court, the debtor having made a general assignment for the benefit of creditors. No sale which is ordered by the Court can be considered a voluntary one, as the debtor has no choice in the matter; he must either pay the amount due or the land will be sold.

I am therefore of the opinion that the executions endorsed on the certificate of title of the defendant's homestead do not encumber it, and that the land will vest in the purchaser free from encumbrances, and after payment of the amounts due the mortgagees the balance must be paid to the defendant Spiller.

Appeal.

The execution creditors, McCarthy & Co. and Willoughby & Dun, appealed and the appeal was heard before SIFTON, C.J., WETMORE, PRENDERGAST and HARVEY, JJ.

Argument.

Alex. Ross, for McCarthy & Co.

W. M. Martin, for Willoughby & Dun.

A. L. Gordon, for plaintiff.

D. J. Thom, for International Harvester Co.

J. L. H. Embury, for defendant.

[*16th October, 1905.*]

The judgment of the Court was delivered by

Judgment.

WETMORE, J.:—It was urged on behalf of the appellants that the learned Judge had no jurisdiction by originating summons to declare that these registered copies of executions did not form an encumbrance, and they relied upon *In re*

Giles,[7] in support of that contention. It must be conceded, I think, that the jurisdiction given to proceed by originating summons is statutory, and cannot be carried further than the clear intention of the enactment would authorize. If the application had been for a declaration that a prior mortgage was invalid, it is quite probable that such declaration would not be obtained by procedure under originating summons. It is also possible that if the certified copies of executions had been registered specifically against the land in question as was the practice before the passing of *The Land Titles Act, 1894*, such a declaration could not be obtained by procedure under originating summons, but under *The Land Titles Act, 1894*, the certified copy of an execution does not form a charge against any specific land ; the effect of it is merely to create a charge against lands which are liable to execution, and if these lands were not at the time of the filing these certified copies liable to seizure under execution and never since became so liable, the registration of the certified copies does not form a charge or encumbrance against these lands.

Judgment.

Wetmore, J.

Without questioning the correctness of the decision in *In re Giles*, I think that the provisions in force here with respect to the powers of a Judge under an originating summons issued under the provisions of Rule 452, are larger than they are in England. Rule 453 contains provisions which are not contained in any English rule affecting the matter. The provision in Rule 453 that "the Judge may, upon such summons, pronounce such judgment and make such orders as the case may require," is contained in Marginal Rule 770 of the English Rules, but the other part of Rule 453, which provides that the Judge may make "orders vesting such property in such person or persons as may be found or declared entitled thereto for such estate or interest as may be requi-

7 (1890) 43 Ch. D. 391.

Judgment.

Wetmore, J.

site," is not to be found in any English rule. Where a Judge is required to make an order of sale he can make an order vesting the property in the purchaser upon the execution of the deed by the party directed by the order for sale to execute such deed. Now, how could the Judge declare the interest that would so vest in the purchaser unless he decided whether or not these executions were charged upon the property? It is true that the abstract of title states, and, for all I know, the certificate of ownership, may state that these executions are registered. That, however, is an act of the Registrar, and the fact that he has so stated does not make these executions an encumbrance or charge upon the land. There is no question of fact to be decided as to whether they form an encumbrance or not; it is simply a question of law and all the Judge has really done is to hold that the registering of these certified copies of execution did not affect the land in question because, being a homestead not exceeding 160 acres, it was exempt from the executions which these certified copies represented, and that when the money was realized from the sale these execution creditors had no interest in it. That was a question that had to be decided in some way or other when the money was paid into Court. Possibly the originating summons went too far in specifying the relief claimed with respect to these executions, but the order is practically correct, assuming, of course, that the filing of these certified copies of executions did not constitute a charge or encumbrance upon the land. I would call attention to Rule 455, which directs that the "Judge may direct such other persons to be served with the summons as he may think fit." That means that other persons than those who were required to be served under the provision of Rule 454, namely, such persons as under the ordinary practice would be proper defendants to an action for the like relief as that specified by the summons. It seems to me that that Rule 455 is intended, among other things, to provide for just such cases as the

present. I therefore distinguish this case from *In re Giles*, because the learned Judge did not decide upon the priority of encumbrances; he simply decided that what appeared upon the register, although there by the act of the Registrar, really was not an encumbrance at all as against the land in question. Judgment. Wetmore, J.

As to the contention that a mortgagee was not entitled to invoke the provision of *The Ordinance respecting Exemptions*, I cannot agree with that proposition. I think he has because if he had not that right his mortgage might be useless as a security, or its value impeached.

In view of what was held by this Court in *Meunier* v. *Doray*,[8] at the last sittings at Calgary, and for the reasons set forth by my brother NEWLANDS in his judgment, to which I have nothing to add, I am of opinion that he correctly decided that these certified executions were not a charge upon this land. The judgment, therefore, of Mr. Justice NEWLANDS should be affirmed and this appeal dismissed with costs to be paid by the appellants.

Appeal dismissed with costs.

[8] Reported *ante*, p. 194.

BOYLE ET AL. v. GRASSICK.

2 W. L. R. 284.

Principal and agent—Commission on sale of land—Substantial compliance with authority—Pleading—Amendment.

A real estate agent employed to find a purchaser for land, who finds a purchaser ready and willing to purchase upon terms which, although not identical with those in contemplation at the time of his employment, are satisfactory to the owner, is entitled to compensation for his services, notwithstanding that no sale is actually made by reason of refusal of the owner to sell the property for reasons unconnected with the terms of purchase.

McKenzie v. *Champion*, (1885) 12 S. C. R. 649, followed.

Semble, where in the proposed vendor's instructions to the agent there is not something to indicate that it was his intention to give the agent authority to sell, it will be inferred that the authority extended only to finding a purchaser.

[*Court* en banc, *10th, 11th October, 16th October, 1905.*]

Statement.

Appeal from a judgment of NEWLANDS, J., 2 W. L. R. 99, dismissing the plaintiffs' action for commission for the sale of certain lands in Regina, where the plaintiffs were real estate brokers. The defendant employed them to sell Lots 18, 19, 20, Block 284, in Regina, for $9,500, of which $5,000 was to be paid in cash, the balance in three equal annual instalments, with interest at 7 per cent.

The plaintiffs found purchasers in Messrs. Smith & Fodey, and gave to them a receipt for $500 "as earnest money on the purchase" of the lots, the receipt continuing, "the whole purchase money being $9,500, $5,000 of which the earnest money shall form a part, to be paid in ten days from date, and $4,500 to be paid in three equal annual payments, with interest thereon at seven per cent., the $4,500 to be secured by mortgage."

On the defendant being advised, he refused to complete on the sole ground that the proposed purchasers were in the same business as himself, making no objection to the terms of payment or to the provision for a mortgage. The purchase was not completed on account of the vendor's refusal,

but the plaintiffs brought this action for commission. The trial Judge dismissed the action on the ground that the sale did not correspond with the authority in respect of the postponement of the balance of the cash payment and the provision as to a mortgage. The plaintiffs appealed, and the appeal was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST and HARVEY, JJ. Statement.

C. C. McCaul, K.C., and *R. B. Gordon*, for plaintiffs. Argument.

James Balfour, for defendant.

[*16th October, 1905.*]

The judgment of the Court was delivered by

WETMORE, J.:—The cases of *McIntyre* v. *Hood*,[1] and *Gilmour* v. *Simon*,[2] relied upon by the Judge, do not, to my mind, govern this case. Judgment.

There the question raised was whether the plaintiff was entitled to specific performance of the contract for the sale of land. The question here is whether the plaintiffs, being agents, are entitled to be recompensed for their services in connection with obtaining a purchaser for the sale of lands. I think the considerations affecting the respective questions are entirely different.

At the hearing of this appeal counsel for the plaintiffs applied to amend the statement of claim by adding an alternative claim, as follows: "Alternatively the plaintiffs' claim is for the sum of $500 for services rendered by the plaintiffs as real estate brokers to the defendant at his request, whereby the plaintiffs procured a purchaser qualified and willing to buy the land of the defendants mentioned in the preceding paragraph, substantially upon the terms which the defendant intimated to the plaintiffs as those upon which the defendant

[1](1884) 9 S. C. R. 556. [2](1905) 1 W. L. R. 417.

Judgment.

Wetmore, J.

was willing to sell. The defendant agreed to pay the plaintiffs the sum of $500 for such services. The services so rendered by the plaintiffs to the defendant were reasonably worth the sum of $500.

There is no doubt that this Court has, by virtue of Rule 507 of *The Judicature Ordinance*,[3] power to make the amendment asked for, and by virtue of Rule 178 it ought to do so if it is necessary for the purpose of determining the real questions in controversy between the parties. Now, the real question in controversy between the parties here is, as I have stated, whether or not the plaintiffs are entitled to recover compensation for their services in connection with obtaining a purchaser for these lots. In my opinion, therefore, the amendment ought to be allowed, because it is clear that the plaintiffs were not entitled to recover under the statement of claim as originally framed, and that, if entitled to recover at all, it must be upon an alternative paragraph as set forth in the amendment.

The case which, in my opinion, governs this appeal and is binding upon the Court is *Mackenzie* v. *Champion*,[4] the remarks of RITCHIE, C.J.,[5] being peculiarly in point.

In that case the real question in controversy was whether the brokers were employed to sell the property or merely to find a purchaser. That question was also raised here by the defendant's pleadings. He set up that the agreement with the brokers was that they were to sell the land and make and execute the contract of sale, and not having made and executed a proper contract of sale, the defendant had nothing to enable them to compel the purchaser to carry out his contract. I think, therefore, that in this case it is important to decide whether the plaintiffs were employed to sell the land in question or merely to find a purchaser, and taking the whole of the evidence, I am of opinion that the

3 Con. Ord. (1898) c. 21. 4 (1885)12 S. C. R. 649. 5 At p. 655,

Judgment.
Wetmore, J.

plaintiffs were not authorized to sell the property; that is, they were not to make a contract and execute an agreement of sale; all they were employed to do was to find a purchaser of the land on the terms that were stated. The term "sell" is the term that would be ordinarily used when a person lists property with a broker to find a purchaser, and unless there is something to indicate that there was an intention to give authority to sell, it would be inferred that the intention merely was to authorize the broker to find a purchaser, and that, I think, is all that was intended in this case.

Having reached that conclusion, the questions, under the judgment of RITCHIE, C J., are whether the plaintiffs fulfilled their contract; whether the purchaser was ready and willing to complete his purchase, and whether the sale fell through because the defendant would not complete the sale. I am of opinion that those questions must be answered in the affirmative. It may be that the terms set forth in the memorandum, which the plaintiffs signed, varied from the terms proposed by the defendant when they were employed, but so far as the terms arranged with the proposed purchasers were concerned, the defendant was satisfied with them. The memorandum in question was handed to him; he knew what the terms of sale were, and he had no objection to offer to them; the only objection was to the proposed purchaser; or, in other words, the plaintiffs found a purchaser of these lots upon terms which were acceptable to the defendant. That being so, under the authority of the cases I have just referred to, they are entitled to recover for their services. Possibly they are not entitled to recover as commission, but they are entitled to recover by way of compensation. But, whether they are entitled to recover by way of commission or by way of compensation is immaterial, in my judgment, because I think the amount to be recovered either way is $500.

Judgment.

Wetmore, J.

In my judgment the proposed amendment should be allowed, the judgment of the learned trial Judge reversed and judgment entered for the plaintiffs in the Court below for $500 and costs, and the defendant to pay the costs of this appeal.

Appeal allowed with costs.

EASTERN TOWNSHIPS BANK v. DRYSDALE.

2 W. L. R. 423.

Interpleader—Claim by execution debtor—Exemption—Buildings

Where the property seized under a writ of execution against goods consisted of a blacksmith's shop in the occupation of the execution debtor.

Held, that the question whether the shop was or was not part of the freehold could not be raised upon an interpleader by the sheriff.

Held, also, that the building was not exempt from seizure by virtue of *The Exemptions Ordinance*, not being the residence of the execution debtor or a building used in connection with his residence.

[WETMORE, J., *11th November, 18th November, 1905.*]

Statementt.

This was an interpleader issue between the plaintiffs and the defendant, as claimant, to try the question whether the sheriff, under a *fi. fa.* goods, properly seized a blacksmith's shop in the occupation of the defendant, who objected that the shop was attached to the freehold, and was consequently seizable only under a *fi. fa.* lands, and that it, being a building in his occupation, was exempt from seizure under execution by virtue of *The Exemptions Ordinance*, sec. 2 (10). [1]

Argument.

Gifford Elliott, for execution creditor.

W. R. Parsons, for claimant.

[1] Con. Ord. (1898) c. 27, s. 2 (10) provided that the exemption should extend to "The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate. . . to the extent of fifteen hundred dollars."

[*18th November, 1905.*]

Judgment.

Wetmore, J.

WETMORE, J.:—I am of opinion that the question whether this property is liable to seizure under an execution against goods cannot be raised by interpleader. This is an interpleader by the sheriff, and there are only four specified cases in which he may interplead, as provided by paragraph 2 of Rule 431 of *The Judicature Ordinance*. The only one of those cases in which the execution debtor can be the claimant is where he is claiming the benefit of any exemptions from seizure allowed by law. This is not the case here, so far as this question is concerned.

As to whether this property is exempt from seizure under *The Exemption Ordinance*, paragraph 10 is certainly not as clear as it might be, and its language is entirely different from that of the Manitoba Statute. I have come to the conclusion, however, that this building is not exempt. Paragraphs 9 and 10 of this Ordinance seem to me to have been passed with the object of providing a home for execution debtors "so as to give to them shelter beyond the reach of financial misfortune," as set out in 15 Am. & Eng. Enc. of Law, page 526. And I read the words "the house and building," in paragraph 10, as meaning the house, being the residence of the debtor, and the buildings used in connection with such house. I regret to say that I have not been able to lay my hand upon any authority directly in point which would guide me in reaching this conclusion, and I am entirely governed by what I find laid down in such text books as I could find with respect to the exemption of homesteads and residences from seizure under execution.

The result is that the claimant will be barred.

Order accordingly.

REX v. PISONI.

REX v. TAYLOR.

4 W. L. R. 527.

Criminal Code—Summary trial—Appeal—Jurisdiction.

Since before 1895 two justices of the pease in the North-West Territories had jurisdiction to try offences under paragraph (*a*)-(*f*) of sec. 783 of *The Criminal Code*, 1892, and there was no appeal from their decision, the extension in that year of this jurisdiction to two justices in any province, subject to appeal where the trial was had before them by virtue only of the new enabling clause, did not extend the right of appeal to the North-West Territories.

The Alberta Act since it continued the law theretofore in force made no change in this respect.

[HARVEY, J., *2nd November, 1906.*]

Statement. These were two appeals from convictions made by justices of the peace under Part LV. of *The Criminal Code, 1892*, relating to the summary trial of indictable offences. Pisoni had been convicted of an offence under paragraph (a) of sec. 783, and Taylor of an offence under paragraph (f) of the same section.

R. B. Bennett, for the Crown, objected that no appeal lay.

P. J. Nolan, for the defendants.

[*2nd November, 1906.*]

Judgment. HARVEY, J.:—In *King* v. *McLennan*,[1] I expressed the opinion that the right to appeal in such cases as these does not exist, and I am still of the same opinion. It is provided by sec. 808 of the Code that the provisions of Part LVIII., which is part of the Code relating to appeals from summary convictions, shall not apply to any proceedings under Part LV. Under sub-paragraph iii. of sec. 782, in Prince Edward Island, British Columbia and Keewatin, and under sub-paragraph iv. of the

[1] (1905) 10 Can. C. C. 14. 4 & 5 Ed. VII. c. 3.

same section, in the North-West Territories, two justices of the peace were given jurisdiction to try these offences, but in no other province was this jurisdiction conferred. In 1895, the following sub-paragraph was added to sec. 782 defining the expression "magistrate:" "v. In all the provinces where the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of sec. 783, any two justices of the peace sitting together; provided that when any offence is tried by virtue of this sub-paragraph, an appeal shall lie from a conviction in the same manner as from summary convictions under Part LVIII., and that sec. 879 and the following sections relating to appeals from such summary convictions shall apply to such appeal."

Judgment.

Harvey, J.

It is contended that, by virtue of this sub-paragraph, the right to appeal exists here as in the other provinces, but I am unable to agree with this contention. In this province, under sec. 16 of *The Alberta Act*,[2] the law as it was in the North-West Territories is continued, so that there appears no difference between the present situation and that which existed before this province was formed, and the right to appeal is only given in cases where the offence is tried, by virtue of sub-paragraph v., whereas in the North-West Territories, such offences were tried before sub-paragraph v. was enacted, by virtue of sub-paragraph iv., and it is perfectly clear that during that time no right of appeal existed. On sub-paragraph v. being enacted, no jurisdiction was conferred upon justices of the peace in the North-West Territories. A jurisdiction was conferred in certain provinces, which was less than that which then existed, and still exists, in two justices of the peace in other parts of Canada under sub-paragraph iii. and iv., and it appears to be perfectly clear that what sub-paragraph v. intended was, while conferring this jurisdiction, which did not before exist, to further limit it by giving the right to appeal, but there is nothing that, to my mind, suggests an intention to confer a right to appeal in respect of the

Judgment.

Harvey, J.

other jurisdiction with regard to which no right to appeal before existed. Nor do I see how if could be said that such offences were tried in the North-West Territories, "by virtue of sub-paragraph v.," when the right to try such offences had been given and continued by sub-paragraph iv.

I am, therefore, of opinion that I have no jurisdiction to hear these appeals, and that they must therefore be quashed.

Appeals quashed.

[See, now, R. S. C. (1906) c. 146, s. 707.—Ed.

ARICINSKI v. ARNOLD.

4 W. L. R. 556.

Lien note—Affidavit for registration—Wrongful seizure of chattels—Title of purchaser at sale.

The plaintiff had sold a grey mare to one B., and took from B. a lien note, the affidavit upon which was imperfect, but which was duly registered. The chattel mortgagees of other property of B. seized and sold the plaintiff's mare under their mortgage.

Held, that the fact that the plaintiff had notice of the sale did not estop them from setting up their title to the mare, and that the defendant, the purchaser at the chattel mortgage sale, was not within the protection of *The Ordinance Respecting Hire Receipts and Conditional Sales of Goods.*

[Wetmore, J., *9th November, 13th November, 1906.*]

Statement.

This was an action to recover a certain grey mare sold by the plaintiff to one Barschel who gave to the plaintiff a lien note. The mare was sold by mortgagees of other of Barchel's chattels to the defendant, who claimed to have obtained a title to the mare through this sale.

Gifford Elliott and *W. R. Parsons*, for plaintiff.

J. A. M. Patrick, for defendant.

[*15th November, 1906*] Judgment.

Wetmore, J.

WETMORE, J.:—The facts of this case as I find them are that one Otto Barschel on the 15th October, 1903, purchased a black mare, a black horse and a grey mare from Menolick, Glass & McDougall, through their agent one Tetlock. Barschel gave the vendors what is called a "lien note," whereby he promised to pay the vendors, or order, $375.00, with interest as therein stated, and it was provided that "the title, ownership and right of possession of the said property for which this note is given shall remain at my own risk in Menolick, Glass & McDougall until this note or any renewal thereof is fully paid with interest." There followed provisions permitting the vendors under certain circumstances to re-possess the property and re-sell it. The animals mentioned in this lien note were described by certain brands which had been placed upon them. The gray mare was described as "branded irregular on left stifle." A copy of this lien note together with an affidavit was registered with the registration clerk for the proper district on the 19th October, 1903. On the 4th March, 1904, Barschel executed a mortgage to the Massey-Harris Company of a quantity of property, amongst which was included one grey mare, seven years old, weight 1,200 lbs., named "Fanny," branded left shoulder "B." Sometime after the execution of this mortgage the Massey-Harris Company by their agents, one Neil Livingstone, seized two horses Barschel had in a stable in Yorkton, one of which was the grey mare in question. Livingstone, seized this mare as being the grey mare mentioned in the mortgage to the Massey-Harris Company. This grey mare, so far as the evidence discloses, did not correspond in any respect with the grey mare mentioned in the mortgage, except it may be in the fact that it was a grey mare. In the first place, it was not branded "B," as the grey mare in the mortgage was stated to have been, and it

Judgment. Wetmore, J.

was not named "Fanny," and I am satisfied that the mare so seized by Livingstone was not the mare included in that mortgage, and so find. As a matter of fact when Barschel gave the mortgage to the Massey-Harris Company, he had a grey mare named "Fanny," branded "B." and that was the mare included in the mortgage. That mare, however, died shortly after the mortgage was made. Therefore, the Massey-Harris Company, or Livingstone, had no right to seize the mare in question at all. Barschel, however, raised no objection to the seizure except to enter a slight protest about the seizure having been made in town, compelling him to go home on foot, and the mare was put up for sale after being advertised by posters, generally posted up At the sale it was purchased in by John T. Hall. So far as the evidence shows, Barschel never took any more interest in the matter of the horses from the time of the seizure, or raised any protest whatever. This mare was bought by Hall, and by him sold to the plaintiff, Aricinski; and the defendant Arnold, acting under the authority of Menolick, Glass & McDougall, re-possessed the property under the lien note.

It was claimed that because this property was advertised publicly and Menolick, Glass & McDougall entered no protest against the sale, they were estopped from claiming the same. I find that that is not correct. There was no estoppel whatever. If they had been present looking at the sale, watching it, and knowing that the property was theirs (because they could not be estopped unless they had knowledge), there might have been something in the plaintiff's contention, but that was not established. There was some evidence to show that Glass, one of the members of the firm of Menolick, Glass & McDougall, was aware of the seizure, and I believe that he was aware of the seizure or aware of the fact that a seizure was contemplated. It was urged that because of that fact Menolick, Glass & McDougall were estopped. I do not think that that would amount to an estoppel; it was

no part of their duty to follow these persons about to see whether they sold the animal, but, apart from that, I find as a matter of fact that Glass did notify Livingstone, the agent of the Massey-Harris Company, that they had a lien upon that property, and that was quite sufficient. Judgment. Wetmore, J.

It was urged also that the registration of this lien note does not comply with the Ordinance Respecting Hire Receipts and Conditional Sales of Goods,[1] a variety of objections being taken. The form of the affidavit, it was alleged, was wrong. It was alleged that it was not a true copy, and as a matter of fact, it is not, strickly speaking, a true copy, but in so far as the description of the mare in question is concerned it is a true copy. The defect, in so far as its not being a true copy is concerned, would, therefore, not seem to affect the question that arises respecting this mare, but I express no decided opinion with respect to that for reasons which I will state hereafter.

The affidavit certainly is peculiar in form. I have come to the conclusion that the provisions of the Ordinance have

[1] Con. Ord. c. 44 para. 1 of s. 1 of which is as follows: "Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor, notwithstanding that the actual possession of the goods passes to the buyer or bailee, the seller or bailor shall not be permitted to set up any such right of property or right of possession, as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration, or as against judgments, executions or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition, is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished."

Section 2. "Such writing or a true copy thereof shall be registered in the office of the registration clerk for chattel mortgages in the registration district within which the buyer or bailee resides, within 30 days of such sale or bailment . . . verified by the affidavit of the sellor or bailor or his agent, stating that the writing (or copy) truly sets forth the agreement between the parties and that the agreement therein set forth is *bona fide* and not to protect the goods in question against the creditors of the buyer or bailee as the case may be."

Judgment.

Wetmore, J.

not been followed because the affidavit does not state that the copy registered "truly sets forth the agreement between the parties." All it states in that respect is this: "The said copy of note is a true and correct copy of the note and endorsements thereon of which it purports to be a copy." That is not according to the requirements of the Ordinance. The Ordinance does not require the vendor or his agents to swear that the writing filed or registered is a true copy of the agreement made, but it does require him to swear that it truly sets forth the agreement between the parties—two very different things, because we see on reading the section that the provision that the affidavit should contain the statement respecting the writing truly setting forth the agreement between the parties is equally applicable whether the original agreement is filed or whether a copy of it is filed. If it were the original it would be impossible to set up that it was a true copy, because it would be the original—not a copy at all; but, as I said brfore, if the original had been filed the affidavit endorsed upon it or annexed to it would have to state that that original writing truly set forth the agreement between the parties. The registration is consequently invalid.

Now what is the effect of this conclusion? What is the object of registration? The object of registration is not to protect every person that comes along: it is simply to protect purchasers or mortgagees, of, or from the buyer or bailee, and to protect judgment, execution and attachment creditors of the purchaser or bailee. Nobody else has any right to protection. In so far as anyone else is concerned, the law is just as it was before that Ordinance was passed, and under the law as it was before, the property and right of property was in Menolick, Glass & McDougall, not in Barschel. Now then, in what position was Hall? Hall purchased property which the Massey-Harris Company had no right whatever to sell. They were perfect strangers, in so far as this horse

Judgment.

Wetmore, J.

was concerned. Hall was not a purchaser from Barschel, in any sense of the word. The Massey-Harris Company were not mortgagees from Barschel, that is, they were mortgagees of other property, but they were not mortgagees of the property in question, and, therefore, in so far as this property was concerned, they were just as if they had no mortgage at all, and Hall was in no better position.

I have had my attention drawn to sec. 23 of *The Sale of Goods Ordinance*.[2] Hall did not purchase from the owners of the goods, as I have stated—the owners were Menolick, Glass & McDougall. Aricinski did not purchase from the owners of the goods, he purchased from Hall. It has been urged that because Barschel stood by and allowed the sale to go on without entering a protest, he comes within the latter part of this section of *The Sale of Goods Ordinance*, but Barschel was not the owner and he could not by his conduct estop the real owners, who were Menolick, Glass & McDougall. Therefore, so far as this provision of *The Sale of Goods Ordinance* goes, Hall got no title, and the plaintiff got no title, because they have not established any conduct on the part of the owners, namely, Menolick, Glass & McDougall, by which they are precluded from denying the seller's authority to sell; that is, the authority of the Massey-Harris Company or Hall to sell this mare. And the Massey-Harris Company or Hall or the plaintiff are not persons who come within the protection of the *Ordinance respecting Conditional Sales* (*supra*). The consequence is that the plaintiff has no title whatever to this property.

There will be judgment for the defendant for restitution to him of the mare in question and five dollars damages for

[2] Con. Ord. c. 39, s. 23 which provides as follows: "Subject to the provisions of this Ordinance, whereby goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

Judgment. Wetmore, J.

the detention thereof, together with his costs of this action to be taxed on the higher scale.

Judgment accordingly

REPORTER :
W. A. Nisbet, Esq., Moosomin.

REX v. WOLFE.

4 W. L. R. 553.

Hawkers and pedlars—Samples or patterns of goods to be afterwards delivered—Form of conviction.

The defendant was convicted under *The Ordinance Respecting Auctioneers, Hawkers, and Pedlars*, for "going from house to house offering for sale certain books to be afterwards delivered within the said Province."

Held, that the conviction was bad because it did not state that defendant was "carrying and exposing samples or patterns" of the goods in question.

[WETMORE, J., *30th October, 24th November, 1906.*]

Statement.

This was a case stated by a magistrate under sec. 900 of *The Criminal Code, 1892*. The defendant was convicted under sec. 2 of *An Ordinance Respecting Auctioneers, Hawkers and Pedlars*,[1] "for that he, the said Will F. Wolfe, between the 7th June, 1906, and the 24th July, 1906, at or near Moosomin, in the said Province, did go from house to house offering for sale certain books to be afterwards delivered

[1] Con. Ord. (1898) chap. 58, sec. 2 which is as follows: "No person shall follow the calling or pursue the business of an auctioneer, hawker or pedlar within the Territories without having first obtained a license therefor, which license shall be issued by such person as the Lieutenant-Governor in Council may authorize." Section 1 defines the expression "hawker" or "pedlar" as meaning and including "Any person who (being a principal or any agent in the employ of any person) goes from house to house selling or offering for sale any goods, wares or merchandise, or carries and exposes samples or patterns of any goods, wares or merchandise to be afterwards delivered within the Territories to any person not being a wholesale or retail dealer in such goods, wares or merchandise."

Statement.

within the said Province, the said Will F. Wolfe being in the employ of F. B. Dickerson, Co., Minneapolis, U. S. A., as agent without a license by law required."

Argument.

J. T. Brown, for appellant.

E. A. C. McLorg, for Attorney-General.

[*24th November, 1906.*]

Judgment.

WETMORE, J.:—In my opinion the defining section of the Ordinance defines two classes of hawkers and pedlars: (1) "Any person who goes from house to house selling or offering for sale any goods, wares or merchandise," and (2) "Any person who carries and exposes samples or patterns of any goods, wares or merchandise to be afterwards delivered within the Territories to any person not being a wholesale or retail dealer in such goods, wares or merchandise." In order to warrant a conviction, therefore, the party must be brought within one or the other of these classes.

The question in this case is rendered difficult by the fact that the defendant appeared before the magistrate and pleaded guilty to the information, and I am therefore not accurately informed as to the circumstances under which the alleged offering for sale was made. I am of opinion, however, that in so far as the first class is concerned, the party going from house to house selling or offering for sale must have with him the goods which he is actually selling or attempting to sell, that is, he must be carrying the goods with him for immediate delivery after the sale is effected I do not think that the legislature intended to carry the definition of "hawker" or "pedlar," in so far as the first class of persons is concerned, beyond what was generally understood to be a hawker or pedlar, that is, a person who goes about the country carrying his goods with him from house to house to sell or endeavour to sell them there. Inasmuch as the defendant is convicted of offering for sale goods to be after-

Judgment.

Wetmore, J.

wards delivered, he does not come within that class, for I must assume, in my opinion, that under such circumstances he had not the goods with him for delivery. Then, in so far as the conviction is concerned he is not brought within the second class of hawkers or pedlars as above stated, because the conviction does not allege that he was carrying and exposing samples or patterns of books to be afterwards delivered, and in order to warrant a conviction against such class of persons that is necessary to be proved and to be set out in the conviction. The conviction, therefore, to my mind, is bad and must be quashed.

I, however, will award no costs in this matter, because, in my opinion, the defendant by appearing and pleading guilty, brought about the whole trouble in this case. I will also order, as a condition of quashing the conviction, that no action be brought against the Justice who made the conviction, or against any officer acting under any warrant issued to enforce such conviction.

Conviction quashed.

REPORTER :

W. A. Nisbet, Esq., Moosomin.

REX v. HARRIS.

5 W. L. R. 4.

Selling liquor to interdicted person—Conviction for—Liquor License Ordinance—Defects in conviction—Quashing conviction on appeal.

On an appeal by defendant from a conviction for selling liquor to an interdicted person.

Held, that the conviction was bad because it did not disclose on its face that the liquor was sold or given "during the period of interdiction," and also because it did not state the period for which defendant should be imprisoned in default of payment of the fine imposed.

[WETMORE, J., *4th December, 1906.*]

This was an appeal by the defendant, James Harris, from a conviction by two justices of the peace for an offence under *The Liquor License Ordinance*.[1] Statement.

L. L. Elwood, for the appellant. Argument.
E. A. C. McLorg, for the Attorney-General.

[*6th December, 1906.*]

WETMORE, J:—This is an application to quash a conviction against Harris, for selling liquor to an interdicted person, contrary to the provisons of sec. 122, par. 3, of *The Liquor License Ordinance*.[1] The offence as alleged in the conviction is as follows: "For that he, the said James Harris, being then a licensee under the provisions of *The Liquor License Ordinance*, did unlawfully give to one Dan Campbell, an interdicted person, intoxicating liquor; he, the said James Harris, having at such time knowledge that the said Dan Campbell was an interdicted person, contrary to the provisions of sec. 122 of *The Liquor License Ordinance*. The conviction then went on to adjudge that Harris should pay a fine of $50 and costs. No method was prescribed in the conviction for enforcing the penalty or costs, nor was it in any Judgment.

[1] Con. Ord. c. 89.

Judgment. Wetmore, J.

way stated what the consequence of default of payment of such fine and costs would be.

A number of objections were taken to this conviction; of which it is only necessary for me to deal with two, namely, first, that the conviction does not disclose on its face any offence against paragraph 3 of sec. 122 of the Ordinance; second, that it does not prescribe any method of enforcing the payment of the fine or cost, or state what the consequence of default in payment of such fine and costs shall be.

Paragraph 3 of the section of the Ordinance in question as it originally stood in the Consolidated Ordinances was as follows: "Whenever the sale of liquor to any such drunkard shall have been so prohibited, any person with a knowledge of such prohibition who gives, sells, purchases or procures for or on behalf of such prohibited person, or for his or her use, any liquor, such other person shall be guilty of an offence, and upon summary conviction thereof, be liable to incur for every such offence a penalty not less than $50, nor more than $200, and in default of payment forthwith after conviction, to not less than two months' nor more than twelve months' imprisonment, and, if a licensee, his license shall be forfeited." This paragraph was amended by sec. 19 of chap. 32 of 1900, by striking out the words "such other person" and substituting therefor the words "during the period of such prohibition." The offence now, therefore, is "with a knowledge of the prohibition to give," etc., "to such prohibited person, any liquor during the period of such prohibition." The legislature must have had some object in making this change, and the only object I can perceive is that the section might be open to the construction that if liquor should have been prohibited to any person, a person with knowledge of the prohibition, giving, etc., liquor to such prohibited person would commit an offence at any time thereafter, whether the prohibition had

Judgment.

Wetmore, J.

expired or not. It seems to me, therefore, that the conviction must be brought within such intention, and it must appear upon its face that the offence provided for by the paragraph was committed ; that is, that the liquor was given within the period of the prohibition.

As to the other ground, I am of opinion that the conviction ought to have stated the period for which the party convicted would be imprisoned if the fine were not paid. Section 104 of chap. 89 provides that the forms in the schedule or forms to the like effect, " shall be sufficient in the cases thereby respectively provided for : and when no forms are prescribed by the said schedule they may be framed in accordance with Part 58 of *The Criminal Code, 1893*." General forms of conviction are provided for in the schedules to this Ordinance, namely, forms " P " and " Q." This offence is a first offence and form " P " is a form of conviction for a first offence. That form is prescribed, however, for cases where a distress warrant is to be issued on default of payment, and in default of sufficient property to distrain, to be then imprisoned. There is no form prescribed in the Ordinance for a case like the present, where imprisonment is provided in default of payment of the penalty, therefore we must have recourse to the forms prescribed in *The Criminal Code, 1892*. In that we find Form " WW," in schedule 1, which is a form of conviction where imprisonment is awarded on default of payment of the penalty. That form provides for adjudging the term of such imprisonment.

I am of opinion that this conviction is bad on both these grounds, and must be quashed. No application has been made to amend in this case, and if it had been, I doubt whether I could have amended. I am inclined to the opinion that where I am called upon to exercise a discretion of the character of fixing the term of imprisonment, I am unable to amend. I am also inclined to the opinion, in view of its

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Wetmore, J.

wording, that the provision in the paragraph (3) in question, providing for imprisonment, is not merely a means of enforcing the penalty, but it is an alternative punishment in case that the penalty is not paid. I express no decided opinion on that question however.

Conviction quashed.

REPORTER:
W. A. Nisbet, Esq., Moosomin.

CANADIAN MOLINE PLOW CO. v. CLEMENT.

5 W. L. R. 32.

Stop order—Application before judgment recovered—Creditors' Relief Ordinance—Application of garnishee proceedings for stopping funds in Court.

A stop order cannot issue before the recovery of judgment and the provisions of *The Judicature Ordinance* for the attachment of debts are not applicable to stop a fund in Court.
Dawson v. *Moffatt*, 11 Ont. R. 481, commented on; *Steckles* v. *Byers*, 10 C. L. T. 41, not followed.

[WETMORE, J., *27th November, 8th December, 1906.*]

Statement.

This was an application by summons for the granting of a stop order, under the circumstances set out in the Judgment.

Argument.

J. T. Brown, for the plantiffs.
No one appeared for the defendants.

[*8th December, 1906*]

Judgment.

WETMORE, J.:—The Home Investment & Savings Association brought an action for foreclosure of mortgaged premises against the defendants and some other parties who were subsequent mortgagees and execution creditors. The execution creditors were one Chapin E. N. Heney & Co., and The Ashdown Hardware Company. An order for sale

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was made and the mortgaged property was sold. Out of the proceeds of such sale, the claim of The Home Investment & Savings Association was paid; the sale was confirmed and the balance of the purchase money was ordered to be paid into Court, and out of that balance, after a payment of a trifling amount to The Home Investment & Savings Association still due on their claim, it was ordered that the plaintiff's costs of that action should be paid, including an allowance to Mr. Matheson, by whom the sale was conducted, and the costs of confirming the sale, the balance of the fund to be applied first in payment to the Moline Plow Company, the plaintiffs in this action, of the amount found due to them under their mortgage, with their costs; and, in the next place, to the three execution creditors above mentioned according to their respective priorities in so far as the same would extend, together with their costs—the right of priority to be established before the Clerk; and any residue to the defendants Clement and Cooper. It has not yet been ascertained, so far as I know, that there will be any balance coming to Clement and Cooper after the other payments have been made.

The plaintiffs brought an action against these defendants, Clement and Cooper, as assignees of a promissory note made by such defendants in favour of one R. Kellett, and they now apply, and have taken out a chamber summons, for a stop order to hold the monies coming to the defendants out of the proceeds of the sale of the mortgaged property. The writ of summons and statement of claim with the chamber summons were served upon the defendants and no one appeared at the return of the chamber summons on their behalf. No judgment has as yet been entered in this action.

I can find no authority for granting a stop order before judgment is recovered except one—*Steckles* v. *Byers*.[1] That

[1](1890) 10 C. L. T. Occ. N. 41.

Judgment.
Wetmore, J.

case was decided by the Master in Chambers in Ontario, and had it not been for that decision it would never have occurred to me that a stop order could be issued before judgment was recovered. It is worthy of note that in that case the application was based upon the fact that another creditor had execution against the defendant in the sheriff's hands, and, that being so, it was urged that all creditors would under *The Creditors' Relief Act* be entitled to share in the fund, *Dawson* v. *Moffat*,[2] being cited. The Master, however, held that a Division Court creditor was entitled to a stop order prior to a judgment because of his right to proceed to attach monies in the hands of a garnishee immediately upon the issue of a summons. I am unable to agree with that conclusion. *Dawson* v. *Moffat* decided two matters, namely; first, that, after the coming into force of *The Creditors' Relief Act*, then in force in Ontario, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby, but all execution creditors must share rateably in such funds; or in other words, that a stop order is to be regarded as equitable execution and that execution creditors are in the same position, in respect to that fund in Court, as they would be with respect to any other fund or any other property which had been seized by the sheriff under execution, and, second, that, inasmuch as there were provisions in *The Creditors' Relief Act*, enabling simple contract creditors to come in and obtain the position of execution creditors, a simple contract creditor having complied with such provisions was entitled to share with the execution creditors in the fund.

We have, however, no such provisions in *The Creditors' Relief Ordinance*,[3] authorizing simple contract creditors to come in and share. On the contrary the provisions of that Ordinance are to quite the opposite effect. Section

[2](1886) 11 Ont. R. 484. [3]Con. Ord. (1898) c. 26.

Judgment.

Wetmore, J.

6 provides as follows: "No creditor shall be entitled to share in the distribution of money levied from the property of a debtor, unless by the delivery of a writ of execution he has established a claim against the debtor, either alone or jointly with some other creditor or creditors." The provisions for attachment of debts, or, as they are more commonly called, garnishee proceedings, are entirely statutory. They do not make any provision for stopping a fund in Court, and, if I were to hold in accordance with what was held by the Master in *Steckle* v. *Byers*, I think I would be legislating. I must refuse this order.

Summons discharged.

REPORTER:

W. A. Nisbet, Esq., Moosomin.

KERR v. SUTER.

5 W. L. R. 256.

Security for costs—Insufficiency of affidavit—Attempt to read supplementary affidavit.

An affidavit on an interlocutory proceeding which is defective in not stating the grounds of the deponent's information and belief cannot be strengthened on the return of the summons by a supplementary affidavit.

[WETMORE, J., *25th January, 1905.*

Summons for security for costs.

Statement.

J. T. Brown, for the plaintiffs, took the preliminary objection that the affidavit of the defendant upon which the summons was granted, did not comply with the provisions of sec. 295 of *The Judicature Ordinance,* in that it did not state the grounds upon which the deponent based his information and belief, and that no other affidavit could be read.

E. L. Elwood, for defendant.

Judgment.
Wetmore, J.

[*28th January, 1905.*]

WETMORE, J.:—This is an application for security for costs. A summons was taken out on the affidavits of the defendant, and Mr. E. L. Elwood. The evidence as to residence was contained in the affidavit of the defendant, and is as follows: "That to the best of my knowledge, information and belief, the plaintiffs in this action reside at Winnipeg, in the province of Manitoba, and have no estate or effects within the jurisdiction of this Honourable Court." This does not comply with Rule 295 of *The Judicature Ordinance*, which provides as follows: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted." The grounds of the defendant's belief are not set out in his affidavit. Evidently for the purpose of curing this, Mr. Elwood prepared another affidavit of himself, setting forth that he is the agent of T. C. Gordon, of Carnduff, the defendant's advocate, and "that from a perusal of what the said T. C. Gordon informs me is, and I believe to be, the copy of the writ of summons served upon the defendant herein, I am informed and believe that the plaintiffs' address is Winnipeg, in the province of Manitoba." A copy of this affidavit together with a notice that it would be read on the return of the chamber summons, was served upon the advocate for the plaintiffs. At the return of the summons the plaintiffs' counsel objected to this last mentioned affidavit being read, and contended that if not read, the affidavit of the defendant was insufficient. I am of opinion that the affidavit of the defendant is insufficient; it does not comply with the rule which I have cited. As to the other question, whether the affidavit of Mr. Elwood can be read, I have had considerable difficulty in making up my mind. I can find no case which affords me any assistance but one,

and that is *Ransome* v. *Eastern Counties Railway Co.*,[1] and in that case it was held that "when a rule to show cause has been obtained and served, the Court will not allow the party who moved it to come on the day when in the ordinary course cause ought to be shown, and file additional affidavits strengthening the grounds for the rule." I can see no distinction in this respect between a summons and a rule to show cause. In this case the effort has been by the supplementary affidavit to support a summons which ought not to have been granted in the first instance on the material. Judgment. Wetmore, J.

This application will, therefore, have to be dismissed with costs.

Summons discharged.

REPORTER:

W. A. Nisbet, Esq., Moosomin.

[1] (1860) 2 Law Times 237.

BAKEWELL v. MACKENZIE.

1 W. L. R. 68.

Action against estate of deceased person—Corroboration—Resulting trust—Immoral purpose.

Although there is no corroboration, effect may be given to a claim against the estate of a deceased person if the uncorroborated testimony of the claimant is completely convincing.

Where a transfer of property has been taken in the name of a third person for the purpose of effecting an immoral or illegal purpose, the Court will not lend any assistance to the actual purchaser in recovering from the transferee the evidences of ownership, at least when the illegal or immoral purpose has been carried out.

[HARVEY, J., *9th and 10th December, 1904.*
[*26th January, 1905.*

This was an action brought against the defendant as administrator *ad litem* of one William F. Cuthbert to establish Statement.

Statement.

the plaintiff's right to certain property which had been in the possession of Cuthbert at the time of his death by an accident on 21st June, 1904, and had been taken possession of by the defendant as public administrator of the Southern Alberta Judicial District. The property in question consisted of $4,990 in Bank of Montreal bills, some personal effects and jewellery contained in a trunk for which Cuthbert had at the time of his death a railway check, a man's watch and chain, cuff links, collar and shirt buttons, and a certificate of title shewing the deceased to be the owner of lots 10 and 11, block 19, plan 723, Lethbridge. The plaintiff's evidence showed that she had for many years lived a life of prostitution, or, as she put it, "a fast life;" that she had been acquainted with the deceased for a long time, during part of which he had lived with her, they having contemplated a marriage, which was never celebrated, and that they had always been on very friendly terms, the plaintiff having on several occasions advanced money to the deceased to carry on business. She stated that at the time of his death the deceased, who then lived in Fernie, had come to Lethbridge on a visit; that she had decided herself to go to Fernie, after making a visit to the United States, and that she had given to the defendant the money found upon him, and also the check for the trunk containing the other articles, except the watch and chain, links and studs. The manager of the Bank of Montreal at Lethbridge stated that on the day previous to the accident the plaintiff had drawn from the bank $5,000, of which $4,000 was in new Bank of Montreal bills, which he believed to be the bills found upon the deceased. The documents contained in the trunk consisted chiefly of notes, mortgages, etc., in the plaintiff's name, and some of the jewellery was engraved with her initials. She claimed the certificate of title on the ground that the money paid for the property had been furnished by her, but she admitted that the reason that the title was taken in the deceased's name was that the vendors

would not convey to her knowing that she would, as she in fact did, make use of the property for the purposes of prostitution. The watch and other male jewellery she claimed had been given by her to the deceased to wear, but not to keep, and stated that the deceased would have given them back to her at any time if she had asked for them. Statement.

C. F. P. Conybeare, K.C., and *C. F. Harris*, for plaintiff. Argument.

L. M. Johnstone, for defendant.

[*26th January, 1905.*]

HARVEY, J.:—It was urged by the defendant's counsel that this being an action against the estate of a deceased person, the evidence of the plaintiff must be corroborated, and that there was not sufficient corroboration as to any of the chattels, and no corroboration whatever as to some of them. Judgment.

It is perhaps open to question whether, as respects these chattels, this is an action against the estate of a deceased person, but if it is not, it is so similar in character that I think the same rules of evidence should apply. The latest authorities I have been able to find, however, seem to establish that there is no rule of law requiring corroboration in such cases. The case of *Rawlinson* v. *Scholes*[1] was an action against executors for money lent to the deceased. The action was dismissed on the ground of want of corroboration, but on appeal to the Queen's Bench Divisional Court, consisting of LORD RUSSELL, C.J., and WILLS, J., a new trial was ordered. LORD RUSSELL says: "There must be a new trial. The case of *Re Finch*,[2] is inconsistent with the later case of *Re Hodgson*.[3] In the former it is said that it is the duty of the Judge to direct the jury not to act upon the unsupported evidence of the claimant in such a case as this. That is not his duty. He should direct them not to act upon

[1](1898) 79 L. T. 350. [2](1883) 23 Ch. D. 267; 14 W. R. 472; 14 L. T. 394. [3](1885) 31 Ch. D. 177.

Judgment.
Harvey, J.

it unless it brings conviction to their minds that it is true. The learned Judge in this case seems to have thought that whether convinced or not that the claim was honest, he was bound to find against it in the absence of corroboration of the evidence of the claimant. This is wrong. He ought to examine that evidence with care, even with suspicion, but if after that he felt that it was evidence of truth, he should act upon it. He ought to be completely satisfied before allowing the claim; but he ought not to disallow it, satisfied or not, merely because the evidence was not corroborated. I wish to add that I accept as good law the doctrine laid down by Sir James HANNEN in *Re Hodgson,* at p. 183."

I adopt the decision in this case as the correct interpretation of the law on the subject and apply it in the determination of this case.

The evidence of the plaintiff was given in an entirely straightforward manner, and I have no reason whatever to doubt its truthfulness.

As regards the money, I am fully satisfied that, not only was it given to the deceased by the plaintiff, but that it was given to him for the plaintiff's use and not for his own, and that she is entitled to have it returned to her. As regards the trunk and contents, the check for which was found on the deceased, I am also convinced that they and all of the documents, with the exception of the certificate of ownership above referred to, were the plaintiff's.

The jewellery consists of two sorts, articles of female adornment and articles of male adornment, and somewhat singularly this classification divides them into groups of some importance for the determination of the rights involved, namely, articles which the plaintiff gave to the deceased at the same time she gave him the money, and other articles which he had in his possession and was using before that time. The second group consists of a man's watch and chain with a charm consisting of a gold sovereign with

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Harvey, J.

the letter "F. engraved on it, a man's diamond ring, a pair of cuff links, a gold collar button, and three gold studs. All of these articles had been in the deceased's possession and use for several years, but the plaintiff states that she had only given them to him to wear, but not to keep. While I do not question the correctness of the plaintiff's opinion, that the deceased would have given them back to her if she had asked at any time, yet in view of the relations existing between the parties, and the character of the articles, it seems to me very reasonable to think that at the time they were given to the deceased they were intended for his permanent use in the same way as anything of the same sort given by a wife to her husband would have been. In other words, the uncorroborated evidence as to these articles does not convince me so as to bring the case within the rule of *Rawlinson* v. *Scholes,* above cited, and I must decide in the defendant's favour. As to all the other articles of jewellery, I feel no doubt and find in favour of the plaintiff.

With regard to the certificate of ownership the plaintiff must then rely on her ability to establish a resulting trust by reason of the purchase money having been paid by her. That it was so paid the evidence establishes to my satisfaction, but it also satisfies me beyond any doubt that in taking the property in the name of the deceased the intention of the plaintiff, concurred in by the deceased, was that she might be safe to use it for illegal and immoral purposes, namely, for purposes of prostitution, and that it was for many years so used. It scarcely seems necessary to cite authorities in support of the view that the Courts will give no assistance in the carrying out of illegal and immoral transactions. The principle as applying to contracts was fully illustrated in the case of *Perkins* v. *Jones,*[4] in which it was held that money paid under a contract for the erection of a house to be used as a house of ill-fame could not be recovered

[4] Court *en banc,* 18th January, 1905.

Judgment.
Harvey, J.

back. The same principle appears clearly to apply to such cases as the present, in which a claim is made under an alleged trust created for some illegal or immoral purpose.

In *Rosenburgher* v. *Thomas*,[5] the Court refused to give any assistance to the plaintiff in recovering back lands conveyed for the purpose of defeating a judgment against him. This case is cited and followed in *Mundell* v. *Tinkis*,[6] and is accepted as authoritative in *Mulligan* v. *Hubbard*,[7] though in the latter case the plaintiff was allowed to recover on the ground that the illegal purpose had not been carried out, but in view of the expression of opinion by the Court of Appeal in *Kearley* v. *Thompson*,[8] it is doubtful whether the dissenting judgment of KILLAM, J., rather than the judgment of the Court, does not express the true state of the law even under these circumstances. KILLAM, J., reviews at some length the authorities on the general principle, and I entertain no doubt on these authorities that in such a case as the present the plaintiff should receive no assistance from this Court under the rule laid down by LORD ELLENBOROUGH, C.J., in *Edgar* v. *Fowler*,[9] where he says, "But we will not assist an illegal transaction in any respect. We leave the matter as we find it, and then the maxim applies, *melior est conditio possidentis.*" Following this rule, the defendant now having possession of the evidences of title as in the case of *Brackenbury* v. *Brackenbury*,[10] the Court will not interfere even to deprive him of them. In the result, judgment will be for the plaintiff for the money, the trunk and contents, and all of the chattels found on the person of the deceased and now exhibits in this case, except the watch, watch chain and charm, the large diamond ring, the cuff links, collar button and studs, and the certificate of ownership.

[5](1852) 3 Grant 635; 4 Grant 473. [6](1884) 6 Ont. R. 625. [7](1888) 5 Man. R. 225. [8](1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 64 J. P. 804. [9] (1802) 3 East 222; 13 L. T. 198; 7 R. R. 433. [10](1820) 2 Jac. & W. 391; 37 Eng. Rep. 677; 22 R. R. 180.

As the counsel for the plaintiff stated on the argument that he had undertaken to be responsible for the defendant's costs, I make no order as to costs. Judgment. Harvey, J.

Judgment accordingly.

LILLIE v. THOMAS.

1 W. L. R. 467.

Pleading—Chose in action—Assignment — Setting off claim in damages against assignor.

In an action by an assignee of a chose in action, the defendant may set up by way of defence a claim against sounding in damages if flowing out of and inseparably connected with the transaction giving rise to the subject of the assignment.
Government of Newfoundland v. *Newfoundland Railway Co.* (1888) 13 App. Cas. 199, followed.

[WETMORE, J., *5th June, 1905.*

This was an application to determine certain questions of law raised by the pleadings set down for hearing under sec. 149 of the Judicature Ordinance. Statement.

The action was brought upon two agreements in writing alleged to have been made by the defendant, whereby he promised to pay Scott, Lawton & Holland, or order, the sum of $250 and $500 respectively, which agreements were alleged to have been assigned and transferred in writing by Scott, Lawton & Holland to the plaintiff. It is alleged that no payment whatever has been made on these agreements. The defendant by his statement of defence set up that the agreements were given for the purchase price of a breeding stallion sold by Scott, Lawton & Holland to the defendant under representations that such stallion was a sure foal getter, and under the written agreement of the vendors that if he should during the season of 1903 fail to get in foal fifty per cent. of the mares covered by him, the vendors would replace this stallion with one equally good and accept the first stallion

Statement. back; that this stallion was purchased by the defendant to the knowledge of the vendors for the purpose of serving and getting in foal mares of the defendant, and for being travelled and getting in foal mares of others for hire; that the defendant procured a number of mares to be served by him during the season of 1903, but that he failed to get any of them in foal; that immediately after the season of 1903 the defendant, pursuant to the terms of the agreement, assigned to the vendors the book accounts for the mares so served, but that the vendors had been unable to collect anything upon such accounts, because none of the mares were got in foal; that the defendant on or before the 1st of February, 1904, for the first time learned that the stallion had failed to get any mares in foal, and so notified the plaintiff and the vendors, and demanded of the plaintiff and the vendors to replace the stallion by another one and to accept the first stallion back, but the plaintiff and the vendors refused to replace such stallion by another one or to accept him back. The defendant claimed to set off against the plaintiff's claim damages, which by his particulars he fixes at $1,725, and counterclaimed for damages to this amount, repeating the paragraphs of the statement of defence.

Argument. *J. T. Brown*, for plaintiff. The facts alleged in the statement of defence do not constitute and are not properly pleadable as a defence to the plaintiff's claim; they constitute, if anything, only a right of action against the vendors, Scott, Lawton & Holland. The allegations in the counterclaim do not constitute any right of action or ground for relief against the plaintiff, but, if anything, they constitute only a right of action against the vendors. What the defendant relies upon is not a set-off at all; it can only be raised by way of a counterclaim. Con. Ord. ch. 41, sec. 4, shows that a counterclaim cannot be set up by way of defence against an assignee of a debt.

E. L. Elwood, for defendant, *contra*.

[*June 5th, 1905.*]

Judgment.

WETMORE, J.—In *Waterous Engine Works Co.* v. *Ball*,[1] I made a distinction between a set-off and a counterclaim, and, relying upon what was laid down in the Annual Practice, 1903, at p. 275, I drew the conclusion that a set-off can only arise where the action is for a liquidated amount, and that a claim sounding in unliquidated damages cannot be set off against a claim for debt or for any other cause of action. I have not altered my opinion in that respect as to the general distinction between a set-off and a counterclaim, but in so far as the right of a party sued by the assignee of a debt to set up a claim sounding in damages and arising out of, or in connection with, the same contract out of which the debt arose, as a defence to an action by the assignee of a debt, I feel I am precluded by what was decided in *Government of Newfoundland* v. *Newfoundland Railway Co.*[2] The Court lays down[3] that "unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also gave rise to the subject of the assignment." That is the case here.

I have not lost sight of the fact that the English enactment which allows the legal right to a debt or chose in action to pass by assignment in writing to a third person,[4] is quite different from our Ordinance, especially in the fact that the express language of that enactment makes the assignment "subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not been passed," and I am inclined to think that the Privy Council, in the case to which I have referred, had that enactment in their minds. Nevertheless, the judgment does not appear to go solely on that ground. It went also upon the ground

[1] Wetmore, J., 2nd March, 1903. [2] (1888) 13 App. Cas. 199. [3] At p. 213. [4] Imp. Stat. 36 Vic. c. 66, s. 25 (6).

Judgment.
Wetmore, J

that the Province of Newfoundland had made an enactment similar to Order 19, Rule 3, of the English Rules of Court, which provides that "A defendant in an action may set-off or set up by way of counterclaim against the claims of the plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not." Now, we have in the Territories the same rule word for word.[5] The decision also goes upon the inequitable consequences that would follow if it had been otherwise decided than as laid down there.

In *Young* v. *Kitchen*,[6] which was approved of in that case it is laid down that a defendant in a case like the present has no claim to recover anything against the plaintiff. He only meets the plaintiff's claim by a counterclaim of damages arising out of the same contract. That is, to use the expression attributed to COCKBURN, C.J., by the author of the Annual Practice, 1905, at page 287, "the matter can only be used as a shield, not as a sword," or, in other words, it serves only as a defence and is not a cross-action.

The matter set up by the defendant, therefore, affords a good defence, and in my opinion is properly pleaded as a defence. But according to the decision in *Young* v. *Kitchen*, the defendant is in error in claiming damages from the plaintiff to the amount of $1,725, as he can only, as against the plaintiff, claim to the amount of the plaintiff's alleged claim under the agreements; for anything over and above that he must have recourse to Scott, Lawton & Holland; and I will therefore, hold, the pleas as to damages good, but the claim for damages bad. The defendant will be at liberty to so amend his defence, by showing that he does not claim to recover damages against the plaintiff, but only to set them off against the plaintiff's claim.

Under all the circumstances of this case I will follow what was laid down in *Young* v. *Kitchen*, and make the costs

[5] See Con. Ord. (1898) c. 21, Rule 110. [6] (1878) 3 Ex. D. 127; 47 L. J. Ex. 579; 26 W. R. 403.

of this application and of the hearing costs in the cause to each party, and the order will be drawn accordingly. Judgment. Wetmore, J.

Order accordingly.

SHORT v. SPENCE.

Consent of next friend—Filing—Proceedings avoided by omission.

The English Rule requiring that, where the consent of the next friend of the plaintiff is necessary, it must be filed before the issue of the writ of summons is in force in the Territories, and default is not cured by filing a consent filed subsequently to the issue, but avoids all the proceedings in the action.

[SCOTT, J., *30th June, 1905, 28th October, 1905.*

This was an application by the defendant to set aside a writ of summons and all proceedings, on the ground that the consent of the next friend of the plaintiff was not filed as required by Order XVI., rule 20, of the English Rules of Court. The action as originally constituted was brought by Thomas Hourston, a person of unsound mind not so found by inquisition, by David G. McQueen, his next friend, against the defendant, to set aside transfers of certain moneys and lands made by Hourston to the defendant, which are alleged to have been obtained by her from Hourston by undue influence. The writ of summons in the action was issued from the office of the deputy clerk on 3rd April, 1905, what purported to be the consent of the next friend having been filed on the 11th April following. Statement.

N. D. Beck, K.C., and *C. F. Newell*, for defendant. Argument.
O. M. Biggar, for plaintiff.

[*October 28th, 1905.*]

SCOTT, J.—Order 16, Rule 20 of the English Rules, provides that "Before the name of any person shall be used in Judgment.

Judgment.
Scott, J.

any action as next friend of any infant, or other party, or as relation, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the central office or in the district registry, if the cause or matter is proceeding therein."

It was contended on behalf of the plaintiff that the rule referred to is, by reason of its inapplicability, not in force here, as there are not here any such offices as those mentioned in it. Under the English rules the central office appears to be the office in London in which all proceedings in actions there are carried on, and the district registries the offices in which proceedings in actions in other parts of England are carried on. They appear to correspond in all respects with the offices of the clerks and deputy clerks of this Court, and as sec. 21 of *The Judicature Ordinance*[1] provides that, subject to the provisions of the Ordinance, the practice and procedure in England shall be followed as nearly as possible, I am of opinion that the rule referred to is in force here, and that the consent of the next friend should be filed in the office of the clerk or deputy clerk in which the proceedings in the action are carried on.

It was also contended that the rule referred to does not require that the consent of the next friend shall be filed before the issue of the writ of summons in the action. In my view, the rule plainly indicates that the consent shall be filed before the name of the next friend shall be used, and as his name must be used before the issue of the writ of summons, it follows that the consent must be filed before writ issues.

A further contention is that the omission to file the consent is one which does not go to the root of the action, and *Ex p. Brocklebank*[2] was cited as supporting this view. In that case it was held that an action may, in many cases, be instituted by an infant without the interposition of a next

[1] Con. Ord. (1898) c. 21. [2] (1877), 6 Ch. D. 358.

friend. In this action the name of a next friend was used contrary to the express provisions of the rule referred to. The fact that the provisions of the rule were not fully complied with would not, I think, warrant my treating the action as one brought without a next friend. Even if I would be justified in so treating it, I doubt whether it could reasonably be inferred from the judgment in *Ex p. Brocklebank* that a person of unsound mind who, in the statement of claim is alleged to be such, could sue without a next friend. Judgment. Scott, J.

No other authorities were cited upon the question whether the defect was one which strikes to the root of the action, and I have not been able to find any bearing upon it, but I am of opinion that it was so, and therefore an order must go setting aside the writ and all proceedings herein. The defendant must have the costs of the application.

Order accordingly.

THE KING v. EARLEY.

3 W. L. R. 567; 14 Can. Cr. Cas. 10.

Conviction—Keeping house of ill-fame — Amending information — Evidence as to offence subsequent to issue of summons—Justices sitting under Part LV. or Part LVII. of the Criminal Code—Deposit of cash security with written conditions.

Two Justices dealing with a charge of keeping a house of ill-fame will be deemed to be acting under Part LV. of *The Criminal Code, 1892*, if they adopt the form of conviction provided by s. 786, and the form of conviction Q Q.

A defendant cannot be convicted of an offence alleged to be committed after the date of the issue of the summons, even though the information is amended and resworn.

Semble, that, if with a deposit of cash as security in proceedings to quash a conviction, a writing is filed, the condition should be that the applicant will prosecute the motion to quash the conviction, not merely the application for the writ of certiorari, and that such writing is bad if the condition is to prosecute such motion or writ of certiorari.

[WETMORE, J., *23rd April, 12th May, 1906.*

This was an application by summons after a return had been made to a writ of *certiorari* to quash the conviction of Statement.

Statement. one Edith Earley, who was convicted before two justices of the peace, for that "she, between the 1st and the 12th days of January, A.D. 1906, at Moosomin, was a keeper of a house of ill-fame, to wit: a house known as 'the stone house," situated one mile east of the town of Moosomin."

The information was originally sworn on the 9th January, 1906, and charged the offence as having been committed on the 6th January. The summons was issued on the 9th January, and commanded the defendant to appear before the magistrate on the 12th January. At the return of the summons, the accused having appeared, the information was amended so as to charge that the offence was committed "on or about the 6th day of January," and the information was then re-sworn. This did not appear upon the face of the information when it was re-sworn, but from a memorandum attached to the return to the *certiorari*. After it was amended and re-sworn, the defendant pleaded "not-guilty." A considerable part of the evidence dealt with occurrences in the house on 11th January.

The security upon the proceedings to quash the conviction was given by a deposit with the clerk of $100 in cash, accompanied by a writing which, after referring to the conviction, continued: "Whereas the said appellant is applying for a writ of *certiorari* to bring up all papers and proceedings relating to said conviction; now, therefore, the sum of $100 is deposited as security that she, the said appellant, will prosecute such motion or writ of *certiorari* at her own costs or charges with effect and without wilful or affected delay."

Argument. *E. A. C. McLorg,* for the accused, urged a number of objections to the conviction.

J. T. Brown, for the informant, supported the conviction, and took a preliminary objection to the proceedings that the security furnished was insufficient, since the condition of the writing was to prosecute "such motion *or* writ of *certiorari*,"

instead of such "motion *and* writ of *certiorari*," as required by sec. 892 of *The Criminal Code, 1892*, and Rule 36 of the Crown Practice Rules. Argument.

[*12th May, 1906.*]

WETMORE, J.—I must say that if it were necessary for me to decide the point raised by the preliminary objection, I would be inclined to think the deposit bad. If no writing had been filed at all, I think that, under the authority of *Reg.* v. *Davidson*,[1] the deposit would have been good, but the accused having chosen to file a writing, the case is, in my opinion, altered very materially. Further the condition set forth in the writing is not that the cash has been deposited as security to prosecute the motion to quash the conviction, but as security to prosecute the motion on the application for the writ, and that does not come either within the provision of the section of the Code or the Rule. I do not, however, consider it necessary to decide that question, since I have, after very great hesitation, come to the conclusion that the justices in this case were proceeding under the provisions of Part LV. of *The Criminal Code, 1892*. Judgment.

The question of whether two justices in dealing with a charge for being the keeper of a house of ill-fame were proceeding under Part LV. of the Code, or sitting as justices under Part LVIII. relating to summary convictions, has frequently arisen, and in my opinion it must be very difficult sometimes to determine under which part they were sitting. Sections 207 (j) and 208 of the Code give jurisdiction to a justice of the peace over an offence of that character. By virtue of secs. 782 and 783 (f), two justices sitting as a magistrate have jurisdiction under Part LV. I have come to the conclusion in this case that the justices were acting under Part LV., because they seem to have adopted the procedure provided by sec. 786. The offence charged was

[1](1900) 4 Terr. L. R. 425.

Judgment.
Wetmore, J.

one which the magistrates could deal with under this part without the consent of the accused. They reduced the charge to writing, as appears by their return, and the form of conviction used in the form "QQ," which is the form relating to proceedings under Part LV., and not the form "XX," which is the form applicable in case the procedure is by summary conviction. That is, they used the form which recites the fact of the party "being charged before the undersigned." This is the only indication I can perceive as to the part of the Code under which the justices were proceeding. Having reached the conclusion that they were proceeding under Part LV., I am of opinion that sec. 892 of the Code and the rule framed thereunder are not applicable to proceedings had under that part, since they relate entirely to proceedings by summary conviction. Therefore no security was necessary. It seems to me that, if a similar proceeding had been before a stipendiary magistrate, or, say before a Recorder or Judge of a County Court in one of the older provinces, security would not be required, and it makes no difference that two justices of the peace happen to constitute the magistrate provided for in the part.

A very great number of objections were taken to the conviction in this case, and, as I have come to the conclusion that it is bad upon one ground, it is unnecessary, therefore, to discuss the other grounds taken.

I am of opinion that the conviction is bad, because possibly the defendant may have been convicted of an offence which she was not summoned to answer. It is clear, to my mind, that the accused was called upon to answer for an offence committed by her prior to the issuing of that summons. It is quite true that the justices had power to amend —that is not controverted—but they cannot so amend as to create, or put themselves into a position to adjudicate upon, an entirely new offence. The amendment made whereby the alleged offence was stated to have been committed on or

Judgment.
Wetmore, J.

about the 6th January instead of on the 6th January, was an amendment that they had a right to make, but having made that amendment the justices could not proceed and convict her of an offence which she committed after the date of the issuing of the summons, and that is just what it is possible, and I think altogether probable, they did in this case, because a great portion of the evidence given against her was with respect to what took place and was observed at the house in question on the 11th January. I unfortunately have not been able to lay my hands on *Ex parte Kennedy*,[2] but that case is cited in *Rex* v. *Keeping*,[3] and it was cited for the proposition that the conviction in question was bad, as it might have been for an offence committed on a date after the information was laid. In that case Keeping was convicted because she "on the 21st April, A.D. 1901, and on divers other days and times during the month of April, 1901, was the keeper of a disorderly house." Weatherbee, J., in delivering the judgment in that case, stated he quite agreed with *Ex parte Kennedy*. If it supports the proposition for which it was cited, I agree with it.

The conviction will be quashed.

Conviction quashed.

[2](1888) 27 N. B. R. 493. [3](1901) 4 Can. Cr. Cas. 494; 34 N. S. R. 442.

BARRETT v. BARRETT.

4 W. L. R. 7.

Husband and wife—Custody of child—Father contracting himself out of rights—Policy of law.

An agreement between a husband and wife whereby the former contracts himself out of his right to the custody of the children of the marriage is against the policy of the law, and will not be enforced.

[WETMORE, J., *21st April, 22nd May, 1906.*

Statement. This was an argument of certain questions of law raised by the pleadings. The action was brought by the plaintiff against her husband for a writ of *habeas corpus ad subjiciendum* commanding the defendant to produce the body of Grace Edna, the daughter of the plaintiff and defendant, in order that she might be delivered into the custody of the plaintiff. The statement of claim alleged an agreement between the plaintiff and defendant in which they agreed to live separately, the plaintiff to have absolute control of Grace Edna, with respect to whom defendant renounced all his rights and powers of every description, and set up that the defendant had in violation of the agreement kidnapped Grace Edna and had refused to deliver her up after demand. The defendant appeared and raised the question of the validity of the agreement relied upon by the plaintiff, and the question of law was set down for argument.

Argument. *E. L. Elwood,* for defendant.

J. T. Brown, for plaintiff.

Judgment. WETMORE, J.—I am of opinion that the authorities clearly support the contention of the defendant, that the agreement is invalid. Sec. 2 of the Imp. Stat. 36 Vic. ch. 12, is not in force in this country, since it was enacted after the 15th of July, 1870. The state of the law as it was in England prior to that enactment is very distinctly laid down by the authori-

Judgment. Wetmore, J.

ties. I will refer in the first place to *Hope* v. *Hope*.[1] In that case, a husband and wife entered into a contract by which it was agreed that the youngest of their five children was to remain in her custody, that she should abandon an English suit for divorce which she had instituted against him, and that she should not oppose his English suit for divorce against her. A question arose with respect to that part of the agreement which referred to the wife having the custody of the child, and TURNER, L.J.,[2] lays down the following: "The law and policy of this country gives the custody of his children to the father and invests him with control over them," and then he went on to state that he had no doubt that this article of the agreement was "against the law and policy of England." This case was not by any means the first case upon the subject, but it has been followed by others since. I refer in this connection to *Vansittart* v. *Vansittart*.[3] It is also recognized as correct in *Hamilton* v. *Hector*,[4] and in *Roberts* v. *Hall*.[5] Of course, there are circumstances under which the Court will deprive the father of the control of his children. This is not, however, by virtue of any contract, except possibly in cases where the contract as regards the child is for the purpose of advancing its welfare, as in *Roberts* v. *Hall*, but is by reason of his immorality, or possibly by reason of his inability to support them, or some other reason apart from a contract which renders it advisable in the eye of the Court or Judge that the father should be deprived of the custody and control of his children, and that they should be given over to the mother. Nothing is alleged in the statement of claim in this case setting forth any such reason why the father should be deprived of the custody of the child in question, and as I before stated, it merely sets up that he has contracted himself

[1](1857) 26 L. J. Ch. 417. [2]At p. 424. [3](1858) 27 L. J. Ch. 222, 289; 4 Kay & J. 63; 4 Jur. (N. S.) 276; 6 W. R. 238, 386. [4](1871) 40 L. J. Ch. 692; 19 W. R. 990; L. R. 13 Eq. 511; L. R. 6 Ch. 701. [5](1882) 1 Ont. R. pp. 388 and 404.

Judgment.
Wetmore, J.

out of the right to have such custody. This I hold to be against the policy of the law, and therefore that the objection taken by the defendant is well taken.

There will, therefore, be judgment for the defendant, and as this question goes to the root of the action, the action will be dismissed with costs.

Action dismissed with costs.

REX v. WALKER.

4 W. L. R. 288.

Forcible entry — Entry effected by force — Previous contradictory statements—Relevancy of.

Held, that, on a charge under s. 89 of *The Criminal Code, 1892*, it is not necessary to show that actual force was used in effecting the entry.

Held (HARVEY, J., *dissentiente*), that evidence of a previous contradictory statement by a witness cannot be given where the matter with which such statement deals is merely collateral to the issue.

[*Court* en banc, *13th, 18th July, 1906.*

Statement.

This was a case reserved by HARVEY, J., before whom, sitting with a jury, the defendant was tried at the sittings at Red Deer, on 14th and 15th March, 1903, upon a charge that he "did unlawfully and forcibly, and in a manner likely to cause reasonable apprehension of a breach of the peace, to wit,[1] in collecting together an unusual number of persons and in making threats, enter into a dwelling house which was then in the peaceable possession of Guy Griffiths." At the close of the evidence for the Crown, counsel for the defendant applied to have the case withdrawn from the jury on the ground that the evidence, a copy of which accompanied

[1] Section 89 of *The Criminal Code, 1892*, provides that "Forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof on land then in peaceable and actual possession of another," and that "Every one who forcibly enters land is guilty of an indictable offence," etc.

the case, did not disclose the commission of the offence charged. This application was reserved by the trial Judge and subsequently refused by him. The jury returned a verdict of "guilty." Statement.

The defendant gave evidence on his own behalf at the trial. During the examination in chief, he stated that he had not sold to the complainant his interest in his homestead, upon which he and the complainant Griffiths were then living, and upon which the alleged forcible entry was effected; and, in his cross-examination, he denied that he had told one McLean that he had done so. At the close of the evidence for the defence, counsel for the Crown called McLean for the purpose of contradicting the defendant with reference to that statement. The evidence was objected to, but the objection was overruled.

The questions reserved for the opinion of the Court were: (1) Was the evidence sufficient to sustain the conviction? and (2) was the evidence of McLean as to the statement made by defendant to him properly received?

The case was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

W. L. Walsh, K.C., for the prisoner. Argument.

James Short, for the Crown.

[*18th July, 1906.*]

The judgment of the Court was delivered by

SCOTT, J.—There was, in my opinion, sufficient evidence to base a conviction for the offence as defined by sec. 89 of *The Criminal Code, 1892*. The evidence for the Crown shews that on the evening preceding the day upon which the entry was made, the defendant went to the dwelling occupied by the complainant where he then was with his partner, one Judgment.

Judgment. Scott, J.

Baker, and ordered them to go out, stating that if they did not go out, he would throw them out the next morning, and that he had the men there to do it, that the next morning the defendant appeared at the house with four other men and after again ordering them out of the house, entered it and, pushing aside Baker who stood at or near the door, he and the others who were with him began to remove and did remove the complainant's furniture and property from the house and premises. The complainant and Baker both state that it was the fear that defendant would resort to personal violence if they resisted that prevented their doing so; and in view of the threats made by the defendant the previous evening, I cannot but think that they might reasonably have assumed that, if they made any such resistance, a breach of the peace would ensue.

It is alleged in the charge that the defendant forcibly entered the premises. That actual force must be used in making the entry does not appear to be a necessary ingredient of the defence is defined by the section referred to.[2] It was, however, contended by counsel for the defendant, that as it was alleged that the entry was forcibly made, the Crown was bound to prove that it was so made. The only actual force shown to have been used was the pushing aside of Baker by the defendant when he entered the building. I am of the opinion that as the use of actual force was not essential to constitute the offence, the allegation that it was used might be rejected as surplusage, and that it was not necessary to prove it.[3] In this view, it is unnecessary to consider whether the act referred to of the defendant constituted actual force.

The objection to the reception of the evidence of McLean in reply was that if the defendant had made any statement to the effect that he had sold the land to the plaintiff, it was

[2] See Archibald's Criminal Pleading (23rd ed.), p. 1111. [3] Op. cit. p. 304.

a statement respecting a collateral matter and was not relevant to the issue.

Judgment. Scott, J.

It appears to be settled that upon such a charge as this, evidence relating to the title of the occupant is inadmissible.[4] If, therefore, the Crown had in the course of the presentation of its case against the defendant, sought to give this statement of the defendant in evidence, it would properly have been rejected; but, as the defendant in the course of his defence introduced evidence relating to the question of title, it may seem unreasonable that the Crown should be precluded from rebutting it. It may be said, however, that the Crown should have objected to any such evidence being received.

Section 701 of the Code provides that, if a witness upon cross-examination as to a former statement made by him *relative to the subject matter of the case* and inconsistent with his present statement, does not distinctly admit that he made such statement, proof may be given, upon a proper foundation being laid for that purpose, that he did in fact make it. Now, the subject matter of this case is not the land, nor the complainant's title to it, but merely the entry by defendant upon it. I think, therefore, it cannot be said that this statement of the defendant, if made by him, was one relating to the subject matter, or that it was other than a statement respecting a collateral matter.

For the reasons I have stated, I am of opinion that the first question submitted should be answered in the affirmative, and the last question in the negative, and that by reason of the answer to the last question the conviction should be quashed and a new trial ordered.

HARVEY, J. (*dissenting*).—I concur with the majority of the Court in the view that there is evidence to support the

[4] See *Reg.* v. *Cokely*, (1856) 13 U. C. R. 521.

Harvey, J., dissenting.

conviction, but am unable to agree with the conclusion that the evidence which was received in contradiction of the testimony of the accused as to his previous statements was inadmissible.

The case appears to me to come within the rule covered by section 701 of *The Criminal Code, 1892*. I cannot bring myself to the conclusion that the expression "relative to the subject matter" is intended to limit the subjects in which self contradiction may be permitted to be proved to matters which are part of the issue, and in my opinion, the statement in question related to the subject matter of the case and was, therefore, a subject in which a former contradictory statement might be given in evidence.

It is stated in Phipson on Evidence, at p. 153, that "Independent evidence may also be given of the following facts though they are otherwise irrevelant to the issue," the first of the exceptions specified being that of proving the self-contradiction of a witness under the provisions of the English *Common Law Procedure Act*, in the same terms as the section of the Code above mentioned. And again, at p. 158, "Although witnesses may be contradicted by independent evidence in all matters relevant to the issue, their credit cannot, except in the cases mentioned *ante*, pp. 153-155, be impeached by contradiction or irrelevant matters."

I have seen no decided case in which the subject is directly considered, but the interpretation of the section as given by Phipson appears to me reasonable and in my opinion it governs the present case.

Conviction quashed and new trial ordered.

HARVEY, J. (*dissenting*).

CANADIAN NORTHERN RAILWAY CO. v. OMEMEE SCHOOL DISTRICT.

4 W. L. R. 547.

Assessment of railway — "Lands" — Meaning of — Onus of proving assessment incorrect.

Held, that, the buildings of a railway company are assessable under s. 3 of the *Ordinance respecting the Assessment of Railways*, the word "lands" therein being properly interpreted as including the buildings.

Held, also, that the assessment must *prima facie* be taken as being correct in amount. *Canadian Pacific Railway Co.* v. *Macleod School District*, (1901), 5 Terr. L. R. 187, followed.

[WETMORE, J., *10th and 13th November, 1906.*

Statement. This was an appeal by the Canadian Northern Railway from the decision of the Court of Revision confirming the assessment of the buildings of the railway for the purposes of the school district.

Argument. *J. P. MacLean*, for railway company.

J. A. M. Patrick, for the school district.

(*13th November, 1906.*)

Judgment. WETMORE, J.—It was urged in the first place that buildings are not assessable against the railway company because by sec. 3 of *The Ordinance respecting the Assessments of Railways*,[1] it is provided that "the assessor of every municipality or school district as the case may be shall assess the lands of such railway company, and the roadway thereof, and the superstructure of such roadway," and the word "lands" as used in that section does not embrace the buildings situate thereupon. I am of opinion that it does, and I come to that conclusion because I have referred to *The Ordinance respecting Municipalities*,[2] sec. 2, par. 4, and notice it is there provided that "land," "real property" and "real estate" respectively, shall include all "buildings or other things erected upon or affixed to the land." Now,

[1] Con. Ord. (1898) c. 71. [2] Con. Ord. (1898) c. 70.

Judgment.
Wetmore, J.

the Legislature in framing the former Ordinance may be assumed, I think, in using the word "lands" in the section referred to, to have had in their minds land as defined in the latter Ordinance, and that, therefore, the buildings in question are assessable.

It was also urged that the lands have not been assessed, but only the buildings that are on the lands. If the buildings would be assessable under the term "lands" and be included therein, they are liable to assessment, and to assess them *eo nomine* is merely doing what the assessor would in any event have the right to do. Buildings on lands are comprised in the term "lands" and are, therefore, assessable, and, if in fixing the value of these buildings they did not include the value of the land, so much the better for the company.

It was also argued that the assessment was excessive. I have no evidence before me as to the value of this property, and I have no hesitation in saying that I agree with my brother SCOTT in *Canadian Pacific Railway Company* v. *Macleod School District*,[1] where he held that in an appeal of this sort the assessment of the assessors is *prima facie* to be held correct so far as the question of value is concerned, and that the onus of showing that it is incorrect is cast upon the person disputing it. I have before me nothing except the assessment roll and the evidence of Mr. Bigham, the assessor, who also corroborates the amount of this assessment. There is nothing before me to show that this assessment is not in accordance with the relative value of other property in the municipality, and I have to assume in the absence of such evidence that it is.

It was urged that these buildings would only be worth their value as material. I am not prepared to say that I accede to that proposition, and it is not necessary to express an opinion one way or the other. The consequence is that

[1] (1901) 5 Terr. L. R. 187.

this appeal must be dismissed and the decision of the Court of Revision affirmed, and I order that the costs of the attendance of the witnesses on behalf of the respondents, and of procuring their attendance, be taxed by the deputy-clerk and paid by the appellants within twenty days after taxation, and on default the respondents to have execution therefor, with the costs of such execution if issued. Judgment. Wetmore, J.

Order accordingly.

GRAY v. BALKWILL.

5 W. L. R. 257.

Writ of Habeas Corpus — Action for — Striking out statement of claim.

An application for the custody of an infant must be by way of motion, summons or petition. Where the only relief sought in an action commenced by writ of summons was the issue of a writ of *habeas corpus*, the action was, on application by the defendant, dismissed.

[WETMORE, J., *25th, 29th January, 1907.*

This was an application by the defendant after delivery of statement of defence to strike out the statement of claim and set aside the writ of summons. Statement.

The action was brought for an order directing the delivery to the plaintiff of his child, an injunction restraining the defendant from detaining her, and the issue of a writ of *habeas corpus*.

E. L. Elwood, for plaintiff. Argument.

J. T. Brown, for defendant.

[*20th January, 1907.*]

WETMORE, J.:—This action was commenced in the usual form by summons. The statement of claim sets forth that on or about the 19th May last the defendant kidnapped Judgment.

Judgment.
Wetmore, J.

the plaintiff's infant daughter, one Vina Almira Gray, while she was on the highway near the residence of the plaintiff, and still detains her, and that the plaintiff has applied to the defendant to deliver the said child to him, but he has refused to do so unless compelled by order of the Court, and the plaintiff claims: (1) an order or direction of the Court that the defendant deliver to him the said infant; (2) an injunction restraining the defendant and all other persons under his orders or control, and his servants or agents, from detaining or concealing the said infant from the plaintiff and from counselling, aiding and assisting in any such detention or concealment and from removing the said infant from the jurisdiction of this Court, and from counselling, aiding and assisting in any such removal; (3) a writ of *habeas corpus ad subjiciendum* to be issued out of the Court directed to the defendant, and commanding him to produce before the Court the body of the infant, that she may be delivered into the lawful custody of the plaintiff. This to my mind is practically an action for the obtaining of a writ of *habeas corpus* to issue. The relief as to an order that the defendant deliver the infant to the plaintiff and for an injunction are merely incidental.

The defendant appeared by advocate and filed a defence herein, to which the plaintiff has replied. The cause is therefore at issue. After these proceedings were taken the defendant took out a chamber summons to strike out the statement of claim and set aside the writ of summons on the ground that the statement of claim disclosed no reasonable cause of action, and that such action is an abuse of the procedure and practice of the Court.

The power to strike out a statement of claim as not showing a reasonable cause of action is given by Rule 151 of *The Judicature Ordinance*.[1] It was held in *McEwen* v. *N. W. Coal and Navigation Company*,[2] that the section of *The*

[1] Con. Ord. (1898) c. 21. [2] (1889) 1 Terr. L. R. 203.

Judgment.
Wetmore, J.

Judicature Ordinance then in force, corresponding to Rule 151, was not to be used when the pleading was of such a character that a question of law was fairly arguable under the pleadings. In *Republic of Peru* v. *Peruvian Guano Company*,[3] CHITTY, J., in dealing with the corresponding English rule, lays down the following: "The pleading will not be struck out unless it is demurrable and something worse than demurrable . . . but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation." In *Dreyfus* v. *Peruvian Guano Company*,[4] KAY, J., struck out the statement of claim on the ground that the Court had no power to grant the relief claimed.

I have never heard of an action being brought to procure the issue of a writ of *habeas corpus*, and my attention has not been called to any case of the sort. This procedure to my mind is entirely novel. Eversley on Domestic Relations,[5] propounds two methods by which a parent may obtain the custody of his child; one is by writ of *habeas corpus*, the other by application to the Court in Chancery. A writ of *habeas corpus* is obtained by application to a Court or Judge by motion or chamber summons, or it is obtained sometimes from a Judge *ex parte*. The application to the Court of Chancery is by petition, and in my opinion a Court can only be seised of its jurisdiction by the ordinary practice and procedure applicable to the character of the relief claimed. There are no two sides to this Court; law and equity are administered from the same seat and at the same time, but if a person is making an application to its exercise of equitable justice he must come by the regular procedure, and if the procedure for the relief is to come by petition he must apply by petition. Rule 1 of *The Judicature Ordinance*, which provides that "Every action ex-

[3] (1887) 36 Ch. D. 489; 56 L. J. Ch. 1081; 57 L. T. 337; 36 W. R. 217. [4] (1889) 41 Ch. D. 151; 58 L. J. Ch. 471; 60 L. T. 216; 37 W. R. 394. [5] 2nd ed., p. 496.

Judgment.
Wetmore, J.

cept as otherwise provided shall be commenced by writ of summons in Form 'A' of the Schedule," makes no alteration in the practice in that respect, because sec. 21 of that Ordinance applies the practice and procedure existing in England on the 1st January, 1898, to the practice and procedure here, subject to the provisions of the Ordinance. The procedure by petition in such cases, then, would be one of the exceptions referred to in Rule 1 just cited.

I have been referred to two cases: *Cassey* v. *Cassey*,[6] and *Munro* v. *Munro*.[7] In the first case, the Statute of Upper Canada provided for the sale of an inchoate right of dower upon petition to the Court under the Act, and the Act gave the Court power to sell. VANKOUGHNET, C., held that the petition was merely the procedure pointed out, and that, the Court having power to sell, he could exercise it under decree upon bill filed. *Munro* v. *Munro* was a suit for alimony, and the prayer of the bill also asked that the custody of the children who were under twelve years of age should be committed to the mother, the plaintiff. The bill had been taken *pro confesso*, and Mowat, V.C., on looking at the statute relating to the custody of infants, observed that it provided for the jurisdiction being exercised on petition, but he stated that a bill might, he presumed, be regarded as a petition for the purpose of the Act. He referred to *Cassey* v. *Cassey*, and gave relief accordingly. I, with due deference, must say that I hesitate before following these cases. It seems to me, as I before stated, that the jurisdiction has to be exercised under the method pointed out by the practice, and, in so far as applications for writs of *habeas corpus* are concerned, it would in many instances create unnecessary expense if it was allowable that a writ should issue and an action brought down to issue by pleadings, and set down for trial. I am satisfied in this case that the plaintiff cannot succeed in the action which he has

[6] (1868) 15 Gr. 399. [7] (1868) 15 Gr. 431.

Judgment.

Wetmore, J.

brought, and the case therefore comes within what was laid down by CHITTY, J., in the *Republic of Peru* v. *Peruvian Guano Company*. I am also satisfied that the Court cannot grant the relief asked for when an action has been brought in the way, and that the case comes therefore within *Dreyfus* v. *Peruvian Guano Company* (*supra*).

It was urged that the defendant had not come promptly for relief, and that he has also debarred himself from such relief by pleading. It was held in *Tucker* v. *Collinson*,[s] that the Court could strike out a frivolous or vexatious action even after reply. I think in this case the action is so clearly bad that the plaintiff ought not to be allowed to keep his action alive. It was also urged that a pleading should not be struck out which is capable of amendment, and that this statement of claim could be amended by claiming a decree that the plaintiff is entitled to the custody of the child. Such a declaration would be frivolous, because that is self-evident. One might as well ask, in an action brought for the detention of a horse which the plaintiff says is his property, for a declaration of the Court that the horse is his property. It was further urged that I could only strike out the statement of claim. Rule 151 authorizes the Judge to go further than that, because it authorizes him to dismiss the action. I will order therefore that this action be dismissed with the costs of this application and of appearance. The defendant will be entitled to no costs of his pleading.

Action dismissed.

REPORTER:

W. A. Nisbet, Esq., Moosomin.

[s](1886) 16 Q. B. D. 562; 34 W. R. 354; 55 L. J. Q. B. 13, 224; 54 L. T. 263.

CLARKE v. FAWCETT.

5 W. L. R. 322.

Reply—Delivery after time allowed by Rules—Validity.

A reply delivered more than eight days after the delivery of the defence without any order extending the time is not a bad pleading, and cannot be set aside for that reason alone, at least if no further step has been taken by the defendant before delivery of the reply.

[WETMORE, J., *12th, 15th February, 1907.*

Statement. This was an application on the part of the plaintiff to strike out the reply delivered by the plaintiff on the ground that it was not delivered until more than eight days after the delivery of the statement of defence, no order having been made extending the time.

Argument. *E. A. C. McLorg,* for the plaintiff.

J. T. Brown, for the defendant.

[*15th February, 1907.*]

Judgment. WETMORE, J.:—In *Graves* v. *Terry,*[1] the defendant moved the Court for judgment upon admission of facts in the pleadings. This application was made before the rules now in force in England came into operation. The rules then in force provided that the plaintiff could deliver his reply within three weeks after delivery of the defence, and then it was provided by another rule that if the plaintiff did not deliver a reply within the period allowed the pleadings should be deemed to be closed at the expiration of that period, and the statement of facts in the pleading last delivered should be deemed to be admitted. The Court held that the reply was a perfectly good one. Field, J., in delivering judgment, says: "But the reply, though delivered after time, is a perfectly good one unless the Act says it shall not be so. No doubt the Act does clearly say that, so long as no reply is delivered

[1](1881) 9 Q. B. D. 170; 51 L. J. Q. B. 464; 30 W. R. 748.

Judgment.
Wetmore, J.

after the time has elapsed, the pleadings may be taken to be closed, and in strictness the defendant is entitled to judgment. But the question would then be whether the plaintiff deliberately intended not to reply." Then he goes on to say: "No case has gone so far as to decide that where, as here, a reply has been actually delivered, judgment can be signed against the plaintiff;" and the motion was refused.

A very important alteration was made by subsequent rules of practice in England, and by the rules in *The Judicature Ordinance*.[2] Rule 153 provides that, "A plaintiff shall deliver his reply, if any, within eight days after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or Judge." Then rule 156 provides that, "If the plaintiff does not deliver reply or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue." These Rules were taken from the English Rules in force at the time of the enactment of *The Judicature Ordinance*. These Rules make the consequence of not delivering a reply to a defence just the opposite of what it was made by the rules under which *Graves* v. *Terry* was decided, but they do not alter the principles upon which the Court in that case laid down the practice as they did, that the reply was a good one though delivered after time, inasmuch as the Act did not say that it should not be so. The Ordinance in this case does not state that the reply shall be bad or invalid if delivered after eight days.

I will also refer to the case of *Wright* v. *Wright*.[3] The Ontario rules of practice provided that if a plaintiff did not

[2] Con. Ord. (1898) c. 21. [3] (1889) 13 P. R. 268.

Judgment. Wetmore, J.

deliver his reply within three weeks after the defence or the last of the defences should have been delivered, the pleadings should be closed. ROSE, J., held that a pleading delivered after the time could not be set aside unless at any rate notice of trial had been given or some other step taken upon the "closed pleadings" as he describes them. I cannot escape the authority of these two cases, and I must hold that the application must fail. No step was taken in this case before the reply was delivered.

Application dismissed with costs.

REPORTER:

W. A. Nisbet, Esq., Moosomin.

SHEDDON v. CITY OF REGINA.

5 W. L. R. 436.

Master and servant — Hiring at monthly salary at pleasure of master.

The hiring of a municipal servant "at the pleasure of the council at $75 per month," is a monthly hiring at the pleasure of the municipality, and the employee cannot, upon leaving his employment in the course of any month, recover any salary in respect of that part of the month which has elapsed.

[NEWLANDS, J., *9th March, 1907.*

Statement.

This action was brought to recover twenty-two days' wages as assistant to the secretary-treasurer of the defendants, at the rate of $75 per month, in all $52.20. The defence was that the plaintiff was engaged by the month and left the employ of the defendants without due notice. The plaintiff was employed by the defendants under a resolution of the Council passed on the 13th March, 1905, which was as follows: "Moved by Alderman McAra, seconded by Alderman Cooper, that J. H. Sheddon be appointed clerk in the secretary-treasurer's office during the pleasure of

Statement.

the council, at a salary of $65 per month. Subsequently, on the 7th day of August, 1905, another resolution was passed by the council as follows: "Moved by Alderman McAra, seconded by Alderman Balfour, that on and after first of September, 1905, the salary of J. H. Sheddon, assistant to the secretary-treasurer, be $75 per month." On April 10th, 1906, the plaintiff sent in his resignation to the defendants and left their employ on the 21st of that month, without such resignation having been accepted by the defendants. The plaintiff's salary had been paid at the end of each month.

Argument.

H. V. Bigelow, for plaintiff.

F. W. G. Haultain, K.C., for defendant.

(*March 9th, 1905.*)

Judgment.

NEWLANDS, J.:—The ordinary principle which applies to cases of hiring is: "When a servant, whose wages are due periodically, refuses to perform his part of the contract, and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of the time during which he has served since the last periodical payment of wages."[1] It is contended, however, on the part of the plaintiff that his appointment having been made "during the pleasure of the council," the council was at liberty to dismiss him at any time, and he had the corresponding right of resigning at any time. In support of this proposition *Rex* v. *Christ*[2] was cited. In that case DALY, J., said: "In *Rex* v. *Towbridge*, which was decided in 1816, but was not reported, it was held that a hiring for as long as the pauper pleased was at will." In *Rex* v. *Christ* the question was whether a pauper had obtained a settlement where he went to work for his master for his board and clothes to remain as long as

[1] Smith, Master and Servant, 5th ed., p. 182. [2] (1824) 3 B. & C. 459.

Judgment. Newlands, J.

he pleased, and it was held that he had not. There could be no broken term for which wages could be claimed because no term was specified, and it is therefore not a case in point.

The plaintiff's counsel also cited *Town of Sydney* v. *Hill*,[3] where HENRY, J., in delivering the judgment of the Court, said: "There is nothing to show that the defendant was appointed or engaged for any fixed or definite period, and therefore he was obviously free to resign his position at any time as in fact he ultimately did. The defendant not being bound to serve, the town council was clearly free to increase or diminish the salary as they might think fit from time to time." The facts in this case as set out in the judgment are rather obscure, so that it is not possible to tell what the action was about, but from the above extract from the judgment it would appear that this case does not apply to the present, for the same reason as *Rex* v. *Christ*, there being no hiring for a definite time.

I can find no other cases on this point, and it seems that when a person is hired by a municipal corporation he remains there until they dispense with his services. The only difference between the hiring of servants by municipal corporations and other persons is that the municipality hires them only during the pleasure of the municipality. The provision in *The Municipal Ordinance*[4] is: "All municipal officers shall hold office until removed by the council or as expressed in their appointments." In this case the plaintiff was hired "during the pleasure of the council at $75 per month."

In *Down* v. *Pinto*,[5] the plaintiff was engaged by the defendant and was "to remain with me for at least three years at my option. Salary £250 per annum." POLLOCK, C.B., in delivering judgment, said: "The case has been presented to us in two views: First, it is said that this is

[3](1893) 25 N. S. R. 433. [4]Con. Ord. (1898) c. 70, s. 91.
[5](1854) L. R. 9 Ex. 327; 23 L. J. Ex. 103; 2 W. R. 202.

an agreement for a service which the defendants might put an end to at any period; and that the expression 'at my option' extends over every moment of the service. In my opinion that argument is wholly untenable. The words 'at my option' only mean that the defendants are to have the option of saying whether the service shall continue for one, two, or three years. The hiring was a yearly hiring, but it gave the defendants a right to insist upon the service of the plaintiff for three years. After the expiration of the first year, the defendants could not determine the service until the end of the second year, and so with respect to the second and third years. The plaintiff could only determine the service at the end of the third year."

Judgment. Newlands, J.

It seems to me the principle laid down in this case applies to the present. The plaintiff was hired during "the pleasure of the council at $75 per month." This would, I think, be a monthly hiring to last so long as it pleased the defendants, and the plaintiff could be dismissed at the end of any month without notice. If this is the proper construction to put on this hiring plaintiff certainly could not leave until the end of a month, and if he should do so he would forfeit his whole month's salary. If it had been at the rate of $75 per month a different construction might be put upon it, but where it is for a definite period for a specific amount he must serve the whole term before he can recover anything. This is in accordance with the general rule which applies to all contracts, that where the plaintiff has contracted to do an entire work for a specific sum he can recover nothing unless the work be done.

Judgment for defendants with costs.

PURDY v. COLTER.

5 W. L. R. 439.

Homestead—Exemption for benefit of execution debtor and his family —Contest between execution creditors and mortgagees — Priority.

The exemption of a homestead from seizure under execution is for the benefit of the debtor and his family only, and the claim of execution creditors to the proceeds of the sale of the land will consequently be preferred to that of mortgagees subsequent to the registration of the writs of execution where the execution debtor can in no event have any interest in such proceeds.

[NEWLANDS, J., *11th March, 1907.*

Statement. This was an application by the sheriff for the payment out to him in respect of executions in his hands of a fund in Court. Certain lands of the defendant had been sold at the instance of the first mortgagee and after the claims of the plaintiff and the second mortgagee had been satisfied there remained a balance which the sheriff sought to have paid to him in part satisfaction of six writs of execution, which together amounted to considerably more than the fund. After the writs of execution had been filed in the Land Titles Office two more mortgages were registered against the lands, the amounts secured in this way being also in excess of the fund.

Argument. *H. V. Bigelow, C. E. D. Wood, A. L. Gordon,* and *J. A. Cross,* for different execution creditors.

W. M. Martin, for third mortgagee.

J. F. L. Embury, for defendant, objected that one of the quarter sections sold was the homestead of the defendant, and as such exempt from seizure, and that consequently the fund was not available in satisfaction of the executions.

[*11th March, 1907.*]

Judgment. NEWLANDS, J.:—It was conceded that if the defendant's claim to exemption was allowed he would receive no part

of the money in Court since it would go to the subsequent mortgagees. Judgment. Newlands, J

The object which the Legislature had in view in passing *The Exemption Ordinance*,[1] was to provide a home for the debtor and his family. This appears from the provisions of secs. 2, 5, and 6, which make it clear that the object of the Ordinance is to provide a home for the debtor and his family. The right must therefore be a personal one in him and exercisable only for the benefit of the debtor or his family.

In this case neither the debtor nor his family can derive any benefit from his claim of exemption, because if these exemptions were allowed the money in Court would go to the subsequent mortgagees. The claim of exemption is therefore not for the benefit of the execution debtor or his family, but for the benefit of subsequent mortgagees. They have no right themselves to claim that the defendant's homestead is exempt, nor do I think that the defendant can in their interest claim an exemption. If no benefit can inure to the defendant or his family from his claim there is no exemption for him to claim and I have to so hold in this case. The money in Court will therefore be paid over to the sheriff for the execution creditors.

Order accordingly.

[1] Con. Ord. (1898) c. 27.

HATFIELD v. IMPERIAL BANK.

The Bank Act—Security in Form C.—Rancher—Description of property.

A rancher whose business is raising cattle is not, no matter how large his transactions may be, "a wholesale purchaser or shipper of or dealer in live stock," within the meaning of s. 88 of *The Bank Act*, R. S. C. (1906), c. 29.

The description in a security in the form in Schedule C of that Act must be sufficient to identify the property.

[SIFTON, C.J., *26th March, 1907.*

Statement. This was an action for the delivery to the plaintiff of a certain registered stallion, or the payment to him of its value. He claimed it as mortgagee under a chattel mortgage from one H. E. G. Cook, a rancher, and the defendant justified their detention of it under a security given by Cook to them to secure an advance. This security was in the form in Schedule C. to *The Bank Act*, R. S. C. (1906), ch. 29, and referred generally to "all unbranded horses and cattle," without specifying their whereabouts. The stallion in question had not become Cook's property until after the security had been taken by the defendants.

Argument. *Clifford T. Jones*, for plaintiff.

James Short, for defendant.

[*March 26th, 1907.*]

Judgment. SIFTON, C.J.—The special privileges granted by Parliament to the chartered banks must be construed strictly and by reference to the general law of the country.

In this case the evidence shows that the man who obtained the loan was a rancher. Now, a rancher, in my estimation at least, is no more a wholesale dealer because he raises cattle, no matter whether he has fifty head or five thousand, than a farmer is who deals in grain which he raises in large crops. There appears from the evidence to have been, so far as my opinion goes, an entire misappre-

hension of the effect of sec. 88 of *The Bank Act*, in regard to these people being treated as wholesale dealers or wholesale purchasers or shippers; they make their money not in that way, but as cattle breeders or cattle growers, and that they sell either in large or small numbers is merely an incident. Judgment. Sifton, C.J.

But even if a rancher could give proper security under sec. 88 of *The Bank Act*, there are two other grounds in this particular case for holding the document in question invalid. In the first place the particular animal in question, so far as the evidence shows, was not the property of the man that secured the loan at the time the loan was secured or for several months afterwards, and, unless specially mentioned and described, it could not possibly come under the description given in the document. In the second place this description is in any event insufficient. It is quite clear that under sec. 88 of *The Bank Act* there must be a proper description of the goods, whether cattle, horses or wheat; there must be a description by which those goods may be located. The description under which this animal is claimed, namely, "all unbranded horses and cattle," without even a location, is not a proper description under the Act. There should be just as good a description under this Act as under a chattel mortgage—a description by reference to which the article can be identified.

On any of these grounds I should hold that the plaintiff was entitled to possession of this stallion, and he is therefore entitled to its return or the sum of $500 as its value, with costs.

Judgment for plaintiff.

DOMINION BANK v. FREEDT.

5 W. L. R. 589.

Where the rules provide that a motion in Chambers shall be made by notice, the procedure by summons cannot be adopted.

[WETMORE, J., *5th, 6th April, 1907.*

Statement. This was a summons under Rule 169 of the Judicature Ordinance, Con. Ord. 1898, ch. 21, to have the action dismissed for want of prosecution.

Argument. *T. D. Brown,* for plaintiffs, objected that, as the rule provides that the defendant may on notice apply for and obtain the order, the Judge had no power to entertain the application by summons.

W. A. Nisbet, for defendant.

[*April 6th, 1907.*]

Judgment. WETMORE, J.—Rule 169 provides that the defendant may on notice apply for and obtain an order to dismiss for want of prosecution. Rule 458 provides that "applications for summonses, rules and orders to show cause and applications authorized to be so made by these rules may be made *ex parte*. Other motions in Court shall be by notice of motion and other applications in chambers by summons except where otherwise specially provided." Now, in applications of this character it is provided that they should be made otherwise than by summons, and that procedure so prescribed must be followed. I held as far back as February 20th, 1894, in *Fortesque* v. *Bell*,[1] that where the Ordinance prescribes than an application should be made by notice I have no jurisdiction to proceed by summons. This application therefore must be refused, and refused with costs. The error was not a very grievous one, and I might under ordinary circumstances be disposed to order a lump sum to be paid for costs,

[1] Not reported.

but I think the defendant was a little bit quick in making this application. Under the circumstances I have no hesitation in ordering this application to be dismissed with costs generally. Judgment. Wetmore, J.

Summons discharged.

CYR v. O'FLYNN.

5 W. L. R. 524.

Disposition of application—New application for same order—Hearing on the merits.

Where a party defendant had applied to be struck out, but his application dismissed on the ground that he had not entered an appearance.

Held, that a second application for the same purpose could not be entertained.

[NEWLANDS, J., *9th April, 1907.*

This was an application to strike out the name of the defendant Lachance as a party defendant and to vary in respect of costs an order dismissing a former application for the same cause on the ground that at the time the application was made the defendant had not entered an appearance. Statement.

H. V. Bigelow, for plaintiff, objected that a former application for the same object having been disposed of, the present application could not be entertained. Argument.

C. E. D. Wood, for defendant Lachance. On the former application the merits were not considered, and consequently the present application is properly made.

[*9th April, 1907.*]

NEWLANDS, J.—After a careful consideration of the English authorities, I have come to the conclusion that I have not authority to make the order. In a number of Eng- Judgment.

Judgment. Newlands, J.

lish cases an order was refused, although all the necessary material was produced, because an application for the same order had been previously refused on the ground that the material then produced was insufficient. In these cases it can hardly be said that the application disposed of by the first order was heard on its merits. It can only be said that it was disposed of on the merits of the material produced.

In the *Queen* v. *Pickles*,[1] where a rule for a mandamus obtained by churchwardens had been discharged with costs on the ground that their affidavits were imperfect, and a subsequent rule was obtained by the same parties on the same ground on amended affidavits, the Court refused to hear the second application on the merits and discharged the second rule also with costs.

In *Queen* v. *Manchester*,[2] it was held that where a party applying for a certiorari fails from the incompleteness of his affidavits he will not have a certiorari granted to him upon fresh affidavits supplying the defect. LORD DENMAN, C.J., in giving judgment, said: "Now if the Court can in any case be deprived of discretion as to granting a certiorari it is under such circumstances as these. For the rule of practice, if not altogether universal and inflexible, is as nearly so as possible, that the Court will not allow a party to succeed on a second application who has previously applied for the very same thing without coming properly prepared."

In *Joynes* v *Collinson*,[3] where the defendant applied for security for costs and his affidavit was defective because he swore he was informed and believed plaintiff resided abroad, but did not give the grounds of his belief, a second application in which this defect was cured was refused because the previous rule was disposed of on the ground of the insufficiency of the affidavit.

[1](1842) 12 L. J. Q. B. 40; 6 Jur. 1039. [2](1857) 8 A. & E. 413; 5 W. R. 751; 29 L. T. 247. [3](1844) 13 M. & W. 588; 2 D. & L. 449; 14 L. J. Ex. 2; 8 Jur. 1010.

Judgment. Newlands, J.

In all these cases the second application was refused because the party had not come properly prepared the first time, and in none of them was the first application heard on its merits.

The rules which apply in cases like the present are concisely given by LORD JUSTICE A. L. SMITH, in *Preston Banking Co.* v. *Wm. Allsup & Sons*,[1] where he says: "This is not an application to rehear a matter before the order has been drawn up and perfected. Nor is it an application to vary an order which has been drawn up not in accordance with the order pronounced by the Judge. Nor is it an application that the Judge should make an order supplemental to the order drawn up; but it is an application that he should rehear the order made and perfected, and make another in its place. In my opinion the Judge had no jurisdiction to do this, though in the three former cases he might have done so."

The summons will, therefore, be dismissed with costs to plaintiff in any event.

Application dismissed.

[1](1895) 1 C. D. p. 141; 64 L. J. Ch. 196; 12 R. 51; 71 L. T. 708; 43 W. R. 231—C. A.

JOHN ABELL ENGINE AND MACHINE WORKS CO. LTD. v. SCOTT.

6 W. L. R. 272.

Homestead — Residence of execution debtor—Exemption—Advertisement of sale under execution — Suspension of publication of newspaper—Substantial compliance with Rule 354—Instituting proceedings to confirm sale—Swearing affidavit of execution of transfer.

A quarter section of land, although all the land owned by an execution debtor, is not his "homestead" within paragraph 9 of s. 22 of *The Exemptions Ordinance*, where he has not occupied it for nine years and appears to have no *animus revertendi*.

Where the advertisement of a sale under an execution had been published in a weekly paper, and had appeared in every issue of the paper published during two months, but there had been no issue in two weeks of the period.

Held, that, it not appearing that the sale of the property had been affected in any way, there had been a sufficient compliance with the provisions of Rule 364 of *The Judicature Ordinance*.

Proceedings to confirm a sale of lands under a writ of execution are proceedings under *The Land Titles Act, 1894*, not in the cause in which the writ issued, but that the proceedings are entitled in the cause and not "In the matter of *The Land Titles Act*," is nevertheless no objection to them.

An affidavit of execution of a transfer upon a sale under a writ of execution sworn before the Clerk of the Court, is bad, but leave may be given to reswear it pending an application to confirm the sale.

[WETMORE, J., *15th, 16th March, 1907.*
[*11th May, 1907.*

Statement. This was an application by Henry Abell to confirm the sale to him of certain lands of the defendant under a writ of execution issued in the action. The facts sufficiently appear from the judgment.

Argument *E. A. C. McLorg*, for applicant.

E. L. Elwood, for defendant.

[*11th May, 1907.*]

Judgment. WETMORE, J.—The land in question, consisting of a quarter section, or 160 acres, was according to Scott's affidavit patented to him as a homestead on the 13th August, 1892, he having taken up the same as a homestead under the provisions of *The Dominion Lands Act*.[1] He lived on

[1] R. S. C. (1886) c. 54.

Judgment.
Wetmore, J.

the land until the month of November, 1898, when he moved therefrom, and since such removal he has continuously rented it down to the present time. He has not taken up any other land in this Province or in the Province of Alberta or elsewhere as a homstead, and he states in his affidavit that this quarter section is the only land which he ever owned or now owns as a homestead. It is claimed that this land is exempt from seizure under sec. 2, par. 9 of *The Exemptions Ordinance*.[2]

It is urged that the expression "homestead" used in par. 9 of this section means a homestead within the meaning of *The Dominion Lands Act*.[3] I am of opinion that this contention is not correct. So far as I am able to discover the expression in the last mentioned Act relates entirely to the entry for the land. The Act provides that a person who intends to apply for land, which he may secure by performing certain duties of improvements and settling upon the land and without the payment of money (except a small entry fee), may make what is called a "homestead entry." When a patent is issued in respect to any such land it is not described as a homestead. Moreover, if I held the contention urged on behalf of Scott to be correct the result would be that paragraph 9 of the section would only apply to land with respect to which the owner had performed homestead duties under *The Dominion Lands Act*[4]; it would not apply to land which the owner had acquired by purchase or in any other way.

I am satisfied that the Legislature never intended that the paragraph should have such a limited operation. The

[2](1898) Con. Ord. c. 27, s. 2, which in part provides as follows: "The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely: . . . (9) The homestead, provided the same be not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon. (10) The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of fifteen hundred dollars." [3] *Supra.* [4] *Supra.*

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intention of the paragraph was to secure to persons of the farmer class as against their creditors a means of livelihood by which they could support themselves and their families. It might be urged that paragraph 10 of sec. 22 of *The Exemptions Ordinances*,[5] would effect that purpose if I gave paragraph 9 the limited operation contended for. But I am of opinion that cases would frequently arise when that paragraph would not carry out the intention of the Legislature so far as the farming classes are concerned. I may add that I am inclined to the opinion that paragraph 10, while not limited to such purpose, is intended principally to cover the cases of persons residing in cities, towns, or villages, and having small holdings.

Now, the word "homestead" in an English word, and is found in all the dictionaries. I see no reason why it should not in construing the Ordinance in question be given its plain, ordinary meaning. I find in *The Standard Dictionary* that it is defined as follows: "The place of a home; the house, and adjacent land occupied as a home." The land in question cannot under such a definition be held to be the homestead of Scott. Neither he nor his family have lived there for nearly nine years. It has not during all that time been occupied by him or them as a home. He has rented it to other persons. He does not state, or can I infer that he left the property *animo revertendi*. In fact under the circumstances I must infer that he has no present intention of returning to it. I therefore hold that the land is not exempted from seizure under execution.

It is claimed in the next place that the sale was not sufficiently advertised. Rule 364 of *The Judicature Ordinance*[6] provides that the "officer shall not sell the land . . until three months notice of such sale has been posted in a conspicuous place in the sheriff's and clerk's offices respectively and published two months in the newspaper nearest

[5] Quoted *supra*. [6] Con. Ord. (1890) c. 21.

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the land to be sold." The sale took place on the 9th February, 1907. The notice of sale was published in the "Elkhorn Advocate" (the newspaper nearest the land) in the issues of the 8th, 15th, 22nd and 29th of November, and of the 6th, 13th and 20th of December and of the 24th and 31st of January. This paper was published weekly; that is, that was the usual course. It will be observed that the notice was not published on the 27th December or the 3rd, 10th or 17th of January. In order to make two months publication in successive weekly issues of the paper it ought to have been published on the 27th December and 3rd of January. The reason why it was not published is that there was no issue of the paper between the 20th December and the 24th January. The proprietor after the 20th December proceeded to instal a new press and engine, he shipped his old press away, and owing to delays in the receipt of parts of his engine he was not able to resume publication of the newspaper until the 24th January.

It has been urged that the provisions in the Ordinance respecting publication of notice are merely directory, that the omission to comply therewith at the most is only an irregularity and will not avoid the sale, and I have been referred to *Jarvis* v. *Brocke*[7] and *Connor* v. *Douglas*.[8] I may say with great diffidence that I would hesitate before I adopted the conclusions reached by the Courts in these cases in so far as the effect of an omission to publish the notice of sale for the term prescribed by the Legislature is concerned. I am inclined to the opinion that the law was more correctly laid down by DRAPER, C.J., and MOWAT, V.C. Moreover, the section of the Ordinance is not merely imperative, it does not say that the officer shall publish the notice, it says that he "shall not sell" the lands until the prescribed publication is made; it is prohibitive. It is not necessary, however, for me to express a decided opinion

[7] (1853) 11 U. C. Q. B. 299. [8] (1868) 15 Grant 456.

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upon the question, because I am of opinion that the requirements of the Ordinance have been complied with. That is, starting from the 8th November, when the first publication of the notice appeared, it was published in each and every issue of the paper for two months. That is, the notice appeared in every issue of the paper that was issued during those two months. In *Connor* v. *Douglas*,[9] DRAPER, C.J., is reported as follows: "When it was enacted that the list should be published for three calendar months the meaning was that in every Gazette published in the three months next after the first publication of such advertisement the publication should be repeated . . . I conclude therefore that under the Act . . the sheriff's duty was to publish the list of lands to be sold for taxes together with . . a notification of the day of sale in each weekly number of the Royal Gazette which should be issued within three months from the first publication." I think that this is very fairly put and I agree with it. The principle of it is applicable to this case. It was urged that to give effect to that would involve this proposition, namely, if a notice appeared in one or two issues of a paper and the subsequent issues were for some reason stopped, it would be a compliance with the requirements of the Ordinance. I do not see that that necessarily follows, because the Court must be careful to see that there is a substantial compliance with the Ordinance. In this case only two issues of the paper were not made during the two months, no person has been misled, and the sale of the property has not been affected in any way, at least, there was no claim that it had been. I therefore hold that in this matter there has been a substantial compliance with the provisions of the Ordinance.

It was further urged that the proceedings on the application should be intituled "In the matter of *The Land Titles Act, &c.,*" instead of being intituled, as they were,

[9] (1868) 15 Grant 456, at p. 468.

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in the Court and cause in which the execution issued. I am of opinion that the proceeding to confirm a sale under execution is a proceeding under the Act, and not a proceeding in the Court. But I do not see that the intituling them in the Court and cause invalidates them, nor do I see that the omission to intitule them "In the matter of *The Land Titles Act, &c.,*" invalidates them either. In fact I do not see why they need be intituled at all, although to intitule them in the Court and cause may afford a convenient method of setting forth some of the facts without prolixity.

The affidavit of the subscribing witness to the execution of the transfer was sworn before the clerk of the Court. This is clearly bad. Section 145 of *The Land Titles Act, 1894*,[10] prescribes the officers before whom affidavits of this character shall be sworn and the clerk is not one of them. It was urged that it was not necessary to bring the transfer before the Judge on an application to confirm a sale, that the application is to confirm the sale not the transfer. That is so, but the transfer is part and parcel of the sale. It is the instrument by which effect is given to it, and sec. 132 of the Act provides that the order of confirmation is to be indorsed on or attached to the transfer. This clearly contemplates that it shall be brought before the Judge, and if brought before him he must pass upon it. I was asked to allow the attesting witness to swear to the affidavit before a proper officer. This was objected to on the ground that the application must stand or fall on the material produced when the appointment was taken out, and I was referred to *Kerr Co.* v. *Suter*,[11] decided by me. That was an application for security for costs, and the affidavit in question, which was the only one on which the application was based, was bad in substance. I ought not to have issued a summons upon it at all. In this case the material on which the appointment was made was substantially cor-

[10] R. S. C. (1906) c. 110. [11] (1907) 5 W. L. R. 256; Vol. VI., Part 2, Terr L. R. 255.

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rect, only the attesting witness, through what I conceive to be a very natural mistake, swore to his affidavit before the wrong officer. It is quite usual to allow mistakes of that character to be corrected. Moreover, sitting as I am in this matter as a *persona designata*, I am not as strictly bound by technical rules as I would be if I was dealing with a matter in the Court. I will allow the affidavit to be re-sworn. Subject to that being done I will confirm the sale.

Sale confirmed.

LEIB v. LEIB.

6 W. L. R. 392.

Alimony—Adultery on part of wife.

Where adultery is proved to have been committed by a wife after her desertion by her husband, she will not be granted alimony.

[NEWLANDS, J., *16th July, 1907.*

Statement.

This was an action for alimony on the grounds of desertion, cruelty and adultery on the part of the husband, and these grounds were proved to be true by evidence given at the trial. The defence was adultery on the part of the plaintiff subsequent to the desertion of her by her husband.

R. Rimmer, for plaintiff.

W. M. Martin, for defendant.

[*16th July, 1907.*]

Judgment.

NEWLANDS, J.—It was argued by Mr. Rimmer, counsel for plaintiff, that adultery of a wife after desertion was no bar to an action for alimony, and he cited *Goodden* v. *Goodden*,[1] where it was decided that the Court had the power to grant alimony in the case of a judicial separation for cruelty on the part of the wife. In giving the judgment of the Court of Appeal, KAYE, L.J., says: "The granting or refusing of alimony after a divorce *a mensa*

[1] (1891) P. L.; 65 L. T. 542; 40 W. R. 49.

et thoro seems to have been a matter upon which the ecclesiastical Courts exercised a large discretion. It appears to have been their practice not to grant alimony to a wife divorced *a mensa et thoro* on the ground of her adultery, but no doubt is thrown upon the jurisdiction of the Court to do so.[2] Judgment. Newlands, J.

In Ontario, where the statutory provisions as to granting alimony are exactly similar to our own, it has always been held that adultery was a bar to an action for alimony against a husband; for example in *Severn* v. *Severn*,[3] the Court deprived the wife of alimony and exonerated the husband from paying same under an existing decree on account of adultery committed by her; and in *Nelligan* v. *Nelligan*,[4] a Divisional Court held in appeal that the only bar to an action for alimony against a husband who is living separately from his wife is cruelty or adultery on the part of the applicant.

In this case I have found the wife guilty of adultery and will, therefore, dismiss the action.

Action dismissed.

CLARK v. CITY OF CALGARY.

6 W. L. R. 622.

Municipal law—Non-repair of streets—Right of action.

The provisions of *The Municipal Ordinances* in force in 1893 or subsequently relating to the repair of sidewalks, etc., are not applicable to the City of Calgary, although not expressly declared inapplicable by the special Ordinance incorporating the city which was passed in that year.

Although a duty to repair streets may be expressly imposed upon a municipality, no action lies against it for damages for injuries resulting from non-repair.

[*Court* en banc, *10th July, 16th July, 1907.*

An appeal from the judgment of HARVEY, J., 5 W. L. R. 292, in favour of defendants in an action for damages for Statement.

[2] See *White* v. *White* (1859), 1 Sw. & Tr. 591; 6 Jur. (N.S.) 28; 1 L. T. 197. [3] (1867) 14 Grant 150. [4] (1895) 26 Ont. R. 8.

Statement. injury suffered by the plaintiff caused by the non-removal of snow and ice from one of the streets in the city of Calgary.

James Short, for plaintiff. The City of Calgary has never been exempted from the operation of *The Municipal Ordinance* and its provisions still govern the corporation. The liability for failure to repair sidewalks, etc., contained in sec. 275 of *The Municipal Ordinance*, Con. Ord. (1888) chap. 8, in force at the date of the city's charter, Ordinance No. 33 of 1893 was continued by sec. 1 of that Ordinance.[1]

John S. Hall, K.C., for defendant.

[*16th July, 1907.*]

Judgment. The judgment of the Court (SIFTON, C.J., WETMORE, and SCOTT, JJ.), was delivered by

WETMORE, J.—I am rather inclined to the opinion that the portion of section 1 of the charter was merely intended to cast upon the city the financial obligation, or obligations of a like character, for which the town of Calgary was liable at the time of the passing of the charter and was not intended to practically incorporate into the city's charter sec. 275 of *The Municipal Ordinance* then in force or any portion of that Ordinance. Taking the whole purview of the proviso into consideration, it seems to be more aimed at the carrying over against the city the liabilities, etc., which, at the time of the passing of the charter, existed or had accrued against the town in favour of any person or corporation, and the performance by the city of any present duty which the town at the time was bound to carry out as

[1] Section 1 of Ord. No. 35 of 1893, incorporating the City of Calgary, is as follows: "Provided further that the corporation of the municipality of the town of Calgary shall not be deemed to be dissolved by this Ordinance, but the same shall always be deemed to be the same corporation as that known hereunder as 'The City of Calgary.' And provided further that the said corporation or 'The City of Calgary' shall not be by virtue of this Ordinance relieved from any duty, obligation, liability or indebtedness heretofore or now owing, existing or due to any person, persons or corporations by reason of or by virtue of any Act, statute, law or ordinance, contract or proceeding heretofore passed, existing, or in force."

Judgment.
Wetmore, J.

regards any person or corporation or which such person or corporation had at such time the right to claim or enforce as against the town. It did not intend to introduce the provisions of *The Municipal Ordinance* so as to create any subsequent duty, obligation, liability or indebtedness against the City.

The charter contains very full provisions for the government of the city, and for laying out and controlling its streets, for constructing and controlling sewers, drains, ditches and water courses, and for building and repairing sidewalks, and for removing snow and ice from sidewalks. Section 158 provides that "Every public street, road, square or other highway within the city shall be vested in the city, and shall be kept in repair by the corporation." This section embraces all that was required to be done in so far as the repairing is concerned by sec. 275 of *The Municipal Ordinance* hereinbefore mentioned, because repairing the streets, roads, squares and highways embraces and includes repairing the sidewalks, crossings, sewers, culverts, approaches and grades. I can nowhere discover in these enactments or any other portion of the charter any enactment giving a right of action for default to keep in repair any such works, and I cannot bring my mind to the conclusion that this provision was left out because the Legislature intended that section 275 of *The Municipal Ordinance* was applicable. The preamble to the charter recites that the petition prayed, that "*The Municipal Ordinance* and all amendment thereto be repealed so far as they affect the said corporation and that all necessary municipal powers be granted to the City of Calgary," and that "it is expedient to grant the prayer of the petition." No doubt the recital is no part of the enactment, but it can be referred to for the purpose of ascertaining the intention of the Legislature where such intention is not otherwise as clear as it might be. In view of this recital and the very full provisions of the charter and the general character of

Judgment. Wetmore, J.

them, I am of opinion that the provision relating to the right of action was omitted from the charter deliberately, that sec. 275 of *The Municipal Ordinance* referred to did not apply to the city, and that no corresponding section of a similar character in any subsequent Ordinance is applicable.

It is clear that the act complained of is a non-feasance; and in *Pictou* v. *Geldert*,[2] *Sydney* v. *Bourke*,[3] and *St. John* v. *Campbell*,[4] it was held that a corporation such as the defendants' is not liable to a civil action for negligence by way of non-feasance unless authority is given by the Legislature to maintain such an action, and as the provisions which were in the old ordinances are not applicable to the city, there is no such authority to bring an action against the defendants for such a cause. It was urged that this case was distinguishable from the three cases which I have cited because there was a duty or obligation cast upon the defendants by sec. 158 of its charter to repair the streets, etc., but in *Sydney* v. *Bourke* the Lord Chancellor in giving judgment[5] recognizes the law to be that the casting upon a corporation the mere duty to repair does not give right to a civil action. He is reported as follows:

"In the series of cases ending with *Cooley* v. *Newmarket Local Board*, in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants, subject-

[2] (1893) A. C. 524; 63 L. J. P. C. 37; 69 L. T. 510; 42 W. R. 114, P. C. [3](1895) A. C. 433. [4](1895) 26 S. C. R. 1. [5]At p. 443.

ing them to indictment in case of its breach, they could not be sued, and that there was nothing to show that the Legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability." Judgment.

I am of opinion, therefore, that the judgment of the learned trial Judge was correct, that his judgment must be affirmed and this appeal dismissed with costs.

Appeal dismissed with costs.

RE SANDISON.

6 W. L. R. 615.

Will—Vesting of shares—Divide and pay—Survivorship.

A testator by his will directed his executors and trustees "to divide all my estate share and share alike among my children and to pay" his or her share to each upon their respectively attaining twenty-one or marrying. The income, and if necessary part of the corpus, was to be expended upon maintenance and education, and regard was to be had to this necessity in paying over any share. If none of his children survived the testator the estate was to go to charitable institutions.

Held, that the direction to divide could not be separated from the direction to pay, and that consequently the shares did not vest, but the share of a child who survived the testator and died before the time for payment arrived was divisible among the children who survived until that time.

[*Court en banc, 10th, 17th July, 1907.*

Appeal from the judgment of HARVEY, J., 5 W. L. R. 316, on an application by the widow of a testator to have determined certain questions arising under the will dated 10th March, 1905, which was, so far as it is material, as follows: Statement.

"I give all my property both real and personal unto my said trustees in trust, to convert the same into money whenever and at such times as my said trustees shall think proper. And to invest the proceeds in any manner they may deem best, with power to vary such investments at their discretion, and to pay the income from such investments, or any income arising out of my estate, to my children for their proper maintenance and education or to such as are

Statement. under age. Should the said income not be sufficient then my said trustees are to use such portions of my estate as they may deem best for such support and education. Should there be any surplus from the income of my said estate, my said trustees are to invest the same as they deem best.

"I desire my trustees to divide all my estate share and share alike among my children and to pay to each of my sons on attaining the age of twenty-one years or my daughters in attaining the said age of twenty-one years or marrying, his or her share. Provided that such share or shares can be paid without in any way being injurious to the rest of my estate, and in arriving at the proportion due to each child I wish my trustees to take into consideration the amount that would be necessary to maintain and educate any child or children that may be under age at the time of making the payment of any share to any child or children. Should none of my children survive me I direct my said trustees to give all my estate at such time or times and in any manner they may deem best to such educational or charitable institutions in Edmonton as they may select."

The testator left him surviving five infant children, of whom two died, without having married and without having attained the age of twenty-one years. The widow applied to have determined (1) what interest, if any, the deceased infant children took in the deceased's estate, (2) what interest, if any, the personal representatives of the deceased are entitled to in the said estate, (3) what interest, if any, the applicant is entitled to as one of the next of kin of the deceased children, (4) when the said representatives or the applicant are so entitled, if at all, and (5) whether the said representatives or the applicant are entitled to such portion or interest, if any, in specie.

The application came before HARVEY, J., who decided that under the true construction of the will the interest of the deceased children had not vested at the time of their

death, but that the period of vesting of the interests of all the children was postponed until they respectively attained the age of twenty-one years or married; and that the applicant, therefore, was not entitled to any share in the testator's estate. The widow appealed, and the appeal was heard before SIFTON, C.J., and WETMORE, SCOTT and STUART, JJ. Statement.

J. E. Wallbridge, for the widow.

N. D. Beck, K.C., for the executors and the surviving children.

[*17th July, 1907.*]

The judgment of the Court was delivered by

STUART, J.:—I am of opinion that the judgment was right and that the appeal should be dismissed. It was urged very strongly that in endeavouring to arrive at the intention of the testator, as expressed in the first sentence of the second paragraph of the will, the Court should make a distinct pause after the word children and should treat the clause, "I desire my trustees to divide all my estate share and share alike among my children," as constituting by itself and apart from the succeeding words a clear gift of the estate to the children, and should look upon what follows only as postponing the time of payment. If I could admit the propriety of so dealing with the testator's words, I should have then no difficulty, under the authorities, in holding that the interests of the children had vested immediately upon the testator's death. But the well known rule is that the will must be read as a whole, and it seems to me that this rule should apply with still greater force when we are dealing, not with the whole will, but with a single sentence of it. If it is not allowable to cut the whole will up into pieces in order to interpret it, surely it is still less allowable to cut a sentence up into pieces, in trying to arrive at its meaning. Reading the whole sentence, there- Judgment.

Judgment. Stuart, J.

fore, together, I feel confident that the intention was that there should be no "dividing" until the time came to pay.

In view of the provisions of the other portions of the will, it is very clear that there could, at any rate, be no real dividing in any tangible sense until that time. Up to that time there could only be at best an imaginary division. I think that the testator used the word "divide" with the idea that it had a real meaning and, therefore, that he must have intended it to refer to a division at the time when payment was to be made and when a very large portion at any rate of the expenses of education and maintenance had been ascertained. It may be said that when the eldest child reached the age of twenty-one years he would be entitled to his share, and that unless all the shares were then vested his share might subsequently be increased by the death of a child who was still under age: and it may also be said that the share of the eldest would still be uncertain by reason of the necessity of spending further sums in the maintenance and education of the younger children. But I think the will leaves it in the discretion of the trustees, when they come to decide on the share of the eldest, to reserve any sum they see fit for the latter purpose before making the division, and the fact that a younger child might still die before reaching twenty-one would, I think, not be sufficient to prevent them from making a real, although not necessarily a final, division in order to decide on the amount of such share. I think, therefore, the sentence must be read as meaning that the trustees are to divide and pay at the same time, and that it is not allowable to separate the first part of the sentence from the remainder in order thereby to establish a present gift. This being so, I think the learned Judge was right in refusing to distinguish this case from the other cases such as *In re Parker*,[1] when there was a simple direction to pay. I cannot discover

[1](1880) 16 Ch. D. 44.

Judgment.
Stuart, J.

any sensible distinction between a direction to pay a fund to the members of a class in equal shares when they attain a certain age, and a direction to divide the fund among the members of the class and to pay each one his share on attaining that age. A direction to pay in equal shares, it seems to me, necessarily implies in any case that a division must take place at least immediately before the payment, and that is all I can gather, from the words of the sentence I am discussing, that the testator meant in this case.

This conclusion is, I think, greatly strengthened by the provisions of the first clause of the will. The whole estate is there treated as a single fund, the income of which the trustees are directed to apply in the maintenance and education of the children. There is no suggestion whatever that the corpus is to be divided into a number of shares, and that the income from each share is to be applied in the maintenance and education of the child to whom it belongs. The absolute discretion given to the trustees to use the whole income as they see fit, or to use even a portion of the corpus if necessary for the maintenance and education of the children generally, seems to me entirely inconsistent with the supposition that the testator had in mind a division of the estate into aliquot parts immediately upon his death. The very fact, moreover, that all this is provided for by the testator first, before making any mention of a division at all, and that it is not until he comes to deal with the question of payment that he speaks of a division, is an additional evidence to my mind that the division was not intended to operate at the beginning.

The case is clearly one to which the principle laid down in *In re Gossling, Gossling* v. *Elcock*,[2] must be applied. This case was decided by the Court of Appeal and is a much later one than any of those cited by the appellant. I think it must, therefore, be taken to express the view of

[2](1903) 1 Ch. 448; 72 L. J. Ch. 433.

Judgment.
Stuart, J.

the law upon such cases, which is now entertained by the Courts in England; and although the interests in that case were held to have vested, yet it will be observed that, as in *Fox* v. *Fox*,[3] so in the case referred to, the testator had used the expression "the presumptive share" of each child, and had given directions as to maintenance or advancement out of such "presumptive share."

The only point which has given me any real difficulty in the case is suggested by the provision at the end of the will that "should none of my children survive me, I direct my trustees to give all my estate . . . to such educational or charitable institutions in Edmonton as they may select." It was argued that the inference to be drawn from these words is that the testator intended that if even one child survived him even for a short time and whether such child attained the age of twenty-one or not, he would take the estate. The will, however, is evidently rather carelessly drawn and I doubt very much whether the testator intended by that clause to do anything more than to do his best to see to it that his wife should get no part of his estate, and, that being so, I think the real inference to be drawn is that he intended to create a right of survivorship among his children. At least I think this latter inference can as easily be drawn as the former one, and it is, I think, more consistent with the first part of the will wherein the testator directs the maintenance and education of his children generally out of the general fund.

The appeal will, therefore, be dismissed and the order of MR. JUSTICE HARVEY affirmed, but as the interpretation contended for by the appellant was one to which the will was fairly open and as the difficulty was caused by obscure language used by the testator himself, the costs of this appeal as well as the proceedings below should be borne by the estate.

Direction accordingly.

[3](1875) L. R. 19 Eq. 286; 23 W. R. 314.

PARADIS v. HORTON.

Small debt procedure—"Debt whether payable in money or otherwise"—Setting aside proceedings.

In an action for $60, being the value of twelve loads of straw at $5 a load, the unpaid balance of rent for a farm leased by the plaintiff to the defendant at a rental of a two-thirds share of the whole crop; and also to recover $15 for money had and received.

Held, that the claim for the value of the straw was not properly brought under the Small Debt Procedure. The words "all claims and demands for debt whether payable in money or otherwise" do not extend beyond cases where there is a debt created in the proper sense of the word, clearly recognized as such, and there is an agreement that such debt is to be paid in something other than money.

Held, also, that, although a claim clearly within the Small Debt Procedure was joined with such claim, the process was nevertheless bad and must be set aside.

[WETMORE J., *March 15th, 1904.*

Statement.

This was a summons to set aside a summons under the Small Debt Procedure and to strike out the statement of claim on the ground that the action was not properly brought under that procedure, and that the proceedings were therefore in abuse of the process of the Court. There were two claims, one for $15 00 for money had and received, and one for $60.00, being the value of twelve loads of straw at $5.00 each, the unpaid balance of the rent of a farm leased by the plaintiff to the defendant at a rental of a two-thirds share of the whole crop.

J. T. Brown, for defendant.

E. L. Elwood, for plaintiff.

[*15th March, 1904.*]

Judgment.

WETMORE, J.—The claim for money had and received unquestionably comes within the Small Debt Procedure, and that is not disputed. The defendant's counsel claimed that it would be sufficient if one of the alleged causes of action was not within the small Debt Procedure since it would be an abuse of the process of the Court if the plaintiff had a cause of action which could only be brought under the ordinary practice and another cause of action which was by itself with-

Judgment.

Wetmore, J.

in the Small Debt Precedure, and did not bring two actions. I think that he is correct in this respect. The contention is that the alleged cause of action for the value of the straw is not within the Small Debt Procedure. This I take to be a case where it is claimed that the plaintiff let his farm to the defendant on shares and that he has not received the share he is entitled to or all of it that he is entitled to. The question turns upon the construction to be given to Rule 602 of *The Judicature Ordinance*. That rule provides that "In all claims and demands for debt, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100 00, the procedure shall, unless otherwise ordered by a Judge," be as prescribed in that part of the Ordinance. I must say I feel some difficulty in putting a construction on that rule, and I can find no authorities that will assist me in the slightest degree. The legislation seems to be peculiar and entirely *sui generis*.

A debt is generally understood to be a liquidated sum of money payable by one person to another—at least that is my conception of a debt. I never understood that an agreement to deliver specific articles or a specific article would constitute a debt; a failure to deliver the specified article would entitle the person to whom the delivery ought to have been made to bring an action for unliquidated damages, for the failure to deliver it would not create a debt due to him in the ordinary sense of the word. But the rule provides that the action is to be brought under the procedure for all claims for debt whether payable in money or otherwise. Some meaning must be given to those words "or otherwise." I was disposed to think that whenever services were performed or acts done which were usually paid for in money, and it was agreed that they should be paid for by the delivery of some specified article or articles, or by the performance of some specified work, that would create a debt within the meaning of the rule, but it

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occurs to me that to lay that down would be simply to reduce a very large proportion of what is known as barter and exchange to a mere matter of indebtedness between the parties. For instance, A and B agree to exchange horses. A delivers his horse to B, relying upon B's promise to deliver his horse to him; B fails to do so. That would, if I decided as I was so disposed to think, constitute a debt due from B to A payable by a horse. Then, again, the value of an article is fluctuating, one day it may be worth one price, and another day it may increase in value. Suppose A sold B a pony to be paid for six months afterwards by 100 bushels of wheat. At the time of the sale, wheat might have been worth 60 cents a bushel, at the time of the proposed delivery it might have increased to $1.00 a bushel or it might have fallen to 40 cents. The word "paid" in the bargain does not appear to me to affect the question at all, because after all it is a barter of the pony for the grain and the amount which the party would be entitled to receive in money on failure to deliver would fluctuate.

I can see difficulties arising in all directions were I to give the construction to the rule that so occurred to me. I have come to the conclusion that in order to constitute a debt within the meaning of the rule that there must be something ascertained of a fixed or liquidated character to start with. For instance, A sells B a horse at a fixed price, say, $150.00, to be paid for in, say, wheat, at a fixed price per bushel, or at market prices, according to the bargain. I have known of bargains made in that way. There is some fixity about this method—the indebtedness, at all events, is fixed. If, however, the wheat is to be delivered at a fixed price he may when the time for payment arrives, be entitled to receive in value either more or less than the amount of the indebtedness, according to what the ruling price of wheat may be at the time fixed for delivery. And then, again, arises at once this difficulty—that, suppose the

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wheat is not delivered what is the person to whom the delivery should be made entitled to recover? Is it the amount of his indebtedness, or the value of the wheat? Or, in other words, is he entitled to sue for the debt, or for unliquidated damages? I think the answer is obvious, the consideration having passed, that he would be entitled to recover the value of the wheat at the time it was agreed to be delivered. That would clearly be an action for unliquidated damages. Whatever construction one attempts to put on this rule, seems to raise difficulties, but possibly not much difficulty arises in such cases as I have suggested, when payment of a fixed sum is to be made in, say, wheat at market prices. When you get outside of that instance trouble arises ot once.

To restrict the rule to those instances presents the fewest difficulties to my mind and seeme to be the best construction to put upon it. In fact nothing else that I can conceive of gives me any idea of a debt. In such a case as the present, when a farm is let on the shares, there is no fixity about it at all, no agreed amount, no question of fair and reasonable price or market price. The lesser may in the event be entitled to receive, comparatively speaking, a great deal, he may be entitled to receive very little; everything depends on the yield, which may be good or bad according to the season. I cannot from any standpoint consider this a debt. Moreover, the delivery of the share cannot be called rent. It cannot be distrained. It is merely a consideration for the use of the farm. Possibly these considerations may be sufficient to dispose of this case without the others I have mentioned.

I hold, therefore, that in order to authorize an action under Rule 602 for a debt payable otherwise than in money, there must be a debt created in the proper sense of the word and clearly recognized as such, and then there must be an agreement that such debt is to be paid in something else

than money. The application must be allowed, and, as it is a case in which I can award costs, it must be allowed with costs. Judgment. Wetmore, J.

Application Allowed.

NEW HAMBURG MANUFACTURING CO. LTD. v. KLOTZ.

1 W. L. R. 471.

Contract for selling of goods—Divisibility—Condition precedent—Performance—Waiver

Upon a sale of a wind stacker and chaff blower of a different make from the threshing machine in use by the defendant, there had been a verbal arrangement, made contemporaneously with the written agreement of purchase, that these were to be attached to the threshing machine by the plaintiffs. It was found impossible to attach the chaff blower, and the alterations in the wind stacker necessary to make it work with the threshing machine had not been made.

Held, that the contract was divisible, and that the price of the wind stacker was recoverable, although the plaintiffs abandoned their claim for the price of the chaff blower.

Held, however, that the proper attachment of the wind stacker was a condition precedent to the plaintiffs' right to obtain payment, and that under the circumstances and in view of the absence of any offer to make the alterations in the wind stacker, its use through a season, and the purchase at the beginning of the second season of another wind stacker in substitution for it, did not constitute a waiver of the performance of the condition.

[NEWLANDS, J., *7th June, 1905.*

Statement.

This was an action for the price of a "Maple Bay" wind stacker, chaff blower and 36 feet of rubber belting. These were sold by the plaintiff to the defendant under a written agreement which contained the usual warranty as to the machinery being "well built, of good material and capable of doing good work when properly operated," and provided that "if when started the machine should be in any way defective and not work well, the purchaser shall give notice promptly" to the plaintiffs and allow them to remedy the defect, they agreeing that, if this was impossible, the machinery should be replaced. The agreement also

Statement. provided that no agent should have "any authority to add to, abridge or change this warranty in any manner." The defence alleged was that it had been agreed that the plaintiff should fit the wind stacker and chaff blower to the defendant's threshing machine, fix the same in their respective places, and make the same work to the satisfaction of the defendant, and that the plaintiffs had never fixed the machinery, whereby the defendant had been released from all obligation to pay for it. It appeared at the trial that the defendant had a J. I. Case threshing machine, and an attempt had been made on the part of the plaintiffs to attach the chaff blower to the threshing machine, but this had been found impossible, and at the trial they abandoned their claim for its price. The wind stacker had been attached by the plaintiffs to the threshing machine and the defendant had used it through one season, but it had not worked satisfactorily, partly on account of a broken wheel, and partly because certain alterations which required to be made in a "Maple Bay," wind stacker in order that it should work properly upon a J. I. Case threshing machine, had not been made; and the defendant stated that he had been obliged to continue using it because in putting on the wind stacker the plaintiffs had cut off a part of the threshing machine which prevented him putting on the apparatus he had formerly used for stacking. The plaintiffs' agents had gone to the defendant's place to make these necessary alterations; the threshing was over, but as it was very cold weather and as the defendant had refused to settle until the machine was running in the following year, they had left the alterations imcomplete, and the agents stated that they had not fixed it the next year because the defendant had purchased another wind stacker and was using that. The defendant explained that he had waited until just before the commencement of the threshing season and had bought the new wind stacker because the plaintiffs had not fixed the

old one. There was no plea of a breach of warranty in reduction of damgaes or any counterclaim, and no evidence was given at the trial as to any damages sustained by the defendant. Statement.

J. F. L. Embury, for plaintiffs. Argument.

D. J Thom, for defendant.

[*7th June, 1905.*]

NEWLANDS, J.—As the contract was in my opinion a divisible one, the fact that the chaff blower would not fit the defendant's thresher does not affect the balance of the claim, and from the evidence given at the trial, I am of the opinion that the agreement pleaded by the defendant is not a verbal alteration of the written contract, but, like the ageeement in *Morgan* v. *Griffiths*,[1] it is collateral to the written agreement and upon the strength of it the latter was entered into. I am also of opinion that the performance of it was a condition precedent to the defendant's promise to pay. Judgment.

In Williams' note to *Pordage* v. *Cole*,[2] the following rule is laid down : " When a day is appointed for the payment of monye, . . . and the day is to happen after the thing which is the consideration of the money . . . is to be performed, no action can be maintained for the money . . . before performance." The alteration of this wind stacker so that it would work properly in connection with the defendant's threshing machine being a condition precedent and being unperformed, the plaintiffs cannot under the above rule recover unless the defendant has waived the condition.

If a man offers to perform a condition precedent in favour of another, and the latter refuses to accept the performance, or hinders or prevents it, this is a waiver, and the

[1] (1871) L. R. 6; Ex. 70; 40 L. J. Eq. 46; 23 L. T. 783; 19 W. R. 957. [2] 1 Wms. Saund. 320.

Judgment. Newlands, J.

latter's liability becomes fixed and absolute.[3] There was no offer to perform the condition in this case. It should have been performed a reasonable time before the threshing season commenced, and if the defendant waited until a reasonable time before the season opened for the performance of the condition by the plaintiffs and nothing was done by them, he would, I think, be entitled to consider that they were not going to perform the condition and that the contract between them was at an end. Therefore I do not think that the purchase by him of another wind stacker was a waiver of the condition that they were to attach it to his threshing machine and make it work satisfactorily.

But it is contended by the plaintiffs that the defendant accepted the wind stacker by using it through the season of 1903; that even though they did not fix it as agreed, he had received and accepted a substantial part of what was to be performed in his favour, and that if there was any condition precedent its character was changed and it became a warranty which would oblige him to perform his part of the agreement; and that as he had not pleaded the breach of warranty in reduction of damages or counterclaimed, they should recover.

There may, however, be cases of a partial performance where the defendant may still be at liberty to say that the plaintiff is not entitled to recover the contract price. Such a case is pointed out by BRAMWELL, B., in *White* v. *Beeton*,[4] "Suppose," he says, "the guardians of a union contracted with a man to supply bread for the house, say 100 loaves per day for three months, it would be preposterous to suppose that if he did it for every day with one exception, in which he supplied 99 only, that he would not be entitled to the contract price. Suppose that he delivered them on the first day and not afterwards, is he then to be paid the con-

[3] Benjamin on Sale, (3rd ed) p. 842. [4] (1861) 7 Jur. (N. S.) 735; 4 L. T. 474; 9 W. R. 751; 30 L. J. Ex. 373.

tract price? That is equally unjust. It seems to me the parties who would have the 100 loaves for one day might reasonably complain that a new contract should be forced upon them by reason of the breach of the other party, and they might say 'as to our retaining the things we cannot help it, for the loaves are consumed.'" This is also laid down by BLACKBURN, J., in *Inst* v. *Dowie*,[5] and by POLLOCK, C. B., in *Graves* v. *Legg*,[6] and other cases. Judgment. Newlands, J.

But this partial performance must be a substantial part of the consideration. In *Heilbutt* v. *Hickson*,[7] BOVILL, C.J., says: "In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them; as in *Poulton* v. *Lattimore*,[8] where the purchaser had sown some and sold other part of certain clover seed which had been warranted as new growing seed, but the whole of which turned out to be totally unproductive and useless."

In this case the acceptance of the defendant was conditional on the plaintiffs fixing the wind stacker as agreed, and he was compelled to use it for the time he did because the plaintiffs' agent had so altered his threshing machine that he could not use his own apparatus. He used it, not because he wanted to but because their action compelled him to. During the time he so used it it was of very little value to him on account of numerous stoppages to fix it, and because he required an extra man to do the work the machine should have done.

I think from all the evidence the wind stacker was of no practical value to him, and that he did not receive such a substantial part of the consideration as would turn the condition precedent into a warranty which would compel him

5 (1863) 32 L. J. Q. B. 179, at p. 181; 13 W. R. 459; 6 (1851) 23 L. J. Ex. 231. 7 (1872) L. R. 7 C. P. 438, at p. 451; 41 L. J. C. P. 228; 27 L. T. 336; 20 W. R. 1085. 8 (1879) 17 C. L. R. 373; 9 B. & C. 259,

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to pay for the wind stacker and look to the plaintiffs for the damages he suffered.

It is also contended by the plaintiffs that the machine is still at the defendant's place, and has never been returned to them. Under the authority of *Heilbutt* v. *Hickson* (*supra*), I think that the defendant had the right to throw it upon the plaintiffs' hands there, and was under no obligation to return it to them.

As to the belting no evidence was given as to its being delivered to the defendant, so I presume the plaintiffs dropped that part of their claim also.

I therefore give judgment for the defendant with costs.

Action dismissed.

RE ALBERTA ELECTION

1 W. L. R. 486.

Controverted Dominion Election—North-West Territories Representation Act—Certified copy of voters' list—Canada Evidence Act—Notice of presentation of petition and nature of security—Receipt of security.

Upon the hearing of preliminary objections to a petition against the return of a member of the Dominion Parliament for the Electoral District of Alberta, due notice having been given, a copy of the list of voters for a certain polling sub division returned by the returning officer of the electoral district to the Clerk of the Crown in Chancery, duly certified by said clerk under his official seal, was put in evidence, and the petitioners identified their names thereon. They also swore that they were male British subjects, not Indians, of the full age of 21 years, and that they had resided in the North-West Territories for over twelve months, and in the electoral district for over three months immediately preceding the issue of the writ of election.

Held, that in view of the provisions of the North-West Territories Representation Act. R. S. C. (1886), c. 7, the evidence of the petitioners was admissible to prove their status, and that the voters' list was properly proved by a certified copy in spite of the absence in the Act referred of any provision, such as is found in *The Franchise Act*, 61 V., c. 14, s. 16, for certified copies of the list being evidence. *Richelieu Election Case* (1892), 21 S. C. R. 168, distinguished.

The notice of the presentation of the petition, handed to the petitioner immediately before the copy of the petition, referred to the presentation of a petition against the return of the petitioner as member for electoral district of the west riding of Assiniboia (*sic*), but there was attached to the petition a certificate signed by and under the seal of the clerk of the Court that $1,000 had been deposited as security for the payment of costs, etc., in the matter of the petition against his return as member for the electoral division of Alberta.

Held, that the first notice was bad, but that the certificate gave a notice sufficient to comply with the provisions of s. 10 of *The Controverted Election Act*, R.S.C.(1886) c. 9, although it was not signed by either the petitioners or their advocate. *Ottawa Election Case* (1908) 2 Ont. El. Cas. 61, referred to.

Objection was taken that the evidence did not show that the security was given in bills of a chartered bank.

Held, that the evidence was sufficient, and that the fact that the bank was a chartered bank sufficiently appeared from the Dominion Statute extending its charter.

The cost of publishing the petition was not paid to the registrar at the time that the petition was presented.

Held, that this was no objection to the proceedings.

No evidence was given that any election had been held or that the respondent had been returned as elected.

Held, that no such evidence was necessary. *Coventry Election Case*, (1869) 20 L. T. N. S. 405, followed.

Objection was taken to certain paragraphs of the petition on the ground that even if true they would not justify a declaration that the seat was vacant or the disqualification of the member.

Held, that the clauses should, nevertheless, not be struck on preliminary objection. *Stanleybridge Election Case* (1869) 19 L.T.N.S. 660, followed.

[NEWLANDS, J., *19th June, 1905*

Statement. This was a hearing of preliminary objections to the petition to unseat the member elected for the Dominion Electoral District of Alberta in the election of 3rd November, 1904. The facts and objections taken appear in the judgments.

Argument. *H. M. Howell*, K.C., *T. C. Johnstone*, for petitioners.

A. J. Andrews, *Ford Jones* and *J. F. L. Embury*, for respondent.

[*15th June, 1905.*]

Judgment. NEWLANDS, J.—At the hearing of the preliminary objections the petitioners were called and gave evidence that they were British subjects by birth, and had resided in the North-West Territories and in the Electoral District of Alberta for more than a year prior to the issue of the writ for the election, and that they were not in any way disqualified to vote and had voted at that election. There was also produced and put in evidence a copy of the voters' list for polling division No. 51, No. 2 for said electoral district, and the petitioners identified their names thereon. This list was certified to by the Clerk of the Crown in Chancery under his official seal as being "a true copy of the list of voters of polling subdivision number fifty-one of the Electoral District of Alberta, which remains on record in my office, and which said list was returned to me by the Returning Officer for the Electoral District of Alberta as the very list used by the deputy returning officer at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district, holden on the 27th day of October and the 3rd day of November, A. D., 1904, and held pursuant to a writ of election issued therefor and dated the 29th day of September, A. D., 1904, and which said original list of voters was returned to me by the said returning officer for the said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office."

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Newlands, J.

Before this list was put in a notice under *The Canada Evidence Act* of the intention of the petitioners to put in said certified copy was proved. This notice was served on the respondent's advocate ten days before the hearing and service was admitted by him.

To this evidence the respondent objected that the evidence of the petitioners that they were entitled to vote, and had voted at the election, was no evidence, and that their status could not be proved by the certified copy of the voters' list because there was no provision in *The Northwest Territories Representation Act*,[1] nor in any other Act making such certified copy evidence, and it was not a public document under *The Canada Evidence Act*.[2]

Section 4 of *The North-West Territories Representation Act* provides that "Every male person shall be qualified to vote at the election of a member under this Act, who, not being an Indian, is a British subject, and of the full age of twenty-one years, and has resided in the North-West Territories for at least twelve months and in the electoral district for at least three months immediately preceding the writ of election."

Section 28 provides for the appointment of enumerators, secs. 29 to 32 for the manner in which they are to make up the list of electors, and sec. 33 provides that the enumerator is to deliver the voters' list to the deputy returning officer before eight o'clock in the morning of the polling day.

This list is not final since it is provided by sec. 44 that "The deputy returning officer shall, while the poll is open, if required by any person whose name is not on the voters' list, administer to such person oath number one in the form P., and such oath having been taken, the deputy returning officer shall at once cause such person's name to be added to the voters' list with the word "sworn" written thereafter."

[1] R. S. C. (1886) c. 7. [2] 56 Vic, c. 31.

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Newlands, J.

The oath referred to is as follows: "You do swear that you are of the male sex and a British subject, that you are not an Indian, and that you are of the full age of twenty-one years, and that you have resided in the North-West Territories for at least twelve months, and in this electoral district for at least three months, immediately preceding the issue of the writ of election."

It is then provided by sec. 45 that every person whose name is on the list may be required to take this oath, and if he refuses his name may be struck off the list, and by sec. 46: "Every voter shall be entitled to vote whose name is on the voters' list, and has not been erased therefrom in accordance with the foregoing provisions of this Act, or whose name is added to the list as herein provided."

It will thus be seen from the above provisions of the Act that the voters' list as prepared by the enumerator and handed to the deputy returning officer is by no means a binding list, and the fact that a person's name is either on the list or not is no evidence that he is or is not qualified to vote, his right to vote in either case being finally decided by his ability to take the oath above mentioned If his name is on the list and he cannot take that oath he is not entitled to vote; on the other hand, if his name is not on the list, and if he can and does take this oath, he is entitled to vote. In the first case his name is struck off the list, and in the other it is added to it. This seems to me a mere detail which the Act compels the deputy returning officer to comply with, and the real criterion of a person's right to vote is his ability to take the oath of qualification.

But the petitioners in this case have sworn that they are qualified to vote. In giving their evidence they swore to their qualifications in the very terms of that oath, and further that they had actually voted.

Judgment. Newlands, J.

It is true that it was held in the *Richelieu Election Case*[3] that the status of the petitioners could only be proved by the production of the voters' list actually used at the election or a copy thereof certified by the clerk of the Crown in Chancery, but the reasons given for that judgment as set out in the decision of STRONG, J., do not in any way apply to the Territories. He says,[4] after reciting the provisions of *The Electoral Franchise Act*: "From these provisions of the statute I am of opinion in the first place that no person has an actual right to vote unless his name appears in fact to be entered upon the list of voters furnished pursuant to the statute by the returning officer to the deputy returning officer for the polling district in which the vote is tendered. It is apparent from the whole scope of the Act, and especially from the oath required to be tendered to a voter who claims that another person has wrongly voted in his name, that no person has a right to vote unless his name appears on the list so furnished to the deputy returning officer either as a voter whose vote has been allowed, and against whom there is no appeal, or as a voter whose vote has been allowed but has been appealed against, or as a person who has claimed to vote, but whose claim, having been disallowed, is the subject of a pending appeal. The oath T. in the schedule of the Act has this pertinence to the question; it shows that the deputy-returning officer is to be guided exclusively by the list delivered to him by the returning officer. This oath which is to be tendered to a voter who claims that he has been personated by another who has already wrongfully voted in his name, requires that the list of voters shall be actually exhibited to the claimant, the list referred to being manifestly the only official list in the hands of the deputy returning officer, namely, that which had been delivered to him by the returning officer. This demonstrates that the right to vote depends upon a voter's name being upon the list delivered to the

3 (1892) 21 S. C. R. 168. 4 21 S. C. R. at p. 174.

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Newlands, J.

deputy returning officer. In short the officer in allowing or refusing claims to vote is to be guided by the list before him, and is to be restricted to that. The very object of registration would be defeated by any other construction of the Act. If, then, a person whose name does not appear upon the list furnished to the deputy returning officer claims to vote his claim must be at once disallowed, and he cannot be permitted to sustain it by referring to the list as originally revised. Can it then be said that such a person has a right to vote? The answer must be certainly in the negative, for, although the name of such a claimant may, by a misprison of the officer who certifies the list or otherwise have been omitted therefrom, and he may thus be wrongfully deprived of his right to vote, still it cannot be said that he has a right to poll a vote which the officer to whom it is tendered could not, without a gross dereliction of duty, receive. It may be that this consideration is a reason why statutory precautions greater than the Act actually provides for should have been enacted to ensure accuracy in the lists used in the polling, but this is nothing to the purpose of the present enquiry. As the law at present stands no one can have a right to vote whose name does not appear on the list according to which the poll is to be taken. To hold otherwise and permit deputy returning officers to enter upon enquiries as to the right of persons whose names do not appear on the list to vote, would be to set at naught the whole scheme of the statute, and to restore the evils and inconveniences which it was the especial object of the Legislature to obviate by providing for a system of registration."

None of this reasoning applies to *The North-West Territories Representation Act*, the opposite being the case here, so that I think the judgment in that case is no authority as to our Act, and apparently Parliament was of the same opinion since it has made no provision for certified copies of the list of electors in the Territories being evidence, as is

provided in *The Franchise Act*,[5] although the inconvenience of requiring the clerk of the Crown in Chancery to attend with the list of electors returned to him is as great if not greater than in the other provinces. Judgment. Newlands, J.

For these reasons I am of opinion that the evidence given was admissible to prove the status of the petitioners.

But this was not the only evidence. A copy of the voters' list used at the election certified to by the clerk of the Crown in Chancery was put in under the provisions of *The Canada Evidence Act*. To this the respondent's advocate objected that it was not a public document that could be proved by a certified copy. I cannot agree with this contention. I think the voters' list is a public document, and as the original could be received in evidence the certified copy is also evidence under *The Canada Evidence Act*. In referring to voters' lists in *The Two Mountains' Election Case*[6] GWYNNE, J., said: "The appellant relies upon these two cases, and the respondent does not at all question their authority in the present case, but neither the *Richelieu Case* nor any other case has ever held that original public documents of which, for convenience of proof, a certified copy by a proper officer in charge of the original may be made by statute *prima facie* evidence when themselves produced constitute no evidence. The originals themselves when produced constitute the best evidence."

The clerk of the Crown in Chancery is the proper officer to certify to this list. The provisions of *The Dominion Elections Act*, as to the sending of the voters' list to him are made applicable to the Territories. So he is the officer in charge of the very list that was used at the election, and he has certified that the copy put in is a true copy of that list, and as the petitioners have identified their names thereon, I think they have proved their status.

[5] 61 Vic. c. 14. [6] (1901) 31 S. C. R. 437, at p. 445.

Judgment.

Newlands, J.

The next objection of importance taken by the respondent was that no notice of the presentation of the petition nor any notice of the nature of the security furnished, or of the manner in which, and the time when same was furnished, was given to him.

Section 10 of *The Controverted Elections Act*,[7] provides that "notice of the presentation of a petition under this Act and of the security, accompanied with a copy of the petition shall, within five days after the day on which the petition has been presented, be served on the respondent."

Under the original *Controverted Elections Act* this notice was of first importance. That Act provided, as the English Act, that the security might be given either by a deposit of $1,000 in money or by a recognizance with not more than four sureties who were to justify by affidavit, and the respondent had the right within five days to object to these sureties on the grounds set out in that Act. The importance of this notice was pointed out by GROVE, J., in *Williams* v. *Mayor of Tenby*,[8] He says: "It is said there would be hardship supposing money deposited, if mere omission of notice should prevent a petition. I see no more hardship than may occur in any case where a definite time is to be observed, and I see good reason why it should be so. There are two alternatives given, and it is reasonable the party should know which has been adopted, viz., deposit or recnizance, and if the latter that he should be set instantly on enquiry whether the securities are good and valid or not," and he held that the terms of the Act were peremptory, and unless the notice was given the petition must be dismissed.

Since the Act has been changed by doing away with the recognizance and providing for the security being given by a deposit of money only, the notice would not seem to be of so

[7] R. S. C. (1886) c. 9. [8] (1879), L. R. 5 C. P. D. 135, at p. 137; 49 L. J. C. P. 25; 42 L. T. 187; 28 W. R. 616; 44 J. P. 348.

much importance, but as the Act retains the provision for giving the notice, this provision must still be complied with. Judgment. Newlands, J.

The notice which was given in this case was as follows:

"In the Supreme Court of the North-West Territories.

"Dominion Controverted Elections Act.

"Election for the Electoral Division of Alberta holden on the 27th day of October, A. D., 1904, and the 3rd day of November, A. D., 1904.

"Notice of presentment of petition and deposit of security.

"Take notice that on Tuesday, the 13th day of December, A. D., 1904, the petition of Robert John Emslie Gardiner, of Macleod, in the North-West Territories of Canada, furniture dealer, and of Ethelbert Silvester, of Macleod, in the North-West Territories of Canada, clerk, was duly presented by delivering the same to Dixie Watson, Registrar of the Supreme Court of the North-West Territories, at his office in the Court House, in the City of Regina, during office hours, against the election and return of John Herron as a member for the House of Commons for the Electoral District of the *West Riding of Assiniboia* (*sic*), for the reasons therein set forth.

"And, further, take notice that at the time of such representation there was presented therewith an affidavit of each of the said petitioners that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true.

"Dated this 13th day of December, A. D, 1904.

"Yours, etc.,

"T. C. Johnstone,
"Advocate and agent for the petitioners."

"To John Herron, Esq.,
Respondent."

Judgment.

Newlands, J.

This notice was handed separately to the petitioner immediately before the copy of the petition was given him. It was not annexed to the petition, and as it referred to a petition against his return as the member for the West Riding of Assiniboia, although that is obviously only a clerical error and could not in any way mislead the respondent, I must hold that it does not refer to the petition served, and is, therefore, not a notice of the presentment of the petition as required by the Act.

If that was all the notice served I would have to allow this objection and dismiss the petition.

At the hearing the petition itself was put in, and to it was attached, among other things, a copy of a certificate signed by Dixie Watson, Registrar of the Supreme Court, which I think complies with the provision of the Act as to notice.

The Act requires notice of the presentment of the petition and of the security. Presentment of the petition is to be made by delivering the petition to the clerk of the Court during office hours. This certificate states that this was done. It further states that the security was given. It is not signed by the petitioners' advocate, but the Act does not require that the notice should be signed by any one. By the wording of the Act there is no doubt the notice must be in writing, as it has to be served on the respondent. This certificate was in writing and was served on the respondent, attached to the petition. It was as follows:

"In the Supreme Court of the North-West Territories.

"The Dominion Controverted Elections Act.

"Election for a member for the House of Commons of Canada for the electoral district of Alberta in the North-West Territories, holden on the 27th day of October, A.D., 1904, and the 3rd day of November, A. D., 1904.

"Dominion of Canada,
"North-West Territories: To wit:

"I hereby certify that I have this day received from T. C. Johnstone, Esquire, agent for Robert John Emslie Gardiner and Ethelbert Silvester, petitioners in this matter, the sum of $1,000 as security for the payment of all costs, charges and expenses that may become payable by the petitioners herein pursuant to the provisions of the Dominion Controverted Elections Act, in the matter of the petition of the said Robert John Emslie Gardiner and Ethelbert Silvester, this day delivered to me at my office during office hours against the election and return of John Herron at the said election as a member of the House of Commons of Canada for the said electoral division.

"Dated this 13th day of December, A.D., 1904.

"(L.S.) Sgd, Dixie Watson,
"Clerk and Registrar of the Supreme Court, N.W.T."

The Act says notice shall be given. What then is a notice? In *Whartons Law Lexicon*,[9] notice is said to be "the making something known to a person of which he was or might be ignorant." In *Greenwood* v. *Leather Shod Wheel Co.*,[10] LINDLEY, M.R., says: "Notice in the section means, not what is called "constructive notice," but actual notice, that is, notice which brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly and in a business sense amounts to notice of a contract." And in *Crook* v. *Morley*,[11] the EARL OF SELBORNE, L.C., in a case under *The Bankruptcy Act*, which provided that "If the debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts," said: "I will only refer to the words of Lord Justice BOWEN, in the case of *Lamb*,[12] where he asks the question: "What effect

[9] (10th ed.), p. 536. [10] (1900) 1 Ch. p. 436. [11] (1891) A. C. 321. [12] Morrell Bankruptcy Rep. 28.

Judgment.

Newlands, J.

would the circular produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors ?'' That is the true test. Then I ask what effect would this circular naturally and properly produce upon the minds of the creditors receiving it ?''

I think this receipt is a notice under all these tests. It certainly brings home to the mind of the respondent two facts of which notice is required to be given to him by the Act : first, that $1,000 has been deposited with the Registrar of the Supreme Court as security for the costs of a petition against his return as a member for Alberta, and second, that a petition against his return as such member was on the 13th day of December, 1904, delivered to the said registrar during office hours.

It is true it was not signed by either the petitioners or their advocates. It was held by OSLER, J.A., in the *Ottawa Election Case*,[13] that the notice need not be signed. *The Ontario Controverted Elections Act*,[14] provides that : '' Notice of the presentation of a petition under this Act accompanied by a copy of the petition itself shall within five days . . . be served.'' No separate notice of presentation was served, but a copy of the petition itself was duly served on which was endorsed the following : '' This petition is filed.'' &c. The only difference between the Ontario Act and the Dominion Act is that in the section which requires notice the words '' and of the security '' are left out. Otherwise the Acts are similar in this respect. OSLER, J. A., delivering judgment, said: ''So far as the Ontario Act is concerned no form of notice of presentation is prescribed. It does not seem necessary that it should specify either when the petition was filed or when the security was given. The language of the section would be satisfied by mere notice that a petition had been presented in respect of such or such return under the

[13](1898) 2 Ont. El. Cas. 64. [14]R. S. O. (1897). c. 11.

Act. Had it been required to be signed by the petitioner it might have been thought that the notice was intended to serve the purpose of verification, and to identify the copy of the petition to be served with that which the petitioner had sworn to, but that is not prescribed. It is difficult to see what purpose is served by a notice of presentation which would be sufficient within the Act which is not equally well served by the endorsement which appears on the copy of the petition served on the respondent. The reasons which seem unanswerable in the *Tenby Case* have no place here looking at our different legislation."

Judgment.
Newlands, J

This language applies equally to the present case, and I think the copy of the certificate of the registrar served with the petition fills all the requirements of the Act as to notice.

The next objection urged by the respondent was that "the petitioners did not furnish the security for costs prescribed by said Act, nor in the manner prescribed by said Act." At the hearing the petitioners produced evidence that $1,000 in bank bills was deposited with the clerk of the Court at Regina, that this money was obtained from the Union Bank of Canada here, and the teller of the bank who paid out said money swore it was in bills of the Union Bank. There was also produced and put in evidence the certificate of the registrar of this Court that the required deposit had been made pursuant to the provisions of *The Dominion Controverted Elections Act.*

To this evidence it was objected, (1) that there was no evidence that the money deposited was in bills of a chartered bank; (2) that if it was proved that the money deposited was in bills of the Union Bank of Canada there was no evidence that the Union Bank of Canada was a chartered bank; and, (3) that the certificate of the registrar of this Court was only evidence of what it stated, that $1,000 was

Judgment. deposited, and not evidence that that deposit complied with
Newlands,J. the provisions of the Act.

As to these objections I am satisfied that the money deposited was in bills of the Union Bank of Canada, and that the Union Bank of Canada is a chartered bank doing business in Canada, as the charter of that bank was continued by ch. 26 of 63 & 64 Vic. (Dom.). I am also of the opinion that the certificate or receipt of the clerk is sufficient evidence, as it states that the deposit was made pursuant to *The Dominion Controverted Elections Act*, which I take to mean that the deposit complied with that Act, and as the Act makes that receipt evidence of the sufficiency of the deposit, I find for the petitioners on this objection also.

A further objection was urged on the ground that the petitioners did not pay to the clerk or returning offier the costs of publication of the petition, pursuant to the provisions of the Act, and the rules and practice relating to the trial of election petitions. It was proved by the petitioners that, at the time of the presentment of the petition, a copy was left for the returning officer, but no fee was paid in advance for the publication of the notice required to be published. Rule 12 of the English rules (which apply in the Territories, the Judges of the Supreme Court of the Territories never having made any rules under *The Controverted Elections Act*), provides that the cost of publication is to be paid by the petitioner. I do not think this is a good ground of preliminary objection. It does not appear to be of any interest to the respondent that the registrar gave the petitioners' advocate credit for fees. This was held by SIR M. TAIT, A. C. J., in *Re Missisquoi Election*.[15]

A further objection is to the form of petitioners' affidavit verifying the petition. The Act requires an affidavit of the petitioner, "that he has good reason to believe and verily

[15] 6 Que. P. R. 372.

does believe the several allegations contained in said petition are true." By the affidavit in this case the petitioner swore "That I have good reason to believe and verily believe that the several allegations in the said petition are true." The respondent's advocate contends that this means that he has good reason to believe and has good reason to verily believe and therefore does not comply with the Act. I do not see how any such construction can be put on the words used in the petitioners' affidavit, but on the contrary I think it means the same as the words used in the Act, and therefore complies with the Act.

Judgment. Newlands, J.

As to the objection that there is no evidence that an election was held or that the respondent was returned as elected as set out in the petition, I will follow the ruling of Mr. Justice WILLES in the *Coventry Election Case*,[16] In that case WILLES, J., said: "I shall not require the election to be proved in any of these cases. I begin by saying that I know as a matter of public notoriety and history that there has been a general election, and that, therefore, there must have been an election for the city of Coventry, and I am bound to take notice of it. There was a return for this borough. If the respondents were not returned at that election I ought to reject them. If they were then I know who were returned."

The respondent also objects to paragraphs 12 to 17 inclusive of the petition on the ground that even if the allegations therein set out are true they would not justify the trial Judges in disqualifying the respondent or declaring the seat vacant.

These sections of the petition allege certain illegal acts of the enumerators and deputy returning officers. As the respondent's advocate pointed out such acts to have any effect must have been sufficient to affect the result of the election,

[16] (1869) 20 L. T. N. S. 406.

Judgment.

Newlands, J.

and this is not alleged in the petition. I fully agree with this contention, but following the decision in the *Stanleybridge Election Case*,[17] I will not strike these clauses out. In that case it was sought to strike out a clause which contained an allegation of acts which, though illegal, would not avoid the seat. Mr. Justice WILLES said he fully agreed in the view of the law which had been stated. He thought the offence charged was only the subject of an indictment. The only conceivable case of conveyance of voters voiding a seat was if a man could be supposed to be bribed by a ride to the poll. In the present case he should not order the clause to be struck out. If the petitioner persevered with it in all probability he would have to pay the costs of it on the trial, whatever the issue might be.

The other objections were dropped or included in the ones I have dealt with. The preliminary objections are therefore dismissed.

Objections overruled.

[17] (1869) 19 L. T. N. S. 660.

REX v. LAKE.

3 W. L. R. 244.

Criminal law—Quashing charge—Corrupting witnesses—Appeal against voter under Territories Election Ordinance.

The prisoner was charged on two counts, with (1) having attempted to dissuade a witness, B., by a bribe, from giving evidence before a Court of Revision held in connection with a contested provincial election; (2) with having attempted to obstruct the course of justice by giving to one B., $10 to induce him to abstain from attending such Court of Revision. B. was the person whose vote had been objected to and appealed against.

Held, that it being charged that B. was dissuaded as a witness, not as a party, the first charge fell properly within clause (a) of s. 154 of *The Criminal Code, 1892*; but that the second charge was defective, at all events in omitting to state that B.'s absence from the Court of Revision would lead to a defeat of justice.

HARVEY, J., *6th, 8th February, 1906.*

Statement

This was an application on behalf of the prisoner before plea to quash the charge as laid by the agent of the Attorney-General on the ground that no offence was disclosed thereby.

The accused was charged (1) with having at the city of Calgary on the 14th day of November, 1905, unlawfully attempted to dissuade a witness, namely, Talbot Henry Berton, by a bribe, from giving evidence in a certain matter namely, in a Court of Revision held in connection with a contested provincial election, and (2) with having unlawfully and wilfully attempted to obstruct, pervert and defeat the course of justice by giving to him, Talbot Henry Berton, the sum of ten dollars to induce him to abstain from attending a Court of Revision in connection with a contested provincial election contrary to the provisions of *The Criminal Code, 1892*, sec 154.*

*The provisions of the section in question were as follows:—

"Every one is guilty of an indictable offence and liable to two years' imprisonment who:

"(a) dissuades or attempts to dissuade any person by threats, bribes or other corrupt means from giving evidence in any cause or matter, civil or criminal; or

"(b) Influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or

Statement. It was admitted on the argument that Berton was a person who had voted at a provincial election whose vote had been objected to, and who had been served with a notice under section 49 of *Territories Election Ordinance*,[1] but had received no other notice to attend any Court.

Argument. *P. J. Nolan* and *W. F. W. Lent*, for prisoner.

James Short, for the crown.

Judgment. HARVEY, J.—The offences included in clauses (b) and (c) were previously covered by section 30 of R.S.C. (1886) ch. 173, but there appears to have been no previous enactment covering the offences specified in clauses (a) and (d), within which apparently these charges are intended to fall. It appears, however, that it was considered a crime to dissuade, or attempt to dissuade, a witness from giving evidence; and in *Russell on Crimes*,[2] is laid down the general proposition that "all who endeavor to stifle the truth and pervert the due execution of justice are highly punishable." It was contended, however, that this must be limited to the case of jurors or witnesses on whom there is an obligation to do certain acts, and could not apply to the present case since the accused was under no obligation to attend, being really in the position of a party who could exercise his discretion as to whether he would contest or abandon his claim to vote. I feel little doubt that clause (a) of sec. 154 is to be limited to the case of witnesses, since it is only witnesses who "give evidence," but I see no reason why, nor was it urged, that it should be restricted to persons who had been served with a subpœna to attend as witness, and it appears quite clear

[1] No. 11 of 1879. [2] Book II, 6th ed., c. 21.

"(c) accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or

"(d) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice."

Judgment.

Harvey, J.

that the first charge has reference to Berton as a witness and not as a party. The words "a witness namely" appear to have been inserted after the accused was notified of the charge, but they appear to me not to be at all material, for the words "from giving evidence" clearly shew that he was to be a witness. The expression of the section "any cause or matter, civil or criminal" appears to me to be intended to cover every proceeding of whatever character in any Court of whatever kind and would, therefore, cover such a proceeding as that to establish the right of a voter in a Court of Revision.

I confess myself unable to understand the object of the word "namely" after "matter" in the charge by the use of which the meaning appears to me to be confused, but without which the meaning seems clear, and in my opinion covers an offence under clause (a). I therefore, under the authority of sec. 629 of the Code, direct the Clerk of the Court to amend the charge by striking out the word "namely."

It was also objected that the charge was bad in not specifying the nature of the matter, whether civil or criminal, the names of the parties and all the other particulars. These objections clearly come within section 613, and I should be disposed to order particulars were it not apparent from the notice of motion and the argument before me that the accused has full information. I therefore hold the charge, as amended, good.

I am of opinion that the second charge does not disclose any offence. If it falls under section 154 it would be under clause (d); and while I am not prepared to say that the inducing of a person to refrain from attending a Court may not, under some circumstances, be a perversion or a defeating of justice, there is nothing in the charge indicating any reason why the attendance of Berton at the Court of Revision should be in any way essential to the due adminis-

Judgment.

Harvey, J.

tration of justice, and therefore why his non-attendance could lead to a defeat of justice. The second charge will therefore be quashed.

Charge quashed in part.

PORTER v. FLEMING SCHOOL DISTRICT

3 W. L. R. 186.

The School Ordinance, s. 155—Agreement for stated sum per month—Application of section.

The plaintiff had a written agreement with the defendants for payment of salary for teaching their school at $50 a month for six months, the agreement setting out the provisions of s. 155 of *The School Ordinance*. He taught for six months and received $300. In an action for $18.55, balance payable under the provisions of the section referred to.

Held, that the section applied although the agreement did not call for a yearly salary.

Semble, that the parties could not have contracted themselves out of the operation of the section.

[WETMORE, J., *6th, 10th February, 1906.*

Statement.

This was an action to recover the balance of salary due to the plaintiff for his services as school teacher between the 1st of January and 30th of June, 1904. By written agreement, dated the 3rd December, 1903, the defendants had agreed to pay him $50 a month from the 1st of January, 1904. The agreement was partly printed and partly written and provided that it should be subject to the provisions of sec. 155 of *The School Ordinance*,[1] which section was set out in the agreement in full in print. The defendants paid the plaintiff $300, of which the last $196.80 was paid on the 28th June, and the plaintiff gave

[1] Ord. No. 29 of 1901, s. 155, provided that: "The salary of a teacher who has been engaged in any district for four months or more continuously, shall be estimated by dividing the rate of salary for the year by 210 and multiplying the result obtained by the actual number of teaching days within the period of his engagement:

"Provided that if a teacher has taught more than 210 days in any calendar year he shall only be entitled to a year's salary."

for it a receipt acknowledging the payment of "salary for the first term, 1904." He entered the suit to recover a balance of $48.55 under the provisions of the section referred to. Statement.

E. R. Wylie, for plaintiff. Argument.

E. L. Elwood, for defendants.

[*10th February, 1906.*]

Judgment.

WETMORE, J.—It was urged on the part of the defendants that section 155 is not applicable to an agreement like the one in question because the section is only intended to apply to agreements by which the salary is made payable at an annual rate, not to those by which it is made payable at a monthly rate. The fact that the section is embodied in the agreement does not, to my mind, very materially affect the rights of the parties under the agreement, because I am of opinion that in all contracts that are embraced by the section it would govern although not embodied in the agreement; the fact that it is embodied in the agreement only serves to draw the attention of the contracting parties more emphatically to its provisions. It was also urged that the clause referring to the section being there was not of very great importance because it was on a printed form and the parties in drawing an agreement like this, reserving $50 a month, would probably pay no attention to it. I do not think there is anything in this contention on its face. Parties must be more careful in looking over their agreements, and they cannot expect to escape the consequences of a clear provision in them simply because it happens to be printed. I think that the parties must have considered the effect of this clause, because section 151 of the Ordinance provides that the contract entered into by the school board with the teacher shall be in the form prescribed by the commissioner. I would assume, therefore, that the contracting parties in this case have complied with the law.

Judgment.

Wetmore, J.

and have entered into an agreement in the form so prescribed. I am unable to put any other construction upon the section in question than that contended for on behalf of the plaintiff. It is embodied in the agreement, and even if it had not been so embodied it would have governed. I am also rather inclined to think, although it is not necessary to decide that question, that the parties could not have contracted themselves out of the provisions of that section. They did not do so, which is all that is necessary for the purposes of this case. The plaintiff comes directly within its provisions; he was engaged for more than four months continuously, and performed his duties for more than four months continuously. I do not think it is necessary, in order to bring the parties within the provisions of section 155, that the contract should provide in words that the salary is payable at the rate of so much a year. It is always a matter of calculation to get at the annual rate, when a monthly or other rate less than a year is reserved, and it seems to me that the usual way to provide for the payment of a salary where the person is engaged for less than a year would be at a monthly, or, it might be, a quarterly, rate.

The plaintiff taught 122 teaching days during the term of his engagement. That, I presume, is the total number of actual teaching days there were within the period of the plaintiff's engagement, and applying the provisions of the section, therefore, to this agreement, the plaintiff would have been entitled to have received $348.55. He was only paid $300, and there will, therefore, be judgment for the plaintiff for $48.55 and costs.

Judgment for plaintiff

MASSEY-HARRIS CO., LTD. v. HUTCHINGS.

3 W. L. R. 252.

Pratice—Taxation of costs—Judgment on default of pleading—Affidavit that defence not served.

In order to constitute the delivery of a pleading, it must be both filed and served; default in either will entitle the party to be proceeded against as upon default in pleading, and consequently upon a taxation of a plaintiff's costs of judgment signed for default of defence, the costs of an affidavit proving that no defence was served will be disallowed where no defence has been filed.

WETMORE, J., *3rd, 9th March, 1906.*

Statement. This was a review of the taxation of the plaintiffs' costs. Judgment was signed against the defendant for default in pleading, no statement of defence having been delivered. An affidavit was filed proving that no defence had been served upon the plaintiffs' advocate. This the clerk refused to tax, and the question was whether he was right in so doing.

Argument *J. T. Brown*, for plaintiffs.

E. L. Elwood, for defendant.

[*9th March, 1906*]

Judgment. WETMORE, J.—It was alleged by counsel that the clerk has been in the habit, where a judgment for default of appearance is signed, of allowing for an affidavit shewing that no appearance or notice of appearance has been served, and that that was done by virtue of item 65 of the tariff. Whether that is correct where no appearance has actually been entered it is not necessary to decide; I may only say that because that item of the tariff provides for an affidavit of non-appearance it does not follow that it is taxable on a judgment for default for want of an appearance, because there are many instances where such an affidavit would be necessary apart from cases where judgment by default is so signed for want of an appearance, as, for instance, on an applica-

Judgment.

Wetmore, J.

tion made to a Judge to assess damages with a view to judgment for default of appearance, or in any other case where a party is entitled to judgment for default of appearance on an application to a Judge.

I am not prepared to say whether it is necessary to file a pleading under the English Practice. I can find nothing in the English Rules to throw any light upon the question ; all I know is that it was the old practice to file pleadings. But it is quite clear under Rule 80 of *The Judicature Ordinance*,[1] that it is necessary to file a statement of defence in the clerk's office and serve a copy on the plaintiff or his advocate.

It is the practice in England to enter an appearance with the clerk and serve notice of appearance on the solicitor for the defendant.[2] It was held in *Smith* v. *Dobbin*,[3] in the Court of Exchequer, and affirmed in appeal, that where the party defendant entered an appearance in London, but failed to give notice to the plaintiff, the appearance was bad and the plaintiff was entitled to sign judgment. HUDDLESTON, B., is reported as follows : "Appearance does not mean merely giving a paper to an officer of the Court ; there must be two things . . . entering the memorandum and serving the notice. Until the defendant does the latter he does not enter an appearance." And BRAMWELL, L.J., says : "The appearance is not effectual unless notice is given in the manner prescribed by the Act."

As before stated, the Rule of the Ordinance requires the statement of defence not only to be served on the plaintiff or his advocate, but to be filed in the clerk's office. By parity of reasoning with what is laid down in *Smith* v. *Dobbin* it requires both a filing and service to constitute a delivery of defence. As no defence has been filed with the

[1] Con. Ord. (1898) c. 21. [2] See Ord. XII. Rules 8 & 9. [3] (1877) 47 L. J. Ex. 65 ; 3 Ex. D. 338 ; 37 L. T. 777.

clerk within the prescribed time there has been a default in delivery. It is not necessary to produce an affidavit to prove that fact. If a defence had been filed but none delivered, then an affidavit would have been necessary; that is not the case here, and I am of opinion, therefore, that the clerk's taxation was right and must be affirmed. Judgment. Wetmore, J.

Order accordingly.

TAYLOR v. GRANT.

3 W. L. R 254.

Specific performance—Statute of Frauds—Transfer in blank—Mortgage back—Payment by instalments.

A transfer of land in the statutory form complete except for the insertion of the name of any person as the person by whom the consideration has been paid or as tranferee, is a sufficient memorandum under the Statute of Frauds to charge the transferor, the person who paid the consideration being identifiable by parol evidence, and the form of transfer requiring the insertion of his name in both blank spaces.

Where in an action in which the plaintiff relies upon such a transfer as the memorandum to satisfy the statute, but admits that the purchase price was not all paid, the agreement being that part of it should be payable by instalments, secured by mortgage, the defendant cannot relie upon this to show that the transfer is not a complete memorandum containing all the terms of the agreement, since to contradict the acknowledgment in the transfer he must accept the admission as a whole, not only as an admission of non-payment.

[HARVEY, J., *1st, 2nd, 3rd, 5th, 9th March, 1906.*

This was an action for specific performance of an alleged agreement for the sale by the defendant to the plaintiff of certain lands. The facts of the case, as found by the trial Judge, were as follows: The plaintiff who was a real estate agent, having reason to believe that he could find a purchaser for the lands in question, of which, the defendant was the owner, approached her with the object of inducing her to place the property in his hands for sale. Before he had succeeded in this, he decided to buy for him- Statement.

Statement.

self if he could induce the defendant to sell, thinking that thereby he could both make both his commission on the sale and a profit on a resale from himself to a prospective purchaser. Under the impression that he had effected an agreement with the defendant to sell for $6,000, he wrote out a cheque to her for $25, on which he marked the words : "Option on lots 37, 38, 39, 40, block 69, sec. 15. Purchase price net $5,700." and left it with her. The defendant did not examine the cheque at the time ; but before the plaintiff's return two days later, she had discovered that the price stated on the cheque was $5,700, and on his return she told him she would not sell, that she was to get $6,000 and not $5,700. The plaintiff, in the meantime, had given an option to purchase at $6,500 for which he had been paid the sum of $20 ; and as he and the defendant could not agree, he went to see his advocate, Mr. Lent, who accompanied him to the defendant's place. It was then agreed that defendant would sell to plaintiff for $6,000, of which $1,000 was to be cash and the remainder, $5,000 secured by mortgage payable in annual instalments of $1,000 each with interest at 8 per cent. On the same day Mr. Lent returned to the defendant's accompanied by Mr. Short, who, as the defendant had told Mr. Lent, was her advocate, and the terms of the sale were gone over in Mr. Short's presence. He then prepared a transfer. As the plaintiff expected to sell immediately to the parties to whom he had given the option, Mr. Lent, in order to save registration fees, asked Mr. Short not to fill in the name of the transferee so that he might insert the names of these purchasers as such. At that time he did not know what their names were. It was also agreed that as the purchasers were likely to make extensive improvements on the property, the payment of the first annual instalment of the mortgage might be deferred for a year if Mr. Short thought the improvements justified it. Mr. Lent handed over the plaintiff's cheque in favour of the defendant for $975, which,

with the $25 cheque, made up the cash payment of $1,000. The transfer, after being signed by the defendant, was taken away with the cheques by Mr. Short, who was instructed by the defendant to look after her interest in closing the matter and to hand over the transfer on receiving the mortgage. On the next day Mr. Short made the usual affidavit of the execution of the transfer and sent the two cheques to the bank where they were accepted; and a day or two later Mr. Lent caused to be submitted to Mr. Short for his approval a draft mortgage which, after he had made certain changes in it, he caused to be returned to Mr. Lent. The mortgage was then engrossed and executed by the proposed purchasers from the plaintiff. They, however, had not yet decided to purchase under their option, their decision depending upon the particulars of a lease which affected a portion of the property. When they ascertained the terms of the lease, they abandoned the idea of purchasing, and the plaintiff thereupon executed a mortgage in the terms of the draft approved by Mr. Short. This was tendered to him but he refused to accept it or to carry out the sale to the plaintiff and offered back to Mr. Lent the cheques for $1,000. These Mr. Lent refused to accept and a few days later this action was begun. On the same day Mr. Short returned the cheques to Mr. Lent. Statement.

W. F. W. Lent and *Stanley Jones*, for plaintiff. Argument.

James Short and *C. A. Stuart*, for defendant.

HARVEY, J.:—The defence relied on is the Statute of Frauds. It is contended that the transfer is not a sufficient memorandum to satisfy the statute inasmuch as it does not contain the name of the purchaser, that the terms of payment are not specified, and that it is not permissible to look at any of the other documents as they are not connected with the transfer signed by defendant by any reference in it. It seems quite clear from the authorities, of which the latest Judgment.

Judgment.
Harvey, J.

that was quoted to me is *Bradley* v. *Elliott*,[1] that the memorandum to be sufficient must contain the names of both parties or some description whereby they may be definitely ascertained. It has been held that the term "vendor" is not a sufficient description any more than "purchaser" would be, because it is impossible to say who the particular person may be since one may sell, as the plaintiff purported to do in this case, though not an owner But it was held in *Sale* v. *Lambert*,[2] and *Rossiter* v. *Miller*,[3] that the term "proprietor" was sufficient since there could be only one person answering that description. In *Carr* v. *Lynch*,[4] FARWELL, J., decided that though no purchaser's name was mentioned, it was clear that the lease was to be made to the person paying the consideration, who was therefore sufficiently defined to satisfy the statute. This appears to me to be sound common sense and it is supported by *In re Holland*.[5] STIRLING, L.J., says: "It is no doubt necessary that the note or memorandum, to satisfy the statute, should shew who the parties to the agreement are, but they need not be named or specifically described as such; it is sufficient if by reasonable intendment it can be inferred from the document who they are."

The transfer in question is in the following words: "I, Jane Grant, etc. . . . do hereby, in consideration of the sum of six thousand dollars paid to me by of the receipt of which sum I hereby acknowledge, transfer to the said all my estate and interest in the said piece of land." Now, considering the document alone, can there be any possible doubt of the name that must be filled in? It appears to me not. The only name is that of the person who paid the consideration, and there is therefore a sufficient description

[1] (1906) 11 O. L. R. 398; 7 O. W. R. 147. [2] (1873) L. R. 18 Eq. 1; 22 W. R. 47; 43 L. J. Ch. 470. [3] (1878) 3 App. Cas. 1124; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865. [4] (1900) 1 Ch. 613; 69 L. J. Ch. 345; 82 L. T. 381. [5] (1902) 2 Ch. 360, at p. 385; 71 L. J. Ch. 518; 86 L. T. 542.

Judgment.

Harvey, J.

of the purchaser by the document itself without any extrinsic evidence. Parol evidence is, of course, necessary to ascertain his identity, but it would be also and to the same extent if his name were given.

If this could be ascertained by reference to another document the cheque which was paid at the time would shew it, and on the authority of *Walters* v. *LeBlanc*,[6] *Long* v. *Miller*,[7] and *Studds* v. *Watson*,[8] the term "consideration" in the transfer would appear to be sufficient to enable the cheque to be looked at; but as I have stated above it does not appear to me to be necessary to resort to that.

The next question to consider is the terms of payment, which are not specified in the transfer or in the cheque. I have not been able to satisfy myself entirely whether the terms of payment of the consideration must all be set out in detail or whether it is sufficient if the "price" or "consideration" alone is given. In *Williston* v. *Lawson*,[9] the agreement was in duplicate—one part signed by the vendor and the other by the purchaser—the consideration was specified but the terms were only set out later and in one part, and STRONG, J., (p. 676), says: "There would, in my opinion, be no difficulty in holding that the two documents dated the 9th of April, 1889—one signed by the plaintiff and the other by the defendant—when read and construed in the light of surrounding facts, contained all the essential requisites of a completed contract of sale sufficient to satisfy the Statute of Frauds were it not for the reference to the further arrangement of terms contained in each of them." From this I gather that it is sufficient if the "price" alone is specified, but I have been able to find no case directly deciding one way or the other. The case of *Gillatley* v. *White*[10] was, however, very similar to the present

[6] (1899) 15 T. L. R. 426. [7] (1879) L. R. 4 C. P. 450; 48 L. J. C. P. 596; 41 L. T. 306; 27 W. R. 720. [8] (1884) 54 L. J. Ch. 626; 28 Ch. D. 305; 52 L. T. 129; 33 W. R. 118. [9] (1891) 19 S. C. R. 673. [10] (1870) 18 Grant 1.

Judgment.

Harvey, J.

case. In that case a deed and mortgage had been prepared and executed by the vendor and purchaser respectively. The deed, as the transfer in the present case, contained an acknowledgment of the receipt of the consideration. It was contended that the deed was defective as a memorandum of the agreement in not expressing the consideration as set out in the plaintiff's bill as payable in instalments. It was held by SPRAGGE, V.C., that since the deed gave a receipt for the consideration, the defendant must go outside the deed to rebut that receipt, and the plaintiff admitting the non-payment, the whole admission of the manner of payment must be taken. Specific performance was decreed on those terms.

I feel disposed to follow that decision in the present case. It was given by a very able judge and seems to me most reasonable. I have been able to find no other case in any way nearly approaching the conditions of the present case.

It is objected, however, that by the terms of the agreement the moneys secured by mortgage were to be paid in five equal instalments, whereas, by the terms of the mortgage, the first payment is one of $2,000 at the expiration of the second year. I am of opinion that Mr. Short had authority to accept payment in this way and that by approving the mortgage in the manner he did without taking exception to this the defendant cannot now object.

There was evidence of an agreement between the parties, that in consideration of there being no interest charged on the mortgage up to the first of May next, the defendant was to be at liberty to remain in possession of the house on the property subject to its being moved to some other part of the premises if necessary ; and it is objected that this is an essential part of the agreement and should appear in the written memorandum. I am of opinion that this was a collateral agreement independent of the contract of sale and therefore consider this objection not a valid one

Judgment. Harvey, J.

The defendant also objected that she was the owner of the land as administratrix, and that therefore the suit would not be against her personally. There appears to me to be nothing in this objection which was not taken until the trial, but if it did appear to me to have any validity it could be cured by an amendment which the Court, under Rule 189, is not merely authorized but required to make in order to determine the real question raised.

For the reasons above given I am of opinion that the plaintiff has made out his right to specific performance of the agreement, and judgment will be in his favor with costs. Unless the parties otherwise agree the judgment may be carried out as follows: The transfer will be completed by the defendant by inserting the name of the plaintiff and will be delivered to the plaintiff with the duplicate certificate of title and the mortgage from the plaintiff and the two accepted cheques making up the $1,000, or $1,000 in some other form shall at the same time be delivered to the defendant.

Judgment for plaintiff.

RE AMERICAN-ABELL ENGINE & THRESHER CO. AND NOBLE

3 W. L. R. 324.

Land Titles Act, 1894—Priorities of encumbrances—Production of duplicate certificate of title—What constitutes "receiving" for registration.

Where a document is produced to a registrar of land titles for registration he has neither any power nor any duty in regard to it until the duplicate certificate of title has been produced, and of two encumbrances upon the same land, that one for the registration of which the duplicate certificate is first produced is entitled to priority of registration irrespective of its date: *Greenshields & Ritchie*, (1905) 6 Terr. L. R. 208; 2 W. L. R. 421, approved and followed.

[WETMORE J., *9th, 23rd March, 5th April, 1906.*

Statement.

This was a reference by the registrar of land titles for the Assiniboia Registration District under sec. 111 of *The*

Statement

Land Titles Act, 1894.[1] One George H. Matthewson had on the same day executed two mortgages on the North-east Quarter of Sec. 14, Tp. 5, Rg. 1, West 2nd Meridian, one to Robert James Noble, and one to the American Abell Engine & Thresher Co, Limited, the affidavits of execution on both being sworn on the same day, and both having been received by the registrar by the same mail. Upon their receipt the registrar notified both the mortgagees of the fact, and advised them that the production of the duplicate certificate of title would be required before registration could be made. He asked them to agree upon the mortgage to which priority should be given. The duplicate certificate of title was subsequently produced by the solicitors for the company, and the question submitted by the registrar was as to which of the two mortgages was entitled to priority of registration.

Argument.

E. A. C. McLorg, for the company.

J. T. Brown, for Noble.

[*5th April, 1906.*]

Judgment.

WETMORE, J.:—There is no evidence as to which of these mortgages was first received by the registrar of land titles. I am inclined to think that the weight of evidence established that the mortgage to Noble was executed first, and that it was intended between him and the mortgagor that his mortgage should have the priority. However, I do not express a decided opinion on this point, because I am inclined to think that before arriving at any conclusion as to that I would have held an enquiry and had witnesses examined before me *viva voce*. In the view I take of it, however, it is not necessary to take that course.

I quite agree with the judgment of my brother SCOTT, in *Re Greenshields Co.*[2] and I have very little to add to it. It seems to me that under the provisions of sec. 33 (2) of *The*

[1] 57 & 58 Vic. c. 28. [2] (1905) 2 W. L. R. 421; 6 Terr. L. R. 208.

Land Titles Act, as enacted by 3 & 4 Edw. VII, ch. 19, sec. 1 (Alberta), the registrar was not only prohibited from entering either of the mortgages in the day-book, but was prohibited from receiving them, and if they had been brought into his office by some person instead of having been forwarded by mail, he might very properly have declined to receive them at all unless the duplicate certificate of title was produced to him. Coming as they did, by mail, although the registrar retained them, he could not be considered as receiving them under the Act or for the purpose of registration; they were to be treated as if they had not been in the office at all. If he had not received them and the company's agent afterwards appeared with the company's mortgage, and the duplicate certificate of title, the registrar would have been bound to have received and entered that mortgage in the day-book and registered it. The consequence of the agent of the company producing the duplicate certificate of title, the mortgages being in the registrar's office, is dealt with by my brother SCOTT, in the case I have referred to. I therefore hold that the mortgage of the company is entitled to priority of registration. Under the circumstances I make no order as to costs of this reference.

Judgment.

Wetmore, J.

Order accordingly.

KERR CO. v. LOWE

3 W. L. R. 400.

Practice—Security for costs—Affidavit of belief as to merits.

On a motion for security for costs it is not necessary that the defendant should swear positively as to the merits. A statement that he believes he has a good defence upon the merits is sufficient.

[WETMORE, J., *30th March, 14th April, 1906.*

This was an application for security for costs. The affidavit in support of the motion was made by the defendant,

Statement.

Statement

who stated: "I have in my belief a good defence to the action herein on the merits."

Argument.

T. D. Brown, for plaintiffs, took objection that the affidavit was insufficient because it did not swear positively to merits, and referred to *Stimson* v. *Ross*, (1903) 5 Terr. L. R. 485.

T. D. Brown, for defendant.

[*14th April, 1906.*]

Judgment.

WETMORE, J.—In the case relied upon for the plaintiff the affidavit was made by one of the advocates for the defendant, and I can quite see that such an affidavit would be objectionable at least unless the advocate swore that he had a knowledge of the matters in dispute between the parties. I am not, however, able to follow the learned Judge in holding that the affidavit when made by the defendant must state positively that there is a defence on the merits. It seems to me that this is asking a defendant to swear to too much, and that the legislature never could have intended to do so. Where there are disputed questions of fact it seems to me that in view of the uncertainty of human memory and judgment, it would be a very bold man in very many instances who would swear positively that he had a defence upon the merits, since that depends so much upon the view that may be taken of the case by other parties. For instance, where the only defence a person has is a matter of law on which there might be a very divided opinion lawyers might differ, judges might differ, how could a layman under such circumstances be expected to swear positively that he has a good defence upon the merits?

I am of opinion that the affidavit is sufficient, and that as the matter stands the defendant would be entitled to the order, but the plaintiff has asked for leave to cross-examine the defendant upon his affidavit, and I will allow that to be done.

RE McVICAR

3 W. L. R. 492.

Wills—Interpretation—Lands subject to charge—Property primarily liable for payment of debts—Which debts are to be paid—Duty of executors.

Where a testator devised a quarter section to one son, directing him to pay $100 to each of two daughters; and to another son another quarter section and all personal property and cash, directing the latter to bear all sickness and funeral expenses, to keep the testator's wife and to pay her $300 every year.

Held, that the quarter sections were respectively chargeable with the moneys directed to be paid by the respective divisees.

Held, also, that the specific devises of the lands and the charging of them with the legacies and the annuity indicated that the testator had no intention of making them liable for the payment of debts unless there was not sufficient movable property or cash to satisfy these.

Semble, that the provisions of *The Land Titles Act*, 1894, 57 and 58 Vic. c. 28, s. 3, and 63 and 64 Vic. c. 21, s. 5, making land descend as personal property, have not altered the common law rule that the personal property is the primary fund for the payment of debts.

Held, further, that the executors could not convey the lands to the devisees without seeing that the proper registrations were made, and that with the consent of the devisees the proper manner of carrying this out was for them to execute encumbrances to be handed in for registration at the same time as transfers in their favour from the executors.

Held, lastly, that the costs of these conveyances and registration should be paid out of the estate.

[WETMORE, J., *29th April, 1906.*

Statement

This was an application on behalf of the executors of the will of W. R. McVicar, deceased, made under Rule 495 of *The Judicature Ordinance*,[1] for the opinion and advice of a Judge.

The testator's will was as follows:

"The sixth day of October, in the year one thousand nine hundred and four, I, Wm. Russell McVicar of Fairmede P. O., Assa., N. W. T., north-east quarter sec. 28, township 12, R. 1., west of 2nd pr. mer., make my last will and testament.

"My children living are: 1 Agnes, 2 Andrew, 3 Sarah Ann, 4 John Reid.

[1] Con. Ord. (1898) c. 21.

Statement.

"To my son Andrew I bequeath north-east quarter of section 10, township 13, R. 33, west of 1st pr. mer. The said Andrew to pay one hundred dollars to Sarah Ann and one hundred dollars to Agnes.

"To my son, John Reid, I bequeath north-east quarter section 28, township 12, range 1, west of 2nd pr. mer. Also lot No. 356, plan 29, P. L. 66, in the town of Portage La Prairie, Man. Also all personal property and cash.

"The said John Reid to bear all my sickness and funeral expenses.

"The said John Reid to keep my wife while she wishes to remain with him, and pay her one hundred dollars every year whether living with him or not.

"As my executors I appoint F. A. Clements and G. C. Lewis."

The questions submitted were:

1. Can the executors convey to Andrew McVicar the quarter section devised to him until he (Andrew) has paid to his sisters the sums of $100 each, directed in the will to be paid to them, or is such land to be charged with the payment of such legacies.

2. Can the executors convey to John Reid McVicar the quarter section devised to him, or is such property charged with the annuity directed to be paid by John Reid to his mother, and also with the charge of the maintenance of his mother?

3. Are the expenses in connection with the administration of the estate and all expenses other than those incurred in connection with the sickness and funeral of the deceased to be paid out of the personal property and cash of the deceased, and if not what part of the estate should be charged with their payment?

Argument.

J. T. Brown, for executors.

No one appeared for the other parties interested.

[*29th April, 1906*]

Judgment.

WETMORE, J.:—I will answer the last question first. At common law the personal property of a deceased person was primarily chargeable with the payment of debts due by the deceased, funeral expenses and expenses of administration, unless there was a will, and it appeared from that to be the intention that the real estate was to be primarily charged. I cannot gather from reading this will that it was the intention of the testator to charge his real estate primarily with the payment of the expenses of administering his estate or with any other expenses. He has devised his real estate specifically, and has in my opinion charged each portion of land devised with certain payments, and I cannot bring my mind to the conclusion that it was his intention to charge such land with any other payments. Section 3 of *The Land Titles Act*,[2] however, provides that "Land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate." And I may call attention to sec. 5 of ch. 21 of 63 & 64 Vic. (1900), which contains a declaration of what the intention of Parliament was in enacting sec. 3 of *The Land Titles Act*, and what was the meaning of that section in the preceding enactment. I must say that I am unable to perceive that sec. 5 of the last mentioned Act carries the matter any further than section 3 of *The Land Titles Act* One question which must occur to me is whether the common law has been altered in respect to the rule requiring the personal estate to be first applied towards the payment of the debts of the deceased and the administration expenses. The inclination of my mind is that Parliament did not intend that the real estate should be applied towards payment of these liabilities in the same manner as personal estate, but that in that respect the

Wetmore, J.

[2] 57 & 58 Vic. c. 28 (Ca.)

Judgment. Wetmore, J.

old law should remain, that is, that personal property should be first applied to such payments. I am inclined to this opinion because land is property of such a fixed nature, and because it in most instances forms the home of the family of the deceased, if he had a family. I cannot imagine that Parliament would ever intend to place in the hands of an executor, who might be a stranger, the power of practically turning the family out of doors for the purpose of paying debts and administration expenses when there was movable property, and cash which could be applied for that purpose. I do not consider it necessary, however, to express a decided opinion upon this question, because, in view of the fact which I have before stated that the testator has made a specific devise of each portion of land and has charged it as I have before stated, I am of opinion that it was not his intention to make it primarily liable or liable at all if there was sufficient movable property and cash to satisfy the payments in question. I therefore answer the last question by giving it as my opinion that the expenses in connection with the administration of the estate and all expenses other than those incurred in connection with the sickness and funeral of the deceased should be paid out of the personal property and cash of the deceased.

As to the other questions submitted I have not found the English authorities very satisfactory, and the American authorities seem to be conflicting. I find a number of English cases where real estate has been devised to a person who has been directed to pay a third person a legacy, and where it has been held that the real estate so devised is charged with the payment of such legacy, but in every case but one that has come under my notice the devisee has been the executor appointed by the will. The only case I can find where that has not been the case is *Sadd* v. *Carter*[3] where the land was de-

[3] Preed. in ch. 27.

vised to Carter and his wife for their lives, and after their decease to such of their children as should be living at the death of the survivor of them, he, the said Carter, paying £40 to the plaintiff. The Court held that this £40 was a charge upon the land, and the report of the case does not state that Carter was the executor.

Judgment.
Wetmore, J.

The question has, however, come up in some Upper-Canada and Ontario cases. In *Clark* v. *Clark*,[4] the testator devised jointly to his wife and his son James (who was not an executor) and James' heirs a certain parcel of land, and he directed that his son James should pay his daughters $200 each, when they became of the age of 21 years. I have set forth sufficient of the will to show the character of the device. STRONG, V.C., held that James' interest in this property was charged with these legacies, and that the charge was on the *corpus*. In *Kobson* v. *Jardine*,[5] a testator devised all his estates both real and personal to his wife for life, and directed that after her death the estate was to be equally divided between one of his sons and one of his daughters, several pecuniary bequests being made which were to be paid by the son and daughter in instalments commencing one year after they came into possession of the property. In this case neither the son or the daughter were executors.

BLAKE, V.C., held that the legacies were a charge on the land, citing a great number of authorities which I have gone through, but in all of them to which I have access and in which the question I am now discussing might arise, the devisees were the executors. His decision was followed by *Gray* v. *Richmond*.[6] There a testator by his will devised land to his son James, subject to the payment of an annuity to his widow for life, after the expiration of a lease given by the testator, and directed his executors to apply the rent de-

[4] (1870) 17 Grant, 17. [5] (1875) 22 Grant, 420. [6] (1893) 22 Ont. R. 256.

Judgment.

Wetmore, J.

rived from the land so devised in payment of an incumbrance thereon "so that my son may have the said property at the expiration of the said lease free from all incumbrance," and he then directed that his son James should pay one-half of the sums in the will thereinafter bequeathed to each of his daughters. FERGUSON, J., after referring to *Robson* v. *Jardine*, held that one half of the legacies were charged upon the land so devised to James.

I will follow these authorities, and my answer to the first question propounded is that in my opinion the land devised to Andrew McVicar is charged with the legacies to the daughters Sarah Ann and Agnes, and to the second question that the land devised to John Reid McVicar is charged with the annuity of $100 payable to the widow of the deceased, and with her maintenance. And I will advise that the executors cannot convey such lands to the devisees without seeing that the charge is made a good and valid charge, but I see no difficulty in effecting that object if the devisees are willing because the respective transfers may be made and the devisees execute an encumbrance in accordance with Form "O" in the schedule to *The Land Titles Act, 1894*, the executors taking care that the transfers and encumbrances are handed in for registration at the same time. The testator having intended to create the encumbrance it becomes the duty of the executors to see that his intention is carried out and that the land is properly charged, and I so advise.

The costs of this application shall be paid out of the estate, and under the circumstances the costs of any transfers or documents necessary to create a proper charge upon the records, and the registration thereof, shall also be paid out of the estate.

Order accordingly.

BERRY v. SCOTT.

4 W. L. R. 282.

Action for a specific performance—Statute of Frauds—Evidence to connect documents—Sufficiency of a statement of consideration and terms—Part performance.

In an action for a specific performance against a vendor, the evidence to satisfy the Statute of Frauds consisted of a receipt signed by the plaintiff for $50, "to apply on equity on Canadian Pacific Railway land," describing it "at $5.50 per acre," and a letter from the vendor offering to return the $50 and referring to the sale as having been "declared off long before." The agreement alleged was to sell the land at $5.50 per acre, the purchaser paying off the balance due the railway company out of his purchase money.

Held, that the letter from the defendant could be used with the receipt to satisfy the Statute, although it repudiated the sale.

Held, however, that the requirements of the Statute of Frauds were not satisfied, the writing indicating an agreement to sell for $5.50 per acre, subject to the railway company's claim and not the agreement alleged.

The plaintiff had done some breaking upon the lands without the knowledge of the defendant.

Held, that the breaking done upon the lands by the plaintiff, being unknown to the defendant, could not be relied upon to show the part performance of the agreement.

[*Court en banc, 11th, 18th July, 1906.*

Statement.

Appeal from a judgment of SCOTT, J., 3 W. L. R. 84, after trial without a jury, dismissing the action. The statement of claim alleged that the defendant on the 17th March, 1908, agreed to sell to the plaintiff the south-east quarter of sec. 13, tp. 45, rg. 24, west of the 4th meridian, for a price of $5.50 per acre; that the defendant was not the registered owner of the land but was in possession of the same as equitable owner under an agreement of sale from the Canadian Pacific Railway Co., and that the plaintiff agreed and was willing to accept an assignment of the said agreement of sale and to assume, as part of the price above mentioned, the payment of all moneys remaining due to the said company. The defendant among other defences pleaded the *Statute of Frauds*.

The evidence given to satisfy the Statute consisted of a receipt and two letters in the following terms :—

Statement.

"March 4th, 1902.

"Received from Will Berry, fifty and no/100 dollars to apply on equity on Canadian Pacific R. W. land. s.-e. quarter, section 13, township 45, range 24, west of 4th meridian, at $5.50 per acre.

"M. E. Scott."

"Wetaskiwin, Alta., Canada,
July 12th, 1902.

"Mrs. M. E. Scott,
Hartley, Ia.

"The assignment papers and drafts which I sent you were returned by Mr. Patch stating you refused to sign them. My money has been ready ever since you sent me the receipt. I wrote to you in April, asking you to send the assignment to the bank and I never received an answer from you. So I concluded I would send you the paper and draft which I did and you refused to sign them.

"I believe I have done my part and hope you will do the same and save trouble.

"I have been breaking on the land and was disappointed to think you refused the papers. Enclose papers, trusting you will sign properly and send to the Merchants Bank at Wetaskiwin. The money is deposited there for you.

"Hoping you will attend to this at once.

"Yours truly,
"Will Berry."

"Hartley, Ia., 7th, 1902.

"Mr. Will Berry,
"Wetaskiwin, Canada.

"Dear Sir,—Yours of the 12th received. It being the first I have recd. from you. I instructed Mr. Patch to retuan your draft as the sale had been declared off long before. You were too slow about making payment, and ignored Mr. Patch's letters.

"I herewith return assignment. Statement.

"Return the receipt either to Frank Patch or to your brother, and I will return the $50.

"Yours truly,

"M. E. Scott."

The trial Judge dismissed the action, holding that there was no sufficient memorandum in writing to satisfy the statute. The plaintiff appealed, and the appeal was heard before SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

N. D. Beck, K.C., for plaintiff.

W. L. Walsh, K.C., for defendant. Argument.

[*18th July, 1906.*]

The judgment of the Court was delivered by

NEWLANDS, J.:—It was proved at the trial that these letters referred to the agreement above mentioned; and although the letter from the defendant to the plaintiff repudiates the sale, there is no doubt but that it can be used to help out the receipt. That it refers to the receipt is shewn from the fact that she wishes to return to the plaintiff's brother the $50 she received from him. The only authority I need cite on the question that a letter repudiating a contract may be used to prove its terms is *Martin* v. *Haubner*,[1] in which STRONG, C.J., says: "Upon the other question, however, that on which the judgments of the learned Chief Justice of the Common Pleas and of the Court of Appeal both proceeded, namely, that there was a sufficient memorandum of the contract in writing signed by the appellant to meet the requirements of the 17th section of the Statute of Frauds, I am of opinion that the respondents must succeed in main- Judgment.

[1] 26 S. C. R. 142, at p. 145.

Judgment.

Newlands, J.

taining the judgment in their favour. I have no doubt but that the letter of the 13th of September is such a memorandum. That letter refers to the invoice in these words: 'The goods shown by your invoice are not what I wanted, and the amount is far in excess of the value of the goods I did want.' The cases of *Wilkinson* v. *Evans*,[2] *Baumann* v. *James*[3] and *Taylor* v. *Smith*,[4] referred to in the judgment of the Chief Justice of the Common Pleas, to which may be added *O'Donohoe* v. *Stammers*,[5] are authorities amply sufficient to warrant the introduction of evidence identifying the invoice produced as that thus referred to in the appellant's letter. Then, from the invoice thus referred to, those particulars of the sale, the names of the parties' vendors and vendee, the description of the goods sold and the price, which are required to be in writing, signed by the party to be charged, in order to come within the terms of the Statute, are all plainly to be ascertained. The reference to the invoice is, therefore, just as effectual as if everything contained in it had been set forth in terms in the body of the appellant's letter. The objection to this letter as constituting a sufficient memorandum within the 17th section, upon which Mr Justice BURTON has founded his dissenting judgment, is that a writing, though containing a statement of all the terms of the contract requisite to constitute a memorandum of the contract under the Statute, cannot be used for that purpose if it repudiates the sale. Upon both authority and principle I am of opinion that this objection cannot be sustained."

We have therefore to consider whether the receipt with the two letters above mentioned are a sufficient memorandum to satisfy the Statute of Frauds.

The receipt itself does not show that the party who paid the money is the purchaser, but I think this is clearly shown

[2] (1866) L. R. C. P. 407; 35 L. J. C. P. 224; 14 W. R. 963. [3] (1868) 3 Ch. App. 508; 18 L. T. N. S. 424; 16 W. R. 877. [4] (1893) 2 Q. B. 65; 7 Taunt. 156. [5] (1884) 11 S. C. R. 358.

by the subsequent correspondence. The land is also properly described. The only question is whether the consideration and terms on which the land was agreed to be sold is sufficiently set out. The receipt shows that the payment is to apply on equity on Canadian Pacific Railway land at $5.50 per acre. The plaintiff contends that mentioning a price per acre shows that the $5.50 per acre is the whole amount to be paid, and that defendant is only to be paid the balance after paying what is due the railway company. From the evidence at the trial there is no doubt but that this was what was agreed between them. This agrement must, however, be proved by some memorandum in writing, and such a term of the contract cannot be proved by oral testimony: *Pierce* v. *Corf*;[6] *Rishton* v. *Whatmore*;[7] Now, can the price and terms of sale be ascertained from the documents in this case. The receipt says that the $50 paid is to apply on equity at $5.50 per acre. By the word "equity" there is no doubt but that the defendant meant whatever interest she had in the land, and it seems to me that the receipt can be read in no other way than that she is selling all her interest in that land at $5.50 per acre. That is not the agreement set out by the plaintiff in his statement of claim, and there is therefore no memorandum in writing as required by the statute. Judgment. Newlands, J.

The plaintiff cited *Newell* v. *Radford*;[8] *Re Holland, Gregg* v. *Holland*.[9] In *Newell* v. *Radford* it was contended that the memorandum did not show who was the seller and who was the purchaser. BOVILL, C.J., in giving judgment said: "At first sight this indeed might not appear quite clear except to a man in the trade, but it has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum, and for this purpose parol evidence of the surrounding circumstances is

[6] (1874) L. R. 9 Q. B. 210; 43 L. J. Q. B. 52; 27 L. T. 219; 22 W. R. 299. [7] (1878) 8 Ch. D. 467; 47 L. J. Ch. 629; 26 W. R. 827. [8] (1867) L. R. 3 C. P. 52; 37 L. J. C. P. 1; 17 L. T. 118; 16 W. R. 79. [9] (1902) 2 Ch. 360.

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Newlands, J.

admissible." The agreement in that case was for the sale of flour, and parol evidence was admitted to shew that plaintiff was a baker and defendant a flour merchant, and BOVILL, C.J., said that from that fact there was no doubt who was the buyer and who was the seller. In *Re Holland, Gregg v. Holland*, where a post-nuptial settlement recited an ante-nuptial agreement on the part of the husband to make the settlement, but did not say with whom he agreed, it was held that the deed of settlement showed with whom the agreement was made. STIRLING, L. J.,[10] said: "It was, however, said on behalf of the trustee in bankruptcy that, even if this were so, the deed did not satisfy the requirements of the Statute of Frauds, because it only recites that previously to the marriage the husband agreed to make a settlement, and does not state with whom he agreed. It is no doubt necessary that the note or memorandum, to satisfy the statute, should shew who the parties to the agreement are, but they need not be named or specifically described as such; it is sufficient if, by reasonable intendment, it can be inferred from the document who they are. For this purpose the whole deed may be looked at. Now I find the guardians of the wife are named as parties, and the covenants of the husband are entered into with their approbation as such. They are the persons with whom an ante-nuptial contract would in ordinary course be made. I see no reason why they should have been made parties to the deed except that the contract was made with them, and it is the reasonable intendment that it was actually made with them. I think, therefore, that this objection is not well founded." I do not see how either of these cases can be taken as authorities for the admission of evidence to show that the $5.50 per acre was to be paid for the whole land, and not for the equity only. On the other hand they seem to me to be authorities for the proposition that you must get the terms of the agreement from the memorandum itself.

[10](1902) 2 Ch. at p. 385.

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Newlands, J.

A number of other cases were also cited to show that an ambiguity in the memorandum may be explained by parol evidence. Here, however, I find no ambiguity. From the documents it appears that the defendant sold her equity in the land at $5.50 per acre, and to allow the plaintiff to prove the agreement he sets up by parol evidence would be allowing him to prove that she sold it for less than that sum, which would be proving a distinct term of the contract by parol evidence, which cannot be allowed under the Statute of Frauds.

It is also contended that there was a part performance of the agreement sufficient to take it out of the Statute. The land was open prairie land and the part performance was the ploughing of a few acres. The plaintiff was not otherwise in possession of the land, and what he did was not with the knowledge of the defendant. In *Maddison* v. *Alderson*,[11] Lord Selborne, L. C., said: "All the authorities show that the acts relied upon must be unequivocally and in their own nature referable to some such agreement as alleged." This cannot be held in this case; the plaintiff was not in actual possession of the land, and what he did was not known to defendant, and could not in this country be considered evidence of ownership."

For these reasons I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

[11](1883) 8 App. Cas. 467, at p. 479.

R. v. HARRIS.

4 W. L. R. 530.

Summary conviction—Certiorari—Entitling proceedings.

Proceedings to obtain a writ of certiorari to quash a conviction where an order quashing it is not asked upon the return of the application for the writ, do not require to show the name of the informant, as part of the style of cause.

[WETMORE, J., *3rd November, 1906.*

Statement. This was an application for certiorari to quash a conviction against the applicant. A summons was issued on the affidavit of the applicant, Harris, and such summons and affidavit were entitled "In the matter of James Harris and of a certain conviction," describing it, but not stating the name of the informant, "*ex parte* James Harris."

Argument. *E. A. C McLorg*, for Attorney-General, objected to the proceedings on the ground that they were improperly entitled, and did not comply with Rule 38 of the Crown Practice Rules of the Supreme Court.[1]

E. L. Elwood for applicant.

[*3rd November, 1906.*]

Judgment. WETMORE, J.:—The entitling seems to be in compliance with the rule unless it was necessary that the name of the informant should have been stated. It is quite clear to me that the informant is not the defendant or respondent in this matter. Then is he the "party against whom the application is made?" I am of opinion that he is not.

The practice in England respecting the entitling of affidavits on application for certiorari is to entitle them in the

[1] Rule 38 of the Crown Practice Rules provided that "All proceedings under these rules shall be entituled in the Court and shall be styled in the matter to which they relate so as to show the name of the applicant as informant, relator, plaintiff, private prosecutor, or otherwise, according to the nature of the case and the name of the defendant, respondent or party against whom the application is made."

Court only. See Short & Mellor's Crown Practice[2] citing *R.* v. *Cole*,[3]

Judgment.

Wetmore, J.

And that would be the practice here had it not been changed by the rule in question. It could never have been considered, therefore, that an application for certiorari was made against the informant. As a matter of fact it was made against the justices, and it was not necessary that the informant or complainant should be served with a copy of the summons or rule nisi. As a matter of fact the practice was not to serve him unless there was a special direction of the Court or a Judge to do so, and I think that this, in view of the provisions of Rules 3 and 4, is quite recognized by the rules of this Court which empower the Court to direct that the informant need not be served with the summons unless the summons asks that the proceedings attacked be quashed without the issue of the writ. It seems to me that either of these rules would have been promulgated if it had been considered that an informant or complainant was the party against whom an application for certiorari was made. In this case the summons did not ask that the proceedings attacked shou'd be quashed without the actual issue of the writ, and I am, therefore, of opinion that the proceedings in this case are properly entitled.

[2] (1st ed.), 455. [3] (1847) 6 T. R. 640.

CAMPBELL v. CAMPBELL

5 W. L. R. 59.

Testamentary capacity — Drunkenness — Sober intervals—Unsoundness of mind.

A will made at a time when the testator was drunk, leaving his property to trustees, with an absolute discretion to pay or not to pay the testator's wife any part of the income, was set aside where it appeared that the testator was affectionate to his wife when sober, but the reverse when drunk.

[SCOTT, J., *6th December, 1906.*

Statement. This was an action by the wife of a testator to set aside the later of two wills made by him. The facts appear in the judgment.

Argument. *W. L. Walsh*, K.C., and *W. M. Campbell*, for plaintiff.

E. P. McNeill and *C. F. Harris*, for defendants the executors of the second will.

[*6th December, 1906*]

Judgment. SCOTT, J.:—Colin N. Campbell, the husband of the plaintiff, died on the 14th day of February, 1906, without issue. On 24th June, 1897, he made a will whereby he devised and bequeathed all his real and personal estate to the plaintiff absolutely, and appointed her his executrix. On 12th May, 1905, he signed a paper writing purporting to be his last will and testament, whereby he revoked all former wills made by him, and with the exception of the specific bequest of his watch and chain, devised and bequeathed all of his real and personal estate to his brothers, the defendants, as trustees and executors upon the following trusts: first, during the lifetime of his wife to pay her such sums as they should from time to time in their discretion deem sufficient and ample for her comfortable support and maintenance, having in mind her separate property and means, and for that purpose they were empowered to use such portions of the corpus of the estate in addition to the income as

they might consider neceessary and prudent; second, upon the death of his wife to give the residue of the estate to his sister, Flora Isabella, for her own use, and, third, in the event of his sister, Flora Isabella, predeceasing his wife, then, upon the death of the latter, to give the residue of the estate to his nephew, Ian Colin Campbell, a son of the defendant, John J. Campbell, and in the further event of his earlier death then to divide the remainder of the trust estate between themselves for their own use. The trustees were also empowered during the life time of the plaintiff in their discretion from time to time, if they should be of the opinion that the estate would remain sufficient for his wife's maintenance, of which they should be the sole judges, to advance from the principal or income of the estate such sums as they should desire and deem necessary and prudent for the support and maintenance of his said sister, Flora Isabella.

The plaintiff charges that the deceased on 12th May, 1905, the date of the last mentioned document, was of unsound mind, and did not possess the testamentary capacity sufficient to entitle him to make such a will, and that such document was so signed by him at a time when, owing to his mental condition induced and brought about by the excessive use of intoxicating liquors for a lengthened period, he was utterly unfit and incapable of understanding or being able to transact business of any kind whatever, or to make a valid testamentary disposition of his estate. She claims a declaration that the document of 12th May, 1905, was executed by the deceased at a time when he was not of sound and disposing mind, and is invalid as a will, and that the will of 24th June, 1897, is the last will and testament of the deceased, and that the plaintiff as the executrix named therein is entitled to probate thereof.

Sometime early in 1905 the deceased instructed Mr. McNeill, a solicitor, to prepare a will for him, and stated to him the details of the deposition he desired to make of his

Judgment.

Scott, J.

estate, the instructions he then gave being for a will substantially the same as the provisions of the will in question, except the last mentioned provision thereof. On a subsequent occasion between that and 12th May he asked Mr. NcNeill if the will had been prepared, and was informed that it had not. On 12th May he called at Mr. McNeill's house between 11 and 12 o'clock, a. m., and asked him to draw up the will that day, stating that he was leaving for Winnipeg that evening. Mr. McNeill states that they went over the terms of the will at that time, as on the former occasion, and upon his asking the deceased what disposition he desired to make of his estate in case his nephew died before he became entitled, he replied that the contingency was not likely to happen, but that if it did his brothers should divide the estate between themselves. Mr. McNeill prepared the will that afternoon and took it over to deceased that evening about 6 or 7 o'clock The latter read over the will, gave instructions as to the filling in of some blanks left for the names of his brothers, demurred to the bequest of a gold watch and chain contained in it, stating that he had no gold chain, and, when he finished reading it, stated that the will was expressed exactly as he desired, and that he would not change a word of it. He then called in his physician, Dr. Millburn, and his pastor, the Reverend Mr. Jaffray, who were in the adjoining room, and asked them to witness its execution. He explained to them in detail the legal formalities necessary, stating that it was not necessary that they should know its contents, but that he should know the contents, which he did, that he should acknowledge it as his will, that two witnesses were necessary, and that all should be present and see each other sign. When in the act of signing, or as he was about to sign, he said to them: "You must be prepared to say that I know what I am doing, that I am in my right mind." He then turned to Mr. Jaffray and said: "What do you say? Am I in my right mind?" To which the latter replied: "You are all

right; it would take a clever man to puzzle you now." He then said to Dr. Millburn: "Medicus, what do you think? Am I *compos mentis*?" To which the latter replied: "You are all right." Deceased then signed the will in their presence and they, with Mr. McNeill, then signed as witnesses. Deceased then asked Mr. McNeill to make a copy for him, and the latter having done so handed the will and copy to him. He then placed the original will in an envelope and handed it to Mr. McNeill, asking him to take care of it for him. Judgment. Scott, J.

The evidence shows that the deceased had been for many years prior to his decease of intemperate habits, and had on several occasions taken what is known as the gold cure treatment, viz., at the Keeley Institute in Minneapolis in 1892, at the Baldur Hot Springs some years later, and at the Keeley Institute in Winnipeg about 1896. After the latter treatment he appeared to have refrained from intoxicants for about four years, but after that he again lapsed into occasional fits of intemperance and continued thus for several years. These lapses were occasional only until about 1st February, 1905, but from that time up to the time the will in question was signed he appears to have been under treatment for drinking by his physician, Dr. Millburn, almost continuously, the latter having visited him for that purpose alone on twenty days in February, seventeen in March, fourteen in April, and every day from 1st to 12th May, upon which last mentioned date he left for Winnipeg to again take the gold cure treatment. He left his house that morning under the influence of liquor and returned in the same state about 1 o'clock p. m. He left again in the afternoon and was brought back about 6 o'clock in the evening by one Parker, who had been employed by his wife to look after him. He was then so much under the influence of liquor that he was unable to return without assistance. He must therefore have been intoxicated at the time he signed the will

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and had evidently been drinking afresh only a short time before he signed it.

Mr. McNeill states that when deceased first gave him instructions about his will, he was in possession of his mental faculties, and keenness in affairs, knew what he was doing, that his acts were voluntary acts, and that he had not been drinking, that at the time he executed his will no doubt as to his testamentary capacity entered his (Mr. McNeill's) mind, that in his opinion the testator thoroughly understood what he was doing, and that in executing the will he was carrying into effect a considered plan. Mr. McNeill admits, however, that deceased told him on 12th May that he must get away, as he felt that he had been drinking too much.

Mr. Jaffrey, who was a witness for the defence, is not so clear as to the mental capacity of the deceased at the time he executed the will. He states that he was not in his best mental condition at that time, but was able fairly fully to appreciate the claims of all persons upon him, and was also capable of estimating the influence of his actions to a considerable extent. He admits that deceased was weak from the effects of drink, and that his conduct during the evening would indicate that he was not in his best, self-contained frame of mind.

The evidence of Dr. Millburn is to the effect that deceased was intoxicated at the time he signed the will, and was not in a condition to understand the consequences of his act or to weigh them, nor was he in a fit condition to understand or appreciate the claims of his relatives or those depending upon him. It is true that Dr. Millburn, upon being asked by the deceased at that time whether he was *compos mentis*, replied that he was "all right," but he states that his reason for so replying, and for afterwards witnessing the execution of his will was that he was anxious that deceased should get away that night. This to my mind is not a sufficient excuse for the impropriety for his conduct, but it may

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Scott, J.

be that it resulted from his anxiety lest anything should occur to prevent or postpone the departure of the deceased, he being then, in Dr. Millburn's opinion, in a precarious state of health. The evidence of the attending physician as to his patient's mental state is, under ordinary circumstances, entitled to very great weight : *Wilson* v. *Wilson*.[1] The fact that in his anxiety for his patient may have acted indiscreetly should not, in my view, lessen the weight of his evidence to any material extent.

The fact that deceased was intoxicated at the time he made the will is not in itself sufficient to warrant the assumption of testamentary incapacity, but where a person is of lower grade of capacity, owing to intemperance, a very different degree of proof is required to satisfy the Court that the will contained the real intentions of the testator. On the other hand the fact that the deceased, at the time he made the will, appeared to comprehend its contents and to understand the formalities required for its execution, and the importance of the witnesses being able to testify as to his mental soundness, is not sufficient to put it beyond doubt that he possessed testamentary capacity.

In Peterson and Haines on *Legal Medicine and Toxicology*,[2] it is stated that during the exhilarating stage of alcoholic indulgences the subject often evinces considerable insight, recalls forgotten subjects, and talks easily and clearly, so as often to cause the ordinary observer to mistake his mental condition for one of true brilliancy, and that in the ordinary drinker this stage of exhilaration from alcohol is often more or less perfectly remembered, but in the periodic inebriate it is frequently a complete blank to the individual after the spree is over.

In *Boughton* v. *Knight*,[3] Sir James HANNEN says : " It is essential to the exercise of such a power [of making a will]

[1] (1875) 22 Grant 39. [2] Vol. I. p. 641. [3] (1873) 3 P. L. R. 64, at p. 74 ; 42 L. J. P. 25 ; 28 L. T. 562.

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Scott, J.

that the testator shall understand the nature of the act, and its effects ; shall understand the nature of the property of which he is disposing ; shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. Here then we have the degree of mental power which should be insisted upon."

The deceased was a Presbyterian, and his wife a Roman Catholic. They appear to have lived happily together at all times when he was free from the effects of alcohol, but when he was intoxicated, there were frequent quarrels between them due to the fact that when he was in that state he became irritable, and inclined to be quarrelsome. The fact that she resented his being in that state led her to indulge in recrimination, which, doubtless, had the effect of intensifying their quarrels. During his drinking bout from 1st to 12th May, there were frequent quarrels in which he would use abusive language towards her, and upon one occasion he, to use the words of a witness, "tried to grab her," but the witness prevented him.

It is impossible to avoid the conclusion that during his drinking spells, and as the result thereof, he became embittered against his wife, and was inclined to treat her with but scant consideration. Immediately after signing the will he went into the adjoining room where his wife was, and told her he had made it, and the disposition he had made of his estate. The result of this communication was a further quarrel between them. Mr. Jaffray, who was present in the house at the time, advised the deceased to destroy the will, and he admits that one of his reasons for so advising him was that he felt that deceased may have been moved by spite to

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make the provisions he did by his will. Considering his usual treatment of his wife when inebriated, it is to my mind not unreasonable to suppose that such was his motive in making the will. The circumstances under which the communication was made to his wife leads me to think that he may have said merely in the spirit of boasting that he had by means of the will obtained an advantage over her.

It appears from the evidence that for many years previous to their taking up their residence in Macleod, the wife of deceased supported him by means of a business carried on by her in Toronto, and with moneys received by her from her father's estate, he being unable, presumably by reason of his unsteady habits, to obtain remunerative employment ; also that after coming to Macleod, she paid his expenses to take the gold cure at Minneapolis, and also her own expenses in accompanying him, amounting in all about $600 ; also the expenses of a friend who accompanied him on one of the occasions he took the gold cure at Winnipeg ; also that upon one occasion, when they were living in Toronto, and he came out west in search of employment, and was stranded here, she supplied the money to take him back to Toronto ; also that a portion of his estate consists of property acquired by him with moneys advanced by her. In view of these facts, and assuming that his objects in making the new will were to prevent his estate going to the Roman Catholic Church, and to make provision for his sister, it is open to question whether the will was not unreasonably harsh, as against his wife, in that he appears to have left it entirely to the discretion of his brothers whether she should receive any portion of the income of the estate, let alone any portion of the corpus. By this statement I do not intend in any way to reflect upon their character or honor, as there is nothing to lead me to think that they would exercise the discretion conferred upon them otherwise than by doing full justice to her in the disposition of both the income and corpus under the terms of the will.

Judgment.

Scott, J.

Mr. McNeill states that several weeks after the deceased returned from Winnipeg, after making the will, he called at his (Mr. McNeil's) office and asked him what his charge was for drawing the will, also whether he had the will. Upon being asked whether he wanted it, deceased replied in the negative and said: "Be sure and keep it safe because it is important; Mrs. Campbell is giving me no rest concerning it, though I have done what I think is right, but I certainly do not want any little property I leave to go to the Catholic Church." Also on a subsequent occasion, about October, 1905, deceased again called at his office and asked for and obtained the will, and that on both occasions he was in excellent health, and gave no evidence of indulgence in drink. These statements, coupled with the statements already referred to that deceased had not been drinking when he first gave the instructions for the will, might lead to the view that, although he was intoxicated when he executed it, he was merely carrying out a plan which he had formed when sober. I am not, however, entirely satisfied that Mr. McNeill may not have been mistaken as to the state of the deceased upon any of the occasions referred to. I am satisfied that he was mistaken as to his mental state at the time the will was executed, as I am of the opinion that at that time he was not, to adapt the words of Sir James HANNEN already quoted, entirely free from any disorder of the mind, which would tend to poison his affections, or pervert his sense of right, and that he, therefore, did not possess the requisite testamentary capacity. If Mr. McNeill was mistaken as to his condition at that time, he may also have been mistaken as to his condition upon the other occasions referred to. The evidence shews that his trip to Winnipeg on 12th May did not effect a cure, and that his intemperate habits continued up to the time of his death.

I hold that the document executed by deceased as a will on 12th May, 1905, was executed by him at a time when he

was not of sound and disposing mind, and that it is for that reason invalid, and should be set aside, and that plaintiff is entitled to a declaration to that effect. The further declaration applied for by the plaintiff, *viz*, that the will of 24th of June, 1897, is the last will and testament of deceased, is one which I think I ought not to make. There is no evidence to shew that deceased may not have made another valid will subsequent to it. Apart from this there does not appear to me to be any necessity for such a declaration, as the plaintiff may obtain the necessary relief by an application for probate.

Judgment.

Scott, J.

As the defendants were bound by reason of their fiduciary capacity to leave the question of the validity of the will of 12th May to the determination of the Court, I think they should not be mulcted in costs. In my view the proper order to make is that the costs of both parties be paid out of the estate, and I do so order.

Judgment accordingly.

TUCKER v. ARMOUR.

5 W. L. R. 35.

Landlord and tenant—Unregistered assignment of lease—Land Titles Act—Parties—Re-entry—Tender of rent due—Costs.

In an action against the landlord by the assignee of a lease under *The Land Titles Act, 1894*, duly registered to recover possession of the premises upon which the landlord had re-entered for default in the payment of rent.

Held, (1), that the fact that the assignment was not registered was no bar to the action.

(2) that the original lessee was not a necessary party.

(3) that the lessee was entitled to relief without the issue of a writ of ejectment upon payment of the rent due, but that the plaintiff, although he tendered all the rent due before action, should bear the costs of it, except in so far as these were increased by the defendant's resistance to the claim.

The plaintiff had sublet the lands, the sublease providing for re-entry in the event of the sublessee permitting an execution to be levied against his goods. This event had happened and the plaintiff had distrained through the sheriff, who was in possession under a writ of attachment and writs of execution when the defendant re-entered.

Held, that the plaintiff's distress and the bringing of this action showed that the plaintiff intended to terminate the sublease.

[NEWLANDS, J., *15th December, 1906.*

Statement.

This was an action to recover possession of certain premises leased by the defendant to the plaintiff. The lease was granted to one Herbert Tucker, on the 18th October, 1904, for a term of twelve years, from the 23rd March, 1903, at a monthly rental of $12, and was duly registered. On the 10th May, 1905, Herbert Tucker assigned all his interest to the plaintiff by assignment duly executed under seal, the assignment, however, remaining unregistered. The rent was paid by the plaintiff up to 30th November, 1905. In September, 1905, the plaintiff had sub-let the premises to one Glasserman, until the 1st of June, 1906, at a monthly rental of $47.50, the lease providing that he should have the right to re-enter if Glasserman permitted any execution to be levied against his goods. Glasserman became insolvent and absconded from the province, and on the 10th January, 1906, the plaintiff put the sheriff in possession under a distress warrant under which the rent was realized up to the 15th March, after which the sheriff continued in posses-

Statement

sion under a writ of attachment, and writs of execution against Glasserman. On the 6th March, and while the sheriff was still in possession, the defendant, his rent being then overdue for three months, re-entered, demanded and received the key from the sheriff and took possession of the premises. Three days afterwards the plaintiff tendered to the defendant all the rent due by him; this the defendant refused to accept, and the plaintiff thereupon brought his action.

Argument.

A. L. Gordon, for the plaintiff.

D. J. Thom, for the defendant.

[*15th December, 1906.*]

Judgment.

NEWLANDS, J.:—It is objected on the part of the defendant that the plaintiff has no title to the premises, the assignment to him from the original lessee never having been registered under sec. 54 of *The Land Titles Act, 1894.** This section is similar to sec. 59 of *The Territories Real Property Act*,[1] under which *Wilkie* v. *Jellett*,[2] was decided. There it was held that, though the registered owner was the legal owner of the lands, he was a bare trustee for an unregistered transferee, and that the Courts would give effect to the title of the equitable owner. As was stated by JESSEL, M.R. in *General Finance Co.* v. *Liberator Benefit Building Society*,[3] "no action for the recovery of land can be defeated for

*57 & 58 Vic. c. 28, s. 54, which provides that: "After a certificate of title has been granted for any land, no instrument, until registered under this Act, shall be effectual to pass any estate or interest in any land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money; but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security, in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature."

[1] R. S. C. (1886) c. 51. [2] (1895) 2 Terr. L. R. 133; 26 S. C. R. 282. [3] (1878) 10 Ch. D. 15, at p. 24; 39 L. T. 600; 27 W. R. 210.

Judgment.

Newlands, J.

the want of the legal estate where the plaintiff has the title to the possession."

The next objection raised by the defendant was that the proper parties were not before the Court, that the original lessee was a necessary party, and should have been a plaintiff.

In *Hare* v. *Elms*,[4] it was held that the original lessee was a necessary party where judgment in ejectment had been obtained, and the lease was forfeited and gone. In this case the lease has not been determined by an action of ejectment. The defendant re-entered under his lease without taking any legal proceedings.

In delivering judgment in that case, DAY, J.[5] referred with approval to the judgment of *Doe d. Wyatt*, v. *Byron*,[6] remarking that in that case "there was no judgment in ejectment at all. The defendants, who were under-lessees of the term less two days, appeared to the writ as soon as they heard of it, and before judgment, and asked the Judge to exercise his jurisdiction by allowing them to pay the rent and costs into Court at once. They asked to be allowed to pay the rent and costs into Court before judgment and execution took place, and asked for a stay of proceedings upon payment of the rent and costs under 4 Geo. II. ch. 28. The Judge allowed that to be done, and under his direction the rent and costs were paid to the lessor. Everybody therefore remained in the same position as they always had been. The Judge's decision was upheld by the Court. That case, however, is no authority for the proposition that an under-lessee has a right to deal with the matter in the absence of the original lessee. The lessees there were not necessary parties at all. The lease had never been determined; there had been no judgment or entry in ejectment." The original lessee is not therefore a necessary party to this action.

[4] (1893) 1 Q. B. 604; 62 L. J. Q. B. 187; 68 L. T. 223; 41 W. R. 297; 57 J. P. 309. [5] (1893) 1 Q. B. at p. 609. [6] (1845) 1 C. B. 623; 50 C. L. R. 623.

Judgment.
Newlands, J.

It is further contended that the plaintiff, having distrained against Glasserman's goods, had abandoned his right to re-enter, and that Glasserman's lease, being still in existence, the plaintiff had no right to bring this action,but as Glasserman had absconded I do not think that this interpretation can be put on the act of plaintiff in distraining, but rather that he intended to re-enter, put an end to the lease and at the same time collect the rent due him. The fact that he brought this action before the expiration of his lease to Glasserman is evidence that he intended to so terminate that tenancy, and under any circumstances the defendant by his re-entry ousted Glasserman and put an end to his term.

The plaintiff in his statement of claim alleges that the defendant through fraud entered into possession of the said premises and evicted the plaintiff therefrom, and defendant contends that there being no proof of fraud on the part of the plaintiff, his action should be dismissed. In support of this proposition he cites *Wilde* v. *Gibson*,[7] where Lord COTTENHAM, L. C., says: "The plaintiff having rested his case in the bill upon imputations of direct personal misrepresentation and fraud cannot be permitted to support it upon any other ground . . . The case alleged is not proved and the case proved is not alleged, and if it had been there would not have been sufficient to support the decree." This is not the case here, since, leaving out the allegations of fraud, there is sufficient to support the plaintiff's claim and he is entitled to recover apart from that allegation altogether.

In *Howard* v. *Fanshawe*,[8] it was decided that the lessee was entitled to relief in the case of a peaceable entry by the landlord without the issue of a writ of ejectment upon payment of the rent due. The plaintiff will, therefore be entitled to the possession of the demised property, according to the lease mentioned in the statement of claim. He must,

[7] (1848) 1 H. L. 605 at p. 626; 12 Jur. 527. [8] (1895) 2 Ch. 581; 64 L. J. Ch. 666; 73 L. T. 77; 43 W. R. 645.

Judgment. Newlands, J.

however, pay the rent, and the defendant must thereupon deliver up possession to him. The plaintiff must bear the costs of the action, except so far as they have been increased by the defendant resisting his claim, and those costs must be borne by the defendant.

There will therefore be a reference to the clerk to ascertain the amount of rent due defendant.

Judgment for plaintiff.

FRANK v. GAZELLE LIVE STOCK ASSOCIATION

5 W. L. R. 573.

Promissory note given for goods to remain property of payee—Memorandum thereon—Endorsement.

In an action by an endorsee of a document in the form of an ordinary promissory note, but having on the face of it a memorandum "Given for Suffolk stallion, 'His Grace,' same to remain the property of J. H. Truman until this note is paid."

Held, that the document was not a promissory note, and that the rights of the parties under it could consequently not be assigned by the simple endorsement. *Bank of Hamilton* v. *Gillies*, (1899) 12 Man. R. 495; *Kirkwood* v. *Smith*, (1896) 1 Q. B. 582, applied.

[HARVEY, J., *13th, 18th December, 1906.*

Statement.

This was an action brought by the plaintiff as indorsee against the defendants as makers of a document in the following terms:—

$3,000 xx/100 Innisfail, N.W.T., June 16th, 1903.

One year.....after date I promise to pay the order of J. H. Truman for the Pioneer Stud Farm, Bushnell, Ill., J. G. Truman, Mgr., at the Union Bank of Canada here, the sum of Three Thousand....xx/100 Dollars. Value received.

Given for Suffolk Stallion, "His Grace."
Same to remain property of J.H.Truman
until this note is paid.

Gazelle Live Stock Co.,
Frank F. Malcolm, Manager.

Statement. This document has endorsed on the back the following: "Without recourse, the Pioneer Stud Farm, J. G. Truman, Manager. Pay to the order of Fred'k Frank. F. Frank.

Argument. *R. B. Bennett*, for plaintiff.

W. T. D. Lathwell, for defendants.

[*18th December, 1906.*]

Judgment. HARVEY, J.:—The plaintiff claims upon this document as a promissory note, or in the alternative as an agreement, the rights under which accrued to him as a member of the partnership, the Pioneer Stud Farm, upon its dissolution and a division of the assets. Several objections are taken by the defendants, the first of which is that the document in question is not a negotiable promissory note, and that, therefore, the plaintiff, without a valid assignment in writing cannot maintain this action, whether the document is treated as a promissory note or not. There is no evidence of any written assignment of the document unless the endorsement above referred to constitutes such an assignment.

In the *Dominion Bank* v. *Wiggins*,[1] it was held by Mr. Justice MACLENNAN, with the concurrence, as he states, of the other members of the Court of Appeal, that a document purporting to be a promissory note, but containing a provision that the title and right to possession of the property for which the note was given should remain in the owners, the payees of the note, until the note was paid, was not a negotiable promissory note, on the ground that it was not an absolute unconditional promise to pay. In *Bank of Hamilton* v. *Gillies*,[2] the Court of King's Bench of Manitoba held that a document purporting to be a promissory note containing a somewhat similar provision as that in the Wiggins case was not a promissory note. The decision in this case however did not go on the same ground as in the Wiggins case, Chief

[1] (1894) 21 Ont. A. R. 275. [2] (1890) 12 Man. R. 495.

Judgment. Harvey, J.

Justice KILLAM, stating that he was not satisfied with the reasoning of Mr. Justice MACLENNAN in that case. The ground of decision, however, in this case was similar to that in *Kirkwood* v. *Smith*,[3] namely, that sec. 82 of *The Bills of Exchange Act*,[4] having indicated what conditions and additions may be made to a promissory note without destroying its negotiability it impliedly negatives any other conditions or additions, and that as such a provision as this above stated does not come within the provisions of that section, the document by including such provision ceases to be a negotiable promissory note. In *Prescott* v. *Garland*,[5] the Supreme Court of New Brunswick arrived at the same conclusion as in the two foregoing cases, the different judges taking both grounds.

If the present case comes within the principle of these decided cases whatever might be my personal view I should hesitate to disregard the decisions of the highest courts in three of our Provinces, and the decision of the English Divisional Court which have been followed in our own Courts in *Imperial Bank* v. *Bromish*,[6] and *New Hamburg Manufacturing Company* v. *Weisbrod*.[7] It is true that in none of the cases mentioned were the circumstances exactly the same as in this case as is seen by reference to the document itself. The added provision is simply a short memorandum at the foot of the document and does not take the form of an agreement between the parties and signed by the maker as in all the other cases, and I have endeavored to make a distinction on this basis, but after very careful consideration the only conclusion I can come to is that the statement of the memorandum, "same to remain property of J. H. Truman until this note is paid," can be treated as nothing but an agreement between the parties to the instrument, and that being the case it appears to me that it is entirely covered

3 (1896) 1 Q. B. 582; 65 L. J. Q. B. 408; 74 L. T. 423; 4 45 & 46 Vic. c. 61 (Ca.) 5 (1897) 34 N. B. R. 291. 6 (1895) 16 C. L. T. 21. 7 (1906) 4 W. L. R. 125.

Judgment.

Harvey, J.

by the principle in *Bank of Hamilton* v. *Gillies* and *Kirkwood* v. *Smith*, and that I must therefore hold that the instrument sued on here is not a negotiable promissory note. That being the case the rights of the parties under it could not be assigned by a simple endorsement, so that even if the endorsement in question were a valid endorsement, which is contested by the defendants, it would not confer any rights on the endorsee, and I cannot see that the plaintiff's position in this respect is any better on his alternative claim than on the original claim.

It was suggested on the argument that in any event the defendants should be entitled to their costs of action because of their conduct in connection with the transaction. I consider that the conduct of one or more of the members of the company was at least somewhat pecuilar, but there are other members of the company, who, in my opinion, have acted entirely properly and regularly throughout the whole transaction, and I do not see how the company itself should be affected and prejudiced by the acts of individual members. I may say, too, that the conclusion I come to from the evidence regarding the giving of the note is that at the time the note was given to Mr. Truman the company was not in a position to do business, but that Mr. Malcolm, the manager, who then gave the note, was thoroughly satisfied that within a year it would be able to do business and would be willing to take the horse in question, and that the sale was made and the note given entirely with that knowledge and understanding. Such being my conclusion as to the circumstances I see no reason why the defendants should be denied their costs of action. Judgment will, therefore, be for the defendants without costs.

Judgment for defendants.

REX v. GILBERT

5 W. L. R. 295.

Criminal law—Murder—Evidence of expression of deceased—Resgestae—Expressions as evidence of state of mind—Charging the jury as to manslaughter.

On a trial for murder evidence was given that while the deceased was apparently fleeing from the accused, who was pursuing him with a gun, he shouted several times, "Hold on. Hold on. He shot me and he will shoot me again. Hold on boys. Hold on," and it appeared that this almost immediately followed the sound of a shot.

Held, that this evidence was properly given as being part of the *res gestae*, irrespective of whether the words were uttered in the presence of the accused or no.

Evidence was also given that at a later time the deceased, upon observing the accused within five or six feet of him, said to the witness who was assisting him, "Don't let him knife me."

Held, (WETMORE, J., *dissentiente*), that the expression was nothing more than evidence of the deceased's state of mind; that it was admissible equally with evidence of the deceased's contemporaneous acts, and that both were material.

The only evidence of the actual shooting was that of the prisoner who swore that the shooting was purely accidental. The trial Judge charged the jury that there was no evidence to justify them in finding a verdict of manslaughter.

Held, that under the circumstances that charge was proper.

[*Court*, en banc, *15th January*, 1907.

Statement. This was a case reserved by NEWLANDS, J., before whom, sitting with a jury, the prisoner, Josiah Gilbert, was convicted of the murder of one Anderson. At the trial evidence was admitted of certain expressions used by the deceased and the questions reserved were as to the admissibility of this evidence.

Two men, Koch and Dick, were passing near the scene of the alleged murder about the time it was supposed to have been committed, and their attention was drawn to the accused, whom they saw running with something in his hand, which they took to be a gun and which subsequent evidence showed was a gun. At almost the same moment they heard a shout and saw the deceased apparently fleeing from the accused, waving his hands and calling to them to stop. The gun was dropped, but the pursuit continued until the deceased reached the witnesses, the deceased shouting more

than once on his way and after he reached them, "Hold on, Hold on. He shot me, and he will shoot me again. Hold on boys. Hold on." The first question reserved was as to the admissibility of this expression. Statement

At a later time when an exchange of conveyances was being made between the deceased and the accused, and while the deceased was being helped by one McKinnon from one conveyance to the other, the deceased turned and saw the accused about five or six feet behind him, whereupon, as the witness McKinnon said, "He made a big jump into the buggy and said, 'Don't let him knife me.'" The admissibility of this expression was the second point reserved.

The case was argued before SIFTON, C.J., WETMORE, NEWLANDS, HARVEY and STUART, JJ.

W. M. Martin, for the prisoner, contended that the evidence was improperly admitted, and also that the Judge's charge was erroneous in that he directed the jury that there was no evidence to justify a verdict of manslaughter. Argument.

James Aiden, for the Crown, *contra*.

[*15th January, 1907.*]

SIFTON, C.J., concurred with HARVEY, J.

WETMORE, J. (*dissenting*) :—I agree with my brother HARVEY that the evidence of the statements made by the deceased Anderson to the witnesses Koch and Dick while coming towards them and after he arrived there was properly admitted as being part of the *res gestæ*. I also agree that there was no misdirection in this case, but I am of opinion that the statement made by the deceased and testified to by McKinnon, namely, "Don't let him knife me," was improperly received in evidence. This statement was offered in evidence as a statement made in the presence and hearing of the accused and only upon that ground. It was not pretended that it

Wetmore, J. dissenting.

was admissible on any other ground. Evidence of this character is admissible because the jury or judge of fact is able to draw an inference from the conduct, the language or the silence of the other party in whose presence and hearing the statement is made. Evidently, if the statement was not heard by such party no inference could be drawn from his language, conduct or silence. In this case I may say that any inference that might be drawn was to be drawn from the silence of the accused. In order to render such testimony admissible I think that the Judge ought to be thoroughly satisfied that the party accused heard the statement. I will concede that ordinarily, if it is established that the statement was made in the presence of the accused, and that he was at such a distance at the time that the statement would be likely to be heard by him, this would be sufficient to admit the evidence of the statement. But if the circumstances are of such a character that render it possible that the statement might not have been heard by him or render it doubtful whether it was heard by him, evidence of the statement ought not to be received.

In this case the witnesses Koch and Dick were not very far distant from where the deceased and the accused were at the time the statement was made, and I think they would have been likely to have heard it. Now, if they did not hear it I think it is open to doubt whether the accused heard it. I am not prepared, however, to state that I would hold that the evidence of this statement was improperly received if there was nothing further in the case than what I have stated. But it was developed at a further stage of the proceedings that the accused was hard of hearing, and he distinctly swore that he did not hear the statement made by the deceased and testified to by McKinnon. This state of facts having come out, in my opinion rendered the testimony of McKinnon as to the statement inadmissible, or, in other words, improperly received. It is urged that inasmuch

as the testimony when received was admissible, it is not rendered inadmissible by testimony subsequently given. I dissent from that proposition. If testimony of this character is received under a mistaken apprehension of fact, it must be considered none the less inadmissible if future developments of facts show that it ought not to have been admitted. In a case of that sort I am of opinion that either the jury should be discharged from giving a verdict or the objectionable testimony expressly withdrawn from their consideration by the trial Judge. I am inclined to think that the latter course would have been quite sufficient for the purpose. Wetmore, J. dissenting.

It was further urged that no subtantial wrong or miscarriage was occasioned by the admission of this testimony. I cannot accede to this proposition either. It is very difficult to state what will or will not influence the mind of a juryman. The remark "Don't let him knife me" had no direct reference to the shooting; it must be remembered that when the remark was made the accused had no gun with him, and a remark such as "Don't let him shoot me" would not be pertinent, as he had no means of shooting. The words "Don't let him knife me" might be pertinent however, and it was a remark from which a juryman might infer "Don't let this man who shot me, as I told you, knife me." Nor can I bring my mind to the conclusion that this was a mere exclamation of fear alone. Doubtless it was an exclamation of fear, but it was an exclamation which not only expressed fear but expressed fear of the accused. I am of opinion, for the reasons above stated, that the contention should be quashed and a new trial ordered.

NEWLANDS, J., concurred with HARVEY, J.

HARVEY, J.:—I am of opinion that the first question should be answered in the affirmative. Apart altogether from whether the words were uttered in the presence of the accused,

Judgment.

Harvey, J.

it appears to my mind clear that the circumstances, including the utterance of the words used, were so closely connected with the shooting as to be properly admissible, for although the witness in question did not hear the sound of a shot, another witness did hear such sound and almost immediately after saw the two men running, as they were when they first attracted the attention of the two witnesses first mentioned.

The strongest case which could be referred to against the admissibility of this evidence was *R.* v. *Bedingfield*,[1] in which COCKBURN, C.J., refused to receive the evidence of a statement made by the deceased to a person whom she met after coming out of the house where the accused was and where the murder was alleged to have been committed. It is easy to see a difference in principle between the two cases. In the present case there was a continuity of circumstances of which the shooting was part, and in which the accused was a participant, which did not exist in the *Bedingfield* case. So that for the purpose of this case it is not necessary to dissent from Chief Justice COCKBURN'S view, though some of the text writers[2] express the opinion that he interpreted the rule too strictly.

In *R.* v. *Foster*,[3] the Court, consisting of three judges, held admissible a statement made by the deceased in answer to a question by a witness who did not see the act which was the cause of the death, but came up after. This case appears to have been accepted as authoritative, and the principle is given by Taylor,[4] as follows: "The principal points for consideration are whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object or to form in conjunction with it one continuous transaction." It appears to me beyond question that the present

[1] (1879) 14 Cox. 341. [2] Taylor on Evidence (9th ed.), p. 583; Phipson on Evidence (3rd ed.), p. 49. [3] (1834) 6 C. & P. 325; 25 C. L. R. 421. [4] Op. Cit. par. 583.

case falls within this principle and the authority of *R.* v. *Foster*. Judgment. Harvey, J.

The second expression was used by the deceased at a later time, and was in no way connected with the *res gestae*. This utterance appears to me to be nothing more than an unequivocal exclamation indicating fear of injury from the accused on the part of the deceased. The principle on which an exception to the rule that hearsay evidence is inadmissible is made in the case of statements made in the hearing of an accused, or in a civil case in the hearing of an opposite party, is that the accused or the opposite party, as the case may be, has an opportunity of denying it, and if he fails to do so it is some evidence as against him of the truth of the statement. When one considers that the utterance in question is not a statement of fact at all and is not susceptible of denial by the accused, it is at once evident that the principle has no application and at the same time that the principle of exclusion as hearsay has no application. The question appears to me to be one then simply of whether the state of mind of the accused in this respect is material, and if it is there is no rule as far as I am aware that requires the exclusion of this remark. It seems to me that the evidence of the witness when he said that when deceased saw accused near him "he made a big jump into the buggy" stands in exactly the same position as the evidence of what deceased said, for each indicates the same thing, *viz*, fear of accused, and nothing more except that the spoken words are less equivocal than the act.

The charge is one of deliberately shooting the deceased while the defence is that the shooting was purely accidental. If it were shown that after the shooting the state of mind of the man shot were one of friendliness to the accused, it surely would be deemed to have an important bearing on the question in issue, and in the same way evidence indicating aversion and fear have as important a bearing in the opposite dir-

Judgment. Harvey, J.

ection. Wigmore in his work on evidence,[5] points out very fully the difference between the admission of utterances as proof of the truth of the facts stated and their admission to prove a state of mind which he terms their circumstantial use as opposed to the other or testimonial use, and states that to the use circumstantially the hearsay rule makes no opposition "because the utterance is not used for the sake of inducing belief in any assertion it may contain."

For the reason stated I am of opinion that this evidence was properly admitted.

A third question, though not reserved, was argued by counsel, *viz.*, that the learned Judge erred in charging the jury that there was no evidence to justify them in finding a verdict of manslaughter. No one gave evidence of the actual shooting except the accused himself, and his evidence and evidence of admissions made by him before the trial was the only evidence of the actual occurrence. These all concurred in maintaining that the shooting was purely accidental. If the jury had believed this evidence, the only verdict they could have found would have been one of acquittal; but if they did not believe it, the only conclusion from the evidence was that the shooting having been estalished the intention to effect the natural consequences of the act existed and that the act was one of murder. It is quite easy to see that a hypothesis could be advanced that the actual facts made the case one of manslaughter, but that the accused, being the only eye witness of the shooting, determined to concoct a story which would enable him to escape the consequences of even that act; but this would be simply a hypothesis, and the jury were bound to bring in a verdict on the evidence and not on hypothesis. I am of opinion that the judge's charge was right in this respect.

5 *Wigmore on Evidence*, par. 1790.

In the result, therefore, the learned trial Judge's rulings on the two questions reserved and on the other question which was argued should be confirmed and the conviction should be affirmed. Judgment. Harvey, J.

STUART, J., concurred with HARVEY, J.

Conviction affirmed.

FRASER v. KIRKPATRICK.

5 W. L. R. 287.

The Imperial Debtors' Act, 1869—Application to Alberta.

Held, (SIFTON, C.J., and NEWLANDS, J., *dissentiente*,) that the Imperial Debtors' Act, 1869, is in force in the Province of Alberta. [1]

Appeal by the defendant from an order of SCOTT, J., 4 W. L. R. 317, under *The Debtors' Act, 1869*,* committing the defendant to prison for 6 weeks or until payment of the plaintiff's judgment, if sooner paid, for his contempt in not having paid such judgment when able to do so. Statement

* 32 & 33 Vic. c. 62, s. 5 (Imp.) which provides that, "Subject to the provisions hereinafter mentioned and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks or until payment of the sum due any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court: Porvided . . . (2) that such jurisdiction shall only be execised when it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sums in respect to which he had made default, and has refused or neglected or refuses or neglects to pay the same. Proof of the means of the person making default may be given in such manner as the Court thinks just, and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath according to the prescribed rules. Any jurisdiction given by this section to the superior Courts may be exercised by a Judge sitting in chambers or otherwise in the prescribed manner."

[1] See now 7 Edw. VII. c. 6, s. 1 (Alberta).—Editor.

Statement. The appeal was heard before SIFTON, C.J., WETMORE, NEWLANDS, HARVEY and STUART, J.J.

Argument. *N. D. Beck*, K.C., for the defendant.
O. M. Biggar, for the plaintiff.

[*15th January, 1907.*]

dissenting. SIFTON, C.J. (*dissenting*):—Two questions were argued before the Court; first, whether *The Debtors' Act, 1869*, is in force in this country, and, secondly, whether, if it is in force, there was sufficient material in this case to justify the order? My opinion in regard to the first question prevents the necessity of considering the second.

If *The Debtors' Act, 1869*, is in force, it can only be by the provisions of The North-West Territories Act bringing into force "the laws of England as the same existed on the 15th of July, 1870, in so far as the same are applicable to the Territories," and as that provision was made as an addition to other laws then in force and not for the purpose of applying all the law of England, the applicability should be clear. When the liberty of the subject is at stake there should be close scrutiny of conditions from which the applicability is judged.

In this connection we find that in 1869 the Parliament of Great Britain passed at the same session two Acts which, taken together, constitute a practical consolidation of the law of England in regard to debtors, *viz*, *The Debtors' Act, 1869*, and *The Bankruptcy Act*. These two Acts refer to each other in their wording, and are, in my opinion, plainly

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Section 10 defines "prescribed" as follows:

"As respects the Superior Courts of common law, prescribed by general rules to be made in pursuance of *The Common Law Procedure Act, 1852*.

"As respects the Superior Courts of Equity, prescribed by general rules and order to be made in pursuance of the Act of the session of the fifteenth and sixteenth years of the reign of Her present Majesty, c. 80."

intended to be worked correlatively. It is admitted that the provisions of *The Bankruptcy Act* are not applicable to this country, and that it was not brought into force under the general provision as to the laws of England in 1870, but in considering its provisions I find that its effect in England would be, by the discharge of bankrupts, to remove them from the operation of *The Debtors' Act*. There being nothing in this country to take its place it follows that *The Debtors' Act*, if in force in this country would practically be a far stronger Act in its effect and would apply to a wider class of persons, and, in some cases, retain debtors longer in gaol than the same Act would in England. It is impossible for me to arrive at the conclusion that this could have been intended, or that it would be a proper interpretation of the law as it now exists, and I therefore think that the appeal should be allowed. Sifton, C. J., dissenting.

WETMORE, J., concurred with HARVEY, J.

NEWLANDS, J., concurred with SIFTON, C.J.

HARVEY, J. :—It is contended that *The Debtors' Act, 1869*, is not in force in this Province, that it was not applicable to the conditions of this country, and was not introduced into the country by section 11 of *The North-West Territories Act*.† Judgment.

The intention of *The Debtors' Act, 1869*, is indicated by its title, which is "*An Act for the abolition of Imprisonment for Debt, for the punishment of Fraudulent Debtors and for other purposes.*" As is well known, imprisonment for debt had existed in England for many centuries, and it was held by the Full Court of Manitoba in *Sinclair* v. *Mulli-*

†49 Vic. c. 50, s. 11 (Ca.), provides as follows: "Subject to the provisions of this Act, the laws of England relating to civil and criminal matters as the same existed on the 15th day of July in the year of our Lord, one thousand eight hundred and seventy, shall be in force in the Territories in so far as the same are applicable to the Territories, etc."

Judgment.

Harvey, J.

gan,[2] that the law of England as it existed in 1670 had been introduced into this country by virtue of the Hudson's Bay Company's charter. It would appear from this that the law respecting imprisonment for debt would thereby become a part of the law of this country, and unless the provisions of *The Debtors' Act, 1869*, abolishing it can be held applicable to this country that it would still continue to be the law. I can see no reason for coming to the conclusion that sec. 4 of that Act which abolishes imprisonment for making default in payment of a sum of money, with certain exceptions, or sec. 5, which is the section in question, is not applicable to the Territories.

It is pointed out that in 1884 an ordinance was passed in much the same terms as section 11 of *The North-West Territories Act*, and at that time there was no such Court as there is at present, and the law could not have been enforced. It does not appear to me to be material whether this contention is valid or not, for we have only to consider the effect of sec. 11, which is the law at the present time, and was enacted at the same time that the Supreme Court was established, But it is also urged that the definition of "prescribed" is not applicable. It appears to me to be a sufficient answer to this to say that by sec. 48 of *The North-West Territories Act* our Supreme Court is given all the powers and authorities by the law of England incident to a Superior Court, and is directed to use all the rights, incidents and priveleges of His Majesty's Courts of Common Law, Chancery and Probate in England. With all these powers it seems to me absurd to say that a law which could be enforced in England and is declared to be law here cannot be enforced here. As far as I have been able to ascertain, sec. 10 of *The Debtors Act, 1869*, has not been amended, but the provisions of sec. 5 are still enforced, though the rules

[2] (1888) 5 Man. R. 17, affirming judgment of KILLAM, J., 3 Man. R. 481.

of *The Judicature Act* have superseded the prescribed rules of that section. Judgment. Harvey, J.

It was also urged that the Act was not applicable because various references showed that it was to be worked in conjunction with *The Bankruptcy Acts*. To this objection it is only necessary to point out that it is not a question of whether *The Debtors' Act, 1869*, is in force as a whole, but whether certain provisions of it which constitute part of the law of England are applicable and so in force, and for the reasons I have stated I am of the opinion that the provisions in questions are in force here. In support of this view I may also refer to the case of *In re Bremner*,[3] in which the Full Court of Manitoba held that these provisions were in force in Manitoba by virtue of an Act similar to sec. 11 of *The North West Territories Act*.

It remains therefore to consider whether the order made by my brother SCOTT was wrong on the evidence. Keeping in mind the remarks made by JAMES, L.J., in *Esdaile* v. *Visser*,[4] that "It would require an overwhelming case to induce the Court of Appeal to differ from the Judge if he says he is satisfied of the debtor's ability to pay," and of JESSEL, M.R., in *Chard* v. *Jervis*,[5] that "We never ought to overrule the decision of the Court below on a question of fact unless it is clearly made out that the decision is wrong," does the evidence show that the learned Judge came to a wrong conclusion? It was held by the Court of Appeal in *Ex parte Fryer*,[6] that the debtor, who had the means to pay part, but not all of the judgment debt, and neglected to pay it, was liable to committal under sec. 5. It appears to me then that the question for this Court to decide is whether the learned Judge could reasonablyconclude from the evidence beforehim that the debtor had had the means to pay part of the judgment

3 (1889) 6 Man. R. 73. 4 (1880) 13 Ch D. 421; 41 L. T. 745; 28 W. R. 281. 5 (1882) 9 Q. B. D. at p. 181; 51 L. J. Q. B. 442; 51 L. J. Ch. 429; 30 W. R. 504; 6 (1886) 17 Q B. D. 718; 55 L. J. Q. B. 478; 55 L. T. 276; 34 W. R. 766.

Judgment.

Harvey, J.

debt, and, if he could, that his order should not be interfered with by this Court. The evidence has been reviewed at length by the learned Judge in his reasons for judgment, and it does not appear necessary for me to do more than say that for the reasons stated by him and leaving aside the question of whether the moneys received in the conduct of the hotel business by the debtor and handed over by him to his wife, were really his money or his wife's, there is evidence to justify the conclusions reached. In *Harper* v. *Scrimgeour*,[7] there was no direct evidence of the debtor having any means to pay the debt, but there was evidence of his manner of living from which an inference could be drawn that he had such means. The debtor explicitly denied that he had such means, and stated that he had no such means, but an order for committal was made and affirmed on appeal. In *Chard* v. *Jervis* (*supra*), similar evidence was given for and against the application, and an order was made for committal, which was affirmed on appeal to the Divisional Court. On appeal to the Court of Appeal the debtor filed an affidavit, in which he set out in detail his means and expenses, and manner of living, and that the means of his wife were settled on her and that she had no power to give him anything. On that evidence the appeal was allowed.

In the case now in appeal the evidence, in my opinion, is stronger than in either of the cases cited, and the whole tenor of the cross-examination of the defendant indicates a deliberate intention to conceal, as far as possible, his real means, and in that respect is in direct contrast to the affidavit filed on the appeal in *Chard* v. *Jervis*. For this reason, therefore, and on the authority of these cases I am of opinion that the order should not be disturbed.

Both grounds of appeal being, in my opinion, disentitled to support, the appeal should be dismissed with costs.

STUART, J., concurred with HARVEY, J.

Appeal dismissed.

[7] (1880) 5 C. P. D. 366.

SAWYER-MASSEY COMPANY v. THIBART

5 W. L. R. 241.

Sale of goods—Express and implied warranties—Specified articles under trade name—Combination of—Fitness for particular purpose.

The defendant bought from the plaintiff an Eclipse thresher, a three-horse power tread, Pitts pattern, and an Eclipse bagger for the purpose of threshing grain for hire, and signed a contract in which the goods were expressly warranted to be of "good material, durable with good care, and, with proper usage and skilful management, to do as good work as any of the same size sold in Canada." It was provided that there should be no other warranties or guarantees than those contained in the agreement. The articles individually were good of their kind, but were not adapted to work in combination, and it was impossible to thresh profitably for hire with the apparatus.

Held,—

1. That the implied warranty that the goods should be reasonably fit for the purpose for which they were, to the knowledge of the vendors bought, was not inconsistent with the express warranty.
2. That the exclusion by the terms of the agreement of other warranties and guarantees did not exclude this implied warranty.
3. That the contract, being a single contract for the sale of the combination of articles, the implied warranty was not excluded, although each of the parts of the apparatus was a specified article under a trade name.
4. That in deciding whether the purchaser had relied upon the skill and judgment of the vendor, the essential thing was not whether he had exercised his private judgment, but what had led him to exercise it as he did.

[STUART, J., *27th November, 1906, 28th January, 1907.*

Statement.

This was an action to recover the amounts of four promissory notes given by the defendant to the plaintiffs in payment for one Eclipse thresher with a 30-in. cylinder, a three horse-power tread, Pitts pattern, an Eclipse bagger, and some rubber belting.

Some time in the spring of the year 1905, the defendant, who was a farmer living near Cowley, Alta., entered into negotiations with one Hartrouft, a general agent for the Massey-Harris Company, who in turn were agents for the plaintiffs, for the purchase of a threshing outfit. The defendant decided to buy from the plaintiffs a New Ontario thresher, with 26-inch cylinder, a three-horse tread power and some additional attachments, all for the sum of $615, his intention being to thresh with this

Statement.

outfit for hire. Some time afterwards the defendant decided, with the approval of the plaintiff's agent, to buy a different kind of thresher, namely, an Eclipse, with a 30-inch cylinder, instead of the New Ontario previously agreed upon. Hartrouft took this last amended order verbally, and about the 20th of August the machinery for which the notes in question were given was shipped to Cowley by the plaintiffs, consigned to Morrison, and was there put together by an agent of the plaintiff's named Brardon. The plaintiffs paid the freight on this machinery to Cowley. About a week afterwards the defendant was given possession of the machinery without as yet having signed any agreement of purchase. The machine did not work satisfactorily, a great deal of difficulty being experienced in preventing it from choking up. After the plaintiff's experts had made some alterations in the machinery and had got it to work considerably better the defendant, at Hartrouft's request, signed an agreement between himself and the plaintiffs, which, after setting out the goods purchased and the price to be paid therefor, provided that "the said machinery is sold upon and subject to the following mutual and interdependent conditions, namely, "It is warranted to be made of good material, and durable with good care, and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty, written notice shall within ten days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy warranty, and reasonable time shall be given to remedy the difficulty, the purchasers rendering necessary and friendly assistance, together with requisite men and horses, the company reserving the right to replace defective part or parts, and if then the machinery, or any of them, cannot be made to satisfy the warranty, it is to be returned by the purchasers, free of charge, to the place where received, and another sub-

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stituted therefor that shall satisfy the warranty, or the money and notes immediately returned and this contract cancelled, neither party in such case to have or make any claim against the other. And if both such notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement, and that the machinery is satisfactory to the purchasers. If the company shall, at purchaser's request, render assistance of any kind in operating said machinery or any part thereof, or in remedying any defects, such assistance shall in no case be deemed a waiver of any term or provision of this agreement, or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. . . . . There are no other warranties or guarantees, promises or agreements than those contained herein.'' The defendant also signed the three promissory notes provided for the price and an additional note for $83.12, dated the 11th of August, 1905, payable on October 1st, 1905, and bearing interest at seven per cent per annum till due, and ten per cent per annum after due till paid, this note being for the amount of the freight paid by the plaintiffs on the machinery from Winnipeg.

The defendant continued to work the machinery, first at Carney's, then at his own place and thereafter at a number of neighbours' farms until late in the month of November, when operations were apparently stopped by a snow storm and the threshing season closed, but it at no time worked satisfactorily.

The defendant by way of defence to the plaintiffs claim upon the notes set up that the machinery did not comply with the express warranty contained in the written contract and also pleaded: ''(3) That he purchased said machinery for the purpose of threshing his own grain and taking contracts for threshing in his neighborhood, and the plaintiffs knew said purpose and sold said machinery to him for such express purpose, but the machinery failed to answer same

Statement

(4) The defendant pleads *The Sales of Goods Ordinance** as a defence to this action. (5) The plaintiffs warranted the machinery to perform the work for which the defendant purchased same aforesaid, but the machinery did not come up to the requirements of said warranty."

He also repeated all these allegations by way of counterclaim and asked for damages for the breaches of the warranties.

Argument.

R. B. Bennett for plaintiffs. The express warranty was to be effective only on the observance of certain conditions which were not complied with. There was only one purpose for which the machinery could be used, and consequently there could be no particular purpose. In any event the defendant did not in fact rely upon the plaintiffs' skill or judgment.

E. P. McNeill, for defendant. There is nothing in the express warranty or in the agreement to exclude the implied warranty. The facts are in favour of the defendant.

[*28th January, 1907.*]

Judgment.

STUART, J.:—I feel bound to hold that even if the express warranty set forth in the agreement was broken, which for reasons I shall give hereafter I very much doubt, the defendant deprived himself of all benefit under it, as a defence to an action for payment of the price, by not complying with the terms and conditions under which it was given The

*Con. Ord. (1898) c. 39, s. 16 (1), provides that, "Subject to the provisions of this Ordinance, and of any Ordinance in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows: (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

plaintiffs are therefore entitled to judgment for the amount of their claim. Judgment. Stuart, J.

A much more difficult question, however, arises when we come to deal with the rights of the parties under the defendant's counterclaim. Sub-section 4 of sec. 16 of *The Sale of Goods Ordinance* provides that "an express warranty or condition does not negative a warranty or condition implied by this Ordinance unless inconsistent therewith." Is the express warranty inconsistent with an implied condition that the machinery should be reasonably fit for the particular purpose of doing threshing under a contract for hire? Upon consideration I cannot see that it is. If that contract had contained the following sentence: "It is warranted to be made of good material and durable, with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada, and it is warranted to be reasonably fit for the particular purpose of doing threshing under contract for hire." It could not be contended that the two clauses of that sentence would have been inconsistent with each other. I can see no inconsistency. If the two warranties were identical with each other then, of course, as pointed out by WETMORE, J., in *Cockshutt Plow Co.* v. *Mills*,[1] the defendant could not be allowed to get rid of the provisions of the express warranty in the contract by pleading the same warranty as an implied one, but I am of opinion that the two are not identical. The express warranty in *Cockshutt Plow Co.* v. *Mills* was simply that the machine would "do good work," but here it is that the machinery will "do as good work as any of the same size sold in Canada." It is perfectly clear to me that the machinery might very well do as good work as any of the same size sold in Canada and yet not be reasonably fit for the purpose of threshing on contract for hire; in fact, as I shall point out later on, I am of opinion that the machinery probably did

[1] (1905) 6 Terr. L. R.; 2 W. L. R. 355.

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Stuart, J.

as good work as any of the same size sold in Canada. The whole trouble arose, however, as I shall also point out, from the relative sizes of the two chief parts of the machinery, so that it is clear to me that the warranties are not identical. Neither do I think that in the face of the express provision of the ordinance already quoted the doctrine of *expressum facit cessare tacitum* and the older cases based upon that maxim, which are cited in the last edition of *Benjamin on Sales*,[2] can be relied on to exclude the implied warranty. The implied warranty must stand, unless inconsistent with an express one, and, as I have said, I do not think there is here any inconsistency. I am confirmed in this opinion by the remarks of DUBUC, C.J., in the Manitoba case of the *North West Thresher Company* v. *Darrell*,[3] from which it is clear that that learned Judge considered that there was no inconsistency in an exactly similar case, although he held on the facts that the implied warranty had been fulfilled.

A point which was not mentioned in the argument, but which has given some difficulty, arises from a consideration of the proviso at the end of sub-sec. 4, sec. 16 of the Ordinance, which reads, "Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose." I have no doubt that an "Eclipse Thresher" is a trade name, as also is an "Eclipse Bagger." Further, although there is no evidence given on the point there can, I think, be little doubt that the expression "three horse tread power, Pitts pattern," is also a trade name. These three articles constituted, with the belting, the goods sold. As there was no question raised as to the quality of the belting it seemed to me at first rather difficult to contend that this contract did not come within the terms of this proviso. But it will be observed that the contract is not divisible. It

[2] 5th ed. at p. 653. [3] (1905) 15 Man. L. R. 553; 2 W. L. R. p. 262.

is one contract for the sale, not of a specified article, but of a combination of specified articles. There is one price specified for the whole outfit combined. That combination has neither a patent nor a trade name, and, as will be pointed out presently, in further consideration of the evidence, the whole trouble arose just exactly out of the combining of these articles into one single piece of machinery and out of the attempt to work them together, and not out of the defects in any one of them separately. I am therefore of opinion that the proviso does not apply to the contract in question.

Judgment. Stuart, J.

Then there is still a further question arising out of a provision in the contract itself, which, again, was not mentioned in the argument. The contract, after setting forth the express warranty and the conditions attached to it, proceeds as follows: "There are no other warranties or guarantees, promises or agreements, than those contained herein." Do these words exclude an implied condition? I am of opinion that they do not. I think these words were intended only to exclude other express agreements, such as an unauthorized agent might attempt to make. Section 53 of *The Sale of Goods Ordinance* enacts that "Where any right, duty or liability would arise under a contract of sale by implication of law it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage if the usage be such as to bind both parties to the contract." Is an implied warranty of fitness varied or negatived by an express agreement? I think the section means an agreement which expressly mentions the implied warranty it is intended to vary or negative. Now the implied warranty of fitness is not mentioned or referred to in the contract at all, and in order to be relieved of it, if it would otherwise arise, I think the plaintiffs should either have inserted in the contract an express warranty inconsistent with it or should have expressly stipulated that they did not warrant the articles sold to be fit

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Stuart, J.

for any particular purpose. They have done neither. I therefore come to the conclusion that it is still open to the defendant to take advantage of an implied warranty of fitness, provided the facts are such as to bring the case within the terms of section 16 (1) of the Ordinance.

We come, therefore, to the questions of fact. First, was the machinery required for a particular purpose expressly or by implication made known to the plaintiffs? And second, did the defendant rely on the plaintiffs' skill and judgment? I am of opinion that both of these questions must be answered in the affirmative. It was contended that there could be only one purpose and no other for which the machinery was suitable, and that therefore there could be no particular purpose within the meaning of the Ordinance. But the machinery might have been used either for threshing the defendant's own grain on his farm, for which purpose I think it was suitable, or for use in performing contracts of threshing for hire.

This latter, I think, is a particular purpose within the meaning of the section, and I hold upon the evidence that it must have been and was known to the plaintiffs when the order was given. Quite aside from the conversations between the defendant and Hartrouft, the plaintiffs' agent, the contract itself in one paragraph contains a provision whereby all monies earned by the purchasers for work done with the aid of the machinery are assigned to the plaintiffs. See also the remarks of COLLINS, M. R., in *Preist* v. *Last*.[4]

It was further contended most earnestly for the plaintiffs that the defendant relied solely upon his own judgment, and not upon that of the plaintiffs. Now it is not a question of what the defendant thought or concluded or decided. It is a question of what led him to so think or conclude or decide. Of course, the defendant decided to buy the Eclipse,

[4](1903) 2 K. B. 148, at pp. 153 and 154; 72 L. J. K. B. 657; 51 W. R. 678.

Judgment.

Stuart, J.

and no doubt he thought it would run well in combination with a three-horse power. If he had not so decided there would have been no sale; just as in *Wallis* v. *Russell*,[5] the little girl, of course, decided to buy the crabs which she saw before her, and in *Preist* v. *Last*, *supra*, the plaintiff decided to buy the hot-water bottle which was shown him, but the real question in these cases was, as it is here, what led to that decision? It is true also that Hartrouft swears that he did not induce or try to induce the defendant to buy any particular kind of machine. That might be so, but this is not a case of damages for fraud or misrepresentation. It is one thing to actively induce a man to buy an article. It is quite another thing to have your skill and judgment relied upon in the selection of the article. It is, of course, clear that the defendant himself decided upon a three-horse power. The question was, what should be combined with it? Hartrouft says he wrote to his principals to find out. That was the reason the New Ontario was first selected. It seems to me clear even from this, and quite aside from what the defendant said to Hartrouft, that the plaintiffs must have known that the defendant was relying upon them. Having reached that conclusion I cannot, it seems to me, avoid the further conclusion that the defendant did, in fact, rely upon the skill and judgment of the plaintiffs in deciding to order the particular combination of machinery which was eventually sent to him.

There remains the further question whether the machinery was really fit for the purpose for which it was required, namely, threshing grain by contract for hire? There can be no question upon the evidence that it was not. It is true that no defect was shown in any of the separate parts of the machinery. It was not attempted to be shown, for instance, that the power of threehorses was not, in fact, communicated from the tread power to the thresher, nor was there

[5] (1902) Ir. R. 2 K. B. 585.

Judgment. Stuart, J.

any defect shown in the thresher itself. There was some slight hint of small defects at the start, such as rods breaking on the tread power and loose tin in the separator, but these seem to have disappeared. It was taken for granted at the trial that the real trouble lay in the fact that a three-horse tread power was not sufficient to run a 30-inch cylinder thresher. While, therefore, the machinery probably did as good work as any of its size sold in Canada, according to the words of the express warranty, it is clear that, owing to the wrong combination of a 30-inch cylinder thresher with a three-horse tread power, the whole machine combined did not do reasonably effective work as a machine for threshing grain on contract for hire. The plaintiffs' counsel, in fact, admitted at the close of the argument that it was not an economical piece of machinery—that it could not be worked economically. It is clear, therefore, that it was impossible to make a profit with such machinery at threshing for hire, which was the particular purpose for which it was required.

It was contended, however, by the plaintiff that the defendant had seen the machine work before he signed the agreement and must be held to have accepted it as it stood. I am of opinion, however, that the actual contract of purchase was made long before this, when defendant gave the order. If defendant had refused to sign the agreement I think the plaintiffs would still have considered him liable as having ordered the machinery and taken delivery of it. It was understood, moreover, from the beginning that this formal agreement was to be signed. A previous one for the NewOntario machine had, in fact, been drawn up and had been seen by the defendant, and the terms of it were known. I think the position was just the same as if the agreement had been signed when the order was given. Nothing, therefore, in my opinion, occurred at the time of or before signing the agreement which would deprive the defendant of his rights under an implied condition. I have held, however, that the

defendant has accepted the machinery and therefore this condition has become a warranty only. The result is that the plaintiffs are liable for a breach of this warranty and the defendant is entitled to damages for the same. Judgment. Stuart, J.

When I come to consider the question of the amount of damages suffered by the defendant, I find that the evidence is not very clear. I think it is useless to attempt to make any calculation upon the prospective amount of grain which the defendant says he might have threshed, but the defendant's statement that he would reasonably have expected to make sufficient profit during that season to make his first payment upon the machine, seems to me to be not an unreasonable estimate of the damage he has suffered. It is true that he has now on his hands this second hand machinery, but, as I have said, the separate parts of it appear to be, as far as the evidence shows, in good order, and aside from the deterioration in value from the use that was made of it, the machinery is worth, no doubt, as much as ever it was. He obtained some benefit from the use of it, at any rate, in the threshing of his own grain. I will, therefore, allow him damages to the amount of the first payment on the price of the machinery, and the amount of the freight, and there will, therefore, be judgment for the plaintiffs for the amount of the remaining two notes given for the price of the machinery. I do not think this is a case for costs.

Judgment for plaintiff.

HANSEN v. CANADIAN PACIFIC RAILWAY CO.

Aff. C. R. [1907] A. C. 523; 40 S. C. R. 194; 7 Can. Ry. Cas. 441.

Ordinance respecting juries—N. W. T. Act—Damages—Personal injuries.

The effect of c. 44 of 6 Edw. VII. (Ca.), was to annul the repeal of the North-West Territories Act, so far as Alberta and Saskatchewan were concerned, and the *The Ordinance respecting Juries is in consequence not in force.*

Held, also, that the increase of damages on the second trial of an action for damages for the loss of a foot from $2,500 to $6,500, was not perverse or wrong, and that the latter amount was not under the circumstances excessive.

[*Court*, en banc, *July 11th and 16th, 1907.*

Statement. This was an appeal by the defendants from the judgment of STUART, J., after the trial of the action with a jury, directing judgment for the plaintiffs for $6,500, the amount of the verdict. On the appeal from the judgment for $3,500 entered after the first trial of the action, a new trial had been directed on the ground of misdirection

Argument.

R. B. Bennett, for defendants.

James Muir, K.C., and *J. L. Crawford*, for plaintiff.

The judgment of the Court, SIFTON, C.J., WETMORE, SCOTT and HARVEY, J., was delivered by HARVEY, J.

[*16th July, 1907.*]

Judgment. HARVEY, J.:—It was held by this Court on the first appeal, 5 W. L. R. 385, that there was evidence from which the jury might find that the defendants had been guilty of negligence which was the proximate cause of the injury, and in view of the similarity of the evidence it appears necessary to do little more than accept that judgment upon that point. I may, however, refer to a case decided by the Supreme Court of Canada since that judgment was given: *Wabash Railroad Company* v. *Misener*.[1] This case, in my opinion, limits the "stop, look and

[1] (1906) 38 S. C. R. 94.

Judgment.

Harvey, J.

listen " rule, and recognizes the jury's right to decide what a reasonably prudent man would do under given circumstances as well as to determine the proximate cause of the accident when there is evidence of negligence on the part of both parties. The Chief Justice of that Court in his reasons for judgment,[2] says: "I assume, however, that to reach a conclusion as to which of the two parties is responsible for the accident, admitting that both were negligent, a comparison of the facts by the jury was necessary, and by their finding, the cases seem to hold that the Court was bound."

At the trial defendant's counsel objected to the jury panel on the ground that the provisions of *The Ordinance respecting Juries*[3] had not been complied with. It is provided by sec. 20 of that Ordinance that it shall come into force immediately from and after the repeal of sections 71 and 88 of *The North-West Territories Act. The Revised Statutes of Canada, 1906*, which came into force of the 31st day of January last, repealed the whole of *The North-West Territories Act*,[4] and it is contended that thereby the Ordinance immediately became effective. Chapter 44 of the Statutes of 1907,[5] however, limits the extent of the above repeal, and except its operation from the Provinces of Saskatchewan and Alberta. It is declared to be retroactive and in effect from the 31st day of January last. Without considering the question from any other point of view, I am of opinion that the effect of this Act is to annul the repeal of *The North-West Territories Act*, as far as the Provinces of Saskatchewan and Alberta are concerned, and that, therefore, the Ordinance did not apply to this jury. The objection is consequently not sustainable.

It is further urged that the damages are excessive and that the increase from $3,500, the amount of the verdict in the former trial, to $6,500 on the present one, shows that the

[2] At p. 99. [3] Con. Ord. (1898) c. 28. [4] R. S. C. 1886, c. 50. [5] 6 Ed. VII. c. 44 (Ca.). [6] (1903) 34 S. C. R. 74; 36 S. C. R. 159.

Judgment.

Harvey, J.

verdict is perverse and wrong. It is, of course apparent to anyone that there can be no accurate measure of damages for personal injuries, and in the absence of any statutory rules fixing a basis by which they are to be determined, no two persons would be likely to fix exactly the same amount; but I am of opinion that a jury of men in the same or a similar station of life to that of the injured person is as good a body as can be obtained to measure the damages sustained if it acts honestly. It is of course, quite true that there has at times been a tendency on the part of juries not to deal honestly with corporations, and particularly with railway companies in such matters, but I am of opinion that it cannot be said that the sum of $6,500 for the loss of a foot by a strong young man just starting to earn a livelihood can be said to be so excessive as to warrant interference by the Court. It is a matter of common knowledge that, particularly in the last few years of commercial prosperity, such sums have been made in comparatively short periods of times in occupations for which this young man would have been fitted, but from which he would be debarred by the loss of a foot. On this point the case of *B'ain* v. *Canadian Pacific Ry.*[6] is instructive. In that case the plaintiff was assaulted by a passenger in the defendants' train under circumstances making the defendants liable. On the first trial he was given a verdict of $3,500, but the Supreme Court of Canada ordered a new trial unless the plaintiff would accept $1,000, being of opinion that of two assaults considered by the jury the defendants were not liable for the first. A new trial was had when the jury gave a verdict of $2,500 for the first assault and $1,500 for the second, or $4,000 in all. On appeal the Supreme Court of Canada refused to disturb this verdict. As far as the reports show, there was no permanent injury as the result of the assault, and the railway was only liable because it neglected its duty to protect the plaintiff. Comparing the verdict in that case with the present one, I can

see no good reason why the discretion of the jury in this case should be interfered with. Judgment. Harvey, J.

For the foregoing reasons, and those given on the former appeal, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

JACKSON v. CANADIAN PACIFIC RAILWAY.

Reversed 7 W. L. R. 828; 1 Sask. L. R. 84.

Pleading—Ex parte order allowing other pleas with general issue—Setting aside.

An order allowing other pleas to be made with a plea of not guilty by statute should not be made *ex parte*.
If such an order is made *ex parte*, even inadvertently, the Judge who made it has no jurisdiction to set it aside. Any application for that purpose must be made to the Court *en banc*.

[WETMORE, J., *5th July, 2nd August, 1907.*

This was an application by the plaintiff to set aside an order made by WETMORE, J., giving leave to the defendants to plead other pleas besides the plea of not guilty by statute. Statement.

H. Y. MacDonald, for plaintiff. Argument.

J. T. Brown, for defendant.

(*2nd August, 1907.*)

WETMORE, J.—It is contended for plaintiff that I had no right to make an order *ex parte*, and I am of the opinion that this contention is right. I may add that I made the order inadvertently. The question is, however, whether I have jurisdiction to set aside my own order, and I am of the opinion that I have not, although it is an *ex parte* order. The practice in England prior to *The Judicature Act*, 1873, undoubtedly was that a Judge might set Judgment.

Judgment.
Wetmore, J.

aside an *ex parte* order made by him.[1] And this would seem to be the proper course to take under the old practice.

That practice has, however, been altered since the enactment of *The Judicature Act*.[2] By sec. 50 of *The North-West Territories Act*,[3] "the Court *en banc* shall hear and determine all applications for new trials, all questions or issues of law, all questions or points in civil or criminal cases reserved for the opinion of the Court, all appeals or motions in the nature of appeals, all petitions and all other motions, matters or things whatsoever which are lawfully brought before it." When I consider that all matters of appeal are given to the Court *en banc*, and it seems to me that what is laid down by JESSEL, M.R., in *Re St. Nazaire Co.* (*supra*) as to the effect of *The Judicature Act* is applicable to the practice here, particularly in view of Rule 188, and I am confirmed in this by referring to Rules 138 and 497. I cannot, therefore, bring my mind to the conclusion that the Legislature intended to give a judge jurisdiction to sit in appeal from his own order except as provided in those two rules.

I will, therefore, dismiss this application; but the defendants having improperly taken out an order *ex parte*, I will not allow them any costs of opposing this application.

Application dismissed.

[1] Archbold's Q. B. Practice, 14 ed., p. 1404. [2] Op. cit. pp. 1398, 1415, *Re St. Nazaire Co.* (1879), 12 Ch. D. 88; 41 L. T. N. S. 110; 27 W. R. 854. Reported below 36 L. T. N. S. 358; 25 W. R. 638; *McNabb* v. *Oppenheimer* (1885), 11 Ont. P. R. 214. [3] R. S. C. (1886), c. 50.

ALLOWAY ET AL. v. HUTCHISON (No. 2).

Promissory notes—Hand writing—Consideration—Drunkenness—Incapacity to contract—Evidence—Onus—Fraud—Pleading.

In an action by endorsees of promissory notes against the maker, there was no evidence that the endorsees were holders in due course. The defence set up that the defendant was, to the knowledge of the payee, so drunk at the time of signing the notes as to be incapable of transacting business.

Held, (1) That knowledge on the part of the payee of the defendant's state of mind was immaterial.

(2) That the fact that defendant was drunk at the time the notes were signed was *prima facie* evidence that the payee did have such knowledge so as to cast on the plaintiffs the onus of proving want of knowledge on the part of the payee.

(3) That in the absence of evidence on the part of the plaintiffs that they were holders in due course, they cannot, under the circumstances, recover.

[WETMORE, J., *July 12, 1898.*

Statement. Action by indorsees of promissory notes against the maker. The facts appear sufficiently from the head note and from the judgment.

Argument. *W. Peel*, for plaintiffs.

J. T. Brown, for defendant.

Judgment. WETMORE, J.:—I find as a matter of fact that the signatures to the notes sued on are those of the defendant. Certainly a person not acquainted with the defendant's handwriting would have great difficulty in making "John Hutchison" out of these signatures. It is no uncommon thing, however, for educated men so to write their signatures that persons unacquainted with their handwriting would have great difficulty in making out that such signatures spelled the names of the signers. In this case, however, Mr. Peel, who is well acquainted with the defendant's handwriting, swore most distinctly that he has not the slightest doubt that the signatures to the notes in question were those of the de-

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fendant. He also swore that the defendant admitted to him that he had made the notes. Moreover two papers, admittedly signed by the defendants (Exhibits D and E) were put in without objection for the purpose of enabling me to compare the signatures to them with those to the notes. I have done so and find that the signatures to exhibit E and to the notes are very similar. I further find, however, that the defendant, at the time he signed such notes was so drunk as to be incapable of transacting business, and he did not know what he was doing.

The evidence however does not satisfy me that the notes were given without consideration. On the contrary I am rather inclined to the opinion that they were given for a consideration. The defendant admitted to Mr. Peel that they were given for spectacles, and the defendant in his own testimony states that there were spectacles left. It is true that Mr. Peel swore that the defendant told him that these spectacles were returned, and the defendant also swore that they were sent back. There is no evidence however to establish that Lazarus, the payee of the notes, ever received them back and rescinded the contract of sale on which the notes were based. The onus of proving that the notes were made without consideration is on the defendant. Possibly the abstract question by itself whether the notes were given without consideration is not of importance in this action, which is between the indorsee and the maker, because the mere absence of consideration in itself is not sufficient under subsection 2 of section 30 of *The Bills of Exchange Act*, 1890 (53 Vic. chap. 53) to cast upon the indorsee the burden of proof that he is holder in due course. In order to do that the notes must be admitted or proved to be affected with either fraud, duress, force, fear or illegality; a note may be without consideration and not affected with either of those taints.

Judgment. Wetmore, J.

Returning to the facts of this case, there was no affirmative evidence that the payee of the notes was aware at the time he took the notes that the defendant was incapable from drunkenness from transacting business, or that he did not know what he was doing, unless I am at liberty to assume such knowledge from the mere fact that the defendant was drunk at the time. I thought possibly that the character of the signatures to the notes might be sufficient to establish this knowledge on the part of the payee. But when I come to inspect the defendant's signature to exhibit E I find that it is no better than those to the notes. There is no pretence that he was drunk when he signed exhibit E. The only other evidence that points affirmatively in the direction of such knowledge on the part of the payee is that of the defendant when he swears as follows: "If I signed these notes this man must have misrepresented matters to me or misled me." But this is not a statement of fact, it is merely an argumentative conclusion in the defendant's mind, which may or may not be correct. Moreover, assuming that the defendant did misrepresent matters or mislead the defendant, it does not follow that he was so drunk as to be incapable of transacting business. It might amount to fraud, but that is not the particular description of fraud that is set up in the statement of defence.

There is then no evidence of fraud or illegality affecting these notes unless it arises out of the fact that the defendant was in the state of drunkenness that I have found him to be in when he made the notes. In nearly every case which I can find on the subject where drunkenness (and I am not speaking now of partial drunkenness but total drunkenness) has been set up as a defence to an action on a contract, the plea or defence sets up that the other party to the transaction had knowledge of the defendant's state. As a matter of fact this is set up in the statement of defence in this case. The four latest cases I can find on the subject are *Gore* v. *Gib-*

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son,[1] *Molton* v. *Camroux*,[2] *Elliott* v. *Ince*,[3] and *Matthews* v. *Baxter*.[4] In *Gore* v. *Gibson*,[1] the drunkenness was pleaded, and it was further pleaded that the plaintiff had notice at the time of the transaction of the defendant's state; the plea was held good, and in delivering his judgment Parke, B., lays it down as follows: "A party who makes a contract in such a state of drunkenness as not to know what he is doing cannot be compelled to perform that contract by the other party who knew him to be in that state. In *Molton* v. *Camroux*,[2] the alleged incapacity was lunacy, not drunkenness; but it is quite evident from the judgment of the Court that incapacity from either lunacy or drunkenness is, in so far as the question we are now dealing with is concerned, to be dealt with on the same principle. The Court held that where the state of mind was unknown to the other contracting party and no advantage was taken of the person alleged to be incapacitated the contract is not void. In *Elliott* v. *Ince*[3] where the alleged incapacity was also lunacy, the Lord Chancellor commented on *Moulton* v. *Camroux*,[2] and approved of it. In *Matthews* v. *Baxter*,[4] the defendant pleaded incapacity from drunkenness and alleged that the other contracting party was at the time aware of his state of mind. The plaintiff replied that the defendant, when sober, ratified the contract. The Court held that the contract was not void but voidable, and that the defendant could ratify it when he became sober. Unquestionably knowledge on the part of the payee of these notes of the defendant's state of mind is a material allegation, and the plaintiff by joining issue to the second paragraph of the statement of defence has put the defendant to the proof of that allegation. According to the well understood rules of evidence the onus of proof is on the party

[1] 14 L. J. (Ex.) 151; 13 M. & W. 623; 9 Jur. 140.

[2] 18 L. J. (Ex.) 356; (1849) 4 Ex. 17.

[3] 26 L. J. Ex. 821; 7 De G. M. & G. 475; 3 Jur. (N.S.) 597; 5 W. R. 465.

[4] 42 L. J. (Ex.) 73; (1873) L. R. 8 Ex. 132; 28 L. T. 169; 21 W. R. 389.

asserting the affirmative of the issue. And in this case the party asserting the affirmative of the issue as to the knowledge of the payee is the defendant. I have, however, after very considerable hesitation reached the conclusion that the mere fact that the defendant was in the state of drunkenness I have found so as to render him incapable of transacting business is *prima facie* evidence of knowledge of that fact on the part of the payee, and puts the plaintiff to the proof of want of knowledge. How otherwise is such knowledge to be proved unless the payee himself is put on the stand? That would compel the person setting up the defence in almost every instance to the necessity of calling as his witness the party who has taken advantage of his weakness. This does not appear to me to be a desirable rule to lay down if it can be avoided. I do not wish to be understood as laying down the broad rule that wherever incapacity to contract by reason of an incapable mind is set up, proof of the mental incapacity casts upon the other party the burden of proving want of knowledge of the incapacity. Take for instance some cases of lunacy where there is a mental incapacity to contract, the other party may not be aware of it because there may be nothing whatever apparent to indicate it. But one must bring to bear his practical knowledge of men and what is continually being observed about us; one is continually seeing drunken men, and men to all appearances incapable from drunkenness to transact business. The state of the person in that condition is generally so obvious that it is difficult for a person who sees the individual not to have knowledge of it. I can conceive of a case where a person might be in such a state of drunkenness, and one might not be aware of it. In some cases the border line between partial and total drunkenness might be difficult to ascertain. Still I think one's common sense would lead to the conclusion that under ordinary circumstances it would be amply observable when a person is in a state of incapacity, so much so that

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proof of the incapacity would put the other party to the contract, who was in a position to observe the condition of the drunkard, to proof of want of knowledge. There is another difficulty which has presented itself, and that is there is very slight testimony that the payee of the notes was present when they were made and was in a position to form an opinion as to the defendant's condition. There are the following facts however from which I am of opinion that I can find that Lazarus, the payee, was present when the notes were made. In the first place the notes were made in his favour, and then there is the testimony of the defendant that he remembers seeing Lazarus one evening, although he cannot remember the date. There is no evidence that these notes were sent to the defendant by mail to sign. I have a right to assume then that they were presented to him by somebody for signature. Then on inspecting the notes it is very clear that the handwriting in the body of the notes is the same as that of "A. Lazarus" in the indorsement. These circumstances I think afford *prima facie* evidence to establish that either the payee or some person on his behalf was present when the notes were made, and I so find. This evidence is in my opinion sufficient to put the plaintiff to the proof that the payee or no one on his behalf was present. Of course if any one was present on behalf of the payee the payee's knowledge would be that of his agent. It is not set up that the defendant in any way ratified these notes when sober. The evidence is quite the other way. Under my findings and the conclusions I have reached, the notes in question are affected with fraud (see judgment of Parke, B., in *Gore* v. *Gibson*,[1] at p. 152) and to say the least under *The Bills of Exchange Act*, 1890, sec. 30, sub.-sec. 2, cast the burden of proof on the plaintiffs that they were holders in due course. There is no evidence to establish that. It is not necessary to decide whether under the findings the notes would be recoverable against the defendant, even assuming that the plaintiffs were

innocent holders for value. I may add that it is possible that there is language in the judgment delivered in *Molton* v. *Camroux*,[1] which goes the length of holding that when the mental incapacity is established, the burden of proving want of knowledge is thrown on the other party. I am not however very much impressed with that. That question in view of the findings on which the case was decided did not arise, and I am inclined to think was not considered. Judgment. Wetmore, J.

Judgment for defendant with costs.

McLEOD v. MEEK

Trespass to the person — Fire-arms — Evidence — Pleading — Amendment — Malice — Negligence — Damages.

In an action for damages resulting from the defendant shooting the plaintiff with a pistol.

Held, (1) Trespass to the person to be actionable must be either intentional or the result of negligence on the part of the defendant.

(2) Amendments to pleadings should be allowed unless the party applying showed want of good faith or an injury would result to his opponent that could not be compensated for by costs or otherwise.

(3) It was immaterial in disclosing negligence whether or not the defendant knew that the pistol would go off.

(4) That in estimating the damages to be allowed the probable consequences of the injury should be looked to.

[WETMORE, J., *July 19, 1898.*

This was an action for damages tried before WETMORE, J., without a jury. Statement.

The facts are sufficiently stated in the judgment.

E. L. Elwood, for the plaintiff. Argument.

T. C. Johnstone, for the defendant.

WETMORE, J.—The statement of claim as it was originally framed charged the defendant with having "maliciously and without lawful excuse committed an assault upon and Judgment.

Judgment.

Wetmore, J.

discharged the contents of a revolver into the body of the plaintiff, causing the plaintiff great bodily injury." The defendant in his statement of defence pleaded to this claim that he did not maliciously or without legal excuse commit any of the acts complained of. He denied that the plaintiff suffered the damage or was put to the expense alleged in the claim or to any damage or expense, and he set up that the plaintiff was guilty of contributory negligence. At the trial a certified copy of testimony taken in Ontario under orders made by me, was read. Mr. Johnston, on behalf of the defendant, objected to certain portions of this testimony and some of his objections were allowed and the testimony they referred to was rejected at the trial. In a few instances the evidence was received subject to the objections with the understanding that I would further consider such objections and if of opinion that the testimony ought not to have been received I would strike it out. One piece of testimony so objected to and received was the plaintiff's evidence that Dr. Elliott told him "he hardly knew which was the greater evil, to stay there doing nothing or go to the college, and as I wanted to go perhaps I had better go and try it." I think this evidence is admissible. It is merely evidence of professional advice given to him, which influenced his action in going to college. However, as the evidence has not influenced my mind and is not very material I have struck it out. Another piece of evidence so objected to and received was that of the plaintiff that "nothing occurred at the shooting to in the slightest degree indicate that the shooting was an accident . . . but on the contrary everything indicated a deliberate intention on his part to shoot me." I think this testimony is not admissible and have struck it out. Evidence of Dr. Clertton of a statement made by Dr Grossett to the effect that he could not distinctly see an outline of a shadow such as might be produced by a bullet was also objected to and received. I think this testimony also inadmissible and

have struck it out. The evidence of Dr. Clertton as to the plaintiff being exposed to the rays by Professor McLennan and what was there found was also objected to and received. I am of opinion that this evidence was properly received. In this instance the witness is giving the result of his own observation and what he actually saw himself. The facts of this case as I find them under the evidence are of follows: The plaintiff, the defendant and five other persons were on the evening of the 24th December, 1896, in the station agent's office at the railway station in Grenfell. The defendant had in his possession a loaded pistol, which went off while it was in his hands, and the bullet struck the plaintiff in the back and penetrated his person. I find that the shooting was not malicious, that is, it was not wilful and intentional on the part of the defendant, but I find that it was the result of gross negligence and want of care on his part. The evidence satisfied me that he was in some way carelessly handling the pistol when it went off. Taking the defendant's own version of how the accident occurred proves to my mind negligence on his part. I may say I am of the opinion, and find as a matter of fact, that the defendant has described correctly how the accident occurred. He that evening was entertaining some friends in his room, he picked up this pistol and fired two shots with it in the air, and tried to fire a third but the cartridge would not explode. The pistol was a single-barreled weapon, and the cartridges, the defendant states, were old ones that had been lying about some time. He also states that one or two of these three cartridges were blank cartridges, that is, they had no bullet in them. He left the cartridge that did not explode, in the pistol, put the pistol in his pocket, and proceeded with it to the station house, and while there in the agent's office he took the pistol out of his pocket, and, it being a self-extractor, attempted to extract the cartridge that was in it, by, in a very careless way, striking the pistol against his leg, and in doing so the cartridge

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Wetmore, J.

Judgment. exploded and the plaintiff was wounded. The defendant
Wetmore, J. states that he did not think that the cartridge would explode, he thought it was old and useless. That to my mind affords no excuse, it was nevertheless negligence on his part. This is simply and practically a repetition of the excuse we are repeatedly reading or hearing of these days for accidents caused by fire-arms, that the party who caused the accident "did not know it was loaded." The only difference in the excuse offered in this case is that "he did not know it would go off." I hold the defendant responsible in damages for the consequence of his carelessness. Persons handling fire-arms should use especial and extra care in handling them when other persons are present. Accidents are so continually happening from want of care in handling them. Persons who use fire-arms know that it is no uncommon thing for a cap or cartridge not to explode on the first occasion of attempting so to do, but to do so on the next occasion. In fact they may in some cases not explode until after two or three attempts. Assuming that one or two of the cartridges the defendant attempted to fire that evening were blanks, they were not all blanks, and evidently the defendant either knew that the one that caused the injury was not a blank, or he did not take any steps to discover whether it was or not, and that in itself was carelessness. But to attempt to extract a cartridge in a small room with seven people in it in the way the defendant attempted it, was in my opinion gross negligence, and is not excused by the fact that he did not think it would explode.

The next question is whether the plaintiff is entitled to recover under the pleadings as they were orginally framed, and whether I was justified in law in allowing the plaintiff to amend his claim by adding a paragraph charging negligence in the alternative. The counsel for the defendant claimed that, in view of the manner in which the statement of claim was framed, in order to find for the plaintiff it was

necessary to find that the defendant did the act maliciously and that he assaulted the plaintiff, and that the defendant would not be liable if the injury was merely the result of negligence, and that I was not warranted in law in allowing the plaintiff to amend by charging negligence, because recent cases have decided that an amendment will not be allowed when it is established that the parties were aware of all the facts when the original pleadings were drawn. He also objected to the amendment on the ground that there was no evidence of negligence. This latter objection however is disposed of by the preceding part of this judgment. Judgment. Wetmore, J.

The plaintiff urged that there was evidence upon which I might find that the act was wilful and intentional, and therefore malicious, and, further, that if I so found, it was clearly an assault. In this I am inclined to the opinion that the plaintiff was correct, but I have found as a matter of fact that the injury was not wilful and intentional, and I must now dispose of this case according to that finding. It was further urged on the part of the plaintiff that I might eliminate from the original statement of claim the allegations of malice and that an assault had been committed, and treat them as surplusage and treat the claim as if it merely charged that "the defendant without lawful excuse discharged the contents of a revolver into the body of the plaintiff" and caused the injuries complained of, and that if the defendant wished to set up that it was the result of accident without negligence on his part he should have specially pleaded that fact. I am not prepared to say that he is not right in this contention, under the authority of *Hall* v. *Fearnley*.[1] In the view I take of this case, however, it is not necessary to decide that question. The correct rule laid down by recent decisions is that a trespass to the person is not actionable if it be neither intentional nor the result of negligence. If, however, it is intentional or

[1] 12 L. J. Q. B. 22; L. R. 3 Q. B. 919.

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the result of negligence it is actionable. The whole question is discussed in a very excellent judgment by Denman, J., in *Stanley* v. *Powell*,[2] I have come to the conclusion that the amendment was properly allowed and that it should stand. *Collette* v. *Goode*[3] was the case relied on by the defendant for disallowing this amendment. I am very doubtful if *Collette* v. *Goode*[3] would now be considered good law. It is questioned by North, J., in *Eedvain* v. *Cohen*,[4] and in *Stewart* v. *The North Metropolitan Tramway Company*,[5] although the amendment was refused on the ground that it could not be allowed because it would prejudice the plaintiff in a way which could not be compensated by payment of costs or otherwise; yet the Court approved of the general rule that amendments should be allowed unless it appeared that the party applying was acting *mala fide* or had done his opponent an injury which could not be compensated for by payment of costs or otherwise. So in the *Australian Steam Nav. Co.* v. *Smith*,[6] Lord Bramwell, in giving the judgment of the Court, lays it down at p. 320; Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way, it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties." In this case the real question between the parties is whether or not the defendant by shooting the plaintiff, injured him, and whether the plaintiff is entitled to recover damages therefor. As I have found the law to be, he is entitled to damages if the injury was the result of either malice or negligence. The only

[2] (1891) 1 Q. B. 86; 60 L. J. Q. B. 52.

[3] 1878) 47 L. J. Ch. 370; 7 Ch. D. 842; 38 L. T. 501.

[4] (1889) 41 Ch. D. 563; 61 L. T. 168; 38 W. R. 8, affirmed, (1890) 43 Ch. D. 187; 62 L. T. 17; 38 W. R. 177.

[5] 55 L. J. Q. B. 157; 16 Q. B. D. 178, 556; 54 L. T. 35; 34 W. R. 316; 50 J. P. 324.

[6] 14 A. C. 318; 58 L. J. P. C. 101; 61 L. T. 135.

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effect of malice or wilfulness would be possibly to increase the damages. It is not pretended that any injustice has been done to the defendant by the amendment. It is one that even does not call for payment of costs by way of compensation. The only question I have is whether the amendment is necessary. I have not decided that, because I think the proposed amendment would have been a prudent paragraph to have been put in the original statement of claim. And I think it advisable to insert it now, so that the plaintiff should be placed in a proper position in the event of an appeal being taken from this judgment.

The only remaining question necessary to discuss is that of the damages. I have no doubt that the condition that the plaintiff is in as described by Dr. Clertton and Dr. Elliott is the result of this shooting, and so find. I find that the plaintiff's health as a consequence of this shooting has been seriously injured. That his life is yet in actual danger from it. That he is incapable by reason of the injury, for work or exertion mental or physical, and that it is doubtful if he will ever be capable of physical work or exertion. He has also undergone considerable pain and a great deal of mental suffering in consequence. He has been put to some expense for medical attention. The evidence as to what has actually been paid for this is not very satisfactory. Details are almost altogether wanting. In view of the suffering, inconvenience, and anxiety which the plaintiff has had to undergo as a consequence of the injury and of the probable consequence of such injury, I think that $4,000 damages are not too much, and I award that sum.

Judgment for plaintiff with costs.

McLEAN v. GRAHAM.

Chattels—Sale of—Pleading—Evidence—Sales of Goods Ordinance—Destruction of chattel before delivery—Risk—Construction of written agreement—Vis major.

In a sale of specific or ascertained goods under contract requiring something to be done by the seller before the buyer was bound to accept delivery, a portion of the goods was destroyed without either party's default. The buyer was nevertheless held entitled to recover as damages the amount paid for the goods so destroyed.

Held, also, that the object of the Sales of Goods Ordinance[1] was merely to codify the existing law, not to lay down new law.

[WETMORE, J., *Dec. 17, 1898.*

Statement. Action for damages. The facts sufficiently appear above and from the judgment.

Argument. *J. T. Brown*, for the plaintiff.

F. F. Forbes, for the defendant.

Judgment. WETMORE, J.:—The defendant sold to the plaintiff 12 head of cattle on 2nd February last for $216.50, and at the time of such sale signed a memorandum or agreement in the following terms :—

"Feb. 2, 1898.

"I hereby sell and agree to deliver to Colin McLean, subject to his approval as to condition at Moosomin :

"4 steers at $14.50 each.....$ 58 00

"1 year.

"3 heifers at $14.50 each 43 50

"5. 2 steers at $23. each 115 00

"Total cost $216 50

"Received on account..... 216 50

"Balance paid on delivery to order of Colin McLean at Moosomin on or about 15th April.

"Signed Angus Graham."

[1] Ordinance No. 10 of 1896.

At the same time the plaintiff delivered to the defendant a memorandum in the following terms:— Judgment. Wetmore, J.

"Feb. 2, 1898.

"I have purchased from Graham 12 head of cattle subject to approval as to condition at time of shipment.

"4 steers at $14.50 each.....	$ 58 00
"3 heifers at $14.50 each.....	43 50
"5. 2 steers at $23 each	115 00
"Total cost.....	$216 50
"Paid on account	216 50

"Balance to be paid on delivery to my order at Moosomin on or about 15th April.

"Colin McLean."

It will be seen that the whole amount of the purchase money was paid at the time of the sale. One of these animals, a 2-year old steer sold for $23, died on the 17th April, and before the cattle were delivered at Moosomin and before they were removed from the defendant's place. On the 28th April the plaintiff wrote to the defendant to deliver the cattle at Moosomin on the 7th May. I presume they were all delivered and received on that date (there is nothing to shew the contrary) except the steer that died. This action is brought to recover the price which had been paid for the animal that died. The statement of claim sets forth that the sale was subject to approval generally. This, however, is corrected in the statement of defence, wherein it is averred that according to the written contract it was "subject to approval as to condition at the time of shipment." The statement of claim also alleges that the purchase money was paid in full, that the defendant failed to deliver the steer or refund the purchase money for it, and claims damages to the extent of the purchase money. The whole point at issue as

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the case was shaped by the pleadings and by counsel at the trial turns on the question whether the steer in question was at the risk of the plaintiff or the defendant, or, in other words, whether or not the property therein was transferred to the plaintiff at the time of the purchase on the 2nd February. Evidence was offered at the trial on behalf of the defendant of a conversation between the plantiff and the defendant with the object of shewing that it was expressly agreed that the cattle were to be at the risk of the plaintiff, and that it was understood that the words in the memorandum "subject to approval as to condition" were not to apply to this sale. And, in short, that the sale was verbally understood and arranged to be an absolute unconditional sale. This evidence was objected to on the ground that the written agreement could not be varied or explained by parol testimony. I received the evidence subject to the objection, but with the understanding that I would consider the objection further, and if of the opinion that it ought not to have been received, I would strike it out, leaving the defendant in the same position as if I had refused to receive the testimony when it was tendered. I am of opinion that this testimony ought not to have been received. Such testimony is inadmissable at common law (see *Rose. N. P.* (15th Ed.). There is no such ambiguity in the manner in which the contract is expressed in the writings so far as the point involved is concerned as to render such testimony admissible. It strikes my mind that it is very clearly expressed that the cattle are so'd to be delivered at a future time, and purchased subject to approval as to condition at the time of shipment or delivery at Moosomin. The principal difficulty which presented itself to my mind in deciding this question was whether the testimony was admissible under section 17, subsection 2, of *The Sale of Goods Ordinance*, 1896,[2] which provides that for the purpose of ascertaining the intention of the parties as to the transfer of property in goods in the cases provided for in that

[2] C. O. 1898, c. 39, s. 19, s.-s. 2.

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section "regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case." So far as I can discover, the object of that Ordinance is not to lay down or prescribe new law governing sales of goods; its object appears to be merely to codify the existing law on the subject; possibly the Ordinance may incidentally lay down some new rules of law. I cannot believe that sub-sec. 2 of sec. 17 intended to affect the rules of evidence, especially in so important a particular as to allow verbal conversations and understandings to entirely alter the clear meaning of a written agreement. If such were allowed there would be no value whatever in written agreements, and a wide and inviting door would be left open to perjury. I read the sub-section as providing that in ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case; such terms, conduct and circumstances being ascertained according to the well-known laws governing evidence and its reception. In this case the attempt was made to establish by oral testimony that the written agreement did not mean or intend what its clear reading to my mind expresses, and I am of opinion that such testimony is not admissible. No question of fraud or misrepresentation or mistake was raised by the pleadings or at the trial. The contention was merely made that the evidence was admissible to explain the contract and establish that it did not intend what was expressed on the ground that the contract was ambiguous I have, therefore, struck out all the testimony of the defendant which is placed between the perenthesis and which I have italicised. I have also struck out all the testimony of Annie Graham and all the testimony of Colin McLean given when called on rebuttal. I have struck out a portion of the testimony given by the defendant on his cross-examination because that portion of such cross-examination

Judgment.

Wetmore, J.

was rendered necessary by my receiving the testimony which was objected to. The same remark will apply to the plaintiff's rebuttal testimony that was offered to rebut testimony which ought to have been rejected. It was contended on behalf of the plaintiff that this contract came within Rule IV of sec. 18 of *The Sale of Goods Ordinance, 1896*.[3] I am of the opinion that this section is not directly in point, because the cattle were not delivered to the buyer at the time of sale or before the animal died. Looking at the agreements in question and the conduct of the parties and the circumstances of the case in so far as I am able to do so under the rules of evidence. I am of opinion that the property in these cattle was not transferred to the plaintiff at the time of the sale, and therefore that they were at the risk of the defendant. There is no doubt that this was a sale of specific or ascertained goods, and were it not for the provision that they were sold and purchased subject to the plaintiff's approval as to condition at the time appointed for delivery I would have no hesitation in holding that the property would, under sec. 18, Rule I,[4] of the Ordinance in question have passed to the plaintiff immediately on the sale. But the insertion of this provision makes all the difference in the world. It is clear that if any of these animals were not in condition at the time appointed for delivery the plaintiff could have rejected it. Or, in other words, the plaintiff was only bound to accept the animal provided he approved of its condition. That is, something was to be done by the seller before the plaintiff was bound to accept it—he was bound to keep it in proper condition up to or make it in proper condition at the time of the delivery so as to be approved of by the plaintiff. Now that being so I cannot perceive how the property could be held to have passed to the plaintiff until he approved of the condition and accepted it. See *Benjamin on Sales* (3rd

[3] Corresponding to C. O. 1898, c. 39, s. 20, Rule IV.
[4] Corresponding to C. O. 1898, c. 39, s. 20, Rule I.

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Ed., with American notes by Kerr), 261, 265, 276, and notes to these pages. And in using the word "condition" I accept the plaintiff's definition of it, that is, a condition of fatness so as to be fit for the market. The plaintiff's testimony in that respect was received without objection, and I think was properly receivable for the purpose of shewing what was understood by the word in the trade. The defendant relied on *McKenna* v. *McMamee*,[5] for the purpose of establishing that when a contract is entered into respecting property or goods and the subject matter is destroyed by the act of God or a *vis major* over which neither party has any control and without either party's default no action will lie for default in performance. *Taylor* v. *Caldwell*,[6] and *Howell* v. *Coupland*,[7] are cases laying down the same rule as that laid down in *McKenna* v. *McNamee*.[5] The damages sought to be recovered in those actions, however, were not of the same character as those sought to be recovered in this action. In *Taylor* v. *Caldwell*,[6] the defendants agreed to let to the plaintiffs certain gardens and a music hall on certain days; before the days arrived the music hall was so destroyed or damaged by an accidental fire as to render it unfit to be used. The damages sought to be recovered, I gather, were the profits which the plaintiffs would have made from the use of the hall. In *Howell* v. *Coupland*,[7] the defendant agreed to sell the plaintiff 200 tons of potatoes grown on land of the defendants' to be delivered the following September and October; the defendant sowed sufficient quantity of seed to meet the contract, but the crop was destroyed by disease, and the potatoes were not delivered. I take it that in this case the damages sought to be recovered were the usual damages recoverable for the non-delivery of the article. The damages

[5] 14 A. R. 339.

[6] (1863) 32 L. J. Q. B. 164; 3 B. & S. 826; 8 L. T. 356; 11 W. R. 726.

[7] (1876) 46 L. J. Q. B. 147; 1 Q. B. D. 258; 24 W. R. 470; 33 L. T. 832.

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Wetmore, J.

asked for in *McKenna* v. *McNamee*[5] were evidently the profits which the plaintiffs expected to make had the Government allowed them to go on with the contract. The damages sought here are merely the money which is payable on a consideration which has failed. If my view of the law is correct, that the steer in question was at the risk of the defendant, the plaintiff is entitled to recover that. It is just possible that the plaintiff may have mistaken his form of action and should have sued for money had and received. That question, however, was not raised. No question was raised as to the form of action, and I am not prepared to say that the plaintiff has not brought his action in the proper form. And anyway, according to my view of the law, he is entitled to recover back the money he paid for the animal and that is all he obtains in the action in the present form; therefore substantial justice in point of law is done. I am not disposed to send parties out of Court on merely technical objections unless I am forced to do so. I have not been asked to do so in this case.

Judgment for the plaintiff with costs

SIMPSON v. MANN

Unlawful distress—Justices of the Peace—Conviction—Certiorari—Costs—Jurisdiction—Res adjudicata—Pleading—Admissions—Adopting unlawful act—Damages.

Plaintiff had been convicted by defendant, a Justice of the Peace, and adjudged to pay a fine of $10.00 and $8.15 costs. To satisfy the fine two cows were seized and sold under distress warrant by one Stoddart, a constable, for $61.00. The sale of the first cow realized more than sufficient to pay the fine and all costs, but nevertheless the constable sold the second cow. Subsequently the conviction was brought up by *certiorari* and quashed by Wetmore, J., who held that he had no jurisdiction to make an order as to costs on such proceedings, but left the plaintiff to recover at law as damagas such costs as he might be entitled to, if any. The plaintiff brought action claiming damages accordingly.

Held, (1) That the constable was not the servant or agent of the Justice in making the seizure or sale, but in as much as the justice had received from the constable the full proceeds of the sale he had thereby adopted the constable's unlawful acts.

(2) That the measure of damages for the unlawful sale was the market value of the cows sold.

(3) That the plaintiff was entitled to recover from the Justice as damages his taxed costs of *certiorari* proceedings in as much as the quashing of the conviction was a condition precedent to the plaintiff's right to sue under Imperial Statute 11 and 12 Vic. Cap. 44, Section 2, in force in the Territories.

[WETMORE, J., *Dec. 17, 1898.*

Argument. *E. L. Elwood*, for plaintiff.

Levi Thompson, for defendant.

Judgment. WETMORE, J.:—There is no doubt that the defendant had not jurisdiction in the matter, and this is conceded. The only question for determination is the amount of damages that the plaintiff is entitled to recover. The cows seized by the constable were offered for sale separately. The first one put up brought $38. The whole amount which the constable was authorized to realize under the warrant including constable's fees and expenses was $22.68. It was therefore the clear duty of the constable to stop the sale when this cow was sold, and not to proceed to the sale of the second cow. He did, however, proceed with the sale of the second cow and she was sold, only realizing $23. The defendant was not present at the sale, and the only instructions he gave the constable

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Wetmore, J.

apart from what the distress warrant contained were to sell enough to satisfy the fine and costs, and the costs of sale up to completion. It is claimed that the defendant is not liable for the value of the cow last sold, that that sale was the wrongful act of the constable and not of the justice. Were it not for what I hereafter state herein I am very doubtful if he would be liable for such last mentioned cow. Stoddard was in no sense the servant or agent of the defendant, he was an officer of the law; the doctrine of *respondeat superior*, therefore, does not apply, and the wrongful act of selling was Stoddard's; and see *Mason* v. *Marker*.[1] The difficulty, however, is that I have great doubts if the defendant in his statement of defence has denied that the selling of this animal was his act, and he has, therefore, under the rules of pleading admitted it. In fact, I am not so sure that he has not by the first paragraph of his defence admitted it. It is not necessary, however, in my opinion, to decide these questions arising on the 1st and 2nd paragraphs of the defence, because the matter is put at rest by the 4th paragraph, which in substance alleges that the defendant received from Stoddard the whole sum of $61 realized from the sale of these two animals. By doing this, in my opinion, he adopted Stoddard's wrongful act. All he ought to have taken from Stoddard was the fine and costs. I am therefore of opinion that the defendant has rendered himself liable. The measure of damages for selling the cow is not what they realized at the sale but what was their real market value. The evidence shows that the cow last sold realized less than what she was worth because parties who were in attendance as bidders very correctly doubted the constable's right to sell her after the sale of the first cow had realized sufficient to satisfy the warrant and expenses. I find that the market value of these animals was $70. The next question that arises is whether the plaintiff has a right to recover the costs incurred in quashing the conviction.

[1] 1 C. & K. 100.

I am of opinion under the authority of *Rowlands* v. *Samuel*, [2] and *Foxall* v. *Barnett*,[3] that the plaintiff is entitled to recover such costs. It was urged that the plaintiff was not entitled to recover these costs because the matter was *res adjudicata* because I, in giving judgment on the *certiorari* proceedings, had adjudged that each party should pay his own costs of such proceedings or had made no order as to such costs. I most certainly did not adjudge that each party should pay his own costs. I, however, made no order as to costs. But I most distinctly held in my judgment that I had no jurisdiction to award costs against the justice or informant because neither of them had been guilty of misconduct. I further expressed doubts then, and I express them now, whether I had jurisdiction in those proceedings under any circumstances to award costs against the justice or the informant. I did, however, state that if I had jurisdiction to award costs, I would not be disposed to grant them under the circumstances, but would leave the plaintiff Simpson to his right to recover them as damages in any action he might bring if such costs were in law so recoverable. As before stated I am of opinion, under the authority of the cases before referred to, that the plaintiff is entitled to recover such costs. I had no jurisdiction to award them in the *certiorari* proceedings, and it was necessary under Imp. Stat. 11 & 12 Vict., cap. 44, sec. 2, which is in force in the Territories, that the conviction should be quashed before the plaintiff could be in a position to bring his action for the wrong done to him. The difficulty, however, is that these costs have not been taxed, and I do not know what they are. It is true that the plaintiff has established that he paid his advocate $53 for such costs, but I am of opinion that the defendant is only liable to pay the taxed costs as damages, he is not liable for just what the plaintiff's advocate chose to demand and the plaintiff saw fit to pay. It was urged for the

Judgment.

Wetmore, J.

[2] 17 L. J. Q. B. 65; 11 Q. B. 39.

[3] (1853) 23 L. J. Q. B. 7; 2 E. & B. 928; 2 C. L. R. 273; 18 Jur. 41; 2 W. R. 61.

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plaintiff that the amount of these costs claimed as damages ($53) is not disputed by the defendant's pleading. That the defendant only disputes that the plaintiff was put to any costs of quashing the conviction. I cannot agree with that contention. I think the defendant very clearly denies that the plaintiff was put to $53 costs in quashing the conviction. The burden of shewing what these costs were is on the plaintiff. And he has not shewn it as he ought to have done. I am of opinion, however, that under sec. 236 of the *Judicature Ordinance*,[4] I can permit the fact of taxation and the amount of taxable costs to be proved in the usual way, by having the costs taxed and the clerk's certificate produced.

Judgment accordingly.

McMILLAN v. KAAKE AND NEFF, Garnishee.

Practice—Garnishee—Irregularity — Money in Court — Setting aside garnishee.

Money in the hands of the Clerk of the Court is not attachable by garnishee process.

[Wetmore, J., *Dec. 27, 1898.*

Statement.

Motion by defendant by summons in Chambers to set aside garnishee proceedings.

Argument.

F. F. Forbes, for defendant.

J. T. Brown, for plaintiff.

Judgment.

Wetmore, J.:—The facts of this case are as follows:—One Lewis brought an action against the defendant Kaake in this Court to recover a debt and issued a garnishee summons against one Robertson, an alleged debtor of Kaake's. Robertson paid $31 into Court. Kaake defended the action so

[4] No. 6 of 1893, s. 136: "Where through accident, mistake or other cause any party omits or fails to prove some fact material to his case, the Judge may proceed with the trial, subject to such fact being afterwards proved."

brought against him and succeeded, and at the trial, and at the same time that I gave judgment for the defendant, I made an order for the clerk to pay the monies so paid into Court to the defendant or his advocate. Before the clerk had complied with this order he was garnisheed in this matter. The defendant now applies to set this garnishee summons aside on the ground that the money is not attachable by garnishee process. The whole point involved turns upon the question whether the clerk of this Court is a debtor to the defendant Kaake in respect of this money. Cases were cited at the argument to establish that money realized by a sheriff under an execution is attachable. It does not strike me that the cases of a sheriff and the clerk are analogous. I can quite understand that money made by a sheriff under an execution may be considered as money had and received to the use of the execution creditor, and to recover which such creditor may bring an action for money had and received against the sheriff from the mere fact that he has received the money, and therefore the money would be attachable in the hands of the sheriff as a debt to the execution creditor. The clerk is not, however, liable to such action by the mere fact that he has received the money. Before he can pay it out some other step has to be taken by some person or some authority. The parties have in some cases to consent that the monies shall be paid out. In other cases it is sufficient that one of the parties signifies his acceptance of the money. In others a Judge's order is necessary. And when any of these steps are taken so as to warrant the clerk in paying out the money, it seems to me that he must pay it out to such person, and in the manner directed by the Ordinance or the order of the Judge as the case may be. *Bland* v. *Andrew*,[1] was cited on behalf of the plaintiff. That case decides nothing upon the question I am discussing; what is observed by the learned judges upon that question are merely matters of opinion, and I must

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Wetmore, J.

[1] 45 U. C. Q. B. 431.

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Wetmore, J.

say that I am inclined to the view taken by Cameron, J., and concur with the decision in *Dolphin* v. *Layton*,[2] wherein it was held that money paid into Court by the judgment debtor to answer a judgment obtained against him by one Layton was not attachable at the instance of a creditor of Layton's. And I do not know but what this decision is binding on me anyway. However, there is an important distinction between the case now under consideration and *Dolphin* v. *Layton*,[2] and *Bland* v. *Andrew*,[1] In *Dolphin* v. *Layton*,[2] as already stated, the money was paid into Court to satisfy the judgment ; it was paid in directly for the benefit of the judgment creditor against whom it was sought to be attached, and it was paid in to be applied to no other purpose than to satisfy that judgment. So in *Bland* v. *Andrew*,[1] the money was paid into Court by the defendant to be paid to the plaintiff in that action, the person against whom it was sought to be attached. It was paid in as being an amount which he admittedly owed to the plaintiff. In this case the money was paid into Court, it is true, as money due Kaake, but not to be paid to him. The clerk was to hold it until it was decided by proper adjudication who was entitled to have it. He might have had to pay it to Lewis instead of Kaake if Lewis had succeeded. The money was, therefore, held subject to the adjudication of the Court. I cannot see how under such circumstances the clerk can be held to be a debtor of Kaake's. I am of opinion that this money is not attachable in the hands of the clerk, and that the plaintiff's procedure has been erroneous.

Garnishee summons set aside with costs.

[2] (1879) 48 L. J. (C.P.) 426 ; 4 C. P. D. 130 ; 27 W. R. 786.

BURGESS v. ST. LOUIS

Master and servant—Wrongful dismissal—Tradesman performing domestic services—Conduct—Damages—Evidence.

The plaintiff, a skilled mechanic, hired with the defendant for one year, performing the services of a mechanic and also of a domestic servant. He left before the expiration of the year under circumstances indicating a dismissal by the master, although there were no express words of dismissal. The plaintiff did not reside with the defendant or within his curtilage.

Held, (1) A dismissal may be created without express words.

(2) The plaintiff was a domestic servant in law.

(3) The general rule whereby domestic servants may be discharged on a month's notice or on payment of a month's wages in lieu thereof does not apply where they are hired for a year and where it is part of the agreement that "the contract is to be indissoluble during the year."

[WETMORE, J., *March 23, 1899.*

Statement. Action by a servant for wrongful dismissal. The material facts appear sufficiently from the above head-note and from the judgment.

Argument. *E. A. C. McLorg*, for the plaintiff.

J. T. Brown, for the defendant.

Judgment. WETMORE, J.:—The evidence of the plaintiff and defendant is as divergent on almost every material point in this case as it can possibly be. They agree that the plaintiff had been in defendant's employ at $2 a day, and that along about the 25th April last this employment was changed from one by the day to one for a longer period, and that the plaintiff practically remained doing work about the defendant's premises until the 14th November. It is also not disputed that the plaintiff is a mechanic and had up to about the 25th April been working for the defendant as a carpenter. But as to almost every other material fact they are at variance. The first question for me to determine is whether the service which is alleged and which I find to have commenced on the 25th April was on a hiring for a year or from month to month. I find that the hiring was for a year. In the first

Judgment. Wetmore, J.

place, the corroborative testimony, especially that of Mrs. Burgess and Shields, supports that fact, and, in the next place, it seems to me most improbable that a mechanic such as the plaintiff is who was getting, and no doubt could command $2 a day, through the summer months would give that up and consent to give his services for $25 a month, and thus leave it optional with the defendant to secure his services, especially those which required his mechanical skill, until the time of year arrived when his services as a mechanic would not be required, and then discharge him. Certainly such an arrangement would afford comparatively a very inexpensive method of securing mechanical labour, provided one could find a mechanic verdant enough to enter into such an arrangement. I find, as before stated, that the hiring was for a year, and also that it was entered into under the circumstances and upon the terms detailed by the plaintiff in his testimony. I am not sure that even under the defendant's own testimony the proper conclusion to reach is that the hiring was for a year. When he first approached the plaintiff, according to such testimony, his request was to work for a year at $25 a month, this the plaintiff declined; when the defendant next approached him his offer was $25 a month. Would not one ordinarily suppose that this offer had reference to the first offer to him for a year at that rate? That this was intended? However, I do not decide the question on that ground. The next question is, did the defendant wrongfully dismiss the plaintiff from his employment? Now the plaintiff and defendant each gave an entirely different account of the circumstances under which and the manner in which the plaintiff left the employment. No doubt if the defendant's evidence in this connection is correct he did not dismiss the plaintiff, the plaintiff refused to remain in consequence of the communication made to him and the contract was rescinded with his consent. In determining as to whom I should give credit on this branch of the case I have un-

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Wetmore, J.

fortunately no direct testimony from other witnesses to assist me. I must, therefore, depend on the character of the testimony given by each party, any circumstances in the case which may afford me any slight assistance and the probabilities judged by such practical knowledge as I may possess affecting the question. If the weight of evidence has established (as it has in this case with respect to the hiring and the terms and circumstances thereof) that the defendant is in error as to the other facts which he has presented, it seems to me that it affords a reason when the testimony is nicely balanced (as possibly it is in this case), to lead one's mind to the conclusion that he is in error as to the particular fact under consideration. Then there are certain matters in the defendant's testimony which strike me as somewhat peculiar; for instance, on cross-examination he was interrogated as to his opinion as to what caused the plaintiff to leave his employment. His answer would lead me to suppose that he considered that the plaintiff was really glad to get the opportunity to leave, because he hated to do the chores around the house, that he thought he could make good wages at the skating rink as men were scarce and that having got good wages all summer he did not wish much more out of him (the defendant). I am not very much impressed with the fact that $25 a month to a mechanic in the summertime and to be cut adrift in the winter is in this country wages which would create any very great amount of ecstasy. Moreover, this belief is utterly inconsistent with the admitted hostility shown by the plaintiff on Monday, the 14th November. There is a difference between them as to what took place on this Monday morning. The plaintiff states he came down that morning and did the chores about the house as usual, except attend to the furnace, which the defendant told him he had attended to, that he then commenced to shovel a snow bank away leading to the work shop. Now the defendant states that the plaintiff told him that he was doing

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Wetmore, J.

the shovelling with the object of moving his work bench, and the colour given to this testimony is that the plaintiff was about to remove this bench because he was then hostile. Nevertheless according to the defendant's letter, in evidence, of 28th November, a fortnight afterwards, the work bench was still on the defendant's premises and had been removed from the work shop or storehouse by the defendant himself. I am quite satisfied of the fact that the plaintiff ceased to work for the defendant by reason of what took place on the 12th, 13th and 14th November, and for no other cause. And the great difficulty I have in accepting the defendant's version of what took place on those occasions is, in view of the evident standing and position of the defendant and the fact that the plaintiff had accepted the employment at $25 a month for a year, influenced by the suggestion of the defendant that in that case, while he would get no more wages than he could earn if he worked at his trade through the summer, yet such wages would be spread over the whole year, which fact I find. And in view of the further fact that the season for doing carpentering work had very nearly expired, I cannot comprehend why the plaintiff should voluntarily throw up his employment merely because the defendant told him that he could not pay him quite as promptly as he had been paying him ; because that is just the effect of Mr. St. Louis' testimony. The inference is quite clear from what took place between the parties leading up to this hiring, that carpenter work could not be got in the wintertime. That being so, how could the plaintiff better himself by leaving the defendant's employ? The defendan taccording to his evidence did not tell him he could not pay him ; on the contrary he told him he would pay him as his collections came in. The skating rink could not possibly afford anything in the nature of permanent employment for the winter, and anyway apparently the plaintiff as it turned out could get no work there worth speaking about at any rate. I am or opin-

ion therefore that Mr. St. Louis' version of this transaction is so improbable that I cannot accept it. I find that the plaintiff's version of what took place on the 12th, 13th and 14th of November is correct. Now the question is, did the facts as stated by the plaintiff amount to dismissal? Or did what took place as stated by him amount to a consent on his part that the contract should be rescinded. No express words dismissing the defendant were used, at any rate before Monday, the 14th November. But that is not necessary to create a dismissal. In *Brace* v. *Calder*,[1] the plaintiff was employed for a stated time by a partnership of four members. During the period two of the partners retired, and the business was carried on by the other two, who were willing to continue to employ the plaintiff for the remainder of the period. He declined to serve. The Court held that the change of partnership amounted to a wrongful dismissal. I I have arrived at the conclusion that under the plaintiff's testimony the question is one of fact. What was the intention of the defendant in interviewing the plaintiff on the 12th November in the manner he did, as stated by the plaintiff, coupled with what took place subsequently? Some of the subsequent events are important as indicative of such intention. Was it the intention of the defendant by what took place to dismiss him? In the first place he told the plaintiff he could not possibly pay him any wages through the winter, that it would take him the *next six months to put himself straight*; he pulled 25 cents out of his pocket and told him it was the last cent he had that Saturday night? He then went into the house and came out with $3, which he gave the plaintiff, stating that he had borrowed it from his wife. The plaintiff did not approve of this, he asked him why he did not let him know this before, that he had no money to put him through the winter, and if he had been informed before

Judgment.
Wetmore, J.

[1] (1895) 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 59 J. P 693; 14 R. 473.

Judgment. Wetmore, J.

he might have got some carpentering work to do and thereby earned some money for the winter, and he gave him to understand that he ought to have stopped his carpentering work and got a boy to do his chores. The plaintiff went on and did his chores that night and came back on Sunday to attend to his usual chores, but found that the defendant had attended to a part of them, namely, to the furnace; the plaintiff went on and did the other chores that were to be done on Sunday. He came back on Monday morning to do his chores and again found that the defendant had attended to the furnace; he went on and did the other chores that morning. Now, I find that the plaintiff did not return on Sunday and Monday to do these chores merely to oblige the defendant, as the defendant has stated, but he came in the hope that the defendant would withdraw what the plaintiff considered his action in dismissing him. And I also find that the plaintiff never assented to his own discharge or discharged himself. On Monday the defendant demanded from the plaintiff the key of his office, which the plaintiff had been in the habit of attending, stating that he was going to employ another person to attend to this office. Now, here was an act to my mind strongly indicative of what the defendant intended by his interview with the plaintiff on Saturday. The defendant states that he got this key on Sunday. I do not think it makes much difference, however, whether he got it Sunday or Monday, the circumstances under which he got it were the same. Then on Monday after the defendant paid the $10 he told him "I can manage my own work now, thank you." This was said very nicely and very politely, but after all it just meant, "I do not want your services any more." Now this has escaped the plaintiff's notice; he either did not hear it or had forgotten it, anyway he gave no testimony embracing it. The defendant, however, brought it out, and I accept it as true. Surrounded with the testimony as given by the defendant and the color

Judgment.

Wetmore, J.

he lends to it, this remark would amount to nothing, it would be merely a civil and courteous acknowledgment of the plaintiff's kindness in attending to the defendant's chores after he had refused to remain in his employment, and an intimation that he would not trouble him any further to attend to them. But taking the plaintiff's testimony as to what occurred and the conduct of the parties, which I have found to be correct, this remark is to my mind strangely indicative of the defendant's intention throughout the transactions of these three days in November. I do not hold that this remark was the dismissal, because I cannot feel sure that the plaintiff heard it, and therefore that it influenced him. I simply refer to it as indicating the defendant's intention. I find that the defendant by his conduct on the 12th, 13th and 14th intended to dismiss the plaintiff from his employment, and that such was his intention when he interviewed the plaintiff on the 12th, and that the plaintiff so understood him. In fact I find that when the defendant told the plaintiff on the 12th November that he could not possibly pay him any wages through the winter, he intended the plaintiff to understand that he would not pay him, and therefore would not retain him further in his employ, and that the plaintiff so understood him. In this connection I must call attention to some testimony given by the plaintiff. On his cross-examination he stated "Mr. St. Louis did not tell me I would have to go, he did not give me to understand that I would have to go." That came out in this way: Mr. Brown put the following question: "Did Mr. St. Louis tell you that you would have to go?" The plaintiff answered "No." Mr. Brown immediately put this question: "Did he give you to understand that you would have to go?" The witness answered "No." I am satisfied from all the facts that the witness meant by the last mentioned answer that the defendant did not expressly give him to understood that he would have

Judgment.

Wetmore, J.

to go. I therefore hold that there was a wrongful dismissal. I may say moreover that I feel strongly that the defendants course was an ingeniously devised scheme to attempt to get rid of the plaintiff and dispense with his services without any unpleasant consequences falling on his shoulders. I also find that the plaintiff was ready and willing to continue his employment for the remainder of the year. It is claimed that because the plaintiff some weeks prior to the 12th November had given the defendant the privilege of getting another man he was justified in discharging him. This is not raised in the pleadings, but anyway I am of the opinion that this did not afford justification; this was just the result of a little difference such as very often arises between master and servant; if the privilege was to be acted on it was intended to be acted on at once or not at all, and not being acted on the parties were in their original status by virtue of their agreement of hire. The only remaining question is, what damages is the plaintiff entitled to recover? The learned counsel for the plaintiff contended that the damages should be the pro rata amount of wages at $25 a month from the 12th November to the 25th April next, less the monies that he has earned in the meanwhile. This measure of damages was not disputed except that it was set up on behalf of the defendant that the plaintiff had not sufficiently exerted himself to obtain other employment since his dismissal. I find that he did so sufficiently exert himself. He swore that he did try to get work and has stated what he earned. He was not cross-examined on the subject; the defendant let it rest there without probing the nature of his exertions. Now two questions have presented themselves to my mind in considering the question of damages:

1. Was the plaintiff a domestic servant?

2. If he was, is he under the circumstances of this case subject to the rule applicable to domestic servants, that al-

though the hiring is for a year it can be put an end to by a month's notice ? Judgment. Wetmore, J.

Or, in other words, is this rule as to a month's notice of such a hard and fast character that it cannot be got rid of either by express contract or by inference. And, if it can was it got rid of under the circumstances of this case ?

If the plaintiff was a domestic servant, and, notwithstanding the circumstances of this case, liable to be discharged on a month's notice, he can only recover as damages a month's wages : *Fewings* v. *Tindal*.[2]

I have no doubt that the plaintiff was employed by the defendant with a view of getting the benefit of his skill and services as a mechanic, and did avail himself of his services and skill as such mechanic. The nature of the conversation between the parties on the 12th November as detailed by the plaintiff and the evidence of Fuller and Mrs. Burgess and other testimony in the case establishes that. Nevertheless the plaintiff was also hired to do the chores in and about the defendant's house, premises and office. I am of opinion under these circumstances although he did not reside in the defendant's house or within his curtilage, that he was a domestic servant; and I reach this conclusion under the authority of *Nicoll* v. *Greaves*.[3]

As I have before stated, the plaintiff was hired with a view to getting his services as a mechanic in addition to the other usual services of an ordinary domestic servant, and the evidence establishes that the plaintiff accepted the service at the persuasion of the defendant and upon his representation (made in substance) that he would receive from him as wages for the year the same or about the same sum that he would probably earn at his trade, but that the earn-

[2] (1847) 1 Ex. 295; 17 L. J. Ex. 18; 5 D. & L. 196; 11 Jur. 977.

[3] (1864) 17 C. B. (N. S.) 27; 33 L. J. C. P. 289; 10 L. T. 531; 10 Jur. (N. S.) 919; 12 W. R. 961.

Judgment. Wetmore, J.

ings in his service would be spread over the year. Now the rule of law that a domestic servant can be discharged on a month's notice, like a great many rules of law, grew out of a general custom. I see no reason why the right to discharge in this way could not be taken away by agreement between the parties. It is not a statutory provision, to so agree would not be immoral, and I fail to see that it would be contrary to the policy of the law, and I must say that were I to use my own unaided judgment I would have no hesitation in holding that when the circumstances of the hiring were of such a character that a hiring for a fixed period was contemplated and by fair inference excluding the right to determine it by a month's notice that effect ought to be given to the intention so inferred. But I feel doubtful under the decision *Nicoll* v. *Greaves*,[3] how far I have a right to go in that direction. I think, however, this case is distinguishable from *Nicoll* v. *Greaves*.[3] *Erle*, C. J., in giving judgment in that case is reported as follows: "The plaintiff might have proved that the contract was to be indissoluble during the year." And I must say that if he could have so proved I do not see why he could not have proved it by clear inference just as well as he could by express words. In this case however the clear contract between the parties was verbal, and the terms of it are to be gathered from the conversations that took place between the parties prior and leading up to the conclusion of such contract. And there was the statement by the defendant that the wages would be spread over the year, and, as stated, the plaintiff accepted the services under that understanding. I look upon that as part of the agreement, and therefore that the plaintiff has, to use the language of the judgment in *Nicoll* v. *Greaves*, [3] proved that "the contract was to be indissoluble during the year."

I am, therefore, of the opinion that the plaintiff is not limited to one month's wages as damages, and as to the principle on which such damages should be ascertained I

refer to the observations of Blackburn, J., in[4] 30 L. J. Q. B. at p. 176, and *Sedgwick on Damages*, sec. 665. I think the defendant will be able to earn wages at his trade about the 12th April. So I arrive at the damages as follows : Judgment. Wetmore, J.

Five months' wages, from 12th November to 12th April, 1899, at $25 a month.....		$125 00
Less what he has earned or likely to earn in the meanwhile, 4 months' work at Methodist Church at $9 per month.....	$36 00	
Other work	12 00	
		48 00
Judgment for plaintiff for damages,		$77 00

and costs.

Judgment for plaintiff.

STEVENS v. McARTHUR, McARTHUR, CLAIMANT.

Interpleader—Lease—Fraud—Statute of Elizabeth—Description—Uncertainty.

An intention to defeat creditors is not of itself sufficient to avoid a deed, but such intention must be the *causa causans* for making the deed.

WETMORE, J., *May 19, 1899.*

Statement.

Trial of an interpleader issue. The facts and points involved sufficiently appear in the judgment.

Argument.

E. L. Elwood, for execution creditors (plaintiff).

D. H. Cole, for claimant (defendant).

Judgment.

WETMORE, J.—It was set up on behalf of the execution creditors that the lease from Thomas McArthur to the claimant under which she claims is fraudulent under the Statute of

[4] *Sowdon* v. *Mills*, 30 L. J. Q. B. 175; 3 L. T. 754.

Judgment.
Wetmore, J.

Elizabeth, having been made to defeat and delay creditors, I am unable under the evidence to reach that conclusion. The lease in question appears to have been made for a valuable consideration, and the rent or its equivalent for the first year of the term (embracing the time during which the wheat in question was grown) was paid by a horse. The seed sown on the land was obtained from a third person, the claimant's horses and her younger son, Edmund, who appears to have been looking after his mother, did the work, both seeding and harvesting. It is true that Thomas McArthur, the lessor and defendant, helped one day to stack, and that the seeding was done with his feeder and the cutting with his binder. It is also true that the claimant has been living with Thomas and that Edmund stopped at his house while working on the forty acres, without paying board, but in view of the relationship existing between these parties, the fact that Thomas was unmarried and that the claimant had just recently lost her husband by death, I cannot look upon these circumstances as satistactory indices of fraud. The most suspicious circumstance, to my mind, is that Thomas purchased the twine to do the binding, and that is suspicious, not from the fact itself, but because I am of opinion that Edmund did not tell the truth when he swore that he saw his mother, the claimant, give Thomas the money to buy a portion of the twine. But I cannot bring my mind to the conclusion that I ought to find fraud from the fact that Edmund has been caught tripping in this one instance in view of the fact that in every other particular he corroborates his mother. It is true that a conveyance may be fraudulent although made for a valuable consideration. In *Stewart* v. *The Bank of Ottawa*,[1] I held that a deed executed for valuable consideration was void as against creditors if the *causa causans* for making it was the intent to defeat and hinder creditors, that is, if the deed would not have been executed at all were it not for that

[1] III. Terr. L. R. 447.

purpose. I arrived at that conclusion in that case not without considerable hesitation as it might be at variance with the decisions in *Wood* v. *Dixie*,[2] and *Darvill* v. *Terry*[3] I was in hopes that my decision would have been appealed. I have not however changed the opinion I expreesed in *Stewart* v. *The Bank of Ottawa*,[1] but there is not in this case (as there was in *Stewart* v. *The Bank of Ottawa*,[1] evidence sufficient to bring my mind to the conclusion that the intention to defeat creditors was the *causa causans* of making the lease in question. It is quite true that the claimant when she accepted the lease was aware of the fact that Thomas had been sued, but she gives a very good reason for renting this forty acres, even assuming that the intention of defeating Thomas' creditors influenced her to some extent. And that is just what I think is the effect of the decisions in *Wood* v. *Dixie*,[2] and *Darvill* v. *Terry*,[3] that this intention does not *in itself* avoid the deed. In this case, however, the claimant, as I have stated, had lost her husband, and she was about giving up his property to his creditors, and the desire to have some land that she could crop influenced her. I may just add that in my opinion the burden of proving fraud is on the execution creditor, and he has not established it to my satisfaction. Judgment. Wetmore, J.

The only other objection raised to the claimant's right was that the lease is void for uncertainty in not sufficiently describing the land. The description was as follows: "The north-easterly forty acres of the n.-w. quarter of sec. 10, tp. 12, range 30, west of 1st prin. mer." and the objection was that the 40 acres were not defined. The evidence, however, establishes that the claimant entered upon and cultivated and grew the wheat on a certain forty acres of the section specified in the lease. I think this is sufficient. On

[2] 7 Q. B. 892; 9 Jur. 796.
[3] 30 L. J. Ex. 355; 6 H. & N. 807.

Judgment. Wetmore, J.

this point I draw attention to *Cummings* v. *McLachlin*,[4] and *Nolan* v. *Fox*.[5]

Judgment for the claimant.

Sheriff to withdraw from the seizure of the property claimed by Ann McArthur. The plaintiffs to pay to Ann McArthur her costs of interpleader and of this inquiry, and to the sheriff his costs of interpleader, including possession money. The money paid into Court by the sheriff, the proceeds of the sale of the wheat ordered to be sold, to be paid to Ann McArthur or her advocate.

Order accordingly.

FRASER v. EKSTROM

Promissory Note—Signature—Evidence—Signed in blank—Note overdue—Indorsees — Defences — Innocent holder — Costs — Bills of Exchange Act, 1890.

The plaintiffs were indorsees of an overdue promissory note signed in blank by defendant and given by defendant in payment of certain indebtedness. By error the note was filled up for more than the amount of defendant's indebtedness. Plaintiffs were innocent holders.

Held, that notwithstanding the provisions of s. 20, s.-s. 1, and s. 30, s.-s. 1 of the Bills of Exchange Act, 1890, this constituted an equity to which the note was subject, and plaintiffs could not recover anything more than the payee could had he sued on the note, but that, as plaintiffs were innocent holders and defendant had set up numerous defences that failed, thus driving the plaintiffs to trial, the plaintiffs were entitled to costs of suit.

[WETMORE, J., *May 25, 1899.*

Statement. Action by indorsees of an overdue promissory note against the maker. The facts are stated above.

Argument. *E. L. Elwood*, for plaintiff.

Gifford Elliott, for defendant.

Judgment. WETMORE, J.—This is an action by the plaintiffs as indorsees of a promissory note alleged to have been made by

[4] 16 U. C. Q. B. 625.
[5] 15 U. C. C. P. 565.

Judgment.

Wetmore, J.

the defendant in favour of N. & D. Livingstone. The defendant denies that he made the note. I find as a matter of fact that he did make it. Neil Livingstone, who was called as witness, swore positively that he saw him sign it. I have compared the signatures to this note with the admitted signatures of the defendant to other papers, and find that they correspond in appearance. The defendant admits that he signed a note in favor of the payees, but states that it was not this note and that he never signed this note; that the note he signed was payable at 90 days with ten per cent interest. Now there is no such note so far as the evidence shews us. I cannot see the object in forging the note sued on, if the payees had a note which was not forged, inasmuch as they have never used the alleged *bona fide* note. I also find as a matter of fact that the amount was not filled in when the note was signed, and that it was signed in blank as to such amount. The evidence does not satisfy me that it was signed on a Sunday. I find, however, that the amount for which the note was filled was greater than the amount of the indebtedness from the defendant to the payees at the time, and which the payees were authorized to fill in, but I find that the amount so inserted was through a mistake and was not done in fraud or for the purpose of deceiving the defendant. An account was rendered to the defendant (exhibit No. 2) which purported to shew the correct amount of the indebtedness. There is an error of $10 in the addition and the correct amount of the indebtedness as appears by the account at the time the note was given was sixty-six 95-100 dollars instead of seventy-six 95-100 dollars. There was uncontradicted evidence that the first items, tea and coffee, which amount to one dollar and five cents ($1.05) were not got. The note therefore ought to have been filled in for only ($65.90) sixty-five dollars and ninety cents. The note was not indorsed by N. & D. Livingstone until long after maturity; it was then endorsed to Mr. White of Moosomin, an agent of John Calder & Co., and it

Judgment.

Wetmore, J.

eventually got to the hands of the plaintiffs. The plaintiffs are, therefore, not holders in due course. I cannot find that the principles which govern this case are dealt with by *The Bill of Exchange Act, 1890*, and I must therefore deal with it as if that Act had not been enacted. The plaintiffs, being the indorsees of an overdue note, hold it subject to all the equities affecting and arising out of it: *Burrough* v. *Moss*,[1] *Whitehead* v. *Walker*[2] The fact that the note was given for more than was due is an equity arising out of the note. The plaintiff can recover no more on the note than the payees could if the action had been brought by them. And this in my opinion is not affected by sec. 20, sub.-sec. 1, or sec. 30, sub.-sec. 1 of *The Bills of Exchange Act*, notwithstanding the fact that the payees signed the note by indorsing it. If this action had been brought by the payees the partial failure of consideration could have been set up as a defence *pro tanto*: *Byles on Bills* (14th Ed.) 151; *Forman* v. *Wright*[3] The amount as to which the consideration fails is a specific, ascertained amount, and is not an unliquidated amount. The plaintiffs are entitled to recover as if the note had been made for $65.90 and interest at 8 per cent. The plaintiffs are therefore entitled to judgment for $66.37 and interest on $65.90 at the rate of 6 per cent. per annum from 4th April, 1892, until judgment. In view of the fact that the plaintiffs are innocent holders of this note and were not parties to the making of it, that they were driven down to trial by virtue of the defendant setting up defences in which he failed, and that the defendant is, to a great extent, responsible for the position of affairs, I think this is a case in which I should exercise the discretion given me by Rule 616 of *The Judicature Ordinance*,[4] as to costs. I therefore order that judgment be entered for the plaintiffs for $66.37.

[1] 8 L. J. K. B. 287; 10 B. & C. 559; 5 M. & R. 296.

[2] 12 L. J. Ex. 28; 10 M. & W. 693; 7 Jur. 330.

[3] 20 L. J. C. P. 145; 11 C. B. 481; 15 Jur. 706.

[4] C. O. 1898, c. 21.

and interest at 6 per cent on $65.90 from the 4th April, 1892, until judgment, with costs to be taxed under the lower scale of the tariff as established by Rule 102 of the Rules of the Supreme Court. Judgment. Wetmore, J.

Exhibits B, C, and D, put in evidence at the trial, to be delivered to the plaintiff's advocate upon his filing in lieu thereof true copies of the same, and his undertaking to produce the originals when required by the Court or a Judge to do so.

Judgment accordingly.

RE LOPWELL DECEASED

Application by administrator—Passing accounts—Practice—Inventory

On an application to pass accounts, a statement and account of the administration—a schedule in the nature of an invintory—must be filed, setting forth clearly the details of the estate and of the applicant's disposition thereof.

The practice to be followed in passing accounts laid down.

[WETMORE, J., *June 20, 1899.*

This was an application on behalf of the administrator under Rule 597 of *The Judicature Ordinance*,[1] to have his accounts passed and allowed. Statement.

E. L. Elwood, for the administrator. Argument.

J. T. Brown, contra.

WETMORE, J.:—Two objections were raised at the hearing on the Chamber summons which appeared to me as worthy of consideration. One was that no inventory of the estate has ever been filed. The other was that no statement and Judgment.

[1] C. O. 1898, c. 21, s. 597: "Every administrator . . shall . . file . . a statement and an account verified by his oath showing his administration of the estate, and apply to the Judge . . to have his accounts passed and allowed . . ."

Judgment.

Wetmore, J.

account of the applicant's administration was filed as provided by the rule[1] in question. As to the inventory, none has ever been filed. I am not however prepared at present to decide whether, under the circumstances of this case, the administrator is bound to file an inventory in the strict sense inasmuch as he has not been cited or called upon by summons to do so. (See *Jones on Executors* (9th ed.) 841). It would seem that according to the ordinary practice when an administrator or executor is cited by any person interested in the estate to render an account of his administration he is at the same time cited to exhibit an inventory (see *Coote's Probate Practice* (11th ed.) 251, 691, and *Williams on Executors*, 1950). The order to account and exhibit an inventory in such case may be obtained by summons (*Williams on Executors*, 1951; *Judicature Ordinance*, Rules 480 and 458). And I must say that I cannot at present understand how an administrator's accounts could be properly passed without an inventory being exhibited, or at any rate something being presented to the Court properly verified to show specifically what the estate consisted of. I must say that what is disclosed in the admistrator's affidavit in this case as to the assets of the estate is of the most general character. There is nothing whatever disclosed which would enable one to form any opinion as to whether the administrator has realized from the assets what ought reasonably to have been realized. Of course it may be said that the administrator is liable to be cross-examined on his affidavit and thus made to disclose the assets of the estate more specifically. Would it however be fair to cast the costs of a cross-examination on the estate? And might not the administrator if he has unnecessarily made a cross-examination requisite be ordered himself to pay the costs of such cross-examination? I am of opinion therefore that when administrator's accounts are filed with a view to being passed and allowed a schedule in the nature of an inventory must be filed, duly verified, specifying in de-

tail the nature and character of the assets which have come to the admistrator's hands or knowledge. I draw the especial attention of advocates to the citations made by Mr. Brown from 2 *Daniel Ch. Prac.* (6th ed.) 1046, 7 and 8, and the form of affidavit referred to in note (ee) at page 1046. It seems to me to say the least that it would be prudent to follow what is there laid down, and I will in future require that such practice be followed. Judgment. Wetmore, J.

The point however upon which I decide this application is that the practice laid down by Rule 597 of *The Judicature Ordinance* has not been followed inasmuch as no statement and account as therein provided has been filed. It was urged that the administrator's affidavit contained a statement and account. If it did, in my opinion that is not what the legislature contemplated. The intention was that an account and statement should be filed which should be referred to as an exhibit, so that any person investigating it can see before him in the shape of an account just what the administrator claims should be charged against him and credited to him and the balance remaining in his hands, and not be compelled to wade through a possibly lengthy affidavit and spell it out. I may refer to Rule 236[2] of the Ordinance. The account called ror by Rule 597[1] is to be something *ejusdem generis* with that referred to in Rule 236.[2] But as a matter of fact the affidavit in this case does not contain any account at all; it contains material from which I might and I think could prepare an account. I imagine, however, that the legislature intended that this work should be done by the advocate and not by the Judge. I must say that I am very much pleased that the question has been raised because it serves to settle the practice. So far as I can recollect I have only been called

[2] C. O. 1898, c. 21, s. 236: "Where an account is directed to be taken, the accounting party, unless the Judge shall otherwise direct, shall make out his account and verify the same by affidavit. The items on each side shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit and be filed in Court."

Judgment.

Wetmore, J.

upon to pass accounts in three estates. In two of them no accounts were made out at all. I had, as I was invited to do in this case, to wade through the affidavit and make the account up myself. It happened however that the matters were very simple, but it did occur to me that if complicated accounts came before me and I had to follow a similar plan it would cast a very arduous work upon me. In the other case an account or, rather, accounts, were filed. It occurred to me in that case whether these accounts were not more than necessary, and, therefore, somewhat complicated and involved. I must say, however, that I do not think that any account was filed which was not warranted by the practice as laid down in Daniel and before referred to. And I may add that in this case I had before me a very full inventory, or what was equivalent thereto, from which I was able with the other material used, to satisfy myself that the assets of the estate had been completely accounted for. The question as to filing proper accounts having been now ventilated I hope that the practice in future may be better understood. As the practice in this Judicial District in respect to passing accounts has not been very great, and has possibly not been thoroughly understood, and as under such circumstances it might be a somewhat harsh proceeding to inflict costs upon the administrator personally, as I would have to do if I dismissed this application, I think justice will be done by adjourning this application to a future day, and in the meanwhile permitting the administrator to file further affidavits with proper accounts, statements, schedules and exhibits as above suggested.

Order accordingly.

RE YORKTON BUTTER AND CHEESE MANUFACTURING ASSOCIATION

Company—Mortgage—Execution—Common seal.

A mortgage under the Land Titles Act, 1894, if executed by an incorporated company, must be under its common seal.

[WETMORE, J., *Nov. 24, 1899.*

Statement. Reference to a Judge in Chambers by the Registrar of Land Titles at Regina, under sec. 111 of the Land Titles Act, 1894.

Argument. *D. H. Cole*, for Edward W. Bull, the mortgagee.

The Association, although served with an appointment, did not appear.

Judgment. WETMORE, J.:—This is an association incorporated either under Ordinance No. 13 of 1899 or chap. 65 of *The Consolidated Ordinance*, 1898. In either case it is a body corporate. Under the last mentioned Ordinance they are authorized to have a common seal and to alter or change it at pleasure. The association, by an instrument purporting to be dated 3rd May, 1809 (I presume 1899 is intended, as by reference to the date indorsed), mortgaged certain lands of which they are the owner to Bull. The attestation clause to this mortgage is as follows: "In witness whereof we, by our president and secretary, have hereunto subscribed our name and affixed our seal this third day of May, one thousand eight hundred and nine." The mortgage is signed "F. W. Bull, President," and "Jas. E. Peaker, Secretary." And opposite to the name of each is a small, common, red seal, such as is usually pasted on an instrument under seal executed by a person (there are two such seals, one opposite the name of each person) and there is an affidavit of the subscribing witness verifying the execution by Bull and Peaker and verifying the fact that they are respec-

Judgment.

Wetmore, J.

tively, president and secretary. This document was forwarded by Mr Worsley for registration to the Registrar, and in his letter forwarding he states that the corporation has no common seal. It is quite evident that this mortgage has not been executed under the common seal of the corporation. The Registrar has referred the question of the validity of the execution to me. I am of opinion that the execution is invalid. Such an instrument should be executed under the common seal of the corporation; such is the common law. *The Land Titles Act, 1894*, contemplates that instruments mentioned in that Act executed by a corporation shall be executed under its common seal (see secs. 100 and 101). It is laid down in 1 *Taylor on Evidence* (9th ed.) par. 149, "That a deed executed by a corporate body may not have the corporate seal affixed to it, but the corporation may adopt any private seal they please for the occasion and the jury may presume that the use of the adopted seal was a corporate seal if the instrument purport to be executed by the head and the subordinate members of the corporation 'under their seal.'" The authority cited for that is *Jones* v. *Galway Iron Commission*.[1] But I cannot find this laid down anywhere else, and it is quite at variance with what was laid down in *Mayor of Oxford* v. *Crow*,[2] and *Mayor of Kiddiminster* v. *Hardwick*,[3] and see *Dart on Vendors and Purchasers* (6th ed.), 217-273.

Execution of mortgage invalid.

Registrar advised accordingly

[1] (1847) Irish. L. R. 435.
[2] (1893) 3 Ch. 535; 8 R. 279; 69 L. T. 228; 42 W. R. 200.
[3] 43 L. J. (Ex.) 9; L. R. 9 Ex. 13; 29 L. T. 612; 22 W. R. 160.

SIMPKINSON v. HARTWELL

Pleading—Non cepit—Evidence—Right to maintain action.

An agister of cattle who has indemnified the owner for lost or missing cattle has a special property therein to entitle him to maintain an action respecting them in his own name.

A denial by a defendant that he "unlawfully took . . . or unlawfully detained the plaintiff's steer," is merely a plea of *non cepit* and *non detinet*, and does not put in issue any right of property.

[WETMORE, J., *Dec. 2, 1899.*

Statement. This was an action for conversion tried before WETMORE, J., without a jury. The facts are sufficiently stated in the judgment.

Argument. *Woolnough Peel*, for plaintiff.
J. T. Brown, for defendant.

Judgment. WETMORE, J.—The statement of claim charges the defendant with unlawfully entering upon the plaintiff's premises and unlawfully taking and converting to his own use a steer, the property of the plaintiff, and unlawfully detaining the same.

The statement of defence denies that he unlawfully entered upon the premises owned or occupied by the plaintiff, and that he unlawfully took or converted to his own use or unlawfully detained the plaintiff's steer. This is the only defence set up.

The essential facts of this case as disclosed by the evidence are as follows: The plaintiff was a rancher and agister of cattle, and carried on this business upon the premises mentioned in the statement of claim. His pasture fields were situated on the northerly side of the Qu'Appelle River and were surrounded on every side, except where they were bounded by the river, with a barbed wire fence. There were two pasture fields on this enclosure, the western one used for pasturing horses, the eastern one for pasturing horned cattle, which I will hereafter describe as cattle to distinguish them from the horses. These pasture fields were separated from each other by a barbed wire fence. The plaintiff's house was

Judgment.

Wetmore, J.

situated in the north-east corner of the cattle pasture field. The trail from this house to Hyde post office passed through both these pasture fields in a westerly direction, and there was a gate in the fence between the two pasture fields where this trail crossed it, and another gate in the western boundary fence of the horse pasture field where this trail crossed it. This trail went on east past the plaintiff's house through a gate in the eastern boundary fence in the cattle pasture field. This trail was the one usually travelled by persons going up and down the Qu'Appelle Valley when it was a dry time of the year. It did not seem to have been very much used at the time the matters in question occurred. On the 23rd May, 1898, the plaintiff took 43 head of cattle, being all two year old steers, to pasture for one Phillip Temple, and they were put in this cattle pasture field. The next day, 24th May, all the cattle on the ranch, both those belonging to the plaintiff and those belonging to Temple, were driven into a corral near the house and were branded, except three steers belonging to Temple, which broke away out of the corral and got into the cattle pasture field, and were not brought back to the corral. A few days after that the defendant and a Mr. Hyde came to the plaintiff's ranch, passing through the cattle, and the defendant asked one James Parker, an employe of the plaintiff on the ranch, if all Mr. Simpkinson's cattle were branded. Parker told him at first that they were all branded, but afterwards recollecting about these three animals that had broken out of the corral and had not been branded, he explained this circumstance to the defendant and told him that these three animals had not been branded. The defendant then said that there were two steers of his in the plaintiff's bunch; Parker replied that he did not know of any stray cattle being then there. The defendant then stated that as he had the buggy with him that day and he could not take these cattle away he would come back some other day and come up to the house and they would round all the cattle into the corral and he would see about

Judgment.
Wetmore, J.

taking those cattle away. About a week after these cattle were so branded they were again driven into the corral and the three unbranded steers were missing. This was after the conversation between James Parker and the defendant, which I have set out. The defendant was in the occupation of the lands adjoining the plaintiffs on the west. On the 19th August following, the plaintiff, accompanied by Temple and John Parker, the manager of the plaintiff's ranch, interviewed the defendant, whom they found cutting hay on the property so in his occupation. On the way one of these lost animals, a brindle steer, was found among the defendant's cattle and was identified by Temple, and was taken away by the plaintiff and his party. The plaintiff on this occasion charged the defendant with having been in his field and taken out some steers. The defendant admitted that he had taken out one steer, but claimed it was his own. It is not necessary to set out all that took place at that interview. I need only say that it strikes me that according to the evidence the defendant was somewhat curt in his language to, and cavalier in his treatment of, the plaintiff. He promised, however, to round up his cattle on the following Sunday, and so afford John Parker an opportunity to look over them. When John Parker, however, went this Sunday to have these cattle rounded up the defendant declined to do so, stating that he had been all through them and that there were no cattle among them but his own. It was also established that the plaintiff had paid Temple $25 for each of the missing steers. As this testimony is not contradicted I am compelled to accept it as true and find the facts accordingly, and draw therefrom all inferences of fact properly to be inferred.

At the close of the plaintiff's case the advocate for the defendant claimed that no case had been made out for the plaintiff on the following grounds:

1st. There was no proof that any steer at all had been taken by the defendant.

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Wetmore, J.

2nd. There was no proof that the animal taken by the defendant was one of the missing steers.

3rd. The steer the defendant admitted taking was stated in the admission to be his own.

4th. Assuming the steers to be one of the missing steers it belonged to Temple and the action was improperly brought in the plaintiff's name.

When the plaintiff's advocate was replying to the defendant's advocate I asked him to specify what animal he claimed to recover under the evidence. He stated that he claimed to recover for one of the two missing steers which they had not got possession of. But further on in his argument he claimed that he was not bound to specify any particular animal which he claimed to recover for, that he had the right to recover for any animal proved to be taken out of the plaintiff's field by the defendant, that such animal would be assumed to be the plaintiff's until it was proved otherwise by sworn testimony.

I was, and still am of the opinion that there is nothing in the defendant's 4th objection. The plaintiff, assuming the steer in question to be one of the Temple steers, had such a special property in it as to enable him to maintain this action.

I am also of opinion that the first objection was not well taken. The defendant admitted taking an animal out of the plaintiff's field, and that it was a steer.

I am free to confess that I was very much impressed at the trial with the second and third objections raised by Mr. Brown, the defendant's advocate. In fact I thought the plaintiff's case a very weak one, especially in view of Mr. Peel's statement as to what animal the plaintiff was seeking to recover for and that I thought there was no evidence to establish that the defendant ever took one of the Temple steers.

I further stated, however, that I experienced a difficulty owing to the nature of the statement of defence; that the evidence established that the defendant did take a steer out of the plaintiff's pasture field, and the defendant's plea was

simply a denial of the taking or detention, and did not allege property in the defendant at all.

Judgment.

Wetmore, J.

I refused to stop the case, but stated that if the defendant's advocate chose to risk it and rest the case as it then stood I would consider the questions which he had raised.

Mr. Brown then stated he would rest the case there, and he called no witnesses for the defence.

It was claimed that the defendant's plea did deny that the property in the steer sued for was the plaintiff's because it denied that the defendant "unlawfully took . . . or unlawfully detained the *plaintiff's* steer as alleged in the statement of claim." I am of opinion that this is not such a specific denial of the plaintiff's property in the animal as the rules of pleading require, or does it amount to an allegation that the property is the plaintiff's, or is the defendant under such a plea at liberty to set up that the property is his. I held in *The Massey-Harris Co.* v. *Pierce*,[1] decided by me on the 29th June, 1894, that a plea of *non detinet* only puts in issue the fact of a detention adverse to or against the will of the plaintiff; it does not put in issue the plaintiff's right of property. I see no reason to change my opinion then expressed, and refer to 2 *Bullen & Leake's Prec.* (4th ed.) 348, 383 and 384; *Richards* v. *Frankum*,[2] and *Mason* v. *Farnell*.[3] The plea in this case is nothing more than a plea of *non cepit* and *non detinet* and a defendant can no more set up a defence of right of property under the plea of *non cepit* than he can under that of *non detinet*

I have to state now that my mind has undergone a great change as to the effect of the evidence in pointing to a conclusion that the animal which the defendant admitted he took, was one of the missing Temple steers, and that if this case was being tried with a jury I could not have properly withdrawn that question from them. Moreover, I have come to the conclusion after going carefully over and

[1] III. Terr. L. R. 253.
[2] 9 L. J. Ex. 162; 6 M. & W. 420; 8 Dowl. 346.
[3] 13 L. J. Ex. 142; 12 M. & W. 674; 1 D. & L. 576.

Judgment.

Wetmore, J.

considering the testimony that I ought, as Judge of the facts in this case, in view that no sworn explanation or testimony has been given on the part of the defendant to find that the steer so taken out of the plaintiff's field is one of the missing Temple steers, and I do so find. It is quite evident that the animal the defendant referred to in his admission was not the brindle steer that was recovered. His attention was called to that animal; he admitted that it was not his; he consented to the plaintiff and his party taking it away; he never asserted that that was the animal he had taken out of the field, and his whole conduct points in the direction that the animal he had referred to in his admission was another animal. The plaintiff's pasture fields were surrounded by a fence on three sides, which was kept in good order, and on the other side by the river. There is no evidence that at the time in question any stray animals were in these fields, or any other animals, except the plaintiff's and Temple's, such animals as had a right to be there. The only animals missed were those three unbranded ones; they were missed within a very few days, not more than three or four, after the defendant had been at the plaintiff's ranch claiming that his animals were there. He admits going into the pasture field and taking an animal out; he does not go to the house as he stated he would to get the plaintiff's people to round the cattle up. He took the animal away apparently when none of the plaintiff's people were present to see him do so. He declined to round his cattle up for the inspection of John Parker, as he said he would, and he is rather short in his conversation with the plaintiff when approached on the subject. It is true in his admission he said the animal he took was his own, but that fact is not sworn to, and, moreover, as I have already held, he does not, by his pleading, set up that the animal was his. Under such circumstances I feel constrained to find as I have stated.

Moreover, under the pleadings the plaintiff was not bound to prove that the animal taken was one of the Temple ani-

mals. If he proved that any steer was taken out of the plaintiff's pasture field by the defendant I must, under such pleadings, assume that it was the plaintiff's property, and the defendant could not, under his plea, set up that it was his, and Mr. Peel's statement as to the property the plaintiff was seeking to recover for being one of the Temple steers would not prevent his insisting to recover for whatever he had a right to recover under the pleadings. At the same time I must say that the evidence, as it stands, points irresistibly to the conclusion that this animal was one of the Temple animals because no other animals were missed from the ranch. Judgment. Wetmore, J.

Judgment for plaintiff.

COMMERCIAL BANK v. KIRKHAM.

Practice—Security for costs—Affidavit—Corporation — Meaning of "Foreign Corporation."

A corporation has no residence, and a summons for security for costs based upon an affidavit stating that the plaintiff (a corporation) resided outside the jurisdiction, but omitting to state where its chief place of business was, was dismissed with costs.

Comments on *Molsons Bank* v. *Hall*.[1]

[WETMORE, J., *Oct. 27, 1899.*

This was an application for security for costs heard before WETMORE, J., in Chambers. The points involved are sufficiently set forth in the judgment. Statement.

E. L. Elwood, for the plaintiff, objected on the return of the summons that the affidavit upon which it was issued was insufficient, in as much as it merely stated that the plaintff resided outside the jurisdiction, but did not show where its principal place of business was. Argument.

J. T. Brown, contra: Rule 520 has been followed. The Rule provides for security being furnished "when the plaintiff *resides* out of the Territories."

WETMORE, J.—This is an application for security for costs. The affidavit on which it was based states that "the plaintiff herein resides outside the jurdiction of this Honourable Court." This, in my opinion, is not correct. A corporation (which the plaintiff is) has no residence. Not- Judgment.

Judgment.

Wetmore, J.

withstanding, anything contained in this affidavit the plaintiff may have its chief place of business within the jurisdiction, and, if it had, perjury could not be assigned on the statement in the affidavit.

I do not intend to lay it down that a corporation cannot be ordered to give security for costs. I am entirely of a contrary opinion, but the residence contemplated by Rule 520 of the *Judicature Ordinance* applies to persons, not to corporations. Corporations come within other cases provided for in the rule. It is not necessary for me to lay down what must be alleged in the case of a corporation.

While on the subject of security for costs, I wish to state that I, in looking this matter up, came across *Molsons Bank* v. *Hall*,[1] in which I delivered judgment on March 25th, 1893. In that case I held that a bank was not a foreign corporation. I doubt if I was correct in a sense in holding that. I decided that case on the authority of *Text Books and Digests*, having had no opportunity to read the cases. Possibly I may have been misled by the expression, "foreign corporation" in the text books, and possibly this is not a proper expression to use. What is intended by the expression is, a corporation which has its chief place of business or transacts its business outside the jurisdiction of the Court.

The Irish Railway Company is incorporated by Parliament, but all its business and works are in Ireland, and it is held to be a foreign corporation in the sense I have expressed *quo ad* the Courts in England. I think *Molsons Bank* v. *Hall*,[1] could be better supported on the principle laid down in *Ross et al* v. *Neilson*.[2]

Application dismissed with costs.

[1] III. Terr. L. R. 187.

[2] This was an application for security for costs heard before Wetmore, J., on March 15th, 1895. It appeared that the plaintiffs, who were implement dealers, had their chief place of business at Winnipeg, but had agencies at various places within the Territories, and carried on their business at such agencies, at each of which they kept a considerable stock of goods. Upon this state of facts the learned Judge refused the application, following *In re Appollinaris Co.'s Trade Mark* (1891), 1 Ch. 1; 63 L. T. 502; 39 W. R. 309.—T. D. B.

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ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERY.

See HUSBAND AND WIFE, 2.

ADVERTISEMENT.

See EXECUTIONS, 1.

ADVOCATE.

See SOLICTOR.

AFFIDAVIT.

See PRACTICE, 3, 4, 11, 13—SALE OF GOODS, 3.

AGENCY.

1. **Principal and Agent**—*Commission on Sale of Land — Substantial Compliance with Authority—Pleading—Amendment.*] — A real estate agent employed to find a purchaser for land, who finds a purchaser ready and willing to purchase upon terms which, although not identical with those in contemplation at the time of his employment, are satisfactory to the owner, is entitled to compensation for his services, notwithstanding that no sale is actually made by reason of refusal of the owner to sell the property for reasons unconnected with the terms of purchase. — *McKenzie* v. *Champion* (1885), 12 S. C. R. 649, followed.—*Semble*, where in the proposed vendor's instructions to the agent, there is not something to indicate that it was his intention to give the agent authority to sell, it will be inferred that the authority extended only to finding a purchaser *Boyle et al.* v. *Grassick.* (Court en banc, 1905), p. 232.

See JUSTICE OF THE PEACE, 1.

ALIMONY.

See HUSBAND AND WIFE, 2.

AMENDMENT.

See AGENCY, 1—CONVICTION, 2, 3—CRIMINAL LAW, 6 — TRESPASS TO LAND—TRESPASS TO PERSON.

ANIMALS.

1. **Sale of Diseased Horses** — *Scienter—Mens rea—Animals' Contagious Diseases Act, 1903 — Evidence—Objections to.*]—Section 7 of the Animals' Contagious Diseases Act, 1903, provides "that every person who sells . . . any animal affected or labouring under any infectious or contagious disease . . . shall for such offence incur a penalty not exceeding $200."—*Held*, that knowledge on the part of the defendant that the animal sold was diseased was not necessary to make him liable to conviction. *Betts* v. *Armstead* and *Pain* v. *Boughtwood*, referred to. — Objections to evidence discussed, *The King* v. *Perras.* (Scott, J., 1904), p. 58.

2. **Animals Trespassing upon Railway Track** — *Duty of Railway Company—Negligence.*]—A number of horses belonging to the plaintiffs, were turned loose to range unattended near the defendants' railway track, on a bright moonlight night. A train overtook the band and killed 44 of them, the bodies being found along several hundred feet of the line, which the railway company were under no obligation to fence at that point and which was not fenced.—*Held* (Wetmore, and

Prendergast, JJ., dissenting), that although the animals were trespassers, the trial Judge's finding on the evidence, that the horses were killed through the negligence of the defendant's engineer, should not be disturbed. *Gleston* v. *Canadian Pacific Railway Co.* (Court en banc, 1905), p. 168.

See PLEADING, 2.

APPEAL.

1. **Criminal Law** — *Appeal from Refusal of Trial Judge to Reserve Case —Application not Made at Trial— Discretion of Trial Judge.*]—On the trial of the accused before a Judge without a jury his counsel objected that the accused was entitled to be tried by a jury, but the objection was overruled and the trial proceeded, no application being made for a reserved case. The accused was convicted and sentenced, and two days afterwards an application was made to the trial Judge to reserve a case for the Court of Appeal. The application was refused.—*Held*, that an appeal from the refusal of the trial Judge to reserve a case on a question of law arising during a criminal prosecution lies only when the application is made at the trial, and although after the trial the Judge might still, in his discretion, reserve a case, yet if he refused, no appeal lay. *King* v. *Toto* (Court en banc, 1904), p. 89.

2. **Criminal Code**—*Summary Trial —Appeal—Jurisdiction.*]— Since before 1895 two justices of the peace in the North-West Territories had jurisdiction to try offences under paragraphs (a)-(f) of sec. 783 of the Criminal Code, 1892, and there was no appeal from their decision, the extension in that year of this jurisdiction to two justices in any province, subject to appeal where the trial was had before them by virtue only of the new enabling clause, did not extend the right of appeal to the North-West Territories.—The Alberta Act, since it continued the law theretofore in force made no change in this respect. *Rex* v. *Pisoni, Rex.* v. *Taylor*, (Harvey, J., 1906), p. 238.

See CONSTITUTIONAL LAW—NEGLIGENCE.

ASSESSMENT AND TAXATION.

1. **Land Titles Act, 1894.** — *The Municipal Ordinance, ss. 201 and 202 —Effect of Transfer — Grounds of Questioning Sale.*]—Under ss. 201 and 202 of the Municipal Ordinance (C. O. 1898, c. 70), a transfer of land, by secretary-treasurer of municipality, on sale for taxes, is conclusive after one year, and sale can only be questioned on grounds specified in s. 202.—The Courts are bound to give effect to unequivocal language of a statute. —*O'Brien* v. *Cogswell*, distinguished.—O.d. c. 10 of 1900 does not affect proviso in s. 202 of the Municipal Ordinance.—Judgment of Richardson, J., affirmed.—*Re Donnelly Tax Sale*, (No. 2). (Richardson, J., 1901). (Court en banc, 1903), p. 1.

2. **School Assessment Ordinance**—*Meeting of Trustees—Recording Proceedings — Invalid Assessment.*] — A rate of taxation not struck at a regular or special meeting of a school board, but at an informal meeting of which no minutes were kept, was *held* to be invalid.—*Quære*, whether the rate would have been validly struck, even if the meeting had been a regular or special meeting, if a proper minute were not then made. *Vienna* v. *Roszkosz.* (Scott, J., 1904), p. 51.

3. **Assessment of Railway**—*"Lands"—Meaning of—Onus of Prov. ing Assessment Incorrect.*]—*Held*, that the buildings of a railway company are assessable under s. 3 of the Ordinance respecting the Assessment of Railways, the word "lands" therein being properly interpreted as including the buildings.—*Held*, also, that the assessment must *prima facie* be taken as being correct in amount. *Canadian Pacific Railway Co.* v. *Macleod School District* (1901) 5 Terr. L. R. 187, followed. *Canadian Northern Railway Co.* v. *Omemee School District.* (Wetmore, J., 1906) p. 281.

ATTACHMENT OF DEBTS.

1. **Practice**—*Garnishee — Irregularity—Money in Court—Setting Aside Garnishee.*]—Money in the hands of the clerk of the Court is not attachable by garnishee process. *McMillan* v. *Kaake and Neff*, garnishee. (Wetmore, J., 1898), p. 448.

See PRACTICE—STOP ORDER.

BAILMENT.

See RAILWAYS—SALE OF GOODS.

BANKS AND BANKING.

1. The Bank Act—*Security in Form C. — Rancher — Description of Property.*)—A rancher whose business is raising cattle is not, no matter how large his transactions may be, "a wholesale purchaser or shipper of, or dealer in live stock," within the meaning of s. 88 of The Bank Act, R. S. C. (1906) c. 29.—The description in a security in the form in Schedule C. of that Act must be sufficient to identify the property. *Hatfield* v. *Imperial Bank.* (Sifton, C.J., 1907), p. 206.

See ELECTIONS.

BILLS, NOTES AND CHEQUES.

1. Promissory Note Given for Goods to Remain Property of Payee —*Memorandum thereon—Endorsement.*]—In an action by an endorsee of a document in the form of an ordinary promissory note, but having on the face of it a memorandum "Given for Suffolk stallion, 'His Grace,' same to remain the property of J. H. Truman until this note is paid."—*Held*, that the document was not a promissory note, and that the rights of the parties under it could consequently not be assigned by the simple endorsement. *Bank of Hamilton* v. *Gillies* (1899), 12 Man. R. 495; *Kirkwood* v. *Smith*, (1893), 1 Q. B. 582, applied. *Frank* v. *Gazelle Live Stock Association* (Harvey, J. 1906), p. 392.

2. Promissory Notes —*Handwriting — Consideration—Drunkenness—Incapacity to Contract—Evidence—Onus—Fraud—Pleading.*]—In an action by endorsees of promissory notes against the maker there was no evidence that the endorsees were holders in due course. The defence set up that the defendant was, to the knowledge of the payee, so drunk at the time of signing the notes as to be incapable of transacting business.—*Held*, (1) that knowledge on the part of the payee of the defendant's state of mind was immaterial.—(2) That the fact that defendant was drunk at the time the notes were signed was *prima facie* evidence that the payee did have such knowledge, so as to cast on the plaintiffs the onus of proving want of knowledge on the part of the payee.—(3) That in the absence of evidence on the part of the plaintiffs that they were holders in due course they cannot, under the circumstances, recover. *Alloway et al* v. *Hutchison* (No. 2). (Wetmore, J., 1898), p. 425.

3. Promissory Note — *Signature—Evidence — Signed in Blank — Note Overdue —Indorsees—Defences —Innocent Holder —Costs—Bills of Exchange Act, 1890.*]—The plaintiffs were endorsees of an overdue promissory note signed in blank by defendant and given by defendant in payment of certain indebtedness. By error the note was filled up for more than the amount of defendant's indebtedness. Plaintiffs were innocent holders.—*Held*, that notwithstanding the provisions of s. 20, s.-s. 1, and s. 30, s.-s. 1 of the Bills of Exchange Act, 1890, this constituted an equity to which the note was subject, and plaintiffs could not recover anything more than the payee could had he sued on the note, but that, as plaintiffs were innocent holders, and defendant had set up numerous defences that failed, thus driving the plaintiffs to trial, the plaintiffs were entitled to costs of suit.—*Fraser* v. *Ekstrom.* (Wetmore, J., 1899), p. 464.

See COMPANIES.

BILLS OF SALE AND CHATTEL MORTGAGES

1. Chattel Mortgage — *Removal of Goods to New District—Sale Within Three Weeks—Omission to Refile Mortgage—Subsequent Purchaser.*]—Where chattels have been mortgaged in one registration district a purchaser from the mortgagor within three weeks after their removal to another district acquires a good title if the mortgagee omits within the three weeks to refile his mortgage.—(SCOTT, J., *dissentiente.*) *Peterson* v. *Hulbert*, (Court en banc, 1904), p. 114.

See BANKS AND BANKING, 1—SALE OF GOODS, 1, 3.

CANADA EVIDENCE ACT

See ELECTIONS—EVIDENCE

CARNAL KNOWLEDGE.

See CRIMINAL LAW.

CARRIER.

See RAILWAY, I.

CERTIORARI.

1. Summary Conviction. — *Certiorari Entitling Proceedings.*]—Proceedings to obtain a writ of certiorari to quash a conviction where an order quashing it is not asked upon the return of the application for the writ, do not require to shew the name of the informant, as part of the style of cause. *R.* v. *Harris* (Wetmore, J., 1906), p. 376.

See ANIMALS, I — CONVICTION, 3 — JUSTICE OF THE PEACE, I.

CHARGE ON LAND.

See LAND TITLES ACT—WILLS.

COMMISSION.

See AGENCY.

COMPANY.

1. Foreign Companies Ordinance —*Unlicensed Company—Right of Action of Indorsee of Note made to the Company.*]— The Foreign Companies Ordinance, 1903 (c. 14 of 1903, 1st session), provides (s. 3), that no foreign company having gain for its object, or a part of its object, shall carry on any part of its business in the Territories unless it is duly registered under the said Ordinance, and imposes a penalty for breach of this provision; it further provides (s. 10) that any foreign company required by the said Ordinance to become registered shall not while unregistered be capable of maintaining an action or other proceeding in any Court in repect of any contract made in whole or in part in the Territories, in the course of or in connection with business carried on without registration, contrary to the provisions of s. 3.—*Held*, that an indorsee with notice of a promissory note made to a foreign company in the course of and in connection with business carried on in contravention of the above provisions, could not recover.—Plaintiff was the indorsee of a promissory note made by defendants in favour of The Sawyer & Massey Co., Ltd., to secure the price of certain threshing machinery. Defendants, with other defences, set up by the 3rd paragraph of their defence that the note in question was given to an unregistered foreign company engaged in selling machinery for gain within the Territories by resident agents, of which facts the plaintiff had notice when he became the holder of the note, and that they would rely upon that provisions of the Foreign Companies Ordinance.—On argument of the question of law thus raised, the facts above set out were admitted.—*Held*, a good defence in law. *Ireland* v. *Andrews et al.* (Newlands, J., 1904), p. 66.

2. Foreign Company — *Ordinance Respecting—Power of Territorial Legislature.*]—The Foreign Companies Ordinance is *intra vires* of the Territorial Legislature, and extends to companies incorporated by the Dominion to carry on throughout Canada a business which the Territorial Legislature might have authorized it to carry on in the Territories. *Rex* v. *Massey-Harris Company.* (Court en banc, 1905), p. 126.

CONDITIONAL SALE.

See SALE OF GOODS.

CONSIDERATION.

See COMPANY, 1—SALE OF GOODS, 1.

CONSTITUTIONAL LAW.

1. The Imperial Debtors' Act, 1869—*Application to Alberta.*]—*Held*, (SIFTON, C.J., and NEWLANDS, J., *dissentiente*), that the Imperial Debtors' Act, 1869, is in force in the Province of Alberta. *Fraser* v. *Kirkpatrick.* (Court en banc 1907), p. 403.

See COMPANY, 2—RAILWAYS, 2.

CONSTRUCTION OF STATUTES.

See ASSESSMENT AND TAXATION, 1—BANKS AND BANKING, 1 — COMPANY, 2—NEGLIGENCE, 1—SALE OF GOODS 6—SOLICITOR, 1.

CONTRACT.

1. The School Ordinance, s. 155—*Agreement for Stated Sum Per Month—Application of Section.*]—The plaintiff had a written agreement with the defendants for payment of salary for teaching their school at $50 a month for six months, the agreement setting out the pyovisions of s. 155 of the School Ordinance. He taught for six months and received $300. In an action for $48.55, balance payable under the provisions of the section referred to :—*Held*, that the section applied although the agreement did not call for a yearly salary.—*Semble*, that the parties could not have contracted themselves out of the operation of the section. *Porter* v. *Fleming School District*. (Wetmore, J., 1906), p. 348.

See BILLS, NOTES AND CHEQUES, 2—EXECUTOR AND ADMINISTRATOR, 1—HUSBAND AND WIFE, 1—MASTER AND SERVANT, 2—PRACTICE, 2—RAILWAY, 1—SALE OF GOODS, 1, 4, 5, 6.

CONVICTION.

1. Hawkers and Pedlars—*Samples or Patterns of Goods to be Afterwards Delivered—Form of Conviction.*]—The defendant was convicted under the Ordinance Respecting Auctioneers, Hawkers, and Pedlars, for "going from house to house offering for sale certain books to be afterwards delivered within the said province."—*Held*, that the conviction was bad because it did not state that defendant was "carrying and exposing samples or patterns" of the goods in question. *Rex* v. *Wolfe*. (Wetmore, J., 1906), p. 246.

2. Selling Liquor to Interdicted Person—*Conviction for—Liquor License Ordinance—Defects in Conviction—Quashing Conviction on Appeal.*]—On an appeal by defendant from a conviction for selling liquor to an interdicted person :—*Held*, that the conviction was bad because it did not disclose on its face that the liquor was sold or given "during the period of interdiction," and also because it did not state the period for which defendant should be imprisoned in default of payment of the fine imposed, *Rex* v. *Harris*. (Wetmore, J., 1906), p. 249.

3. Conviction—*Keeping house of ill-fame—Amending information—Evidence as to Offence Subsequent to Issue of Summons—Justices Sitting under Part LV. or Part LVIII. of the Criminal Code—Deposit of Cash Security with written Conditions.*]—Two Justices dealing with a charge of keeping a house of ill fame will be deemed to be acting under Part LV. of the Criminal Code, 1892, if they adopt the form of conviction provided by s. 786, and the form of conviction QQ.—A defendant cannot be convicted of an offence alleged to be committed after the date of the issue of the summons, even though the information is amended and resworn.—*Semble*, that, if with a deposit of cash as security in proceedings to quash a conviction, a writing is filed, the condition should be that the applicant will prosecute the motion to quash the conviction, not merely the application for the writ of certiorari, and that such writing is bad if the condition is to prosecute such motion or writ of certiorari. *The King* v. *Earley*. (Wetmore, J., 1906), p. 269.

See ANIMALS, 1—CERTIORARI, 1—CRIMINAL LAW—EVIDENCE, 3—INTOXICATING LIQUOR, 1.

COSTS.

See BILLS, NOTES AND CHEQUES, 1, 3—JUSTICE OF THE PEACE, 1—LANDLORD AND TENANT, 2—PRACTICE—SALE OF GOODS, 2.

COUNTERCLAIM.

See PLEADING.

CRIMINAL LAW.

1. Criminal Law—*Theft—Art. 305. s.-s. J, clause (a)—Criminal Code—Special Property or Interest in Railway Car — Manitoba Grain Act, 1900.*]—M. made application in order book kept at Moosomin Station under s. 58 of Manitoba Grain Act as amended, which provides "cars so ordered shall be awarded to applicants according to order in time in which said orders appear on the order book." Sec. 42 of the

Act as amended by s. 5 of 2 Edw. VII. c. 19, provides (clause 5), "The railway company shall furnish cars to farmers, without undue delay, for the purpose of being loaded at said loading platform." The station agent intended a special car for M. and told one S. to notify M. He was not notified; and the accused took possession of and loaded the car. He was convicted of theft:—*Held*, that M. could not insist on any car being delivered to him; and he had therefore no special property or interest in the car in question within the intent of clause A of s.-s. sec. 1 of sec. 305 of the Criminal Code. Conviction quashed. *The King* v. *McElroy*. (Court en banc, 1903), p. 10.

2. Criminal Law.—*Seduction of Female under Promise of Marriage—Meaning of Previous Chaste Character—Sufficiency of Promise of Marriage*.]—The words "previously chaste character" as used in sec. 182 of the Criminal Code, 1892, do not mean previous reputation for chastity, but mean those acts and that disposition of mind by which the morals of an unmarried woman may be judged, and therefore when an unmarried woman under the age of twenty-one years who previous to the date of the seduction under promise of marriage in respect of which the charge is laid, has had illicit sexual intercourse with the accused, she cannot be said to be of "previously chaste character" unless between the date of such illicit intercourse and the seduction complained of there is evidence of reform and self-rehabilitation in chastity. *The King* v. *Lougheed*. (Court, en banc, 1903), p. 77.

3. Crown Case Reserved.—*Extorting Money by Accusing a Person of an Offence—Admissibility of Documents as part of res gestæ—Sufficient Statement of Offence*.]—On the trial of a charge for extorting money by threatening to accuse of an offence a letter written to a third party by the person threatened at the time of the threats and at the instigation of the accused, but not read by him, is not admissible in evidence as part of the *res gestæ* or otherwise.—A summons issued by a justice of the peace citing the accused to appear and answer a criminal charge is a "document containing an accusation" within the meaning of sec. 406 (c) of the Criminal Code, 1892.—A summons issued as above need not have been issued at the instigation of the informant with the intent aforesaid, but the offence is complete if the summons is used by a third person for the purpose of extortion.—A charge that A. B. "did unlawfully abuse a mare the property of C. D., contrary to the Statutes of Canada, s. 512," is sufficiently stated. *King* v. *Cornell*. (Court en banc, 1904), p. 101.

4. Murder.—*Proof of Corpus Delecti — Identity — Right to Reply by Crown Counsel—Comment upon Prisoner's Failure to Give Evidence—New Trial*.]—On a charge of murder, the death of a human being having been once established, the identity of the deceased, and the fact that his death was caused by the prisoner, may be established by circumstantial evidence, which should, however, be cogent and convincing:—*Held*, (Wetmore, J., dissentiente) that in this case the evidence of the identity of the deceased and of the prisoner's having caused his death was sufficient to warrant the prisoner's conviction.—The prosecution was conducted by the Crown prosecutor, having general instructions from the Department of Justice in all criminal cases, and particular instructions in this case:—*Held*, (Wetmore, J., *dissentiente*), that although no evidence was given on behalf of the deceased, the Crown prosecutor had the right to reply. *Rex* v. *Martin* (1905), 5 O. W. R. 317, followed. The Crown prosecutor in the course of his address to the jury referred to the fact that the prisoner might have given evidence on his own behalf and expressed the opinion that "his counsel took the very best and wisest course in not having him go on the stand," adding, "I think it was wise for himself."—*Held*, that the prisoner was entitled to a new trial, these remarks constituting an improper comment, by which substantial wrong and injustice was caused. *Rex* v. *King*. (Court en banc, 1905), p. 139.

5. Forcible Entry—*Entry Effected by Force — Previous Contradictory Statements — Relevancy of*.]—*Held*, that, on a charge under sec. 89 of the Criminal Code, 1892, it is not necessary to shew that actual force was used in effecting the entry:—*Held*, Harvey, J., *dissentiente*, that evidence of a previous contradictory statement by a witness cannot be given where the

matter with which such statement deals is merely collateral to the issue. *Rex* v *Walker*. (Court en banc, 1906), p. 276.

6. Criminal Law—*Quashing Charge — Corrupting Witnesses — Appeal against Voter under Territories Election Ordinance.*]—The prisoner was charged on two counts, with (1) having attempted to dissuade a witness B., by a bribe, from giving evidence before a Court of Revision held in connection with a contested provincial election; (2) with having attempted to obstruct the course of justice by giving to one B., $10 to induce him to abstain from attending such Court of Revision. B. was the person whose vote had been objected to and appealed against.—*Held*, that it being charged that B. was dissuaded as a witness, not as a party, the first charge fell properly within clause (a) of sec. 154 of the Criminal Code, 1892; but that the second charge was defective, at all events in omitting to state that B.'s absence from the Court of Revision would lead to the defeat of justice. *Rex* v. *Lake*. (Harvey, J., 1906), p. 345.

7. Criminal Law — *Murder — Evidence of Expression of Deceased — Res Gestæ — Expressions as Evidence of State of Mind—Charging the Jury as to Manslaughter.*]—On a trial for murder evidence was given that while the deceased was apparently fleeing from the accused, who was pursuing him with a gun, he shouted several times, "Hold on, Hold on. He shot me and he will shoot me again. Hold on boys. Hold on," and it appeared that this almost immediately followed the sound of a shot:—*Held*, that this evidence was properly given as being part of the *res gestæ* irrespective of whether the words were uttered in the presence of the accused or no.—Evidence was also given that at a later time the deceased, upon observing the accused within five or six feet of him, said to the witness who was assisting him. "Don't let him knife me."—*Held*, Wetmore, J., *dissentiente*, that the expression was nothing more than evidence of the deceased's state of mind; that it was admissible equally with evidence of the deceased's contemporaneous acts, and that both were material.—The only evidence of the actual shooting was that of the prisoner who swore that the shooting was purely accidental. The trial Judge charged the jury that there was no evidence to justify them in finding a verdict of manslaughter:—*Held*, that under the circumstances that charge was proper. *Rex* v. *Gilbert*. (Court en banc, 1907), p. 396.

See APPEAL—CERTIORARI—CONVICTION—EVIDENCE.

DAMAGES.

See ANIMALS—JUSTICE OF THE PEACE—MASTER AND SERVANT—NEGLIGENCE—PRACTICE—*Railways*—SALE OF GOODS—TRESPASS TO THE PERSON.

DELAY.

See JUDGMENT, 1.—TRUSTS AND TRUSTEES, 2.

DISCOVERY, EXAMINATION FOR.

See EVIDENCE, 2.

DISTRESS.

See JUSTICE OF THE PEACE, 1—LANDLORD AND TENANT.

ELECTIONS

Controverted Dominion Election—*North-West Territories Representation Act—Certified Copy of Voters' List—Canada Evidence Act—Notice of Presentation of Petition and Nature of Security — Receipt of Security.*]—Upon the hearing of preliminary objections to a petition against the return of a member of the Dominion Parliament, for the Electoral District of Alberta, due notice having been given, a copy of the list of voters for a certain polling sub-division returned by the returning officer of the electoral district to the clerk of the Crown in Chancery, duly certified by said clerk under his official seal, was put in evidence, and the petitioners identified their names thereon. They also swore that they were male British subjects, not In

dians, of the full age of 21 years, and that they had resided in the North West Territories for over twelve months, and in the electoral district for over three months immediately preceding the issue of the writ of election:—*Held*, that in view of the provisions of the North-West Territories Representation Act, R. S. C. (1886), c. 7, the evidence of the petitioners was admissible to prove their status, and that the voters' list was properly proved by a certified copy in spite of the absence in the Act referred of any provision, such as is found in the Franchise Act, 61 Vic., c. 14, s. 16, for certified copies of the list being evidence. *Richelieu Election Case* (1892), 21 S. C. R. 168, distinguished.—The notice of the presentation of the petition, handed to the petitioner immediately before the copy of the petition, referred to the presentation of a petition against the return of the petitioner as member for electoral district of the west riding of Assiniboia (*sic*) but there was attached to the petition a certificate signed by and under the seal of the clerk of the Court that $1,000 had been deposited as security for the payment of costs, etc., in the matter of the petition against his return as member for the electoral division of Alberta:—*Held*, that the first notice was bad, but that the certificate gave a notice sufficient to comply with the provisions of s. 10 of the Controverted Election Act, R. S. C. (1886), c. 9, although it was not signed by either the petitioners or their advocate. *Ottawa Election Case* (1908), 2 Ont. El. Cas. 61, referred to.—Objection was taken that the evidence did not shew that the security was given in bills of a chartered bank: *Held*, that the evidence was sufficient, and that the fact that the bank was a chartered bank sufficiently appeared from the Dominion Statute extending its charter.—The cost of publishing the petition was not paid to the registrar at the time that the petition was presented:—*Held*, that this was no objection to the proceedings.—No evidence was given that any election had been held, or that the respondent had been returned as elected:—*Held*, that no such evidence was necessary. *Coventry Election Case* (1869), 20 L. T. N. S. 405, followed.—Objection was taken to certain paragraphs of the petition on the ground that even if true they would not justify a declaration that the seat was vacant or the disqualification of the member.—*Held*, that the clauses should, nevertheless, not be struck on preliminary objection. *Stanleybridge Election Case* (1869), 19 L. T. N. S. 660, followed. *Re Alberta Election*, (Newlands, J., 1905), p. 329.

See CRIMINAL LAW, 6 — MUNICIPAL LAW, 1.

ESTOPPEL.

See SALE OF GOODS, 3.

EVIDENCE.

1. **Foreign Judgment**—*Proof of—Seal - Certificate — Canada Evidence Act, 1893, s. 10*]—A document purporting to be a transcript of the judgment roll of the Circuit Court for Walworth county, South Dakota, was tendered in evidence. The seal affixed was engraved "Clerk of the Circuit Court, Sixth Judicial District, South Dakota, Walworth County;" the certificate appended under the hand of the clerk of the Court stated, "I have hereunto set my hand and affixed the seal of the said Court:"—*eld*, that the certificate signed by the officer who would ordinarily have the custody of the seal of the Court, was *prima facie* proof that the seal was that of the Court, and that the judgment purported to be under the seal of the Court as required by s. 10 of the Canada Evidence Act. *Beebe* v. *Tanner*, (Court en banc, 1903), p. 13.

2. **Foreign Judgment**—*Proof of—Canada Evidence Act—Imp Stat 14 & 15 Vic c 99—Exemplification of Judgment—Re opening Plaintiff's Case—Examination for Discovery after Adjournment of Trial*]—On the trial of an action upon a foreign judgment the plaintiff, without giving any notice under the Canada Evidence Act, s. 19, tendered in evidence a copy of the judgment sued on certificate under the hand of the clerk and by the seal of the Court in which it was recovered, and this was received subject to objection. The defendant adduced no evidence and judgment was reserved. The trial Judge held that the document was im-

properly admitted, no notice having been given, but adjourned the case to give the plaintiff an opportunity of proving his judgment:—*Held*, that the copy of judgment tendered was not an exemplification and notice of intention to use it should have been given under s. 19 of the Canada Evidence Act before it could be admitted, in spite of the provisions of sec. 11 of Imp. Stat. 14 & 15 V. c. 99, to which the Canada Evidence Act is not repugnant, but only adds a condition:—*Held*, further, that the trial Judge properly exercised his discretion in giving the plaintiff a further opportunity to prove his judgment by adjourning the trial:—*Held*, further, that the similarity of the name of the defendant in this action and that of the defendant named in the foreign judgment taken with the present defendant's pleas in confession and avoidance was sufficient *prima facie* evidence of the identity of the two defendants.—After the adjournment of the trial the plaintiff had secured an order for the examination of the defendant for discovery:—*Held*, that the trial having been commenced and adjourned the plaintiff was not entitled to examine the defendant for discovery. *Stevens* v. *Olson et al.* (Court en banc, 1904), p. 106.

3. Criminal Law—*Keeping a Common Gaming House — Evidence*]—On the premises of the accused a number of persons unconnected with the premises had been observed playing games involving the use of money, dice and dominoes, and the accused had stated to the chief of police that he was having a game of fan-tan at his place, and that he was willing to pay for the privilege, as he was doing well out of it:—*Held*, sufficient evidence to sustain a conviction for keeping a common gaming house. *King* v. *Mah Kee.* (Court en banc, 1905), p. 121.

See ANIMALS, 1—BILLS, NOTES AND CHEQUES, 2—CRIMINAL LAW—ELECTIONS, 1—EXECUTORS AND ADMINISTRATORS, 1—NEGLIGENCE, 1—SALE OF GOODS, 6—SPECIFIC PERFORMANCE, 1, 2.

EXECUTIONS.

1. Homestead—*Residence of Execution Debtor — Exemption — Advertisement of Sale under Execution—Suspension of Publication of Newspaper—Substantial Compliance with Rule 354—Instituting Proceedings to Confirm Sale—Swearing Affidavit of Execution of Transfer.*]—A quarter section of land, although all the land owned by an execution debtor, is not his "homestead" within paragraph 9 of s. 22 of the Exemptions Ordinance, where he has not occupied it for nine years and appears to have no *animus revertendi*.—Where the advertisement of a sale under an execution had been published in a weekly paper and had appeared in every issue of the paper published during two months, but there had been no issue in two weeks of the period:—*Held*, that, it not appearing that the sale of the property had been affected in any way, there had been a sufficient compliance with the provisions of Rule 364 of the Judicature Ordinance.—Proceedings to confirm a sale of lands under a writ of execution are proceedings under the Land Titles Act, 1894, not in the cause in which the writ issued, but that the proceedings are entitled in the cause and not "In the matter of the Land Titles Act," is nevertheless no objection to them.—An affidavit of execution of a transfer upon a sale under a writ of execution sworn before the clerk of the Court, is bad, but leave may be given to reswear it pending an application to confirm the sale. *John Abell Engine and Machine Works Co. Ltd.* v. *Scott.* (Wetmore, J., 1907), p. 302.

See EXEMPTIONS UNDER EXECUTION—LAND TITLES ACT, 1.

EXECUTORS AND ADMINISTRATORS.

1. Action against Estate of Deceased Person—*Corroboration — Resulting Trust—Immoral Purpose.*]—Although there is no corroboration, effect may be given to a claim against the estate of a deceased person if the uncorroborated testimony of the claimant is completely convincing.—Where a transfer of property has been taken in the name of a third person for the purpose of effecting an immoral or illegal purpose, the Court will not lend any assistance to the actual purchaser in recovering from the transferee the

evidences of ownership, at least when the illegal or immoral purpose has been carried out. *Bakewell* v. *McKenzie*. (Harvey, J., 1905), p. 257.

2. Application by Administrator—*Passing Accounts — Practice — Inventory.*]—On an application to pass accounts, a statement and account of the administration—a schedule in the nature of an inventory—must be filed setting forth clearly the details of the estate and of the applicant's disposition thereof. The practice in passing accounts laid down. *Re Lopwell*, deceased. (Wetmore, J., 1899). p. 467.

See WILLS.

EXEMPTIONS UNDER EXECUTION.

1. Fraudulent Transfer of Land—*13 Eliz. c. 5—Homestead—Exemption*] *Held*, Scott, J., *dissentiente*, that a transfer of a homestead exempt from seizure under execution was not by reason of the exemption a fraudulent transfer of property under the statute 13 Eliz. c. 5—*Semble*, the right to claim the benefit of an exemption is not confined to the execution debtor, but extends at least to members of his family. *Meunier* v. *Doray*. (Court en banc, 1905), p. 194.

2. Homestead — *Exemption — Proceeds of Sale under Mortgage—Practice —Originating Summons.*]—An execution against lands does not bind the homestead of the execution debtor, and mortgagees of the land subsequent to the executions are entitled to sell it free from the executions.—Such a mortgagee may invoke the provisions of the Exemption Ordinance for the purpose of securing his priority.—The sale of a homestead under a mortgage is a compulsory sale and consequently the proceeds after payment of the mortgages are exempt from seizure under execution to the same extent as the land.—The rights of the parties appearing to be interested in the land may be determined upon an originating summons for sale under a mortgage. *Bocz* v. *Spiller*. (Newlands, J., 1905; Court en banc, 1905), p. 225.

3. Interpleader—*Claim by Execution Debtor—Exemption—Buildings.*]—Where the property seized under a writ of execution against goods consisted of a blacksmith shop in the occupation of the execution debtor: *Held*, that the question whether the shop was or was not part of the freehold could not be raised upon an interpleader by the sheriff:—*Held*, also, that the building was not exempt from seizure by virtue of the Exemptions Ordinance, not being the residence of the execution debtor or a building used in connection with his residence. *Eastern Townships Bank* v. *Drysdale*. (Wetmore, J., 1905), p. 236.

4. Homestead—*Exemption for Benefit of Execution Debtor and his Family —Contest between Execution Creditors and Mortgagees—Priority.*] — The exemption of a homestead from seizure under execution is for the benefit of the debtor and his family only, and the claim of execution creditors to the proceeds of the sale of the land will consequently be preferred to that of mortgagees subsequent to the registration of the writs of execution where the execution debtor can in no event have any interest in such proceeds. *Purdy* v. *Colter*. (Newlands, J., 1907), p. 294.

FRAUD AND MISREPRESENTATION.

See BILL, NOTES AND CHEQUES, 1.

FRAUDS, STATUTE OF

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

See EXEMPTIONS UNDER EXECUTION, 1—INTERPLEADER, 1, 2—TRUSTS AND TRUSTEES, 2.

FUNDS IN COURT.

See ATTACHMENT OF DEBTS, 1—EXEMPTIONS UNDER EXECUTION, 4—STOP ORDER, 1.

GARNISHEE.

See ATTACHMENT OF DEBTS.

HABEAS CORPUS.

See PRACTICE, 6.

HAWKERS AND PEDLARS.

See CONVICTION, 1.

HOMESTEAD.

See EXECUTIONS—EXEMPTIONS UNDER EXECUTION.

HUSBAND AND WIFE.

1. Husband and Wife—*Custody of Child—Father Contracting Himself out of Rights—Policy of Law.*]—An agreement between a husband and wife whereby the former contracts himself out of his right to the custody of the children of the marriage is against the policy of the law, and will not be enforced. *Barrett* v. *Barrett*. (Wetmore, J., 1906), p. 274.

2. Alimony—*Adultery on Part of Wife.*]—Where adultery is proved to have been committed by a wife after her desertion by her husband, she will not be granted alimony. *Lieb v. Lieb*. (Newlands, J., 1907), p. 308.

IMPERIAL ACTS, ETC., IN FORCE IN N. W. T.

See CONSTITUTIONAL LAW—PRACTICE.

INFANT.

See HUSBAND AND WIFE, 1—PRACTICE, 6.

INFORMATION AND COMPLAINT.

See CONVICTION.

INTERDICT.

See CONVICTION, 2.

INTERPLEADER.

1. Interpleader—*Crops Raised by Claimant on Land Alleged to have been Transferred by Defendant Fraudulently.*]—The sheriff seized crops grown on property of the claimant, son of the defendant. Part of the property was the defendant's homestead transferred to the claimant, and part was the property of defendant's wife, leased by him verbally to the claimant, under authority from the wife.—The claimant purchased the seed grain, hired and paid for the help, and paid for twine and harvesting. The defendant did a small amount of work on the farm.—*Held*, that the question of *bona fides* of the transfer from father to son did not materially affect the ownership of the crops; that on the evidence the claimant was entitled to the crops.—*Kilbride* v. *Cameron*, followed. *Massey-Harris* v. *J. Moore*, W. H. Moore, claimant. (Newlands, J., 1905), p. 75.

2. Interpleader—*Lease — Fraud — Statute of Elizabeth—Description — Uncertainty.*]—An intention to defeat creditors is not of itself sufficient to avoid a deed, but such intention must be the *causa causans* for making the deed. *Stevens* v. *McArthur*. (Wetmore, J., 1899), p. 461.

See EXEMPTIONS UNDER EXECUTION, 3.

INTOXICATING LIQUOR.

See CONVICTION, 2—WILLS, 3.

IRREGULARITY.

See EXECUTIONS, 1—PRACTICE—SMALL DEBT PROCEDURE, 1.

JUDGMENT.

1. Motion for Speedy Judgment—*Filing of Defence — Accounting for Delay.*]—Upon a motion for speedy judgment launched after the statement of defence has been delivered, it is not essential that the delay in moving should be accounted for.—*McLardy* v. *Stateum* (1890), 24 Q. B. D., 504, 60 L. T., 151, 38 W. R. 349, 59 L. J.

Q. B. 154, not followed. *Victoria Lumber Co.* v. *Magee.* (Wetmore, J., 1905), p. 187.

2. Foreign Judgment—*Jurisdiction of Foreign Court — Citizenship.*]—In an action to enforce a personal judgment obtained in a State Court of the State of Dakota, where it appeared that the defendant had been born in the State of Wisconsin, had been living, at the time of the judgment, and for many years previously in the Northwest Territories, and had not appeared in the Dakota Court or submitted to its jurisdtction.—*Held*, that the defendant was not bound by the judgment, although the covenant sued upon had been executed in Dakota, when defendant was resident there.—Judgment of WETMORE, J., reversed. *Dakota Lumber Co.* v. *Rinderknecht.* (Wetmore, J., 1905, Court en banc, 1905), p. 210.

See EVIDENCE, 1, 2—LIMITATION OF ACTIONS, 1—STOP ORDER, 1.

JURISDICTION.

See APPEAL, 2—EXEMPTIONS UNDER EXECUTION, 2—JUDGMENT, 2—JUSTICE OF THE PEACE, 1—PRACTICE, 8, 9, 12.

JURY.

See APPEAL, 1—CRIMINAL LAW, 7—MALICIOUS PROSECUTION, 1 — RAILWAYS, 2.

JUSTICE OF THE PEACE.

1. Unlawful Distress—*Justice of the Peace—Conviction—Certiorari—Costs Jurisdiction—Res Adjudicata—Pleading—Admissions—Adopting Unlawful Act—Damages.*]—Plaintiff had been convicted by defendant, a Justice of the Peace, and adjudged to pay a fine of $10 and $8.15 costs. To satisfy the fine, two cows were seized and sold under distress warrant by one Stoddart, a constable, for $61. The sale of the first cow realized more than sufficient to pay the fine and all costs, but nevertheless the constable sold the second cow. Subsequently the conviction were brought up by *certiorari* and quashed by WETMORE, J., who *held*, that he had no jurisdiction to make an order as to costs on such proceedings, but left the plaintiff to recover at law as damages such costs as he might be entitled to, if any. The plaintiff brought action claiming damages accordingly.—*Held*, (1) That the constable was not the servant or agent of the Justice in making the seizure or sale, but inasmuch as the Justice had received from the constable the full proceeds of the sale, he had thereby adopted the constable's unlawful acts.—(2) That the measure of damages for the unlawful sale was the market value of the cows sold.—(3) That the plaintiff was entitled to recover from the Justice as damages his taxed costs of *certiorari* proceedings, inasmuch as the quashing of the conviction was a condition precedent to the plaintiff's right to sue under Imperial Statute 11 and 12 Vict. ch. 44, sec. 2. in force in the Territories. *Simpson* v. *Mann.* (Wetmore, J., 1898), p. 445.

See APPEAL, 2—CONVICTION, 3.

LACHES.

See DELAY.

LAND TITLES ACT.

1 Land Titles Act—*T. R. P. Act — Execution—Equitable Mortgage—Unregistered Charge—Priority.*] — Notwithstanding that by the Land Titles Act, 1894, differing in this respect from the Territories Real Property Act, an execution is declared to be an "instrument," the principle established in *Wilkie* v. *Jellett* still applies; and therefore an unregistered equitable mortgage takes priority over a writ of execution against lands delivered to the Registrar subsequently to the creation of the equitable mortgage. *Sawyer and Massey Co.* v. *Waddell.* (Newlands, J., 1904), p. 45.

2. Land Titles Act—*Production of Duplicate Certificate of Title—Priority of Registration.*] —Where a mortgage had been registered as to some of the lands comprised therein, but remained unregistered as to one parcel owing to the non-production of the certificate of

title.—*Held*, that a subsequent mortgage of the remaining parcel was entitled to priority of registration when the duplicate certificate was sent to the Registrar at the instance of the subsequent mortgagee, and he made the first request for registration after its receipt by the Registrar. *Re Greenshields, Limited, and Ritchie.* (Scott, J., 1905), p. 208.

3. Land Titles Act, 1894—*Priorities of Encumbrances—Production of Duplicate—Certificate of Title—What Constitutes "Receiving" for Registration.*] Where a document is produced to a registrar of land titles for registration, he has neither any power nor any duty in regard to it until the duplicate certificate of title has been produced; and of two encumbrances upon the same land, that one for the registration of which the duplicate certificate is first produced, is entitled to priority of registration, irrespective of its date: *Greenshields & Ritchie* (1905), 6 Terr. L. R. 208, approved and followed. *Re American-Abell Engine & Thresher Co. and Noble.* (Wetmore, J., 1906), p. 359.

4. Company—*Mortgage—Execution—Common Seal.*] —A mortgage under the Land Titles Act, 1894, if executed by an incorporated company, must be under its common seal. *Re Yorkton Butter and Cheese Manufacturing Association.* (Wetmore, J., 1899), p. 471.

See ASSESSMENT AND TAXATION, 1—EXECUTIONS, 1 — LANDLORD AND TENANT, 2.

LANDLORD AND TENANT.

1. Landlord and Tenant — *Holding over after Expiration of Tenancy for a Year—Implied Tenancy from Year to Year—Rebuttal of.*]—A letter from the landlord posted to the tenant before the expiration of a lease for a year, proposing that after its expiration the tenant should hold from month to month, is not sufficient, if the letter is not received by the tenant, to displace the tenancy from year to year which arises by implication from the tenant's holding over and paying rent after the expiration of his term. *Gass* v. *McCammon.* (Court en banc, 1904), p. 96.

2. Landlord and Tenant—*Unregistered Assignment of Lease—Land Titles Act—Parties — Re entry—Tender of Rent Due—Costs.*] —In an action against the landlord by the assignee of a lease under the Land Titles Act, 1894, duly registered, to recover possession of the premises upon which the landlord had re-entered for default in the payment of rent. —*Held*, (1) That the fact that the assignment was not registered was no bar to the action.—(2) That the original lessee was not a necessary party.—(3) That the lessee was entitled to relief without the issue of a writ of ejectment upon payment of the rent due, but that the plaintiff, although he tendered all the rent due before action, should bear the costs of it, except in so far as these were increased by the defendant's resistance to the claim.—The plaintiff had sublet the lands, the sublease providing for re-entry in the event of the sublessee permitting an execution to be levied against his goods. This event had happened and the plaintiff had distrained through the sheriff, who was in possession, under a writ of attachment and writs of execution when the defendant re-entered. *Held*, that the plaintiff's distress and the bringing of this action shewed that the plaintiff intended to terminate the sublease. *Tucker* v. *Armour.* (Newlands, J., 1906), p. 388.

LEASE.

See LANDLORD AND TENANT.

LIBEL.

See PARTIES, 1.

"LIEN" NOTE.

See SALE OF GOODS, 1, 3.

LIMITATIONS OF ACTIONS.

1. Statute of Limitations — *Part Payment—Re sale of Goods the Subject of Conditional Sale.*] —Plaintiff sued for the balance due upon two lien notes which were more than six years

overdue at the time of suit. He had retaken possession of the goods for which the notes were given, and had re-sold them, crediting defendant with the amount obtained.—*Held*, not to be a payment by the party chargeable or his agent, sufficient to take the case out of the Statute of Limitations. *Massey-Harris* v. *Smith*. (Newlands, J., 1904), p. 50.

See CRIMINAL LAW, 2.

LIQUOR LICENSE ORDINANCE.

See CONVICTION, 2.

MALICE.

See TRESPASS TO TO THE PERSON, 1—MALICIOUS PROSECUTION, 1.

MALICIOUS PROSECUTION.

1. Malicious Prosecution — *Malice —Reasonable and Probable Cause*] — In an action for malicious prosecution the Court must decide whether upon the facts, the defendant had reasonable and probable cause for his proceeding, and it will be held that he had if he took reasonable and probable care to inform himself of the facts, and honestly, though erroneously, believed such a state of facts to be true as would, if actually true, have constituted a *prima facie* case for the prosecution complained of.—*Held*, (reversing the judgment of SIFTON, C.J.,) that the defendant in this case had reasonable and probable cause for his proceeding. *Wainwright* v. *Villetard*. (Court en banc, 1905), p. 189.

MASTER AND SERVANT.

1. Master and Servant— *Hiring at Monthly Salary at Pleasure of Master.*] —The hiring of a municipal servant "at the pleasure of the council at $75 per month," is a monthly hiring at the pleasure of the municipality, and the employee cannot, upon leaving his employment in the course of any month, recover any salary in respect of that part of the month which has elapsed. *Sheddon* v. *City of Regina*. (Newlands, J., 1907), p. 290.

2. Master and Servant— *Wrongful Dismissal — Tradesman Performing Domestic Services—Conduct—Damages —Evidence.*]—The plaintiff, a skilled mechanic, hired with the defenddant for one year, performing the services of a mechanic and also of a domestic servant. He left before the expiration of the year, under circumstances indicating a dismissal by the Master, although there were no express words of dismissal. The plaintiff did not reside with the defendant or within his curtilage.—*Held*, (1) A dismissal may be created without express words.—(2) The plaintiff was a domestic servant in law.—(3) The general rule whereby domestic servants may be discharged on a month's notice or on payment of a month's wages in lieu thereof does not apply where they are hired for a year and where it is part of the agreement that "the contract is to be indissoluble during the year." *Burgess* v. *St. Louis*. (Wetmore, J., 1899), p. 451.

See NEGLIGENCE, 1.

MORTGAGE.

See EXEMPTIONS UNDER EXECUTION, 4—LAND TITLES ACT.

MENS REA.

See ANIMALS, 1.

MUNICIPAL LAW.

1. Quo Warranto—*Validity of Election.*]—The practice in the Territories providing for a writ of summons in the nature of a *quo warranto*, differs from that in England. There the question raised is the right of the respondents to use and exercise the office. Here, what is to be decided is whether there was an election, if so, whether the respondent was elected, and, if so, whether his election was valid. Consequently it is not necessary in proceedings here that the material should shew that the respondent has accepted the office or the term for which he was elected. *Rex ex rel. Park* v. *Street*. (Wetmore, J , 1905), p. 137.

2. Municipal Law—*Non-repair of Streets—Right of Action*]—The provisions of the Municipal Ordinance in

force in 1893 or subsequently relating to the repair of sidewalks, etc., are not applicable to the city of Calgary, although not expressly declared inapplicable by the special ordinance incorporating the city which was passed in that year.—Although a duty to repair streets may be expressly imposed upon a municipality, no action lies against it for damages for injuries resulting from non-repair. *Clark* v. *City of Calgary*. (Court en banc, 1907), p. 309.

NEGLIGENCE.

1. **The Ordinance Respecting Compensation to the Families of Persons Killed by Accident (C. O. 1898, c. 48)** *The Coal Mines Regulations Ordinance (C. O. 1898, c. 16)—The Workman's Compensation Ordinance (1900, c. 13)—Negligence—Liability for Non-performance of Statutory Duty—Contributory Negligence of Fellow Workmen or of Mere Strangers—Marriage, Evidence of.*]—Action brought by administratrix of Prosper Daye, killed in explosion in defendants' mine, under C. O. 1898, c. 48. There was evidence of plaintiff's that she was married to Daye in Belgium, was living with him to time of death, and that he was the father of her children, oldest aged 17 years; that he was killed by explosion of gas in defendants' Canmore mine in June, 1900; that ventilation was defective and not as required by s. 39, rule 1 of C. O. 1898, c. 16; that mine was not inspected as required by rule 3 of last cited section; that the mine was gaseous; that on the morning of the accident there was gas present in explosive quantities for two or three hours prior to the explosion; that the manager knew of the presence of gas; that two fellow workmen of deceased had opened their safety lamps; there was no evidence to rebut presumption of marriage, and no evidence of inspection of the lamps as required by rule 8 of s. 39 above, or that the explosion arose from any act or default of deceased:—*Held*, per McGuire, C.J., trial Judge). (1) That the oral evidence of the widow was sufficient proof of marriage according to the general rule that cohabitation and reputation is sufficient evidence of marriage, though in cases of bigamy, divorce and petitions for damages for adultery, stricter proof is required. (2) That, having found the effective and proximate cause of death to be an explosion due to the fault and negligence of the defendants and their breach of duty imposed by the Ordinances C. O. 1898, c. 16, they were not relieved if there was contributory negligence on the part of a fellow workman of accused or of a mere stranger. (3) That by reason of Ord. c. 13 of 1900, if negligence was proved there was no reason to enquire whether it was that of a fellow workman.—On appeal to the Court en banc.—*Held*, (1) that marriage was sufficiently established by Mrs. Daye's evidence; that strict proof was not required; that the fact that the alleged marriage in a foreign country did not affect the question, as the *lex fori* governs questions of proof.—(2) That there was sufficient evidence to support the findings of the trial Judge; that the findings were sufficient to render the defendants liable. Appeal dismissed with costs. *Daye* v. *H. W. McNeill Co.* (McGuire, C.J., 1902): (Court en banc, 1904), p. 23.

See ANIMALS, 2—MUNICIPAL LAW, 2—RAILWAY, 2—TRESPASS TO THE PERSON, 1.

NEXT FRIEND.

See PRACTICE, 5.

NULLITY.

See PRACTICE, 1, 3, 5.

PARTIES.

1. **Libel**—*Improper Joinder of Parties—Separate Causes of Action—Right of Plaintiff to Elect.*]—Where it appears in the course of the trial that two or more defendants have been joined in an action for two separate torts, one of which has been committed by both, but the other only by one, the plaintiff should be allowed to elect upon which cause of action he will proceed and the necessary amendments as to parties made accordingly. *Nyblett* v. *Williams*. (Court en banc, 1905), p. 200.

See LANDLORD AND TENANT, 2.

PLEADING.

1. Pleading.—*Chose in Action—Assignment—Setting off Claim in Damages against Assignor.*]—In an action by an assignee of a chose in action, the defendant may set up by way of defence a claim against the assignor sounding in damages if flowing out of and inseparably connected with the transaction giving rise to the subject of the assignment.—*Government of Newfoundland* v. *Newfoundland Railroad Company* (1888), 13 App. Cas. 199 followed. *Lillie* v. *Thomas.* (Wetmore, J., 1905), p. 263.

2. Pleading.—*Non Cepit—Evidence—Right to Maintain Action.*]—An agister of cattle who has indemnified the owner for loss or missing cattle has a special property therein to entitle him to maintain an action respecting them in his own name.—A denial by a defendant that he "unlawfully took . . . . or unlawfully detained the plaintiff's steer," is merely a plea of *non cepit*, and *non detinet*, and does not put in issue any right of property. *Simpkinson* v. *Hartwell.* (Wetmore, J., 1899), p. 473.

See AGENCY, 1—BILLS, NOTES AND CHEQUES, 2—PRACTICE—TRESPASS TO LAND—TRESPASS TO THE PERSON—TRUSTS AND TRUSTEES.

PRACTICE.

1. Practice—*Action Commenced in Wrong Sub judicial District—Irregularity—Transferred—Irregular Summons—Adjournment—Rules 538, 540.*] *Held*, (1) That the entry of an action in wrong judicial district contrary to s. 4, s.-s. 2, of the Judicature Ordinance (C. O. 1898, c. 21), is an irregularity, not a nullity, and the defect may be cured under Rule 538, by transferring it to the proper judicial district. (2) That in case of an irregularity in a summons to set aside irregular proceedings, in not stating the objections relied upon, pursuant to Rule 540, the summons should not be discharged, but on the objections being stated on the return of the summons, it should be enlarged at the request of the party called upon. *The Saskatchewan Land Co.* v. *Leadley.* (Scott, J., 1903), p. 18.

2. Practice—*Issue of Writ in Wrong District—Setting Aside.*]—Where the provisions of the Judicature Ordinance fix the judicial district in which a writ must issue in any action, a writ issued in the wrong judicial district is a void, not merely an irregular proceeding, which cannot be cured by an order transferring the cause into the proper district. Judgment of Scott, J., reversed.—Remarks by Scott, J., on the proper practice where a summons to set aside proceedings for irregularity is itself irregular in omitting to give the grounds relied upon. *Saskatchewan Land and Homestead Co.* v. *Leadley.* (Scott, J., 1903); (Court en banc, 1904), p. 82.

3. Practice—*Service out of Jurisdiction—Contract by Correspondence—Non-resident—Sale of Land within the Jurisdiction—Damages—Rule 18.*] A contract made by correspondence between a resident purchaser and a non-resident vendor for sale of land in the Territories—the acceptance of the vendor's offer to sell having been mailed in the Territories—is one which, according to the terms thereof, ought to be performed within the Territories.—In an action for damages for breach of such a contract:—*Held*, that service out of the jurisdiction was properly allowed.—The question, where it is doubtful, whether there was a completed contract should not be determined on an application to set aside the order for service *ex juris. Bishop* v. *Scott.* (Scott, J., 1904), p. 54.

4. Practice—*Garnishee Summons—Defect in Affidavit—Irregularity—Rules 384 and 539.*]—*Held*, (1) That the affidavit of an advocate, which on its face shewed that he had no personal knowledge of the facts, and which did not contain a positive statement of an indebtedness by defendant to plaintiff, is not a sufficient affidavit upon which to issue a garnishee summons under Rule 384, and a garnishee summons so issued was set aside.—(2) That a garnishee summons so issued cannot be treated as a mere irregularity so as to be waived under Rule 539, by taking fresh step. *Rumley* v. *Saxauer.* (Scott, J., 1904), p. 63.

5. Security for Costs—*Insufficiency of Affidavit—Attempt to Read Supplementary Affidavit.*]—An affidavit on an interlocutory proceeding which is defective in not stating the grounds of the deponent's information and belief cannot be strengthened on the return of

the summons by a supplementary affidavit. *Kerr* v. *Suter*. (Wetmore, J., 1905), p. 254.

6. Consent of Next Friend—*Filing—Proceedings Avoided by Omission.*]—The English Rule requiring that, where the consent of the next friend of the plaintiff is necessary, it must be filed before the issue of the writ of summons, is in force in the Territories, and default is not cured by filing a consent filed subsequently to the issue, but avoids all the proceedings in the action. *Short* v. *Spence*. (Scott, J., 1905), p. 267.

7. Writ of Habeas Corpus—*Action for—Striking out Statement of Claim.*] An application for the custody of an infant must be by way of motion, summons or petition. Where the only relief sought in an action commenced by writ of summons was the issue of a writ of habeas corpus, the action was, on application of the defendant, dismissed. *Gray* v. *Balkwell*. (Wetmore, J., 1907), p. 283.

8. Reply—*Delivery after Time Allowed by Rules—Validity.*]—A reply delivered more than eight days after the delivery of the defence without any order extending the time is not a bad pleading, and cannot be set aside for that reason alone, at least if no further step has been taken by the defendant before delivery of the reply. *Clarke* v. *Fawcett*. (Wetmore, J., 1907), p. 288.

9. Where the rules provide that a motion in Chambers shall be made by notice, the procedure by summons cannot be adopted. *Dominion Bank* v. *Freedt*. (Wetmore, J., 1907), p. 298.

10. Disposition of Application — *New Application for Same Order—Hearing on the Merits.*]—Where a party defendant had applied to be struck out, but his application dismissed on the ground that he had not entered an appearance:—*Held*, that a second application for the same purpose could not be entertained. *Cyr* v. *O'Flynn*. (Newlands, J., 1907), p. 299.

11. Practice — *Taxation of Costs—Judgment on Default of Pleading—Affidavit that Defence not Served.*]—In order to constitute the delivery of a pleading, it must be both filed and served; default in either will entitle the party to be proceeded against as upon default in pleading, and consequently upon a taxation of a plaintiff's costs of judgment signed for default of defence, the costs of an affidavit proving that no defence was served will be disallowed where no defence has been filed. *Massey-Harris Co. Ltd.* v. *Hutchings*. (Wetmore, J., 1906), p. 10.

12. Practice—*Security for Costs—Affidavit of Belief as to Merits.*]—On a motion for security for costs it is not necessary that the defendant should swear positively as to the merits. A statement that he believes he has a good defence upon the merits is sufficient. *Kerr Co.* v. *Lowe*. (Wetmore, J., 1906), p. 361.

13. Pleading—*Ex parte Order Allowing other Pleas with General Issue—Setting Aside.*]—An order allowing other pleas to be made with a plea of not guilty by statute should not be made *ex parte*. If such an order is made *ex parte*, even inadvertently, the Judge who made it has no jurisdiction to set it aside. Any application for that purpose must be made to the Court en banc. *Jackson* v. *Canadian Pacific Railway*. (Wetmore, J., 1907), p. 423.

14. Practice—*Security for Costs—Affidavit—Corporation — Meaning of "Foreign Corporation."*]—A corporation has no residence, and a summons for security for costs based upon an affidavit stating that the plaintiff (a corporation) resided outside the jurisdiction, but omitting to state where its chief place of business was, was dismissed with costs.—Comments on *Molson's Bank* v. *Hall. Commercial Bank* v. *Kirkham*. (Wetmore, J., 1899), p. 479.

See ATTACHMENT OF DEBTS, 1—CERTIORARI, 1—EXECUTORS AND ADMINISTRATORS, 2—EXEMPTIONS UNDER EXECUTION, 2—JUDGMENT, 1—PARTIES, 1—STOP ORDER, 1.

PRINCIPAL AND AGENT.

See AGENCY.

QUO WARRANTO.

See MUNICIPAL LAW, 1

RAILWAYS.

1. **Common Carrier** — *What is Personal Baggage—Liability for—Contract.*[—The plaintiff was one of fifty-four Chinamen travelling over the defendants' railway on one ticket purchased on their behalf by an employment agent, who received the price of his passage from each of the Chinamen, out of the wages earned by him after reaching his destination. The plaintiffs' baggage, consisting of personal effects and bedding, was destroyed by the burning of the baggage car, the cause of the fire being unknown :—*Held*, that the contract was with each Chinaman, to carry him and his baggage safely, and that the defendants were liable in damages :—*Held*, also, that the defendants having accepted the bedding as personal baggage were liable for it as such, and *semble*, that it would have been held under the circumstances to be personal baggage, even without such acceptance. *Chan Dye Chea* v. *Alberta Railway & Irrigation Co.* (Harvey, J., 1905), p. 175.

2. **Ordinance Respecting Juries** — *N. W. T. Act — Damages — Personal Injuries.*] — The effect of c. 44 of 6 Edw. VII (Ca.), was to annul the repeal of the North-west Territories Act, so far as Alberta and Saskatchewan were concerned, and the Ordinance respecting Juries is in consequence not in force :—*Held*, also, that the increase of damages on the second trial of an action for damages for the loss of a foot from $3,500 to $6,500, was not perverse or wrong, and that the latter amount was not under the circumstances excessive. *Hassen* v. *Canadian Pacific Railway Company.* (Court en banc, 1907), p. 420.

See ANIMALS, 2. — ASSESSMENT AND TAXATION, 3—CRIMINAL LAW, 1.

RECEIVER.

See TRUSTS AND TRUSTEES.

REGISTRY LAWS.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1—LANDLORD AND TENANT, 2— LAND TITLES ACT — SALE OF GOODS, 3.

RES GESTAE.

See CRIMINAL LAW, 3, 7.

SALE OF GOODS.

1. **Conditional Sale of Goods**—*Retaking Possession on Default in Payment of Price — Chattel Mortgage — Rescission of Contract — Failure of Consideration.*] — The defendants ordered from the Massey and Co., Ltd., machinery, for the price of which he gave three promissory notes, which provided "the title, ownership and right to the possession of the property for which this note is given shall remain in Massey and Co., Ltd., until this note or any renewal thereof is fully paid with interest, and if default is made in payment of this or any other note in their favour, or should I sell or dispose of or mortgage my landed property, or if for and good reason Massey and Company, Ltd., should consider this note insecure, they have power to declare it and all other notes made by me in their favour due and payable at any time, and to take possession of their property, and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price." The defendant gave two chattel mortgages as collateral security for the notes. The notes were afterwards endorsed by Massey and Company, Ltd., to the plaintiffs, who on default took possession of and sold the property mentioned in the notes and applied the proceeds upon the amount unpaid.—The plaintiff sued for the balance $187.45 as due under the chattel mortgages.—*Held*, (1) That, in the absence of provision in the notes that the plaintiff could after sale recover the balance, the original agreement was rescinded by the sale ; (2) That as the plaintiff had no right to recover on the notes, they could not recover on the collateral security. *Massey-Harris* v. *Lowe.* (Newlands, J., 1905), p. 71.

2. **Sale of Chatels** — *Actual and Continued Change of Possession.*]— At the time of the sale of certain cattle they were in a pasture belonging to the vendor, but on the same day the vendor's right to the field passed to a third person with whom the vendee made an arrangement under which the cattle con-

tinued in the field where they were looked after by the vendee and his servants:—*Held*, that there had been a sufficient actual and continued change of possession to support the sale.—Remarks as to the application of item 95 of the tariff providing for set-offs of costs in certain cases, *McNichol* v. BRUCKS. (Wetmore, J., 1905), p. 184.

3. Lien Note—*Affidavit for Registration—Wrongful Seizure of Chattels—Title of Purchaser at Sale.*]—The plaintiff had sold a grey mare to one B., and took from B. a lien note, the affidavit upon which was imperfect, but which was duly registered. The chattel mortgagees of other property of B. seized and sold the plaintiff's mare under their mortgage.—*Held*, that the fact that the plaintiff had notice of the sale did not estop them from setting up their title to the mare, and that the defendant, the purchaser at the chattel mortgage sale, was not within the protection of the Ordinance Respecting Hire Receipts and Conditional Sales of Goods. *Aricinski* v. *Arnold*. (Wetmore, J., 1906), p. 240.

4. Contract for Selling of Goods—*Divisibility — Condition Precedent—Performance—Waiver.*]—Upon the sale of a wind stacker and chaff blower of a different make from the threshing machine in use by the defendant, there had been a verbal arrangement, made contemporaneously with the written agreement of purchase, that these were to be attached to the threshing machine by the plaintiffs. It was found impossible to attach the chaff blower, and the alterations in the wind stacker necessary to make it work with the threshing machine had not been made.—*Held*, that the contract was divisible, and that the price of the wind stacker was recoverable, although the plaintiffs abandoned their claim for the price of the chaff blower. *Held*, however, that the proper attachment of the wind stacker was a condition precedent to the plaintiffs' right to obtain payment, and that under the circumstances and in view of the absence of any offer to make the alterations in the wind stacker, its use through a season, and the purchase at the beginning of the second season of another wind stacker in substitution for it, did not constitute a waiver of the performance of the condition. *New Hamburg Manufacturing Co., Ltd.*, v. *Klotz*. (Newlands, J., 1905), p. 323.

5. Sale of Goods—*Express and Implied Warranties—Specified Articles under Trade Name—Combination of—Fitness for Particular Purpose.*]—The defendant bought from the plaintiff an Eclipse thresher, a three-horse power tread, Pitts pattern, and an Eclipse bagger for the purpose of threshing grain for hire, and signed a contract in which the goods were expressly warranted to be of "good material, durable with good care, and, with proper usage and skilful management, to do as good work as any of the same size sold in Canada." It was provided that there should be no other warranties or guarantees than those contained in the agreement. The articles individually were good of their kind, but were not adapted to work in combination, and it was impossible to thresh profitably for hire with the apparatus.—*Held*, (1) That the implied warranty that the goods should be reasonably fit for the purpose for which they were, to the knowledge of the vendors, bought, was not inconsistent with the express warranty.—(2) That the exclusion by the terms of the agreement of other warranties and guarantees did not exclude this implied warranty.—(3) That the contract, being a single contract for the sale of the combination of articles, the implied warranty was not excluded, although each of the parts of the apparatus was a specified article under a trade name.—(4)—That in deciding whether the purchaser had relied upon the skill and judgment of the vendor, the essential thing was not whether he had exercised his private judgment, but what had led him to exercise it as he did. *Sawyer-Massey Co.* v. *Thibart*. (Stuart, J., 1907), p. 409.

6. Chattels—*Sale of—Pleading—Evidence—Sales of Goods Ordinance—Destruction of Chattel Before Delivery—Risk—Construction of Written Agreement—Vis Major.*]—In a sale of specific or ascertained goods under contract requiring something to be done by the seller before the buyer was bound to accept delivery, a portion of the goods was destroyed without either party's default. The buyer was nevertheless held entitled to recover as damages the amount paid for the goods so destroyed.—*Held*, also, that the object of the Sales of Goods Ordinance was merely to codify the existing law, not to lay down new law. *McLean* v. *Graham*. (Wetmore, J., 1898), p. 438.

SALE OF LAND.

See ASSESSMENT AND TAXATION—VENDOR AND PURCHASER.

SCHOOL TRUSTEE.

See ASSESSMENT AND TAXATION, 2.

SCRIP.

See VENDOR AND PURCHASER, 1.

SEDUCTION.

See CRIMINAL LAW, 2.

SET-OFF.

See PLEADING, 1.

SETTING ASIDE.

See ATTACHMENT OF DEBTS, 1—PRACTICE—SMALL DEBT PROCEDURE, 1—SOLICITOR, 1—WILLS, 3.

SMALL DEBT PROCEDURE.

1. Small Debt Procedure—*"Debt Whether Payable in Money or Otherwise"—Setting Aside Proceedings.*]—In an action for $60, being the value of twelve loads of straw at $5 a load, the unpaid balance of rent for a farm leased by the plaintiff to the defendant at a rental of a two-thirds share of the whole crop; and also to recover $15 for money had and received.—*Held*, that the claim for the value of the straw was not properly brought under the Small Debt Procedure. The words "all claims and demands for debt whether payable in money or otherwise" do not extend beyond cases where there is a debt created in the proper sense of the word, clearly recognized as such, and there is an agreement that such debt is to be paid in something other than money. *Held*, also, that, although a claim clearly within the Small Debt Procedure was joined with such claim, the process was nevertheless bad and must be set aside. *Paradis* v. *Horton*. (Wetmore, J., 1904), p. 319.

See LIMITATIONS OF ACTIONS, 1.

SOLICITOR.

1. Legal Profession Ordinance—*Annual Certificate—Disqualification of Advocate for Non payment of Annual Fee*]—*Held*, that an advocate who neglects to pay his annual fee to the Law Society becomes disqualified from practising only after the expiry of the service of time limited in the notice required to be given by the rules. *Maxfield* v. *Inskip*. (Court en banc, 1904), p. 81.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER.

STATED CASE.

See CONVICTION, 1—CRIMINAL LAW, 1.

STATUTE OF FRAUDS.

See VENDOR AND PURCHASER, 2, 3.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STOP ORDER.

1. Stop Order—*Application before Judgment Recovered—Creditors' Relief Ordinance—Application of Garnishee Proceedings for Stopping Funds in Court*]—A stop order cannot issue before the recovery of judgment and the provisions of the Judicature Ordinance for the attachment of debts are not applicable to stop a fund in Court.—*Dawson* v. *Moffatt*, 11 Ont. R. 484, commented on; *Steckles* v. *Byers*, 10 C. L. T. 41, not followed. *Canadian Moline Plow Co.* v. *Clement*. (Wetmore, J., 1906), p. 252.

STRIKING OUT.

See COMPANY, 1—PLEADING.

SUMMARY JUDGMENT.

See JUDGMENT.

THEFT.

See CRIMINAL LAW, 1.

TRESPASS TO LANDS.

1. **Trespass**—*Cancellation of Agreement for Sale of Land—Plaintiff not in Possession—Amendment of Pleadings.*] —An action for trespass cannot be maintained unless the plaintiff has been in actual possession of the land.—An application to amend the pleadings by adding a claim for recovery of possession of the land was refused on the ground that to do so would give the plaintiff an entirely new action. *Leadley* v. *Gaetz.* (Court en banc, 1904), p. 98.

TRESPASS TO THE PERSON

1. **Trespass to the Person**—*Firearms—Evidence—Pleading—Amendment—Malice—Negligence—Damages.* —In an action for damages resulting from the defendant shooting the plaintiff with a pistol.—*Held*, (1) Trespass to the person to be actionable must be either intentional or the result of negligence on the part of the defendant.—(2) Amendments to pleadings should be allowed unless the party applying shewed want of good faith or an injury would result to his opponent that could not be compensated for by costs or otherwise.—(3) It was immaterial in disclosing negligence whether or not the defendant knew that the pistol would go off. (4) That in estimating the damages to be allowed, the probable consequences of the injury should be looked to. *McLeod* v. *Meek.* (Wetmore, J., 1898), p. 431.

TRIAL.

See CRIMINAL LAW, 4—EVIDENCE, 2.

TRUSTS AND TRUSTEES.

1. **Receiver and Manager.**—*Liability for Deficit Arising During Management—Default—Reasonable Care.*] *Held*, that the law requires of a receiver and manager the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs.—*Held*, *per* SIFTON, C.J., and HARVEY, J., WETMORE and PRENDERGAST, J.J., *dissentiente*, that as it appeared upon the facts that the receiver and manager had exercised such supervision over the business as was possible for one in his position, he should not be held responsible for the deficit which had occurred under his management. The Court being equally divided, judgment of NEWLANDS, J., affirmed. *Plisson* v. *Diemert.* (Court en banc, 1905), p. 160.

2. **Resulting Trust** — *Intention of Purchaser at Time of Conveyance—Pleading*]—*Held*, that when it appears that the actual purchaser by whom the purchase price is paid directs that the conveyance be made to a third party, intending that a beneficial interest in the land should pass to the person to whom it was conveyed, no trust results to the real purchaser by presumption of law, although no value is given by the third party.—*Semble*, *per* WETMORE, J., that while a question of law may be raised without being pleaded, yet the facts upon which such question of law is raised must be pleaded, and therefore it is not open to a defendant who has not pleaded fraud to set up that the plaintiff is precluded from obtaining the relief asked for by reason of fraud, evidence of which is brought out at the hearing.—*Semble*, that undue delay in the bringing of an action to have a resulting trust declared is strong evidence of an intention to convey a beneficial interest. *King v. Thompson.* (Court en banc, 1905), p. 204.

See EXECUTORS AND ADMINISTRATORS, 1

VENDOR AND PURCHASER

1 **Half-breed Scrip Certificate**—*Acquisition of Rights in—Purchase*] —The payment of money to a half-breed entitled to land scrip, and the delivery of the scrip certificate by the half-breed to the person paying conveys to the latter no right in the certificates the transaction being no more than an

agreement by the half-breed to exercise his rights under the certificate as he may be directed, and the delivery of the certificate being merely to protect the person paying the money against the exercise of such rights adversely to him.—An assignee of the person who made the original agreement with the half-breed has, therefore, no rights against an innocent purchaser from the half-breed of the land allotted to him under the certificate. *Patterson* v. *Lane.* (Court en banc, 1904), p. 92.

2. Specific Performance — *Statute of Frauds—Transfer in Blank—Mortgage Back—Payment by Instalments.*]—A transfer of land in the statutory form complete except for the insertion of the name of any person as the person by whom the consideration has been paid or as transferee, is a sufficient memorandum under the Statute of Frauds to charge the transferor, the person who paid the consideration being identifiable by parol evidence, and the form of transfer requiring the insertion of his name in both blank spaces.—Where in an action in which the plaintiff relies upon such a transfer as the memorandum to satisfy the statute, but admits that the purchase price was not all paid, the agreement being that part of it should be payable by instalments, secured by mortgage, the defendant cannot rely upon this to shew that the transfer is not a complete memorandum containing all the terms of the agreement, since to contradict the acknowledgment in the transfer he must accept the admission as a whole, not only as an admission of non-payment. *Taylor* v. *Grant.* (Harvey, J., 1906), p. 353.

3. Action for Specific Performance —*Statute of Frauds—Evidence to Connect Documents—Sufficiency of a Statement of Consideration and Terms—Part Performance.*]—In an action for a specific performance against a vendor, the evidence to satisfy the Statute of Frauds consisted of a receipt signed by the plaintiff for $50, "to apply on equity on Canadian Pacific Railway land," describing it "at $5.50 per acre," and a letter from the vendor offering to return the $50 and referring to the sale as having been "declared off long before." The agreement alleged was to sell the land at $5.50 per acre, the purchaser paying off the balance due the railway company out of his purchase money.—*Held*, that the letter from the defendant could be used with the receipt to satisfy the Statute, although it repudiated the sale. —*Held*, however, that the requirements of the Statutes of Frauds were not satisfied, the writing indicating an agreement to sell for $5.50 per acre, subject to the railway company's claim and not the agreement alleged.—The plaintiff had done some breaking upon the lands without the knowledge of the defendant.—*Held*, that the breaking done upon the lands by the plaintiff, being unknown to the defendant, could not be relied upon to show the part performance of the agreement. *Berry v. Scott.* (Court en banc, 1906), p. 369.

See AGENCY, 1.—EXECUTORS AND ADMINISTRATORS, I — TRESPASS TO LANDS, 1.

VIS MAJOR.

See SALE OF GOODS, 6.

WARRANTY.

See SALE OF GOODS.

WAY.

See MUNICIPAL LAW, 2.

WILLS.

1. Will—*Vesting of Shares—Divide and Pay—Survivorship.*]—A testator by his will directed his executors and trustees "to divide all my estate share and share alike among my children and to pay" his or her share to each upon their respectively attaining twenty-one or marrying. The income, and if necessary part of the corpus, was to be expended upon maintenance and education, and regard was to be had to this necessity in paying over any share. If none of his children survived the testator the estate was to go to charitable institutions.—*Held*, that the direction to divide could not be separated from the direction to pay, and that consequently the shares did not vest, but the share of a child who survived the testator and died before the time for payment arrived was divisible among the

children who survived until that time. *Re Sandison.* (Court en banc, 1907), p. 313.

2. Wills — *Interpretation — Lands Subject to Charge —Property Primarily Liable for Payment of Debts — Which Debts are to be Paid—Duty of Executors.*]—Where a testator devised a quarter section to one son, directing him to pay $100 to each of two daughters; and to another son another quarter section, and all personal property and cash, directing the latter to bear all sickness and funeral expenses, to keep the testator's wife, and to pay her $100 every year.—*Held*, that the quarter sections were respectively chargeable with the moneys directed to be paid by the respective devisees.—*Held*, also, that the specific devisees of the lands and the charging of them with the legacies and the annuity indicated that the testator had no intention of making them liable for the payment of debts unless there was not sufficient movable property or cash to satisfy these.—*Semble*, that the provisions of the Land Titles Act, 1894, 57 and 58 Vic. c. 28, s. 3, and 63 and 64 Vic. c. 2, s. 5, making land descend as personal property, have not altered the common law rule that the personal property is the primary fund for the payment of debts. *Held*, further, that the executors could not convey the lands to the devisees without seeing that the proper registrations were made, and that with the consent of the devisees the proper manner of carrying this out was for them to execute encumbrances to be handed in for registration at the same time as transfers in their favour from the executors. *Held*, lastly, that the costs of these conveyances and registration should be paid out of the estate. *Re McVicar.* (Wetmore, J., 1906), p. 363.

3. Testamentary Capacity—*Drunkenness—Sober Intervals—Unsoundness of Mind.*—A will made at a time when the testator was drunk, leaving his property to trustees with an absolute discretion to pay or not to pay the testator's wife any part of the income, was set aside where it appeared that the testator was affectionate to his wife when sober, but the reverse when drunk. *Campbell* v. *Campbell.* (Scott, J., 1906), p. 378.

WORDS, PHRASES, ETC.

"Any cause or matter civil or criminal."—*See* CRIMINAL LAW, 6.

"Claims and demands for debt whether payable in money or otherwise."—*See* SMALL DEBT PROCEDURE, 1.

"Document containing an accusation."—*See* CRIMINAL LAW, 3.

"Domestic Servant." *See* MASTER AND SERVANT, 2.

"Equity." — *See* VENDOR AND PURCHASER, 3.

"Foreign Company."—*See* COMPANY, 2.

"Foreign Corporation." — *See* PRACTICE, 13.

"Hawker and Pedlar."— *See* CONVICTION, 1.

"Homestead."—*See* EXECUTIONS.

"House and Buildings,"—*See* EXEMPTIONS UNDER EXECUTION, 3.

"Lands."—*See* ASSESSMENT AND TAXATION, 3.

"Notice."—*See* ELECTIONS, 1.

"Personal Baggage."—*See* RAILWAYS, 1.

"Previously chaste character." — *See* CRIMINAL LAW, 2.

"Receiving for registration."—*See* LAND TITLES ACT, 3.

"Special property."—*See* PLEADING, 2.

"Wholesale purchaser, etc., of stock."—*See* BANKS AND BANKING, 1.

WRIT OF SUMMONS.

See PRACTICE, 1, 2—SOLICITOR, 1.