
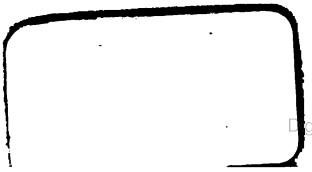

THE SASKATCHEWAN LAW REPORTS.

REPORTS OF CASES DECIDED IN THE SUPREME COURT OF SASKATCHEWAN, JANUARY 5, 1909, TO DECEMBER 31, 1909.

REPORTED UNDER THE AUTHORITY OF THE

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EDITOR:

ALEXANDER ROSS.

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1910

JUDGES

OF THE

SUPREME COURT OF SASKATCHEWAN

DURING THE PERIOD OF THESE REPORTS.

THE HONOURABLE EDWARD LUDLOW WETMORE, C.J.S.
THE HONOURABLE JAMES EMILE PRENDERGAST, J.
THE HONOURABLE HENRY WILLIAM NEWLANDS, J.
THE HONOURABLE THOMAS COOKE JOHNSTONE, J.
THE HONOURABLE JOHN HENDERSON LAMONT, J.

Attorney-General:

THE HONOURABLE ALPHONSE TURGEON, K.C.

ERRATA.

Page 364, the word "injury" in the fifth line should be "inquiry."

" 442, *McCallum* v. *Russell*, Johnstone, J., concurred with Lamont, J., not with Wetmore, C.J., as reported.

CASES REPORTED

CASES CITED

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF SASKATCHEWAN.

[IN CHAMBERS.]

LAIRD v. LEADER PUBLISHING CO.

1909

Jan. 5.

Pleading—Action for Libel—Application to Amend Statement of Defence—Matter of Defence Charging Crime—Allowance of Amendment Pleading—Discretion of Judge—Particulars not Sufficient—Refusing Amendment for Insufficiency.

In an action for libel, the defendant in the first place pleaded generally denying the matters alleged in the statement of claim. Subsequently he applied to amend by pleading justification, and filed the proposed amended defence. The matters relied upon by way of justification charged the acceptance of bribes by the plaintiff when holding a municipal office, and it was objected that the Court should not permit an amendment charging fraud or crime, and it was also objected that the matters charged were not stated with sufficient particularity:—

Held, that the allowance of an amendment setting up fraud is discretionary with the Judge and in some cases permissible, and in this case the amendment should be allowed.

(2). That it is not now necessary to put the particulars relied upon by way of justification in the pleading, but such particulars, if not pleaded, must be subsequently delivered, and the proposed amended pleading was not therefore bad, although all the matters therein alleged were not stated with sufficient particularity.

THIS was an application by the defendants to file an amended defence in an action for libel, and was heard before WETMORE, C.J., in Chambers.

Alex. Ross, for the defendants.

J. F. L. Embury, for the plaintiff.

January 5. WETMORE, C.J.:—This is an application for leave to deliver an amended statement of defence in substitution for the original. The action is for an alleged libel, and the alleged libellous document is set forth in a judgment of my brother Johnstone in *Laird* v. *Scott* (1908), 9 W.L.R. 349. The defendants originally

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pleaded in answer to the action, putting the plaintiff to the proof of the fact of the printing or publishing of the alleged libel, that the words set out in such alleged libel do not mean what is alleged to be their meaning in the statement of claim, and that such words are not capable of such alleged meaning or any defamatory meaning. The statement of claim alleged that the alleged libel meant and intended that the plaintiff, while in the occupancy of the municipal office of mayor and councillor of the city of Regina, was guilty of dishonest and corrupt acts in his office as such mayor or councillor, and that he was so guilty of such corrupt and dishonest acts for the purpose of gain to himself and with the result of gain to himself, and, further, that the defendants intended by such libellous matter that the plaintiff had received money as consideration for corrupt and improper and dishonest acts done by him in and by virtue of his offices of mayor and councillor of the said city.

The proposed amendment, first (by paragraph 1) denies the writing or publishing the words complained of; second, that such words do not mean what is alleged in the statement of claim and are incapable of such alleged meaning or of any other defamatory meaning; third, if the defendants did write or publish such words or any of the words alleged, they did not refer to and were not spoken of the plaintiff; fourth, that the words complained of are true in substance and in fact. Then the proposed pleading goes on to give particulars of the alleged corrupt acts of the plaintiff, and these particulars form part of the pleading. The first three paragraphs of the proposed amendment are practically the same as the original statement of defence. The question turns upon the 4th paragraph.

This paragraph is objected to on the ground that the defendant seeks by the amendment to set up criminal offences on the part of the plaintiff, and such criminal offences are alleged to have been against sec. 161 of the "Criminal Code." It was urged that under the authorities a party to an action is not allowed by an amendment to set up fraud, and that the setting up of crime by way of an amendment is equally objectionable. In the first place, I am of opinion that the matter of allowing a party to an action to set up fraud by way of amendment is discretionary with the Judge, and in some cases permissible.

Without quoting at length the reasons given by the defendant

for not pleading a justification in the first instance, I may state that in my opinion they are of such a character as to warrant the application being granted even supposing that the matter of pleading fraud and pleading a criminal offence should be treated on the same principles. I am of opinion, however, that in an action of this character there is a distinction between the two cases, and that where an amendment is sought in such an action it will be governed by the same rules as are applicable to other actions.

It was further claimed that the proposed clauses of paragraph 4 did not set out the offences of which the plaintiff was alleged to be guilty with sufficient particularity, and I am of opinion that this is correct. But, at the same time, I am of opinion that that is not a ground for refusing the amendment. It is merely a ground for directing further and better particulars to be delivered along with the pleading or within a reasonable time thereafter. Under the old practice the proposed pleading, or some of the clauses of it at any rate, would undoubtedly be held bad, but as the practice now exists, I am of opinion that it is sufficient. In *Zierenberg* v. *Labouchere* (1893), 2 Q.B. 183 (63 L.J.Q.B. 89, 69 L.T. 172), Lord Esher, M.R., at p. 186, after citing the judgments of Ashurst and Buller, JJ., in *J'Anson* v. *Stuart* (1787), 1 T.R. 748, goes on as follows: "That is a leading case on the subject, and at the time when it was decided it was necessary to put the particulars in the plea. Afterwards the practice was varied, and a defendant could make his plea general; but he was still bound before he went to trial to give as particulars the same matters that he would formerly have been bound to put in his plea." And further on, after quoting Alderson, B., in *Hickinbotham* v. *Leach* (1842), 10 M. & W., at p. 363 (62 R.R. 654): "'The plea ought to state the charge with the same precision as in an indictment.' That, I think, must now be read in this way: 'If the instances are not put into the plea the particulars must be as precise as would be necessary in an indictment.'" This is the latest case that I can find upon the subject, and I will follow it. Upon reading the affidavit of the defendants' manager, I am satisfied that paragraphs 1, 2 and 3 of the proposed amended defence are not true, and, in like manner, that the original statement of defence is not true.

The order will be, therefore, that, upon the defendants' counsel undertaking to admit at the trial that the defendants did write or

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publish the words complained of, and that such words do mean what is alleged in paragraph 3 of the statement of claim, and that such words did refer to and were written of the plaintiff, and also consenting to admit in evidence in this case, if the plaintiff desires to use it, evidence taken under an order for examination in the case pending in this Court of Henry Willoghby Laird against Walter Scott of certain persons at MacComb, in the State of Illinois, the defendants have leave to amend by delivering the 4th paragraph of the statement of defence, such delivery to be made within one day from the date of this judgment, and that within five days after such delivery they deliver to the plaintiff further and better particulars: (1) Setting forth more precisely the date in the year 1905 when the plaintiff accepted from the parties mentioned in clause (a) of the said paragraph the gift of the sum of $1,500 therein mentioned, and for granting of what contracts to the said parties therein mentioned by the corporation of the city of Regina, the said $1,500 was accepted by the plaintiff, and the nature of such contracts. (2) Particulars of the alleged pretended rental for the warehouse accommodation mentioned in clause (b) of the said paragraph, and specifically stating what the warehouse accommodation was and where the warehouse was situated. (3) Specifying more precisely when the gift of $500 from the MacComb Sewer Pipe Company was received. (4) Giving more precisely the date or dates on which the plaintiff did corruptly and improperly use his influence to procure the establishment at the expense of the city of connection between the waterworks system of the said city and certain premises comprised in the said addition, and stating specifically what premises in addition to those of Reginald Kirk and A. M. Fleming. (5) Also particulars setting out more particularly the date upon which the plaintiff unlawfully offered and attempted to bribe James Franklin Bole, as alleged in clause (e) of the said paragraph, and with respect to what brick the said alleged endeavouring to induce was exercised, and the name of the company mentioned in such clause.

In the event of such particulars not being delivered, the defendants not to be at liberty to give evidence of the matters set forth in such respective clauses with respect to which such particulars have not been given.

I am not very well satisfied that all the matters that are pleaded

are good. I have some doubts with respect to the matter pleaded in clause (d) of par. 4, but, as I am not clear, and no objection was raised with respect to it, I will follow the course pursued by the Master in *Conmee* v. *Lake Superior Printing Co.*, 2 O.W.R. 509, and leave it to the trial Judge. I do this, not because I am of opinion that I am not in a position to decide it, but the plaintiff is so anxious to get down to trial (and I can understand why) I consider it advisable to take that course.

In the event of my allowing this amendment, it was urged that I should make it part of my order that the defendant go down to trial peremptorily at the next sittings of the Court, to be held on the 26th of this month. I do not see how I can do this, especially in view of the fact that the plaintiff claimed the right to be allowed to amend his statement of claim if I granted this amendment. I do not know what amendment the plaintiff proposes to make, but it might be of such a character that it would not be fair to drive the defendants down to trial at such an early date. I have come to the conclusion, therefore, not to make any such order as that, nor will I give the plaintiff leave to amend. He must make a substantive application for that purpose. I do that because I see nothing in the amended defence which in itself would call for any amendment.

The plaintiff has caused the defendants' manager to be examined for discovery, and he claims that this amendment will render a new examination necessary. That is conceded by the defendants' counsel. The plaintiff, therefore, will have leave to again examine the manager for discovery, and the costs of the first examination for discovery will be borne by the defendants.

[TRIAL.]

1909

Jan. 5.

STEINE v. KORBIN.

Sale of Goods Ordinance—Memorandum in Writing—Connecting Different Documents—Admissibility of Parol Evidence—Inconsistency between Documents—Acceptance—Receipt.

The defendant gave plaintiff's traveller an order for certain goods, a memorandum of the sale being made and delivered to the defendant; but not signed by him. Some of the goods were shipped, when the defendant wrote a letter to the plaintiffs referring to "an order given to your traveller," but not specifically referring to the written memorandum. When the goods reached their destination the defendant opened the cases, examined the contents, but did not take delivery, claiming the goods were not as ordered. This, however, was not pleaded as a matter of defence:—

Held, that where in a letter signed by the party to be charged a reference is found to something which may be a conversation or may be a written document, parol evidence is admissible to shew that it was a written document which was referred to, and the document referred to having been proved, it may be put in as evidence and so be connected with the one already admitted or proved, and parol evidence was therefore admissible to connect the letter and the previous order.

2. That opening the case and examining the contents was an act of the buyer, which recognized a pre-existing contract of sale and constituted a sufficient acceptance to take the case out of the statute.

THIS was an action to recover the price of goods sold and delivered, and was tried before LAMONT, J., at Yorkton.

C. D. Livingstone, for the plaintiff.

J. A. M. Patrick, for the defendant.

January 5. LAMONT, J.:—The plaintiff, who is a manufacturer carrying on business at Montreal, sues for $474.80, the price of goods sold and delivered to the defendant, who resides at Canora, in this Province.

On April 26th, 1907, the plaintiff's traveller called on the defendant at Canora. The defendant inspected his samples and gave him an order for a quantity of goods. The traveller took down the order in writing. It was not signed by the defendant, but he received a copy of it. The order was as follows:—

"April 26, '07.

"Order: from Samuel Korbin.

"Post Office address: Canora.

"When required: As soon as possible.

"Terms: Net 60 days, 1st Sept."

Then followed a description of the various goods ordered, and the price, which amounted in all to $564.65.

It was shewn in evidence that in the trade, where goods are ordered from a manufacturer to be delivered "as soon as possible," they are to be shipped as soon as a sufficient quantity is manufactured to make a shipment of at least 100 lbs. On May 9th, 1907, the plaintiff, having a portion of the order manufactured, shipped the same to the defendant, and sent him an invoice of the goods shipped, and on June 25th shipped a further consignment, and sent the defendant an invoice of this portion also. On July 12th the plaintiff received from the defendant the following letter:—

"Some time ago I gave an order to your traveller for some shoes to be shipped in June but I have received a part of it and it did not say on the invoice balance to follow or anything in that way and not filling the order I have bought elsewhere shoes and cannot accept your shoes. Please do not ship any more. I will not accept as I have written before. Hoping it will be satisfactory."

As to this letter the defendant denies that it is his. He says it was written by his son without his knowledge or direction. In this statement I do not believe the defendant. It seems to me exceedingly unlikely that his son (a boy of fifteen years of age), working in the store with his father and under his direction, would, without authority, write such a letter and sign to it his father's name. Besides, the defendant's manner of giving his evidence was not such as to inspire confidence in its truthfulness. I hold the letter to be binding on the defendant.

The defendant opened the two boxes shipped and examined the goods at the railway station at Canora, but refused to take them away, on the ground (as he now states) that some of the goods were inferior to the samples shewn by the plaintiff's traveller, and also that there were goods in the boxes which he had never ordered at all. The plaintiff, after receiving the defendant's letter, did not ship the balance of the goods, and he now brings this action for the price of the goods delivered at Canora.

The statement of defence consists simply of a denial of the contract, a denial of the delivery of the goods, and, in the alternative, "if the defendant did enter into the contract with the plaintiff, the contract did not comply with the Sale of Goods Ordinance." Counsel for the defendant relied upon sec. 6 of the Sale of Goods Ordinance, which is as follows:—

"(6) A contract for the sale of any goods of the value of fifty

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dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

"(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract whether there be an acceptance in performance of the contract or not."

And he contended that in this case there was neither a note or memorandum of the contract in writing, nor had there been any acceptance of part of the goods so sold.

The first question for consideration, therefore, is, is there a note or memorandum of the contract in writing sufficient to satisfy the Ordinance?

It has long been settled that, where the memorandum of the bargain between the parties is contained in separate pieces of paper, and where these papers contain the whole bargain, they form together a sufficient memorandum of the contract, provided the contents of the signed paper makes such reference to the other written paper or papers as to enable the Court to consider the whole of them altogether as constituting all the terms of the bargain: Benjamin on Sales, 5th ed., 240. The defendant's letter sets out that he gave an order for shoes, but it does not say that this order is in writing. Is parol evidence admissible to shew that the order referred to in the defendant's letter was in writing and was the order taken by the plaintiff's traveller? The point came before the learned Chief Justice of this Court in the case of *Calder* v. *Hallet* (1900), 5 T.L.R. 1, cited by counsel for the defendant, but there, as the case went off on another ground, the point was not decided. In *Oliver* v. *Hunting* (1890), 44 Chy.D. 205, 59 L.J.Ch. 255, 62 L.T. 108, Kekewich, J., held that "where in a letter signed by the party to be charged a reference is found to something which may be a conversation or may be a written document, parol evidence is admissible to shew that it was a written document, and having proved it was a written document that written document may be put in as evidence and so connect it with the one already admitted or proved." Parol evidence was therefore admissible to shew

that the order referred to in the defendant's letter was the order taken by the plaintiff's traveller which contained all the terms of the contract. That they were the same was admitted.

The letter, containing as it does a reference to the order taken by the plaintiff's traveller which contains all the terms of the contract, and wholly incorporating it, is, in my opinion, a sufficient note or memorandum of the contract to satisfy the Ordinance: see *Taylor* v. *Smith* (1893), 2 Q.B. 65, 61 L.J.Q.B. 331, 67 L.T. 39. I have not overlooked the fact that the time when the goods were to be delivered is stated in the defendant's letter to be "in June," while in the order the goods were to be shipped "as soon as possible," and that the rule is that there must be no inconsistency between the terms set out in the document signed by the defendant and the document establishing the terms of the contract. There is here practically no inconsistency between the letter and the order, as all the goods that were shipped were delivered in or before June. At the trial the defendant swore that the date agreed upon for the delivery of the goods was not "in June," as stated in his letter, but "immediately on the order reaching the plaintiff." In this, also, I am satisfied the defendant was mistaken. The copy of the order which he admitted receiving shewed the delivery to be "as soon as possible," and having received that copy he made no objection to the correctness of its terms. I therefore hold that the letter and the order referred to therein constitute a sufficient note or memorandum of the contract to satisfy the Ordinance.

I also think there was an acceptance by the defendant of part of the goods sold and an actual receipt of the same within the meaning of sec. 6 of the Sale of Goods Ordinance. The defendant admitted that he opened two of the boxes shipped and examined the goods and stated that he found some of the goods inferior in quality to the samples and found also in the boxes goods which he did not order at all. The opening of the boxes and the examination of the goods to see if they were equal to sample is, to my mind, "an act of the buyer in relation to the goods which recognizes a pre-existing contract of sale," which, under sub-sec. 3 of sec. 6, is a sufficient acceptance to satisfy the Ordinance and allow the terms of the contract to be established by parol evidence. It is, however, no acceptance in performance of the contract, and leaves it open to the defendant to resist payment on the ground that the

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plaintiff has not performed the contract: *Abbot* v. *Wolsey* (1895), 2 Q.B. 97, 64 L.J.Q.B. 587, 72 L.T. 581. The only defence raised by the statement of defence to the performance of the contract consists of a denial of the delivery of the goods. I find, as a fact, that on May 9th the plaintiff delivered a portion of the goods to the Canadian Pacific Railway at Montreal for the defendant, and on June 25th he delivered a further portion, leaving a small balance still to be delivered; that before this balance was ready for shipment he received the defendant's letter refusing to accept the goods. The delivery to a carrier for the purpose of transmission to the buyer is *primâ facie* delivery to the buyer: Sale of Goods Ordinance, sec. 31. There was, therefore, delivery of the goods for the price of which this suit is brought. As to the balance of the goods, the plaintiff was under no legal obligation to ship them, as the renunciation of the contract by the defendant discharged him from the necessity of further performance of the contract on his part, and entitled him to recover for the goods delivered without a tender of the balance: Anson on Contracts, p. 319.

I therefore find that the defendant has failed to establish the only defence to the performance of the contract which is set out in his statement of defence.

There will be judgment for the plaintiff for the amount of their claim and costs.

[TRIAL.]

NEWMAN v. WHITEHEAD.

1909

Jan 11.

Detinue—Boarding House Keeper—Goods of Lodger—Lien for Board and Lodging—Goods not Brought for Purpose of Journey—Extent of Right of detention.

Defendant was a boarding house keeper, and plaintiff, while staying with him in a transient manner, brought a large quantity of personal property, consisting of household effects and other articles, to the defendant's house, and left them there, in the meanwhile becoming indebted to the defendant for board. There was some dispute as to the amount due, and the defendant refused to deliver the goods until payment, and claimed a lien on goods to the value of about $1.000 for a small balance due for board:—

Held, that a boarding house keeper's lien extends to all goods brought to the premises by the lodger while a guest, and not merely to goods brought for the purpose of the journey.

2. That the lien extends to all the goods, no matter how great the value as compared with the amount due.

THIS was an action for detinue, tried before the Chief Justice at Battleford.

A. M. Panton, for the plaintiff.

W. W. Livingstone, for the defendant.

January 11. WETMORE, C.J.:—This is an action for the wrongful detention of goods. The defendant is alleged in the statement of defence to be a boarding house keeper. This is not denied by the reply, nor did counsel for the plaintiff attempt to controvert that fact during the progress of the trial. I must, therefore, take that fact to be admitted. I must say that had I been left to my own judgment I have very grave doubts if I would have arrived at that conclusion on the evidence. I may state that I have decided this case entirely upon the pleadings and what was urged before me by the respective counsel for the parties at the trial. I state this in order to avoid misunderstanding should other questions be subsequently raised.

The facts of the case are as follows, as I find them:—

The plaintiff had entered for a homestead some distance from where the defendant resided and carried on his boarding house, and he was taken by the defendant to visit this homestead and also to look over another piece of land near to where the defendant resided with the view of a possible application to enter for it as a homestead. However, he retained the homestead he originally

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entered for. On his way to and from this homestead he passed the defendant's place and from time to time stopped there, taking meals, and, it is alleged, occasionally sleeping there over night. In this way he became liable to the defendant as a boarding house keeper.

It was further claimed that the plaintiff purchased part of a stack of hay from the defendant.

The plaintiff, in arriving at this boarding house as a guest, brought a quantity of personal property with him, which consisted of a cooking stove and other property mostly contained in boxes. This property consisted of household effects, clothing, pictures and the like, and was stored on the defendant's premises. A portion of this property was taken away by the plaintiff to his homestead after his shack was completed. This was taken away without objection. In fact, it was taken away at the request of the defendant. The property left on the defendant's premises is alleged by the plaintiff to be of the value of $1,500, and I judge that it was worth between at least $1,000 and that amount. The plaintiff demanded possession of this property from defendant, who refused to give it up, and this action was brought for the unlawful detention thereof.

The defence set up by the defendant is that the plaintiff is indebted to him for board and lodging, and that he has a lien on this stuff for the amount of such indebtedness, and he counter-claims for

Board	$ 8.65
5 tons of hay at $5 per ton	25.00
Work locating the homestead, 1½ days	3.50
Total	$37.15

And he credits by cash on account of hay, $10, leaving a balance of $27.15.

The plaintiff admits incurring liability for board, but denies purchasing the hay and denies liability for work locating homestead, and he claims that the $10 that he paid the defendant satisfied all his indebtedness to him, and that, therefore, the defendant had no right to this property by way of lien or otherwise.

I may say, in regard to the claim for work locating homestead, I am of the opinion that the defendant is not entitled to recover for it. The plaintiff states that the services were voluntarily done at defendant's own instance, and I take that view under the evidence. In the first place an original statement of defence was prepared for the defendant, and no such claim was included in it. The statement of defence under which the case came down for trial was an amended statement of defence, and there, for the first time, this claim for "work locating homestead" is to be found, and I cannot find that any claim for such work was made by the defendant to anyone before action brought. The claim, therefore, seems to me to be entirely an afterthought. The only claim advanced was the claim for the hay and the board and lodging. I find that the hay was purchased by the plaintiff; but he sets up that it was only a conditional purchase, conditioned upon his entering for the homestead which was near the defendant's place, and if he did enter for that he was to take the hay, and if he did not he was not to take it. The plaintiff's conduct with respect to this, however, is not consistent with what he testifies to. He made a payment to the defendant of $10, and he claims that that was in full for what he owed him at the time such payment was made. The time of this payment is material. That is left very vague by the plaintiff's testimony. The only way of getting at it by his testimony is by inference, and that by no means of a conclusive character. The defendant's testimony, however, makes this clear. The payment was made on the 27th April. At that time the whole amount that could possibly be due for board, even charging the plaintiff with stopping over night, was only $5.50. As he disputed the claim for work locating homesteads, there was nothing else to which the balance of $4.50 would apply except the purchase of the hay. I, therefore, find that he did purchase the hay. But I find that he purchased half a stack of hay at $20 (not $5 a ton), and which I will allow the defendant for it.

As to the amount to be allowed for board: The defendant only proved twenty-four meals at twenty-five cents each, and a lunch at fifteen cents. Then the board furnished to the plaintiff's messenger and team when he went there to demand the goods, and which plaintiff has admitted to be correct, is $1.25, making in all $7.40 for board. There were a number of items for keeping the plaintiff

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over night which were not proved. What was done was this: A memorandum which the defendant copied from his books (and which really was not admissible at all except by way of reference) was produced. This memorandum was merely admitted for the purpose of reference, and the defendant proved, as I have stated, as to the board; but he gave no testimony whatever as to stopping over night, and, therefore, I have not allowed it.

Now, as to the question of lien: It was claimed, in the first place, that this property which was brought to the boarding house was not brought there for the purpose of the journey, that is, for the purpose of using while staying at the boarding house, but was brought there by the way of freight and left there as such. All that it is necessary to say with respect to that is that the plaintiff, having brought this property there at the time he arrived as a guest, it became liable to the defendant's lien for board. The authorities seem quite clear with respect to that. It was also claimed that the seizure was excessive. The only seizure there was the merely retaining possession of it. No authority was pointed out to me which holds that a retention under a lien for board or the lien of an innkeeper is excessive if the lien exists, that the lien holder is only to retain a part of the property sufficient to cover the indebtedness and is bound to deliver the other up. The right does not appear to be governed by the same principles as attach to distress for rent. It is also claimed that the board was paid for by the $10. That payment I find was made generally; there was no appropriation of it by the plaintiff to any particular part of the debt, and there was no such appropriation by the defendant at the time he received it. It occurred to me whether the defendant was bound to appropriate this $10 to payment of the board which was then first due. It is not necessary to decide that question, because the plaintiff subsequently incurred a bill for board to which the $10 could not possibly apply. I, therefore, hold that the defendant had a lien for unpaid board with respect to the property in question at the time action was brought for $7.40. There will, therefore, be judgment for the defendant on the claim dismissing the action with costs. As to the counterclaim, I find that the plaintiff is indebted to the defendant for board $7.40, hay and oats $20.10, amounting, therefore, to $27.50, and deducting the $10 paid, leaves a balance of $17.50, for which

there will be judgment for the defendant on the counter-claim with costs, and declare that the defendant has a lien on the property in question left with him by the plaintiff for $7.40 and his costs of this action and counterclaim.

I must add that it seems to me a very unfortunate matter—almost a melancholy affair—that these two men should have got involved in a law suit involving very heavy costs, as this has, for such a trifling matter as lies at the bottom of it. Even on the defendant's own shewing, the whole amount in question was $27.15, and these men have gone into litigation involving several hundred dollars. All I can say is, however, that one party seems to me to have been just as much to blame as the other. But if people will do such absurd and foolish things they have got to take the consequences of it.

[TRIAL.]

ROBERTS v. MORROW.

1909
Jan. 18.

Damage by Prairie Fire—Origin of Fire—Degree of Care Required—Prairie Fires Ordinance—"Permitting Fire to Escape"—Interpretation.

Plaintiff's buildings and other property were destroyed by a prairie fire alleged to have spread from the ashes of a stack of straw burned by the defendant. The evidence shewed that before the stack was fired a guard of about 40 yards in width was burned around it, and there was also a fire guard three furrows in width about 300 yards to the west. The prairie fire did not occur until four days later, on which day a high wind was blowing, and indications pointed to the remains of the straw stack as the origin of the fire:—

Held, that in view of the climatic conditions prevailing in the Province, a man bringing fire upon his land must exercise the greatest caution, and under those conditions precautions must be taken to prevent the fire spreading until such time as it is absolutely extinguished, and the defendant, having failed to take such care, was liable to the plaintiff in damages.

That if a person does not properly watch a fire started by him and see that it does not get away, and it escapes, he thereby "permits" it to escape within the meaning of sec. 2 of the Prairie Fire Ordinances (ch. 87, C.O. 1898).

THIS was an action for damages for destruction of property by a prairie fire, tried before NEWLANDS, J., at Moosomin.

J. T. Brown, K.C., (*W. Peel* with him), for the plaintiff.

E. L. Elwood (*B. P. Richardson* with him), for the defendant.

January 18. NEWLANDS, J.:—On the evening of Thursday, April 16th, 1908, at about 7.30, defendant set fire to a straw stack

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on his farm, the north-west quarter of section 2-18-8 w. 2. Before setting it on fire he burned the stubble around the stack for a distance of 40 feet in every direction. There was also a fire guard of three furrows some 300 yards to the west of it, and a dump some 100 yards long across a slough leading to the road allowance between sections 2 and 3. On the night in question there was no wind, and defendant watched the fire until 11 p.m., and, it then having burned down and there being no more danger, he went home. The next day at 8 p.m. he visited the stack, and the fire was apparently out. The evidence of other witnesses shews that it was not out at that time nor for some days later. According to William Blizzard it was still smoking on Saturday. Plaintiff and Harry Smith both say there were hot ashes there on the following Tuesday, and Constable Brown, R.N.W.M.P., says it was still smoking on Saturday, the 25th of April. On Monday, April 20th, a high wind was blowing from the south-east, and a fire burned from the direction of this stack across the north-west quarter of 3 and sections 10 and 16 to plaintiff's farm on the east half of 16, and did considerable damage to plaintiff. The evidence shews that the grass and stubble were burned from defendant's stack and went in a fan shape towards plaintiff's farm. Anson Moore, a witness for defendant, sought to shew that the fire had started on section 3 and had backed up to defendant's stack and was put out by him, but even he said that there was a strip of burnt land from the road to defendant's stack about 40 feet wide, getting narrower as it approached the stack, and he could not explain how it was in that shape if it had not started from the stack but had backed up against the wind. None of the other witnesses for the defence gave any evidence that the fire originated from any other direction, and as the plaintiff and three witnesses shew that it could be traced to this burnt stack and that the ground was burnt in a V shape from there and went directly towards plaintiff's farm, I am of the opinion that the fire which burned the plaintiff's property originated from hot ashes or cinders being blown from this burnt stack by the high wind that prevailed on Monday, the 20th April, the day the plaintiff's farm was burnt. It was also shewn that it was not unusual to have high winds at that season of the year, and in fact that they were looked for at that time.

It is notorious that in this country at certain seasons of the

year, when the weather is both dry and windy, prairie fires are a source of constant danger, and scarcely a year passes in which a large amount of property is not destroyed by fires. The amount of care, therefore, which a man must exercise who brings upon his land such a dangerous element as fire is much greater than in a country where the same climatic conditions do not prevail. The Legislature have recognized this source of danger to the property of residents of this Province by passing the Prairie Fires Ordinance (ch. 87, C.O., 1898). Section 2 of that Ordinance provides that any person who either directly or indirectly . . . "(b) permits any fire to pass from his own land" shall be guilty of an offence, "and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by such fire." In *Macartney* v. *Miller* (1905), 2 W.L.R. 87, the Chief Justice, at p. 89, interpreted the above subsection as follows: "It was urged on behalf of defendant that no offence had been committed against this section because there was no letting or permitting upon the part of the defendant; that the term 'letting' or 'permitting' involved the idea of action or abstaining from action. Conceding this to be true, I am of the opinion that there was on the part of the defendant at least an abstaining from action. He started the fire; it is true that he stayed there for an hour or an hour and a half, but that is the longest time he did stay there, I find, and when he left, the fire was smouldering in the straw bucks, and a wind sprang up later in the day, which caused it to spread. According to his own testimony also, which I very much doubt, he burned some sort of a guard around the straw bucks before he set fire to them. If he did, the guard must have been insufficient for the purpose. It did not prevent the fire from getting away. If a person kindles a fire on his own land and does not properly watch it to see that it does not get away, and it does get away, he lets or permits it to do so; that is, he abstains from taking the action that he ought to have taken to have prevented it so getting away, and therefore he is guilty of an offence under the section of the Ordinance referred to."

Taking that as the correct interpretation of this section, are the two cases so similar that I should follow that case and hold the defendant liable for the damage which the plaintiff suffered from the fire? The main distinction between the two cases is that de-

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fendant burnt a fire guard of 40 feet around his stack before setting it on fire, and the fire which did the damage happened on the fourth day after the burning of the stack.

Can he, therefore, adopting the interpretation placed by the Chief Justice on the word "permit" in *Macartney* v. *Miller*, be said to have permitted this fire to have escaped from his land. As I have pointed out, more care is required in this dry and windy country on the part of those bringing fire upon their land for the purposes of husbandry than where the conditions are not so favourable to the spread of fire. And the only care that should satisfy a cautious man would be to take precautions against its spreading until certain that the fire was extinguished. So long as fire remained in the burnt stack there was danger of its being scattered by a high wind, as happened in this case, and if this could be prevented, as I believe it could, then by failing to prevent it from passing from his land he permitted it to escape, and is therefore liable in damages to any person whose property was injured or destroyed.

The defendant raised the question of the plaintiff's ownership of the buildings destroyed. At the trial plaintiff swore that he had bought the land and held it under an agreement of sale. This is, I think, sufficient evidence of title in an action of this kind.

I allow plaintiff the following damage: for the buildings destroyed, $500; and for other property, $550, with costs.

[TRIAL.]

CAIRNS v. CANADIAN NORTHERN R.W. CO. 1909

Jan. 20.

Railway Company—Destruction of Property by Spark from Locomotive—Negligence of Defendant—Proximate Cause.

Plaintiff was the owner of a warehouse in close proximity to defendant's railway. Within six feet of the warehouse he piled a quantity of hay, which became ignited by a spark from a locomotive on the railway, and the fire spread to the warehouse, which was totally destroyed. The jury found that the fire originated from the defendant's engine, but that the plaintiff had been guilty of negligence in storing the hay in such close proximity to the railway:—

Held, that as the jury had found the plaintiff negligent, and as such negligence was the proximate cause of the damage, he could not recover.

THIS was an action for damages for the destruction of the plaintiff's warehouse by fire originating from an engine of the defendant company, and was tried before NEWLANDS, J., at Saskatoon.

Jas. Straton and *H. L. Jordan*, for the plaintiff.

O. H. Clarke and *J. D. Ferguson*, for the defendant.

January 20. NEWLANDS, J.:—This is an action for burning plaintiff's warehouse and contents. The jury found that the fire was caused by defendant company; that they used modern and efficient appliances, but were otherwise guilty of negligence; that plaintiff was guilty of contributory negligence by placing baled hay on his property too close to his warehouse.

The evidence shewed that a pile of baled hay was set on fire by a spark from defendant company's locomotive, that the fire was communicated from the hay to the warehouse, which, with the contents, was totally destroyed. This hay was piled within six feet of the warehouse by plaintiff, and the jury have found that this was negligence on his part.

It was urged by plaintiff that he had the right to use his property as he saw fit, and was not compelled to protect it against the negligence of any other party. In support of this contention he cited the dictum of Strong, J., in *New Brunswick Railway Co.* v. *Robinson* (1886), 11 S.C.R. 688, p. 696. This dictum is based upon *Fero* v. *Buffalo, etc., R.W. Co.*, 22 N.Y. 209, and *Grand Trunk R.W. Co.* v. *Richardson*, 91 U.S. 454-473; also *Jaffery* v.

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Toronto, Grey, and Bruce R.W. Co., 23 U.C.C.P. 553; *Holmes* v. *Midland R.W. Co.*, 35 U.C.Q.B. 253; *McLaren* v. *Canada Central R.W. Co.*, 32 U.C.C.P. 324; and *Campbell* v. *McGregor*, 29 N.B.R. 644. In none of these cases did the jury find that the plaintiff was guilty of negligence, and therefore I do not think that they are authorities that I should follow in this case.

The jury having found that the plaintiff was negligent in piling hay too close to his warehouse, and this action being for the loss of the warehouse and contents, not for the loss of the hay, it follows that if plaintiff had exercised more care in piling the hay, that is, had piled it at a greater distance from his warehouse, as a prudent man would have done, knowing, as he must have known, that there was danger in the hay being set on fire by sparks from defendants' locomotives, his warehouse would not have been burnt.

Having left the question of contributory negligence to the jury, and the jury having found as they did, I have to enter judgment for defendants with costs.

[TRIAL.]

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SEE v. BRANCHFLOWER.

Jan. 20.

Contract—Action for Damages for Non-performance—Failure of Plaintiff to Perform Conditions—Mutual and Dependent Covenants.

Defendant agreed to plough a certain quantity of land in consideration of receiving a portion of the crop to be grown thereon. The plaintiff, on his part, agreed to provide a granary for the purpose of storing the grain to be grown. Defendant failed to plough the land agreed upon, and plaintiff did not erect the granary. In an action by the plaintiff for damages for failure to plough the land, defendant pleaded that by reason of the plaintiff's failure to provide the granary he had to haul away the grain, and the time occupied in doing so prevented him completing the contract before frost prevented him doing so:—

Held, that neither the covenant of the plaintiff to furnish the granary nor that of the defendant to plough went to the whole consideration, and the covenants were not mutual conditions the one precedent to the other, and therefore the failure of the plaintiff to furnish the granary was no defence to the plaintiff's action for damages on the other branch of the contract.

THIS was an action for damage for non-performance of a contract to plough a certain quantity of land, tried before NEWLANDS, J., at Saskatoon.

F. F. MacDermid, for the plaintiff.

A. W. Rutledge, for the defendant.

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January 20. NEWLANDS, J.:—This is an action for the breach of a covenant by defendant to plough back 152 acres, in the fall of 1907, free of charge. The following is the agreement between the parties;—

"Davidson and Lake City, Sask.,
Feb. 18, 1907.

"This contract enterd in to this the 18 day of feb Betwene B. A. SEE. Party of the first part. and N. Branchflower. party of the secont part.

"first prty a greese to hyer party of the secont part to turn back 80 achers more ar less on the NW¼ of sec 22 28 24 w2. first party agreese to pay sectentparty $2 per acher far al lands turned back inthe inthe spring.

"first party agreese to turn over to secontparty 152 achers morear less 142 achers to be put in wheat 10 achers. to be put in barley.

"first party a greese to furnish all the seed and is to hav half of al the crops that is grone on said lands. first party agreese to pay half of the meshean bill farthrashing said crop. seccenty party greese to put the grain in the grainry on the said lands mentened. party of the secont part a greese to furnish teams and tools and al laber conecet with the seeding and harvesting of the said crop al so the twine to cover same. first party agreese to furnish granary on said lands ser fisent to hold said crop.

"secont party a greese to plowe back 152 achers in the fall of 1907. free of charge."

The defence is that the plaintiff agreed to furnish a granary on said lands sufficient to hold the crop, but he neglected to do so, and defendant was forced to remove and haul away the grain, thus preventing him from ploughing up the 152 acres before the arrival of the frost in the fall of 1907.

This defence depends upon the question whether these covenants are mutual and dependent one upon the other. In Leake on Contracts, 5th ed., p. 458, the following rules are laid down as applicable to such covenants: "But the construction mainly depends upon the matter of the mutual covenants or promises. 'When two covenants in a deed have no relation to each other, the non-performance of the one could not be pleaded in bar to an action brought for the breach of another; for this plain reason, amongst others, that the

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damages sustained by a breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other.'" (Willes, C.J., *Thomas* v. *Cadwallader*, Willes 499). "When mutual covenants go to the whole consideration on both sides they are mutual conditions, the one precedent to the other; but where a covenant goes only to a part of the consideration, and a breach of such covenant may be paid for in damages, it is an independent covenant, and not a condition precedent." (*Pordage* v. *Cole*, 1 Wms. Saund. 552, 554, rules 3, 4).

Neither the covenant to plough 152 acres on the part of the defendant nor the one to furnish a granary on the part of plaintiff go to the whole consideration, and I do not see how the performance of the one depends upon the performance of the other. The covenant to furnish a granary goes only to part of the consideration and may be paid for in damages, and it is therefore an independent covenant and not a condition precedent. The breach of it is therefore no defence to this action, and as defendant has not counterclaimed for damages it cannot be set off in this action against the plaintiff's claim.

The plaintiff also claims damages for not being able to take a crop off said land in 1908 on account of its not being ploughed the preceding fall. In giving evidence on this claim plaintiff swore it was impossible to tell what, if any, crop he would have got off said land if it had been ploughed according to agreement, and as I have no means of fixing any damages on this claim I will not allow any.

Plaintiff claims that 107 acres of the 152 were not ploughed according to agreement, and under the evidence I am of opinion that $2 per acre is a fair price for same. I will allow plaintiff $214 damages with costs.

[TRIAL.]

WELLWOOD v. HAW. 1909

Jan. 20.

Vendor and Purchaser—Specific Performance—Vendor Owner of Uncertain Equitable Interest—Relief to which Plaintiff Entitled—Misrepresentation—Laches—Property Traversed by Public Road—Divisibility of Contract.

The plaintiff and defendant agreed to an exchange of certain properties in which they, at the time of the agreement, had some equitable interest. The plaintiff subsequently acquired title to his land and brought an action against the defendant for specific performance, the defendant having then only an equitable interest of an indefinite character in the property he had agreed to convey. The defendant pleaded misrepresentation, and particularly that the plaintiff had not a good title, owing principally to the fact that part of the property in question was traversed by a road which had been used by the public for upwards of twenty-four years:—

Held, that in view of the uncertain nature of the interest of the defendant in the land in question, the Court could not decree specific performance of the contract.

2. That the property in question being traversed by a highway in use for over twenty years, and in respect of which the owner might at any time be involved in a litigation, the Court would not compel the purchaser to accept the property subject to a prospective lawsuit.

3. That even though the road in question affected only a portion of the land, yet the contract was an entire one, and the Court could not decree specific performance as to part.

THIS was an action for specific performance of a contract for sale of land, tried before WETMORE, C.J., at Prince Albert.

A. E. Doak, for the plaintiff.

Jas. McKay, K.C., for the defendant.

January 20. WETMORE, C.J.:—The plaintiff and defendant entered into the following agreement:—

"Prince Albert, Sask., April 30, 1907.

"Memo of agreement made in duplicate between B. Wellwood of the city of Prince Albert in the Province of Saskatchewan, broker, and I. E. A. Haw, of the town of Qu'Appelle in the said Province of Saskatchewan, contractor.

"Whereas B. Wellwood agrees to sell and I. E. A. Haw agrees to buy lots 1 to 6 in block 7 and lots 43 to 46 in block 6 and 45 to 48 in block 5 and 15 and 16 in block 3 and 12 and 13 in block 1 according to a plan of subdivision known as Hazel Dell for the price or at the sum of thirty eight hundred dollars or its equivalent payable as follows whereas I. E. A. Haw agrees to sell and B. Wellwood agrees to buy the south half of section 13 township 19 range 16

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situated and lying west of the 2nd meridian in the Province of Saskatchewan for the price or at the sum of thirty eight hundred dollars or its equivalent and whereas B. Wellwood agrees to give a transfer free from all encumbrance for the lots mentioned herein and I. E. A. Haw agrees to give a transfer of the farm herein mentioned free from all encumbrance I. E. A. Haw agrees to build a residential house the cost when finished to be not less than two thousand dollars to be built this coming summer of 1907. B. Wellwood reserves the right to inspect the farm herein mentioned and if not suitable to declare this contract null and void farm to be inspected within ten days from date."

At the time of entering into this agreement neither of the parties had the title to their respective properties. The plaintiff had an agreement with one McLeod (who owned the Hazel Dell lots) for the purchase of the same, and the defendant seemed to be under some sort of an agreement with the representatives of what was known as the Sykes estate for the purchase of the half section mentioned in the agreement, together with other lands. The plaintiff, however, at the time of the making of this agreement, was, by virtue of his agreement with McLeod, in a position to make a title on certain conditions. However, this does not seem to me to be material, because at the time of the bringing of this action he was the registered owner of the property in Hazel Dell and was in a position to give a title. The defendant never has had the title to the half section of land vested in him, and, for all I know, may not be financially in a position to acquire it. The defendant never went into possession of the lots agreed to be sold to him in Hazel Dell, nor has the plaintiff gone into possession of the half section of land agreed to be sold to him. The defendant has refused to carry out the contract, and this action is brought for specific performance on the part of the defendant, and for damages.

One difficulty meets me right on the threshold of this case, and that is, how can I decree specific performance of the contract—that is, how can I decree that the defendant shall carry out his contract by giving to the plaintiff what he is entitled to under the agreement, namely, a clear title? I know of no authority by which I can make any vesting order to serve the purpose, because I can only make a vesting order in respect to what the defendant has

to give, and that at present is at the best a mere equitable interest of a very uncertain quantity. I cannot order him to pay the money that the Sykes estate claim in respect of their contract before they will execute a transfer, and hold him guilty of a contempt of Court if he refuses to do it. The only remedy, therefore, it appears to me the plaintiff has, if any, is for damages.

The defendant defends this action, however, on the ground that he was induced to enter into the agreement by the misrepresentations of the plaintiff made at the time of entering and before entering into the agreement, and which alleged misrepresentations are as follows:—

(1) That there was a contract signed at that time for the immediate erection of a hotel of the value of $20,000 on one of the blocks in which some of the lots in Hazel Dell agreed to be sold to the defendant were situated, and that such hotel would be completed forthwith, before the end of the summer of 1907.

(2) That contracts were signed and executed between the Provincial Government of Saskatchewan and the Canadian Northern Railway Company for the immediate erection of a joint traffic and railway bridge across the North Saskatchewan river (which flowed by Hazel Dell), such bridge to be erected in the immediate vicinity of the lots in block 1 agreed to be sold to the defendant, and that such bridge would be erected and completed forthwith and before the end of the summer of 1907.

(3) That he (the plaintiff) had a clear title to the lots in Hazel Dell so agreed to be sold, and was in sole occupation and possession of the same, and that they were free of all claims and easements, and that he would give the defendant quiet and peaceable and undisturbed possession of the same.

(4) That five or six good substantial residences of the value of not less than two thousand dollars each would be erected and completed forthwith, some on the blocks wherein the lots agreed to be sold were situated and others in adjoining blocks.

And that such representations were untrue, inasmuch as there was no contract to build the hotel and no hotel has been built; there was no contract to build the bridge and it has not been built; that the plaintiff had not at the time of bringing the action a clear title to the lots and could not give the defendant quiet and peaceable and undisturbed possession thereof; that there was and is a public

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road in use through the lots in block 1, and has been for over twenty years.

As to the first, second and fourth alleged misrepresentations, the evidence is very contradictory, the plaintiff swearing to one thing and the defendant to another, and there is no other witness to throw any light on the questions with respect to which they have testified. I have come to the conclusion, and find, that these alleged misrepresentations were not made. I think the defendant's conduct is inconsistent with the fact that they were made, or that he so relied upon them as to warrant the contract being set aside, assuming that they were made and were false. He states distinctly that he did not lay much stress on the hotel being built or the completion of the bridge, and, again, he saw through the whole summer that the bridge was not commenced or the hotel or other buildings started; nevertheless, he makes no protest, he does not seek to repudiate the contract until after this action was commenced, on the 5th September, 1907.

As to the title which the plaintiff had at the time that the contract was entered into, or just before, the defendant was well aware of it, and, as I have already stated, before this action was brought the plaintiff acquired the right and could have given a clear title to the defendant, except in so far as the matter to which I am now about to refer is concerned—that is, the road. Hazel Dell was surveyed off into blocks and lots, with streets. Block 1, in which lots 12 and 13 were agreed to be sold to the defendant, fronts south on the Saskatchewan river, and is bounded on the north by First avenue, one of the streets so laid out by the survey. Running between this avenue and the river is a road or trail leading from the ferry and running all the way across this block. This road has been used by the public for twenty-four years and upwards, and to my mind is a very serious blemish to these lots. The defendant has been continually, ever since he made the purchase, objecting to the fact that this road was there. This does not seem to be practically denied. On the occasion of his going there with the plaintiff, and noticing the road, he told him: "There is no use of me coming over here to build, I would be opposing the public, I would be opposing the Government in blocking up this road, and I don't want to be up against such a proposition as that, as I would be open for action either by the public or by the Government."

The plaintiff admitted that the defendant spoke to him about the road, said it looked to him as though it would be an encumbrance on the property, and that he told the defendant that he thought legally he could have the road removed, but that he wasn't going to any trouble about it, as he had seen the Attorney-General at that time, and in some conversation he had had with him he had pointed out where he thought it would be a benefit to the public to have the road changed and have it in conjunction with First avenue, and the Attorney-General led him to believe that he would change the road for him, being that he was giving him more ground on another street off his sub-division, and from the conversation he had with the Attorney-General he was led to believe that he would change the road, and he told the defendant that he didn't think there would be any trouble in getting the road changed; and then he went and saw the Attorney-General who succeeded the one first spoken to, who said he didn't think there would be any trouble in getting it changed. There is the fact duly recognized that this road was an objectionable feature with respect to these two lots, and the desirability of having it changed. Nevertheless, it never has been changed, and the assurances of the Attorney-Generals have not made the matter any better. The objectionable feature is there yet, and I am of opinion that the defendant cannot be compelled to accept the property while that objectionable feature is there. The plaintiff, at least, ought to have had it removed before he brought this action, and I say this apart from any question of misrepresentation.

I do not intend to express any opinion with respect to the legal effect of the user of this road, whether it would amount to a presumed dedication of the road under the circumstances by the user, or whether it would amount to a dedication of the road by a user for over twenty years. All that is necessary for me to say is that there is a prospect of a very good lawsuit over it. The authorities are quite clear that the Court will not compel a person to take a title which will involve him in a lawsuit. In Fry on Specific Performance, 4th ed., p. 385, I find the following: "Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or, as it was put by Alderson, B., where there is 'a reasonable decent probability of litigation,' the Court, to use a favourite expression, will not compel the purchaser

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to buy a lawsuit." *Cattell* v. *Corrall*, 4 Y. & Coll. Ex. 237, is cited for that proposition. I have not been able to lay my hand upon this report, but, knowing the high standing of the author of Fry on Specific Performance, I have not the slightest doubt but that the quotation is properly made. In *Price* v. *Strange* (1821), 6 Madd. 159, at p. 165, the Vice-Chancellor lays it down: "In attempting to lay down a rule upon this subject, I should say that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision." In *Sharp* v. *Adcock* (1827), 4 Russ. 374, the Master of the Rolls says as follows: "To compel the purchaser to take this title would be to compel him to buy a suit, for the application of the words which are relied on as giving the fee to all previous devises made to the wife, is much too doubtful ever to be settled without litigation"; and judgment was given in favour of the purchaser. In *Pegler* v. *White* (1867), 33 Beav. 403, at p. 408, the Master of the Rolls lays down as follows: "This Court will not compel a person to take a title where it has distinct evidence before it, not only that there are two claimants to the reversion, but that it is impossible for this Court to say which of the two may be in the right, and that it would involve the necessity of the purchaser of the property filing a bill of interpleader for the purpose of being secured in the enjoyment of it." That seems to me to be practically the situation in this case in so far as the forcing upon the defendant to take the Hazel Dell lots is concerned, and in this case the fact that it was recognized that the public had rights with respect to that trail is emphasized by the plaintiff considering it so serious that he applied to the Attorney-General for the purpose of having the road changed, so that the rights of the public would be wiped out.

The fact that this objection applies specially only to lots 12 and 13 does not affect the question, because I cannot order this contract to be divided and hold that with respect to one portion of the lands agreed to be conveyed the contract may be enforced but not enforceable with respect to the other. The whole contract must stand or fall together, and that is specially so in this case, where the purchase price to be given in payment is a block of land. It is true that it is reduced to a money value in a manner, but, nevertheless, the intention is by the agreement that one party was to give as a consideration for certain lots of land another block

of land. The plaintiff, bringing this action, must be "ready and willing" to perform his part, and "ready" does not mean merely that he must be prepared to do it, but he must be ready to give what he agreed to give; he must, in the first instance, be ready to give a good title, and that to the whole of it, and he must be ready to give it free from objectionable features, such as this road is. He must be ready to transfer property which will not involve the transferee in a lawsuit, and, if he is not in a position to do that, he is not "ready" within the meaning of the word; and, if he is not ready, he cannot compel the other party to transfer to him.

I am, therefore, of the opinion that the objection that is raised with respect to this road is valid. The defendant has never done anything that would amount to an acceptance of this property without that road being there, and he has been prevented from doing so by the representations of the plaintiff that he was going to get it removed, which he never did do.

Therefore, I am of opinion that this action must be dismissed with costs to the defendant. And under the circumstances of this case, justice will be done by ordering the agreement of the 30th April, 1907, to be cancelled, and I so order.

[TRIAL.]

1909

Jan. 21.

FLEMMING v. BONNIE.

Vendor and Purchaser—Action for Purchase Price—Misrepresentation by Vendor as to Price Paid for Land and Buildings—Effect of.

Plaintiff sold defendant a house and lots and sued defendant for the purchase price. The defendant alleged that he was induced to purchase on the plaintiff's representation that he had paid $375 for the lots and $400 for the house. The plaintiff admitted that the lots cost him only $175 and the house $300. The defendant, before purchasing, examined the property, and after purchasing made inquiries as to the value:—

Held, that the representations in question must be regarded as representations respecting the value, and there being no fiduciary relationship between the parties the purchaser was not justified in placing confidence in them.

2. That in order to avoid a contract for misrepresentation, the representation must not only be untrue, but the purchaser must have been induced to act upon that representation, and as the vendor had examined the property before purchasing, and after purchasing had made inquiries as to the value, it would appear that he had not relied solely upon the representations and so been induced to enter into the contract on the strength of such representations.

THIS was an action to recover the purchase price of land, tried before NEWLANDS, J., at Saskatoon.

H. L. Jordan, for the plaintiff.

J. D. Ferguson, for the defendant.

January 21. NEWLANDS, J.:—This is an action for the purchase price of certain lots sold by plaintiff to defendant. The defence is that the plaintiff misrepresented the price he paid for them, the cost of the buildings thereon, and the selling price of the adjoining lots. The land and buildings were sold for $625, and defendant swears that plaintiff told him that he had paid $375 for the lots and $400 for the house thereon. Plaintiff admits that the house cost him between $200 and $300, and that he paid only $175 for the lots. Is this such a misrepresentation that will avoid the contract? In Kerr on Fraud and Mistake, 3rd ed., p. 51, he says: "The representations of a vendor of real estate to the vendee as to the price which he has paid for it are, in respect of the reliance to be placed on them, to be regarded generally in the same light as representations respecting its value, or the offers which have been made for it. A purchaser is not justified in placing confidence in them." "But," he goes on to say, "a false affirmation by a vendor as to the actual cost of property, or as to the amount spent

upon it by him in improvements, may amount to a fraudulent misrepresentation." The cases he cites in support of this last proposition are all cases in which there was some fiduciary relationship between vendor and purchaser, and I can find no case in support of that proposition where there was no such relationship between the parties.

In order to avoid a contract, a representation must not only be untrue but the purchaser must have been induced to buy by that particular representation: *Smith* v. *Land and House Property Corporation* (1884), 28 C.D. 7, 51 L.T. 718. In this case the purchaser wanted the house to live in, and he examined it for himself. His subsequent conduct shews that he did not place reliance in the vendor's statements, as he made inquiries for himself. He did not make these inquiries until after he had completed the purchase, but the fact that he did make them shews that he had not confidence in the vendor's statements. In *Govers Case* (1875), L.R. 20 Eq. 114, at p. 123, Bacon, V.C., said: "It is not inequitable that a man should buy as cheap and sell as dear as he can. The seller is under no obligation to state the price at which he purchased. The purchasers are the best judges of whether the thing offered for sale is worth the money which is demanded for it." Parties in purchasing real estate generally deal at arms' length, and however immoral it may be to make false statements about the value of property, if the purchaser is not deceived thereby he has no ground for avoiding the contract.

Judgment will be for plaintiff for amount claimed. As he has been residing in the house since the sale, there will be a reference to the local registrar to ascertain the rent due, which will be set-off against the plaintiff's claim.

[IN CHAMBERS.]

1909

IN RE REGINA WINDMILL AND PUMP CO., LIMITED.

Jan. 25.

Companies Winding-up Ordinance—Company in Liquidation—Seizure of Goods by Sheriff Before Liquidation—Right of Sheriff to Sell.

An order was made, under the provisions of the Companies Winding-up Ordinance (ch. 13 of 1903), to wind up a company, and a liquidator was appointed. Before the appointment of the liquidator the sheriff seized the goods of the company under a writ of execution. On an application for an order directing the sheriff to hand over the goods so seized to the liquidator:—

Held, that the Court had, under the Companies Winding-up Ordinance, 1903, no jurisdiction to require the sheriff to hand over the goods seized by him under execution.

APPLICATION for an order requiring the sheriff to hand over to the liquidator the goods of a company in liquidation seized by him prior to the appointment of the liquidator, heard before LAMONT, J., in Chambers.

W. S. Ball, for the liquidator.

W. B. Scott, for the sheriff.

J. A. Cross, for the execution creditor.

January 25. LAMONT, J.:—This is an application, on behalf of the liquidator, for an order directing the sheriff to hand over to the liquidator certain goods and chattels of the Regina Windmill and Pump Company, which the sheriff has in his possession by virtue of a seizure of the same made under an execution against the said company.

On December 2nd, 1908, an execution against the goods of the said company was placed in the hands of the sheriff, and on the same day he made a seizure. On December 17th of the same year a summons was taken out asking for an order to wind up the company, and on December 29th the winding-up order was made. The sheriff was, therefore, in possession of the goods under an execution before winding-up proceedings were commenced, and the question is, is he under our law obliged to hand the goods seized over to the liquidator?

The winding-up proceedings were taken under the Companies Winding-up Ordinance, 1903. That Ordinance contains no provision directing goods in possession of the sheriff to be handed over to the liquidator similar to sec. 9 of the Assignments and

Preference Act, nor any provision similar to sec. 84 of the Dominion Winding-up Act. By sec. 7, sub-sec. 2, the Ordinance directs that the property shall be applied in satisfaction of its liabilities *pari passu* with a certain preference to claims for wages. By sec. 22, sub-secs. 2 and 3, power is given to the Court to stay any pending action and to order that no action shall be commenced or proceeded with except with the leave of the Court. The Court, therefore, has power to restrain the sheriff from proceeding to sell the goods under the execution in his hands if sufficient reasons are shewn therefor. In the present case, however, no application has been made to stay proceedings by the sheriff, and until such an order is made it seems to me that not only is the sheriff within his right in not giving up the goods, but he might be liable to the execution creditors if he released his seizure without being so directed by the Court. In Masten's Company Law, at p. 606, the learned author says: "Where a creditor has actually issued execution against a company before the petition to wind it up has been presented, and the sheriff is in possession when it is presented, the Court will not interfere to deprive the creditor of the fruits of his diligence unless under special circumstances, *e.g.*, oppression or fraud." And in Lindley's Law of Companies, 6th ed., p. 911, it is also laid down that the Courts will not interfere to deprive a creditor of the fruits of his diligence in getting execution and making a seizure.

Where a winding-up order has been made and a liquidator appointed, the liquidator stands in the place of the company, and has no greater powers over the goods of the company than the company itself would have, unless such powers are given to him by statute. If the proceedings were under the Dominion Winding-up Act, ch. 144, R.S.C. 1906, it would seem that the sheriff would only be entitled to hold the goods for his costs and such costs of the execution creditor as by the law of this Province are given a preferential lien on the goods (sec. 84). Our Ordinance, however, does not appear to contain any provision depriving an execution creditor, who has seized before the winding-up proceedings were commenced, of the fruits of his execution, and as no order has been made by the Court staying proceedings by the sheriff for enforcing his execution, I am of opinion that the sheriff was right in refusing to hand over the goods seized. The application will, therefore,

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be dismissed, with costs to be paid by the liquidator out of the estate.

If the liquidator is of opinion that the whole estate can be more advantageously administered by having possession of the goods seized by the sheriff, I will make an order directing the sheriff to deliver the goods upon the liquidator paying or guaranteeing to the sheriff the amount for which he holds these goods, and all costs.

[TRIAL.]

1909

DOUGLAS v. HOURIE.

Jan. 26.

Assignments and Preferences Act—Action to Set Aside Chattel Mortgage—Knowledge of Mortgagee of Insolvency of Mortgagor—Intent to Obtain Preference—Mortgage to Secure Past and Present Advances—Validity of—Action Brought by Simple Contract Creditor—Right of Such Creditor to Maintain Action.

Defendant Hourie, being in insolvent circumstances, gave a chattel mortgage to the defendant bank to secure $500 past indebtedness and $250 a present advance. The manager of the defendant bank was well acquainted with the defendant Hourie's circumstances, and must have known him to be insolvent. A simple contract creditor of Hourie brought an action to set aside the mortgage as void under the Assignments and Preferences Act:—

Held, that in order to render a conveyance void under the provisions of sec. 39 of the Assignments Act, there must be knowledge of the insolvency on the part of both parties and concurrence of intent to obtain an unlawful preference over other creditors.

2. That the chattel mortgage attacked having been given and taken with knowledge of the insolvency of the mortgagor, was as to the past indebtedness of $500 void, but was valid as to the advance of $250, which, although not actually advanced until a few days after the mortgage was given, was intended to be a present advance on the security of the mortgage.

3. That under the Assignments Act any creditor may maintain an action to set aside a fraudulent conveyance under the provisions of the Act, whether his claim has been reduced to judgment or not.

THIS was an action to set aside a chattel mortgage as given in fraud of creditors, and was tried before PRENDERGAST, J., at Yorkton.

J. A. M. Patrick and *W. R. Parsons*, for the plaintiff.

C. P. Fullerton and *J. H. Parker*, for the defendant Bank.

January 26. PRENDERGAST, J.:—This is an action to set aside a chattel mortgage from the defendant Hourie to the other defendant, the Bank of British North America, as being fraudulent under the Assignments Act.

With respect to the financial status of Hourie when he made the chattel mortgage, it is unnecessary to go into the schedule of liabilities and statements of assets filed. It is enough to say that they resolve themselves into this: that provision being first made to pay off the secured creditors, there remained only a balance of $476 to satisfy claims amounting to more than $2,600. I consequently find that Hourie was insolvent at the time.

I cannot but feel, moreover, that Mr. Lang, manager of the defendant bank, knew of Hourie's insolvency. He knew a good deal of Hourie's business in a general way; he knew that he had been owing the bank nearly $500 for eighteen months; he must have known that the general power of attorney which Hourie gave to him and McClure was intended to be virtually an assignment to wind up his affairs, as he must also have had information on October 3rd that the crop, estimated at $3,000 in the statement, exhibit B, which had been placed in his hands, was a failure.

The case seems to me to come within sec. 39 of the Assignments Act. This sec. 39, in my view, is not qualified at all by sec. 42, which appears to have a bearing only on secs. 40 and 41. It also differs from secs. 1 and 2 of the Preferential Assignments Ordinance, which it has replaced, in that the latter contains the words, "or which has such effect"—*i.e.*, of being preferential.

It was largely upon the strength of these five words in the ordinance that our own Court, in *Ross Bros.* v. *Pearson* (1905), 1 W.L.R. 338, decided that the mortgage was void.

It appears, however, that the five words in question had in themselves no particular significance, as in *Benallack* v. *The Bank of British North America* (1905), 36 S.C.R., p. 120, which was an action brought under an ordinance of the Yukon Territory substantially similar to our Preferential Assignments Ordinance, it was held that, in order to render the assignment void, there must be knowledge of the insolvency on the part of both parties and concurrence of intent to obtain an unlawful preference over the other creditors.

This should apply *a fortiori* to sec. 39 of our Act, inasmuch as, although substantially similar to the Yukon and our own Ordinance, it, nevertheless, differs from them (as above remarked), in not referring to the effect which the assignment may have.

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In *Molson's Bank* v. *Halter et al.* (1891), 18 S.C.R., p. 88, and in *Stephens* v. *McArthur*, 6 Manitoba Reports, p. 496, the main question was also as to the interpretation of the words, "or which has such effect," and the latter case also turned on the question of pressure, which does not arise here. In *Codville* v. *Fraser*, 14 Manitoba Reports, p. 12, the main point considered is the dominant motive which actuated the parties, in order to come to their real intent, and that, again, has nothing to do with the present case.

The chattel mortgage was given by the defendant Hourie to the defendant bank on October 3rd to cover two advances: a prior advance of $500 and an actual advance of $250.

In my opinion, under sec. 39 of the Act, and the decision in *Benallack* v. *The Bank of British North America, supra,* the mortgage is void as to the $500.

As to the $250, I think the mortgage should hold. I take this to be an actual advance. The fact that the amount was not taken out at once, but only a few days after, by Hourie does not make it a future advance, and so does not come under the prohibitions of the Bank Act. With reference to this transaction, considered singly and by itself, the bank cannot be said to have been a creditor, and, then, the fact that full consideration was given would negative the fraudulent intent. But the main point is that such a transaction is expressly declared valid by sec. 44 of the Act.

With reference to the distinction between the two advances secured by the one mortgage, the point arose in *Mader* v. *McKinnon* (1893), 21 S.C.R. 653, and Gwynne, J., referring to the third section of ch. 124, R.S.O., which is similar to our own enactment, said: "If, then, any portion of the amount to secure which the chattel mortgage in the present case was given could be held to have been a present actual *bonâ fide* advance of money made by the mortgagee, I should be of opinion that to such extent the mortgage would be good and valid, although as to the residue it could not be sustained, and that such a case was quite distinguishable from *The Commercial Bank* v. *Wilson* , 3 E. and A. Reports, p. 257."

The chattel mortgage, in my opinion, should then hold as to the actual advance of $250.

It was also urged for the defendants that the plaintiff has no standing in the case, not being an execution creditor. This, however, does not seem to be required by the Act, see. 48, sub-sec. *b*, of which says: "Where there is no valid assignment for the benefit of creditors, one or more creditors may," etc., and not "one or more execution creditors may," etc. It is true that in *Parkes* v. *St. George*, 10 O.A.R., p. 496, it was held that the plaintiff, not being a judgment creditor, could not maintain the action; but the action was one to impeach a chattel mortgage for irregularities by reason of its non-compliance with the provisions of the Chattel Mortgage Act, and not at all an action under the Preferential Assignments Act. So in *Hyman* v. *Cuthbertson*, 10 Ontario Reports, p. 443, the judgment was that the plaintiff, not being an execution creditor, could not dispute the defendant's possession of the goods. But the reason given was that the case did not come under the Assignments Act. So, also, in *Coats* v. *Kelly*, 15 O.A.R., p. 81, and in *Ross et al.* v. *Dunn*, 16 O.A.R., p. 552, where Burton, J.A., in giving judgment upholding the chattel mortgage, called attention to the fact that the action was taken and the mortgage impeached neither under the statute of Elizabeth nor under the statute against fraudulent conveyances.

There will be:—

(1) An order rescinding and declaring null and void the said chattel mortgage with respect to the said sum of $500 as against the plaintiff and other creditors of the defendant Hourie.

(2) An order for the delivery to the clerk of this Court of such property and moneys as are still in the possession of the defendant bank after satisfaction of the said mortgage rescinded in part as aforesaid, and for such further relief as may seem meet.

With costs to the plaintiff.

[TRIAL.]

1909

J. I. CASE THRESHING MACHINE CO. v. FEE.

Jan. 27.

Sale of Goods—Entirety of Contract—Intention of Parties—Sale by Description—Misrepresentation—Admissibility of Parol Evidence to Vary Written Contract—Acceptance by Buyer—Reasonable Opportunity of Inspection.

Plaintiffs agreed to sell defendant certain threshing machinery, consisting of "a second-hand, portable John-Abell engine, known as the Sutcliffe engine," separator, and other accessories. The engine was second-hand, and the other articles were new. The memorandum of the agreement was embodied in two documents, the reason given by the agent of the plaintiff being that they would not warrant the second-hand goods, but would warrant the new goods, the document relating to the engine containing no warranty. It was alleged that the engine was represented as having been recently re-built and as good as new. When the goods arrived, the defendant, who knew nothing of engines, made a cursory examination of the articles, and then signed the notes for the purchase price. Subsequently his engineer examined the engine and refused to have anything to do with it, on the ground that it was so badly out of repair as to be unsafe. The defendant thereupon refused to accept the goods. In an action for the purchase price:—

Held, that as the agreement was for articles necessary to constitute a complete threshing outfit, and the memorandum of sale was only severed on account of the warranty, the contract must be deemed to be an entire contract, and the defendant was not required to accept any portion of the goods if he was not required to accept all.

2. That the representations as to the character of the engine were not of a collateral nature, but were a description of the property to be sold, and the sale was therefore a sale by description, and as the goods delivered did not correspond with the description the purchaser was entitled to reject them.
3. That as the character of the engine to be sold was not sufficiently stated in the memorandum of sale, parol evidence was admissible to prove the description of the engine to be delivered.
4. That the execution of the notes for the purchase price after a cursory examination by the defendant, who was not capable of judging whether the engine was as described, was not an acceptance of the goods, but he was entitled to a reasonable opportunity of examining the goods with the assistance of one qualified to judge of the quality of the goods delivered, and to reject them if they did not comply with the description.

THIS was an action for the purchase price of certain threshing machinery sold to the defendant, tried before LAMONT, J., at Yorkton.

J. A. M. Patrick, for the plaintiffs.

C. D. Livingstone, for the defendant.

January 27. LAMONT, J.:—This is an action brought by the plaintiffs to recover the amount of six lien notes made by the defendant in the plaintiffs' favour, payable as to two of them on November 15th, 1907, as to two others on November 15th, 1908, and as to the last two on November 15th, 1909. The notes contained an accelerating clause, and were given to secure payment

of a second-hand portable steam engine, a wind stacker and loader, a quantity of belting, and attachments necessary for changing a horse-power threshing outfit to a steam-power machine. The agreement for these articles was made on August 20th, 1907. On that date, the plaintiffs' agent, John R. Franks, met the defendant at Sheho, and learning that he had a horse-power threshing outfit, proposed to him to change the machine to steam power, and after some negotiations sold him the above mentioned articles.

The plaintiffs' agent admits that at the time the agreement was entered into he stated to the defendant that he had a second-hand engine which was just the thing the defendant required, that the engine had been recently rebuilt, and that for the defendant's purpose it was just as good as a new one. The defendant agreed to take the engine and the other articles so as to have one complete steam threshing machine. The plaintiffs' agent then drew up two written contracts, one for the engine and one for the other articles. The defendant asked why he did not put them all in one contract, and the agent explained that if he did so the defendant would lose the warranty which the plaintiffs gave with the new goods, as they did not give a warranty with a second-hand engine. The defendant then signed the two orders. The order for the engine was an order for "one 16 horse-power portable J. Abell engine, known as the Sutcliffe engine." Some time later the engine and other articles arrived at Sheho. The defendant, who lived fifty miles away, happened to be in Sheho one day, and there saw the plaintiffs' agent Franks and the plaintiffs' machine expert. The three went down to where the engine was and looked at it. The defendant had never had an engine and knew nothing about one, and stated so to Franks. On seeing the engine, he said it looked pretty ancient. Franks said that the expert had examined the engine and there was nothing to fix about it. As Franks had to hurry to catch his train, they were only a few minutes looking at the engine. On returning to the office Franks asked the defendant to sign the notes sued on, which he did.

A short time afterwards the defendant came to Sheho with his engineer and a couple of men and teams to take the engine home. As soon as the engineer examined the engine he refused to operate it, and said he would have nothing to do with it. He pointed out that there were no fire grates in the engine, that there was nothing

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to keep the fire off the bottom of the ash-pan, and that in the ash-pan itself there were several holes and openings through which the fire would fall to the ground; the flame-sheet was badly burned and cracked, some of the flues were choked, and there were holes in the wire screen in the smoke-stack as large as a hen's egg, and that in the condition in which the machine was it was absolutely dangerous to take near a barn or stacks. The new goods appeared to be all that they were represented as being. The defendant then refused to take away either the machine or the new goods. He left them where they were, and told the plaintiffs' agent that he would not accept them, and also refused to pay the notes.

On January 8th, 1908, the plaintiffs' solicitor sent the defendant a notice which, after reciting the notes and the proviso containing the accelerating clause, declared on behalf of the plaintiffs, all the notes to be due and payable forthwith, and in the following May commenced this action.

The defence set up (1) that the contract was an entire one including both the engine and the new goods, (2) that the sale was a sale by description, and that the goods supplied did not answer the description. The statement of defence alleges that at the time the contract was entered into the plaintiffs' agent represented that the said machinery and every part thereof was in good, complete running and working order, that the engine had been recently rebuilt and was as good as new, and that all the said machinery was fit for the purpose of threshing grain; that these representations were untrue, and that the said engine was not reasonably fit for the purpose for which the plaintiffs sold it to the defendant. The defendant counterclaims for general damages and for $55 freight paid by him.

I will first deal with the question as to the entirety of the contract.

The question whether a contract for several things is an entire contract for all, or is to be considered as split up into separate contracts for the different articles, depends upon the intention of the parties and the circumstances of the case: Benjamin on Sales 5th ed., 193.

The fact that all the goods were contracted for at the same time, that they consisted of the different articles necessary for the completion of the defendant's machine as a steam thresher, and

that the only reason they were not embodied in the one order was because the warranty applying to the new goods did not apply to the engine, shews, *primâ facie*, that the contract was an entire one, as the clear intention of the parties was to make one complete steam threshing outfit, and the new goods were absolutely useless to the defendant without the engine. I hold, therefore, the contract to be an entire one.

Was the sale a sale by description?

On the sale of a specific article by description, the description is a condition where it is essential to the identity of the chattel, so that its falsity makes the chattel something quite different from what was contracted for: *per* Prendergast, J., in *Bannerman* v. *Harlow* (1908), 1 Sask. L.R. 301.

In that case the plaintiff sold to the defendant a second-hand engine, separator, tank and pump which were then in Manitoba, and took his lien notes therefor. At the time of the sale he represented that the engine and separator were in good, complete, running order, as good as new; that they had only been used for 120 days and were fit for the purpose of threshing grain, for which purpose the plaintiff knew the defendant was purchasing them. It was held by the Court *en banc* that this was a sale by description, and as the machinery delivered did not correspond with the description the defendant was entitled to reject it.

In *Varley* v. *Whipp* (1900), 1 Q.B. 513, 69 L.J.Q.B. 333, the plaintiff sold to the defendant a "self-binder" reaping machine which he said was then at Upton, and which he declared as having been used one season and having cut only about fifty or sixty acres. The defendant had not seen the machine, but relying on the plaintiffs' representations agreed to buy it. The statement that the machine had cut only about fifty or sixty acres was untrue. The defendant refused to accept it. In an action for the price, it was held that the description given was not a mere collateral warranty but an identification of the machine, that it was a sale by description, and as the machine delivered did not answer the description the defendant was not liable for the price. In that case, Channell, J., said: "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods but is relying on the description alone."

In the present case I find that at the time the sale was made

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the plaintiffs' agent represented to the defendant that the engine was in good working and running order; that it had been "recently rebuilt," and that, for the purpose of the defendant (which was that of threshing with a 28 x 46 inch Case separator) the engine was just as good as a new one. He also stated that the engine had been purchased by him from one Sutcliffe, and that it was then at Birtle, in the Province of Manitoba. The defendant had never seen the engine, and relied upon the description given by the plaintiffs' agent. Under the above quoted authority, I must hold the sale to be a sale by description.

It was contended, however, by the plaintiffs' counsel, that the order having been taken in writing, and the writing not containing these verbal representations, parol evidence was not admissible to shew that the representations had been made. I do not think this contention can be supported. The written contract described the subject matter of the sale as "one 16 horse-power portable J. Abell engine, known as the Sutcliffe engine." The word "Sutcliffe" in the contract does not designate a particular make or kind of engine, but simply the man from whom it was bought. The defendant had never seen the engine, and it is unbelievable that he would have purchased it without the representations made as to its quality and usefulness merely on the statement that it was a second-hand engine known as the Sutcliffe engine. The engine delivered was purchased from a man named Sutcliffe, but, supposing that Sutcliffe had a number of second-hand engines, some in good repair and some absolutely worthless, can it be contended that the sending to the defendant of any one of these engines would be a compliance with the contract? I do not think so. The parties having described the engine in the contract as the "Sutcliffe engine," parol evidence was admissible to shew what engine the parties meant by that description.

The next question is, did the engine correspond with the description?

Section 15 of the Sale of Goods Ordinance says that when there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description.

The evidence shewed that the plaintiffs obtained the engine from one Peter Sutcliffe, of Birtle, in the spring of 1907. Sutcliffe

had purchased the engine second-hand in the fall of 1905. In his evidence Sutcliffe stated that shortly before he purchased the machine it had been re-flued, and that immediately after he bought it he had new brasses and a new jacket put on it. The evidence also shews that flues have some times to be replaced within two years after they are put in, and that flame-sheets have been known not to last for two years without requiring repair. Under these circumstances, can an engine that was renovated two years prior to the sale to the defendant be said to be "recently rebuilt"? Apart from the plaintiffs' agent Franks, there was only one witness who gave evidence on the point, and he said that an engine rebuilt two years before could not be said to be "recently rebuilt." I am of opinion that his statement is correct. Where a machine is represented as being recently rebuilt the inference to be drawn is that the rebuilding has been of so recent a date that the machine is practically in the same state of repair and usefulness as it was the day the rebuilding was finished. I find that the engine in question in this action was not in that condition. I find that there was no fire-grate in the engine, that the spring which regulates the governors was missing, that some of the flues were choked up, that the flame-sheet was badly burned and cracked, that the ash-pan was so burned and twisted that if the engine were put in operation the fire would drop through to the ground, and that in the condition in which the engine then was it was absolutely unsafe to take near a farmer's barn or stacks for the purpose of threshing. I therefore find that the engine did not correspond with the description.

It was argued by the plaintiffs' counsel that even if the engine was not at the time of its delivery in working order that it could have been repaired at a small cost, and that the plaintiffs' expert offered to repair it. What it would have taken to make the engine answer the description I cannot say on the evidence, but in my view that is immaterial. The plaintiffs were bound in the performance of their contract to tender an engine that answered the description of the one sold, and if they did not do that the defendant was entitled to reject it.

It was further contended by the plaintiffs' counsel that even if the engine did not answer the description of the machine sold, the defendant by examining the machine after it had been delivered at Sheho, and then signing the notes sued on, accepted the engine,

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and that being so the condition became a warranty and he lost his right to reject the goods, and must rely on the warranty alone, for breach of which he can claim only damages. At the trial I was somewhat impressed with this argument, but on further consideration I do not think it tenable. Section 33 of the Sale of Goods Ordinance reads as follows:—

"33. Where goods are delivered to the buyer which he has not previously examined he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

"34. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

Here, the buyer did not accept the goods, unless the slight examination he made with the plaintiffs' agent and the signing of the notes constitutes an acceptance. Under sec. 33 he is not deemed to have accepted the goods unless and until he has had a reasonable opportunity for examining them. Did the defendant have that opportunity? He was personally present at the engine for a few minutes with the plaintiffs' agent. He knew nothing about an engine. The agent stated that the expert who was present had examined the engine and there was nothing to fix about it. The expert expressed neither assent or dissent, although he knew that the statement was not correct. The evidence is contradictory as to how long the examination of the engine lasted. The plaintiffs' agent says ten or fifteen minutes, the defendant two or three minutes. No examination at all was made of the inside of the engine beyond looking at the fire-box. In my opinion this cannot be considered as an examination within the meaning of the section. Such an examination means an examination on behalf of the defendant by some one who is competent to make an examination. The defendant himself had not sufficient knowledge of engines to say whether or no it complied with the contract. This inspection, therefore, was, for all practical purposes, no inspection at all. I am of opinion that the examination by his

engineer was the first opportunity the defendant had of examining the engine for the purpose of ascertaining whether or not it was in conformity with the contract. That examination was made within a reasonable time after delivery, and the defendant had not in the meantime exercised any proprietory right over the goods, nor had he done anything by which he lost his right to reject them: See judgment of Brett, J., in *Heilburt* v. *Hickson* (1872), L.R. 7 C.P. 455; also *Strait* v. *Shaw* (1908), 9 W.L.R. 72.

Besides, the plaintiffs' agent Franks did not think the defendant had lost his right to reject the machine, for he stated in his evidence that when he left town after getting the notes he understood the defendant would take the engine out and the expert would test it. The defendant, therefore, in my opinion, was justified in rejecting the engine, and, as I have found the contract to be an entire one, the other articles as well.

As to the counterclaim, the defendant claims $55, being freight paid on the engine by him to the plaintiffs' agent, who actually paid the freight on his behalf, and which the defendant subsequently paid to him. The written contract contains a clause by which the defendant agrees to pay freight charges "in case he should cancel this order or decline to accept this machinery." This clause can, it seems to me, apply only where the machinery shipped corresponds with the machinery sold, and as I have held that the engine delivered was not in conformity with the contract, the clause does not bind the defendant to pay freight on it, and he is therefore entitled to a return of the freight paid.

There will, therefore, be judgment for the defendant on the claim, with costs, and judgment for him on the counterclaim for $55 and costs. The notes sued on will be delivered up to be cancelled.

[IN CHAMBERS.]

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Feb. 1.

IN RE CLAUDE MCCREADY.

Extradition—Abortion—Evidence—Prima Facie Case—Accessory.

The accused was arrested at the instigation of the United States authorities charged with having procured an unlawful operation to be performed upon a woman. In support of the charge a deposition of the woman was presented which set out that she had been seduced by the accused and become pregnant; that he had taken her to St. Paul to have an operation performed; that he took her to a physician who made an examination of her; that afterwards the accused left St. Paul, and after his departure an operation was performed by the physician and a miscarriage resulted:—

Held, that as the deposition did not set out that the operation which was to be performed and which the accused took the complainant to St. Paul to have performed was the unlawful operation which was performed, and as there was no evidence to connect him with the unlawful operation, he must be discharged.

THIS was an application for the extradition of one Claude McCready, charged with having procured an unlawful operation to be performed upon a woman, in the State of Minnesota, and was heard before LAMONT, J., in Chambers.

Avery Casey, for the State of Minnesota.
Norman Mackenzie, K.C., for the accused.

February 1. LAMONT, J.:—When the matter came before me two weeks ago, Mr. Casey, acting on behalf of the authorities of the State of Minnesota, made an application for further time to perfect the evidence against the accused. He then stated that certain depositions had been forwarded to him, but that these were insufficient for the purpose, and he would require time to return them to St. Paul for correction. To-day he appears with practically the same material, and asks for a further remand. The application for remand is based solely upon a telegram from the authorities in St. Paul. When the matter was last before me, I stated that the matter had been dragging along since December 12th, 1908, and that unless the prosecution was ready to go on when the matter came up again to-day I would discharge the accused, as although under extradition proceedings the Court is supposed to give the prosecution every reasonable opportunity to secure their evidence, the law does not contemplate that a subject and resident of this country must be held in custody or under

bail indefinitely. I therefore refuse the application for a further remand.

In extradition proceedings of this character, the duty cast upon the extradition Judge, under the extradition treaties and our Extradition Act, is, simply to see if there is such evidence before the Court that the accused is guilty of the crime charged as would justify a magistrate in committing for trial when holding a preliminary inquiry under the Criminal Code. He has to see (1) that the offence charged is an extraditable offence; (2) that the evidence establishes a *primâ facie* case that an offence has been committed; and (3) that it was committed by the accused.

In this case the accused is charged with having, on the 16th day of November, A.D. 1908, at St. Paul, in the State of Minnesota, with intent thereby to procure a miscarriage of Ruby Fanning, a certain woman, unlawfully used on the body of the said Ruby Fanning, and inserted in the body of the said Ruby Fanning, a certain instrument, to wit, a catheter. This is the crime with which the accused stands charged before me. There is no question but that this is an extraditable offence. There is also no question as to its being an offence under our Criminal Code. The language of the information is practically word for word with the Code, and my duty is to see now whether or not the evidence is such as to establish a *primâ facie* case that the accused committed this crime.

In the information he is charged with having unlawfully used upon the body of the said Ruby Fanning, and inserted into the body of the said Ruby Fanning, a catheter. The evidence shews that he himself was not guilty of using any instrument as charged, but under our Code it is not necessary that he himself should be the one to use the instrument. Section 69 of the Code reads as follows:

"Every one is a party to and guilty of an offence

"(a) Who actually commits it.

"(b) Does or commits any act for the purpose of aiding any person to commit any offence.

"(c) Abets any person in the commission of the offence.

"(d) Counsels or procures any person to commit an offence."

Under this section all that is necessary to justify me in committing the accused, so far as the law of Canada is concerned, is to shew that he aided or abetted the commission of the offence, or that he counselled or procured some person to commit it. The

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only evidence which has been submitted to me (apart from certain admissions which the defendant has made, but in which admissions nothing was said to connect him with the crime charged) is the deposition of Ruby Fanning. To the reception of this deposition in evidence objection was taken by counsel for the accused. He contended that the requirements of our Act necessary to entitle it to be received had not been observed. I will not now deal with the objection, as in my opinion the deposition, even if received, is clearly insufficient to justify the committal of the accused. In her deposition Ruby Fanning sets out that in May last she had sexual intercourse with the said Claude McCready and became pregnant to him, and that on the 25th October she and McCready left Regina and journeyed together in the same train to the city of St. Paul, arriving there on the 27th October; that the purpose of their journey was to have an operation performed there upon the body of the said Ruby Fanning by a physician in the city of St. Paul; and that in furtherance of the said purpose the said McCready remained in the city of St. Paul until the 29th day of October; that on that date he took her to a physician's office, and the said physician made then and there an examination of the private and sexual parts of the said Ruby Fanning; that on the same date Claude McCready left the city of St. Paul and returned to Regina; that thereafter, on the 14th day of November, 1908, the said physician performed an operation upon the body of said Ruby Fanning, and that thereafter, on the 16th day of November, said Ruby Fanning had a miscarriage, and the child with which she was pregnant did then and there die as a result of said operation. Now, as I read this deposition, every word of it may be absolutely true, and yet the accused be absolutely innocent of the offence with which he is charged. The purpose of the journey of the accused and the said Ruby Fanning to St. Paul, as set out in the deposition, was to have an operation performed on the body of Ruby Fanning by a physician in St. Paul. That operation, from anything stated in the deposition or in the evidence before me, may have been a perfectly legitimate operation. There is nothing in the deposition which connects it with the operation which the physician on the 16th of November performed. It may have been that he took her there to have a legitimate operation performed, and that the operation that was performed by the physician after

he left and which produced the miscarriage may never have been discussed or thought of by the accused. I cannot assume that the operation which she alleges he took her to St. Paul to have performed was the criminal operation which was afterwards performed—if the operation subsequently performed was criminal. There may be a strong suspicion that it was, but whoever drew the deposition of Ruby Fanning was not sufficiently careful to have her say so in the deposition. If the accused counselled and procured an unlawful operation he would be as guilty as if he performed it, but, as I have said, there is nothing in the deposition to connect the operation which she says he took her to St. Paul to have performed with the operation which was, on the 14th November, over two weeks after he left, performed by the physician. And further: the deposition does not say that the operation performed by the physician was an unlawful operation. Section 303 of our Code requires that the use of the instrument on the body of a woman with intent to procure a miscarriage must have been unlawful. From the evidence before me I cannot say that the operation which was performed and which resulted in the miscarriage might not have been necessary to preserve her life, in which case it is not unlawful. Every miscarriage brought on by a physician is not unlawful, and I cannot assume without evidence that this one was. The law has been clearly laid down that while it does not require very strong evidence to justify a committal, there must be some legal evidence before the Court connecting the accused with the commission of the offence. From the material before me, and certain statements which it has been shewn were made by the accused, there seems to be some grounds at least for the suspicion that the accused counselled or procured the commission of an operation resulting in a miscarriage, but the evidence before me is not sufficient to connect him with it or to shew that the operation was an unlawful one. And, as was said by Osler, J., in *Re Parker*, 19 O.R. 612, if the parties concerned in prosecuting do not take sufficient pains to see that there is sufficient legal evidence before the Court to connect the accused with the crime charged, the Court has no option but to discharge the accused, as a criminal in extradition proceedings has the right to be discharged unless a *primâ facie* case against him has been made out.

I therefore discharge the accused.

[TRIAL.]

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Feb. 10.

GESMAN v. CITY OF REGINA.

Highway—Closing of by Municipal Corporation—Effect of By-law Closing Streets Passed Without Notice—Validity of—Effect of sec. 101, *Municipal Ordinance—Defect of Substance or Form.*

By a plan duly recorded in the proper land titles office, the area incorporated within the bounds of the city of Regina was shewn as divided into blocks and lots, streets and lanes. The defendant the city acquired block 197, excepting one lot, which was subsequently acquired by the plaintiffs, and other land, and being desirous of creating a number of warehouse sites, the city decided to close the streets and lanes leading to block 197, and for that purpose passed a by-law. No notice of this by-law was given to the registered owner of the lot subsequently acquired by plaintiffs. The defendants, having passed the by-law, proceeded to sell block 197 and portion of the streets and lanes so closed, and buildings were erected which obstructed the way of egress and ingress to plaintiffs' lot, and plaintiffs sued for a declaration that the streets and lanes closed were public highways, and for the removal of the obstructions:—

Held, that until notice is given to the registered or assessed owners of all land abutting upon any street or lane which it is proposed to close by by-law, under the provisions of sec. 5 of ch. 28 of the Ordinances of 1903 the city council has no jurisdiction to pass any by-law closing such streets.

2. That if any by-law is so passed without notice, the provisions of sec. 101 of the Municipal Ordinance (ch. 70, C.O., 1898) and 307 of the Regina Charter (ch. 46 of 1906), now sec. 193, City Act, ch. 16, of 1908, will not validate any act done under such by-law, the lack of jurisdiction to pass such by-law without notice not being "a want of substance or of form."

THIS was an action for a declaration that certain highways in the city of Regina which had been closed were still public highways and for an order that the obstruction be removed.

J. A. Allan, for the plaintiffs.

F. W. G. Haultain, K.C., for the defendant city.

J. F. Frame, for the other defendants.

February 10. LAMONT, J.:—This is an action for a declaration that Halifax street and the lanes in block 197 in the city of Regina, as set out on a plan of the said city, known as plan old 33, which the council purported to close by by-law, are still public highways, and for an order for the removal of the obstructions thereon.

The plaintiffs are the registered owners of lot 13 in block 197. Block 197 was originally part of section 30, township 17, range 19, west of the 2nd meridian. This section originally belonged to the Dominion Government, and, along with two sections belonging to the Canadian Pacific R.W. Co., was conveyed to E. B.

Osler and others, as townsites trustees, by deed bearing date October 29th, 1883. The agreement under which these lands were transferred to the said townsite trustees provided that the townsites should be surveyed and "laid out in town lots and streets and squares" by the said trustees, and that they should put the lots on the market and sell the same, and, after deducting the expenses of sub-dividing the land and the administration thereof, should divide the balance received between the government and the Canadian Pacific R.W. Co. The said trustees sub-divided a portion of said lands, including that portion of section 30 in reference to which this action is brought, and on January 19th, 1884, filed in the land titles office for the Assiniboia land regis-tion district a plan of said sub-division, which plan is now known as plan old 33. This plan shews that a portion of section 30 was sub-divided into lots and blocks, with streets between the blocks and lanes, extending down the centre of the blocks at the back of the lots, and connecting with the streets. One of these blocks was marked block 197, and between that block and block 198 was a street marked "Halifax street." Lot 13 in block 197 abutted on Halifax street, and extended to the lane in the centre of the block. According to this registered plan, lots in the city of Regina were placed on the market and sold.

By a deed bearing date October 25th, 1883, the townsite trustees sold said lot 13 in block 197 to James Browne, which conveyance was duly registered in the said land titles office at Regina on December 20th, 1887, and by transfer bearing date December 15th, 1887, James Browne transferred the said lot to S. L. Hicks, which transfer was also registered on December 20th, 1887.

On April 22nd, 1903, the said townsite trustees transferred to the Dominion Government all the lots in the said sub-division, according to the said plan, which were then not sold or disposed of. These included all the lots in block 197 except lot 13. By a grant dated June 27th, 1904, the Dominion Government transferred all the said lots to the city of Regina. On May 10th, 1906, S. L. Hicks sold and transferred said lot 13 to the plaintiffs, which transfer was duly registered and certificate of title issued to them.

On October 2nd, 1905, the council of the city of Regina passed by-law No. 339, closing up certain streets and lanes. Said by-law enacted as follows:—

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"Now, therefore, the council of the city of Regina assembled do hereby enact as follows:—

"1. That all portions of Osler street, Halifax street, Ottawa street, Montreal street and Quebec street, situate lying and being between the south line of Eighth avenue and the northern limit of Dewdney street, as said streets and avenue are set out in the map or plan of said city on record in the land titles office for the Assiniboia land registration district as old number thirty-three (33), be and they are hereby closed.

"2. That all lanes in blocks 192 to 199, both inclusive, as said blocks are shewn on a map or plan of said city on record in the land titles office for the Assiniboia land registration district as old number thirty-three (33), be and they are hereby closed.

"3. That the corporation of the city of Regina be and it is hereby authorized to sell or lease the areas of land formerly occupied by said streets and lanes hereby declared to be closed."

After passing the said by-law, the council sold the east half of Halifax street to the defendants the Western Manufacturing Company, and part of the west half to the defendants the Regina Lumber and Supply Company, and the other part to R. B. Ferguson, who, in turn, sold his portion to the Regina Lumber and Supply Company. The defendants the Capital Ice Company are now in possession of the north half of Halifax street between the said blocks 197 and 198, having purchased the same from the defendants the Western Manufacturing Company and the Regina Lumber and Supply Company. The defendants the Western Manufacturing Company have lumber piled on their portion of the street. The defendants the Regina Lumber and Supply Company have erected a barn on their portion, and have fenced the street in with their own land, and the defendants the Capital Ice Company have two ice houses erected on their portion of the said street. The defendant the Western Manufacturing Company have also taken possession of the lane in the rear of lot 13, and have erected buildings thereon, by which the said lane has become impassable.

It will be readily seen that if Halifax street and the lanes in block 197 are closed, the plaintiffs have no means of ingress or egress to or from their lot 13, and they have brought this action for a declaration that the street and the lanes are still public high-

ways. The plaintiffs' statement of claim also included a claim for damages for the deprivation by the defendants of the enjoyment by the plaintiffs of lot 13, but at the trial no evidence was offered on this claim, and the plaintiffs' counsel abandoned it.

In their statement of defence the city rely on by-law No. 339 and the fact that it has never been quashed or repealed. The other defendants rely on the said by-law and on their purchase from the defendant city. In their reply the plaintiffs deny that by-law No. 339 was ever properly or legally passed or that it ever became an effective by-law of the defendant city. The question to be determined is whether or not by-law 339 is a good and valid by-law. The by-law was passed under the authority of sec. 5 of ch. 28 of the Ordinances of 1903. Section 5 reads as follows:—

"5. The council of the city of Regina may pass by-laws for closing and selling or leasing any public highway the fee whereof is not vested in the Crown, provided that no such by-law shall be passed unless at least two weeks' notice of the intention of the council to pass the same be served upon the persons registered or assessed as the owners of the lands abutting upon the portion of the highway so proposed to be closed and sold or leased, and be published in at least two weekly issues of a newspaper published in the city previous to the passing of the by-law; nor until any person who claims that his land will be prejudicially affected thereby and petitions to be heard has been afforded an opportunity to be heard by himself or his agent in relation to the proposed by-law; and any such person so claiming, petitioning, and appearing shall be compensated for all damage to his land which he shall sustain by the passing of the by-law."

At the time of the passing of the by-law the fee in the highways closed was not in the Crown. The evidence shews that no notice of intention of the council to pass the by-law was served upon S. L. Hicks, who was at the time of the passing thereof both the registered and the assessed owner of lot 13.

Mr. Hicks had for years been a resident of Pasadena, California, and had up to the date of the by-law paid all taxes levied against his land by the defendant city. The plaintiff contended that the giving of the notice to the registered and assessed owners of the land abutting the highway proposed to be closed by the

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by-law was a condition precedent to the passing of the by-law, and until they were so served the council had no power to pass it.

For the defence it was contended, first, that the plaintiffs had no right to bring this action, because the right to notice and the right to compensation were personal to Hicks and did not run with the land.

Whatever force there might be in this contention were the plaintiffs claiming compensation under sec. 5 (concerning which I express no opinion), it cannot, it seems to me, have any application in an action of this kind, where the plaintiffs seek to preserve their common law right of access to land which they purchased according to a well-known and duly-registered plan, which plan shewed certain streets and lanes as public highways. That these streets and lanes were recognized as public highways by the defendant city is shewn by the fact that they made title to the remaining lots in block 197, according to the said plan, and also by the by-law upon which they now rely.

The defendants relied upon sec. 101 of the Municipal Ordinance (ch. 70 of 1898) and on sec. 307 of the Regina Charter (ch. 46 of 1906). Section 101 reads as follows:—

"101. In case no application to quash a by-law is made within two months next after the final passing thereof, the by-law shall, notwithstanding any want of substance or form either in the by-law itself or in the time or manner of passing the same, be a valid by-law."

No application was made to quash by-law No. 399. It is, therefore, necessary to determine whether the by-law was a valid by-law when originally passed, and, if not, whether sec. 101 validates it. Is the effect of this section to make valid every by-law, irrespective of its character, passed by the council, if no application to quash it is made within two months, or is its application limited to by-laws within the competence of the council to pass, but in the passing of which some irregularity has occurred? By the language of the section itself, its validating effect is limited to "any want of substance or form either in the by-law itself or in the time or manner of passing the same." The defect alleged against by-law 399 is that it was passed without notice being first served on the owner of lot 13 of the intention of the council to pass it. Is this fatal to its validity?

In the case of *Canada Atlantic R.W. Co.* v. *Township of Cambridge*, 11 O.R. 392, which was an action for a mandamus to compel the council to deliver to the plaintiffs certain debentures, being the amount of a bonus granted to them by a by-law of the defendant township, the defence raised the objection that the council had no power to pass the by-law, as it had not received the assent of the electors as required by sec. 346 of ch. 18 of 1883 (O.). The plaintiffs replied that the defect was one of substance or form within the meaning of sec. 333 of the same Act (similar to sec. 101), and that the by-law was validated by that section.

Section 342 of the Ontario Act gave to every municipal council the right to pass by-laws for contracting debts by borrowing on the rateable property of the municipality, but sec. 346 provided that "every by-law for raising upon the credit of the municipality any money not required for its ordinary expenditure and not payable within the same municipal year shall, before the final passing thereof, receive the assent of the electors of the municipality." The council of the defendant corporation passed a by-law granting a bonus to the plaintiff. The by-law did not receive the assent of the electors before it was finally passed. Rose, J., said: "It seems to me if a majority of the electors did not assent to the by-law, it is not within the proper competence of the council to pass it. The fault does not seem to be either in the form or substance of the by-law or in the time or manner of passing it."

In appeal, 14 A.R. 299, it was held that the non-assent of the electors was fatal to the by-law. Osler, J.A., at p. 307, said: "For, assuming that where promulgation makes a by-law proof against a motion to quash it after a certain time, it establishes also its validity for all purposes, yet it cannot validate a by-law which ordains something not within the competence of the council to pass; and by sec. 323, where a by-law which requires the assent of the electors has not received such assent, an application to quash it may be made at any time. *A fortiori*, therefore, such an objection is fatal in an action on the by-law."

This judgment was unanimously affirmed by the Supreme Court of Canada (1889), 15 S.C.R. 219, where Gwynne, J., used the following language: "In the present case, it is sufficient to say that the defect which has rendered the document in question

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utterly void, and, in fact, no by-law, cannot be cured by the promulgation clauses of the Municipal Institutions Act. These clauses apply only to by-laws which it was competent for the council of the municipal corporation to pass. Now, by sec. 559 of the Act, it was not within the competency of the municipal corporation to give to the proposed by-law in question here a third reading and to pass it, as it had not received the assent of the ratepayers in the manner provided by the Act."

If, in that case, it was not within the competency of the council to pass the by-law until it had received the assent of the ratepayers, I fail to see how the city council had power to pass by-law No. 399 before giving notice to the registered owners of the property to be affected by the proposed by-law. In both cases the legislature gave to the municipal council power to pass the by-law provided certain condition precedents were complied with. In the above-mentioned case the Supreme Court has held that the council had no jurisdiction to pass the by-law until the condition precedent had been complied with. That decision is binding upon me, and, as I cannot see any distinction in principle between the necessity for obtaining the consent of the electors and the necessity for serving the notice required by sec. 5 before the council shall pass the by-law, I must hold that the council was not competent to pass by-law 399 until the notice required had been given to the registered owner of lot 13. I therefore hold the by-law to be invalid; and the provisions of sec. 101 cannot, in my opinion, validate it. That section cannot confirm jurisdiction or make valid a by-law which the council had no power to pass. As was pointed out by Gwynne, J., in the case above referred to, a by-law which the council had no power to pass was no by-law at all.

The object the legislature had in view in passing sec. 101 is, I think, clear. Realising that the powers it was granting to municipal bodies must be enforced by individual officers and servants, and that in the passing and enforcement of by-laws to carry these powers into effect the requirements of the statute might not infrequently be overlooked or violated, the legislature desired to establish a period of limitation within which the by-law should be liable to be impeached for "any want of substance or form in the by-law itself or in the time and manner of passing it," but that, after the expiration of the time so limited, the

by-law, if unimpeached, should be valid. The failure to give the notice required by sec. 5 is not a defect in the substance or form of the by-law which can be cured by its non-impeachment for two months, but the notice is a condition precedent without which the council has no jurisdiction to pass the by-law.

The defendants further contended that, even if the by-law was illegal, the plaintiffs' action could not be maintained, as they are protected under sec. 307 of the Regina Charter. That section reads as follows:—

"307. In case a by-law or resolution is illegal in whole or in part or in case anything has been done under it which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law or resolution has been quashed or repealed, nor until one month's notice in writing of the intention to bring the action has been given to the city; and every such action shall be brought against the city alone and not against any person acting under the by-law or resolution."

This section was treated by all the counsel engaged in the case as being exactly similar to sec. 273 of the Municipal Ordinance. There is, however, a slight difference in the wording. Section 273 says "in case a by-law or resolution is illegal in whole or in part and in case anything has been done under it," etc. After some consideration, I have come to the conclusion that, so far as this action is concerned, there is no difference in meaning between sec. 273 and sec. 307. This section was taken from the Ontario Act, and has been the subject of numerous conflicting decisions in the Ontario Courts. In considering the section, the Court of Appeal for Ontario, in *Connor* v. *Middagh*, 16 A.R. 356, held that it was a bar only in respect of actions awarding damages for something done under the by-law, but that it is not a bar in an action to restrain the corporation from enforcing an invalid by-law. In that case Hagarty, C.J., in referring to the section, said: "We must see how far this bar operates. This is not a proceeding to enforce the by-law. It is not a claim to obtain possession of property held or taken under the by-law. It is simply a claim for damages against the corporation and its officers for acts done under the by-law, and it is only to such claims for damages that the legislature requires the preliminary proceedings

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of obtaining the judgment and decisions of the Courts as to the validity of the authority under which the acts were done for which damages are claimed."

In *Rose* v. *Township of West Wawanosh et al.*, 19 O.R. 294, Street, J., said: "It was objected on the part of the defendants that, even supposing the by-law to be illegal, they were protected by sec. 338 of the Municipal Act (our 307) from any action, because it had not been quashed. It is, perhaps, true that the plaintiff here might be unable until he had quashed the by-law to recover damages for anything done under even such a by-law as this; but the damages here claimed are trifling; the substantial relief sought is an injunction to restrain the defendants from proceeding to enforce the rights they claim under this by-law. Section 338 does not tie the hands of a person threatened with damages under an illegal by-law; it only prevents his bringing an action to recover damages for a wrong already done him until he has quashed it."

In *Bannan* v. *Toronto*, 22 O.R. 274, Boyd, C., held that "no preliminaries (as to notice or quashing) are needed when the by-law is on its face invalid, and the relief sought is to restrain action being taken thereon by the municipality which is injurious to the party asking the intervention of the Court."

In *Pease* v. *Town of Moosomin* (1901), 5 Terr. L.R. 207, which was an action for a declaration that a resolution of the council was illegal and void, and for a return of certain monies paid out of the civic funds under it, Wetmore, J., held that it was not necessary to quash the resolution before bringing action.

As the relief sought in the present case is a declaration that the streets and lanes are public highways and the removal of obstructions therefrom, I hold the action to be maintainable by the plaintiffs, although by-law 399 has not been quashed.

There will be judgment declaring that the portion of Halifax street and the lanes in block 197 which by-law No. 399 purported to close are still public highways. The defendant the city of Regina will have four months within which to validly close these streets and lanes. If, at the expiration of that time, this has not been done, the other defendants will remove the obstructions they have placed on Halifax street and the lanes in block 197. The defendant city will pay the plaintiffs' costs.

[TRIAL]

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Vendor and Purchaser—Default of Purchaser—Rescission of Contract—Forfeiture of Payments—Possession of the Premises—Time Essence of Contract—Intention of Parties—Peaceable Possession—What Constitutes.

Plaintiff was the owner of certain property in Yorkton, upon which were certain buildings in which she carried on business as dealer in implements and as a keeper of a feed stable. The implement business consisted largely of selling goods on commission as agent for several different machine companies. She entered into an agreement to sell the property in question to the defendant, together with the business carried on by her, and to use her best efforts to procure for the defendant the agencies for the several companies represented by her. The agreement provided for quiet possession of the premises by the purchaser until default, and that upon default the plaintiff could cancel the contract and retain all moneys paid by the purchaser in respect thereof. The defendant, being in financial difficulties, was unable to secure the agencies in question, notwithstanding that the plaintiff gave assistance to secure such agencies. The defendant made default in payment of the second instalment and the plaintiff served notice of cancellation. Subsequently the plaintiff entered into possession of the premises in the absence of the defendant, who on his return resisted the plaintiff's right to possession. The plaintiff sued for a declaration that the contract was cancelled, while the defendant claimed the return of the purchase price on the ground that he had not secured the agencies:—

Held, that the agreement having declared time to be of the essence of the contract, and there being nothing in the dealings between the parties to indicate that it was not really the intention of the parties that it should be so, it must be held that time was of the essence of the contract.

2. (Following *Steele* v. *McCarthy*, 1 Sask. L.R. 317) that time being of the essence of the contract and the defendant having made default under such agreement, and the plaintiff having performed her part of the contract, the plaintiff was entitled to cancel the contract under the provisions thereof, and such cancellation was not in the nature of a forfeiture against which the Court could relieve, but was distinctly a matter of agreement between the parties to which effect must be given.

3. That the Court could only order the return of the payments made by the defendant as an alternative to specific performance by the plaintiff, which could not be ordered, as the defendant was not ready and willing to perform his part of the agreement.

THIS was an action for a declaration that an agreement for sale of land was cancelled and that the plaintiff was entitled to possession of the premises, and was tried before PRENDERGAST, J., at Yorkton.

T. L. Metcalfe and *J. A. M. Patrick*, for plaintiff.

C. P. Fullerton, *J. F. MacLean* and *J. H. Parker*, for defendant.

February 13. PRENDERGAST, J.:—The plaintiff, who appears as vendor in an agreement for sale of four lots in the town of Yorkton, alleges that the defendant, who is the purchaser, has defaulted in making certain payments provided therein, and asks

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that it be declared that the said agreement is void, that she is entitled to possession of the premises, and that a cash payment of $2,000 made by the defendant shall remain her property, with her costs of action.

The defence is to the effect that the agreement contemplated not only the four lots, with the buildings thereon, but also the privileges and appurtenances belonging or appertaining thereto, and that the latter included the barn business and machine business then carried on upon the premises by the plaintiff; that the plaintiff has failed to deliver and is and has always been unable to deliver the said barn and machinery business; that he (the defendant) has not defaulted in any of the conditions and payments provided by the agreement, but is and always has been ready to fulfil his obligations; that the plaintiff forcibly ejected him (the defendant) out of possession of the said premises; and he claims, first, the return of the sum of $2,000 paid by him to the plaintiff; second, for loss of time, $600; third, for damages for loss of profits, $2,000; and, fourth, for legal expenses incurred in resisting the plaintiff's obstruction, $200, with costs.

The agreement is dated November 4th, 1907, and the following seem to be its most salient features:—

It provides for the sale of the four lots, "together with all the privileges and appurtenances thereto belonging or appertaining," and further on are the two following clauses:—

"It is further agreed and understood between the parties hereto that the privileges and appurtenances belonging or appertaining to the said premises as aforesaid shall include the livery, barn and machine business situated and carried on upon the said premises, and shall include the goodwill of the said livery, barn and machine business as heretofore conducted by the said vendor.

"The said vendor further covenants, promises and agrees that she shall use her best efforts to procure for the said purchaser the agency of the different machinery firms represented by her in the carrying on of the said machine business, and all expenses incurred in procuring the said agency for the said purchaser shall be borne by the said purchaser."

The consideration is stated as $8,000, payable as follows: $2,000 on the execution of the agreement, $2,000 on December

4th, 1907, and $1,000 on January 4th in the years 1909, 1910, 1911, and 1912.

There is a clause for possession and quiet enjoyment, which reads as follows:—

"And the said vendor shall and will suffer and permit the said purchaser, his heirs and assigns, to occupy and enjoy the said lots and premises from the date hereof until default shall happen to be made in the payment of the said sum of money above mentioned; subject, nevertheless, to impeachment for voluntary or permissive waste."

There is also a default and forfeiture clause in the following words:—

"And it is further expressly agreed that if the said purchaser, his heirs, executors, administrators or assigns, fail to make payments as aforesaid, or any of them, within the times above limited, or fail to carry out in their entirety the conditions and stipulations of this agreement in the manner and within the times before mentioned, the times of payment as aforesaid, as well as the strict performances of each and every of the said other conditions and stipulations being a condition precedent, and of the essence of this agreement, then the said vendor, her heirs, executors, administrators and assigns, shall have the right to declare this agreement null and void as fully and completely as if these presents had never been executed, by written notice to that effect personally served on said purchaser, his heirs, executors, administrators or assigns, or mailed in a registered letter, addressed to him or them, as the case may be, at the Yorkton, Saskatchewan, post office; and all the rights and interest hereby created or then existing in favour of the said purchaser, his heirs, executors, administrators or assigns, or derived under this contract, shall thereupon cease and determine, and the premises hereby agreed to be sold shall revert and revest without any further declaration of forfeiture or notice, or act of re-entry, and without any other act by the vendor to be performed or any suit or legal proceeding to be brought or taken, and without any right on the part of the said purchaser, his heirs, executors, administrators or assigns, to any reclamation or compensation for moneys paid thereon," etc.

The plaintiff commenced carrying on a barn and machinery

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business in Yorkton in the spring of 1900. The first was never but a feed barn business, but in the summer of 1907 the implement business had come to be considerable. It consisted mainly in the selling of farming implements, as agent of the International Harvester Company, the American-Abell Threshing Company, and the Fairchild Company for John Deere goods. Implements of the value of between $25,000 and $40,000 were being handled in a year. The agency of the International Harvester Company represented probably more than five-sixths of the plaintiff's business—nearly the whole of it.

On August 8th, 1907, the defendant entered the plaintiff's employment. His duty was to set up machinery, to go out in the country where machinery was being sold, and to make himself generally useful. He says himself that he thought he could conduct the business; that he considered for some time the advisability of procuring it; that he thought of it a couple of months, and made it a point to know what the business was. I should here say that the defendant is educated, observant, particularly intelligent, and has seen a good deal of the world. I have no doubt that he knew perfectly what the business amounted to and consisted of, and that he was aware that the agency of the International Harvester Company was practically the whole business, and that it was not within the powers of the party holding such agencies for the time being to transfer them at will. He knew, moreover, that those agencies were given out from year to year, and that that of the International Harvester was about to expire.

After many conversations on the matter, a draft agreement was made on November 2nd or 3rd, and handed over in typewritten form to the defendant, who took it with him and kept it some time. He says, "I had it in my possession 24 or 48 hours before execution."

On November 4th the agreement was executed, the defendant paid the plaintiff $2,000, received the keys, and took possession.

It appears that it was then mentioned to the defendant, and well understood by him, that the following payment of $2,000 (to become due one month later) was to be paid over by the plaintiff to the International Harvester Company in satisfaction of her liability to them.

The agreement being signed, and the defendant put in possession, the plaintiff, after that, introduced him to her customers, telling them that she had sold out to him, and retired altogether from the business.

On November 7th the plaintiff went down to Winnipeg expressly to introduce the defendant to the three companies, and try to procure him the agencies. After discussing the matter some time with Mr. Rodney, the manager of the International, and after the plaintiff had stated, among other things, that the defendant had already paid her $2,000 as evidence of her conviction that he was financially able, Mr. Rodney inquired about a writ issued against the defendant by the Union Bank on November 23rd for $143, and finally told him he was aspiring to something too large for him, advising him at the same time to get a partner or some kind of security. The manager of the American-Abell told them that their agency would go with the International. The Fairchild Company seemed disposed to advance goods on some basis or other, but the defendant did not seem to think it worth anything without the International Agency. Later W. J. Hamilton, who was either the local agent or the travelling agent of the International, being at Yorkton, the plaintiff approached him also, with a view of securing the agency for the defendant. Called as a witness, Hamilton said that she was pretty aggressive about it; that she kept at him pretty persistently; that he thought she made it a personal matter, and that she appeared anxious.

The defendant says that, after his interview with Rodney, he complained to the plaintiff that he had not got the kernel with the shell.

I might mention here, as to the defendant's financial status, that from November 23rd, 1907, to March 20th, 1908, seven writs were issued against him for sums varying from $50 to $289, and judgment was eventually secured against him in several cases.

After coming back from Winnipeg, the defendant says that he tried to find a partner, but could not.

On November 26th the plaintiff, having on several occasions during that month put up her horses at the barn in question, the defendant sent her an itemised bill for the same, the last item being of that same day.

Nothing more of any moment seems to have occurred until

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December 4th, when the second instalment came due. The plaintiff then sent word to the defendant, saying that she required the money to pay the International, and he replied as follows (exhibit D) on the same day:—

"In answer to the question you left for me with William McCann as to the International Harvester Company drawing on me, I am not prepared for such a contingency, and since our talk with Mr. Rodney I must get a partner."

The defendant says, in a general way: "After the first payment was due (December 4th), I was frequently requested to pay the money."

Being again pressed for payment, the defendant, on December 21st, sent to the plaintiff a letter (exhibit C), which is in the following words:—

"I see a fighting chance in Winnipeg and go down this morning."

The defendant says that he meant by that that he thought Mr. Rodney might take a guarantee company.

The defendant, having accordingly gone to Winnipeg, again saw the manager of the International the same day, but could not come to terms; so he came back to Yorkton and advised the plaintiff that he could not get the agency.

On December 31st the plaintiff caused a written notice to be served on the defendant. It is signed "J. A. M. Patrick, solicitor for the vendor, Mrs. Jane Hole," refers to the agreement, sets out at full length the clause therein which is hereinabove reproduced as the default and forfeiture clause, and ends as follows:—

"Take notice that you have made default in payment, and the vendor, Mrs. Jane Hole, hereby declares this agreement null and void."

"And further take notice that the said vendor, Mrs. Jane Hole, desires you to give up possession of the said premises at once."

The defendant did not give up possession, but instructed his solicitor on the same day to send to the plaintiff's solicitor a letter (exhibit 1), in which, after referring to the notice cancelling the agreement having been served, he says:—

"I have advised Mr. Wilson to state that as soon as Mrs. Hole carries out her part of the agreement he is ready and willing to

carry out his part. If Mrs. Hole will deliver to him the premises above-mentioned, together with the machine business and livery business which she sold him, Mr. Wilson is ready to make the payments called for in the agreement.

"If Mrs. Hole is unable to carry out her part of the agreement, Mr. Wilson will consider terms of settlement by which the parties can be placed as nearly as possible in the same position as they were before the contract was entered into, together with any actual damage he has suffered by reason of her non-fulfilment of the contract.

"In the meantime Mr. Wilson intends to retain possession of the premises."

On the morning of January 22nd, when nobody was in the barn, the plaintiff made entry, with two of her hired men, with the intention of taking possession. The plaintiff having returned a few minutes later, a scuffle ensued, which ended by the defendant being arrested, and the events of that day were the matter of long argument by counsel, as upon it turns the question as to who ultimately remained in possession on that occasion, and in whose possession must the premises be deemed to have been at the time of the trial. But I will deal with this later, and only touch upon it now, as this completes the statement of the facts of the case.

The main ground of defence—and upon it revolves the whole case—is that the plaintiff undertook, under the agreement, to transfer to the defendant the three implement agencies which formed part of the business.

I do not think that this is at all tenable. First of all, if such had been the intention, the parties would more likely have first made sure that this could be done, before the agreement was executed, the $2,000 paid, and the premises delivered over.

There is also the statement, sworn to by Mr. Patrick's clerk, that just after the agreement was executed, the defendant expressed his satisfaction, and said to him, "If those agencies only come my way I will be able to make the next payment without difficulty." Then there are other implement companies than the three named, of which the defendant might have procured the agencies, so that the procuring of the latter was not absolutely vital to carrying on a machinery business on the premises.

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The defendant also says that, after being told by Mr. Rodney that he could not get the International Agency, he complained to the plaintiff that he had not the kernel with the shell. Why should he complain? If this agreement was made subject to the contingency that the plaintiff should procure the agencies, he had only to say that, the contingency failing, the agreement was off. But, on the contrary, being aware that the agreement was absolute and definite, he realised that his expectations would not be fulfilled, and, feeling disappointed, he expressed that disappointment by complaining. I might here remark that this is the only occasion when he went even so far as to utter a complaint. It was not a complaint that was in order on his part under the circumstances, but the strongest kind of remonstrances. Neither is his conduct up to December 31st, when he was served with the default notice, at all consistent with his ground of defence. Even when the plaintiff pressed him for the payment due on December 4th, his letter in reply (exhibit D), as well as that other one (exhibit C), where he speaks of having still another fighting chance, both rather apologetic in tone, in no way discloses the mental attitude that would have been natural at that juncture if he had felt that he was not getting what had been contracted for. The main point, however, is that the very wording of the agreement clearly disproves the defendant's contention. After stating that "the privileges and appurtenances belonging or appertaining to the premises shall include the livery barn and machine business . . . and shall include the goodwill of the said livery barn and machine business," it proceeds thus: "The said vendor further covenants, promises and agrees that she shall use her best efforts to procure for the said purchaser the agency of the different machinery firms represented by her."

This, in my opinion, is conclusive.

The plaintiff did agree, however, to use her best efforts to procure these agencies. Did she do so? Being asked the straight question: "Confining the matter to the International (which was practically the whole business), what could Mrs. Hole have done that she did not do to procure the agencies?" the defendant replied, "She could have obtained it on Mr. Rodney's suggestion—that is to say, by going security for me. She could have taken the contract herself. She could also have sold it to somebody

else who had Mr. Rodney's sanction as to being sufficient security. I cannot suggest now anything more that she could have done." Or, in other words, the plaintiff might have taken all the responsibility, which means have made herself liable for all the losses, whilst the defendant would have taken all the profits. I think that this disposes of this point altogether.

I am of opinion, then, on this branch of the case, that the plaintiff has completely performed her part of the agreement.

As to the time being here of the essence of the contract, I do not see how this can be disputed. The agreement so states in unmistakable terms, and I cannot conceive that the default and forfeiture clause above reproduced could be made stronger.

The rule has been laid down repeatedly that it is not enough that time should be declared in the written agreement to be the essence of the contract, but that, moreover, there should be nothing in the subsequent conduct of the parties to shew that such was not really the intention. The case of *Lowther* v. *Heaver* (1889), 4 Ch. D. 248, 58 L.J. Ch. 482, 60 L.T. 310, was decided on that principle, and so did the Manitoba Courts in *Barlow* v. *Williams* (1906), 4 W.L.R. 233. But here no contrary intention of the plaintiff appears. As soon as the payment of December 4th was due, the plaintiff called for it. The defendant himself says that after that he was frequently asked to make the payment. When the plaintiff had him served with notice of default on December 31st, it was only 27 days after this payment was due, and in the interval she had made those frequent requests, and he had written —letter (exhibit C) dated December 31st—about his "seeing a fighting chance in Winnipeg and going down in the morning;" which is, in itself, an acknowledgment that he was being pressed. It is also in evidence, as stated, that the defendant knew, when entering into the agreement, that the plaintiff would require the instalment due on December 4th to pay the International; and in *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519, where the purchaser was aware that one of the instalments would be used to pay off an indebtedness of the vendor, Anglin, J., pointed out that not only was there a clause in the contract making time of the essence thereof, but that adequate reasons for such stipulation had been communicated by the vendor to the purchaser, and agreed to by him.

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As to the provision for the forfeiture of payments being in the nature of a penalty, I would refer to the decision of our own Court *en banc* in *Steele* v. *McCarthy* (1908), 1 Sask. L.R., 7 W.L.R. 902. In that case the default and forfeiture clause was substantially the same as in the present one, and the learned Chief Justice Wetmore said (at p. 908), in delivering the judgment of the Court: "The simple question is, was the provision that time should be the essence of the contract, and that, on default of keeping the covenants and making the payments provided for, the defendant could give notice cancelling the agreements and render it void, a matter of agreement or a provision respecting a penalty? I am of opinion that it was distinctly a matter of agreement, and not a provision creating a penalty. I am quite at a loss to understand how the term 'penalty' can apply to a provision of the sort I am discussing. If a provision merely related to the forfeiture of payments made, I can quite understand how the Court might construe the payment proposed to be forfeited in the nature of a penalty; but here is an agreement by which the parties have mutually agreed that, on default of the performance of certain covenants or the making of certain payments by one party to the other party, such other party may determine and put an end to the agreement; that is distinctly a matter of agreement, and if parties choose to insert such a clause in a contract they must be held to it. This Court cannot make an agreement for them or alter the agreement they have made. It is stated in some of the books that it is a question of intention whether time shall be of the essence of the contract or not. When the parties have expressly provided in their agreement that it shall be, I see no way by which the Courts can, on any principle known to me, escape giving effect to their mutual agreement."

But I must say that I do not see how this question of time being or not being here of the essence of the contract can affect this case. It would be a very important question, and a determining one indeed, if the defendant were asking for specific performance, because he would then have first to show that his rights have not been forfeited by lapse of time. But the defendant has not asked specific performance; he does not want at all what the agreement (as I interpret it) contemplates, it being, in his view, without the agencies, a mere shell—"a shell without the kernel."

Nor do I see that it matters (and this has reference to the defendant's claim for a return of the $2,000) whether the forfeiture clause is in the nature of a penalty. Supposing it were? The return of the $2,000 could only be decreed against the plaintiff as an alternative left to her between that and the performance of her part of the agreement. In order to have standing before this Court, the defendant must at least be in a position to say: "I am ready to perform my part of the agreement; I ask the Court to compel the plaintiff to perform hers; and if she does not do so, I claim the return of $2,000." Here, on the contrary, the defendant is not willing to perform his part of the agreement; he does not ask that the plaintiff be compelled to perform hers, and yet he claims the return of the money. This is what distinguishes this case from a dozen cases cited for the defendant, and as many for the plaintiff, and which it is needless to review, as they have no resemblance to the present one. Of course, it might be different—because the defendant's claim for specific performance would then be a mere matter of formality and in that sense idle—in a case where the vendor would have placed himself in a position where it was impossible for him to perform his part of the contract. But I have held that, very far from that being the case here, the plaintiff has already done all that she was called upon to do under the agreement.

The foregoing, besides establishing the plaintiff's claim, also disposes of the defendant's counterclaim for the return of the $2,000, for loss of time ($600), and for damages for loss of prospective profits ($2,000).

There remains to be dealt with the defendant's counterclaim of $200 for legal expenses incurred in resisting the plaintiff's alleged obstruction at the barn on January 22nd, already briefly alluded to.

The facts, in brief, are as follows:—On January 21st the plaintiff, who was then living on her farm, came to Yorkton, with two hired men. The premises in question were left by the defendant that night in care of the stable boy, who slept on the premises. Next morning the stable boy left the barn unattended, with all the doors wide open, and went to breakfast. The plaintiff and her two hired men then made entry, and claimed to be in possession. When the defendant returned there was a prolonged struggle, and many other things occurred from that moment

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until the evening which, to my mind, are immaterial, for, in order to ascertain the plaintiff's position, we have, in my opinion, to go back to the time in the morning when she was alone, with her two hired men, in the barn. Was she then, at that time, in quiet and peaceable possession? What is required to constitute quiet and peaceable possession depends on circumstances. It is obvious that, in order that it should be peaceable and quiet, it is not required that possession should be effected with the consent of the party claiming an adverse interest, or else the question would never arise. In this case, however, the defendant agreed to the clause that the vendor would "suffer and permit him to occupy and enjoy the said lots and premises . . . " only "until default shall happen to be made in the payment of the said sum of money." Then there is the default and forfeiture clause, providing that, in case of default, the plaintiff should have the right upon notice "to declare the agreement null and void as fully and completely as though these presents had not been executed," and that "all the rights and interests hereby created . . . in favour of the said purchaser . . . or derived under this contract, shall thereupon cease and determine, and the premises hereby agreed to be sold shall revert and revest without any further declaration of forfeiture, notice or act of re-entry, or without any other act by the vendor to be performed or any suit or legal proceeding to be brought or taken." The defendant should have vacated the premises in compliance with this stipulation and the notice. He had no longer any right to be there. The plaintiff committed no act which, even on the part of a stranger or in any circumstances, would amount to a breaking in; she did not even turn a key or lift a window or a latch; she found the doors open, the barn vacant and unattended, and she entered. Under the agreement she had a right to possession, and, having thus acquired it peaceably and quietly, she was, in my opinion, from that moment in quiet and peaceable possession, and whatever costs the defendant may have incurred to oust her of this possession must be his loss. If this view is correct, it, of course, disposes of this last item of $200 of the defendant's counterclaim.

All the items of the counterclaim are then dismissed.

As to costs. It might, perhaps, be argued that, having chosen to resort to the proceeding of giving notice and taking possession,

it was not in order for the plaintiff to resort to the further proceeding of an action, and that the costs of the latter should not, at all events, be borne by the defendant. The answer to that is that, if the action was a useless and idle duplication of proceedings, the defendant should have made it clear that he was not contesting it, or was only contesting it in the sense and to the extent of bringing in a counterclaim. The defendant did not make it clear in his evidence that he considered that the premises were worth nothing to him, and that he abandoned possession of them to the plaintiff. If he had made that as clear in his statement of defence, I probably would experience difficulty in awarding costs against him. But his defence, besides being ambiguous in several other respects, and alleging virtually that the plaintiff's possession was obtained by violence, distinctly alleges that he has not defaulted in any payment, but has, on the contrary, performed all his part of the agreement, which strikes at the root of the plaintiff's claim. The plaintiff is, then, entitled to her costs.

I do not see that it is necessary to declare that the $2,000 received by the plaintiff shall remain her property. I do not think that such a declaration is customary, and it is, moreover, implied here by the fact of the counterclaim being dismissed.

There will be a declaration that the agreement is rescinded and void.

And an order for possession as prayed for.

With costs to the plaintiff.

[TRIAL.]

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VACHOE v. STRATON.

Promissory Note—Verbal Agreement as to Extension of Time for Payment—Principal and Agent—Commission on Sale of Land—Duty of Agent—Sale Without Agent's Knowledge.

Plaintiffs, as executors, sued on a promissory note. Defendant admitted the note, but alleged a verbal agreement for the extension of time for payment. He also counterclaimed for commission on sale of land, it appearing that deceased had promised him a commission if he could procure a purchaser. The defendant interested a party in the property, but the latter, finding it impossible to raise sufficient money to carry the sale through, mentioned the property to a third party, who went to the deceased and purchased on the terms stated to the defendant, without the defendant's knowledge, and without the deceased being aware that the purchasers had learned that the property was for sale through any efforts on the defendant's part:—

Held, that the date of payment expressed in the promissory note could not be varied by parol evidence.

2. That in order to entitle the agent to commission on sale of land it must be shewn that the sale is the direct result of the agent's efforts, and it is not sufficient that he mention the property to another person who is not his agent, nor the agent of the purchaser, and who afterwards mentions it to a third party, who purchases.

THIS was an action to recover the amount of a promissory note, with a counterclaim for commission on sale of land, tried before NEWLANDS, J., at Saskatoon.

R. W. Shannon, for the plaintiff.

Jas. McKay, K.C., for the defendant.

February 16. NEWLANDS, J.:—This is an action on a promissory note for the sum of $5,478.33, made by defendant in favour of James Flanagan, deceased. Defendant admits the making of the note, but says that while on the face of it the said promissory note appeared to be absolute as between the said James Flanagan, deceased, and himself, it was at the time of the making thereof agreed that the money secured thereby should not be payable until the 27th February, 1909. The defendant, by this defence, seeks to alter a written contract by parol evidence, which cannot be done, and there must therefore be judgment for the plaintiffs for the amount claimed, with interest and costs. The defendant also counterclaims for $6,250 commission due him for the sale of certain property belonging to said James Flanagan, deceased.

In order that defendant should succeed on his counterclaim he must prove (1) that there was an agreement between himself

and Flanagan that he should receive a commission on his obtaining a purchaser who would purchase the property at a price and on terms agreeable to Flanagan; and (2) that he did obtain such a purchaser.

As to the agreement between the parties, I am of the opinion, from all the evidence, that there was such an agreement, and that Flanagan did agree to give defendant a commission on his obtaining a purchaser for said property who would purchase same at a price and on terms agreeable to him. Now did he obtain such purchaser?

The evidence shews that the defendant offered the property to one A. Bramley Moore after obtaining from Flanagan his price and terms; that Moore told the defendant he would either take the property himself or obtain a purchaser for him; that Moore found that the first payment of $30,000 was more than he could raise, so he (Moore) submitted the proposition to Miller and Robinson, of Lloydminster; that one of that firm went to Saskatoon and saw Flanagan, and purchased the property for the price and on the terms mentioned by defendant to Moore, but did not communicate with defendant in any way, and defendant did not know that the purchasers were obtained by Moore until after this suit was commenced. There was no evidence that Moore was an agent for either the defendant or the purchasers; he was simply a third party who said he could get a purchaser and who afterwards did get a purchaser. No doubt the property would not have been sold if defendant had not spoken to Moore, but is that sufficient?

In *Beable* v. *Dickerson* (1885), 1 Times L.R. 654, the facts were very similar to this case, and the agent was held not entitled to a commission. There the plaintiff instructed the defendant to sell for him fifty shares in the London and South-Western Bank (Ltd.), by auction or otherwise, and agreed to give him a commission of five per cent., and handed him authority to sell the shares. The defendant accordingly advertised them for sale by auction. After the insertion of an advertisement, the London and South-Western Bank communicated with defendant and informed him that, as they did not like their shares being advertised, they could find a purchaser for him. Afterwards the bank wrote to him that they had sold the fifty shares standing in plaintiff's name, and defendant informed plaintiff of the fact. Defendant received a further letter from the bank enclosing him a transfer to get executed by plaintiff.

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The transfer having been sent by defendant to the plaintiff, and having been duly executed by the latter, was subsequently forwarded by defendant to the bank, who sent him a cheque for £857 10s. A few days afterwards he forwarded plaintiff a cheque for £814 12s. 6d., being the amount of the proceeds of the sale, less five per cent. which he kept as his commission. Plaintiff then brought action for £42 17s. 6d. as money had and received for his use. The county court Judge before whom the action was tried gave judgment for plaintiff on the ground that the shares had not been sold by the defendant or through his instrumentality. On appeal to the Queen's Bench Division, Coleridge, L.C.J., and Grover, J., dismissed the appeal. Lord Coleridge, in giving judgment, said that defendant had allowed the bank to find a purchaser for the plaintiff's shares without communicating with him (defendant) in any way, and that defendant, not having sold the shares, was not entitled to the commission. There seems to be no material difference between that case and this one. Here the plaintiff allowed Moore to find a purchaser without communicating with him. Moore was the person who obtained the purchaser and not defendant, and therefore defendant would not be entitled to the commission.

Amongst the cases cited by Mr. McKay on defendant's behalf was *Wilkinson* v. *Alston* (1879), 48 L.J.Q.B. 733, 41 L.T. 394, where the sale was made through a third party to whom plaintiff (the agent) had offered the property. The Court of Appeal held that the property was offered to the third party as agent of the purchaser, and Bramwell, L.J., said, "I do not see any difference between a proposal made to the agent of a purchaser and one made to the purchaser himself," and the plaintiff was entitled to his commission. The other Judges, Brett and Colton, L.JJ., agreed with him that Wise, the third party, was the agent of the purchaser, and that plaintiff fulfilled his contract in introducing the property to be sold to the agent of the purchaser.

In *Bailey* v. *Chadwick* (1877), 35 L.T. 740, the plaintiffs were ship auctioneers, and defendant employed them to sell, by public auction or otherwise, the steamship Bessemer. It was agreed that if the ship was not sold by auction but a sale was subsequently effected "to any person or firm introduced by" the plaintiffs, "or led to make such offer in consequence of" plaintiff's "mention

or publication of the ship for auction purposes," the plaintiff should be paid a commission of one per cent. on the purchase money. At the trial, Lord Coleridge, L.C.J., ruled that these words included a sale which was the indirect consequence of advertisements published by plaintiffs for auction purposes. The evidence shewed that, though the purchaser must have made his offer through hearing of the advertisement, neither he nor his agent had themselves seen it. The facts were that plaintiffs advertised the Bessemer for sale and put her up to auction, but she was not sold. Defendant afterwards sold her to a person named Wilson, who purchased as the agent of one Sugden. At the trial it was proved that one Pearson, who wrote to the plaintiffs to inquire about the Bessemer shortly after the auction, had met Sugden and had a conversation with him about the auction, and Sugden then stated if he had been at the auction there would have been a bid. This conversation was previous to Sugden's purchase through Wilson. On an application for a new trial, the Court, Coleridge, C.J., and Denman, J., refused a rule, on the ground that the words "in consequence of" were very large words, amply sufficient to include indirect as well as direct consequence. On appeal, (1878) 37 L.T. 593, the Court, composed of Bramwell, Brett and Colton, L.JJ., entered judgment for the defendant on the ground that there was no evidence that the subsequent sale of the ship was effected to a person who was led to make the offer in consequence of the plaintiffs' mention or publication of the ship for auction purposes. This decision was reversed by the House of Lords (1878), 39 L.T. 429, on the ground that there was no question of law in the case, and that upon the facts set out there was ample evidence to go to the jury in support of the plaintiff's claim. This case is, therefore, no authority, as the facts here are different.

Upon the whole, I am of the opinion that the weight of authority is that the defendant, to earn his commission, must be the direct cause of the sale; that it is not sufficient that he should mention the property to a person who afterwards mentions it to the purchaser, but in order to earn his commission he must himself bring the purchaser and vendor together, and he does not earn his commission if he does this through the medium of another party who is neither his agent nor the agent of the purchaser.

[TRIAL.]

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PARSONS v. ALBERTA-CANADIAN INSURANCE CO.

Feb. 18.

Fire Insurance—Application—Misrepresentation in—Policy Void on Account of—Knowledge of False Representation by Agent of Company—Effect of.

Plaintiff insured a building with defendant company, and made certain statements in the application as to fires used on the premises which were found to be false. The premises were destroyed by fire, and the company disputed liability. In answer to the defence of misrepresentation, the defendant pleaded that the company's agent, who had filled out the application, was aware of the condition of the premises:—

Held, that the policy was void on account of the mis-statements contained in the application.

2. That even if the plaintiff's agent had been aware of the condition of the premises, as it appeared that he had filled out the application and had filled in the answers to the questions upon which the misrepresentations were based, he would be acting as agent of the plaintiff and in fraud of the company, and the company would not be bound by the policy or affected by his knowledge.

THIS was an action to recover the amount payable under a policy of fire insurance, and was tried before NEWLANDS, J., at Regina.

G. H. Barr, for the plaintiff.

J. A. Allan, for the defendant.

February 18. NEWLANDS, J.:—In this action the plaintiff signed an application for fire insurance which contained, under the general heading of "heating," after answering questions that there were no stoves, furnaces, pipes or chimneys, the following questions and answers:—

"12. Are other fires used on the premises? If so, for what purpose? A. No, not in building.

"13. What kind of fuel is used? A. None.

"14. How are ashes disposed of? A. None."

These answers are made part of the contract, and form the basis of the liability of the company, by the following clause in the application, which is signed by plaintiff:—

"The applicant hereby covenants and agrees to and with the said company:

"That the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known

to the applicant and are material to the risk, and that the above diagram, if any, shews all buildings or combustible material exposing the property proposed for insurance; and agrees and consents that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of the insurance contract."

The above answers are admitted by the plaintiff to be untrue.

These answers being false, the policy is avoided, and the plaintiff cannot recover, unless, as the plaintiff contends, the company is prevented from setting up that ground of avoidance by reason of its agent, Murray, knowing at the time of the application that these answers were untrue and that the plaintiff had a kettle or furnace upon the premises for the purpose of rendering tallow.

The only evidence produced by the plaintiff upon this question is that of his brother, who swears that he took the company's agent over the premises to be insured before the application was signed, and at that time there was a kettle or furnace in the storehouse for rendering tallow, with a pipe from it to the outside of the building. The agent swears that he does not remember whether this kettle or furnace was inside or outside the building when he inspected it, but that if it was inside the storehouse it was not connected by a pipe to the outside of the building. This evidence of the agent is, I think, corroborated by the application, the answer to the question "Are other fires used on the premises" being "No, not in building" and the proof of loss put in signed by plaintiff, which contains the following statement: "The occupancy of the premises had not changed since the above insurance was issued, except that tallow was rendered in storeroom." As plaintiff has not proved that defendant's agent had any knowledge that the answers were untrue, it is unnecessary for me to consider what effect they might have upon defendant's liability. I may say, however, that the case of *Biggar* v. *Rock Life Assurance Co.* (1902), 1 K.B. 516, 71 L.J.K.B. 79, 85 L.T. 636, is an authority against plaintiff's contention that such knowledge would alter the liability of the company. There, as here, the agent filled up the application for the insured. He would, therefore, be acting as the agent for the insured, not the company, and by putting false answers to the questions asked would be acting in fraud of the company, and the

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company would not be bound by the policy. I am of the opinion, therefore, that even if plaintiff had proved this contention the company would still not be bound by the policy. Judgment for defendants with costs.

[IN CHAMBERS.]

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Mar. 6.

THE KING EX REL. DALE v. LANZ.

Local Improvement Act—Controverted Election—Admissibility of Affidavit to Prove Election Void—Evidence as to Disqualification of Voters—Conviction for Non-payment of Taxes—Chambers Summons—Signature of by Chamber Clerk—Judge persona designati.

An application was made under the provisions of the Local Improvement Act to oust a councillor on the ground that three of the voters voting for him had not paid their taxes and were therefore disqualified. Evidence in support of this allegation was given by affidavit, which shewed that the voters in question had been convicted for non-payment of taxes, and which also contained an allegation that their taxes had not been paid, the kind of taxes not being specified:—

Held, that the provisions of the Act contemplated evidence in support of the application being given by affidavit, and therefore affidavits of which no notice of intention to read had been given might be read.

2. That the conviction by a justice of the peace of the voters objected to for non-payment of taxes was not sufficient evidence that they had not in fact paid their taxes.
3. That, as the affidavits did not shew that the taxes which it was deposed had not been paid were local improvement taxes due the district, the fact was not sufficiently proved.
4. That the summons was irregular, being signed by the chamber clerk, and not by the Judge granting the same, who alone had jurisdiction under the Act to sign such a summons.

THIS was an application to oust a councillor of a local improvement district, and was heard before JOHNSTONE, J., in Chambers.

G. H. Barr, for the applicant.
W. S. Ball, for the respondent.

March 6. JOHNSTONE, J.:—This is an application, under sec. 16 of ch. 36 of the Local Improvement Act of 1906, as amended by way of summons, calling upon George Lanz, the respondent, to shew cause why he should not be ousted from his position as councilman for the local improvement district 6 M. 2, on the grounds that A. R. Thomas, H. A. Sampson and Louis Garlach

voted at the election of the said George Lanz, and that these were not properly qualified to vote, inasmuch as the taxes owing by them had not been paid.

The summons was obtained upon the affidavit of George T. Dale, the relator. This affidavit sets out that Dale was nominated as a candidate as a member of the council at the election held on January 11th, the other candidate being the respondent, George Lanz. That the returns of the result of the election by the returning officer shewed eleven votes had been cast in favour of the deponent and thirteen in favour of the respondent; that three of the persons who voted at the said election for Lanz were A. R. Thomas, H. A. Sampson and Louis Garlach; that these three persons had not paid their taxes at the time of the election, and were on the 3rd day of February, 1909, tried and convicted before J. T. Westgate, J.P., under the provisions of the Local Improvement Ordinance, for having voted at the said election contrary to the provisions of said Ordinance.

Further affidavits were produced by the applicant, on the hearing, to the reading of which exception was taken by counsel for the respondent, who urged that under the practice these affidavits could not be read, as leave had not been given to read further material on the return of the summons.

The affidavits referred to were those of Curtis Gough and E. M. Kezer.

I think these affidavits receivable. Upon reference to sec. 16 it will be seen that where, upon the return of the summons, it shall appear to the Judge, upon affidavit or oral evidence, that such person was elected unduly or contrary to the Act, the Judge may adjudge such person to be ousted. It is here evidently intended that material other than that used on the application for the summons may be used at the hearing.

The allegations contained in the several affidavits that Thomas, Sampson and Garlach had been convicted before Westgate, J.P., are insufficient to prove the fact that these persons were not qualified to vote under sec. 18 of the Act, as amended. This section reads: "At any election persons over eighteen who are owners or occupants of rateable land in the division and who have paid all taxes due by them to the district shall be entitled to vote." Apart from the statements that these men had been

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convicted, there is no allegation in any affidavit filed that these persons were not entitled to vote for the reason stated, namely, that they were in default, not having paid the taxes due by them. The only allegation leading up to the fact that the taxes had not been paid is contained in the affidavit of Gough, who, in paragraph 3, states that the taxes and lands on which Thomas, Sampson and Garlach voted, as shewn by a return of the returning officer, were not paid to the deponent until after January 11th, 1909. This allegation is not sufficient to prove default. The taxes in this paragraph referred to may have been school taxes. There is nothing to shew that the taxes referred to were those owing by these parties to the local improvement district.

The application is also defective in that the summons is signed by the clerk in Chambers, instead of by the Judge who granted the same: see *Re Parquette* 11 P.R. 463, at p. 469.

The summons therefore will be dismissed with costs.

[IN CHAMBERS.]

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Mar. 6.

IN RE LOCAL IMPROVEMENT DISTRICT NO. 11-A-3.

Local Improvement Act—Controverted Election—Irregularity in Proceedings to Avoid—Intituling Affidavits—No Statement that Election Held— Irregularity in Proceedings Prior to Election—Insufficient Notice of Election—Effect of—No Evidence that Result Affected.

The applicant applied to have one Stribbell ousted from office as a councillor of a local improvement district on the ground that the notice of election had not been posted as required by law. No evidence was given that the result of the election was affected thereby, or that all the voters had not voted. The summons and affidavit for the purpose of the application were not intituled in any Court:—

Held, that it was not necessary that the proceedings under the Local Improvement Act should be intituled in any Court.

2. That every irregularity will not defeat an election, and the effect it may have on the final result must be considered, and as there was no evidence that if the notice required by law had been posted the result of the election would have been different, and as it did not appear that all the voters had not voted, the application should be dismissed.

THIS was an application under the Local Improvement Act to oust from office one of the councillors of a local improvement district, and was heard before JOHNSTONE, J., in Chambers.

F. W. G. Haultain, K.C., for the applicant.
T. D. Brown, for the respondent.

March 6. JOHNSTONE, J.:—This is an application, under sec. 16 of the Local Improvement Act, to oust from office as a member of the council for the local improvement district named, one John Stribbell, on the ground that the said John Stribbell was elected unduly and contrary to the provisions of the Local Improvement Act at an election for a member of the said local improvement district council for the said division held on the 11th day of January, 1909, in that the returning officer for the said division at the said election did not post up in five conspicuous places within the division the notices required by sub-sec. 2 of sec. 25 of the Local Improvement Act at least six days previous to the meeting of the electors, and upon the grounds set out in the affidavit of Harry Jones and Arthur Dinning filed.

On the hearing of this summons, which came before me on the 4th instant, exception was taken to the proceedings because they were not entitled in any Court, and also for the reason that the affidavits did not shew the holding of an election, or that Stribbell had been declared elected.

I cannot give effect to these objections. Section 16 of the Local Improvement Act was passed, I think, for the express purpose of enabling the very summary disposal of questions affecting the election of members of district councils. In my opinion it is not necessary that the proceedings had under the section referred to should be entitled in any Court: see *Re Parquette*, 11 P.R. 468, at pp. 469, 470 and 471, and cases quoted. I also think the evidence contained in the affidavits filed is sufficient to shew that John Stribbell was declared duly elected.

I am of opinion, however, the evidence is insufficient to warrant me in finding that Stribbell was unduly elected or that he was elected contrary to the provisions of the Act. There is no proof that if the notices required by law to be posted (sub-sec. 2 of sec. 25 of the Act) had been so posted the result of the election would have been different. It is not shewn all those entitled to vote had not voted.

In *Regina ex rel. Walker* v. *Mitchell*, 4 P.R. 218, Adam Wilson, J., lays down the law that it is not every irregularity which would be held to defeat an election, but that the effect it may have

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upon the final result of the election must be considered, and that if it did not appear that the result would have been different the election should not be set aside.

In *Regina ex rel. Harris* v. *Bradburn*, 6 P.R. 308, Harrison, C.J., made a similar statement as to the law, referring to this case and to *Woodward* v. *Sarsons* (1875), L.R. 10 C.P. 733; 44 L.J.C.P. 293; 32 L.T. 867; and *Regina ex rel. Ritson* v. *Perry*, 1 P.R. 240.

The summons will therefore be dismissed with costs.

[IN CHAMBERS.]

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BOWE v. WHITMORE.

March 10.

Controverted Election Act—Motion to Strike Out Particulars of Corrupt Practices—Provision in Order for Delivery of Particulars as to Effect of Non-compliance—Effect of—Jurisdiction of Judge to Make Further Order—Applicability of General Practice to Particulars in Controverted Election Proceedings—Effect of Provisions of Controverted Elections Act as to Delivery.

By an order under sec. 11 of the Controverted Elections Act, the petitioner was directed to furnish particulars of the matters alleged in his petition, and it was further ordered that no evidence be given at the trial of any matter of which particulars were not delivered as ordered. The respondent moved to strike out the particulars delivered, on the ground that the order had not been sufficiently complied with, or for further and better particulars:—

Held, that the Legislature having made provision in the Controverted Elections Act for delivery of particulars, and having empowered the Judge to order that in default no evidence be given at the trial of any matters of which particulars were not given as ordered, and a Judge having made such order, no further or other order could now be made with respect to particulars.

2. That as the practice provided by the Controverted Elections Act in respect to delivery of particulars differed from that prescribed by the rules of Court, and the practice under the Act was sufficient, the provisions of the rules of Court could not be invoked to support the application, and must be deemed to be excluded by the specific provisions of the Act.

THIS was an application to strike out particulars of charges in an election petition, under the controverted Elections Act, and for further and better particulars, and was argued before JOHNSTONE, J., in Chambers.

Alex. Ross, for the petitioner.

C. E. D. Wood, for the respondent.

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March 10. JOHNSTONE, J.:—This is an application, by way of summons returnable in Chambers, calling upon the petitioner to show cause why an order should not be made dismissing the petition filed, on the ground that the particulars delivered, pursuant to the order of the Hon. Mr. Justice Newlands, of December 11th, 1908, had not been complied with, or, in the alternative, for an order that the particulars delivered pursuant to said order of the 11th December should be struck out, or, in the further alternative, that the petitioner be ordered to deliver further and better particulars.

The order of the 11th December is one made under sec. 11 of the Controverted Elections Act, directing that particulars in writing should be delivered to the respondent's solicitors within twenty days of the service of the order, such particulars to contain the names and addresses and the time or times and place or places where each of the acts complained of were done or committed, concluding with this provision:—

"It is further ordered that in case particulars are not delivered, as herein ordered, within the time herein prescribed, the petitioner shall not be at liberty to give any evidence at the trial of the petition herein with respect to facts and grounds of which said particulars are herein ordered and not delivered as herein prescribed."

The section of the Act referred to reads as follows:—

"Evidence need not be stated in the petition, but the respondent may at any time within twenty days after service upon him of the petition . . . apply to a Judge for particulars or for further and better particulars of the facts and grounds relied on to sustain the prayer of the petition; and the Judge may order such particulars as may be necessary to prevent surprise and to ensure a fair and effectual trial; and may prescribe the time within which such particulars shall be delivered, and may, in such order, direct that in case such particulars are not delivered as prescribed, the petitioner shall not be at liberty to give any evidence at the trial with respect to facts and grounds of which particulars are ordered and not delivered."

Mr. Ross, who appeared for the petitioner, on the argument, contended that the order having made provision for default in the delivery of particulars in the manner stated, that the respon-

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dent could not obtain the relief asked for in the summons—that is, no order could be made dismissing the petition, or for the striking out of such of the particulars as were insufficient, or for further and better particulars—that, in effect, as to particulars the matter was *res judicata*.

It was contended, on the other hand, by Mr. Wood, for the respondent, that under sec. 18 of the Act, the provisions of the Judicature Act relating to the delivery of particulars applied, such practice being not inconsistent with the provisions of sec. 11.

In England the practice in election matters is usually not to entertain motions to strike out particulars, but to refer the matter for hearing before the trial Judge: Rogers on Elections, vol. 2, 208; McPherson's Election Law, 608.

The English rules, however, governing the delivery of particulars are different from the provisions of sec. 11.

Provision is made by rule in England (Par. C, El.R. of Mich. T. 1868, rules 6, 7 and 8) for the delivery of particulars and for default in delivery whereby, in case of default, no evidence shall be given of any objection, etc., not specified in the list of particulars, except by leave of the Court or Judge, an exception not provided for by sec. 11 of the Controverted Elections Act or by the order for the delivery of particulars. Moreover, the English rule does not limit the time, as does our Act, within which particulars or further and better particulars are to be delivered.

That I have no power at this stage to dismiss the petition, I think, must be admitted, and if I could make a valid order striking out the objectionable particulars, I would not be disposed to do so.

As to the last alternative—namely, an order for further and better particulars—the legislature, having by sec. 11 legislated as to the procedure in respect to the time within which the application should be made, and having limited this time to the period of the twenty days immediately following the service of the petition—a period now past—and provisions having been expressly made empowering the Judge directing the delivery of particulars, in his order, to deal with the matter in the case of default in delivery to the extent of ordering that no evidence shall be given at the trial with respect to facts and grounds of which particulars were ordered to be and were not delivered, and the Judge in this

case having so provided, I am of opinion I am precluded from making any order for further and better particulars. Effect must be given to sec. 11, the provisions of which are not in accord with the practice and procedure under the rules of Court continued by sec. 55 of the Judicature Act. In these rules there is no set time within which, in an ordinary action, an application for particulars or for further and better particulars shall be made, and in the case of default in delivering of particulars under the rules, the consequences are not the same. Under sec. 11 default is punishable, in the first instance, with an absolute direction that (using the words of the section) "the petitioner shall not be at liberty to give any evidence at the trial with respect to facts of which particulars are ordered and not delivered," whereas, under the rules, in the event of default on the part of the plaintiff, the action is, in the first instance, stayed.

The Court or Judge, moreover, under the rules, has power to extend the time for the doing of any act. No such power is given by the Act, and I do not think it could be successfully contended a Judge could make an order extending the time twenty days fixed by the Act within which the application for particulars must be made.

This time cannot be controlled or affected by any rule of Court. It is absolutely determined, as is also, in my opinion, the punishment or penalty for default, provided the Judge chooses to adopt the provisions of the section in that behalf. The learned Judge, in dealing with this matter, did so, and I think his order must be taken to be final, in any event as far as an application in Chambers is concerned.

The summons will therefore be dismissed with costs.

[TRIAL.]

1909

KEINHOLZ v. HANSFORD.

March 26.

Vendor and Purchaser—Sale of Land on Deferred Payments—Default by Purchaser—Cancellation and Forfeiture of Moneys Paid—Land Encumbered for Amount Greater than that Due by Purchaser—Right of Vendor to Insist on Payment.

Plaintiff purchased a section of land from defendant upon deferred payments. The plaintiff made default in one payment, and such default continuing for two months the defendant served notice of cancellation of the contract in accordance with the terms thereof, and claimed the right to retain all moneys paid thereon. At the time of cancellation the defendant had encumbered the land for an amount greater than that which was due by the plaintiff. The plaintiff tendered the balance due and brought action for specific performance:—

Held, that the defendant, having encumbered the land for an amount greater than that due by the plaintiff at the time default was made, was not entitled to be paid or to receive the balance due in respect of the land by the plaintiff, and not being entitled to such payments could not cancel the contract because payments were not made to him.

THIS was an action for specific performance of a contract for sale of land, tried before NEWLANDS, J., at Regina.

J. A. Allan, for the plaintiff.

F. W. G. Haultain, K.C., for the defendant.

March 26. NEWLANDS, J.:—On the 17th July, 1906, the plaintiff purchased from the defendant section 1-26-2 west of the second meridian for the sum of $6,400, payable: $500 on the execution of the agreement of sale; $1,500 on the 20th July, 1906; $3,000 on the 1st of June, 1907; $700 on the 1st December, 1907; and $700 on the 1st June, 1908, with interest at 6 per cent. The first three payments are admitted to have been made, with the exception of $13.25 bank charges, which defendant had to pay the banks making the collection. The fourth payment of $700 was not made on 1st December, 1907, because, the plaintiff swears, he thought it was not due until the 1st of June, 1908. Time was made of the essence of the contract, and provision for cancellation if payments were not made as provided by the agreement. On the 3rd February, 1908—the payment due December 1st, 1907, not having been made—the defendant cancelled the agreement, and sent the plaintiff a notice of cancellation. As soon as the plaintiff received this notice he went to Winnipeg, where the defendant resided, and tendered him the whole amount due,

which the defendant refused to accept, claiming that he had cancelled the agreement, and it was therefore at an end, and that under the agreement he was entitled to retain the amounts paid as liquidated damages. The plaintiff then brought this action for specific performance, or, in the alternative, for relief against the forfeiture of the sums paid the defendant. As a defence the defendant set up the non-payment of the instalment due December 1st, 1907, and the cancellation of the agreement under the provisions thereof.

At the trial it appeared that the plaintiff had mortgaged this land to two separate parties, the mortgage in each case being for the sum of $1,500, and that in each case there was over-due payments of interest which he had not paid. These mortgages, together, amounted to over $3,000, and the amount due under the agreement, including the payment due December 1st, 1907, was only $1,400, with interest, being less than half the amount due under the mortgages. There is no covenant to convey free from incumbrances in the agreement of sale, but the whole purchase money is put at $6,400, "being $10 per acre," as stated in the agreement, and the intent and meaning of the agreement is that that amount is all the plaintiff has to pay, and that defendant would, therefore, be liable to pay off these mortgages before he could complete the agreement with the plaintiff. In Dart on Vendors and Purchasers (p. 612) he states: "Until the conveyance is executed by all necessary parties, the vendor remains liable in respect to all defects in title. He must, for instance, refund the purchase money if the purchaser, having paid it, even though he has taken possession, is evicted by an adverse claimant. So, if incumbrances are discovered, he must discharge them, or the purchaser may pay them off out of unpaid purchase money." And on p. 613: "In some cases a purchaser may, after the conveyance is executed, retain out of unpaid purchase money the amount of incumbrances which then come to his knowledge. And a purchaser, with notice of an incumbrance which he intends to be discharged, should take care that it is discharged, or that satisfactory security for its being done is given him, before he pays his money."

In *Niblock* v. *Ross* (1908), 8 W.L.R. 792, an action for instalments due on an agreement of sale, Scott, J., held, "As the property

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is shewn to be incumbered for a sum greater than the balance of the purchase money due by the defendant, the plaintiff is not entitled to judgment for the payment to him of the purchase money now due. For the protection of the defendant I think I should follow the practice laid down in *Armstrong* v. *Auger*, 21 O.R. 98, and direct its payment into Court."

Now, if the defendant was not entitled to have these last two payments made to him, and I think he was not, it would, I think, follow that he could not cancel the agreement of sale because they were not so made to him, and it would be inequitable to allow him to set up such alleged cancellation as a defence to this action. It is true the plaintiff, after the alleged cancellation, tendered to him the whole amount due, but as this tender was evidently made in ignorance of these incumbrances, it does not put the defendant in any better position.

The defendant not being entitled to have these payments made to him, he could not cancel the agreement of sale because they were not so made, and his alleged cancellation is, therefore, of no effect; and as the plaintiff acted promptly he is entitled to specific performance. The plaintiff will pay into Court the balance due on the said agreements of sale—namely, $1,400—with interest and $32.88 paid by the defendant for taxes, which amount will be paid out to the persons entitled to the same under the said incumbrances; and the defendant will then transfer the land to the plaintiff free from incumbrances. The plaintiff will have the costs of this action.

[TRIAL.]

HALL v. TURNBULL. 1909

March 27.

Vendor and Purchaser—Agreement for Sale of Land on Deferred Payments—Default by Purchaser—Cancellation of Contract—Specific Performance—Right to—Delay—Forfeiture of Purchase Money Paid—Jurisdiction of Court to Relieve.

Plaintiff purchased a section of land from defendant on deferred payments, the contract containing a clause providing for cancellation upon non-payment of any of the instalments, and that in the event of cancellation the vendor should be entitled to retain all purchase money paid. Default was made in payment of the second instalment, and the defendant cancelled the contract and declared the moneys paid forfeited. After a lapse of about a year the plaintiff tendered the balance due and demanded a conveyance, which being refused, he brought an action for specific performance:—

Held, that the plaintiff was not entitled to specific performance by reason of his delay.

2. That the purchase money paid not being in the nature of a deposit, and being a substantial payment, its forfeiture on cancellation would constitute a penalty against which the Court would relieve.

THIS was an action for specific performance, or, in the alternative, for the return of money paid on a contract for sale of land, and was tried before NEWLANDS, J., at Regina.

J. F. Frame, for the plaintiff.

J. A. Allan, for the respondent.

March 27. NEWLANDS, J.:—On the 28th of August, 1906, the plaintiff purchased from the defendant section 21-30-7 W. 3rd, and took separate agreements of sale for each quarter-section, the consideration being $1,440 for each said quarter. Five hundred dollars was paid down on each quarter-section, and the balance was to be paid in five annual instalments, with interest at 6 per cent., such payments to be made on the 28th days of August in the years 1907 to 1911, inclusive.

The first payment under this agreement fell due on the 28th August, 1907. On the 21st of August of that year the defendant wrote to the plaintiff calling attention to the fact that the payment would fall due on that date. This payment was not, however, made by the plaintiff, and on the 22nd October, 1907, the defendant sent the plaintiff a notice in writing cancelling the said sale. This notice was given under the following provision in the agreement of sale:—

"And it is further agreed that if the purchaser shall fail to

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make the payments of principal and interest aforesaid, or any of them, or the taxes, in the manner and at the time herein before specified, or shall fail in the performance of any of the covenants herein contained, then, and in such case, the vendor shall have the right at any time to serve a notice upon the purchaser, personally served upon him, or mailed in a registered letter, addressed to him at the post office named below, declaring his intention, at the expiration of thirty days after the service or mailing of such notice, of terminating this agreement and forfeiting all interest of the purchaser therein, and of re-entering and re-possessing the land, as in his first estate, without claim of the purchaser upon any of the moneys paid by him thereunder; and upon the expiration of such time the vendor shall be at liberty, without further notice of intention as aforesaid, by due process of law, to re-enter upon and re-possess the said land as in his first estate."

There was also a provision in the agreement that time was to be of the essence of the contract. The notice of cancellation given was as follows:—

"W. E. Hall, Esq.

"I, Leonard Turnbull, of the city of Brandon, in the Province of Manitoba, farmer, hereby notify you that there is due on the purchase by you of the south-east quarter of section twenty-one (21) in township thirty (30) and range seven (7) west of the third principal meridian, in the Province of Saskatchewan, from me, the said Leonard Turnbull, the sum of $188 principal and $56.40 interest, which fell due on the 28th day of August, A.D. 1907, together with interest on the said sum at 6 per cent. per annum from the 28th day of August, A.D. 1907, to this date.

"And take notice, that unless the said money is paid within thirty (30) days from the mailing of this notice by registered letter, the sale and agreement therefor will be cancelled, and all money heretofore paid by you will be forfeited, and I will, without any further notice to you, enter into possession of the said property and receive and take all rents and profits thereof, and will either occupy the said property myself or continue to rent same, or shall make sale or sales thereof as I shall think fit and proper, and any interest you may have acquired in the said lands

and premises will be at an end, and you will have no further right, title or interest therein.

"Dated at Brandon, this 22nd day of October, A.D. 1907.

"LEONARD TURNBULL,

"*Per* Adolph & McKay, his Solicitors."

And a separate notice was given for each quarter-section.

These notices were mailed by registered letter to the plaintiff, addressed to "W. E. Hall, Hanley P.O., Sask.," this being the address given in the agreement of sale. These notices never reached the plaintiff, he being then in the United States. Before leaving he had asked the postmaster at Hanley to forward his mail to Mason City, Iowa, but the postmaster had apparently by mistake forwarded the letter containing these notices to Mason City, Illinois, and the letter was returned to the defendant as unclaimed. This, however, was not the fault of the defendant. He sent the notice to the address provided for by the agreement of sale, and the postmaster, in forwarding the same, was acting as the agent of the plaintiff. Not hearing from the plaintiff, the defendant entered into possession of the said land and did some breaking on same. The plaintiff returned to Saskatchewan in July, 1908, and on the 20th July and again on the 5th of August of that year tendered him the amount due under the said agreement of sale, excepting the amount of some taxes which had been paid by the plaintiff. The defendant refused to accept the moneys tendered, and the plaintiff brings this action for (1) specific performance of the contract, and, in the alternative, (2) for relief against the forfeiture of the $2,000 paid by him on the said land.

The plaintiff is certainly not entitled to specific performance. The payment was due August 28th, 1907, and the plaintiff did not make the same because he did not have the money and could not, and he did not tender the amount due until nearly a year afterwards. After this long delay he is certainly not entitled to have the contract specifically performed.

As to the alternative claim for relief against the forfeiture of the amount paid by the plaintiff, the agreement sets out that if the purchaser shall fail to make the payments of principal, etc., the vendor, on giving notice, may re-enter, etc., without claim

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of the purchaser upon any of the moneys paid him thereunder. The amount paid was $500 on each quarter-section—in all $2,000. It was not paid as a deposit to bind the bargain, but was a payment on account of purchase money. The agreements state: "The purchaser has paid the sum of five hundred dollars on account of the said purchase." Being a substantial payment on account of the purchase money, its forfeiture on the cancellation of the contract would be, in my opinion, a penalty against which this Court can relieve. This also applies to the sum of $62 paid by the plaintiff for local improvement taxes on the said land. As the land was unimproved, and the purchaser never entered into possession, there is no set-off against these amounts for the use and occupation of the said land by the plaintiff.

I therefore give judgment for the defendant on the claim for specific performance, and relieve the plaintiff against the forfeiture of the said sum of $2,062, which will be paid by the defendant to him, after deducting therefrom his taxed costs of action, which I allow to the defendant.

[TRIAL.]

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Contract for Sale of Land—Deferred Payments—Provision in Contract for Assignment Only by Consent of Vendor—Transfer in Fee Simple by Purchaser—Refusal of Vendor to Approve of as an Assignment—Subsequent Assignment to Innocent Purchaser—Fraud in Procuring Approval of by Agent of Assignee—Locus Standi of Transferee under First Transfer to Attack Assignment for—Restraint on Alienation—Right of Vendor to Reserve Pending Completion of Contract.

Defendant Bennett purchased a quarter section of land from the Canadian Pacific R.W. Co. on deferred payments, the contract containing a clause that no assignment of the contract should be valid unless approved of by the company. Subsequently and before the land was paid for, and while the company was still the registered owner, Bennett by a transfer in fee simple transferred the land to the plaintiffs. About one year later the plaintiffs tendered the transfer to the company as an assignment, and applied for approval thereof. This the company refused to do on the ground that the instrument was not an assignment. Negotiations were continued for some time. Before the plaintiff began these negotiations the Massey-Harris Co. had secured an assignment of the contract in proper form as security for a debt, but this assignment was never registered, being apparently abandoned for an arrangement whereby the land was to be sold and their claim paid from the proceeds. This sale was arranged by J. D. McLeod, a collector for the Massey-Harris Co., who sold to one M. J. McLeod, procuring an assignment of the contract from Bennett to M. J. McLeod. To procure the acceptance of this assignment the Canadian Pacific R.W. Co. required the covenant of the assignee to carry out the provisions of the original contract, and J. D. McLeod proceeded to forge the signature of M. J. McLeod thereto, and also made a false declaration as to the loss of the original contract, to which he also forged the name of M. J. McLeod. By use of these forged documents he succeeded in getting the assignment approved and accepted while the plaintiff's negotiations with the railway company were in progress. M. J. McLeod was innocent of fraud, and no knowledge on his part of the previous transfer was proved. The plaintiffs then brought action against M. J. McLeod and the railway company to have this assignment set aside as fraudulent and void:—

Held, that the clause in the contract providing that no assignment thereof should be valid unless approved of by the company was a reasonable provision and not void as being a restraint on alienation, the vendor having the right while the contract remains uncompleted to decide with what persons he shall be brought into contractual relations.

2. That the railway company having refused to approve of the transfer to the plaintiff, and the fraud which had been perpetrated having been perpetrated upon the railway company, the plaintiffs had no *locus standi* to attack the transaction.

THIS was an action to have an assignment of a contract for sale of land set aside as fraudulent and void, and was tried before WETMORE, C.J., at Moose Jaw.

J. F. Frame, for the plaintiff.

W. B. Willoughby, for the defendant McLeod.

A. L. Gordon, for the Canadian Pacific R.W. Co.

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March 29. WETMORE, C.J.:—The defendant Bennett, on the 10th May, 1902, entered into an agreement with the Canadian Pacific R.W. Co., by which the company agreed to sell to him and he agreed to purchase from the company the south-west quarter of 17-19-26, west of the 2nd, he paying $119.85 down and agreeing to pay $100 on the 10th day of May in each year, beginning 1904 and ending 1912, with interest at 6 per cent. upon all payments in default. This agreement contained several covenants upon the part of the purchaser, as, for instance, among others, that all improvements placed upon the land should remain thereon and not be removed or destroyed until final payment; that he would pay the taxes and assessments imposed upon the land for improvements; that he would cut no timber therefrom except a sufficient quantity for fuel and fencing for necessary use thereon and for buildings to be erected thereon; and that he would, within a year from the date of the agreement, settle his family upon the land and break up at least one-sixteenth of it, or, in lieu of such breaking, erect a substantial fence around it to the satisfaction of the company's land commissioner; and that he would furnish satisfactory proof to the commissioner of such settlement and breaking or fencing within one year; and it further provided that if the purchaser or his legal representatives or assigns should pay the monies agreed to be paid punctually and perform all conditions provided, then he or his approved assignee would be entitled to a deed of the premises in fee simple, and then it went on to provide certain remedies that the company might have if default was made in the payments and conditions of the contract, and then the agreement contained the following clause:—

"No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser and approved and countersigned by the commissioner of the land department or other duly authorized person, and no agreement or conditions or relations between the purchaser and his assignee, or any other person, acquiring title or interest from or through the purchaser, shall preclude the company from the right to convey the premises to said purchaser, on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder, unless the assignment hereof be approved

and countersigned by the said commissioner or other person as aforesaid."

The Massey-Harris Company were the collecting agents of the plaintiff company in that part of the then North-West Territories which now forms the Province of Saskatchewan. The manner of collecting was that the Massey-Harris Co., by their agents, collected for the plaintiffs. In May, 1905, the defendant Bennett was indebted to the plaintiffs in the sum of $3,250, and one John D. McLeod, an agent of the Massey-Harris Co., went out to endeavour to make arrangements for obtaining the payment of the claim or for further security therefor. This resulted in Bennett, by an instrument dated the 26th May, 1905, transferring the quarter-section in question to the plaintiffs. This instrument alleged that Bennett was registered owner of an estate in fee simple in possession in the quarter-section of land in question, and professed to convey it to the plaintiffs absolutely. The instrument was in form a transfer of the land as if under the Land Titles Act (1894). This transfer came into the possession of the plaintiffs about the end of June or 1st of July, 1905. No action was taken in the matter by them until somewhere about the latter end of August or 1st of September, 1906, when one McLean, an agent of the plaintiffs, took the transfer to the land department office of the Canadian Pacific R.W. Co., and left it with a clerk in that office, requesting a statement of the amount to be paid in order to procure a title to the plaintiffs. Hearing nothing with respect to the matter, on the 22nd September the plaintiffs wrote to the railway company, stating that they had heard nothing in response to their request for a statement of the amount due. As a matter of fact, a statement had been forwarded by the railway company to the plaintiffs on the 13th September, with a letter, which was as follows:—

"I send you herewith statement shewing the amount to pay the company's claim in full against the above land (meaning the land in question), which stands in our books in the name of G. H. Bennett. If you have acquired his interest in same, it will be necessary for you to furnish me with assignment papers as per attached circular. I return herewith transfer covering this land in your favour, also blank forms."

This was signed by "F. T. Griffin, land commissioner," and

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a statement was enclosed in that letter shewing that the amount outstanding in full as due under Bennett's agreement was $501.55, and the transfer was also returned therewith. This letter miscarried, it having been improperly addressed to Moose Jaw. It was accordingly some time late in September before the transfer so returned was received by the plaintiffs. Some further correspondence must have taken place between the parties other than what I have mentioned, but what the character and nature of it was the evidence does not disclose. On the 26th September the plaintiffs wrote to the land commissioner of the railway company, stating as follows:—

"We wish to explain that we have taken over the above-mentioned land (meaning the land in question), and will assume payment of the balance of your account, but it may be difficult for us to get the form of assignment that you require us to get, in view of the fact that Bennett at the present time is out of the country. We obtained an ordinary transfer from Bennett a year ago or more, which, of course, could not be registered, as the title to the land stands in the name of your company. We shall be glad to know if there is any way by which the transfer can be substituted for the assignment, should it be impossible for us to get this man Bennett to execute the regular assignment form prescribed by your company."

And on the 27th Mr. Griffin wrote to the plaintiffs, and in that letter stated the following:—

"I do not see how we can accept transfer in lieu of an assignment. A transfer sets forth that the transferee is the owner in fee simple of the land covered by the transfer, and this was clearly not the case in this instance. I suggest that you make a renewed effort to find Mr. Bennett and have him execute an assignment, and if this ultimately fails, I shall be glad to give the matter further consideration."

On the 11th October the plaintiffs wrote the land commissioner as follows:—

"As intimated in our letter of the 27th September, we have made another effort to secure the assignment from Bennett in this case, but the report of a special agent we sent to Moose Jaw for that purpose is that Bennett, as soon as he learned that the former transfer he had executed in our behalf was not acceptable

by your company, went immediately and assigned his contract and gave another transfer as well to one Annable of Moose Jaw. We submit that our transfer from Bennett, dated the 26th May, 1905, takes priority over any subsequent assignment or transfer that he may have given and which may be tendered to you for filing purposes. We are prepared to pay to you the balance owing under the contract according to your statement of the 7th September, amounting to $501.55, and interest subsequent to that date, and we are also prepared to give you a bond of indemnity in regard to any action or proceedings that may be taken in the matter, if you will accept the transfer that we submitted to you on the 5th September in lieu of the regular form of assignment that you required. We maintain that the transfer executed by Bennett to us is virtually a quit claim deed under the Land Titles Act, although there are no covenants recited in the transfer. We shall be glad to arrange the matter of indemnity through our solicitors, Messrs. Aikins, Robson, Loftus & Coyne, at any time, and will close up the transaction with you and pay off the balance owing under the contract.

"We might also state that we have sent forward a caveat for registration to the registrar, Regina, to prevent any dealing with the land until the questions at issue are satisfactorily arranged.

"We called on your solicitors, Messrs. Tupper, Galt, Tupper & McTavish, with reference to the matter, and intimated to them that we would file a caveat against the land in the meantime, until an amicable adjustment of matters was arrived at.

"Kindly let us know by return mail if you will now accept our cheque for the balance owing under the contract made by Bennett, and we will surrender to you the transfer from Bennett to ourselves, and also obtain the usual certificates required from the registrar, Land Titles Office, Regina."

And they also wrote a letter of the same date to Messrs. Tupper, Galt, Tupper & McTavish, whom, I presume, were the solicitors for the railway company, as follows:—

"As intimated to you on the 10th inst., we forwarded to the registrar, Land Titles Office, Regina, a caveat for registration against the lands referred to in contract No. 18806. We enclose you herewith a copy of our letter to-day to the land commissioner, and we wish to state that we are now prepared to give any in-

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demnity that may be required by the department, as intimated to Mr. Griffin, upon the transfer from Bennett to ourselves being accepted, and will pay off the balance owing under the contract, and furnish the usual certificates required, and pay the incidental costs attending same.

"We submit that the department had notice of our transfer first, and as the transfer executed in our favour is dated and executed on the 26th of May, 1905, we maintain that it will take priority over any subsequent assignment or transfer that may be executed by Bennett, who has absconded or is about to abscond from the country."

On the same date, the 11th October, Mr. Griffin, in reply to the letter to himself, wrote as follows:—

"Under the circumstances of the case I wish you would return to me the transfer executed by Bennett in your favour, together with abstract and certificate and the original contract, and I will again submit the papers to our solicitors, together with your present letter, and advise you later as to whether or not the transfer can be accepted."

On the 16th October the plaintiffs returned the transfer from Bennett to them to Mr. Griffin by letter of that date, stating also that the registrar had not yet forwarded the abstracts of title, and that they would be glad to hear from Mr. Griffin "as soon as the solicitors are prepared to report," and stating that they would deposit with him the amount required to pay the contract off any time he might say; and on the 22nd October Mr. Griffin wrote the plaintiffs, enclosing this transfer, and stating:—

"I return herewith transfer from George F. Bennett to yourselves. I find that a satisfactory assignment from Mr. Bennett to Malcolm John MacLeod of Moose Jaw, Sask., has been filed here, and has been formally approved, and contract, with approval endorsed thereon, has been handed to Mr. MacLeod."

The practice in the office of the railway company with respect to transfers of their land contracts to other persons was to require an assignment, to which the assignee was a party, and bound himself to perform the covenants in the original contracts to be performed on behalf of the purchaser. No such covenant or agreement had been given on the part of the plaintiffs to the railway company, and it also appeared in evidence that, under advice

of their counsel, the approval of the assignment by Bennett to the plaintiffs was also refused on the ground that the transfer to the plaintiffs set forth a false statement, namely, that Bennett was the owner in fee simple of the lands in question. The company distinctly refused to assent to the transfer or assignment—whatever it may be called—from Bennett to the plaintiffs. It will be observed that the plaintiffs delayed a very great length of time in making application to have the assignment to them approved of by the railway company, and the railway company threatened Bennett with proceedings to enforce their contract. I do not know that this latter fact is very material, but I draw attention to it in passing.

Up to this point I am unable to find that the railway company had done anything to waive the provision in their contract requiring an assignment thereof to be approved by their commissioner before it became valid. It was urged that the sending in a statement of the amount due was a waiver of that provision. I am unable to come to that conclusion. This was done at the request of the plaintiff, and with that statement they returned the transfer. I am of opinion that the railway company never intended, by handing that statement in or by any of their correspondence, to waive their right to have the assignment approved, and that, I think, is accentuated by the fact that they so returned the transfer.

Along about the 15th June, 1906, John D. McLeod went to Bennett's place for the purpose of obtaining payment of or securing a claim which the Massey-Harris Co. had against Bennett. The result was that Bennett executed an assignment to that company of the contract with the railway company. This instrument was not under seal. It purported, upon its face, to be an absolute assignment of the contract and of all benefits thereunder. After this assignment was executed, John D. McLeod and Bennett proceeded to discuss the indebtedness to the Massey-Harris Co. and Bennett's interest in the land in question, and it was verbally agreed between them that McLeod should endeavour to procure a purchaser for the land, and out of the purchaser's money the claim of the Massey-Harris Company should be paid, and that $1,000 should be paid to Bennett, and that J. D. McLeod should have what remained from the proceeds of the sale for his own bene-

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fit. Evidently the intention, so far as McLeod and Bennett were concerned, was to abandon the assignment to the Massey-Harris Co. John D. McLeod took the assignment to the Massey-Harris Co. to Regina, and acquainted Johnson, the collection agent of the company, and Forsythe, the manager of the company at Regina, with what he had done. The agents of the company raised no objection. John D. McLeod made efforts to secure a purchaser, but without success, until he approached the defendant Malcolm J. McLeod, who agreed to purchase for $2,400, and John D. thereupon proposed that the Massey-Harris Co. should, under the assignment to them, execute an assignment to Malcolm J. McLeod, as it would avoid his travelling out again to see Bennett, and he prepared such an assignment for them to execute, but was informed (which was evidently quite correct) that an assignment by the company would have to be under their seal, and it would involve the necessity of sending the documents to the place where their seal was kept for execution, and the idea, therefore, of getting the assignment to the purchaser made by the Massey-Harris Co. was abandoned. John D. thereupon procured an assignment of the contract to be made by Bennett to Malcolm J. McLeod, who paid the amount agreed to be paid to the Canadian Pacific R.W. Co., in so far as their claim was concerned, in cash, to the extent of the amount due, retained sufficient from the purchase money to pay the balance of the amount that might become due under the contract, and gave notes for the balance to John D. McLeod. So, therefore, in so far as Malcolm J. McLeod is concerned, he has paid or secured the whole amount that was payable in respect to the assignment of the contract to him.

Down to this point I hold that there was no fraud, actual or constructive, on the part of Malcolm J. McLeod in connection with this assignment. John D. McLeod was not his agent in any sense whatever. If he was the agent of any person at all, he was Bennett's agent. As a matter of fact, I find that he was acting in the matter entirely on his own behalf. Malcolm J. McLeod purchased the right to the assignment from John D. McLeod, and in securing the assignment John D. McLeod in no sense whatever acted as the agent of Malcolm J. Malcolm McLeod had no knowledge of the assignment to the Sawyer-Massey Co.,

and I see nothing in the evidence to charge him with either actual or constructive notice of that assignment.

Having procured the assignment to Malcolm J. McLeod, it became necessary to obtain the approval of the railway company, and here fraud and criminal acts were unquestionably perpetrated. But the fraud, in my opinion, was upon the Canadian Pacific R.W. Co. The company required, as I have already stated, that an assignment of the character in question should be executed by the assignee, as well as by the original purchaser of the land. Malcolm J. never executed the assignment in question. John D., without any authority whatever, put his name to it, and deliberately swore to the execution of the instrument by Malcolm before a commissioner for taking oaths. So the signature by Malcolm to that instrument was a forgery, and the affidavit of execution was false. I say the signature of Malcolm was a forgery, because it was done with the intent to lead the railway company officials to believe that Malcolm had really signed it, and so to induce them to approve of the assignment to him. For some reason or other, apparently, the railway company required that Bennett's copy of the original contract of sale between them and him should be produced. It was not produced, and John D. McLeod, thinking it necessary that the non-production of it should be accounted for, prepared a solemn declaration, purporting to be made by Malcolm J. McLeod, setting forth that he was the purchaser of the assignment, and that he had lost the purchaser's copy of the original contract, and that there was no assignment endorsed on such contract, and that he had not delivered it to any person for any purpose whatever. John D. McLeod, without any authority, affixed Malcolm J. McLeod's name to this declaration, and then signed a certificate in his own name, as commissioner for oaths, that the declaration had been made before him by Malcolm. I hold both these acts to be criminal acts and therefore fraudulent. John D. McLeod obtained an approval of the assignment of the contract of sale from Bennett to Malcolm J. Had it not been for these fraudulent documents to which I have referred, such approval would not have been granted. There was, to my mind, therefore, a clear fraud with respect to the Canadian Pacific R.W. Co. I entirely acquit Malcolm J. McLeod of being an actual party to these fraudu-

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lent and criminal acts—he knew nothing about them. Nevertheless, John D. McLeod, in endeavouring to procure an approval by the company to this assignment to Malcolm J., was acting as his agent, and Malcolm must take the consequences of his agent's acts. But the difficulty I have is in coming to the conclusion that the plaintiffs have any *locus standi* to avail themselves of that fraud. The Canadian Pacific R.W. Co. had refused to recognize them as assignees; they had been informed of that fact, and, according to the regulations of the railway company in such matters, the plaintiffs were not in a position to have the assignment to them recognized. In taking an assignment from Bennett they must take it subject to the provision, which I have above quoted, requiring the approval of the commissioner of their land department to render it valid. Consequently, as between the company and the plaintiff, the assignment by Bennett was invalid unless it was so approved by the company's commissioner (whatever the plaintiffs' rights may have been as between them and Bennett), provided, of course, that that clause is good and valid in law and equity. And if it is valid, it seems to me that the company would not be bound to give any reasons for not approving the assignment of the plaintiffs, and, in so far as Malcolm J. McLeod is concerned, the company having refused to approve of the assignment to the plaintiffs, and having approved the assignment to Malcolm J., this last-mentioned assignment is good, especially as he (Malcolm J.) was not guilty of any fraud in procuring the assignment from Bennett, and had no notice of the assignment by Bennett to the plaintiffs. I may state that I find that the railway company had knowledge of the assignment to the plaintiffs before they approved of the assignment to Malcolm J. McLeod.

We are now brought to the question, is this a valid clause in the original agreement of sale? It is contended that it is a restraint upon alienation and against the policy of the law. It would seem that at common law there may be a restraint upon alienation under certain circumstances and to a certain extent. Jessel, M.R., in *In re MacLeay* (1875), L.R. 20 Eq. 186, 44 L.J. Ch. 441, 32 L.S. 682, deals with the subject, and he, at p. 188, lays down the law as follows (the question in that case arose under a will): "The law on the subject is very old, and I do not think it can be

better stated than it is in Coke upon Littleton, in Sheppard's Touchstone, and other books of that kind, which treat it in the same way. Littleton says (1): 'If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.' Then he says (2): 'But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good.' So that, according to Littleton, the test is, does it take away all power of alienation?" And at p. 189 he states as follows: "Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time." This is the latest case that I can find on the subject, and it is referred to with approval, apparently, by Chitty, J., in *In re Elliott* (1896), 2 Ch., at p. 357. Again, it is no uncommon thing to insert a clause in a lease that the lessee shall not assign or under-let without the consent of the lessor, and no person ever thinks of questioning such a provision in a lease. The reason would seem to me to be very apparent. A landlord has the right, if he wishes to reserve it, to say who shall, in effect, be his tenants and who shall not, so by parity of reasoning I see no cause why a vendor of land should not reserve to himself, while the contract of sale remains uncompleted, the right to say or to decide who he shall be brought into contractual relations with and in what manner he shall be brought into contractual relations with such persons, especially where, in a case like this, there are covenants for doing acts other than the mere payment of the purchase money.

I have come to the conclusion, therefore, that the clause is a valid clause, and that the company having refused to recognize the assignment to the plaintiffs as a valid one, the plaintiffs, as assignee of Bennett, have no *locus standi* to attack this transaction.

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As I stated before, the fraud was on the Canadian Pacific R.W. Co., and, if they desire to do so, they are at liberty to attack it.

But the plaintiffs also claim by an assignment from the Massey-Harris Co. to them of the assignment made by Bennett to the Massey-Harris Co. of the 15th June, 1906. That assignment, as I have stated before, was not under seal, and I have no hesitation in holding that it was abandoned by the Massey-Harris Co. before it was ever assigned to the plaintiffs—as I have also before stated, as between John D. McLeod and Bennett, in so far as John D. McLeod could do it, it was abandoned before it was taken away from Bennett's house, and a new arrangement substituted. The Massey-Harris Co.'s agents were informed of what had been done and what was proposed to be done. They raised no objection to it. In fact, the evidence shews that they rather assented to it, because they looked to John D. McLeod to pay them the amount coming from the purchase money according to the arrangement which he had made with Bennett. The collection agent, Johnson, was not produced at the trial. Mr. Forsythe was, but he does not deny what John D. McLeod has sworn to. He states he has no recollection of it, and at the same time he will not say that what John D. McLeod has sworn to is not true. Now, while John D. McLeod is not a person one would be inclined to put very much confidence in, nevertheless, when he swears to a fact of the character which I have mentioned, and this is brought to the notice of these people, and they will not deny it more clearly than what is contained in the evidence of Mr. Forsythe, I have to give credit to what he swears, and, moreover, as I have before stated, when he had procured Malcolm J. McLeod as a purchaser, he purposed to use the assignment to the Massey-Harris Co. as the means to pass the assignment of the original contract to Malcolm J., and prepared assignments with that object. These assignments were greatly relied upon to shew the fraud of John D. in this respect, but, to my mind, they tend more to shew that he is telling the truth, and the cause he gives for those assignments not having been executed is a reasonable one. I am of opinion that the Massey-Harris Co. had practically consented to the abandonment of this assignment by Bennett to them, and that it was only unearthed for the purpose of assisting the claim of the Sawyer-Massey Co., with whom evidently the Massey-Harris Co. had

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very intimate relations. Therefore, in my judgment, the assignment by Bennett to the Massey-Harris Co. does not affect this question.

I may add that a good deal of argument was had at the trial, and a good deal of testimony produced also, upon the subject, namely, that the plaintiffs, by their delay in holding this assignment for over a year without any effort to have it approved by the railway company, were guilty of conduct on their part which might reasonably lead Bennett to the conclusion that the company had abandoned the assignment, and that it was, therefore, open to him to make such other arrangements as he might please. I express no opinion upon that, more than to say that I think the question is worthy of serious consideration.

The conclusion of my judgment is that this action must be dismissed as against the defendants Malcolm J. McLeod and the Canadian Pacific R.W. Co., and that the plaintiffs must pay their costs of this action.

In so far as Bennett is concerned, he has not appeared, and it is claimed that the plaintiffs are entitled to have the claim taken *pro confesso* as against him. I am of opinion that that is correct, but just what judgment can be had against him in that respect I am not prepared to say at present. I will order the claim to be taken *pro confesso* as against the defendant Bennett, with costs as in the case of a judgment by default against him. And in so far as any relief or further or other relief as against him is concerned, the plaintiffs will be at liberty to apply for further directions.

[TRIAL.]

1909

March 31

WHITE v. CUSAK.

Trespass—Conversion of Goods—Landlord and Tenant—Distress for Rent—Irregular and Excessive Distress—Sale Without Appraisement—Unreasonable Delay in Selling.

Plaintiff and one B. carried on business in partnership in premises owned by the wife of B. There was a verbal arrangement between B. and plaintiff by which they were to become the joint owners of such premises, but the wife of B. did not appear to have been a party to such arrangement. It was also a part of such arrangement that the partnership should assume and make the payments due under a mortgage on the property. The partnership was dissolved, plaintiff continuing the business. After the dissolution defendant became the owner of the premises, and served a notice on plaintiff demanding rent at $20 per month, to begin from a date some months previous to the date of the notice. Plaintiff never agreed to pay any rent, and not paying same defendant distrained for 8⅓ months' rent, locked up the premises, and after a delay of nearly three weeks sold the goods of plaintiff and of other parties which were then on the premises, without appraisement, the defendant himself buying in at a very low price. The plaintiff sued for damages for trespass, conversion and illegal distress:—

Held, that to give a right to distress there must be a fixed rent, and there being no such rent fixed by agreement there was no right of distress

2. That a landlord cannot by notice fix the amount of rent to be paid unless the amount is assented to or fixed by implication.

THIS was an action for trespass, conversion and illegal distress, and was tried before WETMORE, C.J., at Arcola.

J. F. Frame, for the plaintiff.

Wm. Trant, for the defendant.

March 31. WETMORE, C.J.:—This action, as originally started, was an action for trespass in seizing and taking implements the property of the plaintiff, and excluding him from the possession thereof, and was in form the old action of trespass *de bonis asportavit*. The defendants justified, setting up, among other things, that the defendant Cusak was and had been since the 17th July, 1907, the owner of the premises on which the goods and chattels in question were situated, and that on or about 1st June, 1907, a partnership, consisting of Horace H. Bilton and H. J. M. White, the plaintiff—trading under the style and firm of "Bilton & White" —became his (Cusak's) tenants of such premises at a monthly rental of $20, and that the rent being in arrears for eight and one-third months, Cusak issued a distress warrant to the other defendant, who distrained the goods in question, and sold them to satisfy such arrears of rent and costs of sale. The plaintiff re-

plied, among other things, denying that there was any rent in arrear or that the relation of landlord and tenant ever existed between the defendant Cusak and either Bilton and himself or as a firm; that if the premises were so leased to the firm, or either of them, the distress was irregular and excessive, and the rent distrained for was not due or payable; that the goods were sold without any appraisement; that the defendant became a purchaser of a considerable portion of the goods sold, and that the defendant neglected, after the lapse of five days, to proceed to sell the same, but remained in possession for an unreasonable time. I have set out the material portions of the defence. Nothing turns on the other portions; they were all unquestionably established in plaintiff's favour.

The replication set up what seems to be to some extent a departure from the original statement of claim. However, as no such question as that was raised at the trial, I do not consider it necessary to deal with it, and I will endeavour to dispose of the questions that were really raised at such trial.

There was a good deal of contradictory evidence in this case, and I will state only what facts I have found under the evidence. Horace Bilton and the plaintiff were in partnership, dealing in agricultural implements, some of which were held in the ordinary course of dealers purchasing from the manufacturers or wholesale dealers, and selling them, and other goods were placed in their hands by the owners merely for sale under commission. This business was carried on in a warehouse situated on the premises in respect to which the rent is claimed. The partnership was dissolved on the 27th April, 1907, Bilton retiring, and the plaintiff continuing the business. And I call attention to the fact that this was before the 1st June, 1907, the time alleged in the statement of defence when Bilton and White became Cusak's tenants, and I also draw attention to the further fact alleged in the defence that Cusak only became owner of the property on 27th July, 1907, nearly two months after it is alleged that Bilton and White became his tenants thereof. There seems to have been a great deal of haziness about this tenancy. Bilton went to British Columbia for a short period, and on his return he went into the warehouse and assisted White, for which he was paid. At the time that Bilton and White went into possession of these premises,

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which was the same time at which they entered into their partnership, the real property was in the name of Maude May Bilton, the wife of Horace. There was a verbal arrangement between Bilton and White by which they were to become the joint owners of these premises. There was no evidence that Mrs. Bilton was ever a party to this arrangement, but, in order to make the payments necessary to acquire a title, or some part of it, the partnership concern were to pay the instalments falling due upon a mortgage made by Maude May to the Colonial Investment and Loan Co. These payments amounted to $9.75 per month, and to the extent of $70 payments were made on this account. It was sworn by Bilton that there was an arrangement between himself and his wife by which $10 a month was to be paid as rent for these premises, and that this $9.75 was also to be paid to the loan company. I do not find that this $9.75 was to be paid as rent at all. It was to be paid, as before stated, in pursuance of the arrangement by which the partnership concern was to obtain the title to the property. I am unable to find that there was an arrangement between Bilton and his wife by which a rent of $10 a month was reserved payable to her. It is inconsistent with the notice, hereinafter set forth, of the 17th December, 1907, given by the defendant Cusak to the plaintiff. This property was transferred by Mrs. Bilton to the defendant Cusak on the 20th July, 1907. The defendant Cusak is her father, and she was living in the same house with him and had been up to a short time before the distress was made. I do not understand, therefore, the defendant Cusak claiming $20 a month from the 1st September preceding if there had been a letting by Mrs. Bilton some months previously at $10 a month.

The notice referred to is as follows:—

"Manor, Sask., Dec. 17, 1907.

"Mr. J. H. M. White —

"We are instructed by Mr. John Cusak to advise you that, owing to the fact that the loan on the building situated on lot 20, block 6, has not been faithfully repaid, he has to charge you a rent at the rate of $20 a month, beginning with the 1st of September last, making, therefore, an amount of $80 owing by you to him, and you are hereby requested to pay same forthwith.

"Yours truly,

"DE TREMAUDAN & Co."

This document was sent by direction of Cusak, and appears to infer that there had been no rent reserved previously, and that the defendant Cusak was fixing a rent, or endeavouring to do so, because the plaintiff had not kept down the payments on the mortgage to the loan company. This communication was the first intimation that White had that he was expected to pay rent. For the same reason I cannot believe that Bilton, while he was in the partnership, ever agreed to pay the defendant Cusak $20 a month. Again, referring to the alleged agreement to pay rent to Mrs. Bilton, it is very extraordinary that the plaintiff never heard of it, and that no payments appear charged in the books of Bilton & White as having been made on account thereof. The plaintiff never agreed to pay rent; he never consented to hold the property upon the terms set forth in the letter of 17th December, and, that being so, I am not able to find any authority or right upon the part of the defendants to distrain.

In the first place, in order to give the right to distrain, there must be a fixed rent—either a fixed amount or an amount that may be reduced to a certainty by calculation. Here there was no fixed amount of rent. There was none agreed to, and a landlord cannot by writing a letter arbitrarily fix the amount of rent which he is to receive unless the amount is assented to by agreement or by implication. It was not fixed in one way or the other in this case.

It is quite probable, and, I think, more than probable, that the defendant Cusak would have had a right of action against the plaintiff for use and occupation, but that does not give the right to distrain.

Having reached this conclusion, it is not necessary for me to go any further, because it seems to me that disposes of the case.

I may add, however, that the proceedings on the part of the defendants in this case were altogether irregular. In the first place, they distrained for eight and one-third months' rent on a warrant issued on the 10th February. The bailiff entered upon the premises and locked them up on the 13th February, when there was only five months' rent due, assuming that the arrears started from 1st September, as per letter of 17th December. He took no proceedings, however, until the 2nd March, except to keep the place locked, and kept the plaintiff out of

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possession for 17 days, without any justification or excuse whatever, and for an unreasonable length of time, and then the bailiff proceeded. Apart from all this, under any view of the evidence, the distraining for the third of a month was irregular and unlawful, because that was for a current month, and the time for payment of which had not arrived. Then the bailiff sold the property without appraisement. He also sold a quantity of property that was left with the plaintiff for sale under commission, and which, under the authorities, was not liable to be distrained. And then the defendant Cusak purchased in a number of articles at a very reduced price indeed, which was irregular also.

However, having held that there was no right to distrain at all, the plaintiff is entitled to recover the whole value of the goods. The plaintiff was kept out of possession of this property from the 13th February to the 14th March. It interfered with the business very seriously, because it was just the time of the year when sales were being made, and he is entitled to damages with respect to that. The fact that he was damnified in that respect has been proved. The value of the damage in money has not been proved.

I therefore give judgment for the plaintiff in respect to the property taken from him and sold for $441.15, and in respect to the injury to his business for $300—in all amounting to $741.15—with costs.

[TRIAL.]

FISH v. BRYCE.

1909

April 1.

Trust—Crown Grant to Trustees—Sale by Trustee—Subsequent Conveyance to Other Trustees—Notice of Agreement to Sell—Issue of Certificate of Title—Effect of Land Titles Act—Application to Bring Under Act—Effect of False Statement Therein—Fraud—Statute of Limitations—Time—Effect of Fraud Upon.

By Crown grant certain lands were conveyed to trustees upon certain trusts. These trustees entered into an agreement to sell to the plaintiff upon deferred payments. Before such payments were completed the trustees from the Crown conveyed to other trustees the deed containing a reference to the sale to one C., who assigned to the plaintiff. These last mentioned trustees made application to have the land brought under the Land Titles Act, filing a declaration that they knew of no interests in the land other than their own, and upon such application a certificate of title was issued. Subsequently other trustees were appointed and a new certificate issued. It appeared that each body of trustees had express notice of the plaintiff's claims. The plaintiff, after the conveyance by the trustees from the Crown, paid the balance due and secured a conveyance from the original trustees in 1896, but on account of the title being vested in the other trustees he could not register this transfer. The second body of trustees were registered as owners of the land in question in 1893. The plaintiff took no action until 1906, when he filed a caveat, and subsequently, the registered owners refusing to recognize his claim, he brought action for a declaration that they held the land in trust for him. All the various bodies of trustees were connected with and held in trust for the Presbyterian Church in Canada, and in the original grant it was expressly provided that the church might at any time change the trust, but subject to all existing rights:—

Held, that the trustees claiming under conveyance from the trustees from the Crown, being voluntary transferees, were subject to the trusts contained in the original grant from the Crown, which preserved rights created by the original trustees.

2. That notwithstanding that the subsequent trustees were registered owners of the land, the Court under its equitable jurisdiction could give relief to the plaintiff if the certificate of title were obtained by fraud, and the suppression of information by the applicants, when the land was brought under the Act, as to the rights created in favour of the plaintiff, of which they were aware, constituted fraud.

3. That under the provisions of sec. 25 of ch. 27, 3 & 4 Wm. IV., the defendants were not entitled to avail themselves of the provisions of the Real Property Limitations Act, not being transferees for value, and being trustees.

THIS was an action for a declaration that the plaintiff was entitled to be registered as owner of certain land of which certain of the defendants were registered owners, and was tried before JOHNSTONE, J., at Prince Albert.

Jas. McKay, K.C., and *H. A. Robson*, for the plaintiff.

F. W. G. Haultain, K.C., for the trustees from the Crown.

J. H. Lindsay, for the other trustees.

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April 1. JOHNSTONE, J.:—The facts in this case, as I find them, are that by letters patent dated the 24th day of November, 1884, the lands in question herein were granted by the Crown to George Bryce, William McLaren, Rev. James Robertson, the Rev. Hugh McKellar, and the Hon. Alexander Morris, trustees nominated and appointed for that purpose by the General Assembly of the Presbyterian Church in Canada, in trust and for the purposes mentioned in the grant, namely, upon such trusts and for such uses, intents and purposes, and to be occupied, sold or leased, or otherwise dealt with or disposed of as might from time to time be determined upon by the General Assembly of the Presbyterian Church in Canada, by resolution in that behalf duly passed at any meeting thereof provided, that such lands and rents, issues and profits thereof until sold and the proceeds thereof when sold should be used and applied for the use of the Indian Mission of the Presbyterian Church in Canada, or in otherwise promoting and advancing religion and religious instruction and education in the North-West Territories. The grant also made provision, in the event of any of the trustees or any future trustee dying, resigning or becoming incapable of acting, or ceasing to be a member of the church, in full communion with the said church, for the appointment of another trustee in the place of such trustees so dying, etc., and also from time to time for the substitution of another trustee or trustees for any existing trustee or trustees as the said assembly might think fit. It was provided, further, that the said assembly might from time to time revoke, annul, alter or vary the trusts affecting the said lands or any part thereof, but so as not to affect any of the lands which might have been sold or leased or the interests of any purchaser or lessee for valuable consideration.

Through the grant the said trustees became and thereafter remained the owners in fee simple of the said lands so held in trust as aforesaid up to the 25th November, A.D. 1892, on which date the lands in question, with other lands, were transferred by the trustees aforesaid to James McArthur, John Stewart, John M. Campbell, James F. A. Stull, and Hugh Montgomery, all of Prince Albert, trustees of the St. Paul's Presbyterian Church at Prince Albert, and these transferees became the registered owners thereof, upon the application of John Montgomery, one of the said trustees.

In his application Montgomery represented there were no documents or evidence of title affecting such land in his possession or under his control other than the said transfer; that he was unaware of any mortgage or encumbrance affecting said land, or that any other person had any estate or interest therein at law or in equity, in possession, remainder, reversion or expectancy, and, having made such application, directed the certificate of ownership to issue to the said trustees, James McArthur, John Stewart, John M. Campbell, James F. A. Stull, and Hugh John Montgomery, with the words "no survivorship." The certificate of title accordingly issued on the 17th day of January, A.D. 1893. This certificate was subsequently cancelled, and a new certificate, No. 9795, issued to the present defendants on the 13th July, 1905, subject to the caveat lodged by the plaintiff on the 20th day of September, 1906. This latter certificate of title was issued in pursuance of the order of the Hon. Mr. Justice Newlands, of the 8th day of July, 1905, whereby it was ordered that the present defendants, Samuel McLeod, Robert T. Goodfellow, James N. Mack, and A. C. Howard, should be registered as owners of an estate in fee simple, no survivorship, in lieu of James McArthur, John Stewart, John M. Campbell, and Hugh John Montgomery. Prior to the transfer from the Crown to the trustees of the Presbyterian Church in Prince Albert, the lots in question, together with others, had been sold by the duly authorized agent of the trustees from the Crown to one Courtland, of the city of Ottawa. The fact of this sale is established by the evidence of one Wright and from what transpired subsequently in the dealings between the trustees from the Crown and the then trustees of the Presbyterian Church in Prince Albert.

Under an indenture, dated December 30th, 1891, entered into between the trustees from the Crown and the trustees of the church—namely, McArthur, Stewart, Campbell, Stull and Montgomery—it was recited that the trustees from the Crown had sold certain lands mentioned in a schedule annexed to said indenture to the parties therein named, in which schedule appears the name of P. S. Van Courtland as having purchased the lands in question, together with lots 20 and 21 on the south side of Ninth street, for the sum of $200. It also appears from an exhibit produced at the trial, in the handwriting of Montgomery, the

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trustee, that there was due on lots 58 and 59 (the lots in question) the sum of $26, and it further appears that at a meeting of the members of the Presbyterian Church at Prince Albert, held on the 21st January, 1891, that Mr. Montgomery and Mr. Newlands were appointed to look after the collection of arrears on lots theretofore sold. The indenture also contains a recital whereby it appears some of the purchasers (referring to those contained in the schedule annexed) had paid the purchase money, and received conveyances of their lands from the trustees from the Crown, and that certain other lots had been paid for in full and the conveyance not executed to the different purchasers, and that there were others for which the trustees from the Crown had not been paid in full, and it was agreed, with a view of making provision for the carrying out of the conditions of the Crown grant in that behalf, that the trustees from the Crown should transfer all these lots, whether sold and conveyed or sold and unconveyed, to the trustees of the Presbyterian Church in Prince Albert, upon the trusts that such trustees should give to the purchasers who had not paid, reasonable notice to pay the balance of the purchase money on their respective lots, and, on the payment of such balance due, should transfer to the said parties the lots so purchased by them, and such trustees of the Presbyterian Church in Prince Albert, in consideration of $1, by such indenture covenanted, promised and agreed to and with the trustees from the Crown and their successors and assigns that they would well and faithfully perform and fulfil the trusts before mentioned, and indemnify and save harmless the trustees from the Crown and their successors, and the Presbyterian Church in Canada as well, from all loss or damage which might be sustained by them by reason of the transfer by the trustees from the Crown to the local trustees of the lands contained in the grant from the Crown.

By a further indenture entered into in 1892 (the exact date of which does not appear), between the trustees from the Crown and the trustees of the Presbyterian Church in Prince Albert, it is recited, that the trustees from the Crown, the owners of an estate and fee simple of lands named, including the lands in question herein, did by authority and pursuant to the direction of the said General Assembly, by transfer dated 2nd day of July, A.D. 1891, transfer all their estate and interest in such lands to

the trustees of the Presbyterian Church at Prince Albert; that long prior to the date of this transfer the lands referred to had been sold; that it was agreed, in consideration of the transfer by the trustees of the Crown to them by the trustees of the Presbyterian Church in Prince Albert, that they should give to the several purchasers or their representatives reasonable notice to pay the balance of the purchase money and interest, and upon such payment transfer the lots to such purchasers, and indemnify and save harmless the trustees from the Crown. This further document was, it is to be presumed, entered into because of the supposed loss of the previously mentioned indenture.

Evidence was given at the trial that the indenture first referred to, together with the schedule attached, was in the handwriting of Mr. Newlands, one of the persons named in the resolution of January 21st, 1891, and that Mr. Hugh Montgomery, one of the trustees who signed both declarations of trust, was the other person mentioned in such resolution. The trustees, therefore, of the Presbyterian Church in Canada had express notice of the sale of the lands in question to Van Courtland.

In the summer of 1896 the interest of Van Courtland in the lots in question was sold by one Tait, the duly authorized agent of Van Courtland, to the plaintiff, who paid the balance of the purchase money due thereon and interest to H. W. Newlands referred to, who prepared a transfer of such lots from the trustees from the Crown to Fish, which was afterwards executed by the then trustees of the Presbyterian Church in Canada—Bryce, McLeod, Robertson, Cassells, and McKellar. This transfer was handed to Fish in October, 1896, and has ever since been in his possession.

The defendants the local trustees having refused to recognize this transfer or to in any way give effect to the sale made to Courtland, Fish lodged the caveat hereinbefore mentioned, and brought this action, alleging that, prior to the year 1893, the said trustees from the Crown had entered into an agreement to sell to one Van Courtland, for a stated price, lots 58 and 59 in range 5, in river lot 78, in the Prince Albert settlement, being portion of the lots referred to in the grant from the Crown; that the interest of Van Courtland in such lots had been transferred to the plaintiff, who had paid the balance of the purchase money due to the said trus-

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tees from the Crown, who in due course executed and delivered to the plaintiff a transfer of the said lands in the form prescribed by the Land Titles Act, 1894; that in 1893 Bryce and his co-defendants, notwithstanding their said contract with the said Van Courtland, transferred the lands to the defendants Stull and others, the then trustees of the congregation of the Presbyterian Church, Prince Albert, voluntarily and without consideration, and that the said last-named trustees procured such instrument of transfer to them to be registered in the land titles office, and a certificate of title to the said lands to issue, which title had been transmitted to the present trustees, McLeod, Mack, Howard, and Goodfellow, and who now hold a certificate of title to such lands; that such trustees at all times knew of the interest of Van Courtland and the plaintiff in the lands, and the defendants, in fraud of the plaintiff, claim to own the said lands and to hold the same free from any estate or interest of the plaintiff.

The defendants the trustees from the Crown denied the making of the agreement with Van Courtland and that Van Courtland had assigned to the plaintiff; and, further, claimed the full amount of the purchase price agreed to be paid had not been paid, and, in the further alternative, that if they did execute the transfer, that it was executed as an escrow to take effect upon payment of the purchase money to the trustees entitled to receive the same. The other defendants, the local trustees, denied the allegations contained in the statement of claim, and claimed to be purchasers for value and without notice. These defendants also set up the Real Property Limitations Act of 1874.

As to the defence of the defendants the trustees from the Crown, I have already found as a fact that such trustees, through their duly authorized agents, did sell the lands in question to Van Courtland, and that Van Courtland assigned the same to the plaintiff, and that the plaintiff paid the balance of the purchase money and received a transfer of the lands in question from the said defendants. There was no evidence whatever offered by the defendants in proof of defence that the transfer was delivered as an escrow. This portion of the defence was practically abandoned at the trial.

As to the other defendants, the local trustees, these are, in my opinion, in the same position as if they had received the lands

directly from the Crown—that is, as far as the carrying out of the trusts imposed were concerned. The Presbyterian Church in Canada (the *cestui qui trust*) is the body; the trustees, both the trustees from the Crown and the local trustees, are tentacles of that body, and subject to the will and control of the body, and the lands, whether in the hands of the trustees from the Crown or in the hands of the trustees of the Presbyterian Church of Prince Albert, were subject to the trusts contained in the grant from the Crown, and the lands could not be dealt with by the church or its trustees, the defendants, in a manner inconsistent with the grant.

The defendants the trustees of the Presbyterian Church of Prince Albert, at the time of the transfer to them by the trustees from the Crown, had full knowledge of the sale to Van Courtland, and of the trusts upon which the lands were granted by the Crown, and, with this knowledge and in fraud of the plaintiff, obtained the certificates of title mentioned to the lands in question to issue. Furthermore, such defendants are not purchasers for value, but voluntary transferees, and the certificates so issued are subject to be declared void and to be cancelled for two reasons—one, for the reason it was obtained fraudently within the meaning of the provisions of the Land Titles Acts, and the other because the trustees were transferees subjected to the burden of carrying out the trusts contained in the original grant from the Crown. A declaration cancelling the present certificate of title as to the lands claimed by the plaintiff, and constituting the defendants the local trustees trustees for the plaintiff, or ordering them to convey to the plaintiff, would only be to give effect to the conveyance from the Crown.

It was provided by sec. 130 of the Territories Real Property Act, an Act in force in 1892, as follows: "Nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of actual fraud, or over contracts for the sale or other disposition of lands or over equitable interests therein." The procurement of an unqualified certificate of title by means of *suppressio veri* is a fraud: *Rochefoucauld* v. *Boustead* (1897), 1 Chy., at 206, 66 L.J. Ch. 74, 75 L.T. 502.

As to what constitutes fraud within the meaning of the Land Titles Act see *Biggs* v. *McAllister*, 14 S.A.L.R. 86 (affirmed

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in appeal, *McAllister* v. *Biggs*, 8 A.C. 315), and Eaglson Land Transfer Act of 1890, pp. 282 *et seq.*; Hogg A.T.S., pp. 834 *et seq.*

As to the relief which may be granted. There is no distinction between a proprietor who has got on the register by fraud and one who has got there under a voluntary transfer as against the rightful owner. In either case the registered owner may be declared a trustee for the rightful owner. Where land was brought under the Act by means of fraudulent representations, and the true owner proceeded against the registered proprietor before he had dealt in any way with the land, the latter was ordered to transfer the land to the true owner: *Ogle* v. *Aedy* (1887), 13 V.L.R. 461. A transfer to a mere volunteer, who thus becomes the registered owner, will not avail against the rightful owner: *Chomley* v. *Firebrace* (1879), 5 V.L.R. 57; *Neill* v. *Lindsay* (1879), 13 S.A.R. 196. It was laid down in *Solicitor-General* v. *Mere Tini* (1899), 17 N.Z.R. 773, that the statute was not passed for the purpose of enabling a person, not being a purchaser for value and in good faith, to retain the estate without right or title merely because he happens to be entered upon the register as owner of such estate. See also *Messer* v. *Gibbs* (1891), A.C. 248. These cases, with others, are referred to in Hogg on the Australian Torrens System, at p. 825 and following pages. See also *Massey* v. *Gibson*, 7 Man. R. 172; *Ontario Bank* v. *McMicken*, 7 Man. R. 218; *Jellet* v. *Wilkie* (1895), 2 Terr. L.R. 133.

As to the defence under the Real Property Act, 1874, I think the case clearly comes within sec. 25, ch. 27, of 3 & 4 Wm. IV. This section reads as follows:—

"Provided always and be it further enacted that when any land or rent shall be vested in a trustee upon any express trust, the right of such trust, or any person claiming through him, to bring suit against the trustee or any person claiming through him to recover such land or rent, shall be deemed to have first accrued to the meaning of this Act at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

In my judgment, the defendants, Samuel McLeod, James

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Black Hack, Arthur Charles Howard, James F. A. Stull, and Robert T. Goodfellow, should be and they are hereby declared, trustees for the plaintiff of the lots in question herein, such defendants to execute a transfer to the plaintiff thereof, and in default a formal order to issue for cancellation of the present certificate of title to such lots, and the issue to the plaintiffs of a new certificate of title.

The plaintiff will be entitled to his costs of this action. There will be no order as to costs as between the defendants the trustees from the Crown and the local trustees.

[COURT EN BANC.]

MAH PO v. MCCARTHY.

EN BANC.
1909
April 7.

Landlord and Tenant—Lease for Years—Repair of Premises by Landlord—Tenant Out of Possession During Repairing—Right of Landlord to Rent During Such Period—Consent of Tenant—Distress for Rent—What Constitutes—Detention of Goods.

Plaintiff leased certain premises from the defendant for a period of three years, and carried on business therein. The premises being out of repair the plaintiff complained to the defendant of the condition of the premises, and the defendant thereupon proposed that the plaintiff vacate the premises for about one month and that he would then have the necessary repairs made. To this the defendant agreed and moved out. The repairs were not completed until after about two and one-half months, and the plaintiff ultimately told the defendant he would not continue in the occupancy of the premises, and the defendant thereupon re-let them. When the plaintiff vacated the premises he left a range thereon, and this he demanded from the defendant, who refused to give it up until the rent for the two months during which the repairs were being made was paid. The plaintiff thereupon sued for detention, and the defendant counterclaimed for the rent. The learned trial Judge found for the plaintiff and dismissed the counterclaim. On appeal:—

Held, that the plaintiff having vacated the premises at the request of the defendant without any compulsion, and apparently without any objection, the dispossession during the period in which the repairs were being made did not amount to an eviction, and in order to effect a suspension of rent the dispossession must amount to an eviction, and therefore the defendant was entitled to rent during such period.

2. That even if the language used by the defendant were sufficient to constitute a seizure for rent, he had not proved that such seizure was made between sunrise and sunset, and as the onus was upon the defendant to prove that the seizure was lawfully made, which had not been done, the plaintiff was entitled to recover on the claim for detention.

THIS was an appeal by the defendant from the judgment of NEWLANDS, J., allowing the plaintiff's claim for detention, and

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dismissing the defendant's counterclaim for rent due, and was heard by the Court *en banc* (WETMORE, C.J., PRENDERGAST, JOHNSTONE and LAMONT, JJ.) on February 25th, 1909.

J. A. Allan, for the defendant (appellant): The present case differs from *Budd-Scott* v. *Daniel* (1902), 2 K.B. 351, in that in that case the tenant was compelled to vacate the premises, while here the plaintiff requested that the repairs be made, and moved out of his own accord. It is not necessary that the tenant should expressly assent to the entry by the landlord. Such an entry may be inferred by conduct: *Fergusson* v. *Troop* (1889), 17 S.C.R. 527. He is not excused from paying rent if he voluntarily vacate the premises to permit repairs: *Surplice* v. *Farnsworth*, 7 M. & G. 576; *Wood* v. *Pope*, 6 C.P. 782; *Buel* v. *Clifford*, 8 T.L.R. 103; Am. & Eng. Enc., 2nd ed., vol. 18, p. 231. Rent being in arrears, the landlord was entitled to distrain for arrears of rent upon all goods found on the premises: Fawcett on Landlord and Tenant, p. 245. Notice is not necessary before distress is made: *Gillingham* v. *Gwyn*, 16 L.T. 640.

C. E. D. Wood, for plaintiff (respondent): A covenant for quiet possession is implied from the mere relation of landlord and tenant: *Budd-Scott* v. *Daniel*, 71 L.J.K.B.D. 708, which case is on all fours with the present, and shews that rent is suspended while the tenant is out of possession while repairs are being made. The right to rent being suspended, there was no rent due under which the defendant could justify detention of goods under distress.

April 7. The judgment of the Court was delivered by LAMONT, J.:—This appeal, on the argument, simmered down to two questions, namely: (1) Was the plaintiff liable for the rent during the period in which he was deprived of possession of the demised premises, while the defendant made the necessary repairs; and (2), if so, was the defendant entitled to hold the range for the rent.

As to the first question, the learned trial Judge found as a fact that the plaintiff moved out at the defendant's request to allow him to make the repairs needed. This fact being proved, does it work a suspension of the rent for that period? The learned trial Judge, on the authority of *Budd-Scott* v. *Daniell* (1902), 2 K.B. 351, 71 L.J.K.B. 706, 87 L.T. 392, has held that it did. As I read

that case, it hardly goes so far as to support the proposition that a tenant is not liable for rent during the time he is out of occupancy of the premises at the landlord's request, while the landlord makes repairs. *Budd-Scott* v. *Daniell* was a case in which a furnished house was let for a year. In the agreement there was, as in the present case, no express covenant for quiet enjoyment. By a private Act of Parliament the landlord was bound, during the year, to paint the outside of the house. Under pressure from the landlord or her agent, the tenant consented to the painting being done. The painting necessitated the vacating of the premises by the tenant for about a fortnight. At the expiration of the tenancy the landlord sued for dilapidations, and the tenant counterclaimed for damages for breach of the implied covenant for quiet enjoyment. The Court held that where there is a letting, a covenant for quiet enjoyment is implied from the relationship of the parties, and that the landlord, by doing the painting during the term, had deprived the tenant of the possession of the house for that time, and the tenant was therefore entitled to damages. A breach of the covenant for quiet enjoyment, however, although entitling a tenant to damages, does not, in my opinion, necessarily work a suspension of the rent, even although the damages to be allowed would at least equal the amount of the rent. To work a suspension of the rent, the acts of the landlord must amount to an eviction in law. See *Ferguson* v. *Troop* (1889), 17 S.C.R. 527, where Gwynne, J., says, "If there was no eviction, there was no suspension of the rent as reserved by the lease and payable by the tenant." In *Upton* v. *Townend* (1855), 17 C.B. 30, Williams, J., says: "There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction, according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction." In *Ferguson* v. *Troop*, *supra*, Ritchie, C.J., states the law as follows: "If the subsequent acts of interference with the tenant's rights rendered it incompatible for him to hold according to the terms of his demise, and those acts were done with the intention of not permitting the tenant to enjoy for the time being the premises,

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as he was entitled to enjoy them, and they were of a serious and continuous character, then they would, in my opinion, amount to an eviction, because the tenant would thereby be deprived of the occupation of the thing demised, and there would be a substantial interference in the enjoyment of the premises by the tenant, whereby he would be deprived of the perfect and convenient use of the subject matter of the demise, so as to entitle him to say he had not had the enjoyment of that to which he was entitled."

Bell's Law of Landlord and Tenant, at p. 231, reads:—"It is an eviction in law, if the lessor, without the consent of the lessee and against his will, enters on the demised premises and turns him out and keeps him out of possession. It is not necessary that there should be an actual expulsion from the whole or part of the premises to constitute an eviction. It is sufficient to shew any act of the landlord, of a continuing character, by which the tenant is deprived of the use and enjoyment of the demised premises."

In *Newby* v. *Sharpe* (1878), 8 Ch.D. 39, 47 L.J.Ch. 617, 38 L.T. 583, Thesiger, L.J., says: "It is a mistake to suppose that a temporary trespass by a landlord, unaccompanied by any intention to put an end to the tenancy, is an eviction. . . . A trespass by the lessor will be no suspension of the rent." See also Foa's Law of Landlord and Tenant, 3rd ed., pp. 152-3.

To amount to an eviction, therefore, which will work a suspension of the rent, the interference by a landlord of his tenant's right to the quiet enjoyment of the demised premises must be something more than a mere trespass, involving a temporary dispossession for the purpose of making repairs. The dispossession to constitute an eviction must be without the tenant's consent, and must be an act of a continuing character, done with the intention of depriving the tenant of the enjoyment of the whole or a portion of the demised premises. This intention is always a question of fact to be decided by looking not merely at the act of entry, but at all the circumstances of the case and the intention with which the entry was made: Foa, at p. 153.

The facts of the case, as found by the trial Judge, shew that the plaintiff went out at the request of the defendant. There is no finding as to any intention on the part of the defendant to put

an end to the tenancy. On the evidence, I do not think any such intention can be found. The plaintiff had been complaining that water was coming through the ceiling and injuring his goods. The defendant agreed to make the repairs, and requested the plaintiff to move out, and the plaintiff did so, to allow the necessary repairs to be made. These were to be completed in about a month, but were not finished until some considerable time later. During this time the plaintiff was in and out viewing the repairs, and on March 1st he went back to take possession, but the building was not then finished. A short time later he told the defendant he would not go back, and that he could re-let the premises. Under these circumstances, I do not think the dispossession of the plaintiff amounted to an eviction, consequently there was no suspension of the rent until the premises were re-let.

The defendant's counterclaim, therefore, for two months' rent should be allowed.

As to the rent claimed from March 20th to March 31st, I am of opinion that this should not be allowed. The defendant re-let the premises on March 20th, and the tenant went into possession, although his rent did not begin until April 1st. The re-letting of the premises put an end to the plaintiff's tenancy, and the relation of landlord and tenant thereupon ceased.

While, in my opinion, the circumstances of this case shew that there was no eviction, and therefore no suspension of the rent, yet under *Budd-Scott* v. *Daniell* it seems to me that a tenant under the circumstances of this case might possibly be entitled to damages for breach of the implied covenant for quiet enjoyment, at least for being kept out of possession for a period much longer than the repairs were to take. As, however, there was no claim made in the pleadings for these damages, they cannot be given on this appeal, and it is therefore unnecessary that I should express any decided opinion on the point.

As to the range. There being rent due, the defendant was entitled to distrain. It was contended, however, on behalf of the plaintiff, that he did not distrain, and that until he did distrain he had no right to hold the range. The evidence shews that the defendant made no formal seizure. All that took place was this: the plaintiff went to him and said, "I want my 'stuff,'" to which the defendant replied, "You pay the rent," and then

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refused to let him have the range. Is this a sufficient distress to entitle the defendant to hold the range?

A distress for rent, even if the language used be sufficient to constitute a seizure, must be made in the daytime; that is, between sunrise and sunset, and (subject to a few exceptions) on the premises out of which the rent issues, otherwise the distress is illegal: Bell's Law of Landlord and Tenant, pp. 266 & 273. There is nothing in the evidence to shew where the above conversation took place, nor that it took place between sunrise and sunset, and as the onus of proving that he was entitled to retain the range is on the defendant, I hold that he has not shewn himself to be so entitled. It was also argued that as landlord the defendant was entitled to hold the range without distraining at all. I cannot find any authority for this proposition. The appeal, so far as the range is concerned, should be dismissed.

The judgment of the learned trial Judge should therefore, in my opinion, be varied by allowing the defendant, on his counterclaim, two months' rent. In all other respects the appeal should be dismissed.

[COURT EN BANC.]

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Transfer of Land by Way of Security—Assignment of Mortgage Thereon to Owner of Fee—Effect of—Merger—Intention of Registered Owner when Taking Assignment of Mortgage—Effect of Land Titles Act—Equitable Jurisdiction of Court to Relieve—Res judicata.

Defendant Konschur was the registered owner of a half section of land, subject to a mortgage to the Mutual Life Assurance Co., a second mortgage to the plaintiff, and an execution recovered at the suit of the defendant Riddell. The assurance company began to foreclose, and to protect her claim under the execution the defendant Riddell paid off the company, taking an assignment of the mortgage and securing a transfer of the fee simple from the defendant Konschur, who at the same time signed a memorandum acknowledging his indebtedness to her in respect of the amount advanced to pay off the mortgage. The assignment of the mortgage was then registered and indorsed on the title. On the same date she also registered the transfer; whereupon the registrar issued a new certificate without any memorandum of the mortgage transferred to Riddell, holding that the mortgage upon registration of the transfer merged in the fee simple, or was extinguished by the transfer. On the question being referred to the Chief Justice under the Land Titles Act, he held, on the evidence then before him, which was simply the documents in the registrar's possession, that the registrar had acted in accordance with the provisions of the Act. The plaintiffs then instituted an action for foreclosure or sale under their mortgage. The defendant Riddell by her defence asked a declaration that she was entitled to a charge in priority to the plaintiffs' claim for the amount of the Mutual Life Assurance Co.'s mortgage. The evidence shewed that the transfer to Riddell of the fee simple was intended as security only for the moneys advanced and her judgment against Konschur:—

Held, that as, when the defendant Riddell took and registered the assignment in question, it was her intention to keep alive the security, it was not extinguished, but remained to her benefit as a valid charge upon land in priority to the plaintiffs' mortgage.

THIS was an appeal by the defendant Riddell from the judgment of Johnstone, J. (1 Sask. L.R. 24), for sale of the property in question under the plaintiffs' mortgage, and was argued before the Court *en banc* (PRENDERGAST, NEWLANDS and LAMONT, JJ.), on February 23rd, 1909.

E. L. Elwood, for the appellant: The question of whether or not there has been a merger of the mortgage is entirely a question of intention of the parties: *Thorne* v. *Cann*, 64 L.J. Ch. 1; *Liquidation of Estates Purchase Company* v. *Willoughby*, 67 L.J. Ch. 251. In determining the question of merger, the principle by which the Court is guided is the intention of the parties, and in the absence of an expression, either documentary or verbal, of any intention, the Court looks to the benefit of the person in whom the two estates become vested: *Ingler* v. *Vaughan Jenkins*, 69 L.J. Ch. 618; *Capital and Counties Bank* v.

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Rhodes, 72 L.J. Ch. 169; *Adams* v. *Engell*, 46 L.J. Ch. 54; Enc. Laws Eng., 1st ed., vol. 8, p. 370. The evidence discloses that it was never the intention of the parties that the mortgage should be merged in the fee, but it was their intention that it should remain as a security. The appellant is not precluded from the relief asked for by the order of the Chief Justice, which was merely based on a set of facts presented by the registrar, and did not touch the merits of the question or the rights of the parties. There was no evidence before the Chief Justice as to the intention of the parties. The effect of sec. 65 of the Land Titles Act, upon which the Chief Justice based his judgment, was not to extinguish the mortgage, but merely provides that in every instrument transferring land there shall be the implied covenant mentioned therein. It does not deprive the parties of the right to contract out of the statute. An expressed covenant displaces an implied one: *Grosvenor Hotel Co.* v. *Hamilton* (1894), 2 Q.B. 836, at p. 840; Leake on Contracts, 4th ed., p. 8; Am. & Eng. Enc., 2nd ed., vol. 15, p. 1078.

T. L. Metcalfe (*D. Mundell* with him), for the respondent: Much of the evidence given is inadmissible, because the matter has already been dealt with by the Chief Justice, and no evidence should be taken in these proceedings. No evidence of intention as to the effect of the assignment of mortgage is admissible except such as is evidence of contemporaneous expression of such intention: *Adams* v. *Engell*, 5 Ch. D. 634. Oral evidence is inadmissible to vary or alter the legal effect and construction of a written document. Evidence of expression of intention to keep the Mutual Life mortgage in force, which expressions were not shewn to or brought to the attention of the registrar, is irrelevant and inadmissible. All such evidence should be rejected by the Appeal Court, whose duty it is to decide the case on legal evidence, even when such evidence is received in the Court below without objection: *Jacker* v. *International Cable Co.*, 5 T.L.R. 13; Ann. Prac. (1907) 810. The implied covenant of Lavina Riddell, as transferee, to pay off the mortgage shews that she must have intended not to keep the charge alive against Konschur. The implied covenant changes the application of intention to the doctrine of merger: Land Titles Act, secs. 65, 53, 54; *Re Riddell* (1908), 7 W.L.R. 301. An implied covenant of indemnity takes

effect notwithstanding that the mortgage is not noted upon the transfer: *Green* v. *Scott*, 2 Terr. L.R. 339. All the conditions of merger are present: Enc. Laws of Eng., vol. 8, p. 366-370; Am. & Eng. Enc. Laws, vol. 20, p. 595. The doctrine of merger applies to land under a registration system: Coutlee, p. 162-3; Hogg's Australian Torrens System, p. 936-7; *Gurnett* v. *Armstrong*, 1 Dr. & W. 182; *Hirch* v. *Skelton*, 20 Beav. 453. There is no expression of intention to keep the mortgage in force, which expression should be contemporaneous: *Adams* v. *Engell*, 5 Ch. D. 634. When the owner pays off charges, it is implied that they will merge: *Toulmin* v. *Scheir*, 3 Man. 210; *Farrow* v. *Rees*, 4 Beav. 18; Coote, 7th ed., 1456. The same principle applies to a purchase: Coutlee, 162-3; *Capital and Counties Bank* v. *Rhodes* (1903), 1 Ch. 631.

April 7. NEWLANDS, J.:—This is an appeal from a judgment of my brother Johnstone granting an order for sale under a mortgage given by the defendant Konschur to the plaintiffs. The learned Judge also held that the mortgage given by the defendant Konschur to the Mutual Life Assurance Company of Canada, and assigned by them to the defendant Lavina Riddell, could not be declared a first charge on the lands in question, and the plaintiffs' claim deferred thereto.

The facts are, briefly, that the defendant Konschur was the registered owner of the south half of 22-2-3 W. 2nd. This land was subject to a mortgage, first, to the Mutual Life Assurance Company for $2,000; second, to a mortgage to the plaintiffs for to secure certain promissory notes; and, third, to an execution at the suit of Riddell and Co., of which the defendant Lavina Riddell was the sole partner. The Mutual Life Assurance Company, the first mortgagee, brought action to foreclose their said mortgage, and the defendant Lavina Riddell, acting under the advice of a clerk in her employment, who was apparently her legal adviser, took a transfer from the defendant Konschur of this land, and an assignment from the Mutual Life Assurance Company of their mortgage. The defendant Konschur also gave to her a memorandum acknowledging his indebtedness to her for the amount paid by her to the said assurance company. She then registered the assignment of mortgage to herself, which was en-

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dorsed upon the defendant Konschur's certificate of title, and some time afterwards the transfer from Konschur to her. Upon the registration of the transfer the registrar issued to her a certificate of title, which did not shew the mortgage nor the assignment from the Assurance Company's mortgage to her, he being of the opinion that the said mortgage merged in the fee simple or was extinguished by the transfer of the land to her. Upon receiving back her certificate of title shewing the mortgage to the plaintiff as a first charge upon the land, she sent the same back to the registrar, and asked to have the mortgage assigned to her endorsed thereon as a first charge against the said land. This the registrar refused to do, but referred the question raised to the Chief Justice for his direction, under the provisions of the Land Titles Act. The Chief Justice, being of the opinion that the mortgage assigned to her was extinguished on the registration of the transfer of the same land to her, so advised the registrar, and the mortgage to the plaintiffs remained the first charge against the land.

The plaintiffs then brought this action for the foreclosure or sale of the said land, and the defendant Lavina Riddell, in her defence, asks that the mortgage and assignment to her be declared to be a first charge against the said land. The learned trial Judge refused this application, and, referring to the opinion of the Chief Justice on the reference, held that "it was open to such defendant to appeal under the provisions of sec. 130 of the said Act from the said judgment, and, not having done so, she is now precluded from obtaining the desired relief in this action."

The learned trial Judge found that it was not her intention that the mortgage which the Mutual Life Assurance Company had assigned to her should be merged or extinguished. I agree with this finding, as her whole proceedings throughout shew that she never intended that the mortgage assigned to her should be extinguished. She took an assignment of the mortgage instead of a discharge; she asked the registrar to have the same endorsed upon her certificate of title; and she took an agreement from the defendant Konschur to pay her the amount she had paid to the said assurance company. She was evidently acting all through under the advice of her alleged legal adviser that she could in this way not only receive back the money to be paid to the assur-

ance company, but also have her judgment against the defendant Konschur satisfied to the exclusion of the second mortgagee. The idea would have been a good one if it had not been for the fact that the equitable doctrine of tacking had been abolished, and that under the Land Titles Act all instruments took priority, the one over the other, according to the date of their registration.

There being, then, no question that her intention was to keep alive the mortgage to the Mutual Assurance Company for her benefit, it is settled, as stated in the case of *Thorne* v. *Cann* (1895), A.C. 11, 64 L.J. Ch. 1, 71 L.T. 852, that where the owner of an equity of redemption pays off a mortgage and takes an assignment of the mortgage, and the documents or circumstances shew an intention to keep alive the security, it is not extinguished, but inures for the benefit of the owner of the equity of redemption. In that case Lord Macnaghten said: "The material facts in this case are very simple. When Searle agreed to buy the equity of redemption from Piller's trustee in bankruptcy he became the owner of the estate, subject to certain charges. The debts which those charges were intended to secure were not his debts, nor was he personally liable to pay them. I do not forget the undertakings which Searle had given. But those undertakings did not make the debts his or bind him to pay so that he could be sued as debtor. There was nothing inconsistent with Searle's duty to Thorne in his performing his undertaking to Miss Arnold. Nothing, I think, is better settled than this: that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot. Here, I think, the intention appears plainly on the face of the deed by which Miss Arnold purported to transfer her mortgage. There is no release of the debt. Payment is not acknowledged simply. The power of sale and other powers are kept alive. To put it shortly, it is a transfer and not a reconveyance."

Unless the law has been changed by the Land Titles Act, the

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defendant Lavina Riddell would be entitled to have the mortgage assigned to her entered upon her certificate of title as a first charge against this land.

In the reference to the judgment of the Chief Justice above referred to, reported in (1908) 7 W.L.R. 301, considering the effect of the provisions of the Land Titles Act, he said: "I am not prepared to say that there was a merger, but I am of opinion that the intention of the Land Titles Act in force at the time Riddell got the transfer and assignment in question was, in so far as she was concerned, to cause the mortgage to be extinguished. The Act in force at the time of this transfer and assignment and registration was the Land Titles Act, 1894 (Dominion). Section 65 of that Act provides as follows: 'In every instrument transferring land, for which a certificate of title has been granted, subject to a mortgage or incumbrance, there shall be implied the following covenant by the transferee, that is to say, that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.' That section shews, I think, very clearly that the intention was to protect the transferor from any covenants that might be contained in any mortgage or incumbrance upon the land existing at the time of the transfer. Now, I take it that this property is not sufficient to satisfy the incumbrances upon it if the mortgage to the assurance company is allowed to stand, because, if it was, I can see no object in testing the question which has been raised in this case. That means this: if Riddell is allowed to keep alive the mortgage of the assurance company, she would leave the subsequent mortgagees and execution creditors without remedy against the land, and cast the burden upon the transferor (Konschur) of paying what was due in respect to such mortgages and incumbrances; and this section seems to me to point directly to the fact, possibly not that there is a merger, but that the transferee is expected to pay these incumbrances off, and, if he pay

an incumbrance off or takes an assignment of it, which is the same thing, he is only carrying out what the section contemplates he should do, and, therefore, that he cannot use such payment or transfer to prejudice the rights of other mortgagees or incumbrancers whose securities the Act intends he shall pay off."

It must be remembered that the above opinion was given by the Chief Justice upon a reference to him under the Land Titles Act to direct the registrar as to what his duties were under the said Act, and I take it that there was no evidence before him as to the intention of the parties other than the instruments submitted to the registrar for registration. In this action we have evidence of what the intention of the parties was, particularly the agreement of the defendant Konschur whereby he agrees to pay to the defendant Lavina Riddell the amount paid by her to the first mortgagee, the Mutual Assurance Company. As an implied covenant can always be modified or restricted by an express covenant, this agreement, in my opinion, nullifies the implied covenant which the learned Chief Justice relied upon. But, even if it does not, this implied covenant cannot be extended to make the debts hers or bind her to pay them so that she could be sued as debtor; and as the original debtor, the defendant Konschur, has agreed to pay her the amount of the mortgage to the Mutual Assurance Company, there is, therefore, no liability on her part, as between Konschur and herself, to pay off this mortgage, or indemnify him against his liability on the same. The reasons given by the learned Chief Justice, though applicable to the facts before him, do not, therefore, apply to this case, the facts before us being entirely different.

I am therefore of the opinion that the expressed intention of the parties will control the implied covenants, and that there has therefore been no change made in the law by the Land Titles Act, which would affect this case, and that the law as laid down in *Thorne* v. *Cann* governs this case.

For the above reasons I am also of the opinion that the case is not *res judicata*, as held by the learned trial Judge, and I therefore think that the appeal should be allowed with costs.

LAMONT, J.:—On September 8th, 1903, Paul Konschur, who was the owner of the south half of section 22, Tp. 2, Rg. 3,

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W. 3, mortgaged the same to the Mutual Life Assurance Company of Canada, to secure the repayment of the sum of $2,000 and interest thereon secured, which mortgage was duly registered.

On July 7th, 1904, he also executed a mortgage of the said lands to the plaintiffs to secure the payment of $4,871. On January 3rd, 1905, Riddell & Co. obtained judgment and execution against Konschur for $443.29, and filed a copy of the execution with the registrar of land titles. Other executions were subsequently registered by various parties. On February 26th, 1906, the Mutual Life Assurance Company commenced foreclosure proceedings under their mortgage. On April 22nd, 1906, Konschur executed a transfer of the said land to Lavina Riddell, who composed the firm of Riddell & Co. Lavina Riddell then paid to the Mutual Life Company the amount of their mortgage, interest and costs, and took an assignment of the same to herself, and also took from Konschur an acknowledgment in writing, which acknowledgment is in the words following:—

"I, Paul A. Konschur, of the village of Frobisher, in the Province of Saskatchewan, hereby acknowledge that the sum of three thousand two hundred and twenty-eight 55/100 dollars is due and payable by me to Lavina Riddell, wife of John S. Riddell, of Frobisher aforesaid, under an assignment of mortgage from the Mutual Life of Canada in favour of said Lavina Riddell, judgment debt and costs at the suit of Riddell & Co. against P. A. Konschur, and costs and expenses of the foreclosure proceedings at the suit of the said Mutual Life Assurance Company against myself.

"Dated at Frobisher, this 1st day of May, A.D. 1906.

(Sd.) "P. A. KONSCHUR."

After having the assignment of the Mutual Life mortgage, some correspondence took place between H. A. MacColl—who was looking after Mrs. Riddell's business interests—and the plaintiffs' solicitors as to the taking over by plaintiffs of Konschur's indebtedness to Mrs. Riddell.

On September 10th, not having reached an agreement with the plaintiffs for an assignment of her claim to them, Lavina Riddell registered her assignment of the Mutual Life mortgage and the transfer of April 4th, from Konschur to her. When the certificate of title was forwarded by the registrar to her, objection

was taken that it had not endorsed thereon the Mutual Life mortgage as a first encumbrance. The registrar, however, refused to enter the mortgage on the certificate, as both the land and the mortgage were now in Lavina Riddell. As a result of the objection, a reference was taken by the registrar to the Chief Justice of this Court, who upheld the correctness of the registrar's ruling.

On April 4th, 1907, the plaintiff commenced foreclosure proceedings on their mortgage, and asked for judgment against Konschur, and, in default of payment, that the lands be sold and the proceeds applied toward the satisfaction of Konschur's indebtedness to them. The defendant Lavina Riddell, in her defence, sets out the mortgage to the Mutual Life as a first encumbrance and the assignment of the same to her, intending that it be continued in full force and effect; also the transfer from Konschur to herself, and the written acknowledgment of his indebtedness to her by Konschur, and asks that it be declared that the plaintiff's claim against the said land is subject to the Mutual Life mortgage now assigned to her. The trial came on for hearing before my brother Johnstone, at Arcola, and he decided in favour of the plaintiffs. From this decision Lavina Riddell now appeals to this Court.

From a perusal of the judgment of the learned trial Judge, it is evident that he felt himself precluded from granting the relief asked for by Lavina Riddell by the decision of the learned Chief Justice on the reference, no appeal having been taken from that decision.

With great deference, I am of opinion that the question now before this Court was not before the learned Chief Justice. On the reference the only question before the Chief Justice was whether or not the action of the registrar was right in refusing to continue on the certificate of title to Lavina Riddell the Mutual Life mortgage. To that question, it seems to me, there could be but one answer, and that was the answer which the learned Chief Justice gave; while the question before this Court is, granting the registrar to have been right in issuing the certificate freed from the mortgage, can this Court, in the exercise of its equitable jurisdiction, continue the existence of the mortgage, if satisfied that the intention of the parties was that it was not to be extinguished? Even if all the facts now before this Court had been before the

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learned Chief Justice, I am of opinion that he could not, on the reference, have given the relief sought. In *Morris* v. *Bentley* (1895), 2 Terr. L.R. 253, it was held that a Judge hearing an application under the provisions of the Land Titles Act as to the duty of the registrar, could not enter into or dispose of any question affecting the equitable rights of the parties, and this view was sustained in *Wilkie* v. *Jellett* (1895), 2 Terr. L.R. 133, 26 S.C.R. 282. Where equitable or beneficial rights are sought to be enforced, the equitable jurisdiction of the Court must be invoked in some cause or matter in the Court, and cannot be raised on a reference to a Judge as to a registrar's duty. The decision of the learned Chief Justice, therefore, on the reference, does not, in my opinion, affect the question to be determined by this Court.

The defendant Riddell supports her appeal on two grounds: (1) that the transfer taken by her was taken merely as a security, and is, therefore, not a transfer within the meaning of the Act; and (2), even if it is held to be a transfer within the meaning of the Act, that, as the intention when she took the assignment of the Mutual Life mortgage was that it should be kept alive, there was no merger in equity.

For the respondent it was contended that Lavina Riddell had taken a transfer of the land mortgaged and had registered it; that the Land Titles Act prescribed the effect to be given to the registration of a transfer under the Act, and that the Court could not relieve the parties from the effect of that registration.

As to the appellant's first contention—which, I understand, was not raised at all before the trial Judge—that the transfer, though absolute in form, was taken as a security only, I am of opinion that the evidence shews that such was the case. Both Riddell and MacColl swore that it was taken as security only, and the written acknowledgment of Konschur, given after the transfer was taken, that he was still indebted to Lavina Riddell in the amount not only of the Mutual Life mortgage, but also of Riddell & Co.'s account, seems to be inconsistent with any theory other than that the transfer was taken by way of security only. If the transfer had been taken, as suggested by the respondents, in settlement of Riddell & Co.'s account, we would not have found Konschur afterwards acknowledging that he still was indebted in that amount. I am, therefore, satisfied that the

transfer, although in the statutory form, was intended by all parties to it to be nothing more than a security. The Court, therefore, acting on the well-recognized equitable principles, should give effect to it as such, unless the provisions of the Land Titles Act require a different holding.

As to the appellant's second contention, the learned trial Judge has found as a fact that it was not the intention of Lavina Riddell, when she took the assignment of the Mutual Life mortgage, that it should be merged or extinguished, and the evidence well bears out his finding. The question whether or not there is a merger is held by the Courts in England to be a question of intention. In *Gryce* v. *Shaw*, 10 Hare 76, Turner, V.-C., laid down the law as follows: "The general rule, indeed, is clear that, where a party has an estate in fee and at the same time a charge upon the estate, the charge will merge . . . but the law does not, of course, prevent the person entitled to both the estate and the charge from keeping alive the charge; and the rule, therefore, yields to the intention whether it is expressed or presumed." That intention may be expressed in the conveyance itself or in the circumstances attending the transaction, or it may be presumed from considering whether or not it is for the benefit of the owner that the charge should be kept alive. In the case above referred to, the learned Judge further said: "If the merger of the charge would let in other charges in priority, thereby rendering it in the interest of the owner of the estate to keep alive his charge, the Court presumes that such was his intention, notwithstanding the absence of other indications of such intention."

In *Thorne* v. *Cann* (1895), A.C. 11, the House of Lords held that where the owner of an equity of redemption pays off a mortgage and takes an assignment of the mortgage, and the documents or circumstances shew an intention to keep alive the security, it is not extinguished, but inures to the benefit of the owner of the equity of redemption.

In *Dean and Chapter* v. *McArthur*, 9 Man. L.R. 391, Taylor, C.J., after an exhaustive review of the cases, sums up the law as follows: "The weight of authority, however, seems to be that where the owner of an estate in fee pays off a charge or the owner of a charge acquires the estate, the result is that the charge merges, unless an intention to keep it alive is expressed in some way, and

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the onus of proving such intention rests on the party contending that there has been no merger."

In the present case the learned trial Judge has found that the intention was that the mortgage should not be extinguished. In equity, therefore, it would not be deemed to be merged, and by sec. 31, sub-sec. 3, of the Judicature Act, there is now no merger by operation of law only of an estate the beneficial interest in which would not be deemed to be extinguished in equity. In *Capital and Counties Bank* v. *Rhodes* (1903), 1 Ch. D., at p. 653, 72 L.J. Ch. 336, 88 L.T. 255, Cozens-Hardy, L.J., said: "If the circumstances are such that a court of equity would have held that there was no merger in equity, there is now no merger at law; and the rights of the parties must be dealt with on that footing." The result, therefore, is that, unless the provisions of the Land Titles Act bar the relief sought by the appellant, the Court, on its equitable jurisdiction being invoked, should deal with the rights of the parties on the footing of there being no merger.

Do the provisions of the Land Titles Act bar this relief? The sections relied on by the respondents are secs. 72, 74, 75, 80, 83, and 180 of the Provincial Act, which sections are almost identical with the provisions of the Dominion Land Titles Act in force prior to September 8th, 1906.

Section 72 provides that in every instrument transferring land under the Act, subject to a mortgage, there shall be implied a covenant that the transferee will pay the principal money, interest, etc., secured by the mortgage, and will indemnify and keep harmless the transferor from and against the principal sum or other monies secured by the mortgage, and from and against the liability in respect of the covenants therein contained or under the Act implied on the part of the transferor. Section 74 provides that upon the registration of any instrument the estate or interest specified therein shall pass. By sec. 75 the owner of land for which a certificate of title has been granted shall, except in certain prescribed cases, hold the same absolutely free from all encumbrances, liens, estates or interests whatsoever, except those endorsed on the certificate of title. Section 80 provides that every instrument shall, upon registration, become operative according to the tenour and intent thereof, and shall thereupon create, trans-

fer, surrender, charge or discharge, as the case may be, the land or estate or the interest mentioned in such instrument. Section 83 declares that every instrument transferring land shall operate as an absolute transfer of all such right and title as the transferor had therein at the time of its execution, unless a contrary intention is expressed in the transfer, and sec. 180 provides that every certificate of title shall (except in certain specified cases) be conclusive evidence in all Courts, as against His Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate and interest therein specified, subject to the exceptions and reservations implied under the provisions of the Act.

In determining the meaning of these provisions, we must keep in view the object and scope of the Land Titles Act. The main object of the Act was "to save persons dealing with land from the trouble and expense of going behind the register to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who *bonâ fide* purchases from a registered owner and enters his transfer or mortgage in the register shall thereby acquire an indefeasible title."

In referring to sec. 72 of the Act, the learned Chief Justice, in *Re Riddell* (1908), 7 W.L.R. 301, said: "That section shews, I think, very clearly that the intention was to protect the transferor from any covenants that might be contained in any mortgage or encumbrance upon the land existing at the time of the transfer." With this interpretation of the section, if I may be allowed to say so, I entirely agree. In the ordinary case where a purchaser buys land subject to a mortgage, he assumes the mortgage, and retains the amount of the same out of the purchase money, and the statute contemplates that he should pay the mortgage and save the transferor harmless. If it were not so, the purchaser would be defrauding the vendor by casting on him the burden of paying off the mortgage, after having retained the same out of the purchase money. This section seems to me equivalent to an express covenant in the transfer that the purchaser will pay off the mortgage and interest, and will indemnify and save harmless the vendor therefrom. Assuming for the moment, therefore, that Lavina Riddell took the transfer of the

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land as a transfer, she is in the position of having covenanted with Konschur that she will pay off the mortgages against the land, and if she does not and he has to pay them, he can call upon her to indemnify him. The covenant is between the transferee and the transferor. The evidence shews, however, that, notwithstanding the transfer, Konschur cannot call upon her to indemnify him and save him harmless as respects the Mutual Life mortgage. His agreement, after the execution of the transfer, to be responsible for it would be an absolute bar to any such claim. Could he call upon her to save him harmless from the plaintiff's mortgage? This would depend upon whether or not there was any agreement between them which would estop him from relying in the covenant implied in this section. If not, and he was obliged by the plaintiffs to pay the mortgage, he could claim the enforcement of the covenant as against Lavina Riddell. But the enforcement of the covenants rests with Konschur; it does not rest with the plaintiff, as there is no privity of contract between them and Lavina Riddell: *Australian Deposit and Mortgage Bank* v. *Lord*, cited in Hunter's Torrens Title Cases, p. 388. The section, therefore, does no more than impose a covenant on Lavina Riddell that she will pay off the mortgages on the land, and gives Konschur his right of action if she does not. It does not, therefore, assist the plaintiff in getting a priority over the Mutual Life mortgage as respects the land itself.

It was strongly contended, during the argument, that by sec. 83 the transfer operated as an absolute transfer of all the right and title of the transferor, and that by sec. 180 the certificate of title was conclusive evidence that the person named therein is entitled to the land for the estate or interest specified in the certificate. Whatever difference of opinion may have existed as to the effect of sec. 180, it must now, it seems to me, since the decision of the Privy Council in *Assets Co., Ltd.*, v. *Mere Roihi* (1905), A.C. 176, 74 L.J.P.C. 49, 92 L.T. 397, be taken as settled that, save as to the exceptions specified in the section, the certificate of title of one who has purchased *bonâ fide*, relying upon the register, and who produces it in Court, and claims the protection of the statute, is conclusive evidence that the owner has a valid title to the land for the estate or interest described in the certificate. In that case it was held, under an Act of New Zealand very similar to

our own, that as the registration had been obtained *bonâ fide*, the effect thereof was to confer upon the registered owner a title unimpeachable by the respondents, who were setting up an adverse claim. But, while it is settled that a certificate of title in the hands of a registered owner, who in good faith purchased, relying upon the register as conclusive as against adverse claimants, it is not to be understood that the certificate of title cannot be questioned at all in a Court of law. In *Wilkie* v. *Jellet*, McGuire, J., said: "I cannot accept the proposition that a Court exercising equitable jurisdiction is powerless, when confronted with a certificate of title, to question the ownership therein set forth," and he further points out that if, as was contended here, the title of one who is registered as owner cannot be questioned, any land held by a person as executor or trustee would be liable to be taken under execution to satisfy the trustee's debts. I think it will not be doubted that, where a trustee held a certificate of title for lands the beneficial ownership of which is in another, the Court, notwithstanding his certificate of title, will force him to hold the lands for the other's benefit, and will give effect to all equities to which the beneficial owner may be entitled. But if the trustee transfer the land to a *bonâ fide* purchaser, who buys relying upon the registered title, the purchaser will obtain an indefeasible title freed from any equities which might have been enforced against the trustee, as the object of the Act is to make the title indefeasible in the hands of such purchaser. Indefeasibility of title, however, is secured by the Act only to those who obtain title relying upon the register. In *Messer* v. *Gibbs* (1891), A.C. 248, Lord Watson, in interpreting the provisions of a Torrens title system similar to ours, said: "The protection which the statute gives to persons transacting on the faith of the register is limited to those who actually deal with and derive right from the registered owner."

Again, while it seems clear that the certificate of title of an owner acquiring title on the faith of the register is conclusive evidence of his right, it seems to me to be equally clear that the conclusiveness of that certificate may be waived or abandoned by the registered owner. In *Miller* v. *Moresey*, 3 V.R. (L.) 38, it was held that a plaintiff had waived his right to have his certificate held as conclusive by putting in evidence contra-

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dictory of his title. In Hogg's Australian Torrens System, at p. 829, the point is dealt with by the learned author as follows: "A plaintiff is entitled to rely on his own certificate of title if no further evidence is necessary to prove his case, but if a plaintiff himself goes behind his certificate of title and gives evidence of his title anterior to it, the certificate of title is no longer conclusive evidence against the defendant." Therefore, it seems to me that in a case such as the present, where the registered owner not only does not claim the protection of the statute and the conclusiveness of her certificate of title, but admits and sets up that, as between her transferor and herself, it was expressly agreed that her title was not to be an indefeasible one and not to carry with it all the incidents of a transfer as provided in the Act, it would be going much further than I think the Act goes to hold the certificate of title to be conclusive.

The conclusion, therefore, at which I have arrived is that the Land Titles Act is only intended to confer indefeasible title on those who deal with the registered owner and deal with him on the faith of his registered title. It affords no protection to a registered owner against equitable rights which he himself has created, and is no defence when his own title is attacked by a person rightfully entitled to the land. If, therefore, a person employed to buy land for another takes the title in his own name, his certificate of title is no defence against the rightful owner. He is merely a trustee for him, and the Court will enforce the trusts, unless the rights of the *bonâ fide* purchaser in the meantime intervene.

If this conclusion is correct, what are the rights of the plaintiff? They took their mortgage expressly subject to the Mutual Life mortgage. They have done nothing to alter their position. They have acquired no new right. They have not dealt with Lavina Riddell as the registered owner nor did they deal on the strength of her registered title. They do not, therefore, come within the protection afforded by the Act to one dealing on the faith of the registered title. The provisions of the Act, therefore, do not bar the relief asked by the appellant, and as there was no merger of the Mutual Life mortgage, the plaintiffs' claim is subject to that mortgage.

The appeal should be allowed with costs, and the order of my

brother Johnstone should be varied by directing the local registrar to take an account also of the amount due under the Mutual Life mortgage, which amount will be a first charge on the land, and the plaintiffs' foreclosure will be subject thereto.

Appeal allowed with costs.

[COURT EN BANC.]

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April 7.

Master and Servant—Agreement as to Wages—Evidence of—Weight of Evidence —Direct Contradiction Between Two Witnesses of Equal Credibility.

Plaintiff was employed by defendant for a number of years, entering such employment without making any agreement as to wages. In an action for wages the plaintiff swore and the defendant denied that after the plaintiff had been in the employment some time the defendant asked what wages the plaintiff would expect, to which the plaintiff replied "$50 per month." To this defendant made no reply, and the plaintiff continued in his employment. There was no corroborative evidence in support of this evidence on behalf of either party, and the learned trial Judge found both parties to be of equal credibility, and held that according to the authorities, where one party alleges the occurrence of an incident which the other denies, both being of equal credibility, credit should be given to him who swears affirmatively; and found the above conversation proved, and gave judgment for the plaintiff. On appeal:—

Held, that, assuming that the testimony of the plaintiff as to the conversation to be true, the learned trial Judge was justified in finding a contract to pay wages at the rate alleged.

2. That there is no rule of law affecting the question of credibility where the evidence is evenly balanced, as in this case; but the Judge must deal with each case as it affects his mind, and the learned trial Judge having found for the plaintiff and there being evidence to warrant such finding, the appellate Court should not interfere.

THIS was an appeal by the defendant from the judgment of LAMONT, J. (1 Sask. L.R. 418), and was heard by the Court *en banc* (WETMORE, C.J., PRENDERGAST, NEWLANDS and JOHNSTONE, JJ.), on February 23rd, 1909.

H. V. Bigelow, for the defendant (appellant): The learned trial Judge, having found the parties of equal credibility, should have found for the defendant, the onus of proof being on the plaintiff. The words of the Judge, in *Law* v. *Jackson*, 20 Beav. 635, were only *obiter dictum*, and not applicable to this case. The weight to be given to evidence of conversation depends altogether

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on the nature of such conversation and whether the parties would be likely to remember: Moore on Facts, vol. 2, p. 1308; *Jibb* v. *Jibb*, 24 Grant Ch. 492. Whenever a credible witness denies the occurrence of an event or a conversation which another witness affirms, the Court will be strongly inclined to credit the negative if the singularity of the conversation must have made an impression on his mind which he could not forget: Moore on Facts, p. 1310. The conversation here was so important that he would be likely to remember it. In any event, the conversation is not sufficient to support a contract, it being no more than an expression of the plaintiff's wishes without any assent by the defendant: Anson on Contracts, p. 11.

W. B. Scott, for the plaintiff (respondent): On the evidence the learned trial Judge was warranted in finding for the plaintiff; and there being evidence to warrant such a finding, the appellate Court should not interfere.

April 7. The judgment of the Court was delivered by WETMORE, C.J.:—This is an action for wages for work done by the plaintiff for the defendant. The particulars claim wages from the 1st April, 1905, to the 1st June, 1907, at $50 per month, and from the 1st June until the 5th September, 1907, at $75 per month. The defendant, by his defence (which seems to be a counterclaim and statement of defence all mixed together), sets up payment and that the amount claimed is unreasonable, and a counterclaim for board, lodging and laundry.

The hiring was not denied at the trial, and the question narrowed down to the amount that was to be paid for the services and whether the plaintiff had credited in his particulars all the credits the defendant was entitled to. And the question of the amount of the wages was further narrowed down to what was to be paid for the services from the 1st April, 1905, to the 1st June, 1907.

The learned trial Judge found that the wages from the 1st June to the 1st September, at $75 per month, was practically agreed to by the defendant, and the evidence fully warranted him in coming to that conclusion.

The plaintiff and defendant are brothers, and before the plaintiff came out to this country he was residing in Ontario. He came out here at the instance of the defendant in 1905, and started

to work for him on or about the 1st April of that year. He continued working for him for some time, no agreement having been made with respect to the amount of wages the plaintiff was to be paid. The evidence, however, taken altogether, establishes that he was to be paid wages of some sort for his services. The plaintiff testified that in September, 1905, he had a conversation with the defendant about the wages to be paid him, in which the defendant asked him, "What do you expect?" (for wages), to which he replied, "$50 a month." To this the defendant made no answer, and the plaintiff went on working down to the 1st June, 1907, when his wages at $75 a month commenced. Apparently no further conversation took place upon the subject until somewhere in June, 1907. I may say that it was conceded that up to the 1st June, 1907, the defendant had supplied the plaintiff with the means for procuring board and lodged him. The $75 a month agreed on on the 1st June, 1907, covered the board; the plaintiff was to pay that out of this wage. The defendant absolutely denied the conversation testified to by the plaintiff as having occurred in September, 1905, and the question between the two, therefore, was whether the plaintiff was entitled to be paid $50 a month, exclusive of board, by virtue of an implied agreement arising out of this conversation, or whether he was entitled only to be paid on a *quantum meruit*.

The action was tried before my brother Lamont, without a jury, at Regina, he giving judgment for the plaintiff, allowing him wages down to the 1st June, 1907, at $50 a month, and from the 1st June to the 1st September, 1907, at $75 a month, and crediting the defendant with some payments and services over and above those credited in the plaintiff's particulars. The learned Judge, in effect, gave credit to the plaintiff's testimony as to what took place in September, 1905, between these parties. The only persons present at this conversation were the plaintiff and the defendant, and, therefore, there could be no corroborative testimony by a third party as to what took place on that occasion. In delivering judgment, the learned trial Judge laid down the following: "If the conversation above referred to took place, I am of the opinion the plaintiff is entitled to $50 per month to June 1, 1907. In *Lefeunteum* v. *Beaudoin* (1898), 28 S.C.R. 89, Taschereau, J., said that it was 'a rule of presumption that

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ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed.' And he cited the language of Baron Parke, in *Chowdry Deby Persad* v. *Chowdry Dowlut Sing* (1846), 3 Moo. Ind. App. 347, where he said: 'In estimating the value of the evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time.' And he referred to *Lane* v. *Jackson* (1855), 20 Beav. 535, wherein the Master of the Rolls said: 'I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstances. By this means I give full credit to both parties.'" The learned Judge then proceeded as follows: "In the case under consideration, so far as I know, the parties are equally credible. Following the rule laid down in the above cited authorities, I find that the conversation took place as testified by the plaintiff, and that the defendant, having retained the plaintiff in his employ afterwards, the plaintiff is entitled to wages at the rate of $50 a month, exclusive of board."

It was urged on behalf of the defendant in this appeal, in the first place, that, assuming the plaintiff's evidence of this conversation to be the truth, it did not bear out the learned trial Judge's conclusion that there was a hiring for $50 a month, inasmuch as there was no evidence that the defendant assented to the proposition. I am of opinion that the learned trial Judge was warranted in coming to the conclusion that he did, assuming that the testimony by the plaintiff in this respect was true. The plaintiff having informed the defendant of the wage that he expected to receive or what he considered his services worth, if the defendant objected to it, it was his duty to do so at once, and, not having done so, and having allowed him to go on for nearly two years without any protest or refusal to agree to it, either

express or implied, it was open to the Judge of fact to find that the proposition was assented to. It certainly would have been open to a jury to have so found if the case had been tried by a jury, and it was equally open for the trial Judge to find.

It was also urged that the learned trial Judge reached the conclusion he did upon a wrong principle: First, because, having found that the two witnesses were of equal credibility, he should have given effect to the testimony of the defendant, and not to that of the plaintiff, inasmuch as the onus of proof was upon the plaintiff and not on the defendant; second, there was no rule of law binding the learned Judge to come to the conclusion he did as to the credibility of the witnesses under the circumstances of this case; third, because there was testimony of other witnesses which affected the improbability of the testimony as given by the plaintiff.

As to the first and second contentions above mentioned, I know of no rule of law, strictly speaking, which affects the question. It is merely a matter of fact under such circumstances for the jury or Judge, as the case may be, to find upon, and their findings will be determined according as to whether they give credit to the one side or to the other. *Gray* v. *Haig* (1855), 20 Beav. 219, at p. 229, was cited on behalf of the defendant, in which Romilly, M.R., is reported as follows: "If the matter rested here, I should not act upon the testimony of one witness against a party as to a fact expressly denied by him on his oath."

It will be borne in mind that this is the same Judge who gave the judgment in *Lane* v. *Jackson*, cited by my brother Lamont, and in which he stated as set forth by that learned Judge.

A number of cases were also referred to, on the part of the defence, in 6 Dig. Eng. Case Law, cols. 900 *et seq.*, in which it was held that the testimony of a single witness, unsupported by corroborative circumstances, would not be sufficient to grant relief in the face of a sworn answer of a defendant. The cases there reported are all in Chancery, and they depend upon a very peculiar state of the law as applicable to Chancery proceedings at the time these cases were decided, which did not then prevail in the common law Courts. To understand them it is necessary to remember what the practice was at the time these cases were decided. Proceedings were commenced in the Court of Chancery

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by the filing of what was called a "Bill," and the defendant put in his defence by what was called an "Answer." It was the practice to present interrogatories to the defendant, and his answer might be in response to such interrogatories, and had, in that case, to be sworn, and the Court of Chancery laid down the rule that where this was done, inasmuch as the plaintiff had appealed to the conscience of the defendant, in order to overcome his answer, there must be the testimony of two witnesses, or of one witness corroborated by circumstances which tended to contradict the answer. But this only applied to such part of the answer as contained positive allegations as to facts responsive to the bill. Where other facts were alleged in defence or in avoidance, the rule had no application in so far as those other facts were concerned. I cannot find in any English text-books of the present day any reference to such rule. In American text-books, such as a not very recent edition of Greenleaf on Evidence and Storey's Equity Jurisprudence, I can find a reference to the rule, and I suppose that is given there because in some parts of the United States the old practice in the Court of Chancery in England still prevails in the practice there. But even in the late editions of Storey any reference to the rule seems to be expunged. I apprehend that the fact that the law respecting the rights of parties to give testimony and the practice in the Court of Equity which substituted a statement of claim for a bill and a statement of defence for an answer having been introduced, it is now considered that the practice does not apply. Therefore, the cases mentioned in the Digest have no application to this case. I am of opinion, therefore, that there is no rule affecting the question of credibility, where there is conflicting testimony of the character it was in this case, one way or the other. The Judge must deal with each case as it arises according as the matter of credibility affects his mind.

As to what was laid down in these cases cited by the learned trial Judge in his judgment, to which I have referred, I do not understand the Judges in any of them to lay down a rule by which a Judge or jury should be governed. If the case had been tried before my brother Lamont with a jury, he could not have directed them to have found either one way or the other; he would have had to refer the question of credibility to the jury, but if, in doing

so, he had cited to them what was stated by Parke, B., and Romilly, M.R., and Taschereau, J., it could not have been held a misdirection. It seems to me the jury would have been at liberty to exercise their own judgment, and come to such a conclusion as they thought they ought to arrive at in view of the credibility they gave the respective witnesses, and I presume they would have been so instructed if these cases had been read to them. That being so, it seems to me that all the learned Judges in these cases attempted to do was to express what their own views were upon the subject, and what they considered to be a reasonable and proper method of arriving at a conclusion of fact under the circumstances to which they referred. And all I understand the trial Judge here to have done is to have adopted the method suggested by those learned Judges for arriving at the conclusion that he did arrive at. Surely such a method cannot be considered improper with such high authority to back it, especially when one is contained in a judgment of the Privy Council, a Court whose judgment is binding on this Court.

Then, as to the contention that the weight of evidence was in favour of the defendant because there were witnesses who gave testimony affecting the improbability of the plaintiff's evidence. There was evidence and matter on each side in this respect, some of it, possibly, pointing in the direction that the plaintiff's testimony was probable; other pointing in the direction that it was not probable. That testimony would simply go to affect the credibility, one way or the other, of the parties to this suit, the only persons who testified with respect to what took place in September, 1905. I presume, in arriving at the fact that these two witnesses shewed equal credibility, the learned Judge was influenced by this outside testimony (if I may so call it), and I am of opinion that this outside testimony was of a character which would warrant the Judge in coming to the conclusion that the credibility of these parties was equal, and, having arrived at the fact that their credibility was equal, as to who told the truth as to what occurred in September.

Without questioning one moment the power of this Court to sit in review over the findings of fact in this or any other case, I am of opinion, to use the language of Girouard, J., in *The Village of Granby* v. *Barnard* (1902), 31 S.C.R. 15, at p. 25: "There is

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ample evidence to warrant the finding of the trial Court," and, under the authority of that case, this judgment should not be disturbed.

The appeal should be dismissed and the judgment of the trial Judge affirmed with costs.

Appeal dismissed with costs.

[IN CHAMBERS.]

1909 Jan. 5.

SAWYER MASSEY v. CARTER.

Practice—Writ of Attachment—Application to Set Aside—Writ Obtained upon False Affidavits—No Appearance by Applicant—Locus standi—Step in the Cause—Proceeding Incidental to the Cause.

Defendant moved to set aside a writ of attachment on the ground that it had been obtained on affidavits which were false. No appearance had been entered by the defendant, and it was objected that until an appearance had been entered he had no *locus standi*:—

Held, that the issue of a writ of attachment is not a step in the cause, but is entirely incidental thereto, and a motion may be made to set it aside on the ground of irregularity before appearance.

THIS was an application in Chambers before WETMORE, C.J., to set aside a writ of attachment for irregularity.

T. S. McMorran, for the plaintiff.

W. M. Martin, for the defendant.

January 5. WETMORE, C.J.:—This is an application on behalf of the defendant Carter, by Chamber summons, to set aside a writ of attachment against personal property issued under rule 417 of the Judicature Ordinance. The ground upon which the application is made is that the affidavits upon which the order for the writ to issue was obtained contained matters that were false. The Chamber summons issued on the 15th of December, but no appearance was filed by Carter or either of the defendants until the 21st of December, and the objection was raised that Carter had no *locus standi* to make this application, not having appeared at the time he made it; and rule 87 of the Judicature Ordinance was relied upon. The practice seems to be clear that a defendant who has not appeared cannot take a step in the cause, unless it may be to

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set aside the service of the writ upon him, or to discharge or set aside the order authorizing such service, or to set aside the writ on the ground of irregularity or otherwise, as provided under that rule.

I am of opinion that the issuing of the writ of attachment is not a step in the cause. It is true that rule 417 provides that the application for such writ is to be made after the commencement of the action. That, however, in my judgment, does not make it a step in the cause. The proceeding is entirely incidental to the cause. It is more, in my opinion, in accord with the old practice where arrest on mesne process for debt was in vogue. In such cases an application could be made to set aside the writ or the arrest for irregularity without appearing. There are a number of proceedings that are incidental to this case, authorized by statute in some instances, but which are not steps in the cause, and I see nothing in the practice which prevents an application being made to have them set aside if they are irregular or issued without authority or the issue of them is an abuse of the process of the Court. I will not, therefore, dismiss this application on the ground taken, but as the plaintiff's counsel asked for leave to cross-examine the parties on their affidavit, I will grant that application.

[IN CHAMBERS.]

1908

ROBINSON v. LOTT.

Jan. 7.

Interpleader—Lease of Land—Rent Payable by Delivery of Portion of Crop—Assignment by Landlord of Interest in Lease—Effect of such Assignment—Security—Bills of Sale Ordinance—No Change of Possession—Conveyance not Registered.

Defendant was the owner of a farm which he had leased upon terms that the tenant was to deliver one-half the crop grown thereon by way of rent. The plaintiff seized this portion under execution. Previously the defendant, being pressed for payment by the claimants, assigned his interest in the lease to them by way of security. The assignment was not registered, nor was there any change of possession, and the crop at the time had not been wholly cut:—

Held, that the intention of the parties in making and accepting the assignment of lease in question was that it should be by way of security upon a growing crop, and was therefore, by the provisions of sec. 15 of the Bills of Sale Ordinance, void as regards the crop uncut at the time of execution.

2. That the assignment of the lease, being intended as a conveyance of the crop, was as to the portion of the crop cut, void, as such an agreement was not registered nor was there any actual or continued change of possession.

THIS was an application, by way of interpleader by the sheriff, to determine the ownership of certain grain. By agreement the matters in issue were determined in a summary way before the Chief Justice in Chambers.

G. H. Barr, for the plaintiff.

H. F. Thomson, for the claimant.

W. B. Scott, for the sheriff.

January 7. WETMORE, C.J.:—This is an interpleader by the sheriff. Executions against the goods of the defendant Lott were placed in the hands of the sheriff at the suit of Bessie Robinson, Clara Maria Medjlay and Mutrie and Mutrie respectively. The first of these executions were placed in the sheriff's hands on the 19th October last and the last of them on the 27th of that month. On the 13th November the sheriff seized, under such writs, the interest of the defendant in 500 bushels of wheat situate on a farm occupied by one Malcolm Gibbons. The claimants claimed this property to be theirs, and the sheriff interpleaded.

The defendant was the owner of the farm above mentioned, and had let the same to Malcolm Gibbons for a term of five years, to be computed from the 1st day of March, 1907. The lease was dated 6th December, 1906. The yearly rental or recompense

to be paid to the defendant for the lease of this land was half the crop grown thereon. The grain seized was the defendant's interest in the crop grown on this land for the year 1908. The defendant, being indebted to one Emerson on a promissory note made by the defendant in Emerson's favour, and also on a mortgage executed by the defendant in Emerson's favour, covering the land rented to Gibbons, and being pressed to pay the amount of such indebtedness or to give security, he assigned to Thompson and Kennedy, as trustee for Emerson, the lease which he had executed to Gibbons. It is not very usual for a landlord to assign a lease. The usual course is to transfer the property, and the lease, of course, would pass to the transferee as incidental to the transfer. However, I have no doubt that the intention in this case was to assign simply the position of the landlord, if I may use the expression, and not to assign any interest in the land beyond that—that is, the right of the assignee would terminate with the expiry of the lease. No question was raised as to this on either side, and I merely mention it in passing for the purpose of pointing out what, in my opinion, the nature of the transfer or assignment was.

At the return of the interpleader summons, it was agreed by counsel for both plaintiffs and claimants that I should decide the questions involved in this matter upon the affidavits which were read at the return of such summons. A good deal of discussion arose on the argument of the different questions raised as to whether or not this transaction was affected by secs. 39 *et seq.* of the Assignments Act, ch. 25, of 1906. In the view I take of the matter it is not necessary to decide these questions. It is quite clear that this assignment to the claimants was taken as a security for the debt due Emerson. The assignment was made on the 2nd September last, and it was made under the following circumstances: Emerson, by himself or through the claimants, who were his solicitors, had been pressing the defendant to either pay the amount of his indebtedness to Emerson or to give him security therefor. On the 20th August they wrote him that if he wanted to save himself the costs incidental to an action, he would have to make arrangements to meet that indebtedness immediately or else to arrange to give Emerson security. The defendant answered this letter, among other things asking

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what security Emerson would require, and the claimants again wrote on the 25th August stating that they were willing to accept any security which might be considered reasonable and good, viewing the same from the view point of a bank or other financial corporation, and they further stated: "Thus much, however, you must fully understand, that Emerson wants either good and sufficient security or else payment at once." On the 1st September Emerson instructed Harold F. Thompson, who was then in the office of Thompson & Kennedy, to go to Regina, interview the defendant, and obtain from him either payment of his indebtedness or security for the payment thereof, and Harold Thompson came to Regina accordingly and interviewed the defendant, demanded of him payment of the indebtedness to Emerson, and, on the defendant replying that he was unable to pay the same, he demanded security for the payment thereof, and the defendant agreed to give the assignment of lease as security in question, and did give it as such security.

It is clear, therefore, that this assignment was made by way of security, and it is equally clear that it covered the growing crop. Section 15 of the Bills of Sale Ordinance provides that "no . . . transfer or assignment hereafter made, executed or created, and which is intended to operate and have effect as security, shall, in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future, in whole or in part, be valid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grain." Now, this transfer or assignment of this lease was intended to apply to and affect the crop then growing, or so much of it as was growing, and was so intended to apply or affect it by way of security, and in so doing it was not given, executed or created as a security for the price of seed grain or for any interest thereon.

I hold, therefore, that, in so far as the portion of the grain which was then growing on this land is concerned, this transfer was invalid. In so far as the crop is concerned which was not growing, if any (I am left to grope a good deal with respect to that, I have nothing to guide me except the statement of one of the counsel, Mr. Harold Thompson, namely, that part of this crop had been cut and part was uncut), I hold, if the assignment can

be construed to mean the grain severed from the land, it is void, under sec. 6 of the Ordinance, because the assignment in question was not accompanied by an actual and continued change of possession. Things remained just as they were so far as the evidence shewed, and there is nothing to shew to the contrary, and I must assume, therefore, that there was no actual change of possession, and the conveyance was not registered as provided by that section.

So, therefore, whether the crop was cut or was not cut, I hold that the transaction *quoad* the crop in question was invalid and void.

The result will be that the claimants will be barred.

[TRIAL.]

CASWELL v. WESTERN ELEVATOR CO.

1909

Jan. 22.

Manitoba Grain Act—Storage of Wheat to be Specially Binned—Storage Tickets Issued—Agents Agreeing to Specially Bin Wheat Contrary to Instructions—Liability of Elevator Company—Delivery of Wheat—Amount to which Bailor Entitled—Place of Delivery.

Plaintiff delivered a quantity of wheat to defendants' elevators at Saskatoon and Osler, receiving tickets or receipts therefor in the form of storage tickets mentioned in the Manitoba Grain Act. The agent marked the words "specially binned" on these tickets; but it was shewn he had express instructions not to accept any wheat to be specially binned. The amount of wheat shipped from the bins in which plaintiff's wheat was stored was greater than that mentioned in the tickets, and he claimed this wheat. The plaintiff also claimed damages by reason of the defendants' failure to deliver the wheat to him at Palmerston, Ont., the wheat being in fact delivered at Fort William:—

Held, that the plaintiff having accepted ordinary storage receipts under the Manitoba Grain Act calling for the delivery to him of the "above quantity grade and kind of wheat," could not claim that the wheat was specially binned under the provisions of the Act, and was entitled only to delivery in accordance with the provisions of the Act when the grain is stored under storage tickets.

2. That the indorsement of the words "specially binned" on the ordinary storage receipt would not give any greater privilege than those to which the plaintiff was entitled under storage tickets.

3. That the contract between the parties being for delivery of the wheat in car lots at any terminal elevator in the district, the delivery of the wheat at Fort William was sufficient compliance with the contract.

THIS was an action for an account of wheat sold the defendant and for damages, and was tried before NEWLANDS, J., at Saskatoon.

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J. D. Ferguson, for the plaintiff.
R. W. Shannon, for the defendant.

January 22. NEWLANDS, J.:—The plaintiff claims that in October, 1902, he delivered to the defendants at Saskatoon certain wheat that was to be specially binned and shipped to his order to Palmerston, Ontario. He claims that this wheat was put into cars—viz., 45,430 lbs. in car No. 23,416 and 65,460 lbs. into car No. 35,864—that defendants, instead of shipping this wheat to his order to Palmerston, shipped same to their own order to Fort William; that these cars were there unloaded and reloaded, and only 40,000 lbs. shipped in car No. 23,418 and 61,050 lbs. in car No. 35,864 to Palmerston; that defendants took 5,430 lbs. from said cars; and, owing to their negligence, lost a further amount of 4,380 lbs. between Fort William and Palmerston—in all 9,840 lbs.—and he claims the value of that amount of wheat and $14 which he had to pay for storage inspection and weighing at Fort William. He admits that the defendants afterwards gave him a receipt for 85 bushels and 40 lbs. of wheat on account of this shipment.

He further claims that in October, 1904, he delivered to defendants at Osler certain grain to be specially binned; that defendants gave him storage receipts showing 775 bushels of grain received; that within 15 days he supplied a car and tendered all charges to which they were entitled and demanded that said car be loaded as agreed, but that they refused to deliver him the said grain; that subsequently defendants loaded this grain on car No. 70,020, and received the proceeds of this grain, amounting to 845 bushels, all of which plaintiff claims belonged to him. He asks for an account, the repayment to him of the $14 paid for storage, etc., at Fort William, and $1,000 damages.

The defence is a denial of the contract set out by plaintiff and an allegation that the contract was that said wheat was received by them to be stored, and upon the return of the receipt therefor and upon payment of all charges for receiving, storing, insuring, delivering and otherwise hauling said wheat, and upon request by the holder of such receipt therefor to be delivered for shipment to the public terminal elevator at Fort William. They further deny all charges of default, negligence and breach

of contract, and say that the contract that they made with plaintiff was well, faithfully and fully performed, that they shipped said wheat to the public terminal elevator at Fort William and delivered to plaintiff all certificates and documents required.

At the trial it was proved that plaintiff received from the defendant's man in charge of their elevator at Saskatoon tickets for 1,778½ bushels of wheat, and from their man at Osler tickets for 775 bushels of wheat. Plaintiff claimed that in both instances he delivered to defendants' elevator more wheat than the tickets shewed; that he called the elevator man's attention to this, who said that it made no difference, as the wheat was being specially binned, and that plaintiff would get all the wheat that was put into his bin. In both instances the elevator man denied this, and swore that plaintiff received tickets for all the wheat he put into the elevator. Plaintiff, in support of his contention, pointed out that, though he got tickets for 1,778½ bushels from the Saskatoon elevator, defendants shipped from that bin some 165 bushels more, and from the Osler elevator 70 bushels more than he had received tickets for, and he claims this wheat as his. It was sworn on the part of the defendants that plaintiff got tickets for all the wheat he put in, and that it was very easy, even when wheat was put in a special bin, for other wheat to get mixed in with it, and that that is what happened in this case.

As to the quantity of wheat that plaintiff delivered to these elevators, I am not satisfied that he put in any more wheat than he got tickets for. He cannot swear what amount he put in in either case, and as defendants' agents swear positively that plaintiff got tickets for all the wheat he put in, and have explained how the extra wheat may have got into these bins, I must hold that this extra wheat belonged to the defendants and not to the plaintiff. Besides the Manitoba Grain Act makes them guarantee only the weights and grade as shewn by their tickets, and when they have delivered that amount to plaintiff they have performed their part of the contract.

The next question to be decided is, what was the contract between the parties? The plaintiff claims that the wheat delivered to defendants at Saskatoon was to be specially binned and delivered to him at Palmerston, and that the wheat delivered by him at Osler was to be specially binned and delivered to him there on

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board a car to be furnished by him. Defendants say that their agents had no authority to specially bin wheat, and that under the Manitoba Grain Act they had the right to deliver this wheat to plaintiff at the terminal elevator at Fort William, which they did.

As to the contract between the parties, I am of the opinion that that is shewn by the tickets or receipts for grain given by the defendants' agents at Saskatoon and Osler to plaintiff. These agents were general agents at these points in charge of their elevators, and, as far as third persons are concerned, would be presumed to have all the authority necessary to carry on the business of the defendants in both purchasing and storing grain, either generally or in special bins, and such third party would not be affected by any instructions given by the principals to their agents of which they had no notice. Now, defendants swear that during the years 1902 and 1904 they were not receiving any grain at their elevators to be placed in special bins, and that their agents had instructions to this effect; also that all grain stored with them was to be shipped to the terminal elevator at Fort William and delivered to the owner there. Under the Manitoba Grain Act, where grain is to be specially binned, a special form of receipt, which is provided by that Act, is to be given. This receipt provides: "Upon return of this receipt and tender or payment of the above-named charges accruing up to the time of the said return of this receipt, the identical grain so received into store will be delivered within the time prescribed by law to the person above-named or his order," while the ordinary storage receipt provides, instead of the "identical grain" being delivered, that the "above quantity, grade and kind of grain will be delivered." This latter was the form of receipt given to the plaintiff in this case, and it was, I think, notice to the plaintiff that the grain was not specially binned under the provisions of the Manitoba Grain Act. This receipt, I think, contains the contract between the parties, and plaintiff is bound by it. The fact that the words "specially binned" were written on the receipt would not make the contract one for the delivery of the identical wheat to the plaintiff, and the fact that the defendants' agents were only provided with ordinary storage receipts would be notice to the plaintiff that they had no authority to receive wheat to

be specially binned under the provisions of the Act. Now, if this wheat was not specially binned, the defendants had the right under the Manitoba Grain Act, and it was so set out in the receipts given to the plaintiff, to deliver this wheat to him "in quantities of not less than car load lots at any terminal elevator in the inspection district of Manitoba, on same line of railway or any railway connecting therewith, as soon as the transportation company delivers the same at the said terminal, and certificates of grade and weight are returned subject to freight, weighing and inspection charges at such terminal point, the grade and weight of such grain to be delivered to be such as will conform to the grade and as near as possible to the weight first above-mentioned on government inspection and weighing thereof at such terminal point." This defendants have always been ready and willing to do, and as this is all they have contracted to do, I think they have fully performed their part of the contract.

Judgment for defendants with costs.

[IN CHAMBERS.]

1909

GREAT WEST LIFE ASSURANCE CO. v. HILL.

Feb. 3.

Mortgage—Sale Under—Regularity of Sale—Time for Holding Sale—Local Time—Standard Time.

Certain land was ordered to be sold under mortgage at 12 o'clock noon at Estevan. In Estevan what is known as local or fast time is observed, such time being one hour faster than Standard time. The land was offered for sale and was sold at 12 o'clock noon local time. On application to confirm the sale:—

Held, that as, under the provisions of sec. 31 of the Interpretation Act, what is known as Mountain Standard time is declared to be the time for the Province, the sale should have been held at 12 o'clock noon, Standard time, and not having been so held, it was irregular.

THIS was an application to confirm a sale under mortgage, heard by NEWLANDS, J., in Chambers.

P. H. Gordon, for the plaintiff.

T. S. McMorran, for subsequent encumbrancers.

February 3. NEWLANDS, J.:—The advertisement for sale stated that sale would take place at 12 o'clock noon on Saturday, November 7th, 1908, at Estevan. Estevan time is one hour ahead of Standard time, and the sale took place at Estevan time, the property being sold for $1,350. D. Murphy swears that he went to the place of sale at 12 noon Standard time, and was told that the sale had taken place one hour previously. He also swears he was prepared to bid $1,800 for the property. Mr. N. J. Lockhart swears that all business transactions in Estevan for the last five years have been conducted on local time. Under these circumstances should I confirm the sale?

Section 31 of the Interpretation Act is an enacting as well as an interpreting section, and it provides that the time known as Mountain Standard time shall be the time for this Province. This time is one hour slower than Estevan local time. Now Standard time is the time we are to go by. The Courts are opened by Standard time, no matter what the local time is, and I think that a sale under an order of the Court must be held on Standard time unless some other time is mentioned. Twelve o'clock noon in the advertisement therefore meant twelve o'clock Standard time, and as the sale was held one hour earlier than Standard time it was held that much too soon, and the sale cannot be confirmed. As the first mortgagee had the conduct of this sale he must be held responsible for costs.

[COURT EN BANC.]

TAEGER v. ROWE.

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April 7.

Detention—Goods Seized under Agreement for Conditional Sale—Previous Sale of Same Goods Without Reservation of Property—Re-sale to Original Seller—Validity of Lien—Change of Possession on Re-sale—Sale to Innocent Purchaser—Intention of Alleged Bailor and Bailee—Bills of Sale Ordinance—Ordinance Respecting Hire Receipts and Conditional Sales.

Defendant sold a team of horses to one A., taking promissory notes in payment. When one of the notes became due he learned that A. would not likely be able to pay, and made inquiries as to his position, and was advised that if he could get possession of the horses he could re-sell them to A., taking lien notes which would afford him security. Accordingly he went to see A., and asked for payment, and on A. stating that he could not pay, the defendant proposed that he buy back the horses for the amount due and he would re-sell them to A., at the same time taking lien notes for the purpose of securing the purchase price. This arrangement was carried out, lien notes being given. The horses were at this time in a livery stable, and there was not any apparent change of possession during the transaction A. immediately afterwards sold the horses to the plaintiff. The defendant, learning of the sale, took possession of the horses under the lien notes, and the plaintiff sued for detention:—

Held, that the whole transaction between the defendant and A. was one devised to evade the provisions of the Ordinance respecting Hire Receipts and Conditional Sales, and there being no actual *bonâ fide* re-sale to the defendant the lien notes under which he claimed were not operative, he having no right, title or interest in the horses in question which could be retained under an agreement for conditional sale.

2. In any event the transaction was void under the Bills of Sale Ordinance, because there was at the time of the alleged re-sale no actual or continued change of possession, nor any memorandum in writing duly registered.

THIS was an appeal by the plaintiff from a judgment of Lamont, J. (1 Sask. L.R. 466), dismissing the plaintiff's action for detention of goods, with costs, and was heard by the Court *en banc* (WETMORE, C.J., PRENDERGAST and JOHNSTONE, JJ).

J. F. L. Embury, for appellant: The findings of the learned trial Judge are not supported by the evidence, and the weight of evidence is such that the appellate Court would be justified in over-ruling such findings: *McKay* v. *Victoria*, 9 B.C.R. 37; *Fairweather* v. *Lloyd*, 36 N.B.R. 353; *Village of Granby* v. *Menard* (1902), 31 S.C.R. 14; *North British* v. *Tourville* (1896), 25 S.C.R. 192-194; *Montreal* v. *Cadreux* (1899), 29 S.C.R. 616; *Debster* v. *Lewis* (1903), 33 S.C.R. 292. The evidence shews that the sale from Armstrong to Rowe and the resale was not *bonâ fide*. In any event, there was no change of possession on such sale, and it is therefore void: *In re Hoffman, ex p. Venning*, 10 L.R. Eq. 62, at p. 71; *Boyle* v. *Lasker*, 16 U.C.C.P., at

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275; *Wilson* v. *Kerr*, 17 U.C.Q.B., at 170; *Howard* v. *Mitchell*, 10 U.C.Q.B. 542; *McMichael* v. *Brook* (1905), 1 W.L.R. 168; *Sonar* v. *Smith*, 45 U.C.Q.B. 159; *Jackson* v. *Bank of Nova Scotia*, 9 M.L.R., at 75; Enc. Laws of Eng., vol. 10, at 228; *Mueller* v. *Cameron* (1905), 2 W.L.R. 534; *Goodyear* v. *Goodyear* 10 W.R. 405; *Danford* v. *Danford* 8 A.R. 518.

C. E. D. Wood, for respondent: The appellant, having admitted the respondent's right to the horses by offering to purchase them after the respondent had taken possession of them, is estopped from disputing the respondent's title; *Baxendale* v. *Bennett* (1878), 47 L.J.Q.B. 626; Cababe on Estoppel, pp. 6 & 7; *Ashpittal* v. *Bryan* (1864), 33 L.J.Q.B. 328. It is not necessary, in order to constitute estoppel, that the facts should be true: *McCance* v. *London and North-Western R.W. Co.* (1865), 34 L.J.Ex. 39. The sale from Armstrong was a *bonâ fide* transaction. The subsequent resale was not in the minds of either party at the time. It was the intention of the parties that the property should pass to Rowe, and the Court will be guided by this: *Farley* v. *Bates* (1864), 2 H. & C. 200, 33 L.J.Ex. 43. Under the circumstances of this case, the learned trial Judge has found that a reasonable time for taking possession had not expired when the new sale was made, and the purchasers being entitled to a reasonable time to take possession, the Bills of Sale Ordinance does not apply: *Haight* v. *Munro*, 9 U.C.C.P. 462; *Jackson* v. *Bank of Nova Scotia*, 9 Man. R. 75. In practically every case where a sale has been declared void as against a subsequent purchaser, on account of no change of possession, the property had remained in the possession of the seller on his own premises. In this case the horses were in a livery barn, and not in the actual possession of the seller, and under such circumstances the sale would be valid: Barron on Bills of Sale, 1897 ed., 393.

April 7. The judgment of the Court was delivered by WETMORE, C.J.:—The defendant, about the 26th of August, 1907, sold to one Fred. J. Armstrong a team of horses and harness for $570. One hundred dollars was paid in cash on account of the purchase, and Armstrong gave two notes for $270 and $200 each, respectively due on the 1st day of December, 1907, and the 26th of August, 1908, with interest at eight per cent. About the 3rd

of December, 1907, the defendant met Armstrong at Lumsden, and, according to his statement, Armstrong sold back to him these horses for the consideration of his delivering up to Armstrong the two notes before referred to, upon which there was then unpaid $478. Armstrong, after this transaction was concluded, expressing a desire to retain the horses, Rowe proposed to sell them back to him for $478, he giving to him two lien notes for that amount, and Armstrong agreed to this proposition, and gave the defendant two lien notes for $208 and $270 each, respectively payable on the 1st of January and the 1st of October, 1908, which he took away. Of course, the lien expressed to be given was on the horses in question, which were a pair of dark bay mares. At the time this transaction was going on and took place, the mares were in a livery stable in Lumsden, and remained there. Nothing whatever was done with respect to them by either Armstrong or the defendant, and there was no actual change of possession nor any apparent alteration in the possession which any person could observe. In fact, there was no pretence of anything of the sort. Afterwards, on the same day, Armstrong sold these horses, some harness and a buggy to the plaintiff for $325, the plaintiff paying on account thereof $50 in cash and a cheque for $150, which was subsequently presented and duly cashed. It was alleged by Armstrong that he was drunk at the time he made this sale. Be that as it may, he went out from Lumsden that night to Regina, the following morning cashed the $150 cheque in Regina, and proceeded to Ontario. He never came back for the $125 balance which he was entitled to, and for which the plaintiff was to give him a note on the morning after the sale.

The plaintiff, after this, used the horses and went driving them until the 7th of December, keeping them, however, at the same livery stable. On the 7th December, however, when the defendant came into Lumsden, he (the plaintiff) removed them to the stables of one Hall, which, perhaps, was the first actual change of possession that was made by any person from the time that Armstrong brought them to the livery stable. Subsequently the defendant took the mares away to Strassburg, where he lived, and this action is brought for the purpose of deciding the question of ownership of these horses, the plaintiff having replevied them out of the possession of the defendant.

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The learned trial Judge found that the sale by Armstrong to the defendant, and by the defendant back to Armstrong, was an honest *bonâ fide* proceeding, and without fraud, and, therefore, gave judgment in favour of the defendant. I very much regret that I am unable to agree with the learned trial Judge in that conclusion. I do not desire to express an opinion that the defendant was guilty of a fraudulent act, but I do find, on the testimony (and I think the conclusion is irresistible), that the defendant and Armstrong entered into a scheme with the object of defeating the intention of the Ordinance respecting Hire Receipts and Conditional Sales, being ch. 44 of the Consolidated Ordinances, 1898, and that there was no real sale, nor was a real sale ever intended, from Armstrong to the defendant and from the defendant to Armstrong, as stated. In order to explain how I arrive at that conclusion, it is necessary to go back and see what occurred before the defendant and Armstrong met at Lumsden. The defendant had been informed by Armstrong's brother that his (Armstrong's) crop had been frozen, and that he would have nothing to pay for the horses, and that the defendant had better look out for his security. The defendant thereupon consulted with one Stedman, a conveyancer and real estate dealer, residing at Strassburg, and was informed by him that when taking the horses back and taking the lien notes on them from Armstrong, that the lien notes would be a security. He thereupon came into Lumsden with blank lien notes in his pocket, apparently prepared to get notes of that character, and, upon meeting Armstrong in Lumsden, he first asked him if he had sold the team yet, and, upon being informed that he had not, he asked him if he was prepared to pay anything on the horses that day, to which Armstrong replied that he had no money, but he thought he would be in Strassburg on Monday night and give him $200 more. The defendant then asked him if he would be willing to give lien notes on these horses on different conditions, to which Armstrong replied "Yes," and wanted to know what the conditions would be; and the defendant told him that he would want one lien note for thirty days and the other one till October next. After this they went to an hotel, and the arrangement was made there which I have before described. The defendant stated, on cross-examination, that when there they talked the matter over for fifteen or

twenty minutes, or perhaps half an hour, and at the end of the conversation Armstrong signed the lien notes, and he (the defendant) handed him over the promissory notes; that one was practically handed over when the other was, and that Armstrong got the promissory notes after he had signed the lien notes. And, upon being asked as to what he would have done if Armstrong had picked up the promissory notes and made for the door, his reply was that it would be hard to say what he would have done. Upon being further asked if it would not have been a breach of faith to walk out with the promissory notes before signing the lien notes, he replied that there would not have been much business about it. The evidence shews that, after the defendant had got these lien notes, he marked "renewal" on them. This was apparently after he had got back to Strassburg. Now, the defendant, in my opinion, made a great deal of shuffling when interrogated as to why he marked the word "renewal" upon these notes, and his explanation was by no means satisfactory. One would ordinarily understand that he meant a renewal of some security that he had held in his hand before. If, as he wishes us to believe, his transaction with Armstrong on the 3rd December practically wiped out the old sale of August, 1906, and created a new transaction altogether, these notes would have been in no sense a renewal of any notes given in consideration of the old sale. They would stand as representing something new, and I can only consider his marking them in that way as some evidence, at least, tending in the direction that he considered the transactions all one and the same. The defendant, in one or two respects, shewed himself, in my opinion, somewhat ingenious. For instance, he has stated, in one part of his examination, that he never had anything to do with a lien note, and knew very little about it. Further on, however, upon being asked to explain why he had these blank lien notes with him which he brought in from Strassburg, he stated that he had had them in his pocket for some time, and that he carried this kind of thing with him all the time. Armstrong was called as a witness, and he seemed to be able to do better for the defendant than the defendant was disposed to do for himself, because he swore that the proposition to sell the horses back was made after his notes were delivered back to him, and that the defendant had got up, with the notes

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in his possession, and was about to leave the room, when he proposed to buy the horses back again. In the first place, this is utterly at variance with what the defendant states. In the next place, I am not much disposed to put very much reliance on the testimony of Mr. Armstrong. His conduct, at any rate at Lumsden that day, was by no means creditable to him. It was dishonest. In the first place, he went into a store there and purchased an overcoat for $50, which he promised to pay for that day, and which he never paid for, and at the time he bought it he had not the means to pay for it, and had no prospective means in view, unless, of course, he intended to sell these horses. In the next place, when he sold out to the plaintiff, he sold a buggy which did not belong to him, and which Taeger had to give up. And, assuming the sale to the defendant to be valid, he was quite prepared to defraud the plaintiff of the $200 he had got from him, and he continued that intention next day, when, I presume, he was sober, by cashing the cheque. For these reasons I have reached the conclusion that the sales between the defendant and Armstrong were pretences, and were not real and were not intended to be real. Of course, under such circumstances, no property passed, nor could it be held that any property was intended to pass. It remained in Armstrong just as if they had never attempted anything of the sort, and, consequently, the lien notes would be of no effect. It was conceded that a lien note upon property the title and ownership of which had passed out of the payee of the note before it was made was invalid as a lien note, and that, in order to hold a lien under such a note, the payee must have a title and ownership to retain at the time the note is made, as, for instance, when the vendor of a chattel, at the time of sale, retains his right of ownership by such a note until the payment is made, then the note should be valid, but without something of that character there would be no such conditional sale as is contemplated by the Ordinance in question. Therefore, as lien notes the documents signed on the 3rd of December were of no use.

But, assuming that I am wrong in finding that the sales between Armstrong and the defendant of the 3rd December were pretences, I am of opinion that no title passed to the defendant from Armstrong as against an innocent purchaser for value, by

virtue of the Bills of Sale Ordinance, C.O. ch. 43, sec. 9, inasmuch as there was no actual and continued change of possession of the property in question, and there was no conveyance thereof with the affidavits provided for by that section. Now, suppose that this sale to the defendant by Armstrong had been *bonâ fide*, and the defendant had left the horses in the stable just where and as they were before. There would have been no sale as against a purchaser for value or a creditor. Therefore, if, after that, Armstrong had sold those horses to the plaintiff, and the plaintiff had taken possession of them, as he did in this case, as I have already stated, the sale to him would have been good. Nor would the defendant's sale of those horses to some person else, without a conveyance as provided for by the Ordinance, and without an immediate delivery followed by an actual or continued change of possession, have been of any avail as against a purchaser for value from Armstrong. And if it would not, it would not be in any better position by making a resale to Armstrong, and Armstrong giving him a lien note. The same evil which the Bills of Sale Ordinance is intended to provide against still existed, because the intention is to prevent *bonâ fide* purchasers being deceived by the fact that the apparent possession and ownership is in one person, while secretly the ownership is in another. The mere fact of Armstrong giving the lien note upon something which he also was apparently in possession of will not help them, simply because Armstrong never had any title to give or consent to as against a person in the plaintiff's position, a purchaser for value, nor was he in a position, as against the plaintiff, to consent to the lien being placed against this property, for the reason I have stated, that in so far as the plaintiff was concerned, and others like him, it was always his (Armstrong's) property and not the defendant's. It has been stated in argument that, inasmuch as these mares were at the livery stable and continued there, that practically the mere act of sale was sufficient change of possession, and Barron and O'Brien on Bills of Sale (edition of 1897, p. 393) was cited in support of that proposition. As I read Barron and O'Brien, it lays down nothing of that sort. In the reference in Barron and O'Brien which I think is relied upon for the defendant, the vendor of the property was supposed to be the proprietor of the stable, and the horse was supposed to have been

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taken away by the purchaser and brought back to the stable. What is laid down there, too, is the opinion of the author: it is supported by no authority. *Ramsay* v. *Margrett* (1894), 2 Q.B. 18, 63 L.J.Q.B. 573, 70 L.T. 788, was also referred to by the defendant, and all that it is necessary to say in respect to that case is that it came up under an English statute, where the question was not immediate delivery and actual and continued change of possession, but was simply a question of what constituted apparent possession under the circumstances—two very different matters. Something has been stated with reference to the question of the immediate delivery of these horses. Now, the immediate delivery and the actual and continued change of possession that was necessary to effect a transfer and make a good title under sec. 9 was immediate delivery and continued change of possession as between Armstrong and the defendant. As between them there was no immediate delivery and no actual change of possession whatever, and it was never intended that there should be. The defendant, when he went home that night with these notes in his pocket, had no intention of taking these horses again, until, at any rate, default had been made in the payment of the notes, and I am unable to bring my mind to the conclusion that, having sold back to Armstrong, that a dealing with them by Armstrong which was intended to defeat the plaintiff's right can be construed to amount to an immediate delivery or an actual change of possession for the benefit of the defendant.

I am forced, therefore, with all due deference to the learned trial Judge, to the opinion that this appeal should be allowed and judgment entered for the plaintiff for $40 and costs, and the defendant should pay the costs of this appeal.

[COURT EN BANC.]

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Land Titles Act—Caveat—Right of Caveator to Require Registration Before Issue of Crown Grant for Land—Duty of Registrar—Judicial Discretion—Caveator's Claim Founded on Unregistered Mortgage—No Evidence which would Support Right to Register Mortgage.

The appellants secured a mortgage from one Ebbing on certain lands, and applied to the registrar to register a caveat against such land claiming an interest therein under such mortgage. At the time of such application grant from the Crown for such land had not been received, and the appellants produced no evidence that such grant had issued or that the mortgagor was entitled to mortgage such land. The registrar refused to register such caveat, and the appellants appealed from his decision:—

Held, that, as the registrar could not accept and register the mortgage under which the caveator claimed until the Crown grant was received by him or until he was satisfied by affidavit in form K. to the Land Titles Act that the mortgagor was entitled to create the mortgage, he could not accept and register a caveat claiming under such a mortgage in the absence of the Crown grant or evidence of the right of the mortgagor to create such mortgage.

THIS was an appeal by the International Harvester Company from a judgment of WETMORE, C.J., sustaining a decision of the registrar of land titles at Prince Albert in refusing to register a caveat tendered by the company for registration.

N. Mackenzie, K.C., for the appellant: The appellant submits that the registrar had not before him any evidence upon which he could act that the land in question was homestead land: Land Titles Act, secs. 33, 36 and 163; *In re Claxton* (1890), 1 Terr. L.R. 282, at p. 288. If he had not this information, the appellant's caveat was regular, and they were entitled to have it registered: Land Titles Act, sec. 137 and Form W., secs. 136, 138, 140 and 141; *Wilkie* v. *Jellett* (1895), 2 Terr. L.R. 133, at pp. 143 and 144; *Massey* v. *Gibson*, 7 Man. L.R. 172, at p. 179; *In re Claxton* (1890), 1 Terr. L.R. 282, at pp. 285 and 288. The registrar cannot refuse registrations apparently good on their face, because on some undisclosed ground they may be bad. Even assuming that the registrar had properly before him the information that this was homestead land, a caveat is not a charge on homestead land: Hardcastle on Construction of Statutes, 3rd ed., p. 119; *Mullins* v. *Collins* (1874), L.R. 9 Q.B. 294; *Union Bank of London* v. *Ingram* (1882), 20 C.D. 465; Land Titles Act, sec. 163, and tariff thereunder, items 9 and 13. A mortgage is a valid instru-

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ment affecting homestead land, because sec. 31 Dom. Land Act, 1908, does not apply to a mortgage: Land Titles Act, 1906, sec. 102, copied from Land Titles Act, 1894 (Dom.), sec. 74, copied from Terr. R.P. Act, R.S.C. 1886, ch. 51, as amended in 1898; *Re Harper*, referred to in *Flannigan* v. *Healey* (1890), 4 Terr. L.R. 391, at 396. This distinction must have been in the mind of the legislature when passing the Dominion Lands Act, 1908, because an assignment or transfer of a homestead was and is prohibited, and a mortgage was first identified in this respect with an assignment or transfer by Land Titles Act, 1898 (Dom.), ch. 32, sec. 9, and continued by Land Titles Act, 1906, sec. 100, which statutory identification has been repealed (ch. 29 (1908), Sask., sec. 7), and the Dominion Lands Act was passed subsequently with knowledge of this state of the law. Effect must be given to the difference in wording between secs. 29 and 31 of the Dominion Lands Act. Section 29 refers to the validity of instruments between the homesteader and the Crown: Dominion Lands Act, R.S.C. 1906, ch. 55, sec. 45 *et seq.*; *Park* v. *Long* (1907), 1 Sask. L.R. 33; *Flannigan* v. *Healy*, 4 Terr. L.R. 391.

Frank Ford, K.C., for the inspector of land titles offices: The mortgage upon which the caveat is based is void as a charge upon a homestead: Dominion Lands Act, 1908, sec. 29; *Harris* v. *Rankin*, 4 Man. L.R. 115; *Flannigan* v. *Healy*, 4 Terr. L.R. 391; *Abell* v. *McLaren*, 13 Man. L.R. 463; *Cummings* v. *Cummings*, 15 Man. L.R. 640; *Park* v. *Long* (1907), 7 W.L.R. 309; and is void as an assignment or transfer or an agreement to assign or transfer homestead land: Dominion Lands Act, sec. 31; cases cited *supra;* and *Sawyer-Massey* v. *Dennis* (1908), 7 W.L.R., p. 272; *Waterous Engine Co.* v. *Weaver* (1908), 8 W.L.R. 432. If not void, it is at least unregisterable: Dominion Lands Act (1908), secs. 29 and 31; Land Titles Act, sec. 100; *Re Rivers* (1893), 1 Terr. L.R., pp. 472 and 474; *Waterous Engine Co.* v. *Weaver*, *supra*. The mortgage in question, being created by a person who is not the registered owner of the lands, does not convey any interest, and at most is not capable of registration or protection by caveat: Land Titles Act, sec. 98, sub-sec. 3; *Kelly* v. *Doddy*, 5 S.A.R. 132; *McAllister* v. *Biggs*, 8 Ap. Ca. cited Hunter's Torrens Title Cases, p. 29. The caveat, being based on a void instrument, discloses no interest in the land

as required by sec. 136 of Land Titles Act: *McArthur* v. *Glass*, 6 Man. L.R. 224 and 310; Coutlee R.P. Stats. 188; and the registrar is justified in refusing to file it: Land Titles Act, secs. 100 and 136; Coutlee's R.P. Acts 31; *Re Webster* v. *C.P.R.* (1907), 6 W.L.R. 384. The fee simple remains in the Crown until issue of patent, and the homesteader has at least only the right of possession, liable to be terminated, and cannot himself nor can anyone claiming under him cloud the title: Dominion Lands Act, secs. 13, 29 and 31; Land Titles Act, sec. 58; *Re Rivers*, 1 Terr. L.R. 472-4; *Balgonie S.D.* v. *C.P.R.* (1901), 5 Terr. L.R. 142; *Alloway* v. *Rural Municipality of Morris* (1901), 6 W.L.R. 729. Until the passing of the Dominion Lands Act, 1908, the mortgagor was entitled, after recommendation for patent, to encumber the title. No such right now exists: ch. 55, R.S.C. 1906, secs. 128 and 142; Dominion Lands Act, 1908, secs. 29 and 31. The land is not yet under the Act, and until this no caveat can be filed: Land Titles Act, sec. 58; *Shore* v. *Green*, 6 Man. L.R. 327; Hogg on Torrens System, p. 736. The issue of patent is its receipt by the registrar for registration: Terr. R.P. Act of 1885, sec. 29; Coutlee, p. 231; *In re Irish*, 2 Man. L.R. 361; *In re Land Titles Act* (1899), 4 Terr. L.R. 233; *In re Thompson*, 10 Can. L.T. 44. The legislature of Saskatchewan cannot validate any transaction relating to Dominion lands forbidden by the Dominion Lands Act. The filing of the caveat would have practically the effect of filing the mortgage, and is contrary to the spirit of the Land Titles Act. It is an attempt to do indirectly what is forbidden directly: Land Titles Act, sec. 139; *Webster* v. *C.P.R.*, 6 W.L.R. 384. The registrar is justified in following the provisions of the Dominion Lands Act in the registration or refusal to register instruments affecting Dominion lands before issue of patent: Coutlee, 294. He has a judicial duty of examining into the validity of instruments presented for registration: Land Titles Act, secs. 36, sub-sec. 2, and secs. 60, 151, 158, 159 and 160; *In re Land Titles Act, C.P.R.*, 4 Terr. L.R. 233; Hunter's Torrens Title Cases, 257.

April 7. PRENDERGAST, J.:—The appellants delivered to the registrar of the Prince Albert land registration district, to be filed, a caveat in Form W of the Land Titles Act, setting forth that

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they claimed an interest in a certain quarter-section of land under an unregistered mortgage made in their favour by Henry Ebbing, dated 22nd October, 1908, securing the sum of $245.30."

At the time no patent for the said land was recorded in the land titles office for the said district.

I may say at once that I will deal with this matter on the assumption that this is all the information that the registrar was possessed of, as I deem it useless to take notice of certain correspondence which he had with the Dominion lands agent at Humboldt.

Having, then, before him this evidence that no patent was recorded in his office, the registrar refused to register the caveat.

The company then applied by petition to the learned Chief Justice for an order directing the registrar to file the caveat, which resulted, in due course, in the action of the registrar being upheld, and the matter now comes before us by way of appeal from the decision of the learned Chief Justice.

I will first remark that Form W of the Act, prescribed for caveats, begins in the following words:—

"Take notice that I, *A.B.*, of (*insert the description*), claiming (*here state the nature of the estate or interest claimed and the grounds upon which such claim is founded*). . . ."

These last words, as I take it, are imperative. It is not sufficient that the caveator should state that he claims an interest in the land. He must also state "the nature of the estate or interest claimed," and, moreover, "the grounds upon which such claim is founded." That this is not an idle matter of form, but must be complied with strictly, is shewn by the fact that it must be supported by affidavit, and is further emphasised by the note at the end of the form, to the effect that "if the affidavit is by an agent, a copy of the authority or power under which he claims to act is to be annexed to the affidavit."

I quite agree that a caveat is not intended to have the completeness and legal precision of a statement of claim in an action, and that a registrar would be misconceiving his duties who would decide on the sufficiency of such a document on grounds involving subtlety and nicety of distinctions. But, for all that, I am of opinion that the duties of a registrar in the matter are not merely ministerial, in the narrow sense of the word, but also, within cer-

tain limits at least, judicial. He has a discretion to exercise. He should see to it that altogether idle instruments should not be put on record. And, in this particular matter of caveats, I conceive it to be decidedly one of his duties to ascertain that the interest claimed, by "its nature" and by "the grounds on which it is declared to be founded," is not, on the face of it, one which the Act forbids to recognize by registration.

In the present case the registrar had this before him: 1st, a caveat wherein the caveators stated that they claimed under a mortgage; and, 2nd, the evidence that the patent for the land in question was not recorded in his office.

This being so, it seems to me that the registrar's duty was plainly indicated to him by sec. 100 of the Act.

This sub-section says in part:—

" . . . the registrar is hereby empowered to refuse to register any mortgage for land for which the patent is not of record in the land titles office, unless the applicant for the registration of such mortgage first satisfies the registrar that he is entitled to execute such mortgage by affidavit in Form K in the schedule to this Act. . . ."

And the affidavit prescribed by said Form K, with the notes accompanying the same, read in part as follows:—

"I claim to be the party rightfully in possession of the said land and to be entitled to create the said mortgage (or incumbrance), and that particulars of my possession and title to the said land are as follows: (*here must be given such information as will satisfy the registrar as to the mortgagor's or incumbrancer's right to create the mortgage or incumbrance, and, in the case of such mortgagor or incumbrancer of land entered for him as a homestead or pre-emption under the provisions in that behalf contained in the Dominion Lands Act, that he has been recommended for patent and has received his certificate of recommendation in accordance with the said provisions*)."

The prohibition contained in sec. 100 (2), as I read it, is general, and extends to the registration of any mortgage on land for which the patent is "not of record in the land titles office," whether such land be homestead, pre-emption, or land of any other class.

Here all that the caveat states that the claim is under is a mortgage, and the patent is not of record in the land titles office.

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Of course, while the prohibition under sec. 100 (2) is general, extending to all cases where the patent is not of record and the claim is on a mortgage and nothing more, the applicant may bring himself within the exception by satisfying the requirements with respect to Form K. But that is just what the applicant in this case has not done, having rested his claim on the mortgage only.

Certain documents, although valid in the sense of securing substantial interests in land, cannot be registered simply on account of their not being in compliance with the forms prescribed by the Act. These are properly the subject of a caveat, and, in due course, the Court may make such order as will further secure such interests by registration, although in a different form from that of the original instrument. This is not so, however, in this case. Here we have a claim simply based on a mortgage, without (as far as is shewn) the element of possession or other requirements of Form K, and sec. 100 (2) is a bar, not only to the registration of such mortgage by the registrar in the first instance, but also to the Court making any order for such registration.

As the above reasons seem to me sufficient to determine the matter in issue, I will not deal with the broad question raised as to whether unpatented lands are subject or not to the provisions of the Land Titles Act. I will add, incidentally, that, although it is clear that no patent was of record in the land titles office, I am inclined to doubt whether the evidence shews that it had not issued.

In my opinion, the appeal should be dismissed, but as the question involved is one of public importance, from the standpoint of practice in the land titles office, and the inspector of land titles offices was represented by the Deputy Attorney General, I think there should be no costs of the appeal.

LAMONT, J.:—This is an appeal by the International Harvester Company from a decision of the Chief Justice upholding the refusal of the registrar of land titles at Prince Albert to register a caveat against lands the patent for which was not of record in his office.

On October 22nd, 1908, the appellants obtained from Henry Ebbing a mortgage on the north-east quarter of section 2, tp. 38, rg. 19, west of the second meridian. They then executed a caveat, in the statutory form, directed to the registrar of the

Prince Albert land registration district, claiming an interest in the above-mentioned lands by virtue of the said mortgage, and forbidding the registration of a transfer or other instrument affecting such lands or the granting of a certificate of title thereto, except subject to the claim set out in the caveat. This caveat they forwarded to the registrar for registration, but he refused to register the same on the grounds (1) that the patent from the Crown for the land was not in his office, and he had no official information from Ottawa that the same had been issued, and that the onus of proof was on the applicant to shew that the patent had been issued; (2) the patent from the Crown for the lands had not been issued, and his source of information for making the statement was, as he alleged, a telegram from the Dominion lands agent at Humboldt, in whose district the land lies, and in which the land agent informed him that Ebbing had not yet made application for patent.

Being dissatisfied with the refusal of the registrar to register the caveat, the company made an application, by way of petition, as provided in sec. 158 of the Land Titles Act, to the Chief Justice of this Court for an order directing the registrar to register or file the caveat. On the matter being argued before him, the learned Chief Justice upheld the refusal of the registrar, and dismissed the petition. From that order the company now appeal to this Court.

The question for our determination is, Is it the duty of a registrar, under our Act, on receiving a caveat in the statutory form, to file the same against lands the patent for which is not of record in his office?

I agree with the contention of the counsel for the applicants that, under our Act, no duty is cast upon the registrar to make inquiries outside of his own office as to whether or not an instrument is a proper one for registration. Nor does our Act, in my opinion, cast upon him the obligation of determining whether or not that instrument be valid or invalid under Dominion legislation. The question whether or not the registrar should accept a document for registration must be determined by the provisions of the Land Titles Act alone.

The caveat is founded on the mortgage made by Henry Ebbing to the applicants. If the mortgage itself had been presented

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for registration, the duty of the registrar is clear. By sec. 98 provision is made for registration of a mortgage of lands for which a certificate of title has been issued, and by sec. 99 provision is made for the filing in the office of the registrar of mortgages or encumbrances prior to the issue of the grant from the Crown upon certain conditions being complied with. Section 99 reads as follows:—

"99. There may be filed in the office of the registrar any mortgage or other encumbrance created by any person rightfully in possession of land prior to the issue of the grant from the Crown or prior to the issue of the transfer from the Hudson's Bay Company, or from any company entitled to a grant of such lands from the Crown, or to which letters patent from the Crown for such mortgaged lands have already issued, if there is produced to and left with the registrar with the mortgage an affidavit made by the mortgagor in the Form K in the schedule to this Act, and also, in the case of lands mortgaged prior to the issue of transfer from the Hudson's Bay Company or other company, as aforesaid, a certificate from the land commissioner or other proper officer of the company that the purchase price of such mortgaged lands has been paid, and that the mortgagor is entitled to a transfer in fee simple therefor from such company.

"(2) The registrar shall, on registering the grant of lands so mortgaged, enter in the register and indorse upon the duplicate certificate of title before issuing it a memorandum of the mortgage or encumbrance."

While the legislature thus makes provision for the registration of a mortgage or encumbrance in these cases upon the applicant furnishing to the registrar an affidavit in Form K, there is, by sec. 100, an additional restriction placed upon the right of a certain class to register a mortgage prior to the issue of the grant. That class comprises settlers who have made entry for homestead or homestead and pre-emption under the Dominion Lands Act. Section 100 reads as follows:—

"100. Nothing in this Act contained shall entitle a settler who is entered for a homestead or homestead and pre-emption under the provisions contained in the Dominion Lands Act to mortgage the land entered for by him as a homestead or pre-emption prior to issue of patent to him therefor or until he has

been recommended for patent by the local agent and has received a certificate of recommendation in accordance with the provisions of the said Act.

"(2) For the purpose of preventing the acceptance and registration of any such mortgage, the registrar is hereby empowered to refuse to register any mortgage for land for which the patent is not of record in the land titles office, unless the applicant for the registration of such mortgage first satisfies the registrar that he is entitled to execute such mortgage by affidavit in form K in the schedule to this Act, and to be filed by the registrar with the mortgage if the latter is accepted and filed or registered by him."

In addition, therefore, to what had to be set out in the affidavit required under sec. 99, a settler, before he is entitled to have a mortgage registered, is required to include in the affidavit a statement that he had been recommended for patent and had received his certificate of recommendation in accordance with the provisions of the Dominion Lands Act. (See Form K.) These restrictions were embodied in our Act in order to carry into effect a provision of the Dominion Lands Act which prohibited the assigning or transferring by a homesteader of his homestead before he had received the certificate of recommendation for patent. Under the Land Titles Act of 1894 (Dominion) a mortgage was expressly declared to be an assignment or transfer prohibited by the Dominion Lands Act. This declaratory clause was carried into the Saskatchewan Land Titles Act when it was enacted, but was repealed by ch. 29, sec. 7, of the Acts of 1908, and the repeal took effect prior to the taking of the mortgage in question.

The fact that this clause had been repealed was strongly urged as an intimation on part of the legislature that a mortgage was no longer to be deemed to come within the prohibition of the Dominion Lands Act. I do not think any such interpretation can be placed upon its repeal. When originally passed by the Parliament of Canada, which had the power of declaring the meaning of its own legislation, the clause was a proper one, but when embodied in provincial legislation the clause may well have been deemed inappropriate, and its repeal suggests to my mind nothing more than a desire to remove from the Act a clause which, on its face, presumes to declare the meaning of Dominion legislation.

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Whether repealed or not, the clause could not have had any effect on this case, as the duty of the registrar is to my mind sufficiently plain without it. Sub-section 2, of sec. 100, above quoted, prescribes the course to be followed by the registrar. Desiring to prevent the acceptance of registration of a mortgage by a settler who has made entry for homestead or homestead and pre-emption, the legislature expressly empowers the registrar to refuse to register any mortgage for land for which the patent is not of record in his office, unless the party applying for registration satisfies him by affidavit that the mortgagor was entitled to execute it. On receiving a mortgage of land the patent for which is not in his office, the registrar does not need to make inquiries as to whether the mortgagor holds the lands as a homestead or not. His duty is simply to refuse to register the mortgage until he is satisfied by an affidavit that, under the provisions of the Act, the mortgagor was entitled to execute it, and the onus of satisfying the registrar is upon the party applying to have the mortgage registered.

This being the duty of the registrar where a mortgage is presented for registration, what is his duty where, instead of the mortgage itself being presented, a caveat founded upon it is sought to be filed?

The effect of filing a caveat is set out in sec. 139, which is as follows:—

"139. So long as any caveat remains in force, the registrar shall not enter in the register any memorandum of any transfer or other instrument purporting to transfer, incumber, or otherwise deal with or affect the land in respect to which such caveat is lodged, except subject to the claim of the caveator."

This prevents any dealing with the land except subject to the caveator's claim under the mortgage, and upon the issuing of a certificate of title, the owner's title would be subject to that claim. If, therefore, the mortgage be a valid one, the filing of the caveat would enable the mortgagee to preserve his claims under the mortgage, although under the Act he was not allowed to register his mortgage without the statutory affidavit. If, under the circumstances of this case, the mortgagees were allowed to file the caveat, they would, so far as the protection of their claim is concerned, be obtaining practically the registration of the mortgage, and thus doing indirectly by means of a caveat what was pro-

hibited, under the Act, without the statutory affidavit. That such was the intention of the legislature should only be held where the language of the Act is so clear as to leave no room for doubt, for it is a well-recognized principle of interpretation that "to carry out effectively the objects of a statute, it must be so construed as to defeat all attempts to do in an indirect or circuitous manner that which has been prohibited": Maxwell on Interpretation of Statutes, 4th ed., p. 171.

Are the provisions of the Act relating to caveats such that this effect should be given to them? The section chiefly relied upon is sec. 136. It is as follows:—

"136. Any person claiming to be interested in any land under any will, settlement, or trust deed, or under any instrument of transfer or transmission, or under any unregistered instrument, or under an execution, where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person, or otherwise may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed, as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat."

Although the language of the section admits of a pretty wide interpretation, there is nothing in it to lead to the conclusion that the legislature intended to give a person a right to file a caveat based on an instrument the registration of which was prohibited without being accompanied by the statutory affidavit. Full effect, it seems to me, can be given to the section without holding that the legislature, in one section, prohibits the registration of a mortgage made except when accompanied by affidavit, and in a subsequent section allows a caveat to be filed based on the mortgage, which caveat, if the mortgage were valid, would, upon the patent being issued, place the mortgagee in practically the same position as if the mortgage had been registered. As pointed out by the learned Chief Justice in the judgment appealed from, such an interpretation is against the whole spirit of the Act. The registrar, therefore, in my opinion, was right in refusing to register the caveat.

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Where, therefore, there is presented to the registrar for registration a mortgage or a caveat founded thereon affecting lands the patent for which is not of record in his office, the registrar is entitled to refuse to register the mortgage or file the caveat unless the applicant first satisfies him by affidavit, in Form K, that the mortgagor is entitled to create the mortgage, and in case the mortgagor mortgages land entered for by him as a homestead or preemption under the Dominion Lands Act, the affidavit must also state that he has been recommended for patent and has received his recommendation in accordance with the provisions of the said Act.

JOHNSTONE, J., concurred.

Appeal dismissed without costs.

[COURT EN BANC.]

EN BANC. 1909 April 7.

WESTAWAY v. STEWART.

Chattel Mortgage—Collateral Security for Payment of Promissory Note—Days of Grace on Notes—Seizure under Mortgage before Expiration of—Right to Make—Acceleration Clause in Mortgage—Evidence that Mortgagee Deemed Himself Insecure—Reference to Local Registrar to Ascertain Damages—Discretion of Judge.

Plaintiff purchased a stock of goods from defendant Stewart, giving promissory notes in payment, and as collateral security to such notes a chattel mortgage expressed to be payable on the days when the notes were respectively payable, and to be collateral thereto. The mortgage also contained the usual accelleration clause, and a provision that the mortgagee deeming the mortgage insecure he might declare it due at any time. The plaintiff having made default in payment of one of the notes, the defendant caused the goods mentioned in the mortgage to be seized, the seizure being made before the expiration of the last day of grace on the note but after the payment became due as expressed in the mortgage. The plaintiff sued for damages for unlawful seizure and conversion of the goods:—

Held, that a mortgage given as collateral security to a promissory note cannot be enforced for default in payment until after the expiration of the last day of grace for payment of such note.

2. An action cannot be maintained on a promissory note until the expiration of the last day of grace.

3. That in order to justify entry and seizure before default, under a chattel mortgage containing a clause providing for entry and seizure, provided the mortgagee deems the mortgage to be insecure before the sum payable thereunder is due, it must appear that the mortgagee did actually deem the mortgage insecure at the time he made the entry, and that such entry was made on that ground.

4. That it is a matter entirely in the discretion of the trial Judge whether he assess the damages claimed in an action himself or refer it to the local registrar to do so.

THIS was an appeal from a judgment of Johnstone, J. ((1908), (1 Sask. L.R. 200), in an action for wrongful seizure and conversion of goods by a mortgagee under chattel mortgage, and was argued before the Court *en banc* (WETMORE, C.J., PRENDERGAST and LAMONT, JJ.), on February 26th, 1909.

Norman MacKenzie, K.C., for the appellant: The proceedings taken under the chattel mortgage were rightfully taken, because the mortgagee was entitled to take such proceedings under the acceleration clause in the chattel mortgage: 7 Enc. Laws 10 & 12; *Cline* v. *Libby*, 49 N.W.R. 832; *Wood* v. *Gaar Scott*, 53 N.W.R. 14; *Richardson* v. *Hoffman*, 54 N.W.R. 356; *Cole* v. *Shaw*, 61 N.W.R. 869; *Beckman* v. *Noble*, 73 N.W.R. 803; Barron and O'Brien, 1897 ed., 57-58; *Conkey* v. *Hart*, 14 N.Y. 22; *Hare* v. *Sampson*, 35 N.Y. 274. It is immaterial whether or not, as a matter of fact, the appellants were insecure, so long as they *bonâ fide* believed themselves to be insecure: *Wood* v. *Gaar Scott*, 53 N.W.R. 14. The mortgage is a separate security apart from the notes, and action can be taken under any of its clauses apart from any question as to whether the notes to which the mortgage is collateral are due or not: *Cole* v. *Shaw*, 61 N.W.R. 869. The whole amount was due under the accelleration clause, and the appellants had the right to refuse to accept a smaller sum, even if a good tender was made: *McFadden* v. *Brandon* (1904), 8 O.L.R. 610; *Wallingford* v. *Mutual Soc.* (1880), 5 A.C. 685, at pp. 696-710; *Reeves* v. *Butcher* (1891), 1 Q.B. 509; *Manitoba Mortgage Co.* v. *Daly*, 10 M.L.R. 425. But no good legal tender was made. The appellant had good reason to consider the mortgage insecure and to invoke the accelleration clause: *Bingham* v. *Bettinson*, 30 C.P. 438; *Whimsell* v. *Giffard*, 30 R.I., at p. 9; *Stevens* v. *Daley*, 1 O.W.R. 622; *Didrick* v. *Ashdown* (1889), 15 S.C.R. 232. There was no evidence in support of the plaintiff's claim for damages on the ground of excessive seizure, and it was not, therefore, competent for the learned trial Judge to refer it to the clerk to ascertain damages.

A. M. Panton, for respondent: The respondent had the whole of the last day of grace in which to provide for payment, and the seizure was made before the expiration of that day, and the mortgage being collateral to the note, the seizure was therefore prema-

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ture and illegal. In any event, the seizure was excessive, because only $1,000 was due on the date of seizure, and goods to the value of over $2,700 were seized. The costs charged were in excess of those chargeable under the Extra Judicial Seizure Ordinance, and, further, the seizure was illegal and improper as extending to the ousting and exclusion of the plaintiff from his premises.

April 7. The judgment of the Court was delivered by WETMORE, C.J.:—The plaintiff having purchased a general stock of merchandise from the defendant Stewart for $4,600, on the 18th of February, 1907, executed four promissory notes—one for $1,500, payable on the 18th of March; one for $1,000, payable on the 18th of May; one for $1,000, payable on the 18th of August; and one for $1,100, payable on the 18th of November, all in the year 1907. At the same time, by way of collateral security for payment of such notes, she executed to Stewart a chattel mortgage on the stock of merchandise. Stewart endorsed these notes over to the Canadian Bank of Commerce, and left with them the chattel mortgage. The chattel mortgage was not assigned by any writing, but I have no doubt that it was left with the bank as collateral security for the payment of the notes.

The plaintiff paid the notes falling due on the 18th days of March and May; and on the 21st of August the defendants, purporting to act under the mortgage, entered the store and seized the stock of merchandise, and sold a portion of it.

The proviso for payment contained in the mortgage is as follows:—

"Provided always that these presents are upon this express condition that if the mortgagor do and shall well and truly pay or cause to be paid unto the mortgagee the full sum of four thousand six hundred ($4,600) dollars, with interest for the same at the rate of eight per centum per annum, in the following manner, that is to say: Fifteen hundred ($1,500) dollars on the 18th day of March, A.D. 1907; one thousand ($1,000) dollars on the 18th day of May, A.D. 1907; one thousand ($1,000) dollars on the 18th day of August, A.D. 1907; and eleven hundred ($1,100) dollars on the 18th day of November, A.D. 1907, with interest as aforesaid, being the principal sums, maturity dates and rate of interest mentioned in four certain promissory notes bearing even date

herewith, and made by the same mortgagor payable to the mortgagee, for which and any or all renewal or renewals this mortgage is given as collateral security."

The mortgage also contained a clause providing that, in case of default in payment of any of the moneys secured, or if the mortgagee did at any time during the currency of the mortgage "deem himself unsafe" as far as the security of the mortgage was concerned, of which contingency the mortgagee was to be the sole judge, then in any such case the full amount of principal and interest, and any other sums which might be added to the same by virtue of the provisions of the mortgage, should forthwith become due and payable, and in such case the mortgagee had the right to enter and sell the goods. It will be observed that the mortgagees in this case entered upon the premises on the last day of grace of the note falling due on the 21st of August. It is quite clear, I think—in fact, it was admitted at the argument by the appellants' counsel—that an action could not have been brought on the promissory note so falling due before the expiration of the last day of grace, but it was claimed that, inasmuch as the mortgage provided on its face that the money should be paid on the 18th of August, the mortgagee had the right of entry at any time after the last-mentioned date. I am of opinion that that is not correct. It is quite clear that the mortgage was given as security for these notes, and it seems to me to be contrary to all reason that that collateral security could be enforced before the money payable under the principal contract fell due.

Then it was urged that, under the clause providing that if the mortgagee should deem himself unsafe so far as the mortgage was concerned, the full amount of principal and interest should become due and payable, and that the mortgagee could enter at any time after he so felt himself insecure. Now, I am not prepared to disagree with that proposition, but I am of opinion that, in order to avail himself of it, the mortgagee must enter and take possession because he deemed himself insecure. That must be the intention in his mind at the time he made the entry. It will not do, if he has made the entry on another ground that is not good, to turn about and endeavour to get behind the clause he is now relying on. That the mortgagee did not enter because he deemed his security unsafe is clear. In the first place, Stewart,

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Wetmore, C.J.

the mortgagee, signed the warrant to take possession under the instructions of the manager of the bank. He did not consider himself as actively interested in it at all. He gave the matter no consideration; he was just willing to do what Mr. Houston, the manager of the bank, requested him to do. But Mr. Houston stated that he deemed the mortgage insecure, and declared it insecure also. That statement came out under very peculiar circumstances. The counsel for the defendants put the following most objectionable question: "Why did you consider the mortgage insecure?" And the witness then went on to state what the reasons were. In the first place, the evidence was objectionable because it assumed that the witness had testified to something which he never had testified to before—in my judgment, the most objectionable sort of testimony to present to the Court, and one which, I think, is very much calculated to make the testimony of the witness unreliable. In the next place, it was a very leading question, put to an interested party at a very crucial stage of the case; and, in the next place, I am satisfied, it led Mr. Houston to make a mis-statement which he would never have thought of making otherwise, and possibly did not appreciate when he made it, because, as a matter of fact, as far as I can judge from the testimony, he never did declare the mortgage insecure. When he comes to state that he considered the mortgage insecure, he stated it in answer to another leading question, which was, "Did you consider the mortgage insecure?" As a matter of fact, Mr. Houston's testimony shews conclusively that they never entered into possession of this property because they deemed the mortgage insecure; the only reason for entering and taking possession was default in payment of the notes. On cross-examination, Mr. Houston said:—

"Q. So that the seizure was made by reason of the default in payment of the notes? A. Yes.

"Q. . . . rather than any claim that the security had suddenly depreciated? A. It was in default of payment—the whole reason."

I am of opinion that the learned trial Judge was correct in giving judgment for the plaintiff under such circumstances. With a view to ascertaining the amount of damages the plaintiff was entitled to apart from the eviction, the learned trial Judge directed

a reference to the local registrar to ascertain the value and inquire as to the amount due the defendants on account of the several promissory notes and the security herein, and this direction is claimed to be erroneous, because the parties came before the learned trial Judge and produced testimony for the purpose of establishing or diminishing the amount of damage, as the case may be. The contention is that, having selected that tribunal, the learned trial Judge should have made up the amount of damages himself, and if the testimony was too vague to allow him to do so, he should have given nominal damages. I am of opinion that the reference could be made under rule 233 of the Judicature Ordinance, and it was a matter entirely within the discretion of the Judge to avail himself of that rule, and therefore this Court ought not to interfere with it.

I am of opinion, however, that the $200, the amount of damages awarded for the eviction, was excessive. Fifty dollars would appear to me, under the circumstances, to be quite sufficient. In view of the fact that the defendants could have seized the property next day, on default in payment, the plaintiff was only in a sense unlawfully dispossessed for part of a day. It is true he has attempted to set up a tender, but what he calls a tender was no tender at all—it was an uncertified cheque, which cannot be called a tender in any sense of the word or from any standpoint.

The judgment appealed against will therefore be varied by reducing the damages awarded for the eviction from $200 to $50, and with that variation the judgment of the trial Judge will be affirmed. The general costs of this appeal will be taxed to the plaintiffs (the respondents). The costs of the appeal applicable solely to the matter of the reduction of the damages for eviction will be taxed to the defendants (the appellants), and deducted from the costs hereby awarded to the respondents, and the balance remaining will be paid by the appellants to the respondents.

[IN CHAMBERS.]

1909

GAETZ v. HALL.*

April 10.

Practice—Summary Judgment—Affidavit Verifying Claim—Sufficiency of—Time for Making Application—Issue Joined.

Plaintiff applied to strike out appearance and enter judgment against the defendant under rule 103 of the Judicature Ordinance. The affidavit filed alleged a judgment recovered against the defendant in the Alberta Court for a certain sum, but did not set out that he was still indebted to the plaintiff in that or any sum:—

Held, that the affidavit did not sufficiently establish the cause of action.

THIS was an application for speedy judgment, argued before WETMORE, C.J., in Chambers.

T. S. McMorran, for the plaintiff.

W. B. Scott, for the defendant.

April 10. WETMORE, C.J.:—This is an application for summary judgment under rule 103 of the Judicature Ordinance.

The proceedings have not been very carefully taken in this matter. There are several irregularities, as, for instance, the summons is not addressed to any person, and it does not appear to be signed by the solicitors, and the copy does not indicate that the original was sealed. These, however, are matters of very trifling moment, and I would have no difficulty in amending them, but I think there is a more serious difficulty arising in the matter.

Rule 103 provides that the "plaintiff, or one of the plaintiffs, if more than one, may, on affidavit of himself or any other person who can swear positively to the facts verifying the cause of action and the amount claimed, and stating that, in his belief, there is no defence to the action, apply to the Judge for leave to enter final judgment for the amount of the claim or the amount so verified."

The action is brought upon a judgment recovered in the Supreme Court of Alberta against the defendant, as a contributory in the Red Deer Mill and Elevator Company, Limited, of which the plaintiffs, Gaetz and Simpson, are liquidators.

The affidavits of Gaetz and Simpson, the plaintiffs, establish that judgment was entered in the Alberta Court against the defendant for $2,056.44 and $172.98, taxed costs, but neither of them

verify the amount claimed. On looking at the forms of affidavit in such cases, it will be seen that they set forth that the defendant is justly and truly indebted to the plaintiffs in a specified sum, or by reference to some other document which shews the amount claimed. Neither of the affidavits in this case do that. I am of opinion, therefore, that this application is not brought within the provision of the rule.

There is another objection raised to this application which, I think, is worthy of serious consideration. The defendant pleaded to the action and counterclaimed. The plaintiffs replied joining issue upon the defence, and setting up a reply and defence to the counterclaim. This was done nearly a month before the application was made for the summons herein. The cause was therefore at issue when the application was made. I doubt very much if a plaintiff can make such an application after the cause is at issue. In *Hackett* v. *Lalor*, 2 L.R. (Ir.) 44, Harrison, J., held that such an application could not be entertained at that stage of the proceedings. In a more recent case, however, *McLardy* v. *Slateum* (1890), 24 Q.B.D. 504, 59 L.J.Q.B. 154, 62 L.T. 151, the Court of Queen's Bench held that such an application might be made after defence was delivered, but in such case the plaintiff must shew circumstances which justified his delay. In the last-mentioned case it would appear that issue had been joined. I will not express any decided opinion upon this question, and merely call attention to it.

It was claimed on behalf of the defence that he had a meritorious defence to this action. I do not feel called upon to express an opinion on that subject, because the defendant has not complied with rule 105, by making the affidavit thereby required in such cases. Possibly that omission might only apply to the counterclaim. A good deal of the defence apparently would be a question of law. Whether it is a good defence or not, I will not express an opinion.

All that is necessary for me to state is that the plaintiff, not having complied with rule 103, for the reasons I have already stated, cannot succeed in this application, and it will be dismissed with costs.

[IN CHAMBERS.]

1909

April 16.

REX v. TURNBULL.

Criminal Law—Appeal by Way of Stated Case—Failure of Justice to Deliver Case Within Time Limited—No Particular Judge Named in Stated Case—Recognizance—Sufficiency of—Jurisdiction of Court.

Appellant, being convicted before two justices of the peace, applied to the justices to state a case setting out that the appeal was to the Honourable the Chief Justice or to such other Judge of the Supreme Court as might be presiding in Chambers when the appeal should be heard, and entered into a personal recognizance in $100 as required by the rules. The justices did not deliver the case within the time limited, but subsequently transmitted it to the Chief Justice:—

Held, that the appellant, having done all that it was practicable for him to do, could not lose his right of appeal by reason of the delay on the part of the justice.

2. That the personal recognizance of the appellant was sufficient within the provisions of the Criminal Code.

3. That the onus of shewing that the case was not transmitted to the Court in a sealed envelope, as required by the rules, was on the respondent, and in the absence of such evidence the Court would presume that the justices had complied with the rules in that regard.

4. That the conviction being palpably bad, the matter was a proper one for appeal by way of stated case.

THIS was an appeal by way of stated case from a conviction by two justices of the peace, and was argued before JOHNSTONE, J., at Regina.

J. F. Frame, for the appellant.

T. D. Brown, for the respondent.

April 16. JOHNSTONE, J.:—This is an appeal by way of stated case by one Thomas Turnbull against a conviction made under sec. 238 of the Criminal Code. Turnbull was convicted on the 19th day of January, 1909, before Kay and Sautor, justices for Saskatchewan, for that he (Turnbull), on the 17th day of January, 1908, at Fairlight, in the Province of Saskatchewan, was a disorderly person, and that he did, on the date named, use insulting language, to wit, "calling the plaintiff Sisley a liar, at the above-described place, and for which offence he was adjudged to make full apology to Mr. Sisley within three days" and to pay costs. Turnbull, on the 23rd January following, made application to the convicting justices to state and sign a case setting forth the facts of the case and the grounds on which the proceeding was questioned, namely, the grounds contained in such application for a stated case. This application, which was in writing, con-

tained a paragraph that the appeal was to be taken "to the Honourable the Chief Justice of the Supreme Court of Saskatchewan, or to such other Judge of the Supreme Court of Saskatchewan as might be presiding in Chambers at Regina, in the Province of Saskatchewan, when the appeal should be heard," provision for which is made by rule 34 of the Supreme Court rules. This request was delivered personally to each of the justices on the date thereof, namely, the 23rd January, when Turnbull appeared before the said justices, and entered into a recognizance, approved of by such justices, in the sum of $100, as required by sec. 752 of the Criminal Code and rule of Court 42. The justices, however, did not deliver their stated case to the appellant within the four days prescribed by rule 35, and it was not until the 5th February, 1909, that such case was delivered. In other respects the rule referred to was complied with. On the 25th February an envelope containing the stated case was handed by the appellant to the local registrar of the Supreme Court for the judicial district of Cannington, which envelope was afterwards, on the 26th day of February, opened by the Chief Justice, as appears by his endorsement to that effect on the envelope. On the application of the appellant in Chambers, on the 27th February, Mr. Justice Lamont fixed Wednesday, the 27th day of March, at 10 a.m., at the Court-house, Regina, as the date and time for the hearing of the appeal, on which day the matter came before me, in the presence of counsel for the appellant and also for the respondent Sisley, when the appeal was heard and judgment reserved. On the hearing exception was taken by Mr. T. D. Brown, counsel for the respondent, to the jurisdiction of a Judge in Chambers to hear the appeal, because of certain irregularities, namely, that the case stated was not delivered by the justices to the appellant within the time prescribed by the rule, four days; that the application did not, nor did the stated case, name the Judge before whom the appeal would be heard; that the recognizance was bad, inasmuch as it was a personal recognizance of the appellant; that there was no evidence before me of the delivery of the stated case to the appellant in a sealed envelope, as required by rule 44; that the objections to the proceedings and conviction set out in the request to the justices for a stated case were not the subject of a stated case.

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The procedure by way of stated case in our Province is provided for by rules of Court promulgated under the provisions of the Criminal Code in that behalf, and such rules (rule 35) fix the time within which the justice shall state, sign, and deliver a stated case at four days. The case here was not delivered by the justices to the appellant within that time, as pointed out. Now, I think there can be no question but that the rules must be strictly adhered to as far as regards the conduct of the parties themselves: *Walker* v. *Delacombe* (1864), 33 L.J.M.C. 77, at p. 40. But where the appellant has done all that it is practicable for him to do, he is not to lose his right to appeal. It is very apparent in this action the utmost precautions were taken by the appellant in the preparation of all papers in any way connected with the application, and in following the procedure laid down by the rules in all subsequent proceedings, and I fail to see where he has made a mistake or even a slight deviation from strict compliance with the rules, which, of course, could be remedied as provided by rule 45. In *Hughes* v. *Wavertree Local Board* (1894), 10 T.L.R. 355, Kay, J., held that the latter part of rule 18 only applied to the acts required to be done by the appellant, and did not apply to the acts of the justices, and, as regards the latter, it was merely directory—that is, "that the case shall be stated within three calendar months after the date of the application and after the recognizance shall have been entered into," were words merely directory, and therefore an application to strike out a case not stated within the time fixed by this rule, on account of the illness of the justices was refused. In another case, *Mayer* v. *Hardy* (1867), L.R. 2 Q.B. 410, 16 L.T. 429, where the stated case was received from the justices on Good Friday, and the rule required that the case should be transmitted by the appellant to the proper office within three days, which was not and could not have been done before the following Wednesday, because the days intervening were public holidays, the Court held that the appellant had sufficiently complied with the rules. I am therefore of opinion that I was not precluded from the hearing of this appeal on this ground.

I think, moreover, that the request was in accordance with the rule, and also that the recognizance taken before the justices was a compliance with the provisions of the Code and the rules

as well. I have already mentioned the receipt of the case by the Chief Justice and the fact of the endorsement by him. Under the circumstances, I think it was with the respondent to shew the envelope was not sealed when it was handed over to the appellant by the justices. They must be presumed to have done their duty and to have complied with the law. The envelope was properly endorsed and sealed when it reached its destination, and I must hold that rule 44 was complied with.

As to the last exception, I cannot give effect to it. The proceedings had by and before the justices are open to so many serious objections, I have no doubt whatever that the case comes within the provisions of the Criminal Code as to stated cases, and of my right to deal with the matter. There was no offence disclosed in the information. The supposed offence was alleged to have taken place within the North-West Territories. The defendant was not heard as to his defence. The conviction is bad for several reasons. It, first of all, contains no offence: *The King* v. *Code* (1908), 7 W.L.R. 819. It imposes a ridiculous penalty. There is no judgment of forfeiture, and I cannot imagine a case where the provisions as to stating a case could be more appropriately resorted to. A number of cases were cited by Mr. Frame, counsel for the appellant, in support of his argument against the conviction. This conviction, however, is so clearly bad that I do not think it necessary to go into the matter further. It seems to me there is only one course which can be adopted, and that is that the judgment of the justices be reversed, and an order be made quashing the conviction, with costs as against the respondent. I make the order accordingly.

[TRIAL.]

1909

Jan. 13.

DOBSON v. DOUMANI.

Vendor and Purchaser—Sale of Land and Business—Default in Payment of Purchase Price—Cancellation of Contract—Notice—Sufficiency of—Forfeiture—Relief Against—Breach of Contract by Purchaser.

Plaintiff agreed to sell defendant a tailoring business, including the premises, stock-in-trade and tools, part of the purchase price to be paid in cash and the balance in instalments. The agreement provided that "the purchaser to have sixty days' notice of each of his quarterly payments being due before the contract can be declared void." The defendant made default in payment, and the plaintiff gave notice that "unless those notes with interest are paid in full within the next 60 days I will proceed to foreclose," and brought this action for a declaration that the contract was cancelled. The agreement also contained a provision that the plaintiff would not carry on business in the vicinity for ten years, and it transpired in evidence that he had carried on business after the sale:—

Held, that the agreement evidently contemplated that the contract might be declared void on default, and as the notice substantially complied with the terms of the agreement and sufficiently conveyed the plaintiff's intention to the defendant it was sufficient to determine the contract, but as the plaintiff had himself been guilty of a breach of the contract the Court would relieve against the forfeiture.

THIS was an action for a declaration that a contract of sale was cancelled and for possession of the premises, and was tried before WETMORE, C.J., at Battleford.

A. M. Panton, for the plaintiff.

J. D. Fergusson, for the defendant.

January 13. WETMORE, C.J.:—The plaintiff is a merchant tailor residing in the town of North Battleford, and on the 15th of June, 1907, owned a lot of land, with a building thereon, situated in North Battleford, in which he carried on his tailoring business. The defendant is a merchant tailor, and was at the same date resident in North Battleford. The plaintiff on that date agreed to sell to the defendant the lot of land and his stock of merchandise in connection with his business, and they entered into the following agreement:—

"Memorandum of agreement made this 15th day of June, 1907, between Walter Dobson of the town of North Battleford in the

Province of Saskatchewan, merchant-tailor, of the first part, and Toufic Doumani of the town of North Battleford aforesaid, merchant-tailor, of the second part.

"Walter Dobson agrees to sell and Toufic Doumani agrees to purchase lot twenty-six (26) in block five (5) in the town of North Battleford for the sum of twenty-five hundred (2,500) dollars, the purchaser assuming a mortgage of six hundred (600) dollars, the sum of one thousand (1,000) dollars to be paid in cash and the balance to be payable as hereinafter set forth. Further the stock of merchandise at invoice cost with no freight charges to be added and the following equipment at the prices mentioned, *viz.*:—

2 sewing machines	$75.00	
1 cutting-table	5.00	
2 work-tables	5.00	
Jacks	1.50	each.
Stove in use	12.00	
Irons	10	cents per pound.
Cheese boards	75	cents each.
Mirror	5.00	

and any unmentioned equipment at present in use in this business to be adjusted, paying therefor a note of two hundred and fifty (250) dollars at thirty (30) days, one note of two hundred and fifty (250) dollars at sixty (60) days, one note for two hundred and fifty (250) dollars at three months, one note for two hundred and fifty (250) dollars at six (6) months, and the balance of purchase price of real estate, stock and equipment, two hundred and fifty (250) dollars per quarter, all to bear interest at the rate of 8 per centum per annum, the purchaser to have the privilege of paying the whole or any portion of the purchase price at any time without notice and the purchaser to have sixty (60) days' notice of each of his quarterly payments being due before the contract can be declared void.

"It is mutually agreed that five hundred (500) dollars shall be deposited this date with J. A. Gregory by the purchaser to make this memo. of effect.

"The vendor hereby agrees not to carry on a tailoring business in either the towns of Battleford or North Battleford for the space of ten years, nor to permit his name to be used in the tailoring business.

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DOBSON v. DOUMANI.

"Possession to be given to the purchaser on completion of all orders at present in the shop, and all manufactured suits at present on the premises to be delivered to the customer, together with all other custom work.

"All orders taken from date to be the custom work of the purchaser, except pressing or repairing.

"Possession to be not later than June 29th, 1907, at ten o'clock of the evening."

Immediately after the execution of this agreement the defendant went into this place of business and worked under the plaintiff until he got full possession of the property agreed to be sold, somewhere about the 6th of July. In the meanwhile stock was taken of the merchandise in question by the plaintiff and the defendant, assisted by a woman whose name does not appear, and that merchandise was valued at $1,846.65, after allowing a discount of five per cent. A memorandum was thereupon placed at the foot of the agreement of sale, as follows:—

"Inventory of stock taken this 2nd day of July, 1907, as follows:

Merchandise	1807.65
5 blinds	8.50
Lamps	5.00
Coal	6.00
Press pad	3.00
Cutting shears	12.50
Square	2.00
Brush	2.00

"In addition to above list. (Sd.) T. Doumani."

Which was signed by the defendant. This memorandum states that this $1,846.65 was in addition to the items mentioned in the original agreement. I find that is not correct, because on going over the stock-list which was put in evidence I find that all the articles mentioned in the original agreement are mentioned in the stock-list with the exception of the cutting table. The defendant paid the cash instalment of a thousand dollars, and the first note for $250 apparently was drawn so as to be payable on the 4th of August, 1907. All the notes were apparently dated 1st July, 1907.

The defendant made default in the note for $250 due on the 4th of September, and also the note for $250 due on the 4th of October. The plaintiff thereupon, on the 7th October, gave the defendant notice, as follows:—

"North Battleford, Sask., October 7th, '07.

"Mr. T. Doumani,

"North Battleford, Sask.

"Dear Sir: Re your past due notes due September 4, '07, and October 4, '07, I beg to notify you that unless these notes with their interest are paid in full within the next sixty days following this notice, I will proceed to foreclose and cause all payments to become due and take possession of the business in keeping with contract made between us of June 15th, '07.

"Yours truly,

"(Sd.) W. Dobson."

No attention was paid to this notice, and the notes have not been paid. The plaintiff therefore brings this action, claiming a declaration that the plaintiff is entitled to forfeit the moneys paid and the possession of the lots, stock, plant and merchandise contained in the agreement, or in the alternative, is entitled to judgment for the whole of the purchase money remaining unpaid and interest from the 29th July, 1907. His action is somewhat peculiarly shaped, and the statement of claim strikes me as most embarrassing. In the first place, the plaintiff alleges in a general way that he and the defendant entered into an agreement for the sale of the property in question on the 15th of June, 1907, and then he proceeds to state that there was an agreement that the defendant should sign agreements for sale which were to be drawn up for that purpose, and which agreements for sale were to contain the usual covenants contained in an agreement for sale in this Province, amongst other covenants being one for the cancellation of the contract and the declaring of it null and void on a sixty days' notice to the defendant, and a clause making future payments to accrue due on default of any payment; in other words, this substituted agreement was to contain an acceleration clause. And then the statement of claim

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proceeded to state that the entry into this formal agreement was a condition precedent to the purchase of the property, and that the defendant is bound by all the covenants proposed to be incorporated therein. Then it proceeds to set up that the plaintiff gave notice of cancellation on the 7th of October, notifying the defendant that he would take possession after a period of sixty days unless the defendant signed an agreement for sale and paid all arrears. Now, what under these allegations is puzzling to me is whether the plaintiff in giving the sixty days' notice, which I have found he did give, is relying upon the clause in the original agreement or is relying upon some clause in the proposed formal agreement which the defendant was to sign. Because his statement of claim does not allege that the agreement of the 15th of June contained such a clause, but it does allege that the formal agreement which was to be signed was to contain such a clause. The so-called formal agreements which the plaintiff relies on were prepared and submitted to the defendant for execution, and he refused to execute them on the ground that he did not agree to execute any further agreement. The defendant in his statement of defence denies that there was any arrangement to execute any formal agreement as alleged by the plaintiff. He states that he was induced to enter into the agreement which he did enter into by the misrepresentations and fraud of the defendant, and he prays that the agreement may be set aside and that the plaintiff may be ordered to repay him the moneys that he has paid. He also claims that under the agreement which was signed he was entitled to sixty days' notice of his quarterly payment being due before the said contract could be declared void, and that the said quarterly payments were not yet due. He also counterclaims for damages by reason of the plaintiff carrying on a tailoring business both in North and South Battleford, contrary to the terms of the agreement, and for taking orders in connection with such tailoring business, which were, according to the agreement, to be the custom work of the defendant.

The evidence does not satisfy me (and the onus of doing so is on the plaintiff) that there was any understanding or agreement that any other or more formal agreement has to be entered into than the one of the 15th of June which I have above set out. But assuming that there was any such agreement, it seems to me to be quite clear that it could not depart in any essential from what was

specially set out in the agreement of the 15th of June. That agreement was in writing, and it was binding upon both parties.

Now, Mr. Gregory, a land broker there, was acting as the agent for the plaintiff. He prepared the agreement of the 15th of June and he prepared two other sets of agreements, one affecting the personal property and the other affecting the land so agreed to be sold, and these agreements were tendered to the defendant for execution. I find that both these sets of agreements were departures in very essential particulars from the agreement of the 15th of June. In the first place, the agreement of the 15th of June provides for a lump sum for the purchase of the whole of this property, real and personal. The formal agreement (as I will call it now and hereafter in this judgment), in so far as the personal property is concerned, specifies the cash payment to be $500 and the subsequent payments to be divided up into notes of $125 each, instead of $1,000 cash payment in the whole purchase real and personal property, and notes of $250 each for subsequent payments. Then the value of the property is put at $2,058.81 in the formal agreement, while the original agreement puts it at $1,846.65. In so far as the formal agreement for the sale of the land is concerned, the departures from the original agreement are of the most pronounced character. In the first place, there is an accelerating clause making the whole principal and interest payable on default of payment of any instalment of either principal or interest or taxes. In the next place, there is a clause which instead of entitling the defendant to a sixty-days' notice of his payments being due before the contract can be declared void, as provided in the original agreement, provides that on default of payment of instalments or performance of the contracts the plaintiff shall be at liberty at any time after such default, and without notice to the defendant, either to cancel the contract and declare the same void and to retain any payments that may have been made on account of or by way of liquidated damages, and further, giving the plaintiff permission upon any such default, and without giving any notice or making any demand, to consider and treat the purchaser as an overholding tenant without permission or any colour of right, and to take immediate possession of the premises; and further, it provides that in case default is made in any of the covenants contained in the proposed agreement and the plaintiff shall see fit to

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declare the contract null and void, such declaration may be made by notice from the vendor "addressed to the purchaser at the post office hereinbefore mentioned." I may say, however, in connection with this, that no post office is mentioned in the agreement. These two agreements are so essentially different from the first agreement that the defendant was quite justified in refusing to sign them, and the fact that he put his refusal to sign them on the ground that he did not agree to sign any further agreements does not affect the question; because, I say again, these provisions are so clearly at variance with anything that the defendant contracted for that no Court would hold him at fault for not signing them. This is particularly applicable, as the defendant is a Greek and does not very well understand the English language. The agreement, therefore, of the 15th June is the only agreement binding on the parties in existence.

The next question that arises is: Did the plaintiff misrepresent the business to the defendant, as alleged; that is, did he represent to the defendant that the business was a steadily increasing business and that it was of the value of and worth $900 a month? The defendant has not satisfied me of the truth of this allegation. In fact, I find that the plaintiff did not make any such representation, and moreover, if he did make any such representation, that it was not the inducing cause of the defendant entering into the agreement and purchasing the property. The defendant is a shrewd man, and when, according to his evidence, the plaintiff, as he states, alleged that this business was an increasing business and worth $900 a month, he promptly told him, in effect, that he could not credit it. He referred to the small size of the town, and at once stated, in effect, that he could not credit it. I find that the defendant purchased this property with a fairly accurate knowledge of what the character of the business really was at the time of the purchase. He was a tailor of many years' experience; he had been in North Battleford for some time, and he had been frequently in the plaintiff's shop and saw what was going on there. He saw that he had a number of hands who were employed and kept busy, and during the time between the 15th of June and say the 6th of July, when the transaction was completed, he had been working in the shop with the plaintiff and had means of knowing what the business was. Now, I am satisfied that the business did not turn

out as well as the defendant expected it would, but I cannot attribute that to any misrepresentation on the part of the plaintiff or to any act of his. I attribute the falling off of the business to two things: First, a great depression in business—and the evidence shews that there was a depression in business (that having been established by testimony). We know that, as a matter of history, along towards the fall of 1907 there was a very great depression of business generally throughout the country, and money was scarce. Another cause I attribute the falling off of the business to was that another concern, Cameron & Bell, had set up doing a tailoring business in North Battleford, and I can quite understand that that would have a great influence in preventing the defendant doing as much business as he would have done if these people had not set up business.

The next question is, has the plaintiff taken the proper steps to determine this contract? I have set out the notice that he gave to the defendant, and that notice was duly received by him. Is that notice a substantial compliance with the provisions of the contract of the 15th of June, because, as I have held, that is the only agreement between the parties in existence? That agreement evidently contemplates that it may be declared void on default of payment of any of the instalments of the purchase money, although it is not very well expressed. Now, the provision is that the defendant is "to have sixty days' notice of each of his quarterly payments being due before the contract can be declared void." I am of opinion that this notice, although it does not follow the language of the clause, is substantially a notice within its requirements. It refers to what notes are past due, namely, September 4th and October 4th, and it notifies the defendant that unless such notes with interest are paid in full within the next sixty days following the notice the plaintiff will proceed to foreclose and cause all payments to become due. Now, so far as that part of the notice is concerned which states that he would cause all payments to become due, it is not in accordance with the agreement, and may be treated as surplusage. But the notice states that unless the payments are made he (the plaintiff) will proceed to foreclose and take possession of the business, and that is in keeping with the contract. I cannot bring my mind to the conclusion that the defendant or any other person could have any doubt as to

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what the plaintiff meant by that notice, namely, that it was the intention of the plaintiff, if the defendant did not comply with it, to proceed practically to have the contract declared void, to enforce his right—in other words, to have the property restored to him, and that to attain that end he would take foreclosure proceedings. I therefore hold that the plaintiff is entitled to relief under his statement of claim. But this is a case where I am of opinion that, in view of the fact that the plaintiff has not acted up to his agreement, I ought to relieve against forfeiture, under sub-sec. 5 of sec. 30 of the Judicature Act (ch. 8 of 1907).

As to the defendant's counterclaim, I find that the plaintiff did carry on a tailoring business contrary to the provisions of the agreement. I do not mean by that that he opened an establishment and carried on a tailoring business either in Battleford or North Battleford, but he did solicit tailoring work and did tailoring work in these towns, or one of them, and in the country contributory thereto. I read the provision in the agreement that the plaintiff was not to carry on a tailoring business in these towns as meaning that he was not to carry on a tailoring business in the country about which was contributory to those towns as well. This was not controverted at the trial. And although he merely solicited work from this person and work from that person, and sold clothing to this person and that person, I am of opinion that that was contrary to the provisions of his agreement, and he is therefore liable to damages. I am of opinion that his lending money to Cameron & Bell, the tailors who started business in North Battleford after the sale in question, was not contrary to the agreement. It does not appear to me that the loan of this small sum of money was the means of these people starting in any way; they could have started without it. Also, I find that the sale of some irons and some machinery to these people was not a breach of the agreement. I may add that the defendant has not shewn that he suffered any damage by reason of the selling of these last mentioned irons and machinery. The sales to which I refer, in which I hold the plaintiff responsible in damages, amount in all to $80.25.

The evidence is that sales of articles of this description would realize half the amount as profit. I will therefore allow as damages in respect of these sales $40. The plaintiff also sold six fur coats at $132, and the evidence establishes that the profit upon them

was $10. I will add that to the $40, making in all $50. I am of opinion that I am not warranted in law in awarding any further damages than have been proved to have been caused by breach of the contract. I am not quite clear that the sale in question in this case was a sale of the goodwill. At the same time I am of opinion that the defendant was in a position to claim more by virtue of the plaintiff's agreement not to carry on business than he would have been entitled to recover if there had been merely a sale of the goodwill. I would be disposed, if I thought I could do it, to allow a sum as damages for the soliciting of business, which I find the plaintiff undoubtedly did, beyond that for obtaining the work and selling the goods which I have specified. But on investigating the authorities I have reached the conclusion that I would not be warranted in awarding any damages except such which have actually been proved.

There will therefore be judgment for the defendant on the counterclaim for $50 damages and costs.

As I have stated, I will relieve the defendant from forfeiture under the circumstances of this case, but it must be on the terms hereinafter mentioned. He has got to pay the costs of the action. The decree of the Court will be that the defendant do pay unto this Court, on or before the first of May next, the amount then due in respect of the said agreement, being $2,000, less the amount awarded to him on his counterclaim and costs, with interest from the first day of July, 1907, at the rate of eight per cent. per annum, and the costs of this action, and in default, that the said agreement be declared void, and the plaintiff be permitted to retain the moneys paid in respect thereof, and the plaintiff forthwith deliver up possession of the said property real and personal to the defendant, and that the plaintiff in the meanwhile be restrained by injunction from dealing with the said property or any of it, in any way other than in the usual course of business. In default of the defendant making such payment as aforesaid into Court, the plaintiff to have his costs of this action after deducting therefrom the amount allowed to the defendant and costs on the said counterclaim.

[TRIAL.]

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Jan. 16.

TURNER v. CLARK.

Vendor and Purchaser—Land Titles Act—Transfer under Power of Attorney—Subsequent Conveyance by Registered Owner—Action to Set Aside Conveyance—Fraud and Collusion.

Defendant C. gave a power of attorney to his wife to sell and convey certain land, and in pursuance of that authority she did convey to the plaintiff. She subsequently disappeared and could not be found. The plaintiff did not take immediate steps to perfect his title, and on applying he was unable to produce the power of attorney and so secure title. In the meantime defendant C. conveyed to the defendant M., taking a note in payment of the purchase price, and M. registered his transfer. To procure registration a new certificate of title had to be procured, and this was done by order of a Judge on production of an affidavit which indicated the loss of the originals. It appeared, however, that when this affidavit was made the defendants were aware of the plaintiff's claim, but no mention of it was made in the affidavit, nor was it disclosed to the Judge. It also appeared that C. had told M. of the giving of the power of attorney, and there was also evidence to lead to the belief that the defendants, when the transfer to M. was made, were afraid of such outstanding title. The note given for the purchase price was never paid, nor did it appear that C. had ever made any effort to collect it. It also appeared that M. had purchased the property without seeing it, and having no idea of its value:—

Held, that the Land Titles Act preserved to the Court jurisdiction to deal with questions of fraud and with other equities that may arise affecting land, and which would properly be cognizable on the equity side of the Court, and, as the evidence indicated fraud and collusion between the defendants, the transfer to the defendant M. should be set aside.

THIS was an action to set aside a transfer of land and cancel a certificate of title on the ground of fraud and collusion, and was tried before WETMORE, C.J., at Prince Albert.

A. E. Doak, for the plaintiff.

J. H. Lindsay, for the defendants.

January 16. WETMORE, C.J.:—On the 27th of April, 1905, the defendant Clark, being the owner of a lot of land in Saskatoon, gave a power of attorney to his wife Louisa to sell and convey such lot. At the time this power of attorney was executed Clark was living on a homestead at Humboldt, where he had gone, leaving his wife at Saskatoon, where they had previously resided. I read between the lines, although it does not appear distinctly in the evidence, that Clark must have given his wife some verbal authority or direction to sell this land. However, be that as it may, she wrote him that she could not convey the land without a power of attorney, and he accordingly sent the power in question. On the 9th of May, 1905, Louisa, acting under that power of attorney,

sold and conveyed the property to the plaintiff for $100, and the purchase money was paid to her. At the time of the execution of the transfer to the plaintiff the duplicate certificate of title in Clark's name was given to the plaintiff. The plaintiff did not take any steps to have his title registered until 1906—somewhere, I should judge, about September. The registrar refused to register it because he had not the power of attorney, and through some oversight the plaintiff omitted to lodge a caveat. By this time, however, Louisa Clark had disappeared. The evidence shews she eloped with some person. Search was made for her, both by her husband and the plaintiff, and by the sheriff's officer at Saskatoon, but she could not be found. Letters were written by the plaintiff to the defendant Clark stating in effect that the transfer had been executed to him by Louisa under the power, and asking him to execute a new one. He, however, refused to do this. It is not very clear, however, that Clark was aware that Louisa had so acted at the time that he executed the transfer to the defendant Macmillan, as hereinbefore stated. I must say, however, that I am of opinion, from the character of the documents that were presented to Judge Prendergast as hereinafter stated, and the evidence generally, that he was either aware that Louisa had acted under the power or had a strong suspicion that she had done so.

On the 27th November, 1906, Clark executed a transfer of the lot of land to the defendant Macmillan. The alleged consideration for this transfer was $500. No cash was paid for this purchase, but Macmillan gave his note to the defendant Clark for that sum, payable at six months without interest. Clark stated as his reason for accepting this note instead of the money or any money that he was going into the bush for the winter, and he would prefer having a note to the cash. At the time this transfer was executed the only instrument registered in respect of the lot was the certificate of title to Clark. There were no subsequent incumbrances or transfers registered. Macmillan swore that at the time of the execution of this transfer he was not aware that any transfer had been executed by Mrs. Clark, but Clark told him, in effect, that he had executed a power of attorney in favour of his wife. I say, "in effect," because Macmillan testifies that he did not tell him that he had executed a power of attorney, but according to his own evidence, Clark did tell him what he must have known was a power

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of attorney or something that would have the same effect. I do not think that the evidence brings home to Macmillan any other knowledge than I have stated. Macmillan searched the registry office and found the title as I have described it. During the progress of these transactions—just whether before the execution of the transfer to him or afterwards, the evidence does not satisfy me—Macmillan applied to the registrar, producing a statutory declaration by Clark to the effect that the duplicate certificate of title had been lost or destroyed, for the issue of a new duplicate certificate to issue to Clark in lieu of the one so lost or destroyed. This application was made under sec. 170 of the Land Titles Act. The registrar refused to grant that application, and Macmillan then applied to Judge Prendergast, under sec. 41 of that Act, for an order. This was based on an affidavit of Clark, but the Judge refused to grant it without notice being given to Mrs. Clark. About the time of the transfer to him in November, 1906, Macmillan filed a caveat against the land. Notice was attempted to be given to Mrs. Clark, but she could not be found, and this having been established to the satisfaction of the Judge, he made an order on the 16th of May, 1907. This order is as follows:—

"To the registrar of East Saskatchewan land registration district.

"On reading the affidavit of Charles Henry Ridsdale Clark and on hearing advocate for said Charles Henry Ridsdale Clark it is hereby ordered that a transfer or any other instrument executed by Louisa Clark wife of said Charles Henry Ridsdale Clark dealing in any way with lot 18 in block 173 according to a plan of Saskatoon in the Province of Saskatchewan of record in the land titles office for the said registration district as plan 'Q3' under and by virtue of a power of attorney given by said Charles Henry Ridsdale Clark to said Louisa Clark be not registered or given any effect to same by virtue of any power conferred on you by Land Titles Act.

"And it is further ordered that a transfer executed by said Charles Henry Ridsdale Clark, the registered owner of said lot 18 may be registered without the production of duplicate certificate No. 8531."

The order is very peculiarly worded in view of the powers conferred upon a Judge by the Act. It seems to me to go far beyond what the Act authorized, and is a very strong illustration

of the fear entertained of a claim by some person under a transfer by Mrs. Clark. In acting under sec. 41 a Judge is *persona designata*; he is not acting as a Judge in a proceeding in Court. All sec. 41 authorizes him to do as such *persona designata* is to require the registrar to do what he is authorized to do under that section without the production of the duplicate certificate of title. The order in question goes further: it orders the registrar not to register "a transfer or any other instrument executed by Louisa Clark" under a power of attorney from her husband dealing with the land in question. That, I must say, with all deference, is more than sec. 41 authorizes to be done, and in effect, it orders behind the backs of interested parties, and without notice to them, what would seem to me can only be ordered as a result of an action.

At the time that this application was made to Judge Prendergast, in May, 1907, and when he made the order, Macmillan was fully aware that Turner claimed an interest in the land, and he was aware also of what the nature of that interest was, because correspondence had taken place between him and Clark which fully apprised him of that fact. He made no mention, however, of that fact to Judge Prendergast. The title of Macmillan was registered under this order, and a certificate of title issued to him. This action was brought to have the registration of the transfer to Macmillan and the registration thereof set aside and the certficate of title to Macmillan cancelled, and to have the transfer to the plaintiff registered and a certificate of ownership issued to him, on the ground of collusion and fraud between the defendants. The power of attorney has been obtained, and was produced in evidence at the trial. On the very day that the title of Macmillan was registered a caveat was lodged by the plaintiff. The Judge's order purports, by the indorsement upon it, to have been registered at 1.10 p.m. on the 16th of May; the caveat of the plaintiff at 1.20 p.m. on the same day. As a matter of fact, I am inclined to the opinion that, according to the practice in the registrar's office, the plaintiff's caveat was received first and ought to have been registered first, but no allegation of that sort appears in the statement of claim, no relief is sought on that ground, and no application was made to amend. I, therefore, am not disposed to grant the plaintiff the relief he claims upon that ground. I do not wish to express any decided opinion upon the subject, but I am inclined to think,

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under the provisions of the Act, that unless fraud or collusion is brought home to the defendant Macmillan—that is, if he was a *bonâ fide* purchaser for value—his title would be good. But if there was collusion or fraud, or the conveyance to him was without consideration, I am of opinion that I have jurisdiction to deal with the matter notwithstanding the fact that a certificate of title was issued to him. Section 4 of the Land Titles Act provides:—

"Nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of actual fraud or over contracts for the sale or other disposition of land for which a certificate of title has been granted."

Section 162 provides:—.

"In any proceeding respecting land, or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorandum or entry affecting land, the Judge by decree or order may direct the registrar to cancel, correct, substitute or issue any duplicate certificate or make any memorandum or entry thereon, or on the certificate of title or otherwise to do every act necessary to give effect to the decree or order."

These sections are intended to preserve the jurisdiction of the Court to deal with questions of fraud, and also with other equities that may arise affecting land and which would be properly cognizable on the equity side of the Court. I have come to the conclusion under the evidence that this transaction between the two defendants is collusive and fraudulent. In the first place, the defendant Macmillan, as I have pointed out at the start, was desirous of obtaining the certificate of title to issue to Clark. That, of course, is by no means conclusive: it is merely a circumstance. He explains that by stating that he did it because he thought it was the quickest way of effecting a registration of his own title; namely, when a substitute duplicate was issued to Clark to obtain a conveyance from him and then register his own title. That seems plausible, but at the same time I take the fact that he did seek to have this new certificate issued to Clark as one circumstance in a chain leading to the conclusion of fraud and collusion. And I may just state here that I would rather say I had arrived at the conclusion that there was collusion between these persons than fraud. I mean by that that it was never intended that any title should pass from Clark to Macmillan at all. It was just a scheme to prevent any title which might have been given through Louisa

Clark from having any effect. Another circumstance in the chain of collusion is the fact that the defendants were evidently very much in fear that Louisa Clark had made a title to some person. The next circumstance is that Macmillan, by his own shewing, purchased this property without knowing anything about it, without ever having seen it, merely upon the representation of Clark. He did not know, apart from what Clark told him, what the value of it was, whether it was vacant or whether it was not, whether there were any taxes against it or not, but was just willing to take it blindfold. And at the time of the trial, more than two years after his alleged purchase, he had never made any inquiries as to whether the land was vacant or not, or any other inquiries about it. Another circumstance is that he never paid any taxes and never has paid any taxes on the lot since he got the title, or made any inquiries about them, or looked after the land in any way whatever. Then no money passed between these persons. Macmillan gave his note, and that note is still in the hands of Clark unpaid, and Macmillan stated that he does not intend to pay it until after this matter is settled. The excuse given by Clark for taking the note instead of cash appears to me to be very thin. The fact that he was going into the bush would not prevent him getting the money and leaving it at interest in one of the banks or in the Government savings bank. It is so very thin that it makes me very suspicious. Another thing is that the note is long overdue. Clark came out of the woods in the spring of 1907, about the time the notes became due, and although it is payable to order he has never seen fit to attempt to raise any money on it. Then I take the correspondence between these two defendants. I will not set it out at length; I will merely state that this correspondence does not bear upon its face the character which I would expect in a correspondence between a vendor and purchaser of lands situated as these parties are, but it does bear to my mind the character of correspondence that would take place between a client and his solicitor. And then, at the last of it, comes a letter of Clark to Macmillan, which Macmillan does not appear to have repudiated in the slightest degree, in which Clark says this: "And I do not recognize Mr. T.'s claim, as I who own the lot have not been paid." There is the statement that he owns the lot at the date of that letter, the 27th of August, 1907, nine months after the alleged sale to Macmillan. That is a letter which the defendants refused to disclose on their affidavit of dis-

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closure, and which the counsel for the defendants at the trial objected to produce because it was a letter passing from one defendant to the other, and was privileged. I overruled the objection, and the letter was produced. I do not wonder that there was a strong effort to suppress it. The defendant Macmillan attempted to get round that expression by stating that it was a retrospective reference. In view of the other circumstances of this action I cannot bring my mind to that conclusion. In this connection I wish to return to the matter of obtaining the order from Judge Prendergast, and state that I am very strongly of the opinion that the obtaining of that order was an imposition upon the Judge. Macmillan was well aware, as I have stated, that Turner was claiming rights in this property. He had a pretty good knowledge, too, that he was claiming under a transfer executed by Mrs. Clark. Turner, he knew, was claiming, and there would be no other person through whom he could claim, so far as he knew, except it was upon a transfer or instrument executed by Mrs. Clark under the power of attorney. He must, being a solicitor, have been also aware that the probabilities were that Turner would be the person who would hold the certificate of title, and not Mrs. Clark, and I am satisfied if the Judge had been informed that Clark was claiming this property or rights with respect to it he would immediately have conjectured that the duplicate certificate of title would be with him, and that he would be the proper person to notify of the application which was made to him; and that being so, that he would have made no order without notice to Mr. Turner. I do not know that this, practically speaking, affects the rights of the party, but to my mind it was so unfair an advantage to take of the learned Judge that I feel I ought to express my opinion with respect to it.

The judgment will be that the transfer to the defendant Macmillan and the registration thereof be set aside, the certificate of title and duplicate certificate of title to him be cancelled, that the caveat lodged by him be removed, and that upon the transfer to the plaintiff with the power of attorney and the duplicate certificate of title to the land being produced to the registrar therein the title of the plaintiff be registered and a certificate of title to him be duly made out, and a duplicate certificate issued to him, and the defendants pay the costs of this action.

Let the promissory note made by the defendant Macmillan in favour of the defendant Clark be impounded.

[IN CHAMBERS.]

HUNTER v. COLLINGS AND BURLEY, GARNISHEE.

1909

April 28.

Attachment of Debt—Judgment Against Garnishee—Order for Made ex parte—Application to set aside—Regularity of Order—Summons to Set Aside—Grounds of Irregularity not Stated—Leave to Defend—Merits—Promissory Note not Due—Attachable Debt—Mistake by Clerk of Court—Effect of—Costs.

The garnishee not having, so far as the record shewed, disputed his liability to the defendant, an order was made *ex parte* giving leave to the plaintiff to enter judgment and issue execution against the garnishee, which was done. The garnishee then moved to set aside the order on the ground that it was made *ex parte*, and also on the ground that he had a good defence on the merits. These grounds were not, however, set out in the summons:—

Held, that an order for judgment against the garnishee in default of appearance may be made *ex parte*.

2. The grounds of the alleged irregularity not having been stated in the summons, the application should not be granted on that ground.
3. The garnishee having shewn that he had what might be good ground for disputing his indebtedness, and having accounted for his apparent default, should be allowed to dispute his liability.
4. The plaintiff should not be prejudiced by reason of the mistake of the clerk of the Court in omitting to file with the record a letter written by the garnishee disputing his liability, and that the garnishee must therefore pay the costs of the judgment and of the application to secure the same.

THIS was an application to set aside a judgment in default of appearance by a garnishee, and was heard by WETMORE, C.J., in Chambers.

H. F. Thomson, for garnishee.

No one *contra*.

April 28. WETMORE, C.J.:—This is an application to set aside a judgment entered against the garnishee for default in entering appearance or filing a suggestion, or any admission or denial of indebtedness.

The garnishee summons was served on the garnishee about the 11th July, 1907. On application to me I ordered judgment to be entered up against the garnishee. This order is claimed to have been erroneously made, and the judgment thereon irregular because no chamber summons was taken out to shew cause why such judgment should be entered. Failing that, the

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garnishee applies for leave to be allowed in to defend on the merits.

I am of opinion that the judgment was not irregular on the ground stated because it is not necessary to take out a chamber summons.

The form of garnishee summons, as provided by the Judicature Ordinance, requires the garnishee within twenty days from the service of such summons, to notify the clerk by statement in writing whether or not there is any debt due or accruing due from him to the defendant, and, if so, what debt, and why he, the garnishee, should not pay the same into Court to the extent of the plaintiff's claim and costs. Then, rule 389 provides "that if the garnishee does not pay into Court the amount due from him to the debtor or an amount equal to the claim or judgment and costs, and does not dispute the debt due or claimed to be due from him to such debtor, then the Judge may, after judgment has been entered against the primary debtor or at once when the garnishee summons is founded on a judgment already recovered, order that judgment be entered up against the garnishee and that execution issue."

Now I am at a loss to understand why, where the garnishee, as in this case, utterly ignored the requirements of the summons which was served upon him, a chamber summons should be issued to shew why such judgment should not be entered.

I therefore hold the order that I made and the judgment entered thereon to be regular.

But the garnishee has made an affidavit in which he states what I consider to be sufficient grounds to allow him to defend. On the 27th July, 1907, the garnishee wrote to the clerk of the Court in Regina, (this action brought in the Supreme Court of the North-West Territories, Judicial District of Regina), advising him that the defendants held the garnishee's promissory notes which did not become due until the 1st December, 1907 and 1911 respectively. This letter was received by the clerk, but was mislaid or he could not find it on the files. If that letter had been on the local registrar's files, and had been brought to my notice, I certainly would not have ordered that judgment be signed against the garnishee, because I think that

such a written statement, although not entitled in the cause, would be a sufficient statement to comply with the requirements of a garnishee summons.

The garnishee, since writing that letter, has paid the note which fell due in December, 1907, to a third person, one P. Metheral, to whom it was endorsed by the defendant after the service of the garnishee summons.

The question whether a debt accruing due by virtue of a promissory note made by the garnishee in favour of the principal debtor is attachable or not, to say the least, is not to my mind very clear. The Ontario authorities very clearly lay it down that such debt is not attachable before the maturity of the note. The trend of the English authorities appear to me to be the other way; therefore, I will not decide the question on this application. All that is necessary for me to say is that I think the garnishee has furnished sufficient grounds to enable him to raise the question of his liability under the garnishee summons.

There is another objection to granting this application so far as the alleged irregularity is concerned, because the ground of the irregularity is not set forth in the chamber summons.

The plaintiff did not appear at the return of the chamber summons granted on this application although served therewith, but he is not at all to blame in respect to the proceedings which he took. The fault is that of the officer of the Court in mislaying the garnishee's letter.

I cannot, therefore, award any costs against the plaintiff.

The garnishee will be allowed to file a statement denying his liability, provided that he does so within twenty days from this date, and pays the plaintiff's costs of signing judgment against him and of his application therefor, and issuing execution, and the sheriff's fees in connection therewith, if any. Upon these conditions being complied with within the twenty days, my order for judgment and the judgment signed thereon against the garnishee, and the executions issued thereon, will be set aside.

Upon non-compliance with these terms, this application will be dismissed without costs to the plaintiff.

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May 27.

Attachment of Debts—Amount Due under Building Contract—Failure of Contractor to Complete Work—Work Completed by Owner—Debt Due— Condition Precedent to Payment—Effect of.

Defendant had a contract for the erection of a school building for the garnishees, but abandoned the work before completion. The contract provided that the proprietor might in such a case take possession of the premises and complete the work and charge cost against amount due the contractor. It was also provided that the final estimate of 20 per cent. should not be payable until all liens had been paid and defective work remedied. The plaintiff after the defendant abandoned the work garnisheed the balance due him under the contract. After the garnishees had paid all liens and completed the building, most of which payments were made after service of the garnishee, there was no surplus remaining:

Held, that the true test as to whether or not there is an attachable debt is to ascertain whether anything has to be done by the judgment debtor as a condition precedent to payment, and as the condition precedent to the payment of the amount due when the garnishee was served was the completion of the building, which was never completed by the contractor, there was not any attachable debt due from the garnishee to the judgment debtor.

AN issue was directed to determine the liability of the garnishee to the judgment debtor, and was tried before PRENDERGAST, J., at Arcola.

J. F. Frame, for the plaintiff.

E. W. F. Harris, for the garnishees.

May 27. PRENDERGAST, J.:—In this action, commenced July 29th, 1907, the plaintiffs caused a garnishee summons to issue against the Heward School District number 1021, and the same was duly served on them on November 10th following. On February 29th, 1908, the garnishees, by a notice filed in the proceedings, disputed any liability. On March 24th following, the plaintiffs recovered judgment against the defendant for $104.00 and costs to be taxed, which costs were subsequently allowed at $159.01. The present issue, directed by the learned Chief Justice, is to determine the liability of the garnishees to the judgment debtor, and what amount, if any, was attached.

On May 17th, 1907, the defendant entered into a contract under seal with the garnishees for the erection of a school house

for the sum of $10,750.00 to be paid in fortnightly instalments of 80 per cent. of the work done and material supplied according to progress estimates to be issued by the architect on the first of each month. Articles V., IX. and X. of the contract read, in part, as follows:—

Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the works with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty (after six days' written notice to the contractor) to provide any such labour or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect, with sufficient justification, shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said works, etc.

Art. IX. The final payment shall be made within thirty-two days after the contractor has substantially fulfilled this contract, if the contractor shall have given satisfactory evidence that no mechanics' lien, other than his own, or liens of which he holds discharges exist in respect of the said works; otherwise the final payment shall be made within two days after the time for filing mechanics' liens has elapsed.

Art. X. No certificate given or payment made under this contract except the final certificate or final payment shall be conclusive evidence of the fulfilment of this contract by the contractor, either wholly or in part, and no payment shall be construed to be such an acceptance of defective work or improper materials as would entitle the contractor to payment therefor.

Barrett seems to have started with the work almost at once. It also appears, although no formal resolution was passed to that effect, that it was understood by the three trustees constituting the board, that two of them—being Joseph Dickey (the chairman) and J. M. Adams (the secretary-treasurer)—should represent the board generally in the matter.

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Divers sums were paid by the trustees directly to Barrett up to September 15th. After that, believing that he was getting behind in paying the men, the chairman and secretary-treasurer of the board told Barrett that they would pay out no more money until the work was completed, except to the men on his orders, and this was done until November 7th. On this last date, Barrett left for Florida, and did not appear again on the works. George W. Beach, a sub-contractor, says: "When Barrett left, he handed over the supervision of the works to all of us, and he left a power of attorney with me . . . After he quit, he took no interest in the matter; so we had a talk about finishing the building, and the understanding was for me to go ahead and issue the orders for labour and the carpentering work in particular, and they would pay them as the work progressed . . . The reason of this was that Barrett was staying away and taking no interest, and the building had to be completed." The evidence is also to the effect that the trustees had trouble with the workmen, who, having experienced difficulty in getting their pay, intimated that they would quit unless they were guaranteed their wages, in consequence of which they were assured that they would be paid upon the production of orders—Beach (who had Barrett's power of attorney) agreeing at the same time to exercise a general supervision of the work until it was completed.

Then the garnishee order was served on the trustees. This was November 10th. On that date there had been paid out on the contract the sum of $7,901.00—from which it would appear, if such amount represented 80 per cent. of the work done, that work for a further sum of $1,975.00 was then completed.

From November 10th to December 4th carpentering and painting were proceeded with, and further orders were issued and payments made.

On December 4th, the trustees sent a written notice to Barrett in care of Beach, pointing out certain omissions and defects in the building, and giving him the option of rectifying the same within five days or forfeiting $200.00 as per estimate of the architect.

On December 10th, no word being received from Barrett, the trustees took possession of the building as it was.

On different dates thereafter, the trustees made further and the last payments for labour and material, one of them being to Montjoy Brothers, who had registered a lien on the building. Deducting $200.00 for defects and omissions as above referred to, and $40.00 for painting which had yet to be done, it appears from the evidence not only that the trustees exhausted the whole amount of the contract, *i.e.*, $10,750.00, but that this amount fell short of what was actually due for labour and material, and some of the men were only paid pro rata of their claims out of what was left on hand.

The judgment creditors rely on articles V. and X. of the contract. With respect to article V., while it is clear that the trustees took possession of the building on December 10th, it is just as clear from the evidence of Joseph Dickey and George W. Beach, that they did not take over the contract when Barrett left on November 7th, nor at any other time prior to their letter of December 4th. As to article X., it seems to me that any special bearing it can have on the facts of the case must be against the judgment creditors.

What is attachable under garnishee proceedings is a debt due or accruing due. J. O. r. 384, and Form C.

It is well settled that a sum *debitum in presenti, sed solvendum in futuro,* is attachable. It is on this principle that the principal due under a mortgage may be attached. *Barnett* v. *Eastman* (1898), 67 L.J.Q.B. 517.

But it is not sufficient to look at the general nature of the debt itself; all the circumstances attaching to the contract creating the debt must be considered, and in *Howel* v. *Metropolitan District Railway* (1882), 51 L.J. Ch. 159, and 19 Ch.D. 508, it was held that "the true test is whether anything else has to be done by the judgment debtor as a condition precedent to payment."

The condition precedent to the payment of the $1,975.00 (equal to 20 per cent.) which was being withheld when the garnishee order was served, was the completion of the contract by Barrett. That was the very object of article IX. of the contract. That matter of the completion of the contract by Barrett remained an open question until the trustees put an end to it

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on December 4th or 10th, by giving him notice and taking possession; and on that date the state of affairs was such that far from there being a balance coming to Barrett, the stipulated sum of $10,750.00 was not enough to meet all demands, and a compromise had to be effected with the workmen. This consideration is based on the nature of an attachable debt, and on the special contract.

But I moreover find that under the Mechanics' Lien Ordinance the trustees had express authority to act as they did.

Section 20, s.s. 3, of the said Ordinance shews that the lien exists from the moment that any sum is due for work or material, even before registration. Barrett, although not having registered the same, had then a lien on the premises at all events in October, November and December; and this being so, under sec. 11 of the Ordinance, all persons doing labour for him, who notified the owner of an unpaid account or demand, became entitled to a charge therefor *pro rata* upon any amount payable by such owner under such lien." And the section provides further: "And if the owner thereupon pays the amount of such charge to the person furnishing material and doing labour as aforesaid such payment shall be deemed in satisfaction *pro tanta* of such lien."

This section 11, as I understand it, creates what Mathers, J., in *Bryson* v. *Municipality of Rosser* (1909), 10 W.L.R. 320, refers to, with regard to a Manitoba statute, as *a statutory assignment.* Or in other words, it simply enacts this most equitable provision, that the owner, when duly notified within the statutory limit of time, must see that such sums as may be then due to the contractor are paid out first to the men by whose labour and material he benefits.

In this case the men were all paid within thirty days after performing the work or supplying the material,—which also means, of course, within thirty days of the performance of the general contract.

There was an exception in the case of Beach, who was paid $625.63 as late as March 19th, 1908. But that was part of an order of $1,036.50 (exhibit 2) which he obtained from Barrett on November 7th, 1907, for work completed within the previous

thirty days; and this order was not only brought to the knowledge of the chairman and secretary-treasurer of the board at the time, but taken into account by them when they effected their settlement on a *pro rata* basis with the other workmen on November 27th. In other words, although Beach was only paid the balance coming to him on March 19th, 1908, he was so paid by virtue of a previous understanding with the trustees arrived at within the statutory limit of time.

With reference to the action taken by the chairman and secretary-treasurer of the trustees without any formal resolution of the Board, see *Pim* v. *The Municipal Council of Ontario*, 9 U.C.C.P. 304.

I hold that on the date that the garnishee order was served on the garnishees there was no debt due or accruing due from them to the primary debtor.

The garnishees will have their costs of this issue.

[IN CHAMBERS.]

KASINDORF v. HUDSON'S BAY INSURANCE COMPANY.

1909
May 31.

Practice—Writ of Summons—Plaintiffs Resident ex juris—Action by Partnership—Action Brought in Firm Name—Motion to Set Aside Writ—Amendment Allowed—Nullity or Irregularity—Waiver.

Plaintiffs, a partnership not carrying on business *in juris*, sued in the firm name. An application was made by defendant, after appearance, to set aside the writ and service, because the writ was issued in the firm name; and on the application leave was given to amend by setting out the names of the several members of the firm. From this order the defendant appealed:—

Held, that the writ was irregular, but not a nullity, and being merely irregular and not a nullity, the defendant, by appearing, had waived the irregularity.

THIS was an appeal to a Judge in Chambers from an order of the Local Master at Moose Jaw, allowing an amendment of a writ issued by a foreign partnership in the firm name, and was heard by NEWLANDS, J., in Chambers.

H. D. Pickett, for the plaintiff.

J. A. Allan, for the defendant.

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May 31. NEWLANDS, J.:—The plaintiffs, who are a foreign firm not carrying on business within the jurisdiction, issued the writ in this action in their firm name. On an application to set aside this writ the Local Master at Moose Jaw gave plaintiffs leave to amend by setting out the names of the several partners of the firm, and from this order the defendants appeal.

Mr. Allan, for the defendants, argued that the writ could not be amended, that the mistake in suing in the firm name was not an irregularity that could be cured by the defendants appearing as they did, but was a nullity and could not be amended, and he cited in support of this proposition *Smurthwaite* v. *Hannay* (1894), A.C. 494, 63 L.J.Q.B. 737, 71 L.T. 157, where the Lord Chancellor, Lord Herschell, said (501):—

"I cannot accede to the argument urged for the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX. could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity."

It is unnecessary for me to consider whether the proposition is as wide as there stated, as there is another authority to shew that it does not apply to this case. Rule 37, which is similar to Order IX., r. 6, of the English practice, applies equally to plaintiffs as to defendants, or, to state the case more correctly, as applying to this case, this rule does not authorize a foreign firm which does not carry on business within the jurisdiction to either sue or be sued in their firm names. In the *Western National Bank of City of New York* v. *Perex* (1891), 1 Q.B. 304, 60 L.J. Q.B. 272, 64 L.T. 543, where a foreign firm not carrying on business within the jurisdiction was sued by its firm name, the Court of Appeal refused to set aside the writ as null and void at the instance of one partner who had been served with the same whilst temporarily in England. Bowen, L.J., with whose opinion Lindley, L.J., concurred, said (316):—

"We are, therefore, I think, bound to apply the same reasoning to both cases, and, this being so, we ought to hold, on the authority of *Russell* v. *Cambefort*, 23 Q.B.D. 526, 58 L.J.Q.B. 498, 61 L.T. 751, that the present writ is incorrectly issued against

the firm, and cannot be justified as against the firm by Order IX., r. 6." "It must not be supposed that our decision implies that no remedy can be had against foreign firms, or such of their members as happen to come within the jurisdiction. The law as to suing and serving them will remain what it always has hitherto been, though the writ cannot, under Order IX., r. 6, be addressed against them in the foreign firm's name. The old course will be still pursued, viz., to insert in the writ the names of the partners whom it is desired to sue, and such writ so framed may be served on any of the partners who are found within the jurisdiction. For service out of the jurisdiction recourse must be had to Order XI., if the case is one which can be brought within the rules of that order.

"The law as to actions against foreign firms being thus, according to the effect of our present decision, wholly unaltered and unaffected by Order IX., r. 6, it becomes necessary to apply ourselves to the second question in this case, viz., whether, as against the defendant who has appeared, the writ should be set aside, on the ground of its being directed against his firm. And it appears to me that, as against the defendant the service of the writ must, under the circumstances, be upheld. The defendant is not the less intended to be sued, because he is intended to be sued with others, who with him are misnamed, and who together with him are intended to be comprehended (though as we have seen irregularly) in one firm name. The writ is no doubt irregular, in that it uses a single firm name to describe the defendant and others, who are beyond the jurisdiction. This irregularity as regards the firm must be set right. What has been writ short must be writ large, for the plaintiff is not entitled to the benefit of Order IX., r. 6, nor to the advantage of proceeding further as against the firm in the firm name. But the defendant is really himself sued together with others, since the plaintiff intends to include him, and to shew at the trial that he is properly included, among the members of the firm, and the irregularity of the nomenclature in the writ the defendant has waived as against himself by appearance, since he might if he had chosen have moved, under Order XII. r. 30 to set aside the service upon himself and was not obliged to appear to enable him to move."

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This reasoning I think applies equally to the case of plaintiffs suing in their firm name as to defendants being sued in that way, and as it is therefore only an irregularity it would be waived by defendant's appearing and obtaining an order for security for costs as defendants have done in this case. The appeal will therefore be dismissed with costs.

[IN CHAMBERS.]

1909

June 18.

IN RE CHESSHIRE.

Probate—Application for Ancillary Letters—Evidence in Support—Exemplification Under Seal of High Court of Justice for England.

This was an appeal from the decision of a Judge of the Surrogate Court refusing a petition for ancillary letters probate upon petition of the executor supported by an exemplification of letters probate under the seal of the High Court of Justice for England:—

Held, that the production of an exemplification of probate under the seal of the High Court of Justice for England, together with the affidavits under the Succession Duty Ordinance, was sufficient to entitle the executor to ancillary letters probate.

THIS was an appeal to a Judge in Chambers from a Judge of the Surrogate Court, and was heard by JOHNSTONE, J.

T. S. McMorran, for the petitioner.

June 18. JOHNSTONE, J.:—Section 70 of the Surrogate Courts Act provides that where any probate, etc., or other legal document purporting to be of the same nature granted by a Court of competent jurisdiction in the United Kingdom, etc., is produced to, and a copy thereof deposited with the clerk of any Surrogate Court of this province, and the prescribed fees are paid as on a grant of probate, the probate or other document aforesaid shall under the direction of the Judge be sealed with the seal of the said Surrogate Court, and shall thereupon be of like force and effect in Saskatchewan as if the same had been originally granted by the Court.

Section 71 requires on all such applications affidavits relating

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to succession duties to be filed. No mention is made of the filing of other affidavits, and these are not required by section 70, and are, therefore, not necessary or called for.

Under section 15 of the Evidence Act, "Evidence of any proceeding or record whatsoever of in or before any Court in the United Kingdom, etc., may be made in any action on *proceeding* by an exemplification purporting to be under the seal of such Court."

Under the latter section production of an exemplification authorized by the seal of the High Court of Justice (England) was sufficient for all purposes to entitle the petitioner to a direction to have the seal of the Surrogate Court for the Judicial District of Moosomin attached by the clerk to the copy of the exemplification produced and filed with the clerk upon payment of the prescribed fees.

The appeal is, therefore, allowed and the seal of the clerk directed to be attached upon payment of the necessary fees.

[COURT EN BANC.]

MISCHOWSKY v. HUGHES.

1909

July 5.

Criminal Law—Appeal to District Court from Conviction by Two Justices —Reference by District Court Judge of Question of Law to Court en banc—Jurisdiction of Court.

An appeal from a conviction by two justices of the peace having been taken to the District Court, and a question having arisen as to the regularity of the proceedings, the District Court Judge referred such question to the Court *en banc*:—

Held, that in such matters the Court appealed to, and in this case the District Court, is the absolute judge of facts and law, and the Court *en banc* had no authority to advise in the matters.

THIS was a reference to the Court *en banc* by FORBES, D.C.J.

No one appeared.

July 5. The judgment of the Court was delivered by WETMORE, C.J.:—The appellant, Mischowsky, is charged with unlawfully obstructing the respondent, a sheriff's officer, in the

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lawful execution of his duty, contrary to section 169, sub-section (*b*), of the Criminal Code. He was tried by J. C. Klaasen and John H. Young, Esquires, justices of the peace, and fined $20 and costs, to be paid forthwith, or in default, to be imprisoned for two months in the common jail at Prince Albert, with hard labour.

A person charged with an offence, under section 169, may be proceeded against by indictment, or on summary conviction, and if on summary conviction the proceeding must be before two justices. Although the reference does not state that the proceeding was by summary conviction, I presume, inasmuch as the party was convicted by two justices, that such was the procedure.

The appellant appealed to the District Court at Prince Albert. A question of law arose in the mind of the Judge of the District Court, as to whether the procedure on the appeal was correct, which he submitted by the reference herein, for the opinion of this Court. I am unable to discover upon what authority this reference is made. I presume that this appeal was taken to the District Court under section 749 of the Criminal Code. That being so, I know of no provision for a reference to this Court. Sub-section 752 of the Code provides:—

"That when an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this part, the Court appealed to shall try and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order."

I presume the learned District Court Judge may have been under the impression, because the question raised was whether the appeal was lodged in due form and in compliance with the requirements of the part relating to summary convictions, that a reference might be made to this Court.

I can find no provisions authorizing this. No person appeared in this matter for either of the parties concerned. I am of opinion that there was no authority to warrant the reference and no jurisdiction in this Court to entertain it.

This Court will, therefore, decline to deal with the matter.

[TRIAL.]

DAVIS v. REYNOLDS.

1909

July 5.

Promissory Note—Action Upon by Guardian of Lunatic—Note Given for Sale of Goods before Guardian Appointed—Consideration—Ratification —Notice of.

The plaintiff, the brother of a lunatic, sold certain property of such lunatic to defendant, taking a promissory note in payment expressed to be payable to plaintiff for the lunatic. The note being dishonoured, plaintiff sued to recover, and the action was dismissed. The plaintiff was then appointed guardian of the estate and brought a new action as guardian, but did not notify the defendant of his appointment or ratify the transactions occurring prior to his appointment:—

Held, that if the note when given was not valid, the plaintiff could not, upon being appointed guardian, recover upon it, in any event not unless he had ratified the sale and notified the defendant of such ratification and of his appointment.

THIS was an action to recover the amount of a promissory note, and was tried before WETMORE, C.J., at Regina.

W. E. Knowles, for plaintiff.

C. E. D. Wood, for defendant.

July 5. WETMORE, C.J.:—J. W. Davis sold the defendant a team of horses for $450.00. These horses belonged to J. K. Davis, who is a person of unsound mind, and Reynolds gave a note dated the 1st March, 1907, for the amount of the purchase money, with interest at 6 per cent., payable to J. W. Davis for J. K. Davis. When the note became due Reynolds did not pay it, and J. W. Davis brought an action in his own name, to recover the amount. That action was tried before my brother, Lamont, who gave judgment for the defendant, on the ground that J. W. Davis was not the guardian of J. K. Davis, and had no right to dispose of the property, and could not give a good title therefor, and that J. K. Davis, on recovering his reason, or his guardian duly appointed, could claim and recover this property.

Now the only conclusion that I can draw from this judgment is that the learned trial Judge found that the note was without consideration. Reynolds had a paragraph in his statement of defence in that action, that he was prepared to deliver

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up the property to whomsoever the Court might direct. That was, to my mind, of no effect. Certainly the Court, in an action of the character which I have stated, would make no order whatsoever in that direction.

Subsequent to this judgment, J. W. Davis was appointed guardian of the estate of J. K. Davis, and letters of guardianship issued to him, and he thereupon brought this action. No notice was given to the defendant that J. W. Davis had been appointed guardian, nor was any notice given to the defendant that J. W. Davis, as guardian, had ratified the dealings between J. W. Davis individually, and the defendant, with respect to the horses.

This action is based entirely upon the note. It claims payment of the note, or, in the alternative, a return of the horses and a sum of money for the use of them since the defendant obtained possession of them. There is no right whatever alleged in the statement of claim upon which the plaintiff seeks to recover in this action, except upon this note. As stated before, the only construction I can put upon the judgment of my brother, Lamont, is, that he held the note was without consideration. That being so, if it was not valid, for that reason, at its inception, it could not be made good by some subsequent conduct on the part of either J. W. Davis or J. K. Davis. But, assuming that it could be made good by the ratification of J. K. Davis's guardian, I am of opinion that the defendant would be entitled to notice of that ratification before action was brought. In fact I cannot conceive any action being brought against the defendant by J. K. Davis, or his guardian, without the contract being ratified and the defendant being notified of the fact of ratification. I might conceive of an action being brought against him for wrongful conversion, without notice of ratification. I suggested at the trial that possibly this action might be considered as brought by the guardian of J. K. Davis for the delivery of J. K. Davis' beneficiary interest in the note, or contract, but, it seems to me, in the first place, that what I have before stated is an answer to recovery on that ground, and in the next place I cannot get over the objection taken by the learned counsel for the defendant, that the action is not

brought in that form. So far as the alternative remedy, which I have stated, is concerned, I cannot see how the plaintiff can succeed. He has stated nothing whatever in his statement of claim which would give him the right to a return of the horses. I do not, by any means, say that J. K. Davis or his estate is without remedy, in fact I am very clearly of the opinion that they have a remedy, but the plaintiff has mistaken that remedy in this action.

I think it is a matter of very great regret, but this action must be dismissed. On the first trial the learned Judge dismissed the action without costs, but I feel that I cannot follow in the same course. Not that I wish to intimate for a moment that my brother, Lamont, was in error in doing what he did, but as the plaintiff has harassed the defendant with two actions, and has failed in both, he must pay the cost of this last one.

This judgment will not preclude J. K. Davis, or his guardian, as the case may be, recovering the value of these horses, in an action properly framed.

There will be judgment for the defendant with costs.

[TRIAL.]

MANITOBA BREWING & MALTING CO. v. MCDONALD.

1909
July 15.

Assignments and Preferences—Fraudulent Conveyance—Statute of Elizabeth —Intent.

Defendant McDonald being indebted to the plaintiffs and others, conveyed a farm to his co-defendants, his wife and father-in-law, for an expressed consideration of $4,000.00 to be paid in cash, notes, and by the proceeds of a loan. The evidence as to payment was contradictory, but the weight of evidence seemed to shew that $1,400.00 was paid. Beyond contradictory evidence between the defendants as to the mode of payment there was no evidence of fraud:—

Held, that no actual and express intent to defraud or delay creditors being shewn in both parties, the transfer, being for valuable consideration, ought not to be set aside.

THIS was an action to set aside a conveyance of land as in fraud of creditors, and was tried before LAMONT, J., at Regina.

Jas Balfour, for the plaintiff.

J. A. Allan, for the defendant.

Lamont, J.

1909

MANITOBA BREWING AND MALTING CO. v. MCDONALD.

July 15. LAMONT, J.:—In this action the plaintiffs have claimed against the defendant D. M. McDonald the sum of $180 for goods sold and delivered to him; also the sum of $171.41 for goods sold to him by G. F. and J. Galt; and the sum of $95.33 for goods sold to him by Blackwoods, Limited, which amounts were duly assigned to the plaintiffs. The plaintiffs also ask that a transfer of the north-west quarter of section 10-35-2 w. 3 from the defendant D. M. McDonald to the defendants Francis McDonald (the wife of the said D. M. McDonald) and Paul F. Jones (her father) be set aside on the ground that the same was a fraudulent preference under the Assignments Act. On the argument before me counsel for the plaintiffs asked to be allowed to amend the statement of claim herein by setting up that the said transfer was also void under 13 Eliz., ch. 5. I allowed the amendment.

D. M. McDonald did not appear to the writ of summons, and the plaintiffs signed judgment against him and proceeded to trial to determine the validity of the transfer. I find the facts to be as follows: In March, 1907, the defendant D. M. McDonald sold a hotel in Aberdeen for $14,000 and received for his interest therein $1,000 cash, the farm in question valued at $4,000, a number of lots in Saskatoon valued at $2,000, and a mortgage on the hotel for $3,500 subject to a first mortgage for $3,500. On May 6th, 1907, he transferred the said farm to the defendants Paul F. Jones and Francis McDonald. The consideration for the transfer was $4,000. The arrangement entered into between them was that the defendant purchasers were to obtain a loan on the land of $1,200, which, they were assured by Mr. Acheson, who drew the transfer, could easily be obtained, and which, being obtained, was to be paid over to the defendant D. M. McDonald, and to give their notes for the balance. The transfer was executed by D. M. McDonald. The purchasers paid him $100 in cash and gave him two promissory notes for $1,400 each, one payable in six months and the other in twelve months after date; and they made an application to Mr. Acheson for a loan of $1,200 and left the transfer and the title papers with him. The transfer was registered, but the application for the loan was not accepted. Having been informed that the loan could not be obtained, the

defendant purchasers gave D. M. McDonald a note for $1,200, payable in eighteen months. As to these facts there is no dispute. There is, however, a conflict of evidence as to the payment of the first $1,400 note. The note was taken up by the purchasers and is now in their possession. On the back of the note there are endorsed the following receipts: "Saskatoon, June 1st, '07. Received from Francis McDonald on the within note six hundred and fifty dollars and fifty cents. $650.50. D. M. McDonald." And underneath that the following: "Port Huron. Received from Francis B. McDonald and Paul F. Jones six hundred and fifty dollars, $650.00, to apply on within note. D. M. McDonald." The amount of these two receipts, together with the $100 cash paid by the purchasers when the transfer was given, makes up the $1,400, and the note was delivered up to the purchasers.

As to the payment of the $650 by Paul F. Jones no question arises as it is not disputed that he paid the money set out in the receipt; but the payment of $650 by Mrs. McDonald is disputed. Paul F. Jones was examined for discovery and in his examination he testified that the $650 paid by Mrs. McDonald was not paid in cash, but by giving her credit for that amount on the note, as the defendant D. M. McDonald owed her at the time more than that sum for moneys loaned by her to him. And he further set out that it was part of their bargain with D. M. McDonald that she was to be allowed as part of the purchase money this $650, which was owing to her. On the other hand, both Francis McDonald and D. M. McDonald state positively in their depositions that Mrs. McDonald paid him in cash $650 in Saskatoon on June 1st, 1907, and the receipt for the same was there endorsed on the note. If the evidence of the defendant Jones had not been impeached otherwise than by the evidence of Mr. and Mrs. McDonald I would have been inclined to accept it even as against both of their testimonies, because Mrs. McDonald says that she had the $650 in the house for near a year before paying it to her husband, and this seems to me scarcely probable. Other portions of Jones's evidence, however, shew that it is unreliable. He swore that after making the first payment, which was the note of $1,400, that the other $2,600 were to be paid by payments of $100 per year. This is not only flatly contradicted by both Mr.

Lamont, J.

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and Mrs. McDonald, but also by the written documents. At the time the transfer was given the two notes for $1,400 were given and an application for a loan of $1,200 made to Mr. Acheson, and had that loan been made it seems to me there could have been, on the evidence before me, no grounds for impeaching the *bonâ fides* of the transfer. The defendant Jones, however, was, I find, mistaken in this part of his evidence, and that being so I cannot accept the other portions of his testimony as against the positive evidence of both the other defendants that Mrs. McDonald paid the $650 in cash. I must, therefore, hold that she made this payment in cash.

Under these circumstances are the plaintiffs entitled to set aside the transfer under either 13 Eliz., ch. 5, or the Assignments Act?

To entitle a creditor to set aside a transfer for valuable consideration under 13 Eliz., ch. 5, he must prove an actual and express intent to defraud or delay creditors in both parties to the transfer, and the onus is upon him. It is not sufficient to shew that the result of the transfer has been to delay or exclude creditors. Parker on Frauds, pp. 3 and 59. There is no evidence before me which shews an actual express intent to defraud or delay creditors on the part of these defendants. Even if the object of the transfer had been to secure on existing debt due to Mrs. McDonald that alone would not make it void under 13 Eliz., ch. 5. In *Mulcahy* v. *Archibald* (1897), 28 S.C.R. 523, Sedgewick, J., in giving judgment of the Court, says:—

"The statute of Elizabeth, while making void transfers, the object of which is to defeat or delay creditors, does not make void, but expressly protects them in the interest of transferees who have given valuable consideration therefor, and it has been decided over and over again that knowledge on the part of such a transferee of the motive or design of the transferor is not conclusive of bad faith or will not preclude him from obtaining the benefit of his security. So long as there is an existing debt and the transfer to him is made for the purpose of securing that debt and he does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor, he is protected and the tranaction cannot be held void."

Lamont, J.

1909

MANITOBA BREWING AND MALTING CO. v. MCDONALD.

The transfer in the present case being given for valuable consideration is not void under the statute of Elizabeth, and as the evidence leads me to the conclusion that the purchasers paid a portion of the purchase money, *i.e.*, the first $1,400 note in cash, and their notes for the balance are now in the hands of third parties, neither of the purchasers has obtained any preference which would entitle the plaintiffs to have the transfer set aside under the Assignments Act. There will, therefore, be judgment for the defendants with costs in so far as the plaintiffs' claim is to set aside the transfer.

[TRIAL.]

HAMILTON v. CHISHOLM.

1909

May 25.

Real Property—Buildings Placed Thereon—Property in.

An execution debtor placed certain buildings on land, the property of the defendant in the issue, for which it appeared a ground rent was paid. These buildings were of wood resting on loose stone foundations to which they were not affixed nor were the foundations let into the earth, but the earth had been levelled to make the foundation level. A cellar had been dug in the earth under one building. A judgment creditor seized these buildings, and the defendant, the owner of the fee simple, claimed them as part of the freehold, and an issue was directed:—

Held, that to be a parcel of the freehold a building must be affixed to it or something connected with it, or there must be evidence to shew that it was intended that the buildings should be part of the freehold; the buildings in question not being affixed to the freehold, and there being no evidence that they should be a part of it, the buildings were the property of the debtor and liable to seizure.

THIS was an interpleader issue tried before NEWLANDS, J.

R. R. Earle, for plaintiff.

A. M. Panton, for defendant.

May 25. NEWLANDS, J.:—This is an interpleader issue to decide the ownership of a house and stable built by the execution debtor, A. E. Dunn, upon the land of the claimant, Eva Chisholm. Neither the claimant nor the execution debtor gave evidence, so that I have to decide the question of ownership from the evidence of the character of the buildings in dispute.

Newlands, J.

1909

HAMILTON v. CHISHOLM.

I may say that there was some evidence pointing to the fact that the execution debtor intended to purchase the land upon which these buildings were erected from the deceased husband of the claimant in his lifetime, and that since his death she had been charging him a ground rent for said land, but this evidence was not sufficiently definite to shew the intention of the parties at the time the buildings were erected. The buildings themselves are of wood throughout, resting on loose stone foundations by their own weight, and are not fastened to the same in any manner. These foundations are not let into the ground, but the ground was levelled so that the foundations would be square. There is a square hole dug in the ground under the house for a cellar, and it is banked around above the foundation with earth. Both buildings can be removed without in any way injuring the freehold.

The buildings in this case are very similar to the buildings in *Rex* v. *Otley* (1830), 1 B. & Ad. 161. There the question was whether a mill was parcel of a tenement. It was held it was not. Bagley, J., said: "To be so it must be part and parcel of the freehold. Now it is not a parcel of the freehold unless it be affixed to it, or to something previously connected with it. Here the mill was not affixed to the land, but merely rested upon a foundation of brick. This is analogous to the case of a barn set upon pillars, and that is nothing more than a chattel. The windmill in this case would clearly have gone to the executor, and not to the heir."

In *Wansbrough* v. *Maton* (1835), 4 A. & E. 884, another similar case, where a barn consisted of wood resting upon, but not fastened by mortar or otherwise to, the caps of blocks and stone fixed into the ground or let into brickwork, the brickwork being built on and let into the ground in those parts where the ground was lowest, for the purpose of making an even foundation for the barn to rest on. It was held the barn was not a fixture, and *Rex* v. *Otley* was followed. Lord Denman, C.J., said: "The first question must be whether the erection be a part of the freehold. If it be not united to the freehold we cannot say that it is not a part of it; and here it is not so united, and, therefore, not a fixture."

Tested by the rule laid down by Lord Blackburn in *Holland* v. *Hodgson* (1872), 1 L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709, neither the house nor the barn are to be considered part of the land, as there is nothing to shew that they were to be considered as part of the land. In that case Lord Blackburn said: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." This rule is also referred to in *Hobson* v. *Gorringe* (1897), 1 Ch. 182; 66 L.J. Ch. 114; 75 L.T. 610.

If the house and stable in dispute are not, therefore, part of the land, they not being affixed to it, but merely resting upon it by their own weight, and there being no evidence to shew that they were to be considered part of the land, they are not the property of the claimant, but chattels and the property of the execution debtor, and were properly seized under the execution against goods issued by the plaintiffs to this issue against the execution debtor, Dunn. The plaintiffs will have the costs of the issue.

[IN CHAMBERS.]

1909

June 1.

TASKER v. CARRIGAN.

Pleading—Amendment—Fraud—No Damages Alleged—Plea Only Open to Party Immediately Affected.

Plaintiff applied to amend his statement of claim by adding an allegation that the instrument which he sought to have set aside was executed by defendant Carrigan by the fraud of the other defendant. It was not alleged that the defendant Carrigan was defrauded or damaged:—

Held, that the plaintiff could not plead such fraud, as it raised an issue not between the plaintiff and defendant, but between the two defendants.

2. That the plea in any event could not be allowed, as it was not therein alleged that the defendant Carrigan was actually defrauded or damaged.

THIS was an application by the plaintiff for leave to amend his statement of claim, and was heard before NEWLANDS, J., in Chambers.

T. D. Brown, for the plaintiff.

T. S. McMorran, for the defendant, the North-West Thresher Co.

June 1. NEWLANDS, J.:—Plaintiff asks to amend his statement of claim by adding the following paragraph:—

"The defendant Carrigan was induced to sign the said lien by the fraud of one George H. Jenson, the agent of the defendant, the North-West Thresher Company."

This would be an addition to paragraph 5 of the statement of claim, which is as follows:—

The defendant Carrigan on the 26th day of April, A.D. 1907, subsequently to selling the said lands to the plaintiff as above set out, executed a lien charging the said land in favour of the defendants, the North-West Thresher Company, for the amount of $4,100, which lien the defendants, the North-West Thresher Company, took with full knowledge that the defendant Carrigan had prior to the execution of the said lien, sold the said lands to the said plaintiff under and by virtue of the said agreement bearing date the 12th day of January, A.D. 1907.

There are two objections to allowing this amendment.

1st. It raises an issue, not between the plaintiff and the defendant, the North-West Thresher Company, but between the defendant Carrigan and the defendant, the North-West Thresher Company. Plaintiff has, of course, no right to make such an amendment, and it could not conveniently be tried with the issues between the plaintiff and defendants; and

2nd. Even if it could be added it does not shew that the defendant Carrigan was defrauded; that is, that he was in any way damaged by executing the lien which it is alleged he was induced to sign by fraud. Before fraud is actionable it must have caused damage. In this case, if the defendant Carrigan was justly indebted to the North-West Thresher Company in the amount of the lien, could it be said that he has been damaged because he had been induced to give them security for his debt?

I do not know what the facts are in this case, as they are not set out in the intended amendment, which, as I have pointed out, does not contain sufficient allegations to make it an actionable wrong. The application to amend will therefore be dismissed with costs to defendants in any event.

[COURT EN BANC.]

WESSELL v. TUDGE.

Appeal—Not Perfected—Motion to Dismiss—Practice—Costs.

Plaintiffs having given notice of appeal to the Court *en banc*, neglected to perfect the appeal within the time limited, and the defendant moved to dismiss. It was objected on the authority of *Griffin* v. *Allen*, 11 Ch.D. 913, that no costs of the motion should be allowed, as no demand had been made for costs of the appeal:—

Held, that *Griffin* v. *Allen*, *supra*, did not lay down the established practice in these matters, but merely indicated the course the Court would pursue in such cases, and no such practice having been established in this Court, the application should be allowed with costs, but the rule in *Griffin* v. *Allen* was a very proper one, and in the future the Court would not, in the absence of good cause, allow costs of an application to dismiss for want of prosecution of an appeal, unless the applicant has made a previous demand for costs of the appeal, which has not been complied with.

EN BANC. 1909 WESSELL v. TUDGE.

THIS was a motion to the Court *en banc* to dismiss an appeal for want of prosecution, and was argued before the Court *en banc* (WETMORE, C.J., PRENDERGAST, NEWLANDS, LAMONT, and JOHNSTONS, JJ.), on the 29th of June, 1909.

C. E. D. Wood, for the respondent.
J. A. Allan, for the appellant.

July 9. The judgment of the Court was delivered by WETMORE, C.J.:—This was an application on motion on behalf of the defendant, Arnold, to dismiss the plaintiff's appeal to this Court for want of prosecution. The plaintiff appeared by counsel and opposed the motion on the grounds:—

(1) That the affidavit on which the motion was based did not set forth when the notice of appeal was served, because, if not served within the prescribed time, there was no appeal lodged.

(2) That the affidavit did not state that no previous demand for payment of the costs of the appeal had been made, and not complied with.

The affidavit disclosed that notice of appeal had been served, but did not state the date of service. We are of the opinion that, as against the appellant this was *prima facie* sufficient. We will not presume, for his benefit, that his proceeding was unwarranted by the practice, and irregular. As a matter of fact counsel for the plaintiff subsequently admitted on the hearing of the application, that the notice was served in due time.

As to the other point, an affidavit on behalf of the plaintiff was read, and it is quite clear that the intention is to abandon the appeal.

This Court held, in *Cyr* v. *O'Flynn,* decided on the 30th June, 1908, that a respondent could move to dismiss an appeal for want of prosecution, as it was the only means by which he could enforce payment of his costs incidental to the appeal, against the appellant. That, no doubt, was the object in making this application. No demand was made on the part of the applicant for the payment of his costs of the appeal. *Griffin* v.

Allen, 11 Ch. Div. 913, was cited on behalf of the appellant. That case was not brought under our notice in *Cyr* v. *O'Flynn*, nor was the question which we are now discussing raised in this case. Jessel, M.R., in delivering judgment in *Griffin* v. *Allen*, states as follows:—

"We wish it to be understood as the rule of this Court that henceforth the costs of an application for the costs of an abandoned notice of appeal will not be allowed, unless the applicant has made a previous demand for payment, which has not been complied with."

The other members of the Court concurred. We do not understand that judgment to lay down what the established practice was. It merely stated what course that Court would, in future, take with respect to applications of the character mentioned (and this application is practically of the same character), we apprehend, from the standpoint both of convenience and equity. We do not look upon it as a judgment which can affect the practice of any other Court. This application, therefore, must be allowed, and the appeal dismissed with costs, including the costs of this application.

We, however, consider the rule laid down in *Griffin* v. *Allen* to be a very proper one to follow in future, and we, therefore, state that we wish it to be understood that this Court will not, unless some good and sufficient reason is given, henceforth allow the costs of an application to dismiss an appeal on the ground that the motion of appeal has been abandoned, unless the applicant has made a previous demand for payment of his costs of the appeal, which has not been complied with.

[IN CHAMBERS.]

1909

April 16.

IN RE GLOBE FIRE INSURANCE COMPANY, LIMITED.

Company — Insolvency — Liquidation — Contributories — Settling List of— Allotment of Shares—Withdrawal of Application Before—Notice of Withdrawal—Notice of Allotment—Application Obtained by Fraud— Liability of Applicant as a Contributory—Debt Due by Company to Shareholder—Right to Set-off.

On the day after signing an application for shares in a company the applicant decided to withdraw and mailed a notice of such intention to the party who had taken the application, which in the ordinary course of the mail should have reached him the following day. There was no evidence that this letter did reach the party to whom it was addressed on that day or that he was an agent or officer of the company authorized to receive such a notice. In the meantime and without notice of withdrawal the company accepted the application and allotted the shares, but notice of allotment was not given until twelve days later. On an application to settle contributories:—

Held, that an application for shares cannot be withdrawn after allotment.

2. That in the absence of a statutory provision or custom of business to the contrary, a notice sent by mail is not operative in the absence of evidence that it was actually received.

An applicant for shares resisted the application to place his name on the list of contributories on the ground that he had been induced to take the shares by misrepresentation.

Held, that fraud was no answer to the application, as the applicant should have taken proceedings to have the shares cancelled before winding up.

A shareholder set up that the company was indebted to him in a large amount, being for amount due under one of the company's policies upon property destroyed by fire, and claimed the right to set off each amount.

Held, that in view of the provisions of sub-sec. 2 of sec. 44 of the Companies Ordinance and paragraph 2 of sec. 14 of the Winding-up Ordinance, the shareholder was entitled to set off such debt.

THIS was an application to settle the list of contributories in a company in liquidation and was heard by the Chief Justice in Chambers.

P. H. Gordon, for the liquidator.

W. B. Scott, for Robertson, a shareholder.

G. H. Barr, for Jarvis, a shareholder.

H. F. Thomson, for Gates, a shareholder.

April 16. WETMORE, C.J.:—This is an application to settle the list of contributories in this company. The list was settled by my brother Lamont as regards all the persons on the liquidators' list except as to J. H. Allen, H. Atkin, John F. Jarvis, H. W. Robertson and John M. Gates. Notice having been given to Allen and Atkin as provided by the Companies' Winding-up

Ordinance, 1903, and they not having appeared, they will be respectively placed on the list as contributories.

As to John F. Jarvis, the evidence shews that on the 1st of May, 1908, he was approached by F. J. Watson, and he signed an application in a form which appears to have been used for that purpose for ten shares in the company, and requested the company to allot that number of shares to him, and he agreed to accept the same. He appointed Armstrong Dean and J. R. Cathcart, or either one of them, as his attorneys to accept such shares on his behalf. Just what position Watson held does not appear by the evidence: I presume he was canvasser or solicitor for shares. On the 2nd of May Jarvis made up his mind to withdraw his application for these shares, and the ground stated was that the state of his finances would not permit of his undertaking the obligations arising from taking such shares, other things not specified. He stated in his affidavit that there were other reasons, but he does not set forth what they were. Consequently, on the 2nd of May, he wrote to Watson, directing his letter to Fernie, stating that he had, after careful consideration, found that it would be imprudent for him to take up shares in the company, that he had a rather large undertaking on hand in building an addition to his hotel, and did not wish to be hampered in any way, and asked Watson to return the notes which he had signed. This letter was mailed on the 2nd of May, and Jarvis states that it ought to have reached Fernie in due course on the following day, the 3rd. No reply, however, was received from Watson by Jarvis until the 9th of May, when he received a letter of that date, dated at Fernie, in which Watson stated that before getting Jarvis's reply his application had been sent in to the head office, and that he (Watson) had also discounted Jarvis's notes. On the 4th of May Jarvis's application for shares came before the Board of Directors of the company, and ten shares of the capital stock were allotted to him. No notice was given Jarvis of this allotment until a letter from the secretary of the company, dated the 16th May, was received by him, and that letter merely stated that as requested in his (Jarvis's) application, ten shares of the capital stock of the Globe Fire Assurance Company, Limited, had been allotted to him. The company's head office appears to have been in Regina.

Wetmore, C.J.

1909

IN RE GLOBE FIRE INS. CO., LIMITED.

I think that the authorities are that a subscriber for shares can withdraw his application at any time before the shares are allotted, but not afterwards. *Graham, Ex. p., In re Cardiff, etc., Iron Co.* (1861), 3 DeG. F. & J., p. 713, 30 L.J. Ch. 861, 5 L.T. 11, was cited as an authority that the application could be withdrawn at any time before notice of the allotment was received. That case does not bear out that contention, as the withdrawal was received by the company before the allotment was made. The question arises, therefore, Had the company notice of withdrawal by Jarvis before the allotment was made? It is true, a long time elapsed between the 4th of May, when the allotment is said to have been made, and the 16th of May, when the notice was written by the secretary of the company that the shares had been allotted, but the testimony is uncontradicted that the allotment was made on the 4th of May; it was sworn to by an officer of the company who was present at the time the allotment was made. Now there is no evidence that the company had notice of the withdrawal at that time. In the first place, assuming that Watson had received notice before the 4th of May, that would not in my judgment be notice to the company. Whatever authority Watson may have had to solicit shares, there is not a particle of evidence he had any authority to receive notice of the character I am discussing, or that any notice served on him would be binding on the company, and much less upon creditors of the company who find Jarvis's name on the list of shareholders. But there is no evidence that Watson ever received this notice prior to the 4th of May.

It was urged that because Jarvis's letter addressed to Watson on the 2nd of May was mailed and postage prepaid on that date, and ought to have reached him on the 3rd, that I will presume in the absence of evidence to the contrary that it did so reach him. I know of no such rule of evidence. There are cases where a notice is deemed to be properly given when mailed, but in all those instances there is statutory provision or something of that nature permitting it, or it is a practice that has arisen out of the custom of merchants; as, for instance, giving notice of dishonour of a bill of exchange or a promissory note. Two cases were cited to me as supporting the proposition contended for on behalf of Jarvis. One is *Warren* v. *Warren* (1833), 1 Exch. Rep.

250, 4 Tyr. 850, 1 C.M. & R. 250, 3 L.J. Ex. 294. The question that arose there was whether a letter containing a libel was published by it being put into the post office. The language of Parke, Baron, in delivering judgment was very broad. He says:—

"If a letter is sent by the post it is *primâ facie* proof until the contrary be proved that the party to whom it is addressed received it in due course."

There are some cases referred to in the notes at the bottom of that case, as, for instance, *Shipley* v. *Todhunter* (1836), 7 C. and P. 680, and *Callen* v. *Gaylord*, 3 Watts 321, in which it was held that the posting was a sufficient publication. Now the posting would be a sufficient publication of a libel even if it never reached the person to whom it was addressed, provided it came to the hand of anyone else. I am of opinion that Parke, B., was dealing with the question of a libellous letter being posted, and was not dealing with the question of service of a notice. *Stocken* v. *Collin* (1855), 7 M. & W. 515, 9 C. & P. 653, was a case of a notice of dishonour. No question arises with respect to the mailing of such a notice being sufficient. I am therefore of opinion that Jarvis has not brought home to the company knowledge of the receipt of his letter of withdrawal, either before the allotment was made or at any time, and he must therefore be entered as one of the contributories.

ROBERTSON'S CASE.

On the 11th of May, 1908, Hugh W. Robertson signed and forwarded to the company an application for fifty shares in the company. That application is as follows:—

To the Directors of the Globe
Fire Assurance Company, Limited.

I, Hugh W. Robinson, of Nelson, B.C., in the Province of British Columbia, do hereby apply for fifty shares of the par value of $50 each, in the above-named company, issued at $50 per share, and I request you to allot or transfer to me that number of shares, and I hereby agree to accept the same or any smaller number that may be allotted or transferred to me, and appoint Armstrong Dean and J. R. Cathcart, or either of them, my attorney to accept the said shares on my behalf.

Wetmore, C.J.

1909

IN RE GLOBE FIRE INS. CO., LIMITED.

I agree to pay the sum of $2.50 per share on application, and $2.50 per share in 60 days and four months from the date hereof, to the company, and I also authorize you to register me as holder of the said shares.

Dated the 11th day of May, 1909.

Witness: A. May.

Hugh W. Robertson,
Nelson — Address.
General Mg. Agent. — Occupation.

On the 23rd May the directors allotted these shares to Robertson, and J. R. Cathcart, one of the persons appointed by Robertson in his application, as attorney to accept the shares on his behalf, accepted them for him. Notice of the allotment was forwarded to Robertson and received by him, and the certificate of shares was also forwarded to and received by him. He sent this certificate back on the 1st June, 1908, to have it properly filled in. Apparently it was not properly filled in, but just in what respect does not appear; and in the letter returning the certificate he requested the company to hold it until they heard from him again, as he intended taking the matter up again with Mr. Dean when he came to Nelson. This certificate, however, was sent back to him—I presume corrected as he required, because Robertson does not state anywhere that it was not so corrected; in fact, he says he did not look at it when it came back to see if it had been corrected. Robertson was solicited by Armstrong Dean, the president and manager of the company, to subscribe for stock in the company. He seemed to have had at least three interviews with Mr. Dean before he consented to send in his application: first, on the 15th of May, 1908, and subsequently a short time afterwards. Certain propositions were then made by Dean to Robertson, neither of which Robertson would accept. The facts that I have stated are set forth in an affidavit made by Robertson. He stated that after these two propositions had been made and declined, he and Dean began to discuss the standing of the company, and Dean represented to him that he had up to that time sold in the neighbourhood of $110,000 of stock, that the first call thereon had all been paid up, and that Dean further represented to him that the company was in a first-class financial position, all of

which he states he was informed and believes was and is not the case. In so far as the company not being in a first-class position at the time, I assume it may possibly be inferred (although not necessarily so), as the winding-up order herein was made on the 14th December, 1908. But as to the other statements so alleged to have been made by Dean, there is no evidence that they were not true. He also stated that Dean represented that the company had re-insuring facilities with some large American or British company to take at least two-thirds of all the insurance obtained by the company, but he was informed and believed that that was not the case. Now that is not evidence, in my opinion, that what Dean stated to him was untrue. But suppose it was true. The result would be—to put the best construction upon it for Robertson that one can put upon it—that Dean was guilty of misrepresentation. But Robertson being registered, he cannot escape being placed upon the list of contributories upon that ground, because he ought under such circumstances to have brought an action to cancel the certificate of shares or to be struck off the list of shareholders, or some other action of that character. And I doubt very much whether he would be in a position now, the winding-up order having been made, to succeed in any such suit. *In re Hull and County Bank, Burgess's Case* (1874), 15 Chan. Div. 507, 43 L.T. 45; 49 L.J. Ch. 541, would seem to establish that he could not now succeed in any such action. The question comes down, then, to this: Was Robertson a shareholder; was he properly put upon the list as such? In 2nd Lindley on Companies (6th ed.), p. 1050, I find the following:—

"A person who has agreed with the company to become a member of it is a contributory, whether he is actually a member or not; and on the other hand, a person who is not a member and has not agreed with the company to become one is not a contributory."

There must be an agreement between the company and the applicant, and it takes two to make an agreement. An application for shares is not an agreement until it is accepted and the shares allotted. There are a number of cases where there has been, as stated by Turner, L.J., in *Ex parte Pellatt* (1867), 36 L.J. Ch. 613, at p. 615, L.R. 2 Ch. 527, 16 L.T. 442, "not a simple

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agreement only, but a two-fold agreement''—one by the company to take something from the party applying for shares for a consideration, and one by the party applying for shares to take them; as, for instance, in a case where it was intended to be part of the agreement on the part of the applicant that the company were to take certain goods from him in the way of his business, for which they were of course to pay, and on the part of the applicant, that he was to take the shares. I might state, while I am on the subject, that I have investigated several cases relating to this matter, and in all of them I find that there was either some writing on the part of the company recognizing the fact that the applicant had made the application for a benefit which he asserted he desired to receive in case he received the shares, or there was some writing on the part of the applicant setting forth to a certain extent what he desired to receive, and that such formed part of his application. Now in those cases it was held that if the company allotted the shares, but did not bind themselves in any way to accede to the request of the applicant, which was for his benefit, that the allotment was no good, that there was no agreement (unless, of course, the applicant for shares waived what he was seeking on his part), because the intended agreement was not entered into. Only part of it was entered into, and that would be, on a very well-known principle of law, no agreement at all. Now let us see if this case comes up to what I have just stated. Mr. Robertson went on to state in his affidavit—because the principal part of the evidence in his behalf is contained in that affidavit—that after these discussions had taken place, it was arranged that he should subscribe *tentatively* for fifty shares of stock, subject to his acceptance of the agency of the company, and that it was distinctly understood and agreed between him and Dean that his subscription to the said stock was not a completed transaction, and that he (Robertson) should not be bound or be under any liability by reason thereof, if he did not find everything to his satisfaction, and if he did not take an agency for such company. He then went on to state that he gave a cheque for five per cent., amounting to $125, to Dean upon Dean promising that nothing whatever would be done if he (the plaintiff) did not take the agency of the company, and that he gave that cheque under that condition, and that he afterwards cancelled the

cheque. He also states that after that Dean left for Revelstoke and points on the coast, and it was understood between them that nothing whatever would be done by Dean until he returned from Nelson, when Robertson was to give him a definite answer as to whether he would take the agency work. A few days after that he received a letter from Dean in which he advised him that he had instructed the head office to forward office and agent's supplies, which, Robertson says, was not according to their agreement, and he refused in any way, shape, or form to use any of such supplies. I may just say in passing, however, that I find that the letter of the 1st June, written by Robertson to the company, in which he returned the certificate of shares for correction, was on the company's forms, and had the company's headings. Robertson goes on to state that after making inquiries he came to the conclusion *from what he could find out* that the company was not a company he could represent, as the general manager, Dean, did not shew up in a very favourable light. He went on to state that by reason of these enquiries he found out certain matters affecting Mr. Dean. These matters were of the most vague character, but Robertson swears that as a result of his inquiries he would not feel justified in taking the agency and issuing policies of the company to his clients. He swears that on the 5th of June Dean called at his office, that he notified him then that he was not satisfied and wanted to discuss the matter with him, but he was busy at that time and made an appointment for Dean to meet him in the afternoon. Dean did not meet him, and when he went to his hotel in the evening he found out that he had gone away. There is no evidence to shew how Robertson's application for a call got to the company's head office at Regina—whether it was sent by Dean or whether it was forwarded by Robertson, but it seems to me it makes no difference, because either way it must have gone forward at his instance. Moreover, when he was notified of the allotment, and received the stock certificate, he raised no objection, but on the contrary recognized the propriety of what had been done by returning the certificate for correction.

Now it will be observed that the arrangement, outside the written application for shares, was not that Robertson was to give something to the company of the character mentioned in *Ex parte*

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Pellatt and receive a recompense for supplying it, but it was that he was to do something for the benefit of the company and himself; that is, to assent to act as the company's agent, and the option of doing that was entirely in his own hands, and there is nothing in writing from the company or any of its agents in any way recognizing that the allotment of the shares was in any way dependent upon his consenting to act as agent for the company, and if there had been, and it was necessary for the company to recognize him as agent, it had done so by forwarding to him the forms, etc., usually forwarded to an agent. Robertson states in his affidavit that he subscribed tentatively for the shares. Now I really am at a loss to understand what is meant by this subscribing "tentatively." There is nothing on the face of the document to shew that it was tentative. It is a very plain, very clear document; there is no ambiguity about it at all; and I am of opinion that this unconditional, clear application having been made, the shares having been allotted, the allotments having been received by Mr. Robertson's duly constituted agent, notice having been given to him besides, and the issue of the certificate of shares recognized by him, as I have stated, that this case does not come within what was laid down *In re Pellatt* and other cases of a similar character. Surely a written document of that character cannot be subject to be varied, or, I may say, absolutely departed from, by such very vague assertions as have been made by Mr. Robertson in his affidavit. Robertson's name will therefore remain on the list of contributories.

GATES' CASE.

Gates applied for twenty shares, which were duly allotted to him. The only ground on which he claims to be struck off of the list of contributories is that the company is indebted to him in the sum of $2,000, arising out of two losses by fire, with respect to which the proofs of claim for loss have been duly put in and the loss has been adjusted at $1,000 in each loss, the property destroyed having been covered by policies issued by the company. This claim is founded on the Companies' Ordinance (section 44, sub-section 2) being chapter 20 of 1901, which provides that "any shareholder may plead by way of defence in whole or in part any set-off which he can set up against the

company, except a claim for unpaid dividends or a salary or allowance as a president or a director of the company." Section 44 deals with the liability of shareholders to creditors of the company. Paragraph 2 of section 14 of the Companies' Winding-up Ordinance, chapter 13 of 1903, provides that "every shareholder or member of the company or his representative is liable to contribute the amount unpaid on his shares of the capital *or on his liability to the company* or to its members or *creditors* as the case may be, under the Ordinance, charter or instrument of incorporation of the company." Now, what is the amount unpaid by Gates on his liability to the company or to its members or *creditors*? In view of the set-off which is authorized by the Companies' Ordinance above set forth, his liability is what is due in respect of his shares after the set-off of the amount which the company owes him. It occurred to me whether this is in accordance with the purview and intention of the Winding-up Ordinance. I am free to confess that at first I was not disposed to reach the conclusion which I have just stated, but when I look at the English Companies Act of 1862, section 101, and the judgment of the Lord Chancellor in *In re Overend Gurney and Co., Ltd.* (1866), 35 L.J. (Ch.) 752, I feel myself forced to the conclusion which I have above expressed. The English Companies Act deals with both limited and unlimited shareholders. Under the Companies' Ordinance shareholders have a limited liability; that is, their liability is limited to the amount of their stock. Section 101 of the Imperial Act referred to, allows a set-off to the contributory only where the company is not limited, and *In re Overend Gurney and Co.*, the Lord Chancellor (page 754) states as follows:—

"The case of a member of a limited company is different from that of a member of a company of an unlimited liability as to set-off. This is exemplified in the 101st section, where a set-off upon an independent contract is allowed to the member of an unlimited company against a call, although the creditors have not been paid, evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied, and, therefore, it signifies nothing to the creditors whether a set-off is allowed or not."

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Now our Act has allowed a set-off where the liability is limited. I can quite perceive that the remark of the Lord Chancellor in the same case and at the same page, that "if a debt due from the company to one of its members should happen to be exactly equal to the call made upon him, he would in this way be paid twenty shillings in the £ upon his debt, while the other creditors might, perhaps, receive a small dividend, or even nothing at all," had a very considerable effect from the standpoint of even-handed justice, but at the same time I am of opinion that the Legislature having chosen to give this right of a set-off, and emphasize it, as I conceive, in section 14, sub-section 2 of the Companies' Winding-up Ordinance, I must give effect to what the Legislature has said. The result will be that Mr. Gates will be struck off the list of contributories.

To recapitulate the conclusion in each case: Jarvis and Robertson will be continued on the list of contributories, and the amount due from Gates in respect of his shares will be deducted from the amount due from the company to him in respect of his fire losses, and Gates' name will be struck off the list of contributories and he be allowed to rank in the assets of the company for the balance coming to him in respect of his fire losses after such deduction, and the list of contributories filed by the liquidator, amended by this order, and by the order of my brother Lamont, will stand settled. The liquidator's costs with respect to this application will be paid out of the assets of the company. I know of no authority in these proceedings in so far as I can discover, to order costs to any other party in the matter.

[TRIAL.]

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LAST MOUNTAIN ELECTION CASE.

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April 27.

Controverted Election Act—Protested Election—Regularity of Nomination —Voter—What Constitutes.

The respondent was declared elected as a member of the Legislature, and a petition was filed against his return. On the trial it was proved that the respondent had been nominated by four persons, and it was sought to shew that one of these was not qualified, not being on the voters' list, and not having resided in the province for one year. The nominator objected to was called and sworn, and stated that he could not remember when he came to the province, nor did he know if he was qualified to vote. The voters' list was also produced and shewed his name erased:—

Held, that in an election held under the provisions of secs. 269 to 284 of the Saskatchewan Election Act the entry of a voter's name on the list is not an essential qualification as a voter, and therefore the absence of the name of the nominator from the list did not in itself disqualify him as a voter.

2. That the receipt given by the returning officer under the provisions of sec. 122 is conclusive evidence only as to the matters in such receipt contained, and does not apply to the qualification of the nominators.

3. That the onus of proving lack of qualification being on the petitioner, in the absence of positive evidence of lack of qualification, the negative evidence given by the party whose qualification was attacked was not sufficient to discharge the onus and prove lack of qualification.

THIS was the trial of an election petition before PRENDERGAST, J., at Regina.

Alex. Ross, for the petitioner.

J. F. L. Embury, for the respondent.

April 27. PRENDERGAST, J.:—At an election held August 14, 1908, for the election of a member of the Legislative Assembly of Saskatchewan for the electoral division of Last Mountain, the petitioner and the respondent were candidates, and the latter was eventually certified to be the person elected at such election.

The petitioner now seeks, under the Controverted Elections Act, to have the election of the respondent declared void and set aside by the Court.

The petition alleges a number of grounds, but, pursuant to agreement between the parties, the trial proceeded for the

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time being only with respect to the first, which is, "That the nomination filed with the returning officer for the said electoral division purporting to name the said respondent, was not signed by four or more voters in the said district."

It is shewn that the writ for the election was issued July 21, 1908, and fixed August 7th for nominations; that the petitioner and respondent were nominated as candidates on the said last date; that no list of voters having then been completed and revised under sections 15 to 88 of the Saskatchewan Election Act, the provisions contained in sections 269 to 284 thereof were followed as prescribed by the first of the last mentioned sections; that a poll was held for the said election at the required date, and that the respondent was thereafter certified as the person elected at said election.

The respondent's nomination paper shews that he was nominated by four persons, one of them being Richard B. Langdon.

The list of voters for polling sub-division No. 17 used at the election, was also produced. It shews, under No. 63 the following: "Langdon, R. B.—clerk—14.27.22"—with a line run through the whole, apparently for the purpose of scoring off or annulling the entry, and followed by the initials "A. C. W.," which are those of Arthur C. Wallace, who was enumerator as well as deputy returning officer for the said polling subdivision.

I may say at once that it is not denied that "Richard B. Langdon," who signed the nomination paper, and R. B. Langdon whose name was put on and scored off the list of voters, are one and the same person.

The objection raised by the petitioner is that the said Langdon could not validly sign the respondent's nomination paper because he was not a voter under section 121, and this he rests on two grounds. First, that he had not resided in the province for at least one year immediately preceding the date of the issue of the writ of the election (July 21, 1907), and second, that his name was not on the voters' list.

If the objection were well founded, it would, of course, be fatal to the respondent's election as that would leave only three voters on his nomination paper.

I would first observe that the onus is on the petitioner. He stands in this respect in the position of the plaintiff in a cause,

and should consequently come within the general rule which I see no reason to reverse or alter in this case.

Now who is a voter under section 121, which deals with the signing of the nomination paper?

First of all, the interpretation clause of the Act (section 2, sub-section 9), says: "Elector or voter means any person entitled to vote at an election under the provisions of this Act."

But a person having certain definite qualifications as to residence, etc., may or may not be a voter according to the process followed in making up the list under the Act.

Sections 15 to 88 provide for the making of voters' lists by a registrar and deputy registrar as well as for their revision by a district Judge, and in this case, the qualification of the voter is determined by section 12, which makes registration one of the essential requisites.

When voters' lists have not been completed and revised in the above manner (which I would term the normal one contemplated by the Act), the lists are made up by enumerators under a more summary process pursuant to sections 269 to 284 as was done in this election, and then the qualification of the voter is determined by section 285.

Now, under section 285, the entry of one's name on the list is not at all made an essential qualification of the voter. And it stands to reason that it could not be otherwise, not at all events, with reference to his right to nominate a candidate. For, when the nomination takes place at some central point of the electoral division, it is only on the previous day (section 274) that the voters' lists were being posted up in the outlying, and sometimes very remote polling sub-divisions; and even then they are subject to be modified by the enumerator for six days thereafter. (Sec. 275). On nomination day, when sections 269 to 284 have had to be complied with as in this case, there are no definite lists in existence; and in such indefinite and incomplete form as they are, it is utterly impossible for the returning officer receiving nominations to have them before him at that moment.

Moreover, although the lists are closed two days before polling day (section 275), as far as the powers of the enumerators extend, any one not on the voters' list may, on presenting himself

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at the poll on voting day, cast his ballot, by taking the oath provided by section 281.

It is clear then under section 285, and the general scheme of the Act, that for the purposes of nomination at all events, registration is not one of the qualifications required to constitute a voter.

It was the respondent's contention, which he based on section 122, that the receipt given by the returning officer of the respondent's nomination paper was conclusive as to its validity, and that no evidence should have been taken as to Langdon's status. But that section is explicit, and does not say any more than that, "The said receipt of the returning officer shall in every case be sufficient evidence of the production of the nomination paper, of the consent of the candidate, and of the payment therein mentioned." It does not go further than that.

I think it may be reasonably laid down that, unless explicitly given a broader meaning, a certificate provided to be issued under a statute is evidence with respect to the matters therein referred to only as bare facts and conditions.

It was so decided in the three cases relied upon for the respondent. *Hanfstaengl* v. *American Tobacco Company* (1895), 1 Q.B. 347, 64 L.J.Q.B. 277; *Ystalyfera Iron Co.* v. *Neath & Brecon Railway Co.* (1874), 43 L.J. Ch. 476, 29 L.T. 662, L.R. 17 Eq. 142, and *Lewis* v. *Leonard et al.* (1880), 49 L.J. Ex. 308, 5 Ex. D. 308, 42 L.T. 351, brought respectively under the Imperial Copyright Act, 1886, the Land Clauses Act and the Bankruptcy Act, 1869. The certificates issued under the said Acts were there held to be simply evidence; in the first case of the production of a copy of the work; in the second case of the subscribing of the capital, and in the third case, of the liquidation proceedings. That is as far as those cases go.

The case of *Gothard et al.* v. *Clark et al.* (1880), 49 L.J.C.P. 474, 5 C.P.D. 253, 42 L.T. 776, cited for the petitioner, has, however, some bearing on the present one, inasmuch as although section 13 of the Ballot Act, 1872 declared "That no election should be declared invalid by reason of any mistake in the use of forms," yet, the Court held that "The section had no application to the decision of the returning officer on the validity of the nomination papers."

There just remains the question whether it is shewn that on July 21, 1908, the date of the issue of the writ of election, Langdon had not been a resident in this province for one year.

Langdon was a clerk in the Northern Crown Bank at Winnipeg, and in the summer of 1907, came up to take up similar duties in the branch of the bank, which was about to open at Govan in this province.

The manager of this branch testified that he came from Winnipeg to Govan after August 15, 1907, that Langdon, was there at the time, and that the bank may have been open more than two weeks before he (the witness) got there.

The manager of the Silver Plate Hotel at Govan said that his building was ready, and that he commenced business on August 11th, 1907; he produced the hotel register shewing that Langdon had registered there that same day, and stated that he had seen him around a few days, but would not swear as to two or three weeks.

R. B. Langdon swears as follows: "Before registering at the Silver Plate Hotel (August 11th), I boarded at Carston & Patterson's restaurant in the same town, perhaps two weeks, as to three weeks, probably, . . . I won't deny that the bank opened August 1st; I got there some time before the bank opened; I went there for the purpose of helping open the bank. . . . I possibly boarded at the restaurant three weeks, possible four weeks, as to five weeks, I don't know. I won't swear five weeks, nor four weeks, nor three weeks, nor two weeks, nor one week, because I don't know, and because I have no records. When I signed the nomination paper, I thought I was qualified. My name was put on the enumerators' list. And then, I didn't know because I was not sure that I had been there one year. So I didn't vote. Being read the oath in the Act, I say I wouldn't take the oath because I don't know when I arrived. I am not prepared to swear that I was in the province on July 20, 1907."

All this is very vague and indefinite, and there is probably occasion to wonder that Langdon, who presumably was trained in the methods of exactness and precision required in a bank, should find his memory so defective with respect to such an

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event which had happened just about a year before. And I have no hesitation in saying that on an application made on Langdon's behalf to be put on the list, such evidence as the above would indeed fall very short from establishing a case. But the question here is quite different. Then, the dispute bears after all on a margin of time of some eight or twelve days at the outside, the presumption should be in the direction of upholding the franchise, and which is the main consideration, the onus is on the petitioner.

I have held that the voters' list has nothing to do with Langdon's qualification as a voter from the standpoint of his right to nominate a candidate. The voters' list for polling subdivision 17, was, however, allowed to be put in subject to objection, and I must say that the evidence with respect to it, if anything, is distinctly favourable to the respondent. That Landdon's name was at first put on the list by the enumerator is evident. Then, A. C. Wallace says that it is probable that Langdon's name was still unobliterated when he took possession of the list as deputy returning officer for the said polling subdivision. How the name was subsequently struck off by running a line through it, is not shewn by direct evidence. But the erasure is followed by the initials of A. C. Wallace; he must then have made the erasure, and (in that case he) made it as deputy returning officer, which he had absolutely no right to do in the circumstances, so that, if this signified anything, I should have to hold that Langdon's name is still on the list.

The case of *Moorhouse* v. *Linnie* (1885), 15 Q.B.D. 273, 53 L.T. 343, does not apply, as there the Act required that the name of the party signing the nomination paper should appear on the burgess roll.

Harmon v. *Park* (1871), 50 L.J.Q.B. 775, 7 Q.B.D. 369, 45 L.T. 174, also cited for the petitioner, is a case under the Municipal Election Act, 1875, providing that the nomination paper must be signed by two enrolled burgesses as proposer and seconder, and by eight others as assenting to the same, and where the proposer has changed after the parties assenting had signed the paper and without their consent to the change. This has obviously no bearing on the present case.

In my opinion, the petitioner has not shewn that Langdon was not entitled to sign the nomination paper nor that the latter is invalid, and I consequently order that the trial proceed on the other grounds of the petition, with costs to the respondent in the final issue to be taxed on the determination of the final issue.

[COURT EN BANC.]

CANADA PERMANENT MORTGAGE CORPORATION v. JESSE.

Mortgage—Sale Proceeding Under—No Bid Except by Plaintiff—Land Sold for Twenty-five Cents—Application to Confirm Sale—Refusal to Confirm—No Consideration.

Plaintiff instituted foreclosure proceedings under a mortgage, and on the application of one of the defendants an order for sale was made with leave to the plaintiff to bid. No one appeared to bid at the sale save the plaintiff's agent, who bid twenty-five cents, and the land was knocked down to the plaintiff for that sum. On an application to confirm the sale, the judge before whom the application was made refused to confirm. The company appealed.

Held, that having regard to the nature of the property, the amount bid and for which the land was knocked down was so puerile that the Court was warranted in treating it as no sale, and refusing confirmation.

Held, also, however, that no substantial bid having been made, the sale should be treated as abortive, and an order for foreclosure made.

THIS was an appeal from a judgment of NEWLANDS, J., refusing to confirm a mortgage sale.

N. Mackenzie, K.C., for appellant.

F. W. G. Haultain, K.C., for respondent.

July 9. The judgment of the Court was delivered by WETMORE, C.J.:—This was a proceeding by originating summons for foreclosure of a mortgage. The plaintiffs obtained an order *nisi* for the sale of the mortgaged premises, they holding the first mortgage. The Alameda Farmers Elevator and Trading Company, who held a subsequent encumbrance, having given an undertaking to pay the costs and expenses incidental to the sale, procured an order *nisi* for the sale to be made, instead of an order *nisi* for foreclosure.

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The plaintiff had leave to bid. Neither the defendant, Jesse, nor the Alameda Farmers Elevator and Trading Company, nor any person else bid at the sale.

The amount due on the mortgage on the 18th day of December, 1907, when the decree *nisi* was made, was $1,134.87, and the property was ordered to be sold unless that amount with interest thereon at 8 per cent. and costs were paid before a date stated in such decree *nisi*.

The plaintiffs' agent bid the property in at the sale for 25c. A summons was taken out to confirm this sale, and on the return the defendant, Jesse, appeared and objected to the confirmation. An affidavit by Jesse was read at this return in which he stated that he was informed by one Ludtke that the plaintiffs had, before the sale, sold the property to him for $1,600. The property consisted of a quarter section of land.

My brother Newlands, before whom the summons to confirm came on for hearing, refused to confirm same, and the plaintiffs appealed.

We are of the opinion that the learned Judge was entirely right. We do not wish, in any way, to narrow the provisions of the Imperial Act, 30 and 31 Victoria, page 48, secs. 6 and 7, but we think that the amount that was bid for this property and for which it was knocked down, 25c., taken as the value of a quarter section in this country, is so puerile as to warrant the Court in treating it as no sale at all.

If this transaction were allowed the plaintiffs might be in a position to recover from the defendant Jesse the full amount of his covenant in addition to sweeping his land away from him. This would be so palpably unfair that it would be utterly incongruous to allow it.

Inasmuch as no person attempted to redeem and the defendant Jesse did not appear at the sale, although he had notice of the time and place, and the Elevator Company did not appear to back up their request for a sale, and as the plaintiffs' counsel stated at the hearing of the appeal that they would be satisfied with an order for foreclosure, and as that order would have undoubtedly been made if the Elevator Company had not intervened at the return of the originating summons and asked for a

sale, we think that justice will be done in this case by ordering a decree for foreclosure absolute, to be entered in the Court below.

The order of the Court of Appeal will therefore be, that there be an order for foreclosure and a vesting order. This order not to interfere with the plaintiffs' right to proceed against the Elevator Company under their undertaking, as they may be advised.

The plaintiffs will pay the appellant Jesse's costs of this appeal.

Concurred in by PRENDERGAST, JOHNSTONE and LAMONT, JJ.

[TRIAL.]

GOGAIN v. DRACKETT ET AL.

1909
Oct. 7.

Conditional Sale of Goods—Alteration of Agreement After Signature—Effect of—Letters Changing Order—Effect on First Order—New Contract.

Plaintiff applied to the defendant Jones to purchase certain goods on the terms that he would pay a certain sum in cash and the balance in fifteen monthly payments, the property in the goods to remain in the seller until payment. Subsequently the defendant Jones found that all the goods offered could not be supplied, but suggested others in substitution, and to this the plaintiff agreed. The alteration had the effect of reducing the price by the sum of $40.00. In shipping the goods an invoice was sent out wherein the terms of payment were incorrectly stated. The plaintiff accepted the goods and made the cash payment thereon, but claimed to pay the balance on the terms as stated in the invoice. It also appeared that when the order was altered by the plaintiff agreeing to the substitution of other articles for those ordered, the defendant Jones had made the necessary corrections in the original order. As a result of the dispute over the terms of payment the defendants, under the terms and conditions of the original order, seized and sold the goods. The plaintiff thereupon brought action for damages alleging the original contract to be void on account of the alteration, and that a new contract had been made when the plaintiff accepted the goods on the terms of the invoice.

Held, that the goods were sold and delivered upon the terms of the original order, with such changes as were necessary, and to which the plaintiff had agreed, and as the defendant Jones could not have collected more than the value of the goods shipped, the alterations in the order were not material and did not have the effect of voiding the contract.

THIS was an action for damages tried before LAMONT, J.

W. B. Willoughby, for plaintiff.

J. A. Allan, for defendants.

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October 7. LAMONT, J.:—The plaintiff, a barber residing at Moose Jaw, sues the defendant for damages for the wrongful seizure of the plaintiff's goods.

The facts of the case are as follows: The plaintiff, who had been living at Somerset, Manitoba, being desirous of commencing business in Moose Jaw, went to Winnipeg and interviewed one Lindsay, an agent of the defendants Jones Brothers & Company, in reference to the purchase from them of a barber's outfit. After going over the catalogue with Lindsay the plaintiff signed a written order, bearing date September 9th, 1907, asking the defendants, Jones Brothers & Company, to ship to him at Moose Jaw three No. 2 pedestal hydraulic chairs, a three-chair national (mirror) case No. 14, two bowl wash stands No. 10, and a compressed air outfit, for which he agreed to pay the sum of $614 as follows: $200 cash (less $50 deposit with order), balance $27.60 per month for 15 months, interest six per cent. The order contained a clause by which it was agreed that the title and property of the goods were to remain in Jones Brothers & Company until payment was made in full, and in case of default of payment, as above specified, Jones Brothers & Company were at liberty, without process of law, to take and remove said goods and any money paid on account was to be considered as rental for the use of the goods. The plaintiff returned to Somerset, and a short time afterwards received a letter from the defendants' agent Lindsay, saying that the defendants could not fill the order as the case of mirrors they had was not No. 14, but No. 11. On September 19th the plaintiff wrote Lindsay as follows:—

"Somerset, Man., Sept. 19th, 1907.

"Mr. W. Lindsay.

"Got your letter. Sorry that they cannot ship that case at once. Well you can let them ship that No. 11 case at once as I have to get it as soon as possible. Do not delay.

"E. Gogain."

The defendants on October 10th shipped the goods mentioned in the order of September 9th with the substitution of case No. 11 for case No. 14, and at the same time sent the plaintiff an invoice of the goods for $574 instead of $614, which had been the

price with case No. 14—case No. 11 being cheaper than case No. 14—but the terms of payment set forth in the invoice were as follows: Terms, $50 deposit, $150 cash on delivery, balance $15 monthly payments. On October 11th they mailed a statement of account to the plaintiff acknowledging deposit of $50, and shewing that they were drawing on him a sight draft for $150 and 15 other drafts, being the balance in 15 equal monthly payments, with interest at six per cent. added. The plaintiff accepted the $150 draft, but refused the others, claiming that the amounts were not correct. Some correspondence took place between the plaintiff and the defendants in which the plaintiff claimed that the balance was to be paid in monthly payments of $15 each, while the defendants claimed that the balance was to be paid in 15 monthly payments as set forth in the order of September 9th. The plaintiff, as admitted in the statement of defence, had paid by May 16th, 1908, the sum of $307.81, and on June 3rd the defendants, through their agent Drackett, seized the said goods and took them out of the possession of the plaintiff, and the plaintiff now brings this action for damages. After the defendants received the plaintiff's letter of September 19th agreeing to the substitution of case No. 11 for case No. 14 they, or some one of their employees, altered the plaintiff's order of September 9th by drawing a pen through the figures "14" in the words "national case No. 14" and inserting in place thereof the figures "11," and by drawing a pen through "$614" and inserting in place thereof the figures "$574."

For the defendants it is contended that the plaintiff's letter of September 19th was a consent on his part to the substitution of case No. 11 for case No. 14, and that the defendants by shipping the goods to the plaintiff signified their acceptance of the plaintiff's offer, and the order of September 9th therefore became a binding contract, and that the $15 monthly payments mentioned in the invoice was simply a stenographer's error in inserting the "$" mark. For the plaintiff, it was contended that the notification to the plaintiff that they could not fill his order was a rejection of his offer of September 9th; that the shipment of the goods and invoice was the defendants' offer while the plaintiff accepted by taking the goods into his possession. But even if

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the offer of September 9th became a contract, that contract having been altered in a material part while in the possession of the defendants without the plaintiff's consent, became void as against him.

The plaintiff's letter of September 19th directing the defendants to send on case No. 11 can, it seems to me, when taken in connection with his evidence, in which he stated that he was accepting case No. 11 instead of case No. 14, mean only one thing, and that is that he was willing that the defendants should substitute case No. 11 for case No. 14, and fill his order accordingly. The shipping of the goods with the substitution to which the plaintiff had agreed constituted an acceptance of this offer on the terms of the original order with such changes as that agreed substitution necessitated. The only term requiring alteration was the price. The plaintiff did not know the price of case No. 11, and nothing had been said in reference to it. Where, however, a person buys goods without anything being said as to the price the law implies that he will pay what the goods are reasonably worth, and that usually is the market value. In my opinion, therefore, the contract concluded between the plaintiff and defendants was that the plaintiff purchased the goods at a price which corresponded with their market value on the terms and subject to the conditions set out in his original offer. No question is raised that the amount charged was not a fair and reasonable price for the goods.

If I am right in concluding that such was the contract, the next question then is, Did the striking out of the figures "14" and the substitution therefor of the figures "11," and the striking out of "$614" and the substitution therefor of "$574," in the contract, while it was in the defendants' possession constitute an alteration of the contract sufficient to vitiate it? It is now the well-established rule that when an instrument is altered in a material part by one of the parties thereto without the privity of the other party, be it by interlineation, erasure, addition or drawing a pen through any material word, the instrument thereby becomes void: *Pigot's Case*, 11 Rep. 47; *Suffell* v. *The Bank of England* (1882), 9 Q.B.D. 555, 51 L.J.Q.B. 401, 47 L.T. 146. What constitutes a material alteration of an instrument? In

Cyc. vol. 2, page 177, the nature of a material alteration is defined as follows:—

"Any change in an instrument which causes it to speak a different language in legal effect from what it originally spoke—which changes the legal identity or character of the instrument either in its terms or in the relation of the parties to it, is a material change, or technical alteration, and such a change will invalidate the instrument as against all the parties not consenting to the change."

But at page 190 the author goes on:—

"It is not every change which will invalidate an instrument, but only a change which is *material* according to the principles above stated. In other words, any change in words or form, merely even if made by an interested party which leaves the legal effect and identity of the instrument unimpaired and unaltered, which in no manner affects the rights, duties or obligations of the parties and leaves the sense and meaning of the instrument as it originally stood is not material and will not destroy the instrument or discharge the parties from liability thereon."

In *Suffell* v. *The Bank of England*, above cited, Brett, L.J., said:—

"Any alteration of an instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such instrument or any part of it is used."

And in the same case Jessel, M.R., at page 565, sums up the result of the cases as follows:—

"But what they did decide was this. They said where the alteration made merely states that which the law would otherwise imply, that is not a material alteration. I think there would be very little difficulty in acceding to that in the case of ordinary mercantile documents. Then they said, where the alteration does affect the contract, either by increasing or decreasing the amount of the obligation of the contracting party sued, that is a material alteration; and then, in some cases, they stated where there is an alteration in a matter which, though it does not directly affect the contract, still directly does so, that is, affects

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the position of the parties to the contract, that is a material alteration."

From these authorities it would appear that one of the tests by which it may be determined whether or not an alteration in an instrument is material is, Would the rights and obligations of the parties, if effect were given to the instrument as altered, be the same as the law would imply if no alterations had taken place? If so, the alterations are not material, and the parties are not discharged from their liabilities under the instrument. Apply this test to the present case. The contract, as I have held, was that the plaintiff took the goods upon the terms and conditions set out in his order of September 9th with such changes as were necessitated by the substitution of case No. 11 for case No. 14. Those changes consisted of an alteration in the price from $614 to $574 with the corresponding lessening of the monthly payments. If, therefore, no alteration had been made in the order of September 9th I am of opinion that the amount which the defendants could have collected from the plaintiff thereunder, would have been the $574, payable $200 cash and the balance in 15 monthly payments. But this is the exact legal effect which the contract would have if effect were given to it as altered. In my view, therefore, the alterations made no change whatever in the rights and obligations of the parties, and consequently they must be held not to be material.

On the claim there will be judgment for the defendants with costs. There will also be judgment for the defendants with costs on their counterclaim.

[TRIAL.]

COCKSHUTT PLOW COMPANY v. MCLOUGHRY.

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May 8.

Conditional Sale—Windmill and Appurtenances—Machinery attached to Freehold by Purchaser under Contract for Sale — Cancellation by Vendor — Action by Bailor under Conditional Sale against Vendor for Detention—Fixture—What Constitutes—Intention of Parties—Right of Bailor to Remove.

Defendant sold certain land to one P. under contract for sale upon deferred payments, and B. went into possession. While so in possession he purchased from plaintiff a windmill, pump, tank, piping and a sawmill for the operation of which shafting was attached to the windmill. This machinery was not paid for, but was sold upon terms that the property therein should not pass until paid for. The machinery was set up on the land, being affixed by bolts to posts set into the soil and fastened there, and could not be used unless so fastened. The defendant cancelled P.'s contract for purchase of the land and took possession. The plaintiff demanded delivery of the windmill and appurtenances and the defendant refused, whereupon the plaintiffs brought action for detention:—

Held, that the windmill in question having apparently been intended to be a permanent improvement and to enhance the value of the premises, and being affixed thereto, became part of the freehold, and while the contract whereby the property therein was to remain in the plaintiff until payment would be enforceable as against P., it was not enforceable as against the owner of the freehold in possession after P.'s contract had been cancelled.

2. That the sawmill being part of the windmill, also went with the land.

THIS was an action for detention and was tried before JOHNSTONE, J., at Moosomin.

E. L. Elwood, for plaintiff.

J. T. Brown, K.C., for defendant.

May 8. JOHNSTONE, J.:—The facts in this case are briefly these: The defendant and his brother Johnston McLoughry became the owners of certain lands, namely, the east half of section 7, township 15, range 31, west of the principal meridian in the Province of Saskatchewan, on the 3rd day of August, 1904, and subsequently the interest of Johnson McLoughry was transferred by him to his brother the defendant. On the 4th July, 1905, Robert McLoughry and Johnston McLoughry entered into an agreement with one Ralph D. Prittie to sell to him the lands described above upon certain terms and conditions which it is not necessary to mention here. Under this agreement Prittie entered

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into possession and, on the 13th July, 1906, in writing, through the duly authorized agent of the plaintiffs, one Virtue, ordered from the plaintiffs at their branch in Winnipeg, one 14 ft. New Ideal Power Windmill, roller and ball bearings, tower and attachments, and also one pump, one tank, 330 feet of piping, one 26-inch saw and apparatus amounting in all to about $530. These orders contained the usual provision that the title to the goods and chattels ordered should not pass to the purchaser until full payment was made of the purchase price. The machinery was shipped by the plaintiffs and was received by Prittie through Doman & Company, also the agents of the plaintiffs, in the month of August and Doman & Company thereupon erected the machinery on the hereinbefore mentioned lands.

The manner of this erection appears from the evidence of V. C. McCurdy (who was really Doman & Company) and of James Graham as follows:—

McCurdy: "Q. Describe how the mill is set up on the property? A. The windmill is on a tower: it is anchored to posts in the ground.

"Q. Tell us what you mean by that? A. On the bottom of the posts there is a foot and that is bolted on a plank and then this is filled in with stones or earth.

"Q. These things that are fixed in the ground, what do you call them? A. Anchor posts.

"Q. Do they project above the ground or not? A. They come up about eight inches.

"Q. What is fixed to that? A. The tower.

"Q. How is that fastened? A. Bolts.

"Q. Can they be undone? A. They can.

"Q. Can the tower be taken down? It can."

Graham: "Q. Shew us how it is erected? A. It is put up on a tower fastened to the ground.

"Q. Did you examine the ground? A. Yes.

"Q. How is it fastened? A. It is fastened I think to two by six planks between four and five feet under the ground.

"Q. Did you dig down to examine it? A. Two by six planks.

"Q. And the anchor post is fastened how? A. Bolted to the plank and made solid.

"Q. The upright parts are fastened to the anchor posts again by bolts? A. Yes, eight bolts.

"Q. Each leg is fastened by eight bolts with nuts? A. Yes.

"Q. And the whole windmill is standing there, is it, at the present time? A. Yes.

"Q. All one piece of machinery? A. All one piece."

Prittie made default in payment of the purchase money for said lands required to be paid by him under his agreement to purchase and the registered owners, McLoughry Brothers, under a provision contained in the agreement of sale in that behalf, on the 19th November, 1907, cancelled such sale, and Prittie thereupon left the premises, the owners taking possession of the land and also the machinery, the subject of this action which they, upon demand, refused to deliver up to the plaintiffs and the plaintiffs brought an action for detention setting forth the purchase and sale of the machinery to Prittie and the refusal of the defendant to deliver up possession.

The defendant McLoughry, who was the owner of the premises at the time this action was brought, sets up his title to the lands in question, and that the machinery was prior to the commencement of the action placed and erected on the said lands and became affixed thereto. This defendant also sets up that he was a *bonâ fide* purchaser for value.

I find the defendant was not a *bonâ fide* purchaser for value, and the only remaining question, therefore, for me to determine is, as to whether or not the machinery became a fixture.

I may say that I have had considerable difficulty in arriving at a conclusion. In *Hellawell* v. *Eastwood,* 6 Ex. 295, the question arose as to whether certain machinery used for manufacturing purposes was attached to the freehold so as to exempt from distress for rent, and it was held that they had never become part of the freehold. Parke, B., in delivering judgment, says: "They were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of their annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." The rule laid down in this case was acted upon in *Huntley* v. *Russell,*

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13 Q.B. 572, and in *Waterfall* v. *Penistone*, 6 E. & B. 876. The authority of the case referred to, however, has been questioned both in England and Canada. The leading authority in England on the question of what chattels taken on to the land are or are not fixtures, is the case of *Hobson* v. *Gorringe* (1897), 1 Ch. D. 182, followed in *Reynolds* v. *Ashby & Sons* (1903), 1 K.B. 87. The rules laid down in the former case and in *Holland* v. *Hodgson*, L.R. 7 C.P. 328, were approved of in *Haggart* v. *Town of Brampton* (1897), 28 S.C.R. 174. In *Holland* v. *Hodgson* it is said that "there is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, namely, the degree of annexation, and the object of annexation." It is laid down in *Haggart* v. *Town of Brampton* as follows: "The circumstance that the fastening is merely to steady the machines when in use is now held not to be inconsistent with the inference that the object was to permanently improve the freehold," and *Longbottom* v. *Berry*, L.R. 5 Q.B. 123, is referred to where it is stated: "This fixing was clearly necessary, for they (the machines) could not otherwise be effectually used; as for the same reason the fixing was obviously not occasional but permanent. It is no doubt said in this case (referring to *Mather* v. *Fraser*, 2 K. & J. 536), that the object of fixing was to ensure steadiness and keep the machines in their places when worked; but the same thing could probably be said of most trade fixtures from a steam engine downwards; and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary consequence is to cause the mill to be put to a more profitable use as a wool mill than it otherwise would be. It is also equally difficult to conceive that a machine which at all times requires to be firmly fixed to the freehold, for the purpose of being worked, could truly be said never to lose its character as a moveable chattel."

In *Hobson* v. *Gorringe*, as in this case, it was argued that the

terms of the hiring and purchase agreement caused the engine to remain a chattel notwithstanding its annexation to the soil, because the intention of the parties who placed it where it was must be considered, and if this consideration shewed that the machinery was not to be a fixture, though actually fixed to the freehold, it still remained a chattel. Lord Justice A. L. Smith, in delivering the judgment of the Court of Appeal refers to the remarks of Lord Blackburn in *Holland* v. *Hodgson* that articles not otherwise attached to land than by their own weight are not to be considered as part of the land unless circumstances shew that they were intended to become such, the onus of proving which was on the person who asserted that the articles had ceased to be chattels, but that, on the other hand, an article which became fixed to the land even slightly was to be considered a part of the land unless the circumstances were such as to shew that it was intended it should continue a chattel, the onus of proving which was with the person who contended it was a chattel, and says: "The question in each case is whether the circumstances are sufficient to satisfy the onus. It is said on behalf of the plaintiff that the hire and purchase agreement shews an intention on Mr. Hobson's part as also on Mr. King's part, that the gas engine should remain a chattel until King had paid the stipulated instalments, which he never did. Now, if the engine had been a trade fixture, erected by King as tenant, with a limited interest, we apprehend that when affixed to the soil, as it was, it would have become a fixture, *i.e.*, part of the soil, and would have immediately vested in the owner of the soil, subject to the right of King to remove it during his term. 'Such,' says Lord Chelmsford in *Bain* v. *Brand* (1876), 1 App. Cas. 762, 772, 'is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed.'

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"It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—*i.e.*, part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture—*i.e.*, part of the soil—subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser. The plaintiffs' right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiffs' remedy for the price or for damages for the loss of the chattel is by action against King, or, he being bankrupt, by proof against his estate." It is further laid down in the judgment referred to at page 195, that there was no doubt but that a person could agree to affix a chattel to the soil of another so that it should become part of that other's freehold upon the terms that one should be at liberty in certain events to retake possession, but that a *de facto* fixture should become not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers was impossible.

In *Haggart* v. *Town of Brampton*, we find that in passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or to improve their usefulness and the articles are affixed to the freehold even slightly, but shewing an intention not of occasional, but of permanent, affixing, then both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are to become part of the realty.

The evidence taken at the trial of this case discloses the fact

that the windmill in question was put up for the purpose of pumping water for animals, also water for use in the house conveyed by piping to the house and for the purpose of sawing wood and was apparently intended as a permanent improvement, and the erection of the mill I find as a fact had for its object the enhancing of the value of the premises and the permanent improvement thereof, and that the mill when affixed became part of the realty.

In this finding I also include the saw. A portion of the shafting was erected for the purposes of operating the saw and this is really part of the fixture. See *Elwes* v. *Maw*, 2 Smith's Leading Cases 189, at page 207 *et seq.*

There will therefore be judgment for the defendant with costs.

As to the question of costs. It was contended at the trial that this question should be governed by the amount still remaining unpaid the plaintiffs on account of their lien, an amount less than $300, and without reference to the value of the mill at the time the action was brought, that is, as to whether the costs should be taxed on the higher or the lower scale. This question, I think, is one to be determined by the clerk on taxation and is not one which the Judge should be called upon to determine unless there are special circumstances arising in the case which, in the opinion of the Judge, should prevent the application of the tariff in the ordinary way.

[COURT EN BANC.]

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July 9.

IN RE THE GLOBE FIRE INSURANCE COMPANY, LTD. ROBERTSON'S CASE.

Company in Liquidation—Winding up—Settling List of Contributories—Register of Members—Evidence of Membership—Condition Attached to Application not Stated in Writing—Application in Writing Unconditional—Condition not Communicated to Company—Effect of.

On an application to settle the list of contributories of a company, one Robertson, who had made application for shares and whose application had been accepted, objected that his application was conditional upon his appointment as agent of the company and his acceptance of that agency. He also objected that his membership in the company had not been properly proved, as the register had not been produced:—

Held, that the register of the company is not conclusive or the only evidence of membership therein, but membership may be proved without reference to the register.

2. That the application for shares being an unconditional one, and there being no evidence that any notice of a condition attached had ever been given to the company, Robertson's name must be placed on the list of contributories.

THIS was an appeal by Robertson, alleged to be a shareholder of the company, from an order of Wetmore, C.J., placing his name on the list of contributories of the company, and was argued before the Court *en banc* (PRENDERGAST, NEWLANDS, JOHNSTONE and LAMONT, JJ.), at Regina.

W. B. Scott, for appellant: The onus of proving that the alleged shareholder should be a contributory is on the liquidator, and to establish this it must be shewn that he is entered on the company's register. See sec. 45, Companies Ordinance, 1903, and Lindley on Companies, 6th ed., vol. 1, p. 75. No evidence as to the register having been given, the liquidator must fail. The evidence shews clearly that Robertson's application was conditional. The company had knowledge of the condition through Dean, the general manager. Notice to the agent in the course of his agency is notice to the company: *Atwood* v. *Small*, 6 Cl. & F. 232; *Baldwin* v. *Cassells*, L.R. 6 Ex. 325; *Bawdem* v. *Cassells*, 2 Q.B. 534; *Gladstone* v. *King*, 1 M. & S. 35. A person who is not a member and has not agreed with the company to become one is not a contributory: *Coleman's Case*, 1 De G. J. & Sm. 495; *Jackson* v. *Turgrand*, L.R. 4 H.L. 305. If a condition precedent has not been performed and has not been waived, the applicant will not be a con-

tributory: *Mainwaring's Case*, 2 DeG. M. & S. 66; *Robert's Case*, 3 DeG. & S. 205; *In re Rogers*, 3 Ch. 633; *Ormerod's Case*, 2 Ch. 474.

J. A. Allan, for the respondent: A person who has agreed with the company to become a member is a contributory whether he is actually a member or not: Lindley on Companies, vol. 2, p. 1050. A binding contract to take shares is made when there is an application, an allotment and notification: *In re Scottish Petroleum Co.*, 23 Ch. D. 430. These conditions were proved in this case. Any right which the appellant might have to bring an action has been forfeited by delay until winding-up proceedings were taken: *Scottish Petroleum Co.*, 23 Ch. D. 413, at 434; *Etna Insurance Co.*, L.R. 6 Eq. 315; *Oglivie* v. *Currie*, 37 L.J. Ch. 541; *Ashley's Case*, L.R. 9 Eq. 263. Even if the contract was void, the delay is fatal to the appellant's right to have his name removed from the register: *Railway Time Tables Co.*, 42 Ch. D. 107. No such application will be entertained after the winding-up order is made: *Oakes Tarquash*, L.R. 2 H.L. 325; *In re Hull and County Bank*, 15 Ch. D. 511.

July 9. The judgment of the Court was delivered by NEWLANDS, J.:—The liquidator of the above company took out a summons to settle the list of contributories of said company, and at the hearing before the learned Chief Justice H. W. Robertson the above-named appellant was placed upon the list. From this order he appeals. Two grounds of appeal are taken: First, that before the appellant's name can be placed upon the list of contributories the register of members of the company must be proved, and that it was not properly proved in this case; and, second, that appellant's subscription for stock in the company was conditional upon his appointment as an agent of said company and his acceptance of such appointment.

As to the first ground of appeal, it is evidently based upon the assumption that the register of members is the only evidence of membership in the company. This is not the case, and not only is it not the case, but the register is not conclusive evidence of membership, as names can be added to it or struck off by the Judge upon evidence that they were either improperly there or have been improperly omitted therefrom. In this case the learned

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Chief Justice had evidence that the appellant had made a written application for shares; that at a meeting of the directors of the company shares had been allotted to him, and a certificate for the same had been forwarded to him. A *primâ facie* case was, therefore, made out to have him placed upon the list of contributories.

As to the second ground of appeal, that his application for stock was conditional, admitting the evidence of the appellant to be true, this case falls within the decision in *Harrison's* case (1868), L.R. 3 Ch. 638, 18 L.T. 779. In that case Harrison applied for shares, which application, he swore, was on condition that he be appointed a local director of the company. The application was sent in by the agent to the directors and the shares were allotted to him. There was no evidence that the agent who got the application had informed the directors of the condition, and the Court of Appeal in Chancery held that his name must be put on the list of contributories. Sir W. Page Wood, L.J., in giving judgment, said: "As to *Harrison's* case, the appellant has not produced the evidence that Rogers has; in many respects the circumstances were much the same, but the evidence falls short in shewing that Stillwrath (the agent who got the application) sent to the directors the letter as to the application being conditional, which he did in *Roger's* case." "In truth it was his business to prove that there was a letter communicated to the directors containing a conditional application, and I do not see any cause for his not calling Stillwrath to prove this if it was the fact. As he has not done so, however unfortunate it may be for him, I think he has failed to establish his case, and the decision of the Vice-Chancellor must be affirmed."

In this case the application was unconditional on the face of it, and there was no evidence that the condition alleged was communicated to the directors until after the certificate of shares was sent to him. On the other hand, there is his own letter of June 1st to the company, in reply to the letter from the company in which the certificate of shares was inclosed, in which he makes no mention of any condition, but tacitly accepts the shares. In that letter he only says: "I am returning herewith stock certificate, which is not filled in properly. I would be obliged if you would hold this certificate until you again hear from me, as I intend

taking the matter up with Mr. Dean when he again comes to Nelson," and it is not until a month afterwards that he declines to accept the stock, which had been returned to him some time previously, on the ground that his application had been conditional.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

[IN CHAMBERS.]

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October 8.

Mortgage — Foreclosure of — Mortgage Given to Secure Performance of Contract—Covenant to Pay Fixed Sum—Assignment of Mortgage—Partial Failure of Consideration—Rights of Assignee to Recover Full Amount—State of Accounts between Mortgagor and Mortgagee—When Assignee Bound by—Estoppel—How Mortgagor Estopped.

Defendant W. employed one D. to break certain land, and executed a mortgage for the contract price to secure payment of the same. The mortgage in question was on the face of it absolute, and contained the usual clause acknowledging receipt of the principal. D. assigned the mortgage to plaintiff, who proceeded to foreclose the same. It appeared that D. had never completed his contract, and of the work done only a small portion was of any value, and in respect of the balance it was so badly done that, in another action, the present defendant had recovered judgment against D. for damages to the land. The plaintiff claimed the whole amount of the mortgage covenant, and alleged that defendant was estopped as against the assignee from denying that the full consideration had not been advanced (1) by acknowledging receipt of the principal sum, and (2) that having recovered judgment on breach of contract in respect of the breaking, he must look to that for relief:—

Held, that an assignee of a mortgage takes, subject to the state of accounts existing between the mortgagor and mortgagee at the time of the assignment, and when the mortgagor shews that the amount advanced or the amount due is less than the face value of the mortgage, the assignee can only recover the full amount if he shew that he gave full value for the mortgage without notice that a less amount only was due, and that the mortgagor has enabled the mortgagee to deceive the assignee or has led the assignee to believe that the greater amount was due, and this not being shewn, the assignee could recover only the amount actually due.

2. That it being the duty of the assignee to enquire into the state of the accounts, the defendants were not estopped from denying the amount due unless some act of the mortgagor justified the belief that the full amount was due, and the mere execution of the acknowledgment in the mortgage was not sufficient.

3. That the judgment recovered by the mortgagor being for damages to the land by the work done and not for non-performance, the recovery of such judgment did not estop the defendant from claiming a reduction in the amount payable under the mortgages.

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THIS was a motion to foreclose a certain mortgage and was heard by LAMONT, J., in Chambers.

G. H. Barr, for plaintiff.

H. D. Pickett, for defendant.

October 8. LAMONT, J.:—This is an application for an order *nisi* foreclosure. On June 22nd, 1908, the defendant Wheeler entered into an agreement in writing with one Victor Dionne by which Dionne undertook to break in a farmer-like manner 250 acres of Wheeler's land for the sum of $1,008. As security for the payment of the said sum Wheeler, at the time the agreement was entered into, executed and gave to Dionne a mortgage on lot 8, in block 3, in the townsite of McTaggart, for the sum of $1,008 payable October 4th, 1908; and gave him also a chattel mortgage for a like amount, which said mortgages were duly registered. Dionne did not perform his contract in the manner agreed, and Wheeler brought an action against him and claimed that the mortgages should be delivered up to be cancelled, an injunction restraining Dionne from assigning or otherwise dealing with them, and damages for the non-performance of his contract. That action came on for trial before the learned Chief Justice at Moose Jaw. The evidence taken, which was read on this application, shewed that before the action had been brought Dionne had assigned the mortgages to James G. Swan. The learned Chief Justice held that, as the mortgages had passed into the hands of parties who were not before the Court, he could not order Dionne to deliver them up for cancellation, but he awarded Wheeler $500 damages and gave judgment for that amount.

On October 26th, 1908, Swan began the present proceedings by taking out an originating summons for the foreclosure of the mortgage on lot 8 assigned to him by Dionne, and having served the parties appearing by the abstract of title to be entitled to redeem he now makes application for an order *nisi*. Prior to this application being made Wheeler sold his equity of redemption to one Quail, who, however, has been served with a copy of the originating summons, and he is before the Court opposing this application.

For the defendants it is contended that the plaintiff, as

assignee of the mortgage, takes the same subject to the state of accounts between the mortgagor and mortgagee existing at the date of the assignment, which was the first day of August, 1908, and that as Dionne, the mortgagee, did not perform the contract which was the consideration for the mortgage, there was a failure of consideration to the extent of his non-performance, and that from the plaintiff's claim, which is for the face value of the mortgage, there should be deducted on the taking of the accounts an amount equivalent to the portion of the consideration money not advanced by the mortgagee.

For the plaintiff it is contended that as the mortgagor executed and placed in the hands of Dionne a mortgage which contains the usual acknowledgment of the receipt of the consideration money therein, he is now estopped from saying that the whole sum was not advanced; and further, that as he brought action for damages against Dionne for the non-performance of the contract and obtained judgment against him, he must look to that judgment for his relief.

In *Dixon* v. *Winch* (1899), 68 L.J. Ch. 572, Cozens-Hardy, J., says:—

"It is well settled that when a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of accounts between the mortgagor and mortgagee at the date of the transfer."

The question here, however, is, What is the true state of accounts? Should the account be taken on the basis that the whole of the consideration as set out in the mortgage was advanced, or at least that the defendants are now estopped from saying that it was not; or should the basis be that a portion only of the consideration was paid and that notwithstanding the judgment for damages against Dionne the assignee is only entitled to succeed to the extent to which the consideration money was advanced?

In *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, 55 L.J. Ch. 227, 53 L.T. 731, the plaintiffs mortgaged to one Bates certain stocks and policies of insurance for £250. By the mortgage deed they acknowledged the receipt of the £250, and they also signed a receipt for the same sum endorsed on the mortgage. Bates

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transferred the mortgage to one Hunter, who acted by his solicitor Walker. Hunter gave full value for the mortgage as a mortgage of £250 without making any enquiry from the mortgagors. The plaintiff had only received the sum of £91 17s. 6d. on the mortgage. In an action brought by the plaintiffs to be allowed to redeem by paying the amount they had received with interest, it was held that they were not entitled to do so; that as against Hunter, who had paid the full face value of the mortgage without notice that the whole amount had not been advanced, relying on the acknowledgment in the body of the mortgage and the receipt endorsed thereon, the amount must be taken on the footing of the whole amount having been advanced. Fry, L.J., in giving the judgment of the Court, laid stress upon the fact that a receipt for the money had been endorsed on the mortgage. At page 159 he says:—

"The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it."

In *French* v. *Hope* (1887), 56 L.J. Ch. 363, 56 L.T. 57, the plaintiff in order to raise money executed to his solicitor a mortgage for £200 and endorsed on the mortgage a receipt for that sum, but received no money therefor. The solicitor deposited the mortgage with Shum & Co. and obtained thereon an advance of £100 for his own use. Shum & Co. had no knowledge of the circumstances under which the mortgage was obtained by the solicitor. In an action brought by the plaintiff to have the mortgage declared void and delivered up to be cancelled, it was held that he was not entitled. In this case not only had a receipt been endorsed upon the mortgage, but, as Kekewich, J., pointed out, the plaintiff had given the deed to his solicitor for the very purpose of raising money upon it.

In *Manley* v. *London Loan Company*, 23 A.R. 139, which was a similar case with this exception, that there it appeared that the assignee had notice that all the consideration money had not been advanced. The Ontario Court of Appeal held that an assignee of a mortgage takes it subject to the actual state of the accounts between mortgagor and mortgagee and cannot, even where the mortgage contains a formal receipt for the whole mortgage money, claim more in respect to it than has been advanced, and the assignee must submit to redemption on the same terms as their vendors would have been subject to.

These authorities, it seems to me, establish that an assignee of a mortgage takes the mortgage subject to the state of accounts existing between the mortgagor and mortgagee at the time of the assignment. That where the mortgagor shews the amount due to be less than the face value of the mortgage the assignee can only recover the amount actually due unless he can bring himself within the principle laid down in *Bickerton* v. *Walker, supra.* To do this he has to shew not only that he gave full value for the mortgage without notice that a less amount only was due, but also that the mortgagor by some act has enabled the mortgagee to deceive him (the assignee), or has given him reason for inferring that the mortgage was still a security for the larger amount. Here the assignee produces his mortgage which on the face of it is a security for $1,008. The onus is then on the mortgagor, or those claiming under him, to shew that on a true statement of accounts there is not that amount due. When, however, that is shewn I am of opinion that the onus is then on the assignee to shew that notwithstanding the fact that the true state of accounts shews a less sum than the amount claimed to be due, the mortgagor and those claiming under him are estopped from asserting that the larger amount is not due.

As to the accounts: I find that the breaking of the land in a farmer-like manner was the consideration for the mortgage; that Dionne did not break the land as agreed; that only 60 acres were broken as per contract; that the other 190 acres had been gone over with a steam plough, but owing to the hardness of the ground the land was not only not properly ploughed, but the work done thereon was an injury to the land to the extent of

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$500; and that it would take that sum to disc and level the spots that had been ploughed so that it would be in a condition in which the whole might then be properly broken. The consideration for the mortgage therefore failed except as to the breaking of the 60 acres. The price for breaking the 250 acres was $1,008; the value of the breaking of the 60 acres would be $241.92. I therefore hold that only $241.92 was advanced upon the mortgage.

This being the state of the accounts when Swan obtained an assignment of the mortgage, are the defendants estopped from claiming that only the sum of $241.92 and interest thereon is due upon the mortgage? I am of opinion that they are not unless Swan shews that he took the mortgage without knowledge that the consideration therefor had not been advanced, that he in good faith had taken it over at the amount he claims to be entitled to, and that he was justified by some act of the mortgagor (which in my opinion would require to be something more than simply the execution of a mortgage with the usual receipt clause embodied therein) in inferring that the larger amount was then due on the mortgage. It is the duty of the assignee to enquire into the state of the accounts when taking over a mortgage, and he omits to do so at his peril, unless he can justify that omission by some act of the mortgagor from which he is justified in inferring the state of accounts to be something different from what it actually is. On this point, however, there is not the slightest evidence. There is no evidence that Swan paid anything for the assignment, nor that he did not have full knowledge of the state of the accounts between the mortgagor and the mortgagee, the only evidence being the affidavit of default—which was not made by the plaintiff himself but by his agent—which contains the statement that there is due from the mortgagor to the plaintiff the full mortgage money and interest. I, therefore, hold that the defendants are not estopped on this ground from shewing that there is only $241.92 and interest due on the mortgage.

Are they estopped, as contended by the plaintiff, by Wheeler's having obtained a judgment for $500 damages against Dionne? The answer to this question, it seems to me, might depend upon what the damages were awarded for. As I read the judgment of the learned Chief Justice, he awarded damages, not for the

non-breaking of the 190 acres, but for the injury done to the ground by the plaintiff's breaking in patches as they did. The facts, as found by the learned Chief Justice, shew that not only was the ploughing on the 190 acres not of advantage to Wheeler, but that it would take the sum of $500 to disc and level the land and put it in a condition in which it could then be properly farmed. The awarding of damages for the non-breaking of the 190 acres he expressly says he could not award because the parties to be affected by that award were not before him, but he intimates that those damages can be taken into consideration in a proceeding to realize upon the mortgage as in the present application. Besides, there is not a particle of evidence to shew that the $500 damages awarded against Dionne has ever been paid, and it seems to me that before the judgment can be held to estop the defendants under the circumstances of the case, it must be shewn that the judgment has been paid.

I am, therefore, of opinion that all the plaintiff is entitled to under his mortgage is the sum of $241.92 and interest thereon at the rate specified in the mortgage. The order therefore will be that there is due to the plaintiff under the mortgage the sum of $241.92 and interest thereon, that unless payment of the same with costs to be taxed be paid by the defendants within six months from the date of the order, the interest of the defendants in the said lands shall be absolutely foreclosed.

[COURT EN BANC.]

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Apr. 16.

ROBINSON v. LOTT.

Interpleader—Lease of Land—Rent Payable by Delivery of Portion of Crop—Assignment of Lease by Lessor—Seizure of Crop by Sheriff under Execution Against Lessor—Validity of Assignment—Growing Crop—Bills of Sale Ordinance—Property in Crop.

Defendant was the owner of a farm, which he leased on terms that he was to receive one-half of the crop, when threshed, by way of rent. Being indebted to one Emerson, he executed a deed by way of security whereby he did "assign and grant . . . all that certain parcel of land . . . together with the residue unexpired of the said term of years and the said lease and all benefit and advantages to be derived therefrom." The sheriff, under writ of execution of the plaintiff, seized the defendant's half of the crop which was claimed by Emerson, and the sheriff interpleaded. Whether the crop was standing or cut, threshed or divided, did not appear by the material before the Court:—

Held, rent is a chose in action, and as such is assignable, and the doctrine applies to future rent as well as past due rent.

2. That until the grain was threshed and divided the property therein remained in the lessee, and in the absence of evidence of division and delivery there was no evidence that the debtor had any interest in the crop liable to seizure.

3. That (JOHNSTONE, J., dissenting) the assignment by the lessor of the benefits of a lease, the rent under which is payable by a portion of a crop, is not an assignment of a growing crop within the meaning of the Bills of Sale Ordinance.

THIS was an appeal by the claimant in interpleader proceedings from the order of the Chief Justice (2 Sask. L.R. 150) barring the claim, and was argued before the Court *en banc* (PRENDERGAST, JOHNSTONE and LAMONT, JJ.), at Regina.

A. Casey, for the claimant (appellant).

G. H. Barr, for the plaintiff (respondent).

April 16. LAMONT, J.:—The execution debtor is the owner of the land on which the crop seized was grown. By a lease bearing date the 6th day of December, 1906, he demised the same to Malcolm Givens for a period of five years from March 1st, 1907, at a yearly rental of half the grain grown on the premises, with the exception of the grain grown on forty acres, which was to belong to Givens. After leasing his farm, Lott became indebted to one Emerson. In the summer of 1908 Emerson began to press for payment and threatened action if payment was not made. Lott, being unable to pay, offered Emerson an assignment of Givens' lease on his farm as security. This was accepted and on September 2nd, 1908, Lott executed an assignment under seal of "the said lease

and all benefits and advantages to be derived therefrom." By its language the assignment assigns the land as well as the lease, but it is clear that the parties did not intend to transfer the reversion, but only to assign the rent reserved and the benefit of the covenants contained in the lease. The assignment was taken in the names of the claimants as trustees for Emerson, who, on the assignment being given, extended the time for payment of the indebtedness thus secured until March 1st, 1909. On October 19th, 1908, an execution for $383.79, issued in a suit of *Robinson* v. *Lott*, was placed in the hands of the sheriff. Between that date and November 11th three other executions against Lott were placed in his hands. On November 13th the Sheriff seized the interest of Lott in 500 bushels of wheat then on the land occupied by Malcolm Givens, and the wheat being claimed by the claimants under their assignment from Lott, the sheriff applied for and obtained an interpleader summons calling upon the claimants to appear and support their claim. No interpleader issue was directed, as the claimants and execution creditors agreed that the learned Chief Justice (before whom the matter came) should determine the same on the affidavits filed. The learned Chief Justice held the assignment invalid and barred the claim of the appellants. From his decision the claimants now appeal to this Court.

The material contained in the appeal book is of the most meagre kind. Although the parties agreed to have the matter determined on the affidavits filed, the appeal book did not contain the slightest evidence as to the ownership of the grain seized or in whose possession it was, and it was only by referring to the affidavits of the sheriff, omitted from the appeal book, that we are able to ascertain what had been seized. In this affidavit the sheriff says he seized the interest of the execution debtor in 500 bushels of wheat. Assuming that the wheat was seized on the debtor's farm and in possession of his tenant under the lease, had Lott an interest therein capable of being taken under an execution?

By the lease one-half of the grain grown on the place was reserved to the lessor as rent, and the tenant had to deliver the lessor's share at an elevator to be selected by both parties. The reservation of a portion of the crop as rent does not vest any

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property in any of the crop in the lessor until delivery to him of his share. In *Hayden* v. *Crawford*, 3 U.C.Q.B. (O.S.) 583, a case in which a lease reserved to the defendant as rent half of the wheat to be raised on the farm, and provided that the lessee had to harvest, thresh and deliver at the defendant's granary his share, Robinson, C.J., said:—"With respect to the points reserved at the trial on the ground of nonsuit, I am of opinion that, under this agreement, Crawford and Stone were not partners in the wheat while it grew in the field; that the relation between them was simply that of landlord and tenant, the rent being payable in kind and uncertain in amount, instead of a fixed rent in money; that no legal property in any wheat raised on the farm could vest in Crawford till the tenant had threshed and divided it, and delivered to him his portion. If the tenant should fail to deliver over half, the landlord would have his remedy as upon other covenants, but the tenant might, before division, legally alienate the whole, and might maintain trespass against any one, even against his landlord, who should wrongfully interfere with his possession of the field or the grain growing on it."

In *Campbell* v. *McKinnon*, 14 M.R. 421, the lease reserved as rent "the —— share of portion of the whole crop grown on the demised premises, as hereinafter set forth," and then provided that the lessee was to deliver the whole of the crop, excepting the hay, in the name of the lessor, at an elevator, and the lessor was to deliver to the lessee a full two-thirds of the proceeds of the crop stored in the elevator, less any sum retained for taxes or advances made. The lease also contained a clause that all the crop grown upon the premises should be and remain the absolute property of the lessor. Before the grain was delivered at the elevator, it was seized under an execution against the tenant. The lessor claimed the grain under the provisions of his lease. Killam, C.J., in giving the judgment of the Court *en banc*, said: "Taking the clause as a whole, it is very clear that the share intended to be reserved as rental was one-third of the crop of grain; the remaining two-thirds were to be the security for the advances, etc. I cannot interpret the clause giving the lessor the property in the crops as operating to prevent the lessee from ever having any property therein. The land was demised to the execution debtor, and out of the crop

a certain portion was to be paid over as rent. *Primâ facie*, the property in the whole until so paid over would be in the lessee. There is nothing to indicate that he was to cultivate the soil as the servant, agent, bailee or other instrument of the lessor. The construction that I would give to the instrument is that the legal property was to be in the lessee until delivery at the elevator for the lessor, but that from that time it was to be in the lessor."

The property in all the grain grown upon the premises was, therefore, in the tenant Givens until he made delivery at the elevator under the terms of the lease or until the grain was divided and the lessor agreed to accept his share at some place other than the elevator. There is no evidence before us that any such agreement took place, and the wheat, as it is assumed, being still in the possession of the tenant, the execution debtor at the time of the seizure had, even apart from the assignment, no property in the grain in which any execution could attach.

It was contended by counsel for the execution creditor that, even if the property in the grain seized was in the tenant at the time of the seizure, yet the appellants are not entitled to succeed unless they shew that the grain belongs to them. This contention, I think, is correct. If an interpleader issue had been directed, the claimants would probably have been plaintiffs, as they claim through the execution debtor, and in that case the onus of establishing their claim affirmatively would have been on them. I think the same rule should apply here. The claimants assert that they are entitled under their assignment of the lease. Does this assignment entitle them to the grain?

Apart from any statute invalidating such assignment, I think it is settled law that rent reserved under a lease is assignable. In Bell's Law of Landlord and Tenant, at p. 511, the learned author says "a landlord may assign rent, and since 4 George II. ch. 28, sec. 5, rent charge or rent seck may be distrained for, and by one who has not the reversion, as, for instance, the assignee of the landlord," and he cites the case of *White* v. *Hope*, 17 U.C.C.P. 52 and 19 U.C.C.P. 479.

Foa, in his Law of Landlord and Tenant, at p. 151, says: "Somewhat analogous is the case where, without assigning his reversion, the landlord assigns—by writing—the benefit of the rent as the successive instalments accrue during a certain period

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to a third party to whom he is indebted, for this is an 'absolute assignment' (within Jud. Act, 1873, sec. 25 (6), and, on notice of it in writing being given to the tenant, will entitle the assignee to receive the rent during the term stipulated and to sue the tenant for it, notwithstanding that the latter may have received notice from the landlord not to pay further instalments to the assignee." See also *Knill* v. *Prowse* (1885), 33 W.R. 163; *Southwell* v. *Scotter* (1880), 49 L.J. Ex. 356.

The claimant's assignment is, therefore, a valid one, unless it is invalidated by our statutes. Its validity was, however, questioned. It was contended (1) that it amounted to a fraudulent preference within sec. 38 and 39 of the Assignment Act, and (2) that it was invalid under the Bills of Sale Ordinance, secs. 9 and 15. The Assignment Act makes void as against prejudiced or delayed creditors every conveyance or assignment of goods to or for a creditor by a person in insolvent circumstances which is made with intent to defeat, hinder or delay a creditor or to give one creditor a preference over the others, and the Act provides that in case the transaction has the effect of giving one creditor a preference and is impeached within sixty days, it shall be void. As the assignment in question was not impeached within the sixty days and as there is not the slightest evidence that it was made with intent to hinder or delay Lott's creditors or any of them or to give one creditor a preference over another, I hold that it is not a fraudulent preference within the Act.

Then, does it come within the Bills of Sales Ordinance? With very great deference to the learned Chief Justice, I am unable to see that it does. There is no evidence whatever to shew that the grain was cut when the assignment was given. It, therefore, cannot come within sec. 9. Nor, in my opinion, does it come within sec. 15, which reads as follows:—

"15. No mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment hereafter made, executed or created and which is intended to operate and have effect as a security shall, in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crops to be grown in future in whole or in part, be valid except the same be made, executed or created as a security for the purchase price and interest thereof of seed grain."

This section renders a mortgage or assignment operating as a security invalid only so far as it binds or assumes to bind growing crops or crop to be grown in future. Did the assignment bind the growing crops? If the conclusion arrived at above is correct that, notwithstanding the provision of the lease, the lessor obtains no property in the crop until delivery was made, and that in the meantime it could be legally disposed of by the tenant or taken under execution by a creditor of the tenant, it follows, I think, that the assignment does not bind the growing crops of the tenant Givens. The object of the section, it seems to me, was to prevent farmers from giving any security on their crops before they were cut, except security given to secure the price of seed grain. The only one who could give such security would be the man who has some property in the growing crop, and as Lott had no property in the crop on which he could give security, the assignment, in my opinion, is not within the section. The assignment, I think, may also be held to be valid on another ground. If Lott had assigned the land, there is no question but that the rent would be payable to the assignee, no matter whether the crops were growing at the time of the assignment or had been cut. If the grain had been cut, and, therefore, had assumed the character of a chattel, the assignment, even then, would not, in my opinion, come within the Bills of Sales Ordinance, because, when the assignee became seized of the property in the grain, he would obtain it not under a document assigning to him a chattel, but as an incident of the reversion. In the present case the assignment was not intended to transfer the reversion, but it does assign the lease and the benefit of the covenants therein contained. The assignment, so far as the rent is concerned, vests in the assignee all the rights of the assignor, even the right of distress, if the rent is not paid, and he is entitled to receive the rent, even if paid in kind, as an incident of the lease, and not by virtue of the assignment to him of a chattel or by virtue of his holding a security on the growing crop. The Bills of Sales Ordinance does not, in my opinion, affect the validity of the assignment.

But, it was contended, that even if the assignment were a valid one, yet the appellant's claim must be barred because there was no rent due at the time of the seizure. It is true that the

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rent was not due and could not be collected from the tenant until March 1st, 1909, but this is a matter between the tenant and the assignee. If the tenant is willing that the grain seized should belong to the claimants as a payment of rent, and the claimants are willing to accept the same, an execution creditor of Lott, who has absolutely no interest in the grain, cannot, in my opinion, be heard to question the assignee's right, and from the fact that the appellants claim the grain as rent under the assignment and the tenant, who is the only one who can dispute their claim, does not dispute it, I think it must be held that the assignee is entitled.

The appeal should be allowed with costs, saving the costs of and incidental to the preparation of the Appeal Book, as to which there should be no costs allowed.

PRENDERGAST, J., concurred.

JOHNSTONE, J. (dissenting):—On the 14th December, 1908, upon the application of the sheriff for this district, supported by his personal affidavit, a Chamber summons issued calling upon the plaintiffs, execution creditors, and the claimants to appear before the presiding Judge in Chambers, and state the nature and particulars of their respective claims to certain goods and chattels seized by the sheriff under writs of execution issued in the several suits of the plaintiffs against the goods and chattels of the defendant, the first of which writs had been issued and placed in the sheriff's hands on the 19th day of October, 1908. The affidavit referred to is not contained in the appeal book. I find, however, upon reference to this affidavit or file, that the sheriff, on the 13th November, 1908, had seized under the said writs the interest of the defendant in five hundred bushels of wheat situated on the farm occupied by one Malcolm Givens, of Kenlis.

Upon the return of the summons, which took place before the Chief Justice, affidavits and documents were produced and filed by the claimants disclosing, or, perhaps, rather purporting to disclose, the nature and particulars of their claim to the goods in question. From these documents it appears that the defendant—who was at the time the owner of the lands upon which the grain was seized by the sheriff—on the 6th day of Decem-

ber, 1906, by deed, demised certain lands—namely, the north-west quarter of section 3 and the whole of section 10 in township 19, range 11, west of the second meridian in the Province of Saskatchewan—to one Givens for the term of five years, the lessee to yield up to the lessor, by way of rent, one-half of the grain grown on the demised premises during each and every year of the term granted, the lessor during such term to provide certain named implements, together with one-half the seed necessary to sow the whole of the cultivated lands, also to furnish binder twine and to bear one-half the expense of threshing the grain grown. It was also a term of the lease that the lessor should provide all the granaries necessary for the storing of his (the lessor's) share of the grain. The lessee agreed to deliver such share at an elevator to be afterwards named.

This lease contains other numerous mutual covenants, but these it is unnecessary to enumerate.

On the 2nd day of September, 1908, the lease was assigned by deed by the defendant to the claimants, as trustees for one Charles E. Emerson. This assignment recites the lease mentioned from the defendant to Givens and also a past due indebtedness of the defendant, the lessor, to the said Emerson of $1,675, and that the defendant then being unable to pay such indebtedness, it had been agreed that the lease and the term thereby granted should be assigned to the claimants, in trust for Emerson, as collateral security for the payment of the said indebtedness. The operative part of the assignment reads:—"That, in consideration of the premises and the sum of one dollar now paid by the assignees to the assignor, the assignor doth assign and grant unto the assignees all that certain part and parcel of land situate, lying and being (namely, the lands already described), together with the residue unexpired of the said term of years and the said lease and all benefits and advantages to be derived therefrom."

It was also provided in and by this assignment that the time for the payment of said indebtedness should be extended, which was afterwards carried into effect by writing under seal. It is clear that rent is a chose in action and is assignable, and this doctrine applies to future rent as well as to past due rent: Warren, pp. 5 and 20; *Knill* v. *Prowse* (1885), 33 W.R. 163; *Ex parte Hall, In re Whiting* (1879), 10 Ch. D. 615, 48 L.J. Bk. 79, 40 L.T.

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179. There was a crop grown upon the demised premises in the year 1908, of which the grain seized was assumed or treated by all parties as part thereof. It seems to have been taken for granted, on the hearing of the interpleader summons, that the grain so seized by the sheriff was subject to seizure and sale by the sheriff unless the claimants should be found entitled to take the crop under their assignment thereof as security, no claim having been made thereto other than by the present claimants.

An issue was not directed on the return of the summons, but, at the request of counsel for the execution creditors and the claimants, the merits of the application were heard and disposed of and the material filed in a summary manner and judgment delivered on January 7, 1909, barring the claim of the claimants to the wheat seized.

In delivering judgment (which was in writing), after referring to certain facts, the learned Chief Justice, for reasons stated in his judgment, held that as to the crop growing on the lands on September 2, the assignment of the lease was invalid, because of the provisions of sec. 15 of the Bills of Sale Ordinance, and as to that portion of the crop which was cut, that if the assignment of the lease could be construed to mean the grain severed from the land, that it was void under the 6th section of the same ordinance, because the assignment was not accompanied by an actual and continued change of possession, and that, whether the crop was cut or not, the transaction *quoad* the crop in question was invalid and void. From this judgment the claimants (upon leave granted in that behalf) appealed to the Court *en banc* from those parts of the judgment which held the assignment of the lease to be governed by the provisions of the Bills of Sale Ordinance, and therefore invalid and void *quoad* the crop, and in this respect to have such judgment reversed, on the grounds following:—

(1) That the learned Chief Justice erred in finding that the said assignment of lease was made by way of security within the meaning of sec. 15 of the Bills of Sale Ordinance.

(2) That the learned Chief Justice erred in finding that the said assignment assumed to comprise or bind or affect growing crop within the meaning of the said Ordinance, and in holding the said assignment to be governed by the provisions of the Ordinance. The appellants further claimed, in the notice of appeal,

that the assignment of the lease was an assignment of a chose in action, and on that account was not within the provisions of the Bills of Sale Ordinance. Further, that the assignment in question was an assignment of an interest in land, and therefore not within the provisions of the Ordinance.

I must say I have experienced considerable difficulty in this case in endeavouring to arrive at a conclusion satisfactory to me. The material in Chambers was of the most flimsy character, so meagre, in fact, that the learned Chief Justice, in his judgment, complained of its insufficiency. The affidavit referred to as having been filed on the granting of the summons to shew the nature of the goods and chattels seized—namely, five hundred bushels of wheat—did not set forth the condition of this wheat when seized, that is, whether it had been cut, was in stook or in stack, or that it had been threshed and divided and delivered over by the tenant to the assignees; nor was it shewn where seized or in whose possession it was at the time of seizure, and evidence was not forthcoming, on the hearing of the summons, to remedy these defects. The conditions on the hearing of the appeal were even worse. The affidavit referred to, together with the exhibit therein referred to, consisting of the claim of the claimant to the goods, in writing, delivered to the sheriff, under sec. 432 of the Jud. Ord., was omitted from the appeal book. The order allowing the appeal and the order dispensing with printed appeal books and factums and substituting typewritten appeal books, because of the incompleteness of such appeal books, might just as well have dispensed with the latter, as in the end resort had to be had to the papers on file.

To obtain an interpleader summons under our rule 431, the sheriff is, by our practice, required to produce an affidavit complying with this section, though it is not the practice in England under a similar rule: Yearly Practice of 1909, p. 815. On the return of an interpleader summons granted under the provisions of this section, the execution creditor need not produce an affidavit, but the claimant must do so for the purpose of shewing the nature or particulars of his claim: Daniell's Chancery Practice, 7th ed. 1283; Encyclopædia of the Laws of England, vol. 7, p. 376.

According to the latter work, the claimant of goods taken under execution must, in order to succeed, shew that he him-

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self has some title to or interest in the goods seized; that where the evidence shews that the goods belong to a third person other than the execution creditor, the claimant fails, and *Richards* v. *Jenkins* (1886), 18 Q.B.D. 451, 56 L.J.Q.B. 293, 36 L.T. 591, is cited as authority for this statement. In this case it was held that, with regard to goods taken in execution, where the evidence shews the claimant had not any interest in nor the possession of the goods at the time of seizure, but they belonged to a third person, the execution creditor is entitled to succeed. The nature of the claimant's claim made to the crops seized under our rule 432 —that is, to the sheriff—does not appear, but a claim under the assignment of the lease referred to was, on the return of the summons, set up and supported by affidavits and documents in the manner before stated. This evidence, when sifted, plainly shews, to my mind, want of interest in the claimants. The assignee of the lease could be in no better position as to the rent reserved than the landlord would be. No time was mentioned in the lease as to when the rent should become due and payable. There would, therefore, be no default in the tenant, and no distress could take place until the end of the first year of the term —namely, 6th December, 1908: Woodfall 448. The law as to the rights of the landlord, under the circumstances of this case, is stated by Robinson, C.J., in *Haydon* v. *Crawford*, 3 U.C.R. (O.S.) 583, a case on all fours with the one under discussion. The learned Chief Justice, in his judgment there, says: "No legal property in any wheat raised on the farm could vest in Crawford (the landlord) till the tenant had threshed and divided it, and delivered to him his portion. If the tenant should fail to deliver over half, the landlord would have his remedy as upon other covenants, but the tenant might before division legally alienate the whole and might maintain trespass against anyone, even against his landlord, who should wrongfully interfere with his possession of the field or the grain grown on it."

No doubt this was and still is good law. I think, however, at this day the landlord or his assignee could have resort to equitable relief should the tenant attempt to remove and convert the grain to his own use, provided, of course, the assignment of the rent was not one taken as security for a debt, as here.

Reverting to the subject of the material filed on behalf of

the claimants, it was open to them to shew that the grain which they claimed had been harvested, threshed and divided (if such were the fact, which I very much doubt), and that that portion thereof the subject of this interpleader issue had been set apart on the 2nd September in the granaries provided by the lessor for that purpose, in which event it might have been urged that the property in the wheat had vested in the assignees notwithstanding non-delivery at the elevator, as provided in the lease. This delivery, I think, could have been waived, so that the property in the grain could be made to vest in the assignees at once. In my opinion, it cannot be presumed the grain was cut and delivered to the assignees on the date named. This fact must be proved. There is nothing to shew that the tenant had ever parted with or that the claimants, and not he, were in possession immediately before seizure. Nothing was shewn by the claimants which would or could be held to entitle them to the grain to the exclusion of the execution creditor (see *Richards* v. *Jenkins*). Moreover, I think the provisions of sec. 15 of the Bills of Sale Ordinance would apply to this assignment. This section reads:—

"15. No mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment hereafter made, executed or created and which is intended to operate and have effect as a security shall, insofar as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future, in whole or in part, be valid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grain."

This section declares all classes of instruments which in any manner affect growing grain, when taken as security, invalid as such in so far as the crop is concerned. I agree, therefore, with the learned Chief Justice that the assignment referred to was intended to apply and affect the crop then growing, and that by way of security for the indebtedness of the defendant to the claimants, and was for these reasons invalid.

As to both grounds stated I think the claimants would be properly held to be barred, and that this appeal should be dismissed with costs, except as to the costs of and incidental to the preparation of the appeal book, as to which there should be no allowance.

Appeal allowed.

[COURT EN BANC.]

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LEE v. BROLEY.

Mechanics' Lien—Contract with School District—Right to File Lien Against Lands of—Construction of Statute—Enforcing Judgment Against School District.

A school district duly organized in Saskatchewan and declared to be a corporation let a contract for the erection of a school building. A sub-contractor filed a mechanics' lien against the building, and not being paid brought action to enforce the lien. It was objected that the lien was not enforceable against the lands of a school district:—

Held, that the lands of a school district were liable to be sold under the provisions of the Mechanics' Lien Act.

2. The provisions of sec. 9 of the School Assessment Ordinance providing a means of realizing the amount of a judgment against a school district do not exclude other remedies.

THIS was an appeal from a judgment of Forbes, D.C.J., at Battleford, and was argued before the Court *en banc* (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE and LAMONT, JJ.).

A. M. Panton, for the appellant: The Mechanics' Lien Act is an extraordinary redress given in favour of special classes of people who obtain their special rights from the Legislature, and these rights should be strictly construed. Educational institutions are favoured by the Legislature, and where the rights of schools and claimants under the Mechanics' Lien Act conflict and the Act does not clearly determine their respective rights, the most liberal construction should be given in favour of the school. The relief under the Mechanics' Lien Act is the sale of the property, but the only relief in the enforcement of judgments against school districts is by special assessment. (See sec. 243, Municipal Act.) The appellants therefore submit it is impossible to grant relief under the Mechanics' Lien Act, as it conflicts with the Municipal Act. The method of enforcing collection in Ontario against municipalities and such buildings as public schools is the same as in this Province, and the decisions under the Ontario Mechanics' Lien Act have been against the right of mechanics' lien claimants to file a lien against public school lands: Armour on Titles, 3rd ed., 242; *Robb* v. *Woodstock School Board*, referred to in *King* v. *Alford*, 9 O.R. 643.

N. Mackenzie, K.C., for respondent: The appellant board is expressly declared to be a body corporate, and a body corporate is included in the definition of "owner" in the Mechanics' Lien Act,

and there is no provision in such Act exempting a school district from the provisions thereof, and the Act therefore applies: *Moore* v. *Protestant School District* 369, 5 M.L.R. 49; *McArthur* v. *Dewar*, 3 M.L.R. 72; *Brace* v. *City of Gloversville*, 167 N.Y. 452, at 455 *et seq.*; *Shagticoke Powder Co.* v. *Greenwich*, 183 N.Y. Reports 306. The appellant is not entitled to succeed on grounds of public policy: *Richardson* v. *Mellish*, 2 Bing. 253.

April 16. The judgment of the Court was delivered by WETMORE, C.J.:—The defendant Broley contracted with the defendants the Board of Trustees for the North Battleford School District for the erection of a schoolhouse in that district for a specified price. The plaintiffs entered into a sub-contract with Broley for installing a heating plant in such schoolhouse. The plaintiffs did the work which they were employed to do, and duly filed a mechanics' lien against the building and the property on which it was situated for the price of the work which they had done upon these premises. The action was brought in the District Court of the Judicial District of Battleford to enforce this lien, and His Honour Judge Forbes, acting District Judge, gave judgment holding that the plaintiffs had a right to file such lien against the land and premises, and to take the steps provided by the Mechanics' Lien Act to enforce their lien. This judgment was appealed to this Court.

The only question arising upon the appeal is whether a mechanics' lien can be filed and enforced against a school building and the land upon which it is situated. There are a number of American cases which hold that such a lien cannot be enforced; that is, that school buildings cannot be sold under such a lien to satisfy the lienholder's claim. These decisions apparently go upon the ground that it would be against public policy to allow such a lien to attach. They put buildings of this character in the same category with municipal buildings held for municipal purposes; that is, that they are held by the public and for the public, and that legislation which would operate to enable a private individual to sell such property and divert it from the public purpose must be clear and explicit; and not only that, there must be express language to cover the case—it would not be covered by general words. These are the reasons, I gather, for the decisions in the American cases.

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The matter has been dealt with to some extent, possibly, by the Courts in Ontario. In *Scott* v. *The Trustees of Burgess*, 19 U.C.Q.B. 28, it was held that land therein specified and conveyed to school trustees in trust for the purposes of the school could not be sold under execution against them. And in that case, Burns, J., makes some very pertinent and strong remarks which might be held to be on accord with the American authorities. But the land in that case was conveyed to the school trustees in trust, and really all that was decided was that an execution creditor could not divert a trust from the purposes for which it was given and sell trust property to satisfy a debt.

In *Peto* v. *The Welland R.W. Co.*, 9 Gr. 455, Esten, V.C., at p. 458, held "that no sale of land or buildings of a railway can be effected under process of execution." Now, that was a suit to enforce equitable execution against the lands of a railroad, and the reason for so holding was that a railway company, being constituted by Act of Parliament authorizing them to acquire lands for the purpose of the railway, and it being quite clear that the sheriff's vendee, if a sale took place, could not exercise the powers conferred by the Act upon the corporation, or—in other words—conduct the railway, it seemed to the learned Judge clear that the Legislature conferred these powers, and especially the power to acquire lands for the purpose of the railway, on the understanding and with the intent that those lands should not be diverted or alienated to any other purpose through a proceeding *in invitum*. That case was followed in *Breeze* v. *The Midland R.W. Co.*, 26 Gr. 225, in which Blake, V.-C., held that the plaintiff was not entitled to enforce a mechanics' lien against the land of the railway company required for the purpose of their railway.

The next case my attention was called to was *King* v. *Alford*, 9 O.R. 643. In that case in the first place it was recognized that *Breeze* v. *The Midland R.W. Co.* was decided on the strength of what was laid down in *Peto* v. *The Welland R.W. Co.* (see pp. 645 and 646). Now, in *King* v. *Alford* it was attempted to enforce a lien against an engine-house and turntable built for the railway company and necessary for the proper working of the railway. The majority of the Court held that such a lien would not attach, and I think it is very clearly to be deduced from that case that a majority of the Court considered that land which was required for

the purpose of a railway could not be attached by execution or by mechanics' lien. And running through the case seems to be the idea that where property was exempt from seizure under execution it would be exempt from seizure also under a mechanics' lien. Proudfoot, J., dissented from the judgment of the Court in that case. I can very readily understand how it could be argued with very considerable force that the lands or buildings of a railway company, which are being used for the purpose of carrying on and running the railway, could not be seized under execution or under a mechanics' lien because the company is chartered for the purpose of using a great public utility, and if persons who had judgments against them could take up the roadway or their buildings piecemeal here and there they could stop the running of the road. That, to my mind, however, does not apply to a board of school trustees or the property they control, because if the property of a board of school trustees is taken from them under execution the most it can mean is that they have got to build another schoolhouse, and they are in no worse position in that respect than any other judgment debtor. There is, therefore, no Ontario case, so far as I can find, that exactly deals with the question which I am dealing with now, although I must say frankly that the *ratio decidendi* of the three cases which I have cited is in the direction that a mechanics' lien would not attach against property of the character of a schoolhouse.

Of course this Court is not bound by the decisions of the American Courts or by the decisions of the Court of Ontario, although we are always prepared to treat them with the greatest respect.

Now, I cannot bring my mind to the opinion (with all due respect to those cases) that a lien does not attach against a school building in this country. In the first place, the board of trustees is a corporation (see the School Ordinance, ch. 29 of 1901, sec. 85). Sub-section 34 of sec. 6 of the Interpretation Act (ch. 4 of 1907) provides that "words making any association or number of persons a corporation or body politic and corporate shall vest in such corporation power to sue and be sued, contract and be contracted with by their corporate name," etc. Rule 364 of the Judicature Ordinance provides that "any person who becomes entitled to issue a writ of execution against goods may, at or after the time of issuing the same, issue a writ of execution against the lands of the *person*

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liable in any judicial district." The next section goes on to provide what steps the sheriff shall take to sell such lands. Under sec. 6, sub-sec. 11, of the Interpretation Act, ch. 4 of 1907, "the expression 'person' includes any body corporate and politic." Now, in the absence of evidence to the contrary, it seems to me that there is a clear expression of intention by the Legislature that the lands belonging to school trustees may be sold under execution. The words of the legislation are general, and there is no exception of lands of a corporation of the character I am dealing with. Now, sec. 4 of the Mechanics' Lien Act (ch. 21 of 1907) provides that "unless he signs an express agreement to the contrary . . . any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving, or repairing of any erection, building, land . . . for any owner, contractor, or sub-contractor, shall by virtue thereof have a lien for the price of such work, service, or materials upon the erection, building . . . and the lands occupied thereby or enjoyed therewith or upon or in respect of which the said service is performed . . . limited, however, in amount to the sum justly due to the person entitled to the lien . . ." Then the Act goes on to provide, by sec. 7, that "the lien shall attach upon the estate or interest of the owner, *as defined by this Act*, in the erection, building . . . and the lands occupied thereby or enjoyed therewith." Then the Act goes on, in sec. 17, to provide for filing the lien in the land titles office of the land registration district in which the land is situated. Then subsequently provisions are made for enforcing the lien. Now, it will be observed by sec. 4 that the lien is created in respect of work done and material furnished for any *owner*, contractor, or sub-contractor, and that it is to attach on the erection or building with respect to which the work is performed or the materials have been furnished. And, it will be observed, by sec. 7 the lien shall attach upon the estate or interest of the *owner* as defined by the Act. Now we turn over to sub-sec. 3 of sec. 2, and there it provides that "owner" *shall* extend to or include any "person, firm, association, *body corporate* or *politic*, having any interest or estate in the lands upon or in respect of which the work or service is done or the materials are placed or furnished, at whose request and upon whose credit, or on whose behalf or with whose privity or consent, or for

whose direct benefit any such work or service is performed or materials are placed or furnished." "Owner" therefore includes a corporation, and therefore includes a school district. I might also call attention to sub-sec. 4 of the same section, whereby it is provided that "person" "shall extend to or include a body politic or corporate." It is not necessary, however, to refer to that definition, because it is covered by the paragraph of the General Interpretation Act which I have before quoted.

It seems, therefore, very clear that, in the first place, a school corporation is liable to be sued and is liable, therefore, to have judgment against them, and is also liable to have execution realized with respect to its lands if it has not sufficient personal property to satisfy such execution. It is equally clear, I think, that a mechanics' lien is in the same position; that is, the school trustees are a corporation and come within the definition given to the word "owner" in the Mechanics' Lien Act. A lien, therefore, would attach against their lands, and the lienholder would have the same remedy for the purpose of enforcing his lien as he would against any other owner. Now, it seems to me that, that being so, to lay down the rule that real property of a school district is exempt from either execution or attachment under a mechanics' lien would be disregarding the clear words of the Ordinance and Acts hereinbefore referred to and the rules of Court (and these rules of Court have statutory authority). In fact, in my opinion to do so would be to legislate.

In *Brophy* v. *The Attorney-General of Manitoba* (1895), A.C. 202, 64 L.J.P.C. 70, 72 L.J. 163, the Lord Chancellor, delivering the judgment of the Judicial Committee of the Privy Council, laid down the following, at p. 215: "But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this board upon the first sub-section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was

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wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said."

If the Legislature desired to exempt property of a school board from seizure under execution or from attachment under a lien it would have been very easy for them to have said so; and they, not having made the exception, it is not within the province of this Court, in my judgment, to do so. I wish it distinctly understood, however, that I refrain from expressing any opinion with respect to levying an execution upon railroad property constituted as such property was in *Alford* v. *King* and *Peto* v. *The Welland R.W. Co.*

It has been urged, however, that the Legislature have provided a special method of levying executions when issued against a school district. This was done by virtue of sec. 9 of the School Assessment Ordinance (ch. 30 of 1901). Now, that section provides as follows:

"Any writ of execution against the board of any district may be indorsed with a direction to the sheriff to levy the amount thereof by rate, and the proceedings thereon shall be the following:"

The section then goes on to provide practically for the sheriff making an assessment and striking a rate on the ratepayers of the district, and having done so, to issue a precept to the treasurer of the district to cause such rate to be levied. It was contended that this method of realizing the money under an execution was in substitution for the ordinary method of realizing it by seizure and sale of the property. If that contention were correct, possibly it might affect the conclusion which I have reached, but I am of opinion that it is not correct. In the first place, the word used there is "may"—that "the writ *may* be indorsed with a direction to the sheriff," etc. Now, that is permissive (see Interpretation Act, sec. 6, sub-sec. 12). There are cases where the word "may" must be used as imperative: it may depend upon the context, or it may depend upon the intention of the Act. And the only question which arises here is, what was the intention of that section? Was the intention to make a method of levying execution on a school district which would protect the school property and make the buildings and other property of the district exempt from seizure and sale, or was it enacted for the benefit of the execution creditor?

If for the purpose first mentioned, it might be argued that it was intended in substitution of the general and ordinary method of levying an execution; if for the benefit of creditors, it simply provided an alternative method of realizing under execution for the benefit of the creditor. Now, I can see no reason why this Court should come to the conclusion that the method of raising the money was in substitution of the general and ordinary mode. The language is, as I have stated, permissive. I can see just as many reasons why it should be for the benefit of the creditor as I can see that it should be in substitution and so for the benefit of the property of the district. In this country most of the school-houses are small, and not very useful for any other purpose. Nothing very much could be realized by their sale, and there is, as a rule, very little other property. In very many instances large sums have been borrowed on the credit of the district and debentures issued. I think the balance is in favour of the idea—especially in view of the language that is used—that the provision is intended for the benefit of the execution creditor. Moreover, to hold otherwise would deprive him of his only right, in so far as personal property is concerned, and that is to issue his execution upon the judgment, according to the practice of the Court, *i.e.*, by *fieri facias* execution, a right which has prevailed for centuries. I think the view I have taken of this case is supported by the judgment of Killam, J., in *McArthur* v. *Dewar*, 3 Man. L.R. 72, who, according to my ideas, has worked out his judgment on somewhat similar lines that I have this one; and further supported by the judgment of Dubuc, J., in *Moore* v. *Bradley*, 5 Man. L.R. 49.

I am therefore of opinion that the judgment of the learned trial Judge should be affirmed, and this appeal dismissed, with costs.

Appeal dismissed with costs.

[COURT EN BANC.]

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VELIE v. HEMSTREET.

Bills of Exchange—Action Upon—Bill Drawn to Order of Bank—Not Indorsed—Action by Drawer Upon—Holder of Bill—Pleading.

Plaintiff, the drawer of a bill of exchange accepted by the defendant, brought action thereon. The bill was drawn payable to the order of the Dominion Bank, and was not indorsed by the bank, but in the statement of claim it was alleged that upon dishonour the bill was returned by the bank to the drawer, who was then the holder thereof. The defendant appeared and filed a defence which was struck out on a motion for speedy judgment. On such motion the defendant filed no affidavit, but relied on the objection that the bill had not been indorsed to the plaintiff, who could not, therefore, maintain the action:—

Held (*per* WETMORE, C.J., and JOHNSTONE, J.), that as the defendant had, in answer to the motion, raised a difficult question of law which might be an answer to the plaintiff's claim, he should be permitted to defend.

Per NEWLANDS and PRENDERGAST, JJ., that it was not necessary for the plaintiff in pleading to allege any facts which would be presumed in his favour, and it was therefore unnecessary to allege that the Dominion Bank were the holders for value, and it might be presumed that when they returned the bill to the plaintiff they were paid by him, and it was therefore unnecessary to allege payment in order to entitle the drawer to recover.

2. That it was not necessary for the Dominion Bank to indorse the bill to the drawer, as when the bank was paid the bill ceased to be negotiable, and the only right of action which exists is the right of action against the acceptor by the drawer, which he acquires not through the payee but by virtue of his original position as drawer.

THIS was an appeal by the defendant from an order of Lamont, J., in Chambers, striking out the defendant's appearance and defence and giving leave to enter judgment, and was argued before the Court *en banc* (WETMORE, C.J., PRENDERGAST, NEWLANDS, and JOHNSTONE, JJ.) at Regina.

J. A. Allan, for the appellant: The bill being payable to the Dominion Bank, payment can only be made to the bank or its indorsee. Payment under the Bills of Exchange Act means payment to the holder, that is, the payee or indorsee of the bill who is in possession thereof. The plaintiff is not the payee or indorsee, and cannot without indorsement of it maintain this action: *Harrop* v. *Fisher*, 30 L.J.C.P. 283; *Rose* v. *Sims*, 1 B. & Ald. 52; Chalmers' Bills of Exchange, 1903 ed., 126. Section 140 of the Bills of Exchange Act merely entitles the drawer, on payment of the bill to the payee, to demand its indorsement. In any event there is no allegation in the statement of claim that the plaintiff has paid the bank. There is, in any event, a material question of

law to be determined, and that being so the defendant was entitled to leave to defend.

T. S. McMorran, for the respondent: Indorsement is not necessary: sec. 140, Bills of Exchange Act; and no allegation of payment is required: Bullen & Leake, 6th ed., 112; Cunningham & Mattinson's Precedents of Pleading, 168; and therefore proof of either indorsement or payment is unnecessary. He referred to *Callow* v. *Lawrence*, 3 M. & S. 95; *Black* v. *Strickland*, 3 O.R. 217. There is no fairly arguable point to be determined: *Anglo-Italian Bank* v. *Davis*, 38 L.T. 201.

July 9. WETMORE, C.J.:—This action was brought upon three several bills of exchange, drawn by the plaintiff upon the defendant, payable at sight, to the order of the Dominion Bank, and accepted by the defendant. The statement of claim sets forth that these bills were dishonoured, and that the bank thereupon returned them to the plaintiff, who is the holder of them. The defendant appeared and pleaded, denying acceptance, and alleging that the bills were not presented for payment, and that they had not been indorsed by the Dominion Bank to the plaintiff. Application was made, and came before my brother Lamont for hearing, for summary judgment under rule 103 of the Judicature Ordinance, and the learned Judge granted the application, and the defendant appeals. No affidavit was produced on behalf of the defendant. He relied entirely upon the fact, as he claimed, that the statement of claim did not disclose a good cause of action against him. He set up:—

1. That his agreement, by his acceptance, was to pay the amount of the bills to the order of the Dominion Bank, and that the bank, not having indorsed the bills, he was not liable.

2. That sec. 140 of the Bills of Exchange Act, Rev. Stat. ch. 119, did not alter or affect the question. That in order to entitle the drawer of a bill to recover the Dominion Bank must indorse it, and the drawer become the holder thereof according to the definition of that term as given in the second section of the Act.

And third, if that is not correct, that the drawer, under the section of the Act referred to, could only take advantage of it when he pays the bill, which was not alleged to have been done in this case.

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I can find no cases in the books where it has been held that the drawer of a bill of exchange could bring an action upon it as such, without its being indorsed by the payee. In Bullen & Leake, 6th ed., p. 112, a form of statement of claim is given in a case such as that which I am now discussing, and that form is exactly the same as the statement of claim in this action, only the statement of claim in this action alleges the plaintiff to be, by reason of the return of the bills, the holder thereof. I look upon the last mentioned allegation as immaterial, because I think it can be treated as surplusage. I may draw special attention to the fact that the form in Bullen & Leake does not allege payment; it simply alleges the return marked "dishonoured," as is done in this case. Still, the question remains, what authority is there for such an action? I say I have been unable to discover it.

In *Harrop* v. *Fisher* (1861), 10 C.B.N.S. 196, at p. 203 (30 L.J.C.P. 283), Byles, J., lays down the following, quoting from Storey on Bills: "If the bill is originally payable to a person or his order, there it is properly transferable by indorsement. We say properly transferable, because in no other way will the transfer convey the legal title to the holder, so that he can, at law, hold the other parties liable to him in *ex directo*, whatever may be his remedy in equity."

It has been very well settled that a provision like rule 103 is not to be used to strike out a defence, unless it is very clear that the defendant has no substantial defence to present to the Court.

In dealing with similar cases arising under a similar section of the English rules, Jessel, M.R., states, in the case of *Anglo-Italian Bank against Wells* (1869), 38 L.T.R. 197, at p. 200, as follows: "When the Judge is satisfied not only that there is no defence, but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give effect to this section, and to give judgment for the plaintiff."

In *Fell against Williams*, 3 C.L.T., p. 358, dealing with a similar rule, the Court held that on a motion for judgment the plaintiff's case must appear as a demonstration, and nothing is to be supplied by the imagination or rest upon probability alone. Therefore, where the defendant set up a matter which might possibly afford a defence against the plaintiff, the Court refused to criticize

or enter into the probabilities of the defence, and refused a motion for judgment." So, in the *Ontario Bank* v. *Burke*, 10 P.R. 561, at p. 564, a question of law arose, and Rose, J., laid down: "It is not necessary for me now to express an opinion on the subject; it is sufficient to say that the question is one open to argument. I am not at liberty to decide upon this motion."

And, in *Electric and General Contract Corporation* v. *Thomson Houston Electric Co.*, 10 T.R., p. 103, Mr. Justice Wills states as follows: "He did not think that order 14 providing for summary judgment applied to cases like this, raising what might turn out to be a difficult question of law. It was never intended to throw on the Judge at Chambers such a burden. It was impossible that such questions could be satisfactorily dealt with at Chambers. This very case had been so argued as to occupy about two hours, and yet no time was wasted. Such questions were not meant to be dealt with summarily at Chambers."

In this last case the question of law appears to have been possibly a difficult one. In my opinion that does not affect the question, however. If it is an arguable question it is sufficient. I am of the opinion that the question raised by the defendant here is arguable, and that the application was not one that was intended to be controlled by rule 103.

I am therefore of the opinion that the appeal should be allowed with costs, and that the order of the learned trial Judge appealed from be set aside.

JOHNSTONE, J., concurred.

NEWLANDS, J.:—This is an action by the drawer of a bill of exchange against the acceptor. The statement of claim set out that the bill of exchange was payable to the Dominion Bank or order and was presented for payment at maturity and was dishonoured at maturity and returned by them to the drawer. The defendant appeared to the writ, and afterwards filed a statement of defence, and on the 14th January, 1909, the plaintiff took out a summons under rule 103 to strike out the appearance and to enter final judgment for the amount of his claim with costs. On the return of this summons the defendant filed no affidavit that he had a defence on the merits, but took the ground that the bill of

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exchange sued on had not been indorsed by the Dominion Bank to the plaintiff, and as there was no evidence of payment of the bill of exchange by the plaintiff to the payee, the Dominion Bank, he did not come under sec. 140 of the Bill of Exchange Act, and could not recover against the defendant in this action.

Under the Rules of Court it is unnecessary to allege any facts that would be presumed in your favour; therefore it was unnecessary to allege that the Dominion Bank, which was the holder of the bill of exchange at maturity, was a holder in due course, and as it would therefore be presumed that it gave value for the bill of exchange, it is, I think, equally to be presumed that when it returned the same to the plaintiff, the drawer of the bill of exchange, that it was paid by him. This presumption would arise on the same principle that a presumption of payment by the acceptor of a bill of exchange or the maker of a promissory note arises from the possession of the bill or note by the acceptor or maker, as the case may be, after maturity, the drawer of a bill being liable to the payee and endorsee in the event of the acceptor not paying the same at maturity; his possession of the bill after maturity would be *primâ facie* evidence that he had discharged that liability by payment. This fact being presumed, it would be unnecessary to allege it to enable plaintiff to recover from the acceptor under sec. 140 of the Bills of Exchange Act.

The statement of claim in this case follows the form given in Bullen & Leake, 6th ed., p. 112, with the exception that plaintiff has added to that form the words, "who is the holder thereof," words that were unnecessary, and which can therefore be treated as surplusage.

As to defendant's contention that the Dominion Bank should have indorsed this bill to plaintiff, I need only point out that under the Bills of Exchange Act a bill payable to a third party, as this was, ceases to be negotiable upon its payment by the drawer to the holder after maturity, and the only right which exists is the right of action which the drawer has against the acceptor. This right he acquires not through the payee but from his original position as drawer, *i.e.*, the bill is not negotiated to him but is paid by him as a party liable, leaving him with only his right of action over against the acceptor.

The defendant has no defence on the merits, nor has he, in my opinion, raised any question of law which would entitle him to defend.

PRENDERGAST, J., concurred.

The Court being evenly divided, the appeal was dismissed with costs.

[IN CHAMBERS.]

MATHEW v. MCLEAN.

1908
Sept 28

Mortgage—Foreclosure—Amending Order Nisi—Payment of Taxes made after Order—Increasing Amount to be Paid to Redeem—Costs.

Plaintiff obtained an order *nisi* for foreclosure. After the order had been made he, under the terms of the mortgage, paid a further sum for taxes. There was, however, no evidence that such payment was necessary to protect the security. He now applied for an order increasing the amount to be paid upon redemption, and fixing a new date for redemption. The mortgagor had been served but did not appear:—

Held, that as the mortgagor had not appeared and would in any event be required to pay the taxes and as reasonableness and convenience should be the basis of practice an order should be made for a new account and a new date for redemption.

2. That as it had not been shewn that the payment of taxes was necessary to protect the security and as the mortgagee could have insisted upon payment before redemption, the costs of the application should be borne by the mortgagee.

THIS was an application by a mortgagee to add an amount paid for taxes after order *nisi* made to the amount required to redeem and to fix a new period of redemption and was heard by LAMONT, J., in Chambers.

P. H. Gordon, for the plaintiff.
No one *contra*.

September 28. LAMONT, J.:—This is an application on part of the plaintiff for an order varying the order *nisi* herein by adding thereto the sum of $100.22 the amount the plaintiff has

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paid for taxes levied against the lands sought to be foreclosed in this action since the order *nisi* was made. The mortgage contained a clause to the effect that the mortgagee might pay all taxes and assessments levied against the land. The plaintiff paid taxes, as alleged, to the amount of $100.22 and then took out a chamber summons to have the amount added to the order *nisi*.

No authority could be produced to me for adding to the sum fixed by order *nisi* as due from mortgagor to mortgagee, an additional claim which arose after the order *nisi* was made. A number of decisions were cited in which there was a direction given for a new account to be taken and a new day fixed for payment, but these were all cases in which after the order *nisi* had been made, the mortgagee received certain sums which lessened the amount due, and it was held that he was not entitled to a final order foreclosure until a new day had been fixed for payment and non-payment by that day. I very much doubt if the mortgagee is entitled to have this additional sum added to his claim, but as convenience and reasonableness should be the basis of our practice, and as the mortgagor has been served with a copy of the summons on which this application is based, and as he would in any event have to pay the taxes if he redeemed, I do not see that he can be prejudiced by my directing a new day to be fixed for payment and a new account taken. I therefore refer the matter to the local registrar to take the accounts anew, with leave to the plaintiffs to file a further affidavit shewing the amount of taxes paid in respect of this land as the receipts filed do not correspond with the affidavit of P. H. Gordon, and a new day, fixed as the time within which the defendant may redeem.

As to costs. The mortgagee must bear the costs of the application and order. The only case which occurs to me in which the mortgagee should be called upon to pay costs of an application of this kind is where the mortgagor is compelled to make the subsequent payment to protect his security. Here there is no evidence that the payment of the taxes was necessary to protect the security. Besides the plaintiff has an order *nisi* for foreclosure. If the defendant does not redeem plain-

tiffs will get the land and the application will have been unnecessary. If the defendant pays in the money now fixed by the order *nisi*, plaintiffs would still be entitled to hold the property under their mortgage security until all payments (including taxes) secured thereby were paid. I am, therefore, clearly of opinion that except where the evidence shews that the subsequent payment was necessary to protect the mortgagee's security the mortgagor cannot be called upon to pay the costs occasioned by the mortgagee's action in making payments subsequent to the order *nisi*.

[TRIAL.]

MCCULLOUGH v. DEFEHR & DYCK.

1909
Sept. 21.

Foreign Judgment—Defendant not in Jurisdiction of Court—Effect of—Sale of Goods—False Representations—Grounds of Belief in Truth of—Right of Buyer to Rescind.

Defendants ordered certain butter making machines from plaintiff on the representation that with these machines butter could be made from milk fresh from the cow. On receiving the machines they found that they would not make butter as represented and immediately returned them. The representation in question was made by the plaintiff's agent who did not give evidence, but it did not appear that he had any ground for believing the representations to be true. In fact the plaintiff's own literature shewed the representations to be untrue. The plaintiff recovered judgment in the Supreme Court of Alberta for the price of the goods, the defendants not being resident in Alberta and not appearing and now sued upon the foreign judgment or alternatively for goods sold and delivered:—

Held, that the representation being untrue and the agent having no ground for believing it to be true the Court could infer that it was fraudulently made and the defendants were therefore entitled to rescind the contract and return the goods.

2. (Following *Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670), the defendants not being residents of or domiciled in Alberta and not having appeared in the action there the plaintiff could not now recover upon the foreign judgment recovered by default.

THIS was an action upon a foreign judgment or alternatively for goods sold and delivered, tried before LAMONT, J., at Moose Jaw.

G. E. Taylor, for the plaintiff.

H. S. Lemon, for the defendants.

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September 21. LAMONT, J.:—The plaintiff, who resides and carries on business at Calgary, claims against the defendants, who reside at Herbert, Sask., on a judgment issued out of the Supreme Court of Alberta, and in the alternative for the price of goods sold and delivered.

On May 5th, 1908, the defendants gave to the plaintiff's agent, Runnions, the following orders:—

"Herbert, May 5th, 1908.

"Messrs. Defehr and J. J. Dyck,

"Bought of Calgary Butter Separator Co.

"Ship freight f.o.b. Calgary

"Terms: ¼ cash 30 days, balance 6 months.

"20 machines, 7 gals. $24.00.....$480.00

"J. J. DYCK.

"F. J. DEFEHR."

On receiving the order from the agent the plaintiff shipped to the defendants eighteen butter separating machines. When these machines were examined and tested by the defendants they were sent back to the plaintiff at Calgary, the defendants claiming that they were not as represented by the plaintiff's agent, and they refused to pay for them.

The plaintiff, on being notified that the machines had been returned to him, refused to take them back, and sued the defendants in the Supreme Court of Alberta for the price, and obtained judgment against them, and he now brings action in this Court on the said judgment and in the alternative for the price of the machines.

As the defendants were not, either before or in the course of the action in which judgment was obtained, residents of or domiciled in the Province of Alberta, and as they did not appear to the said action and did not in any way subject themselves to the jurisdiction of the Alberta Court, the present action, in so far as it is founded on the judgment of the Supreme Court of Alberta, must fail: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670.

As to the alternative claim for the price, the defendants admit that they signed the order for twenty machines, but claim that they were induced to do so by the false representations of

the plaintiff's agent, and that upon certain machines being sent to them by the defendant they tested the machines and, finding that they were not as represented, refused to accept them.

I find on the evidence that the plaintiff's agent, at the time he took the order for the machines, represented to the defendants that the machines would make butter from fresh milk within fifteen minutes from the time it was taken from the cow, that the defendants relied upon the said representation, and that the said representation was untrue.

The representation being untrue, were the defendants entitled to rescind the contract and return the machines, or must they retain the machines and rely upon their claim for damages for breach of warranty. The law is well settled that if a false representation be made with a knowledge of its falsity or with a reckless disregard as to whether it is true or false, with the intention that it should be acted upon by the injured party, and he is induced by the representation to enter into the contract, it constitutes a fraud and the party deceived may rescind the contract.

The evidence satisfies me that not only was the representation made by the plaintiff's agent untrue, but that it was made without any honest belief in its truth. The agent was not called to give evidence, but the plaintiff admitted that the machines were not intended to make butter from milk freshly taken from the cow, but from sweet milk at least twelve hours old; and the literature with which the agent was supplied contains a statement that the machines would not operate successfully on milk direct from the cow, until the animal heat had been removed therefrom. The agent, therefore, had no ground for believing the truth of his statement, and that fact alone is evidence which if unexplained entitles the Court to infer that the representation was fraudulently made: *Derry* v. *Peeke* (1889), 14 A.C. 359; 58 L.J. Ch. 864; 61 L.I. 265. Fraud, however, was not pleaded in the defence, but simply that the defendants were induced by the false representations of the agent to enter into the contract and that upon discovering that the representations were untrue they repudiated the contract and returned the machines. Apart altogether from the fraud, in my

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opinion, they were within their rights in doing so. In *Derry* v. *Peeke*, above referred to, Lord Herschell said:—

"Where rescission is claimed it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand."

And the act of the defendants in returning the goods to the plaintiff with notice to him is a sufficient repudiation of the contract on their part to put an end to it. (See judgment of Lord Hatherly in *Reese River Silver Mining Company* v. *Smith* (1869), L.R. 4 H. of L., p. 74).

In "Kerr on Frauds," at page 100, the learned author sums up the law as follows:—

"From all these cases the principle is obviously deducible that a misrepresentation, however honestly made, is a ground for rescission of contract, provided the misrepresentation is material, or, in other words, so different in substance from what it was represented to be as to amount to a failure of consideration or fundamental error."

In the present case the order was for twenty machines. Parol evidence is admissible to shew what machines were meant. That evidence shews that what the defendants were ordering were machines to make butter from milk fresh from the cow. What they received were machines which not only would not do that, but which were never intended to do it. Therefore, even without imputing any fraud to the plaintiff's agent, there was in my opinion such a difference in substance between what the defendants ordered and what they received as to justify them in refusing to accept. There will therefore be judgment on the claim for the defendants, with costs.

The defendants counterclaimed for damages for breach of warranty and for freight paid. Having refused to accept the goods sent to them, they are not entitled to damages for breach of warranty, but they are entitled to a return of the freight paid on the machines from Calgary to Herbert. They are not entitled to the freight paid in returning the machines as there was no obligation upon them to send them back. All they were

required to do was to notify the plaintiffs of their refusal to accept, and that the machines were at Herbert at the plaintiff's risk. The freight paid from Calgary to Herbert was $13.00. There will be judgment on the counterclaim for the defendants for $13.00, and costs.

[TRIAL.]

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BAKER v. TEDFORD AND HOSSIE.

False Imprisonment—Pleading—Not Guilty by Statute—Amendment by Pleading—Claiming Benefit of Statute without Pleading—Action Against Justice of the Peace—Notice of—Sufficiency—Pleading Insufficiency—Probable Cause as a Defence—Malice.

In an action against justices of the peace for false imprisonment the defendant at the trial applied to amend by pleading not guilty by statute:—

Held (following *Gesman* v. *City of Regina*, 1 Sask. L.R. 39), that such an amendment should not be allowed at this stage.

The defendants then claimed to have the right to avail themselves of the statutes in question without pleading same; particularly as to no notice of action being given, the notice which had been given being, it was claimed, defective:—

Held, that this could not be allowed and in any event the defendants not having pleaded that the notice was defective could not attack the same.

In an action for false imprisonment against two justices of the peace it appeared that a dispute was pending as to the ownership of a certain building, to the knowledge of the defendant Tedford. The plaintiff having attempted to remove this building the other claimant laid an information before the defendant Tedford charging the plaintiff with entering on the premises of the claimant and attempting to remove a house. It also appeared that before acting on the information Tedford was notified by the plaintiff that he owned the house in question and there were other circumstances to his knowledge from which he might reasonably believe the plaintiff's claim to be well founded. He was also advised by a police officer that the dispute was not within his jurisdiction; but notwithstanding he issued a warrant for the arrest of the plaintiff who was brought before the two defendants in custody and after various irregular proceedings was committed to gaol to stand his trial, being released by the agent of the Attorney-General as soon as possible but not until he had been subjected to all the indignities attendant on arrest and imprisonment. There was no evidence that the defendant Hossie was aware of the circumstances set out. In an action for false imprisonment:—

Held, that in an action for malicious prosecution the existence or non-existence of probable cause must be determined by the Court although the facts from which the Judge is to draw the inferences are matters for the jury, except where the facts are not in dispute when the Judge decides such matters himself.

2. That upon the facts set out and undisputed there was no evidence of reasonable and probable cause justifying the action of the defendant Tedford to go to the jury.

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THIS was an action for false imprisonment tried before PRENDERGAST, J., at Moose Jaw.

G. E. Taylor, for the plaintiff.

C. E. Armstrong, for the defendant.

September 21. PRENDERGAST, J.:—This is an action for false imprisonment wherein the plaintiff claims from the defendants, who are justices of the peace, the sum of $5,000.00.

The action was tried with a jury.

At the trial the defendants applied to amend their statement of defence by adding thereto the plea of "not guilty" by statutes 6 Edw. VII. ch. 146 (the Criminal Code) secs. 653-5, and 1143-8, and 11-12 Vict. ch. 44 (Imp.) being an Act protecting justices of the peace from vexatious actions. I refused to allow the amendment on the same grounds that my brother Newlands refused a similar application in *Gesman* v. *City of Regina* (1907), 7 W.L.R. 308; 1 Sask. L.R. 39.

The defendants also claimed at the trial that they could avail themselves of the said statutes without pleading them specially; but this would clearly be contrary to rule 113 of the Judicature Ordinance the object of which is to prevent a defendant from pleading at the same time not guilty by statute and other defences without special leave.

I may say, moreover, if one month's notice of action was required as provided by the said statutes, that the evidence is to the effect that such notice was given. It is true that it does not comply with the rule laid down in *Taylor* v. *Fenwick*, 7 Term. R. 635, and *Madden v. Shewer*, 2 U.C., C.B. 115; but this defect should have been specially pleaded by the defendants who, instead, merely set up in their defence that "they have not upon action been notified of the plaintiff's claim."

This action is then the common law action for false imprisonment.

In an action of this kind, the defendant must either prove that the imprisonment was not his act, or was justified: 5 Ency. of Laws of Eng. 312. The onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification: *Hicks* v. *Faulkner* (1881), L.R. 8 Q.B.D. 167; 51

L.J.Q.B. 268. In an action for false imprisonment, malice is not, as in an action for malicious prosecution, primarily an ingredient; it is, however, matter for the jury to consider, as it has a bearing on the assessment of damages: *Tarlton* v. *Fisher* (1781), 2 Douglas 674.

In an action for malicious prosecution, the existence or non-existence of probable cause must be determined by the Court, although the facts from which the Judge is to draw the inference are matters for the jury: *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521; 39 L.J. Ex. 177; 23 L.T. 269; *Abrath* v. *North Eastern Railway Company* (1883), 52 L.J.Q.B. 620; 11 Q.B.D. 440; *Wainwright* v. *Villelard*, 6 Terr. L.R. 189. If, however, the facts on which the question of reasonable and probable cause depends are not in dispute there is nothing for the Judge to ask the jury, and he should decide the matter himself: *Brown* v. *Hawkes* (1891), 2 Q.B. 718; 61 L.J.Q.B. 151; 65 L.T. 108; *Archibald* v. *McLaren* (1892), 21 S.C.R. 588, at p. 593.

The above is with reference to actions for malicious prosecutions; but it seems that the question of reasonable and probable cause should be similarly dealt with in an action for false imprisonment: 5 Ency. Laws of Eng. 314.

On the above authorities, I submitted to the jury's consideration the assessment of the damages and the subsidiary question of malice, upon which they found that defendant Tedford had acted with malice and defendant Hossie without malice, and assessed the damages at $600.00.

With respect to the facts from which it devolved upon me to infer the existence or non-existence of reasonable and probable cause, I did not submit the same to the jury, as I considered that they were not disputed,—in fact, they mostly rested on the defendants' own admissions, and documentary evidence which was not impugned.

The defendants have lived at Mortlach for a number of years.

The plaintiff, who was first an architect and surveyor in England, had been living at or near Mortlach for nearly three years at the time of the arrest, and was then manager of a general store known as "Hudson's Limited" in that village. He had a wife and family of several children living with him. He

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also had a homestead some short distance from Mortlach. As to reputation, the evidence of the defendants themselves is that there is nothing against him and that he is known as a respectable and well-behaved man.

Sometime in 1905, the plaintiff built a small house on one Macdonald's lot in Mortlach, and lived in it up to April, 1906. The house was next occupied by one Breese as plaintiff's tenant and moved while in his occupancy to the land of one Damon in the same village, and said Breese continued to occupy it till November, 1906. The plaintiff again occupied it with his family on this last date, and continued to do so till the first days in December, 1907. The house was then vacant a few days, and on December 17th Breese went again in possession with his family, and was still occupying the same on January 21st, 1908, when the plaintiff, with the aid of a contractor, raised the house and placed skids underneath to remove it from Damon's land.

I should also here state that while in occupation of the premises on the first occasion, Breese had put up a small addition to the house with lumber bought from defendant Tedford; and also that it was a matter of public notoriety that a dispute with respect to this house had long been standing between plaintiff and Breese. I may add that Breese appears to have been a man of no substance, and that he was in defendant Tedford's employ at different times during the spring and summer of 1907.

A good deal more than this was shewn at the trial on behalf of the plaintiff; but in making the above statement of facts I have been careful to limit the same to such facts as were shewn by undisputed evidence, to have been within the knowledge, if not of both defendants, at least of defendant Tedford. I will only add in this respect, that the fact that Breese had attended to the moving of the house to Damon's lot could not be (and as I find, was not) considered by Tedford an act of ownership, for he knew that Breese first occupied the house as plaintiff's tenant, and that the plaintiff re-occupied it thereafter, so that this circumstance of the removal of the building could not signify anything in itself. And, of course, defendant Tedford knew, as everybody else, of the dispute between the plaintiff and Breese.

When the house was raised and put on skids by the plaintiff on the morning of January 21st, Breese went to defendant Tedford for the purpose of laying an information, producing at the same time, it would appear, an agreement for sale from Damon to him for the lot on which the house stood, or was supposed to stand,—for the uncontradicted evidence of the plaintiff is that when it was moved, it was by mistake placed, not on Damon's lot, but on the street adjoining. Tedford, however, took Breese's information which is to the effect that "A. C. Baker, of Mortlach, on the 21st day of January, A.D. 1908, at Mortlach, in the said province, did enter on to the premises of the said L. F. Breese and remove or attempt to remove a house the property of the said L. F. Breese." This is followed by the words and figures "Sec. 347 of ch. 146 C.C.," which I find, on the evidence, were not there when the complaint was sworn,—but this, I think, is immaterial. Tedford at the same time issued against the plaintiff a warrant to apprehend, in which the offence is stated in the same words as in the information, except that it contains no reference to the Code.

It is in evidence that after Tedford had agreed with Breese to receive his information and issue the warrant, but before the documents were actually drawn, the plaintiff went to him and told him that Breese was running all over town to have somebody interfere with his removing the house, but that he (Tedford) should be careful about what he would do as he knew the house belonged to him. Speaking of this same occasion, Tedford says in evidence: "I didn't tell him Breese wanted to lay an information or that I would issue a warrant. By Baker's manner at the time, I thought nothing short of a warrant would stop him. I did not think it was my place to tell him about the warrant. I won't force information on any man. He didn't give me the opportunity to tell him."

It is also shewn that Tedford, who was inexperienced in his duties as a justice of the peace, was in the habit of consulting the R. N. W. M. P. officer stationed at Mortlach, and that on that occasion, the latter, being aware that it was simply a dispute as to civil rights, advised him strongly, as he put it, "that he should have nothing to do with it."

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The warrant to apprehend was however issued, and the plaintiff arrested and brought before defendant Tedford, who set him at liberty after taking his recognizance of bail for $500.00. The operative part of the condition in the said recognizance reads as follows: ". . . That he (Baker) will cease all attempts at the removal of the aforesaid house until such times as the question of ownership in dispute is settled by the common procedure in proper course of law,—or if said A. C. Baker appears before me the above mentioned justice of the peace or any other justice or justices of the peace and pleads to the accusation aforesaid, then the said recognizance to be void, otherwise to stand in full force and virtue." Tedford swears that he told the plaintiff before he left that the hearing would be on the following Saturday (25th), which is denied by the plaintiff who says that no date was fixed. Tedford says further that the police officer on duty at Mortlach having been called away for a day or two, it was necessary to change the date first appointed, and the plaintiff says that on the Thursday (23rd), Tedford told him that the hearing would be on Monday (27th).

On the last mentioned date, at 2.45 p.m., the constable told the plaintiff that the hearing was coming on at 3.00. The latter, however, having been advised that the proceedings in general were irregular, and the adjournments in particular a nullity, did not appear. Tedford then issued a summons commanding the plaintiff to appear at 3.00 p.m. of that day, which was served on him a few minutes after that hour. The plaintiff not responding to this order, Tedford issued a warrant to apprehend on disobeying summons, upon which the plaintiff was arrested and brought before the two defendants for hearing.

What happened exactly at the hearing was not made very clear. The defendants say that, after Breese was examined in chief, they asked the plaintiff "if he waived preliminary hearing" and that he consented. The plaintiff on the other hand says that he replied that he waived nothing, that he reserved the right to examine everybody, and that he required to be sent to another jurisdiction,—meaning, as I understood, to a Court of civil jurisdiction. Be that as it may, the plaintiff was committed to stand trial at the next regular sittings of the Supreme Court

at Moose Jaw. He was taken in charge by a police officer who took him over as far as Moose Jaw and there delivered him to another officer already in charge of two prisoners, and taken with them to the Regina gaol. After being detained there two days, as I understand, he was brought back to Moose Jaw, with hand-cuffs on his hands, and made to appear at a sitting of the Supreme Court then being held there; but upon the Crown prosecutor stating that he had no charge to lay, was discharged from custody.

The whole proceedings, I may say, almost from beginning to end, fairly bristle with irregularities. The issue of the warrant to apprehend for disobeying summons, amongst other things, was to my mind clearly irregular and out of order. But I think it sufficient to deal with the initial proceeding of which all that followed was the direct result and consequence, and the question is: Was it justified? was there reasonable and probable cause for it?

The question here is not with respect to the duties of a justice of the peace who is required to take action on a valid information setting out a real offence, whether he extra judicially knows that the real facts are or are not true ground for complaint, or not.

In most cases, the magistrate is not of course personally aware of the facts, and the reasonable and probable cause he has for taking action, is the information contained in the complaint. In this case, defendant Tedford cannot shield himself behind the information which discloses no offence, and then he was cognizant of the essential facts of the case.

The plaintiff, a reputable and well-behaved man, at the head of a family, a citizen of good standing in a small town where the daily actions of everyone could be so easily scrutinized,—was subjected to extreme indignities. Was there good and reasonable cause for this?

Even taking it for granted that the course which he took was ill-advised, did it call for such extreme measures?

It seems to me that it did not. The plaintiff's general standing was not that of a thief. The allegations of the complaint, as they are, do not shew him to be a thief. And what

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Tedford is shewn to have known of the facts of the case did not point to his being a thief. Tedford knew well the nature of the dispute between Breese and the plaintiff; and even if he thought that the matter called for some intervention on his part there was no reasonable and probable cause for resorting at once to the extremely harsh and degrading measures that he did.

The element of malice, which it was proper for the jury to consider as a subsidiary question, and the affirmative finding which they presumably based upon the evidence of business rivalry, is not a matter for me to consider. It is sufficient that I should find that there was no reasonable and probable cause. (See dictum of Burton, J.A., in *Grimes* v. *Miller*, 23 O.A.R., at p. 768.

There was practically no attempt made at the trial to shew that those facts of which Tedford was cognizant, were also in the knowledge of defendant Hossie. That this distinction was also in the jury's mind is shewn by the fact that on the question of malice they found affirmatively as to the former, and in the negative with respect to the latter. I do not think a case was made against Hossie.

Hossie however was a party to the committal, and seems to have been willing to follow whatever course was determined upon by Tedford without sufficiently ascertaining the facts for himself, and for that reason he should have no costs.

The action will be dismissed as to Hossie, without costs.

There will be judgment for plaintiff against Tedford for $600.00, with costs.

[TRIAL.]

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Sept. 25.

Mechanic's Lien—Time of Registration—Goods Supplied —Entire Contract —All Goods of same Class—Notice of Lien of Sub-Contractor to Owner —Waiver—Building Contract—Acceptance—Architect's Certificate—Damages for Non-completion—Right to Set Off Against Lien-Holder.

Defendant B. contracted with defendant F. to build a house for the latter. Plaintiff supplied at different times during the work hardware and installed plumbing and heating apparatus and not being paid filed a lien. The last work done was on the furnace on January 3rd, the other work done by plaintiff having been completed and material supplied at an earlier date. The lien was filed on February 2nd. No formal notice was given by Smith to Fry of his claim as a sub-contractor but payment of the account had been discussed between them on several occasions, and Fry had promised to protect Smith. Fry also claimed that the work had not been finished by Bernhardt in accordance with the contract, that no architect's certificate had been produced and that he was entitled to set off certain damages. It appeared however that he had taken possession of the premises and that accounts had been stated to some extent and a balance found due:—

Held, that the plumbing, heating and building hardware were all supplied with the same object by the one party on the one hand to the one party on the other, standing in the same relationship and were so supplied as material and labour coming within the scope of the plaintiff's business and were so bound into one as to form an entire contract and not as separate contracts or deliveries and the last work on the whole being done on the 3rd of January the lien was filed in time.

2. That the defendant Fry by his conversation with plaintiff and assurance of protection of the account had waived notice of claim of lien.

3. That by taking possession of the premises, selling the same and stating accounts with Bernhardt, Fry had accepted the work and waived the presentation of an architect's certificate.

4. Damages for delay in performance can not be set off against a lien-holder.

THIS was an action to enforce a mechanic's lien tried before PRENDERGAST, J., at Moose Jaw.

W. B. Willoughby and *H. D. Pickett*, for the plaintiffs.
C. E. Armstrong, for the defendants.

September 25. PRENDERGAST, J.:—This is an action under the Mechanics' Lien Ordinance first instituted by G. K. Smith, and J. H. Ashdown as assignee was later added as co-plaintiff.

The defendant Fry, the owner under the Ordinance, entered into an agreement with the defendant Bernhardt, as contractor, some time in August, 1906, for the building of a house for the sum of

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$2,825.00. Bernhardt went on with the work and Fry took possession of the building on January 4th, 1907, when the same was not quite completed, whatever the cause may have been.

The plaintiff, a hardware merchant also engaged in plumbing and tinsmithing, now brings this action by virtue of having been employed by the said contractor on the said building, and claims: for plumbing, $230.00; for installing of furnace, $245.00, and for hardware and tinsmith supplies, $390.10;—in all $865.10, less $200.00 received, leaving a balance due of $665.10.

Although in no way pretending in the statement of claim to have had a contract directly with the owner for the said material and labour, the plaintiff, however, also claims from him under a distinct promise to pay, the statement of claim alleging that "the said defendants promised and agreed to pay to the plaintiff for the said plumbing . . the installation of the said furnace . . and the said wares and merchandise . . ."

I may say, so as to fix the correct amount of the claim at once, that on the plaintiff's own shewing at the trial, there is an over-charge (see Montgomery's evidence *re* item of December 31st, 1906, in Exhibit "G") of $50.00 with reference to the tank and conductor pipe, as also (on Bernhardt's evidence) several other over-charges in Exhibit "G" amounting to $30.25; half a barrel of oil taken away from the building by the contractor need not be taken into account, as it was not had from Smith and is not charged for by him. All the other items are shewn to have been supplied, so that—after deducting the two above over-charges—the plaintiff's claim stands at $584.85.

The questions raised are: first, whether there was an express promise to pay by Fry,—the defendant owner,—to Smith the plaintiff sub-contractor; second, whether the provisions of the Ordinance were complied with, more particularly with respect to the time allowed to file a lien, as well as notice to the owner; and, third, was there such a performance of the contract as to entitle the contractor at least to part of the contract price, and if so, what is the amount so due, what sums were paid by the owner on the same, and is there a balance still owing the contractor and available to the sub-contractor under his lien?

On the first question, I do not think that there was a distinct

promise to pay to the plaintiff sub-contractor. It is true that he appears to have been apprehensive that Bernhardt might not be able to do the job for the price, but so was Fry, as I judge, and the same reason led them to seek information from one another. Several of the alleged conversations between Fry and the plaintiff's foremen took place before the general contract was let, and one of them, McWatt, the foreman plumber, says: "Perhaps he was taking it (Smith's estimate) as figures so that he could make an estimate to "let the contract"— meaning the general contract. It is also shewn that Smith charged everything to contractor Bernhardt, and not to the owner, Fry, and the bills were also rendered to Bernhardt only. Bernhardt moreover says: "Mr. Fry had asked me to patronise Mr. Smith,"—but adds, "Of course I was at liberty to go wherever I wanted." Then, when Smith asked for money for the first time, on December 7th, he was told by Fry to get an order from Bernhardt as well as the architect's approval, to which Smith did not demur. Of course, Smith asserts that, upon his telling Fry, between the 15th and 20th August, that he would not supply the goods unless he saw him paid, the latter replied that he would see that he was paid. But Fry swears that when Smith offered to take those jobs himself, he replied that he "would have only one trouble and give the whole thing to one man," and that with reference to protecting him, he only said: "I will as far as I can." Smith also says that Bernhardt could buy wherever he wished. And I would here again insist on this essential point, that the position taken by the plaintiff in his statement of claim is that he was merely a sub-contractor and not a contractor, although at the same time relying on this alleged promise. Fry's explanation of what he did is that he asked Smith for figures on that special work only to form an estimate of what the total contract-price should probably be, and that he suggested to Bernhardt to deal with Smith's firm simply because he considered it a reliable concern,—to which Bernhardt acquiesced, without being, as he says, bound to do so. With reference to the promise itself, Fry's denial is just as strong as the plaintiff's assertion. Smith does not contend that he had any direct contract from Fry, and I hold that there was no distinct promise by the latter to pay at all events.

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On the second question, the first point is whether the lien was registered within thirty days of the completion of the work. The evidence is plain, and I understood counsel for Fry to admit on the argument, that work was done on the furnace at all events as late as January 3rd, and the lien was registered on February 2nd, which is within the thirty days following. But it was urged for Fry, that the plumbing, the heating, and supply of tin and hardware goods were three different contracts, that the thirty days must be reckoned from the completion of each of them, and that the lien was not registered in time, at all events with respect to the plumbing and the supplying of the goods. With this I cannot agree. The three may not have been ordered at the same time, but neither were the different articles of hardware ordered at the same time, and yet they would be considered under the Ordinance as the subject of the one order, or of the one act of supplying them. And a different price was set on each class of labour and goods; but so was a different price set on the door-knobs and nails, which does not prevent them from being considered as included in the same contract. The plumbing, heating and goods were all supplied with the same object, by the one party on the one hand to the one party on the other standing in the same relationship, and were so supplied as material and labour coming, as a class, within the scope of the plaintiff's business, which is that of a hardware merchant with plumbing and tinsmithing establishment attached, a common and natural combination of several trades into one, and considered as one. If Smith happened to own a quarry and had supplied stone, that might be different. But I will hold here that the so-called different contracts are bound into one, by the same reason that binds the different departments of the concern into one business. I consequently hold that the lien, filed as it was within thirty days after the last work on the furnace, was filed within the statutory limit of time with respect to all the labour and all the material supplied by Smith.

With respect to notice under section 11 of the Ordinance, the defendant Fry has admitted having been notified by letter from the plaintiff's counsel dated January 21st; and I would moreover say,—referring to Fry's request that Bernhardt should

deal with Smith, and his many conversations with the latter, as well as his assurance that he would protect him as far as he could,—that I can hardly conceive of a stronger case where notice should be deemed to have been waived by the owner.

On the third question, I do not think that the first point raised thereunder, with respect to the non-completion of the contract, offers much difficulty. There is no doubt that the contract here was what is termed an entire contract, that the doctrine of substantial compliance as broadly recognised in most of the States of the Union does not obtain here, and that the sub-contractor cannot recover unless there was something due the contractor when the lien was filed.

The cases cited by counsel for Fry do not go further than that. *Goddard et al.* v. *Coulson et al.*, 10 O.A.R., p. 1; *Truax et al.* v. *Dixon et al.*, 17 O.R., p. 366; *Appleby et al.* v. *Miles*, L.R. 2 C.P., p. 651; *Briggs* v. *Lee*, 27 Grant, p. 464; Holmestead on Mechanics' Liens, p. 63. There are also the cases of *Munro* v. *Butt*, 8 E. and B., p. 737, and *Oldershaw* v. *Garner*, 34 U.C.Q.B., p. 37, which are very emphatic on the point that the taking possession alone of an incomplete work, when the contract is an entire one, does not entitle the contractor to recover. But here, there is more than the fact that Fry received the keys on January 4th, took possession, and sold the house. There is also the fact that Fry entered into a deed of settlement (Exhibit O) with contractor Bernhardt, whereby he not only explicitly accepts the part performance, but acknowledges that he owes therefor to the contractor a further sum than he had then received. And it moreover seems, on the evidence, that the broad lines of this settlement, which was later put in this form of a deed, had been previously agreed upon by verbal understanding.

As to the contractor not being entitled to anything in the absence of a certificate by the architect, Hudson, in his work on Building Contracts (p. 431), has the following:—

"The clauses inserted in building contracts as to the production of a certificate are for the benefit of the owners of the building, and they may at their option waive its production . . . The conditions as to approval of the architect being

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also for the benefit of the building owner, without which the builder cannot recover, the building owner's approval dispenses therewith." I hold that in this case there was such a waiver of the production of the architect's certificate by Fry accepting the partly-performed contract under the terms of the said settlement. Contractor Bernhardt will then be entitled to recover for such work and material as he supplied.

The question of setting off damages for delay in delivering possession of the house, although not referred to in the defence, was raised at the trial. But such damages cannot be taken into account against the sub-contractor under the amendment made to the Ordinance by ch. 18, sec. 2, 1903 (second session): See *Swanson* v. *Mollison*, 6 W.L.R., p. 685, which was decided when the same Ordinance as our own was in force in the Province of Alberta, and also *Goddard et al.* v. *Coulson et al.*, above referred to (at p. 9).

I find due the sum of $503.04, for which the plaintiff's lien should hold.

There will be the usual declaration and order against the defendant Fry for $503.04, the sale, if any, to take place after two months, and all moneys whether paid in by Fry or realised under sale to be deposited into Court subject to further directions.

With costs to the plaintiffs, including costs of lien.

[IN CHAMBERS.]

WRAY v. CANADIAN NORTHERN RAILWAY CO.

1909

Oct. 22.

Practice—Order for Security for Costs—Appeal from Local Master—Formal Order not Drawn Up or Settled—Stay of Proceedings—Discretion of Local Master as to.

Defendants secured an order from a local Master requiring the plaintiff to give security for costs, but he refused to direct a stay of proceedings meanwhile. The defendants on account of this refusal appealed. No formal order was taken out before appeal:—

Held, following the English practice, that it is unnecessary to take out the formal order before appealing.

2. That the granting of a stay of proceedings is purely a matter of discretion and the local Master in the exercise of his discretion having refused a stay for reasons given such discretion should not be interfered with.

THIS was an appeal by the defendants from the Local Master at Battleford who, on an application by defendants for security for costs, refused to grant a stay of proceedings; and was argued before NEWLANDS, J., in Chambers.

T. S. McMorran, for the appellant.

H. V. Bigelow, for the respondent.

October 22. NEWLANDS, J.:—Two objections are taken to the order made by the Local Master at Battleford to the order for security for costs made by him on the 1st of October instant; 1st, that the order not having been drawn up an appeal will not lie from it.

As we have no rule or any recognized practice on this subject under sec. 15 of the Judicature Ordinance, I have to follow the English practice. That practice, as stated in the 1909 Yearly Practice, page 742, and Annual Practice, page 795, is that it is unnecessary for the purposes of appealing to draw up an order.

Second: The second objection is that the Local Master did not stay proceedings in the action until the security was given.

It is usual in making orders for security for costs to stay proceedings, but that is a matter of discretion. Yearly Practice, 1909, page 1001.

The reasons given by the Local Master for not staying proceedings are reasonable ones and I cannot therefore interfere with the discretion he has exercised. The appeal will be dismissed with costs.

[IN CHAMBERS.]

1909

Aug. 31.

IN RE LANG SCHOOL DISTRICT ASSESSMENT.

Assessment—Personal Property—Assessment of Chartered Bank—Assessment of Moneys Held on Deposit—Notes and Specie.

A school district assessed a branch of a chartered bank in respect of personal property including money held on deposit, notes and bills of exchange held by the bank, the notes of the bank, specie and Dominion bills.

On an appeal from the assessment:—

Held, that money held on deposit not being the property of the bank, notes and bills of exchange representing such moneys, and the bills of the bank representing no value until issued were not assessable, but that all fixtures, fittings, specie, bills of other banks, Dominion bills, notes and bills of exchange representing moneys held otherwise than on deposit were assessable.

THIS was an appeal from the Court of Revision of a school district confirming the assessment of a branch of a chartered bank and was heard before PRENDERGAST, J., in Chambers.

D. J. Thom, for the appellant.

Respondent represented by its secretary.

August 31. PRENDERGAST, J.:—This is an appeal from the Court of Revision by the Union Bank of Canada.

The ground of appeal is stated to be over-valuation, but involves a distinction between the different kinds of property assessed.

Village districts cannot impose a business tax. Their assessments and levy must be confined to real and personal property (section 30).

Section 31, in making certain special provisions, with respect to stocks-in-trade, does not thereby make them a third class of taxable property, and such stocks can only be assessed on the ground that they are personal property.

I admit that the provisions of the Ordinance do not seem to be quite adequate when made to apply to the assessment of banks; but these provisions are general, they apply to all real and personal property by whomsoever held, and I must follow the wording of the Ordinance.

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I do not believe that the sums of money held on deposit by a bank are assessable because they do not belong to it.

Nor do I believe that a bank's own notes are assessable, because they represent no value at all as long as they remain in the bank's possession.

But I am of opinion that the following are properly assessable at their actual cash value: Fixtures and fittings, specie, other banks' bills, Dominion bills, and loans as represented by bills of exchange, etc., taken as security for the same.

These last, in the present case, amount to $7,400.

I may observe that when a bank advances some part of the deposit moneys, or of its own bills, on loans, it takes in a corresponding amount of promissory notes and other securities, which are taxable, and in this way, the deposit moneys and the bank's own bills may be said to become indirectly taxable to the extent that the bank makes use of them.

[COURT EN BANC.]

THE KING v. DUFF.

EN BANC.

1909

July 7.

Criminal Law—Crown Case Reserved—Bringing Stolen Property into Canada—Evidence of Theft—Recent Possession—Sufficient Evidence to go to Jury.

Accused was convicted of bringing stolen property into Canada knowing it to have been stolen. It was proved that the property was stolen in North Dakota on the 6th of March, 1909, that on the 12th of the same month it was found in the possession of the accused in Canada, and there were circumstances from which the jury might find that the accused brought the property into Canada. It appeared that the accused was in the locality where the goods were stolen at the time they disappeared and he gave no account of his possession. On a Crown case reserved:—

Held, that the evidence was sufficient to warrant the jury in finding that the accused stole the property and brought it into Canada.

THIS was a Crown case reserved upon the conviction of the accused after trial by jury upon a charge of bringing stolen property into Canada knowing it to have been stolen, and was argued before the Court *en banc* (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE and LAMONT, JJ.) at Regina.

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Frank Ford, K.C., for the Crown.

W. B. Willoughby, for the accused.

July 7. The judgment of the Court was delivered by WETMORE, C.J.:—So far as the arguments that have been presented by counsel are concerned, we are of opinion that the conviction must be affirmed.

A team of horses and a set of harness were proved to have been stolen at Flaxton in the State of North Dakota, by some person on the night of the 6th March, 1909. The horses were subsequently found in the possession of the accused at the city of Regina, about the 12th of that month, and the accused gave no evidence to account for such possession. There was also evidence on the part of the Crown to shew that the accused, who lives at Halbrite, Canada, was at Flaxton on the 5th and 6th of March.

We are of opinion that that would be evidence which would warrant a jury coming to the conclusion that the property not being accounted for, was stolen by the prisoner. If the property was stolen by the prisoner and he had it in Regina on the 12th of March, he must have known that the property was stolen. It was stolen, I presume, as a matter of course, in North Dakota, under circumstances which would amount to a theft in Canada. That seems clear. All these matters, that the property was stolen in North Dakota, the fact that he had it in his possession in Canada knowing it to be stolen, were clearly matters of fact. The circumstances were such that the jury might reach a conclusion, first, that the property was stolen; secondly, that it was stolen by the prisoner, and thirdly, that he had it in his possession knowing it to have been stolen, and I think I might go further for there was evidence that they might have found, under the circumstances, that he brought the property with him into Canada.

For these reasons we are of opinion that the conviction must be affirmed and the sentence imposed carried out.

[TRIAL.]

PIONEER FRUIT CO. v. LITSCHKE.

1909

Oct. 13.

Sale of Goods—Cancellation of Order before Shipment—Acceptance by Buyer Under Mistake as to Consignor—Conversion—Establishment of Relation of Bailor and Bailee.

Defendant ordered a car of apples from plaintiff but before shipment cancelled the order and placed an order elsewhere. The plaintiff shipped the car originally ordered and this reached the defendant without notice and he, thinking the car to be the one subsequently ordered, accepted it. When the second car arrived however he discovered his mistake and immediately notified the plaintiffs that he held the goods at their risk. Some of the apples had been sold, and subsequently to prevent loss a further quantity was sold. In an action for conversion or for goods sold and delivered:—

Held, that there was no conversion, the defendant not being aware that the car had been shipped by plaintiff, nor was there any sale and the relation between the parties was merely that of bailor and bailee and the defendant therefore should account only for moneys actually received less freight and expense of sale.

THIS was an action for conversion or, alternatively, for goods sold and delivered and was tried before PRENDERGAST, J., at Regina.

D. Mundell, for the plaintiff.

G. H. Barr, for the defendant.

October 13. PRENDERGAST, J.:—This action is for the conversion of a car of apples, valued at $487.50, or, in the alternative, for goods sold and delivered.

In September, 1908, the defendant put in with the plaintiffs an order for a car of apples, subject to the condition that he could cancel the order within a certain time.

On October 1st, the plaintiffs, whose head office is at Brandon, Manitoba, wrote to A. Mallinson, their purchasing agent in Toronto, to ship a car of apples to the defendant at Halbrite, Saskatchewan.

On October 7th, the defendant cancelled the order by letter to the plaintiffs at Brandon, and ordered another car from one Roberts.

By letter of October 8th to the defendant, the plaintiffs accepted the cancellation, and they wrote the same day to Mallin-

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son to cancel the order. I think it is shewn that the car was not yet in consignment when Mallinson received this last letter.

On October 31st a car of apples, which in fact was shipped by the plaintiff's agent in Ontario, arrived at Halbrite, consigned to the defendant. There was no invoice, and the shipping bill did not shew who was the consignor; so that the defendant, believing that the car was sent by Roberts, paid the freight, amounting to $184.39 and took possession of the car.

The defendant was retailing the apples when, on November 11th, the second car came, and this one was in fact shipped by Roberts. The defendant also took possession of the second car and says that he kept it separate from the balance of the first car.

On November 26th the plaintiffs wrote to the defendant enclosing invoice and advising him that they were drawing on him; and on November 30th the defendant replied as follows:—

"Halbrite, Nov. 30th, 1908.

"The Pioneer Fruit Co.,
"Brandon.

"Dear Sirs,—We have your letter to hand *re* the car of apples you claim to have shipped to us, and in reply beg to state that this is the first we have heard *re* who these came from, and we wish to state that they are at your risk. We had a car coming from the East, and when these arrived we thought that they were ours and so unloaded them and as we cancelled the car from you. Our car arrived just a few days after your car and we have them both in the cellar at the present time. The first car was the poor, miserable stock and made up of such poor varieties and badly mixed we cannot handle them; they are here for your inspection at any time. However, if you will sell those at right figure so we could sell them real cheap to the farmers we might be able to handle them. Let us hear from you soon and oblige.

"Yours truly,

"FRED LITSCHKE."

It appears that there was no market at Halbrite at that time for two cars of apples, so that the unsold part of the first car remained in the cellar. A considerable quantity seems to have decayed and was thrown away in the winter, and in April and

May, which was after suit brought, the defendants sold all the remainder that were still merchantable.

The plaintiffs cannot succeed for goods sold and delivered, because there was no contract. Nor do I believe that this is a case of wrongful conversion; how could the plaintiffs call "wrongful" an act of the defendant which they courted and invited? I am of opinion that the relations between the parties are simply those of bailor and bailee. It was not shewn that the defendant as bailor did not take the usual and ordinary precautions, but of course he has to account. The statement of sales of the apples (exhibit 5) shews that, deducting therefrom the freight and other charges, there remains only about $30—which I think is but a reasonable compensation for having handled the goods.

But, as just stated, the defendant should have accounted, which he has neglected and even refused to do up to the time of the suit.

For this reason, while the action will be dismissed, there will be no costs.

[IN CHAMBERS.]

IN RE WAUCHOPE SCHOOL DISTRICT ASSESSMENT.

1909
Aug. 26.

Assessment—Occupant of Crown Land—Assessment in Respect of—Value to be Placed Thereon—Assessment of Real Property—Actual and Comparative Values.

Appellant was a lessee of Crown land and was assessed therefor by the respondent for the full cash value. He claimed to be liable for assessment only in respect of the value of his interest therein, and in any event that the assessment was excessive:—

Held, that in view of the provisions of sec. 26, sub-sec. 2, of the Schools Assessment Ordinance of 1901, which directs that the occupant of Crown lands shall be assessed therefor and, as by the only provision respecting the basis of assessment, section 30 of the same ordinance, it is directed that real property shall be assessed at the actual cash value thereof it must be held that the occupant must be assessed for the full cash value.

2. That the adoption of a flat assessment rate per acre throughout a district does not constitute an equitable assessment, unless it be shewn that all the land is equally valuable, and that the rate adopted is the fair cash value of such land, and the land in question not being equally as valuable as are other lands assessed, it must be assessed at its actual cash value.

1909

IN RE WAUCHOPE SCHOOL DISTRICT ASSESSMENT.

THIS was an appeal from a Court of Revision confirming the assessment of the occupant of Crown lands and was heard by PRENDERGAST, J., in Chambers.

E. W. F. Harris, for the appellant.

A. E. Vrooman, for the respondent.

August 26. PRENDERGAST, J.:—This is an appeal by J. W. Cunningham from the decision of the Court of Revision of the said district dismissing his complaint with respect to the assessment of certain lands in the assessment roll for the current year.

The appellant is entered on the roll as the occupant of a certain half-section of land there described, and the valuation is set down at $3,200, which is equal to $10 an acre.

The admitted facts are: That the said lands are held by His Majesty, and that the appellant occupies same under a grazing permit issued by the Department of the Interior, good for one year.

The appellant's two grounds of appeal are: First, that even if $10 an acre be the actual cash value of the half-section, he should not be assessed for such full value, but only for the value of his limited interest under the grazing permit, which he puts at $3 per acre; and second, that $10 per acre is in excess of the cash value of this land.

As to the first objection, the Act (sec. 26, sub-sec. 2, pars. 1, 2 and 3) provides for just such a case where a person occupies, otherwise than in an official capacity, property held by His Majesty, and clearly directs that the occupant shall then be assessed in respect to such property. As to how such property or any other should be assessed, there is only one direction given by the Act in this respect, and that is under section 30, which provides that "real and personal property shall be estimated at their actual cash value as they would be appraised in payment of a just debt from a solvent debtor." This seems to me quite clear, and the appellant must fail on this ground. I may say that an appeal was taken last year by the same appellant, with respect to the same property, and on the same grounds, before my learned brother Johnstone, who also dismissed the same.

On the second ground: are these lands assessed as they are at $10 an acre, estimated at their actual cash value? I would observe that in appeals of this kind, more especially in a country of rapid changes and developments, it is often difficult and sometimes almost impossible to determine accurately the actual cash value contemplated by the statute; and for that reason, in attempting to do so, I think it is proper and advisable for the Court—more especially as the main object is above all to obtain an equitable, which means a proportionate, assessment—to consider also, even if that is not made a separate issue, the general standard of valuation observed in the making of the roll generally, as well as the comparative values set upon the lands adjoining those respecting which the complaint is made.

On the evidence, the appellant's two sons both put on this half-section a cash value of $9. A third witness called by the appellant, who, however, admits that he is not quite familiar with the land, puts this value at $8. But the appellant himself and the Secretary-Treasurer of the Board both agree upon the same value of $8 per acre.

It is admitted that a flat valuation of $10 was adopted by the assessor for all the lands in the district—which I most emphatically say is not in compliance with the Act. Several sections adjoining the half-section in question were also shewn to be worth more than $10, and it was, moreover, stated in evidence for the appellant that the average value of the land in that district is above that figure, which the respondent did not attempt to disprove.

$10.00 is then neither the actual cash value nor the comparative or proportionate value of the said lands.

In my opinion, the evidence shews that the said half-section should have been assessed at $8.00 and no more.

[TRIAL.]

1909

PERRY v. KIDD ET AL.

Oct. 19.

Sale of Goods—Fraud—Substitution of Other Goods for those Ordered—Payment of Notes Given Therefor After Knowledge of Fraud—Action for Damages—Right to Maintain—Measure of Damages.

Plaintiff offered by correspondence to purchase by description a certain horse. The defendants agreed to sell at the price offered and shipped a horse to the plaintiff. The horse shipped was not that ordered but the plaintiff did not know this and accepted the horse as the one ordered, it being however a very much inferior animal. He shortly afterwards learned that he had been defrauded, but notwithstanding retained the horse and continued to use it and paid the notes given for the purchase price. He now sued for damages:—

Held, that the plaintiff notwithstanding his retaining the horse and making payments after knowledge of the fraud was entitled to maintain an action for damages for the delivery of an inferior animal in place of that ordered.

THIS was an action for damages in respect of a sale of goods and was tried before WETMORE, C.J., at Regina.

N. R. Craig, for the plaintiff.

J. F. Frame, for the defendants.

October 19. WETMORE, C.J.:—I find the following facts in this case:—

The plaintiff in the winter of 1904 purchased from Kidd Brothers, a horse by the name of Carl Klohn. This purchase was effected through one Thompson, the agent of Kidd Brothers. The firm of Kidd Brothers was composed of the defendant W. C. Kidd and Richard T. Kidd, since deceased. Before purchasing this horse, the plaintiff had seen a letter written by the defendant W. C. Kidd to one Mackenzie, describing the horse and stating that he was willing to take $1,000 for him, and that if he kept him until spring and got him ready for racing, he would want $3,000 for him. When the plaintiff interviewed Thompson on the subject he stated that he had seen this letter from W. C. Kidd to MacKenzie and gave him the material contents of it. A telegram was sent to Kidd Brothers by the plaintiff and Thompson, and a reply was received in answer. The effect of the two telegrams was that Kidd Brothers offered to sell this horse for

$1,000 delivered at Regina, and the plaintiff agreed to receive and pay that amount for him. The horse was to have arrived somewhere about the 12th of March. He did not arrive at that time, however, but a horse came on the 20th of April, which the plaintiff had the right to expect, and which he believed was Carl Klohn, and he received the horse under that belief. Two notes were given for the horse for $500 each, dated the 20th of April, one payable on the 12th of September, 1904, and the other on the 12th March, 1905. The notes were signed by the plaintiff and his wife, Fanny Perry, and were paid in due course.

It was set up on the part of the defendant that the plaintiff took delivery of this horse knowing that it was not Carl Klohn, and that he was informed by Thompson that it was not Carl Klohn. I find against the defendants in that respect. This horse was not Carl Klohn. It was a horse that went by the name of Sousa. It was four or five years older than Carl Klohn, and was, comparatively speaking, a much inferior horse to what Carl Klohn was represented to be. Perry did not discover that this Sousa horse had been foisted upon him until some time afterwards. I find that it was not very long after he got him that he discovered that the horse was not the horse he ordered, and I am inclined to think that he paid both notes with the full knowledge that he was not the horse. That, in my mind, however, will not affect his right to recover in this action. I find there was a deliberate swindle perpetrated upon the plaintiff in this matter. It seems to me that this is very clear from the evidence, and it is not necessary for me to analyze it to establish the reason why I have arrived at the conclusion that this transaction was fraudulent. It is quite sufficient to state that I find that fact, and in my judgment the evidence will bear that out.

The next matter that I have to deal with is that of the damages. In the first place I have the right to assume from the statements of the plaintiff in his letter to MacKenzie, and from what was stated by Thompson and the fact that the defendant Kidd sold the horse for $1,000, that Carl Klohn was worth that money. The horse Sousa that the plaintiff got, he subsequently sold for $300 after keeping him two years and upwards, but he was quite as good then as when he got him.

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PERRY v. KIDD.

I hold the plaintiff to be entitled to recover the difference between the price stated for Carl Klohn and that for which he sold Sousa—or $700. That, in my opinion, is the damage sustained by the plaintiff naturally arising out of the transaction.

I have been asked, however, to award large damages for money that the horse might have won at races if he had really been Carl Klohn. That unquestionably is too remote. It does not follow that if the plaintiff had had Carl Klohn that he would have won first money at these races as he claims he would have done. Racing is a very uncertain business.

In the next place, I am asked to award damages for the expense he was at in training this horse for races and carrying him about to the several race meetings and for expenses of care and keep. I am of opinion that I would not be justified in awarding damages of this character. In the first place, the horse the first season he went out, won second money on one or two occasions, and he was prevented from racing further that season by having his knee hurt. The second season he won second money now and again and third money, but it seems to me that a horseman (like Perry is) must have soon discovered (if from no other reason than from the indications of the age of the horse) that this was not the five-year-old animal that he had bargained for, and, as before stated, I think he was pretty well satisfied of that fact shortly after he got him. Upon such circumstances he choose to go on training him for races and spending money on his transportation and paying for extra keep that might be occasioned by such training and transportation, and I am of opinion that the defendants are not responsible for damages in this action arising in that way. For somewhat similar reasons I do not feel disposed to award interest in this matter, even assuming I could do so.

There will be judgment for the plaintiff against the defendant W. C. Kidd for $700 and costs.

The executors of the estate of Richard T. Kidd were joined as parties to this action. Probate of the will of Richard T. Kidd was taken out without the jurisdiction of the Surrogate Court of this province or the Supreme Court of the North-West Territories, but is was alleged that the executors had collected assets

in the province belonging to the estate of the testator. It was not shewn that any such assets had been collected, therefore, the action, as against them, will stand dismissed. But, inasmuch as all the defendants pleaded jointly, I will allow no costs of the defence to the executors of Richard T. Kidd, merely dismissing the action as against them.

[IN CHAMBERS.]

IN RE COOK.

1909
April 17.

Administration—Application for Letters of—Deceased Domiciled ex juris—Application by Widow—No Evidence as to Grant of Administration by Court of Domicile—Right of Widow to Letters in Absence of this Evidence.

Deceased in his lifetime resided in the State of North Dakota and died leaving property in Canada. His widow made application to this Court for letters of administration, but it did not appear that she was the person entitled to administration by the law of the place of domicile, or that any administration had been granted in North Dakota; and on this ground the Surrogate Judge refused the application. The applicant appealed:—

Held, that when an intestate dies *ex juris* leaving property *in juris* the Court should grant administration to the person clothed by the Court of the country of domicile with the power and duty of administering the estate no matter who he may be, and in the absence of evidence of appointment of an administrator in the place of domicile, or as to the party entitled there to such administration, the application should be refused.

THIS was an appeal by the applicant for letters of administration from the refusal of the Surrogate Judge to grant letters upon the material filed, and was argued before JOHNSTONE, J., in Chambers.

T. S. McMorran, for applicant.

April 17. JOHNSTONE, J.:—This matter came up before me in Chambers by way of appeal from the decision of His Honour Judge Rimmer refusing grant of letters of administration to the widow of one Frank L. Cook, deceased. The petition for letters and the affidavits annexed thereto set forth that the deceased died in the city of Minneapolis in the state of Minnesota in the year 1907, having his chief place of abode at the time of his

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death at Fairmount in the State of North Dakota; that the deceased died intestate, leaving him surviving a widow, the petitioner, and three infant children, and that the deceased had left real and personal estate to which letters were sought to be granted to the value of $4,400. Except as to certain real estate named, however, which was valued at $2,400, and situated within the Province of Saskatchewan, the *locus in quo* of the estate was not disclosed.

The material on which the application is based is silent as to whether or not letters of administration of the intestate in the United States or letters of guardianship to the infants aforesaid and their estate, had been granted in the United States, and, moreover, there was no legal proof forthcoming as to the person or persons who would in the State of North Dakota the domicile of the deceased, be entitled as next of kin, to share in the distribution of the estate or who would, according to the law of the said State, be entitled to administer, or that the widow was a person to whom the grant of letters of administration would be there made.

On this and another ground, which I need not mention, the learned Judge refused the grant.

I think in taking this course, under the circumstances of this application, the learned Judge pursued the right one. *In re the Goods of Earl* (1869), L.R. 1, 450; 36 L.J.P. 127; 16 L.T. 799. Sir J. P. Wilde reviews the authorities up to that time (July, 1869), including the *Goods of Enohin* v. *Wylie,* 10 H.L.C. 1; 31 L.J. Ch. 402; 6 L.T. 603, in which Lord Westbury, L.C., gave expression to the words referred to by Judge Rimmer, and of which Sir J. P. Wilde said:—

"I think that there is strong, good sense in these remarks, and the practical principle there pointed out is one that ought to be adhered to. The only question is, In what way ought the Court to act upon it? There was no power in the old ecclesiastical Courts to make a grant, except on the direction indicated by the practice of those Courts. This Court, however, is armed with a special power by the 73rd section of 20 & 21 Vict. ch. 77. I think the Court ought to act upon that section, and to make a grant in all such cases as the present to the person who has been clothed by the Court of the country of domicile with the power

and duty of administering the estate, no matter who he is or on what ground he has been clothed with that power." And the learned Judge proceeds to say, "The grant under the 73rd section will describe him (that is the foreign executor) as a person having that power," and letters in that case were granted under the statute referred to, to the person who was entitled to the grant according to the law of domicile.

Section 73 is as follows:—

LXXIII. Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof, willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person, to the person who, if this Act had not been passed would by law have been entitled to a grant thereof, but it shall be lawful for the Court in its discretion to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.

It is provided by section 39 of the Surrogate Courts Act, that unless otherwise provided by this Act or by the rules of Court the practice of the Surrogate Courts shall so far as the circumstances will admit be according to the practice in Her Majesty's Court of Probate in England, as it stood on the 15th day of July, 1870, so that the law as laid down in *In re Earl* and by the Imperial Act, is now the law of Saskatchewan, no provision having been made by statute or rule regulating the practice under like circumstances. The appeal from His Honour Judge Rimmer will, therefore, be dismissed.

[TRIAL.]

1909

Sept. 22.

SHINN v. MCLEAN.

Sale of Goods—Action by Foreign Partnership in Firm Name—Action by Foreign Company—Right to Maintain—Acceptance of Goods—Damages for Breach of Warranty—Evidence of Breach.

Defendant ordered a car of apples, which the plaintiff shipped on terms that it should be accepted on delivery at point of shipment. The car was received in due course and unloaded by the defendant, who first complained that one box was short and one bad, and later that ten boxes were bad, and at a subsequent date that the whole shipment was bad. There was no evidence as to the condition of the goods when delivered for shipment.

At the trial it was objected that a foreign partnership (the plaintiffs being resident out of the Province) could not maintain an action in the firm name, and subsequently, when it transpired that the plaintiff was a corporation, that being a foreign corporation not registered they could not maintain an action. In an action for the price of goods sold and delivered:—

Held, that defendant, having appeared to the writ of summons, waived any objection to the plaintiff's right to bring an action in the firm name if the plaintiffs were a firm.

2. That the contract being made by correspondence, and delivery having taken place out of the Province, the plaintiff could not be said to be a foreign company carrying on business in the Province.

3. That the defendant not objecting to the condition of the whole shipment when received, and having taken possession of the car and sold some of the contents, must be deemed to have accepted the goods.

4. That it was, however, a condition of the sale that the goods should be in merchantable condition when delivered for shipment, and the defendant could accept the same and sue for breach of warranty if the goods were not as ordered.

5. That while the defendant's actions raised a very strong presumption that the goods were practically satisfactory when delivered, yet as the plaintiff had given no satisfactory evidence that the goods were in good condition when shipped, and the defendant having shewn damages, he was entitled to an allowance for such damages.

THIS was an action for the price of goods sold and delivered, and was tried before PRENDERGAST, J., at Moose Jaw.

W. B. Willoughby, for the plaintiff.

H. S. Lemon, for the defendant.

September 22. PRENDERGAST, J.:—This action is for $550, being the price of 500 boxes of apples alleged to have been sold and delivered by the plaintiffs to the defendant at Moose Jaw.

The defence is in substance that the said apples were decayed, unmerchantable and worthless, and the defendant claims damages for difference in value, extra freight paid, and cost of labour in sorting—in all $819.25.

The defendant first took the objection, under rule 37 of the Judi-

cature Ordinance, that the plaintiffs (who live at Spokane, Washington), not being within the jurisdiction cannot bring action under their partnership name. I would hold that this is a mere irregularity which the defendant waived by appearing and taking out an order for security of costs. Such was also the decision of my brother Newlands in the recent case of *Kasindorf & Co.* v. *The Hudson Bay Insurance Co.*, *supra* p. 215, which is in every point similar to the present one.

It was, however, made to appear later on at the trial that the plaintiffs are not a partnership firm, but a company incorporated under United States law; and it not being shewn that the said company was registered in this Province, the defendant objected that it could not maintain the action under sec. 10 of the Foreign Companies Ordinance.

It does not appear, however, that the plaintiffs ever shipped to this Province any other goods than this car of apples; then, the transaction was wholly initiated by the defendant asking the plaintiffs for quotations and later on ordering the apples by correspondence; and finally, as I shall presently state, I find that delivery was to be at Spokane and not at Moose Jaw. For these reasons, I hold that the plaintiffs cannot be said, on account of this transaction, to be a foreign company carrying on business in this Province within the meaning of the said Ordinance.

I find that the contract is contained in the following extracts from the correspondence exchanged between the parties:—

1. Defendant's letter of August 8th: "We want car mixed fruit at once if prices right. Will (require) car of apples later when prices right."

2. Plaintiff's letter of August 19th: "We quote you apples at ; plums and prunes at , &c. The fruit must be accepted here as we will take no chances on same while in transit. We will give you good fruit, but when we get the transportation company's receipt, our responsibility ceases."

3. Plaintiff's letter of August 25th: "We will put in a nice assortment of fruits to make a minimum car. We will probably have a straight car of apples to offer about Sept. 1, which we quote at $1.10 per box."

4. Defendant's letter of August 28th: "We have decided to take a car . . . We want mostly good red eating apples with

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mixture of best kinds. Good eating pears. Silver Italian prunes, etc. . . . We accept your terms."

5. Plaintiff's letter of August 30th: "The fore part of next week, will wire you exactly what we have to offer . . . In the meantime quote you car of apples, shipment to be from 1st to 10th September $1.10 per box f.o.b. here, varieties principally Wealthies and white McMahons. We may have a few pears at $1.50 per box."

6. Defendant's telegram of September 2nd: "Ship at once car of apples, few pears, first quality, Wealthy."

7. Plaintiff's letter of September 14th: "We got your car of apples loaded C.P. car 80286. We did not put any pears in as it would change the rate . . . This is an extra nice car of apples. . . . We gave a good supply of Wealthies, Alexandrias, McMahons, Wolfords, Pippins and Berthenheimers, as well as a nice lot of other apples."

The car arrived at Moose Jaw on September 21st, and the defendant took possession of same after paying freight and customs duty amounting to $342.

The defendant had been advised that the car contained not only Wealthies and McMahons, but also Wolfords, Pippins, etc., so that his acceptance disposes of any objection on the ground that the apples were of other kinds or varieties than he expected.

The defendant states that he found the apples to be totally valueless for the three-fourths, and that the balance, except for a small proportion, were depreciated by one-half or even two-thirds of their value.

Now, if this was so, I must say that the defendant's conduct was very extraordinary under the circumstances,—so much so, indeed, as to leave it open to grave suspicion.

What does he do with respect to notifying the plaintiffs, and how or when does he complain or protest? For, according to his own evidence, he knew practically at once of the condition of the apples.

On September 23rd the defendant writes to the plaintiffs that the car was unloaded on the 21st, and that there is one box short of the invoice and one box of partly rotten apples and thirds. The plaintiffs having drawn on him at sight, he also says, "we will accept your draft for thirty days."

On October 1st—having in the meantime received from the

plaintiffs a letter saying that the transaction was a spot cash one—the defendant writes to claim a freight overcharge owing to the car not having been filled to minimum capacity, and also for said shortage of one box and one bad cull (in all, $28.52), and winds up: "No draft, please settle this legitimate claim and we will remit you." But except as to the one box, there is no complaint about the condition of the apples.

On the same day (October 1st) the defendant seems to have sent to the plaintiff another letter practically to the same effect, and equally silent as to the defective condition of the apples.

On October 5th, the plaintiffs having insisted on immediate payment, the defendant writes: "Before we remit in payment of car of apples, we shall expect you to pay attention to claim for allowance of two boxes of apples and for freight overcharged," and he then goes on complaining that their agent at Calgary had undertaken to sell him another car of fruit on certain conditions but changed the conditions afterwards and sold the said car to another fruit man at Moose Jaw for less than $1.10, and finally claims a rebate on the car in question in this case, as also a refund of moneys alleged to have been expended by them in advertising the second car. But here, again, there is no complaint about the condition of the apples.

Then, having received a sharp letter from the plaintiffs, the defendant, on October 18th—that is to say, 27 days after unloading the car—writes to complain for the first time. He says: "Ten boxes of your car of apples marked dump and are rotten. This mark was on when unloaded from car. No sale, not fit for sale. We charge these boxes against your account," etc. Even then, he seems to complain only about ten boxes, and had he not seen this mark "dump" long before?

I find that it was a condition that the apples should be merchantable when put on board at Spokane. I hold that the defendant had a right to inspect the apples, and that in case he found they did not comply with the condition, he would have the right, generally speaking, either to repudiate the contract or treat the breach of condition as a breach of warranty: Sale of Goods Ordinance, clause 13.

That the defendant did not repudiate the contract is, of course,

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more than plain from the fact that he took possession of the apples, opened all the boxes, sorted them, threw some away, and sold some.

The defendant must be held to have accepted: *Chaplain* v. *Rogers* (1800), 1 East 192, 6 R.R. 249; *Blenkinsop* v. *Clayton* (1817), 7 Taunton 597, 18 R.R. 602.

The defendant's delay in complaining would of course be considered extraordinary under all circumstances, and must appear more so as that exchange of correspondence was going on between the parties all the time. But must the defendant on that account alone be considered to have waived all objection, and is he decidedly debarred thereby from claiming for the breach of warranty if such existed?

The point, I think, is one having more to do with the rules of proof and presumptions, and should be decided on the merits of the evidence given. It seems to me that the general trend of the cases on the point does not go further than this, that "the not giving notice indeed raises a strong presumption that the article at the time of the sale corresponded with the warranty and calls for strict proof of breach of warranty": *Poulton* v. *Lattimore* (1829), 9 B. and C., 259, at p. 265.

In this case there was notice, but only when the fruit had been decaying (if it was decayed when received) for 27 days more in the defendant's possession.

James Simington, who has been in the fruit business in Moose Jaw for eight years, says in this respect: "The customary time allowed in the trade here, is that it is generally inspected on arrival and reported. It is shorter to inspect boxes, as it is a smaller package and more visible. 500 boxes should be inspected in two or three hours. The custom is usually to report losses at once. This is a world-wide usage, I think."

I will make free to say that if the plaintiffs had given proper evidence that the fruit was in good condition when put on board at Spokane, I should probably hold that the defendant's conduct raises such a presumption that his evidence cannot avail as against that of the plaintiffs. But the plaintiffs did not give such evidence of the condition of the apples at Spokane.

I will then entertain the defendant's claim for breach of warranty, but will at the same time weigh the evidence given on his behalf with the greatest strictness.

The defendant has produced no books, vouchers, memoranda or statements shewing what disposition he made of the apples. At the same time, by his own testimony and that of Stamper and Hourgo, I think he has shewn that some of the apples did not correspond to the warranty. What that proportion was he did not support by actual and conclusive figures in detail, nor did he bring the same within any definite limit of time. And it must not be forgotten, as I have found, that delivery was to be at Spokane and not Moose Jaw by plaintiffs' letter of August 19th, and that this condition of the contract was never varied.

It stands altogether out of reason that I should hold that the condition of these apples at Spokane must have been the same as the plaintiff states he found them in when, he says, he inspected and picked them on the tenth, eleventh, twelfth and even as late as the thirteenth and fourteenth days after they were taken over.

The defendant is shewn to have on two occasions offered in settlement the sum of $334.95. This is less than the amount claimed by $215.05, and this difference, as I find, would represent (together with the proportionate amount of freight and duty for which he would be entitled to compensation, some $81.00) the loss of about thirteen boxes, or just one in excess of the loss complained of in his letter of October 18th, plus one short of invoice as before reported. Although believing that the damage really sustained was greater, I do not see anything else that I can confidently rely on but the above, and the defendant has only himself to blame for not having placed himself in a position to bring to Court evidence more definite and less suspicious, for the onus is altogether upon him, he having accepted the goods.

In the absence of more definite figures to go by, I will allow the defendant this sum of $215.05. I allow this as representing, besides the proper refund of charges, the loss on account of decay, figuring the same on the basis of $1.10, the contract price.

The measure of damages fixed by sec. 51, sub-sec. 3, of the Sale of Goods Ordinance, would mean, of course, in this case, the difference in value by the car lot without reference to retail prices, and I do not find that there is positive evidence that wholesale prices went higher than $1.10, say within two or three days after September 21st, the date when the defendant took possession of the goods.

There will be judgment for the plaintiffs for $334.95, with costs.

[TRIAL.]

1909

Oct. 29.

REINHOLZ v. CORNELL & GAAR SCOTT & CO.

Conversion—Seizure of Goods under Chattel Mortgage—Goods Held by Mortgagor under Agreement for Conditional Sale—Seizure in Good Faith.

Plaintiff delivered a team of horses to his son, under an agreement for conditional sale whereby the property in the horses was reserved to the plaintiff until the purchase price was paid. Subsequently the son mortgaged the horses, and the mortgage came into the hands of the defendant company. Default being made, the company authorized its bailiff, the defendant Cornell, to seize the horse. On the seizure being made the plaintiff notified the bailiff of his lien and the registration thereof, but, by reason of a change in the boundaries of the registration district, mentioned the wrong office as the place where the note was registered. Search on two occasions at the office named failed to shew the lien registered, and the defendants thereupon sold the horses. The note had in fact been properly registered before the changes in the boundaries. In an action for conversion:—

Held, that although the defendants acted innocently and in good faith in selling the property in question, there was nevertheless a wrongful conversion.

THIS was an action for damages for conversion of a team of horses, tried before PRENDERGAST, J., at Regina.

W. W. Guggisberg, for the plaintiff.

J. F. L. Embury, for the defendant Gaar Scott & Co.

H. A. Archer, for the defendant Cornell.

October 29. PRENDERGAST, J.:—This is an action for conversion of a team of horses, and the plaintiff claims the value of the horses, and certain damages; in all, $784.39.

On March 16th, 1907, the plaintiff, who was the owner of a team of horses, bargained the same with his son Frederick, receiving from him as consideration therefor a note of even date for $400, bearing interest at 8 per cent. and due October 1st following, and containing the usual clause of lien notes in the words following: "The title, ownership, and right to the possession of the property for which this note is given shall remain at my own risk in F. Reinholz until this note or a renewal thereof is fully paid with interest," etc.

Nothing was ever paid on this note.

Frederick took the horses away from his father's stable to his own place shortly after the bargain, worked them, and put them again in charge of his father after some time, as he was going to work in some other village and there was no one to attend to them on his own farm. This part of the evidence is rather indefinite.

but I find, at all events, that the horses from that time, although under the control of the father, were still in the constructive possession of his son.

Now, on July 1st of that year, one Krause bought from one Woods a team of horses on credit, and as Woods required that he should have the security of a chattel mortgage on the team he was selling and on some other team as well, Krause requested Frederick Reinholz to join with him in the mortgage and include therein the team he had bought from his father, the plaintiff—to which Frederick acquiesced, and the mortgage was executed accordingly and delivered to Woods.

Some time after, Woods being indebted to Gaar Scott & Co. for some farming implements, turned over to them certain collateral securities, amongst which was the chattel mortgage in question.

In the following winter (1907-08), not being able to get satisfaction from Woods, M. D. Bacon, collector for the company, went to the plaintiff's place, where he saw Frederick Reinholz and reminded him of the chattel mortgage. Bacon says that the father was there also, and that he did not say that he had a lien on the horses, but he admits that he may not have heard the conversation.

Bacon, however, returned the following fall (about October 8th, 1908), and the plaintiff then told him that he had a lien note on the horses and that it was registered at Arcola. The fact was that the note was registered, not at Arcola, but at Moosomin.

Bacon consequently went to Arcola, and finding no lien note registered there, handed over to the defendant Cornell, as bailiff, the chattel mortgage referred to, with the company's warrant to distrain thereunder.

The defendant Cornell accordingly proceeded to the plaintiff's place on October 21st, made seizure of the two horses, brought them to Stoughton, and announced a sale of them to be held on November 12th.

Cornell having, however, received on that day a letter from plaintiff's solicitor warning him not to proceed with the sale, and again stating that the lien note was registered at Arcola, postponed the sale to November 18th and referred the letter to Bacon. The latter again went to the Clerk's office at Arcola, when a more minute search was apparently made, and again finding no note registered, ordered the bailiff to proceed with the sale.

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On November 18th, as soon as the sale was declared open, a justice of the peace living at Stoughton read out, standing in a buggy, to the crowd of about two hundred who were present, a notice that there was a lien on the horses about to be sold. The horses were, however, sold, one for $135 and the other for $25.

The plaintiff and two other witnesses say that the horses were worth $200 each; the defendant Cornell says $131 and $100.

Otto Reinholz, another of the plaintiff's sons, eventually bought back one of the horses from the party to whom it had been sold by the bailiff for $175.

I may say that the mistake of the plaintiff and his solicitor in stating that the lien note was registered in Arcola, while it was in truth registered at Moosomin, was due to the fact that the boundaries of the registration district had in the meantime been altered by order in council.

I hold that there was a wrongful conversion. See *Jones* v. *Dowler* (1842), 11 L.J.Ex. 52, 9 M. & W. 19, and *Driffil* v. *M'Fall*. 41 U.C.Q.B. 313, in which the leading cases are reviewed. and amongst others, *The Lancashire Waggon Co.* v. *FitzHugh* (1861), 6 H. & N. 502, 30 L.J.Ex. 231, 3 L.S. 703, where it was said: "It is now settled law that the assumption and exercise of dominion over a chattel for any purpose or for any person, however innocently done, if such conduct can be said to be inconsistent with the title of the true owner, is a conversion."

I would also refer to Jones on Chattel Mortgages, 4th ed., p. 447, where the principle laid down with reference to mortgaged chattels will apply to all chattels on which there is a lien.

This is an unfortunate matter, as the defendants acted in good faith, and even endeavoured to make assurance doubly sure by going a second time to the Clerk's office at Arcola. It did not occur to them that the registration district might have been altered. On the other hand, those horses were the plaintiff's, he had a lien thereon, he had registered his lien, he made repeated demands for the return of his property, he was equally in good faith, and when he stated that the note was registered at Arcola it did not occur to him either, any more than to the company, that there might have been a change in the boundaries of the district.

I value one of the horses at $200 and the other at $175, which is the price Otto Reinholz paid for it to the man who had bought it from the bailiff. The other damages I value at $40.

[TRIAL.]

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Sale of Lands—Specific Performance—Tender—Payment Garnisheed—Tender of Balance—Sufficiency—Laches—Waiver—Time Essence of Agreement—Intention of Parties.

Plaintiff agreed to purchase certain land from the defendant and made the first payment thereon, it being also understood that the defendant should retain possession for some time. Before the second payment became due the plaintiff was served with a garnishee summons at the instance of a creditor of defendant, and pursuant to such summons paid into Court the amount attached. When the second payment became due plaintiff tendered the amount less the amount attached, which defendant refused to accept, apparently basing his refusal on the deduction of the amount paid into Court. Nothing further was done until the time came for the defendant to deliver possession, when several conferences took place, during which the plaintiff asked for a definite statement from the defendant as to his intentions, stating that he must have the land or his money back. At the last of these conferences the defendant, without committing himself, promised to give an answer later. He never made any further communication. The plaintiff did not tender the next instalment, and about a year after the time when he should have received possession he brought action for specific performance. After action brought the defendant served notice of cancellation. In an action for specific performance:—

Held, that an instalment due under an agreement for sale containing a covenant by the purchaser to pay is a debt which is attachable.

2. That tender of the balance of the instalment after deducting the amount paid into Court was a sufficient tender.

3. That the defendant's conduct in refusing to give a definite refusal to complete the contract and deliver possession, and promising an answer which he never gave, would excuse any laches on the part of the plaintiff in claiming relief.

THIS was an action for specific performance of a contract for sale of land, and was tried before PRENDERGAST, J., at Arcola.

A. M. Matheson, for the plaintiff.

Jas. Balfour, for the defendant.

September 29. PRENDERGAST, J.:—This is an action for rectification and specific performance of an agreement for the sale of land.

It is admitted that the words "the south-west quarter" in the description of the property in the said agreement were intended to be and should be "the north-west quarter," and that is all that is sought to be rectified.

In the fall of 1907, the defendant listed for sale the quarter section on which he lived, with one Naismith, a real estate agent, at $3,000 nett, the agent to have as commission whatever he could get over that.

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The agent found a purchaser in the plaintiff at $3,120, and the parties on October 7th signed a memorandum of agreement (exhibit A), the defendant at the same time receiving ten dollars on account. The land is therein described as "the north-west quarter of section 20," etc., which is, it is admitted, the quarter which both parties had in mind.

On October 14th the parties executed an agreement for sale under seal, which is the subject of this suit. It is dated October 7th, 1907; the land is therein described as "the south-west quarter" (instead of "the north-west quarter") of section 20, etc., and the consideration and conditions of payment are set out as follows: " . . . at and for the price and sum of three thousand one hundred and twenty dollars of lawful money of Canada payable in the manner and on the days and times hereinafter mentioned that is to say: One hundred and ten dollars ($110.00) in cash at the execution of these papers, the receipt of which is hereby acknowledged. Eight hundred and ninety dollars on December 1st, 1907; four hundred and eighty dollars on December 1st, 1908; four hundred and seventy dollars December 1st, 1909; four hundred and seventy dollars December 1st, 1910. Seven hundred dollars from proceeds of loan which is being executed with the Trust and Loan Company, Regina; the repayment of which the said John H. Campbell assumes."

There is also a clause declaring time to be of the essence of the agreement, and providing for rescission by the vendor giving written notice in case of the purchaser's default in any of the conditions.

Of the cash payment of $110, the receipt of which is acknowledged in the agreement, only ten dollars was actually paid in money, and the balance in the following manner: the agent, in consideration of the fact that the instalments in the agreement were more extended than in the memorandum, reduced his commission from $200 to $100, and allowed this $100 to go in satisfaction of the balance of the cash payment, the defendant having already received ten dollars on signing the memorandum. (This, I may say, at the same time amounted to a loan that the agent was making to the plaintiff, and the plaintiff secured him for the same by a note.) I have no shadow of a doubt that this arrangement, which was convenient for all parties, was perfectly understood and agreed to by the defendant, and that he considered that this cash

payment was made then and there to all intents and purposes, just as the agent considered that he was then and there being paid for his commission. This is further shewn by the defendant never asking thereafter for this first payment, and also by that part of his evidence where he says that on December 2nd he was willing to accept the amount of the second payment then falling due with interest,—meaning evidently that he was ready to accept that in satisfaction of all that he considered was due up to that date.

Some time later, on November 30th as I judge, the plaintiff was served with a garnishee summons for $203.75 in a District Court action wherein the Moose Mountain Lumber and Hardware Co. were plaintiffs and the defendant herein defendant.

The second payment, being $890 and interest, is declared in the agreement to be payable on December 1st, but that was a Sunday. On Monday, the 2nd, the plaintiff went to see the defendant. He did not find him at home, but found him at ten or eleven in the evening at a neighbour's residence where there was a social gathering. The plaintiff, who was accompanied by one McKee, called the defendant outside and told him to go and get a light, that he would pay him his money on the place. The defendant replied that he would not bother with it that night, and that he would call at his (the plaintiff's) place next morning. On Tuesday morning, as agreed, the defendant called on the plaintiff. The latter explained to him about his having received a garnishee summons from the Moose Mountain Lumber and Hardware Co., and tendered him a certain sum of money as the balance coming to him on this second payment. The defendant says: "He offered me one dollar. That is all I saw, and he was quite close to me. I was willing to take $890 and interest. When Campbell spoke of the garnishee, I asked him how he was authorized to hold $250 of my money." The plaintiff's evidence, on the other hand, is as follows: "MacKinnon said he would not take it. He said it was on account of the garnishee that he would not take it, and they had no business putting that much costs on him. I said that I would like to have him paid. He said that he would not take the money; that he would not do anything about it that day. He did not say when he would do anything about it." The plaintiff swears that he had got over $800 at the bank at Stoughton the previous week, and that he tendered the plaintiff that morning

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$645.45, as being the balance left on the payment of December 1st after deducting the amount attached, and adding thereto interest as called for by the agreement. The plaintiff's evidence is substantially corroborated by Richard McKee, and I take it, with all reasonable certainty, to be the correct version of the incidents of that meeting.

The plaintiff, on the same day, it seems, sent a letter (exhibit 1) to the defendant, advising him that he was leaving the $645.45 with the Naismith Implement Co. at Heward (which is the post office address of both parties) to be paid to him on demand, and that he would pay the balance of $253.75 into Court, which two payments the plaintiff made as stated, except that it would perhaps appear in another part of his evidence that he only paid into Court $250, which, however, would not affect the issue. What has since become of the $645.45 does not appear.

Some time later in the course of the same month, probably about the 15th, upon the error of description in the agreement being discovered, Naismith saw the defendant to have the matter straightened out; but the latter refused, saying (as one Sullivan was the owner of the south-west quarter mentioned in the document): "If I like I can get Sullivan's quarter delivered, but I won't change it." About the same time, the plaintiff, accompanied by one Handley, who also gave evidence, went to the defendant and presented to him for execution an agreement (exhibit C) already executed by himself, and which is in every particular similar to the one sued upon except the description reads "the north-west quarter" instead of "the south-west quarter," but the defendant refused to execute it.

Then, some months passed without anything being done. The plaintiff explains, in this respect, that the defendant had at all events the use of the buildings till April 1st, 1908. The defendant, on the other hand, after affirming that the plaintiff asked him to sign a new agreement only in October, 1908—in which he is manifestly wrong—says: "In the winter of 1907-08, I was waiting to see if he would not take out a new agreement," a phrase which, when read with the rest of his evidence, will appear at the same time as both uncandid and senseless, as so many others of his statements.

Some time in March, 1908, the plaintiff was served with another

garnishee summons for $143.04 in a suit of the Massey Harris Co. against the defendant. The plaintiff says in this respect: "I arranged with the Massey Harris to wait until such time as I got the farm, but they didn't release me."

About April 1st, 1908—the date up to which the defendant had the privilege of using the buildings—the plaintiff asked him if he was not going to give him possession of the whole thing; to which the defendant replied that he was in possession of the farm and was going to stay on.

Two or three weeks later, however, which would be about April 20th, the defendant went to see the plaintiff at the latter's place, and the conversation which took place then was in the presence of John L. Handley.

The defendant admits that he spoke first by asking the plaintiff, "What about the farm?" but sums up the whole conversation as follows: "I asked him, 'What about the farm?' He said he had not heard from Naismith and did not know anything about it. He asked me to let him know if I was going to let him have the farm. Later on, he said he did not want the place." It is to be noted here that, on the defendant's own evidence, it was he who opened the conversation and that he went to the plaintiff's place for the purpose, which shews that he had not yet definitely taken his position as to refusing to give up possession.

The plaintiff's version, which is wholly corroborated by Handley, is very different. It is as follows: "He came down and said, 'Campbell, how about our deal with this farm?' I said, 'I have not gone to any trouble, but I want my money back or the farm.' He said, 'What money have you got?' I said, 'I have the money in the bank, but if I get the farm I want it in time to put the seed in.' He said, 'I do not know.' I said I learned his wife did not want to leave the farm, and if she would not leave, to give me back my money, but I'd rather have the farm. He said, 'I will be here again; I am going to work and will let you know'—meaning if he was going to keep the farm. That is the last I ever heard about it."

Handley says: "Campbell said he wanted either the place or his money, and that he wanted time to put in his crop. He said, 'I do not want to take the place from Mrs. MacKinnon if she won't leave it; but I want my money, or I will pay you your balance."

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As stated by the plaintiff, that was the last he heard about it. The defendant has ever since remained in possession of the farm.

Some time in the fall of 1908, the defendant paid $56 as interest on the mortgage to the Trust and Loan Co. which the plaintiff assumed under the agreement. He seems, however, to have paid it with an eye to this suit, for he says in his examination for discovery (p. 14): "I sent the money way before it was due." Neither had he given notice to the plaintiff of that payment, and in fact it was not shewn to me that any money became payable to the Trust and Loan Co. before action was brought.

On December 1st, 1908, the third instalment, being $480 and interest thereon, became payable, and was not paid by the plaintiff.

On February 3rd, 1909, the writ herein was issued, and on the 17th of the same month the plaintiff was served with notice of cancellation (exhibit 2).

The performance which the plaintiff prays for is delivery of possession, and he also claims damages and mesne profits.

The defence is that "the plaintiff has failed to carry out the terms of the said agreement with respect to payment of the purchase price and of the mortgage assumed by the plaintiff, and in consequence of such default the plaintiff, in accordance with the said agreement, cancelled the said agreement and declared the same null and void, and caused notices to that effect to be given to the plaintiff in the manner provided by the said agreement." The defence also states that "in view of the said default and of the delay and laches of the plaintiff, the plaintiff is estopped from obtaining the relief asked for," and there is also a prayer for a declaration that the said agreement is cancelled and determined.

First of all, with respect to the cash payment, I have already commented on the arrangement which was arrived at with respect to it, and I hold that this payment should to all intents and purposes be held to have been made.

With respect to the second payment, I hold that it was attachable although it was not yet payable. It is a debt accruing due within the meaning of rule 384 of the Judicature Ordinance. I can see no distinction in this respect between an instalment under a mortgage and an instalment under an agreement for the sale of land. I am inclined to think it would be different with an instalment under an agreement for the sale of land where the vendor

would bind himself to the usual obligations in such cases, but without any promise to pay on the part of the purchaser. This would practically be in the nature of an option, and the instalments thereunder would not be a debt accruing due, for the reason that it would not be a debt at all, there being on the purchaser's part no obligation to pay. But the agreement in the present case is just the reverse: it binds the purchaser to pay the instalments it provides for. I consequently hold that in tendering the defendant $645.45 on December 3rd, 1907, and paying into Court $253.75 under the garnishee, the plaintiff performed all that he was called upon to do with respect to the second payment.

Now, up to April 1st, 1908, no laches can be attributed to the plaintiff, and it seems to me that none could be. The defendant had reserved to himself the right to occupy the buildings until that date, and besides roaming over the fields in the winter time, there was no right that I can see that the plaintiff could claim or exercise.

But when the time came when the defendant should give up possession, the plaintiff asked him "if he was going to give up the whole thing." It is true that the defendant at first squarely replied that he would not; but he evidently thought more of it afterwards, for about April 20th we see him going to the plaintiff's place to discuss the matter with him.

I attach the greatest importance to this conversation; in fact, I think that in a large measure the case revolves upon it—as far, at all events, as laches might be otherwise a bar to the relief sought by the plaintiff. My view of it is, in short, that the plaintiff made it quite plain on that occasion that he wished for a definite understanding on the matter, that he wanted either "his money back or to pay him (the defendant) his balance," and that, in consideration of Mrs. MacKinnon being averse to leaving, he left it to the defendant to choose between the two. If the defendant did not want to leave the farm, all the plaintiff asked was "his money back," which surely is not unreasonable.

The defendant appears to have then answered the plaintiff, "I will be here again; I am going to work, and will let you know." But he never sent any answer nor intimated anything to the plaintiff until after suit, when he served him with cancellation notice.

It was pointed out that from April 20th, 1908, the date of the

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last mentioned conversation, up to February 3rd, 1909, when the action was instituted, the defendant was all the time in possession, the plaintiff did not seek relief, and he moreover made default with respect to the second time payment of $480 and interest due December 1st, 1908.

With respect to the defendant's possession, it does not seem to me that it was really adverse possession, not at all events at the beginning, and unless it became so by effluxion of time. It seems to me it was qualified by the conversation referred to. The defendant, by saying that he would come back to give an answer, and the plaintiff, by acquiescing to the defendant taking time to consider, seemed to have put the whole matter for the time being on neutral ground, as it were.

It is true that a Court of Equity as a rule refuses relief when not promptly sought for. But it is also true that the time employed by the parties in negotiating will not be computed in laches: *Southcombe* v. *Bishop of Exeter* (1846), 6 Hare. 213. I think that in this case, some further time after the conversation in question, during which the defendant was supposed to be considering his answer, should be allowed as part of the negotiations. In a case where the defendant made no reply to the plaintiff's last letter calling for a distinct answer, the Court overlooked on that account the plaintiff's delay in seeking relief: *Marquis of Hertford* v. *Boore*, 5 Vesey 719. In the present case it was for the defendant to take the next step by bringing his answer to the plaintiff. The Court will also the more readily deny the relief, when the defendant has actually refused to complete, than where "the matter has merely slept": *Guest* v. *Homfray*, 5 Vesey 518. After April 20th, 1908, the defendant never refused to complete until after action brought, and it does seem that the parties' position is that they allowed the matter to sleep. It is also true that the plaintiff did not make the payment falling due December 1st, 1908. Probably he should have tendered it. But there are these three circumstances which, taken together, the Court should make some allowance for: the defendant had refused to accept the first time payment, he had refused to rectify the agreement, and the matter was left in an indefinite shape by his not bringing in an answer.

The Court should also, of course, take into consideration the defendant's conduct in passing on the plaintiff's laches. In this

case the defendant had no grounds to refuse the money tendered to him by the plaintiff as being all that was payable on the first time payment; he was wrong in refusing to rectify the agreement; there was not a particle of reason why he should not deliver up possession when called on to do so on April 1st, 1908; he did not act frankly and openly in disregarding his promise to bring an answer to the plaintiff, and he never signified any intention of cancelling the contract until after the writ was issued. Of course, his motive seems obvious; he wanted neither of the alternatives which the plaintiff left to him to choose from; he did not want to deliver up the land, nor did he want to reimburse the plaintiff the sums of money that the latter had paid on his account.

In the special aspect of this case, it does not seem to me that it calls for consideration of the rule that though time may be declared to be the essence of the agreement, the parties nevertheless will not be bound thereby if it appear by their conduct that their intention was not that it should really be so: *Lowther* v. *Heaver*, 4 Chy. Div. 248; *Barlow* v. *Williams* (1906), 4 W.L.R. 233. The case seems to come rather within the rule laid down in *Guest* v. *Homfray* just referred to.

The last time, however, that the evidence shews that the parties communicated together, is on April 20th, 1908. When they parted on that day the proposition was pending as to whether the agreement should be rescinded by the defendant repaying the plaintiff the money he had been made to pay out on the transaction, or whether the plaintiff should have possession and the terms of the agreement be carried out. The choice, as stated, was left with the defendant. There has not been since then even the slightest intimation by the one party to the other of what his intentions might be; and while it is true that the defendant has remained in possession, it is also true that it rested with him to make the matter plain one way or the other, and he did not.

I think substantial justice will be best served by putting the parties back to the position they occupied on the said 20th of April, and from which neither gave notice to the other that he intended to recede.

The defendant will have the option, as he had then, of having the agreement cancelled by paying the plaintiff his money; and if the defendant does not choose to do so, then the plaintiff will be

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put in possession upon payment of all sums due under the agreement.

In the first contingency, the defendant will have to refund the cash payment made under the arrangement I have at first explained, as well as the amount paid under the garnishee summons in the cause of the Moose Mountain Lumber and Hardware Co. He will not have to pay the amount of the garnishee order in the suit of the Massey Harris, as I understand from the plaintiff's evidence that the said firm have agreed not to press their claim in case he did not ultimately come into possession of the land. In the second contingency, I have made allowance neither on the one hand for the increase in breaking since April 20th, 1908, nor on the other for mesne profits since the same date, as it is due to the laches of the parties respectively claiming the same that the question arises,—and I may moreover say that it appears that the two just about compensate each other.

There will be an order rectifying the agreement as prayed for.

Upon the defendant depositing within three months into Court, subject to further directions, the sum of $110 and legal interest thereon since October 7th, 1907, and paying to the plaintiff the sum of $253.75 and legal interest thereon since December 1st, 1907, together with costs of this action, the agreement will be annulled and rescinded.

And in default of the defendant paying the said sums as aforesaid there will be a reference to the local registrar to ascertain the sums then due by the plaintiff under the said agreement, and upon the plaintiff depositing into Court within three months the amount so found to be due, less the taxed costs of this action, there will be an order that the defendant vacate the premises described in the agreement as rectified, and that the plaintiff be put into possession.

[TRIAL.]

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Oct. 1.

BELL BROTHERS v. THE HUDSON'S BAY INSURANCE CO.

Fire Insurance—Premium—Payment by Bill of Exchange—Default in Payment of Bill—Effect of—No Notice of Loss—Notice a Condition Precedent—Waiver of Notice—Appointment of Adjuster—Effect of.

Plaintiffs insured in the defendant company against loss by fire a stock of goods for $2,000. The application contained a clause that if the premium was not paid as agreed the insurance should be void until "such settlement is made." The premium was never paid in cash, but a bill of exchange was drawn upon plaintiffs and accepted by them, but this was never paid. The property was shortly afterwards destroyed by fire. The policy contained one of the statutory conditions, namely, that the insured should forthwith after loss give notice to the company in writing. No such notice was given by the insured, although the company's agent gave notice and told plaintiffs he had done so. It was contended, however, that notice had been waived: first, because the company did not draw attention to the omission; second, because they sent an adjuster to adjust the loss; and third, because the manager of the company made an appointment to discuss the claim. The policy, however, contained a clause that no condition should be waived except in writing. The policy also required that the proofs of loss should shew when and how the fire originated to the best of the claimant's belief, while in the proof of loss filed the claimant stated the cause of fire to be unknown, while from his examination for discovery it appeared that he believed it started from an explosion of the furnace. In an action to recover the amount of the policy:—

Held, that the defendant, having drawn a bill of exchange upon the plaintiffs which was by them accepted and became a floating security which might be passed from hand to hand, must be deemed to have accepted "settlement" within the meaning of the terms of the application.

2. That compliance with the term of the policy requiring notice of loss was a condition precedent to the right to recover, and while if some sort of notice had been given which was defective the Court might possibly relieve, yet no such relief could be granted where there was an absolute non-compliance.

3. That the acts pleaded in support of waiver were not sufficient to support the plea, but in any event the policy provided that no waiver should be effective unless in writing, and there being no writing that would constitute a waiver, the plaintiffs could not succeed on that ground.

4. That the proofs of loss were insufficient, as the statement of the cause of the fire being in the belief of insured unknown, was untrue.

THIS was an action to recover the amount of a policy of fire insurance, and was tried before WETMORE, C.J., at Regina.

J. A. Allan, for the plaintiffs.

G. E. Taylor and *Hare*, for the defendants.

October 1. WETMORE, C.J.:—This is an action upon a policy of insurance made by the defendants the Hudson's Bay Insurance Company Limited (hereinafter called the old company) in favour of the plaintiffs, Bell Brothers, on a stock of merchandise alleged to be contained in a two-storied brick-veneered building with metal

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roof occupied by the assured as a general store, and situated on lot 14, block 20, north side of Derward street, between Fifth and Sixth streets, in Sintaluta. The amount so insured on this stock was $2,000. The policy is dated September 17th, 1907, and insured the property from that date at noon until September 17th, 1908, against damage by fire. The amount of premium agreed to be paid was $66.

On November 25th, 1907, the property insured and the building in which it was situated were entirely destroyed by fire. The statement of claim sets forth the policy, and that all things had been done and all times had elapsed and all conditions performed to entitle the plaintiffs to recover the amount of the loss under it.

The defendants the Hudson's Bay Insurance Company (hereinafter called the new company) were incorporated and took over the assets and liabilities of the old company, including its liability under this policy. The defendants set up in the first place that the plaintiffs Bell Brothers had never carried on business at Sintaluta or elsewhere in the Province of Saskatchewan, and that the defendant Chapman was not the owner or possessed of the real estate referred to in the statement of claim. The statement of claim alleges that the policy in question with the right to the money thereunder was assigned to Chapman. Why the allegation that Chapman was not the owner or possessed of the real estate referred to was made I am utterly at a loss to understand, because it was not alleged that he was. However, I practically find the whole of that matter of defence against the defendants. I find that Bell Brothers, at the time the insurance was effected, and at the time of the fire in question, did carry on business at Sintaluta. Whether Chapman was the owner or possessed of the real property in question is immaterial, in so far as that paragraph of the defence is concerned.

In the next place, the defendants pleaded that the Hudson's Bay Insurance Company, Limited never insured or agreed to insure the goods and chattels referred to in the statement of claim, or any goods or chattels on behalf of the plaintiffs Bell Brothers, and never made or executed the policy of insurance in the statement of claim referred to. All that it is necessary to say is that I find the issue joined upon that paragraph of the defence also in favour of the plaintiffs.

In the next place they pleaded that if they did make or execute such policy of insurance the plaintiffs never performed the agreement and conditions contained in the said policy or any of them, or paid the sum of $66, the premium therein mentioned, and that the said agreement to insure was made without consideration and was not binding on the said defendants.

If the defendants by this paragraph intend to set up in a general way that the conditions contained in the policy to be performed on the part of Bell Brothers were not performed, I hold the pleading to be, in that respect, too general, and I will therefore limit the allegation set forth in it to a denial of the payment of the $66 premium.

The application for the policy in question contained a clause as follows: "If the premium is not paid as hereinunder agreed, this insurance to be held void until such settlement is made." The premium never has been paid in cash, but the defendants, the new company, who then had charge of the matter in question, after a considerable amount of correspondence upon the subject in which they were urging Bell Brothers, through their agent Stauffer at Sintaluta, to pay the premium, eventually, on the 16th October, 1908, drew a draft upon Bell Brothers in favour of the Bank of Hamilton, Moose Jaw, for $66, the amount of this premium, payable on November 1st, after date. Bell Brothers accepted this draft, but the amount was never paid, either at maturity of the draft or since. The attorney of Bell Brothers, however, after the fire, tendered the amount with interest to the defendants, who refused to receive it. The fact of the tender made at that date does not affect the question which is now being considered, because if the omission to pay before the loss occurred avoided the policy, a subsequent tender would have no effect whatever, unless, of course, the amount of the tender had been accepted.

It was urged that because this premium had not been paid the policy was void, and a number of cases were cited alleged to be in support of that proposition. I have carefully read these cases, and I am of opinion that they do not bear out the contention for the defendants. Under these cases there was an express provision, either in the policy or upon the face of the note, or in some collateral agreement, that failure to pay any note given for the premium should avoid the policy. There was no such provision in the policy

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in question or in the note which was given, or in any other writing. The application merely contained the clause which I have quoted above. I think, reading between the lines in the cases cited by the defendants, that it can be gathered that if there had not been such a provision avoiding the policy in case of nonpayment the giving of a note would have been held equivalent to payment. I am of opinion that the requirements of the clause to which I have referred have been filled. Strictly speaking, perhaps, there has not been a payment of the premium (although I would hesitate a good deal before I would hold that there has not), but there has been unquestionably a settlement. A settlement need not necessarily mean payment. A settlement is an adjustment of the amount that is due, and the defendants having drawn the draft which was accepted, and which is a floating security that may be passed from hand to hand, it seems to me idle to contend that a settlement has not been made. I therefore find against the defendants on the third and fourth paragraphs of their defence. I will only add that the allegation in the fourth paragraph that there was an agreement that *if the premium should not be paid* the policy should be void is not correct—the language of the clause in question is as I have stated.

By the tenth paragraph of the defence the defendants have pleaded that no notice of loss was given to the company in writing forthwith after the said loss. Paragraph (a) of condition 13, one of the statutory conditions which is contained in the policy, provides that the insured "is forthwith after loss to give notice to the company in writing." It is quite clear this condition was not complied with, and it is equally clear, in my opinion, that unless the plaintiffs are assisted by Ordinance, ch. 16, of 1903 (first session), the omission to give this notice would be fatal to their right to recover. *Employers Liability Assurance Corporation* v. *Taylor* (1898), 29 S.C.R. 104; *The Atlas Assurance Co.* v. *Brownell, Ibid.* 537; *Commercial Union Assurance Co.* v. *Margeson, Ibid.* 601, establish that compliance with a condition of that character is a condition precedent to the right of the insured to recover unless such compliance has been waived.

It was urged here that there has been a waiver on the part of the defendants of compliance with this condition (as well as with other conditions which I will have occasion to refer to hereafter): first, because the defendants did not notify Bell Brothers of the

omission; secondly, because they sent an adjuster to adjust the loss; thirdly, because the manager of the new company wrote Bell Brothers stating that he would endeavour to be in Sintaluta on the Tuesday following the date of the letter to meet them in relation to the matter of their claim. I cannot bring my mind to the conclusion that any of these acts or omissions amounted to waiver. In so far as the first act or omission is concerned, "waiver cannot be implied from mere silence": Taschereau, C.J., in *Hyde* v. *Lefaivre* (1902), 32 S.C.R., at p. 478. There were other insurances upon this property, and an adjuster was appointed by those other companies to adjust their losses, and the defendant company through their agent requested the same adjuster to adjust the loss in so far as they were concerned. That was not a matter, however, between the defendants and the assured at all. It was a matter entirely between the defendants and their own officers and employees. A so-called adjuster, to use the language of Sedgwick, J., in *The Atlas Assurance Co.* v. *Brownell*, (1899), 29 S.C.R., at p. 545, "was simply appointed to make inquiries, investigate and report to his employers what in his view was the amount of loss sustained," and such an appointment cannot be construed as amounting to a waiver. The manager's letter concedes nothing. It could not possibly alter the situation of Bell Brothers. It was written over five months after the fire occurred, and over four months after the proofs of loss had been put in, and merely stated in effect that he would give the plaintiffs an interview. I cannot conceive how that could possibly be construed as in any way implying a waiver. But that which I now propose drawing attention to is, in my opinion, conclusive on the subject. One of the statutory conditions (No. 20) of the policy is as follows: "No condition of the policy either in whole or in part shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing signed by an agent of the company." There was no writing that filled the requirements of that condition. In *Logan* v. *Commercial Union Insurance Co.* (1886), 13 S.C.R. 270, there was a condition in the policy that "no one of the conditions or stipulations either in whole or in part shall be deemed to have been waived by or on the part of the company unless the waiver be clearly expressed in writing by indorsement upon the policy signed by the agent of the company at Halifax." That provision was similar

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in its general character to condition No. 20 in the policy under discussion. It was attempted to rely upon a waiver in that case, but Ritchie, C.J., held that the provisions of the condition which I have just quoted not having been complied with was conclusive against the alleged waiver, and the other members of the Court seemed inclined to the same opinion. In *Atlas Insurance Co.* v. *Brownell* (cited above), there was a similar condition in the policy. It was held that the conditions could not be considered waived unless the waiver was brought within the provisions of that condition, and that was followed in *The Commercial Union Assurance Co.* v. *Margeson* (1899), 29 S.C.R. 601. I have been referred to *Shera* v. *The Ocean Accident and Guarantee Corporation*, 32 Ont. Rep. 411, as authority for the proposition that compliance with the paragraph I am discussing respecting notice of loss is not a condition precedent to the right of recovery in the policy. With all deference to the eminent Judge who decided that case, I am of opinion that the decision in that respect is opposed to the decisions of the Supreme Court of Canada which I have cited. I am therefore driven to consider whether, in so far as the omission to give notice in writing to the defendant is concerned, the plaintiffs are aided by Ordinance, ch. 16, 1903 (1st session).

I was disposed to think in the first instance that this Ordinance might assist the plaintiff, but upon a closer reading of it I have reluctantly come to a different conclusion. Section 2 is as follows: "2. Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in the Territories, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith, by or on behalf of the assured in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective and so from time to time, or where for any other reason the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should

be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof, as the case may be, shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the coming into force of this Ordinance."

If some sort of notice had been given by the plaintiffs to the company and that had been defective, I might possibly see my way clear to grant relief—that is, to apply the provisions of this section in aid of the plaintiff's right to recover, but that section seems to me to require some sort of document, notice, or proof, as the case may be, to be delivered, and if that document is defective then it might be cured under the section. But if there is no compliance at all with the requirement of the condition of the policy, then the section will not apply, and I am driven to apply the common law principles under the authorities which I have cited. In this case no notice of loss was given at all. What did happen was that the defendants' agent, entirely at his own instance and without any instruction or direction from the insured, sent notice by telegram and subsequently by letter to the head office of the loss, and he, it is true, informed the plaintiff that he had done so. That does not fulfil the requirements of the condition to which I refer. That condition requires the notice to be sent by the insured. He is the party to give it, and it is not satisfied by someone else giving it. This objection may be technical; it may create a hardship. All I can say is that it is a statutory provision which the defendants had a right to put in their policy, and in my opinion must be complied with.

As I read paragraph (a) of clause 13 of the conditions, it has reference to one notice which is required to be delivered. Then by clauses (b) and (c) the insured is called on to deliver another statement which amounts to proof of loss. One is notice of loss and the other is proof of loss, and one is entirely independent of the other. I was referred to *The City of Kingston* v. *Drennan* (1896), 27 S.C.R. 46, and *Armstrong* v. *Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560, in support of the proposition that the Ordinance will permit me to give judgment for the plaintiff if I think substantial justice requires it notwithstanding the omission to give notice, but, as I have pointed out, the language of the Ordinance

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does not, under the circumstances of this case, permit it. The authorities referred to in the two cases cited expressly gave the Judges the power which it is suggested I have under the Ordinance. If I am at liberty under the Ordinance to relieve against the omission to give the notice, then paragraph (a) of clause 13 is practically a useless clause as a condition precedent to the right of recovery under the policy, because, in view of the means now available for disseminating news, a case can hardly arise when immediate knowledge of the fact of the fire from other sources than the insured could not be brought home to the company. The clause in the policy is authorised by the Ordinance, and I cannot see my way clear to hold that it is inequitable on the part of the company to set up an utter non-compliance with a condition *so authorised by the Legislature*, and which, in my opinion, in the light of decided cases, I must hold to be a condition precedent to the right to recovery under the policy. I have also been referred to *Robins* v. *The Victorian Mutual Insurance Co.*, 6 Ont. App. 427. The question of the construction to be put on sec. 2 of ch. 162 of Con. Stat. of Ont. (1877), arose in that case. That section is identical with sec. 2 of the Ordinance. I distinguish that case from this because in this case there was no compliance whatever with the particular condition; in the Ontario case there was an attempt to comply with the condition, and the decision went in favour of the plaintiff on the ground that non-compliance with the terms of the condition was the result of a mistake or accident. Patterson, J., at p. 437, divides the operation of the Act into three cases, and it will be observed that he, as well as the other Judge, question whether the third case—namely, the power of the Judge, if he considers it inequitable, that the insurance should be held void, to hold it valid — is so far reaching as might at first glance be supposed.

There is another matter to which I will draw attention, although, perhaps, it is not necessary for me to do so in view of the conclusion which I have reached. Paragraphs (b) and (c) of clause 13 require proof of loss to be furnished with a statutory declaration declaring that the account is just and true, and also "when and how the fire originated so far as the declarant knows or believes." The assured did furnish what purports to be proof of loss, which was made by the plaintiff George R. Bell, in which he states that the origin of the fire is unknown.

The reason I particularly draw attention to this branch of the case is that clearly sub-paragraph 2 of paragraph (c) of clause 13 of the statutory conditions was not complied with. The declarant, George R. Bell, swore at his examination for discovery, "the furnace exploding was the only reason that I could give for it" (that is, for the fire), and then he testified that he always believed that that was the cause of the fire, and that he was so satisfied immediately after the fire. He stated that that was what he said all along, and that that was correct, and that he always believed that the fire originated in the furnace and that that was the cause of it. His statement that the cause of the fire was unknown might be strictly true, but at the same time he had a belief that it was caused by an explosion from the furnace, and he must have had that belief at the time he made the proof of loss, and he did not in that proof of loss or in the declaration made with respect thereto state such belief. This is a very serious non-compliance with the conditions of the policy. It is more particularly true in this case because it was set up at the trial as one of the matters of defence to this action that the plaintiffs (the declarant particularly) was aware of the explosive character of the coal he was using, that he had seen flames "gush out," as he expressed it, when he opened the furnace door, and it was claimed that the plaintiffs could not recover in this action because of their carelessness with respect to the manner of dealing with coal of such an explosive nature. I make no ruling upon the question of this carelessness as a matter of defence. I merely refer to it for the purpose of shewing what an important element the statement of George R. Bell's belief in connection with this matter was in handing in his proof of loss.

It is set up, however, that in so far as this matter is concerned the defendants, having got proof of loss, did not notify the plaintiffs that they objected to it by reason of the omission of G. R. Bell's belief. I am inclined to think that is not just a matter where they could have given a notification to that effect, because I cannot see that the defendants were bound to take notice that he had any belief at all, inasmuch as he did not state it. I think they were fairly justified in assuming that he had no belief on the subject, and therefore they were not called upon to ask him what his belief was. Again, it may be set up that equitable justice would require that judgment be given for the plaintiff notwithstanding this

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omission because the defendants were not prejudiced by it. In my opinion this is not a case where that could be applied. These statutory conditions mean something, and it seems to me that where a person has omitted from his proof of loss such an important matter as this is (an omission which does not suggest an injury), that he must take the consequences. I think that, with all the respect I have for the legislation, there must be a limit. People must not run away with the idea that no matter how slipshod they make their proofs, and no matter what they do or omit to do, the Courts will throw the doors wide open and give them relief.

I draw attention to the fact that had this declarant stated his belief in this respect, who knows that, with the matter fresh in the minds of the people in the neighbourhood, what information the defendants might have got with respect to the carelessness and negligence of the plaintiffs in this respect? It is not necessary for me, having reached this conclusion, to enter into further consideration of the case.

I am of opinion that judgment must be entered for the defendants with costs, but as they have seen fit to plead a whole lot of matter, some of which is entirely unnecessary and some of which is untrue, I will, so far as I have been able to go into them, give the costs of these matters against them. I think it quite time that something should be done to discountenance the practice which is sometimes followed of lumbering up the pleadings with pleadings false in fact or immaterial. It only serves to cast unnecessary and useless work on the Judge trying the cause in sifting out what is really in issue from the chaff with which it is surrounded.

There will be judgment for the defendants with the general costs of the action.

The plaintiffs will be allowed the costs exclusively applicable to the issues arising out of the issues joined in the 1st, 2nd, 3rd, 4th, 8th, 9th, 12th, 13th, 17th and 21st paragraphs of the statement of defence, and nothing shall be taxed to the defendants arising out of such paragraphs. The costs so allowed and taxed to the plaintiff will be set off against those taxed to the defendants, and the defendants shall have execution for the balance.

[TRIAL.]

ROBERTSON v. HOPPER AND TRUSTEES OF GLEN MORRIS SCHOOL DISTRICT.

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Oct. 15.

Distress—Arrears of Taxes Due School District—Unlawful and Excessive Distress—Assessment of Interest of Occupant of Crown Lands—Regularity—Distress for a Greater Amount than Actually Due—Regularity of—Excessive Seizure.

Plaintiff had been for a number of years an occupant of Crown lands for which he had been assessed by the school district. No taxes were paid by plaintiff, and other parties subsequently assessed for the same land paid none. In 1908, these taxes being unpaid and the plaintiff having 73 head of horses on the land, the defendant school district authorized the defendant Hopper to seize the goods of plaintiff and the other occupants for such arrears. In pursuance of such warrant Hopper seized 73 head of horses belonging to plaintiff and 2 belonging to the other occupants. At most there was only $200 due for taxes. The proceedings connected with the seizure appeared to be regular. It was objected, however, that the assessment was irregular, but it had not been appealed from, nor were any grounds laid which would invalidate all the assessments. In an action for trespass and excessive seizure:—

Held, that while Crown lands cannot be assessed, yet the occupant thereof can be assessed in respect of his interest therein.

2. That even if certain of the assessments were irregular, some of the taxes were properly due, and distress for a greater amount than that actually due is not *per se* actionable.

3. That the seizure of 73 head of horses to satisfy a debt not exceeding $200 was an excessive distress for which the plaintiff was entitled to damages.

THIS was an action for wrongful and excessive distress, and was tried before PRENDERGAST, J., at Arcola.

E. W. F. Harris, for the plaintiff.

A. E. Vrooman, for the defendant.

October 15. PRENDERGAST, J.:—This action is based on the seizure of 73 head of the plaintiff's horses, made by the defendant Hopper, as bailiff, for the defendant trustees, for school taxes.

Although the action purports by the statement of claim to be for unlawful seizure only, I shall treat it also as being for excessive seizure, as this is set out in the plaintiff's reply, and the defendants did not move to have the same struck out, but joined issue thereon.

There were two distress warrants addressed to Hopper by the other defendants on October 20th, 1908, one of them reading as follows: "Distrain the goods and chattels of Hume Robertson in and upon section 29 township 8 range 2 west of the second meridian in the Province of Saskatchewan and also distrain any goods and

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chattels found upon the said lands and premises the property of or in the possession of any other occupant of the said lands and premises for the sum of eighty dollars being the arrears of school taxes due to Glen Morris school district No. 436 for the years 1902, 1903, 1904 and 1905, by the said Hume Robertson as the occupant of the said lands, together with legal costs, etc."

The other warrant is in the same words, except that "Richard W. Hamill and John Abercrombie" are substituted for "Hume Robertson," "$120" for "$80," and "the years 1906, 1907 and 1908" for "the years 1902, 1903, 1904 and 1905."

On October 23rd, pursuant to the said warrants, Hopper proceeded to the said section and seized all the horses thereon, being 75 head, of which 73 belonged to the plaintiff, by locking up the gates of the pasture field in which they were. He appears to have at the same time posted up on the pasture fence two notices of sale and two inventories (that is to say, one conformably with each warrant), to have served copies of the same on the same day upon the plaintiff as well as Hamill and Abercrombie, and to have also posted up copies of the notices of sale in four public places in the district.

With reference to having seized the whole band of horses, Hopper says in evidence: "They were mostly colts . . . they were wild . . . they were all mixed up and I did not know which was which, whose they were. If there had been two or three I could have taken them, but as they were I might have lost some. I thought I was acting in a way to do the least damage."

At all events, on October 31st the sheriff claimed the horses under a writ of replevin, and Hopper thereupon delivered them over to him.

The rolls shew that the plaintiff was assessed for the said section in the years 1902, 1903, 1904 and 1905, and he appears charged therein with twenty dollars each year, making a total of $80, which is the amount claimed in the warrant in which he is named.

The rolls also shew that Hamill and Abercrombie were assessed for this land in the years 1906 and 1908; and they appear charged in 1906 for $39.93, and in 1908 for $40. (The treasurer of the district admitted in evidence that Hamill and Abercrombie were not assessed in 1907.) So that the most that they could owe would

be, in round figures, $80, and not $120, as the warrant with reference to them calls for.

This section of land, I should say, belongs to the Crown.

Now, the plaintiff says that he for the first time put horses on that land on July 12th, 1902 (which would be about three months after the closing of the roll), and that he got no assessment notice for that year; that in 1903 he got notice; but that having gone to the school house at the time the notice stated the trustees would be there, he found the place locked, and that in 1904 and 1905 he may have had notice but had only a few horses on the place. He admits, however, having had tax notices for all the years, the last three shewing arrears besides the current taxes, but says that he had complained verbally to the trustees, and had been left under the impression that the matter would be arranged. He says also that he stated several times that he would not pay the taxes. The treasurer of the board, on the other hand, says that he repeatedly promised to pay the taxes, and the chairman says that he promised to pay them in 1904, but said that he would not in 1906. Be that as it may, he undoubtedly never took an appeal to a justice of the peace under sec. 11 of the Ordinance.

For 1906, 1907 and 1908, of course, the plaintiff received no assessment notice, as the land was then assessed to Hamill and Abercrombie, but I understand the plaintiff to admit that he had horses there in 1906 and 1907, and he surely had there in 1908 the 73 head that were seized.

Allowing that the plaintiff should probably not have been assessed in 1902, he has failed to shew such defects in the preparation of the roll or otherwise as would relieve him of the assessments of 1903, 1904 and 1905, amounting in all to $60. Moreover, although not personally assessed in 1908, he would be liable under sec. 16 of the Ordinance, at least for the taxes of that year, $40, making a total of $100 for which the trustees could levy upon the horses.

The plaintiff had another objection, which was—as he says he stated to one of the trustees—that he did not rent the place, but just paid pasture to the party who rented it. He said that one Lindsay had the place rented from the Crown in 1902. Who had the place rented subsequently he did not state; nor did he shew, nor attempt to shew, that the conditions under which he paid for

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pasture would not make him an occupant of the land under the Ordinance. There is nothing in all this that is ground to disturb the assessment for the years I have referred to.

Of course Crown lands cannot be taxed (British North America Act, sec. 125); but it is well settled that one's interest in the same is assessable although the land itself cannot be sold, and there is no reason why, under said sec. 16, personal property situate on Crown lands cannot be seized in satisfaction of the assessment of an interest in such Crown lands, the same as with personal property situate on land of any other class. I may here say that the present case has no analogy with *Osler* v. *Coltard* (1907), 6 W.L.R., p. 536, where the question was whether the taxes imposed on the interest of a homesteader who subsequently gives up his duties attach as a lien on the land against a subsequent occupant who in due course becomes patentee.

It seems to me that the seizure here, inasmuch as it was conducted in a regular way and there were taxes due—even if all the taxes claimed were not due—was not a nullity. The regularity of the proceedings in this case distinguishes it at once from *The Canadian Canning Co.* v. *Fagan* (1906), 3 W.L.R. 38.

In *Tancred* v. *Leland* (1851), 20 L.J. Q.B. 316, 16 Q.B. 669, it was laid down that distraining for a greater amount of rent than is due is not *per se* actionable. Of course this is for rent, and the Distress for Rent Act (1837) has given to landlords a measure of protection which does not extend to distresses other than for rent. But the reasons given by Parke, B., in the above judgment do not seemed based at all on the Distress for Rent Act, and consequently would apply to all kinds of distress.

Nor does the fact that Hopper levied at the same time and by the one act also, under a warrant against the goods of Hamill and Abercrombie, render the seizure null or irregular: see *The Governor, etc., of the Poor of the City of Bristol* v. *Waitt et al.* (1834), 3 L.J.M.C., p. 71.

On the other hand, while the sale of two horses, or three at the very most, would have satisfied the taxes due and costs, the bailiff seized 75, of which 73 belonged to the plaintiff, and that, of course, notwithstanding Hopper's explanations and reasons for proceeding as he says he did, is an excessive seizure.

The plaintiff, then, cannot recover for trespass, but is entitled to do so for excessive seizure.

I should say, in this respect, that the plaintiff duly made demand to the bailiff for the return of the horses two or three days after seizure.

The horses were surrendered to the sheriff after about eight days, which means that Hopper unlocked the pasture gates. Of course the plaintiff was deprived of the possession of the horses for that time; but he has really shewn only the very slightest damages, if any, and it moreover does not appear that the defendants were actuated by malice. The plaintiff is, however, certainly entitled to some damages: *Chandler* v. *Doulton et al.* (1865), 34 L.J. Ex. 89, and I will assess the same at $20.

There will be judgment for the plaintiff for $20 and costs.

[COURT EN BANC.]

MOORE MILLING CO. v. LAIRD.

Sale of Goods—Sale of Wheat by Sample—Right of Inspection—Rejection.

Plaintiffs purchased from defendant by sample a quantity of wheat to be shipped. The wheat was duly loaded and the bill made out to defendant, but some days afterwards the defendant, having been paid for the wheat, transferred the bill of lading by indorsement. The car was delayed in shipment, and when it reached its destination the plaintiffs found the wheat in one end of the car not equal to sample, being badly heated. The plaintiffs refused to accept the shipment, and notified defendant, who sent an agent to inspect it, and as a result of this inspection the agent requested the plaintiffs to unload the car and make the best possible out of it, which was done. The plaintiffs then brought action for damages. The defendant's evidence went to shew that the wheat was in good condition when loaded in the car, while expert witnesses for the plaintiffs were of the opinion that it must have been tough when loaded. In explanation of heating it was shewn that after the car was loaded and before the door was closed a violent rainstorm had occurred, and that the wheat in the end of the car which, from the direction of the wind, would naturally have been reached by the rain, was that which was damaged. This storm took place before the indorsement of the bill of lading. The plaintiffs having obtained judgment for damages, the defendant appealed:—

Held, that the reasonable explanation of the condition of the wheat was, that it had become dampened by the rain, and as this took place while the wheat was still at the risk of the defendant, the plaintiffs were entitled to recover.

2. That the true measure of damages was the difference between the price agreed to be paid for the good wheat and the amount realized from the sale of the damaged wheat.

EN BANC. 1909

MOORE MILLING CO. v. LAIRD.

THIS was an appeal from a judgment for the plaintiffs given by Lamont, J., and was argued before the Court *en banc* (WETMORE C.J., PRENDERGAST, NEWLANDS and JOHNSTONE, JJ.), at Regina.

J. F. L. Embury, for the appellant: The wheat in question was shipped in good condition and arrived at its destination in bad condition. The action, if any, is against the railway company, and the right to bring such action is in the consignee: Imp. Bills of Lading Act, 18 & 19 Vict. ch. 11. Delivery was made at Regina, and the respondents were responsible for all damage after delivery: sec. 22, Sales of Goods Act.

J. A. Allan, for the respondents: There was no delivery until indorsement of the bill of lading (sec. 21, sub-sec. 2, Sales of Goods Ordinance), and the respondents had no opportunity of inspecting and accepting until the arrival of the car at its destination: Sales of Goods Ordinance, sec. 33. The learned trial Judge has found that at the time of delivery the wheat was not in good condition, and the Court of Appeal will not interfere with that finding. The wheat having been so delivered in bad condition without inspection or acceptance by the respondents, they are entitled to recover damages, and the measure thereof is correctly set out by the trial Judge, as the respondents are entitled to be placed in the same position as if the contract had been performed: *Robinson* v. *Hanna* (1848), 1 Ex. R. 855; Enc. Laws of England, 2nd ed., vol. 4, p. 317 *et seq.*

July 9. The judgment of the Court was delivered by WETMORE, C.J.:—The defendant sold to the plaintiffs, by sample, a carload of wheat, containing, or to contain, No. 2 Northern wheat and No. 3 Northern wheat. The wheat was to be shipped from Regina to Qu'Appelle station. It was loaded on a car about the 29th August, 1905. The No. 2 Northern wheat was loaded in a compartment at the east end of the car, and the No. 3 in a compartment in the west end. The defendant made the bill of lading out to himself. On the 1st September, the plaintiffs having paid by a cheque on the Imperial Bank at Regina for the amount of grain represented by the defendant to have been in the car, the bill of lading was transferred to them by the defendant, by indorsement. Consequently the wheat was at the risk of the defendant until the 1st September. The car and its contents were conveyed by the railway company to Qu'Appelle station. The conveyance, unexplained, certainly

took an unnecessary long time. When the car was opened the No. 3 wheat was found not to be equal to the sample. It was badly heated. The plaintiffs immediately notified the defendant that they refused to receive this wheat. The defendant insisted that the plaintiffs should receive it, and practically that the grain was not damaged while it was at his risk. He subsequently sent Dr. Creamer to inspect the grain, and Dr. Creamer called in two other persons, whom he considered more experienced than himself, to assist him in the inspection, and they all agreed that the grain was in a very bad condition. These three gentlemen arrived at the conclusion that this damaged wheat should be unloaded if it was going to be any good for anything at all, and consequently Creamer advised the manager of the plaintiff company to unload the wheat, as he thought it was best to do so. The plaintiffs accordingly unloaded this grain and sold it for the best price they could get for it. It was only fit for hog feed, and the best price they could get was forty cents a bushel.

The question that first arises is—when was this wheat damaged so as to get in the condition in which it was when it arrived at Qu'Appelle? A number of expert witnesses testified that it must have been tough at the time it was loaded into the car, and it was conceded that if such was the case that would account for the state which it was in when it arrived at Qu'Appelle. Other witnesses, especially the defendant's elevator man, testified positively that the wheat was not tough when it was loaded, but was in good order.

On the 31st August, and after the wheat was loaded into the car, there was a very violent rainstorm, and the evidence established that the door on the north side of the car in which the wheat had been loaded was not securely fastened and was repeatedly open. The evidence shewed that the wind, at the time of this rainstorm, was from the east, possibly a little north of east. The No. 3 wheat, which was, as stated before, in the west end of the car, was wet when it arrived at Qu'Appelle, while the No. 2 wheat, which was on the east end, was not wet. In view of the direction of the wind, the wet was found in the grain where it would naturally be expected, and the evidence shewed that this wet would be sufficient to bring about the bad condition of the No. 3 wheat presented at Qu'Appelle.

Now, I am of the opinion that the cause of this wheat getting in the condition in which it was in when it arrived at Qu'Appelle

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occurred before the 1st of September, when the bill of lading was indorsed to the plaintiffs. It does not appear to me to be very material whether it was tough when it was laden, or whether it was caused by the rain which took place on the 31st August, as the results would be precisely the same. I may say, however, that I have individually reached the conclusion that the overwhelming weight of evidence shews that the wheat was so damaged by the rain on the 31st August, and while it was at the risk of the defendant.

There was also a shortage in both the varieties of wheat when it arrived at Qu'Appelle. The amount of this shortage is not disputed, and no question arises upon it.

The plaintiffs made up their damages as follows: They charged the defendant with the amount of their cheque on the Imperial Bank of Canada, $696.42. They credited him with 416 bushels and 50 pounds of wheat at 71 cents, being the No. 2 Northern, amounting to $295.96, and with 578 bushels and 30 pounds of No. 3 wheat (or what ought to have been No. 3 wheat) at 40 cents, amounting to $231.40, and then they charged him also with the freight on the damaged wheat from Regina, $30.89, and deducting the amount so credited from the amount so charged, left a balance of $199.95, and for this amount the learned trial Judge gave judgment in favour of the plaintiffs.

It was urged that the defendant was not responsible for the whole amount of this damage, because there had been negligence on the part of the railway company by reason of the long time taken to convey the wheat to Qu'Appelle, and that if the company had used ordinary diligence the wheat would not have arrived in as bad state as it was, and could have been—at any rate to some extent—cured by treatment. I am not satisfied that the fact that it could be so cured at Qu'Appelle was satisfactorily established, but I will assume that it was for the purposes of this judgment.

It was also urged that the plaintiffs, having taken possession of the damaged wheat and sold it, served to emphasize the defendant's contention in this respect.

It was also contended that the measure of damages was the difference between the actual value of the wheat when it was delivered on the 1st September at Regina, and the price agreed to be paid.

It is necessary, I think, in order to arrive at a conclusion on this branch of the case, to consider just what the rights of the plaintiffs were. Now, it is clear that the plaintiffs had no opportunity to inspect this wheat and ascertain whether it was up to sample or not until it arrived at Qu'Appelle. They were not here, nor any person on their behalf on the 1st of September, nor was any person expected to be here on their behalf on that date. Consequently, they had the right, when the grain arrived at Qu'Appelle, to inspect it, and having ascertained by inspection that it was not up to sample, to reject it, and this they did at once, by letter. If the matter had stopped there the plaintiffs would have had the right to recover from the defendant the amount paid to him for the No. 3 wheat.

Now the defendant's agent, Creamer, appears on the scene, and, it seems to me, dealt very fairly with the matter, and, on consultation with persons whom he called in, he advised the plaintiff's agent to unload this wheat as the only mode of doing anything with it to any useful purpose, and the plaintiffs, acting upon that advice, did so. This was done with a view of making the most out of the property for all parties concerned, and it seems to me that Creamer, having gone there for the purpose he did, acted prudently in the interests of all parties, including the defendant, and we may assume that having been sent there by the defendant for the purposes above stated that he was acting especially in the interests of the defendant.

Under such circumstances I think that the plaintiffs would be entitled to recover the amount that they paid for good wheat, less the amount they realized by his selling the property under the circumstances. I am therefore of the opinion that the judgment of the learned trial Judge was correct, and that his judgment should be affirmed, and the defendant's appeal dismissed with costs.

Appeal dismissed with costs

[COURT EN BANC.]

EN BANC. 1909 Nov. 20.

GAAR SCOTT COMPANY v. GUIGERE.

Land Titles Act—Caveat—Summons to Continue—Powers of Judge Upon—Determination of Rights of Parties—Jurisdiction of Judge—Dismissal of Summons—Substantial Question in Issue—No Opportunity Given to Bring Action—Power of Judge to Dismiss—Caveat in Respect of Mortgage of Crown Land Before Patent—Right to Maintain—Interest in Land—What is Sufficient to Support Caveat.

The appellant the Gaar Scott Company filed two caveats against the respondent Guigere's land, one under a mortgage which was shewn to have been given in respect of Crown lands before the issue of the patent, and the other under a judgment recovered against the respondent under the name of Gear as to land of which the respondent was registered as owner under the name Guigere. The respondent served a notice requiring the withdrawal of the caveats, and a summons was taken out by the appellants to continue them. On the hearing, the Judge in Chambers dismissed the summons, without giving any time for bringing an action to maintain the rights asserted:—

Held, that if there is any *bonâ fide* question of law or equity to be decided as to the right of the caveator to the estate or interest claimed under the caveat, such question should be disposed of in the Supreme Court, and the caveat should be continued for a sufficient time to allow an action to be brought in which to decide such question.

2. That (following *In re Ebbing* (1909), 2 Sask. L.R. 167) as to the claim under the mortgage, such mortgage being given in respect of Crown lands before the issue of the patent, and there being no evidence of the mortgagor's right to create the mortgage, the registrar should never have accepted the caveat, and the Judge in Chambers properly refused to continue the caveat.
3. That as to the caveat filed under the judgment against land of which the debtor was the registered owner under another name, the land could properly be said to be registered in the name of "some other person," and being so registered the appellants had a right to file a caveat, and the Judge in Chambers should have continued the caveat to give the appellant an opportunity to amend the proceedings so as to charge the land in question under the judgment.
4. The question of whether or not the land was the homestead of the respondent and not liable to be charged by the appellants' judgment was not such a question as should properly be determined in summary proceedings under the Land Titles Act.

THIS was an appeal from a judgment of JOHNSTONE, J., in Chambers, dismissing an application by the Gaar Scott Company to continue two caveats filed against the respondent's land, and was argued before the Court *en banc* at Regina.

W. B. Scott, for appellant: The learned Judge in Chambers erred in disposing of the matters in dispute in a summary way. The provisions of the Land Titles Act, under which this order was made, were intended only to provide for the withdrawal of caveats where there was no contest as to interest or where defects by reason of non-compliance with the Act were found: *Re Riddock and*

Chadwick's Contract (1907), 6 W.L.R. 360; *Re Webster and Canadian Pacific R.W. Co.* (1907), 6 W.L.R. 384. There being a substantial question between the parties, the learned Judge should have allowed sufficient time for an action to be brought to determine those rights.

W. B. Willoughby, for respondent: The land in question is the homestead of the respondent, and the mortgage in respect of which the first caveat is filed was executed before the issue of the Crown grant and is void: Dominion Lands Act, 41 Vict. ch. 17, sec. 42, as amended by 60-61 Vict. ch. 29, sec. 5; *Waterous Engine Works* v. *Weaver* (1908), 8 W.L.R. 432; *Park* v. *Long* (1908), 7 W.L.R. 309; *Flannagan* v. *Healey*, 4 Terr. L.R. 391; *Harris* v. *Rankin*, 4 M.L.R. 115; *Sawyer-Massey* v. *Dennis* (1908), 7 W.L.R. 272; *Abell* v. *McLaren*, 13 Man. L.R. 463; *Cummings* v. *Cummings*, 15 Man. L.R. 640. The second caveat was filed in respect of an execution without any allegation that the beneficial interest was in the respondent, and is, therefore, not within the terms of the Act. In any event, the land being the homestead of the debtor, the execution would not attach, and there was no right to maintain the caveat: *Bocz* v. *Spiller* (1905), 2 W.L.R. 280.

November 20. The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS and LAMONT, JJ.) was delivered by NEWLANDS, J.:—Prudent Guigere, otherwise known as James Gear, the respondent, took out a summons, under sec. 140 of the Land Titles Act, calling upon the Gaar Scott Company, the appellants, to shew cause why two caveats filed by them against the S.W. 36-12-24 W-2 should not be withdrawn. These caveats were filed, the first, under a certain mortgage made by Prudent Guigere to the Gaar Scott Company, dated the 10th day of December, 1907, and the second, under a certain execution for the sum of $1,052.93 issued out of the Supreme Court for the Judicial District of Regina, on the 30th day of November, 1908, in an action wherein said Gaar Scott Company were plaintiffs and James Gear was defendant. After hearing the parties and the evidence produced by them, my brother Johnstone ordered the said caveats to be discharged.

From this order the Gaar Scott Company appeal on the grounds:—

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1. That the learned Judge erred in disposing of the matters in question summarily.

2. Because he erred in not allowing the said caveats to remain registered against said lands until the caveators might have an opportunity of bringing action to substantiate the claims therein made; and

3. Because he did not allow the caveators sufficient time to obtain proper material to substantiate the claims therein made.

As to the first and second grounds of appeal, sec. 140 provides "that the Judge may, upon proof that the caveator has been summoned and upon such evidence as he requires, make such order in the premises as to him seems fit."

Although this section gives a very wide discretion to the Judge, it does not, in my opinion, confer upon him the powers of the Supreme Court to decide upon legal or equitable rights between the parties, but only the jurisdiction to decide whether the caveator had any right to file the caveat in question, and if he had at the time of filing such right, whether he had at the time of the application the right to have the caveat continued against such property. If there is a *bonâ fide* question of law or equity as to the right of the caveator to the estate or interest which he claims under the caveat to be decided, the Supreme Court is the proper place for such question to be disposed of, and the caveat should be continued a sufficient time to allow an action to be brought in which to decide such question.

All the cases cited by the appellant bear out this proposition.

In *Re Wark* (unreported) the Chief Justice said: "If the material before me was of such a character as to satisfy me clearly and beyond all doubt that the caveator had no rights with respect to the property, I would, I think, be justified in directing that the caveat be removed; but where there is a fair *bonâ fide* ground for setting up his alleged right, the Court is the proper jurisdiction to deal with the question (not a Judge under the proceedings under the Act) in an action properly instituted for the purpose. I am, therefore, of the opinion that my duty is to maintain the *status quo* between the parties and to continue the caveat."

In *Re Webster and the Canadian Pacific R.W. Co.* (1907), 6 W.L.R. 384, Scott, J., held that the question was so important that he should not dispose of it on such an application and continued

the caveat for one month to allow the necessary proceedings to be taken; and in *Re Riddock and Chadwick's Contract* (1907), 6 W.L.R. 360, Stuart, J., ordered pleadings to be delivered and the application set down for trial. All these cases go to shew that it is in the discretion of the Judge as to whether he will dispose of the matter summarily on an application under sec. 140, or continue the caveat to allow of an action being brought to determine the rights and interests of the respective parties, and that the latter course should be taken where there is any question as to the rights and interests of the parties.

Here, however, there is no such question. As to the first caveat, the appellant claims under a mortgage made by the respondent. This mortgage is stated in the caveat to have been made on the 10th day of December, 1907. It was proved before the Judge who heard the application that the land contained in this mortgage was a homestead taken up by the respondent under the provisions of the Dominion Lands Act, and that the respondent did not get his patent from the Crown for this land until the 13th day of February, 1909.

It was decided by this Court *en banc*, in *Re International Harvester Co. of America and Ebbing* (1909), 11 W.L.R. 29, 2 Sask. L.R. 167, that the registrar should not register such a mortgage by way of caveat. As my brother Lamont, in that case, said (p. 57): "Where, therefore, there is presented to the registrar for registration a mortgage or a caveat founded thereon affecting lands the patent for which is not of record in his office, the registrar is entitled to refuse to register the mortgage or file the caveat unless the applicant first satisfies him by affidavit, in Form K, that the mortgagor is entitled to create the mortgage, and in case the mortgagor mortgages land entered for by him as a homestead or pre-emption under the Dominion Lands Act, the affidavit must also state that he has been recommended for patent and has received his recommendation in accordance with the provisions of the said Act." In this case there was no evidence either that such an affidavit was made or that the mortgagor had been recommended for patent, the land being his homestead under the Dominion Lands Act; and the fact that it had to be registered by way of caveat shews that the provisions of the Act for filing it were not complied with. It was, therefore, the duty of the registrar to

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have refused to file this caveat, and, that being the case, the learned Judge was right in summarily disposing of it and ordering its discharge.

As to the caveat filed under the execution against the land of the respondent, sec. 136 of the Land Titles Act provides "that any person claiming to be interested under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person or otherwise, may file a caveat."

The land in question was registered in the name of Prudent Guigere. The execution was against James Gear. The execution debtor swears that he was known by that name, but that his proper name was Prudent Guigere. Now, this land was not, strictly speaking, registered in the name of some other person, because James Gear and Prudent Guigere are the same person, but, as far as the Land Titles Office was concerned, it was registered in the name of "some other person," as they could not recognize these two names as belonging to one and the same person, and, therefore, as to the execution against James Gear, the land which was registered in the name of Prudent Guigere was registered in the name of some other person. Besides, the words "or otherwise" must be given some meaning, so that if in this case the land is not actually registered in the name of some other person, it seems to me that these words extend the right to file a caveat to cases where the execution creditor is interested in land the title to which is registered otherwise than in the name of some other person which would make the provision applicable to this case, and give the Gaar Scott Company the right to file this caveat.

That being the case, I do not think the learned Judge should have summarily disposed of this application, but should have continued it long enough to allow the execution creditor to have the proceedings in the suit of *Gaar Scott Company* v. *James Gear* amended by the insertion of the proper name of the execution debtor.

The question as to whether it was his homestead and therefore exempt from execution is not, I think, a question that should be decided upon such an application, but only in an action brought for that purpose, and therefore I have not considered that question.

The appeal should be allowed with costs as to the caveat filed under the execution, and that caveat continued four weeks to allow the execution creditors to amend their proceedings.

Order accordingly.

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[COURT EN BANC.]

IN RE NORTH-WEST TELEPHONE CO. LIMITED.

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NOV. 20

Land Titles Act—Mortgage Against Specific Land—Reference Therein to Unspecified Land—Refusal of Registrar to Register—Right of Registrar to Refuse.

The company executed a mortgage of specific lands in the form provided by the Land Titles Act, but by the covenants contained therein embodied in and made a part of the mortgage a trust deed whereby the company mortgaged generally all its lands, such lands not being specifically described. This mortgage the Registrar refused to register. On appeal:—

Held, that by embodying the trust deed in the mortgage the mortgagor purported to mortgage both described and undescribed lands, and this being contrary to the provisions of the Land Titles Act the Registrar was justified in refusing to register the instrument.

THIS was an appeal by the North-West Telephone Co. Limited from the refusal of the Registrar of Land Titles for the Saskatoon Registration District, confirmed by the Inspector of Land Titles Offices, to register a mortgage made by the appellant company, and was argued before the Court *en banc* at Regina.

Alex. Ross, for the appellant.

Frank Ford, K.C., Deputy Attorney-General, for the Registrar of Land Titles.

November 20. The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, LAMONT and JOHNSTONE, JJ.) was delivered by NEWLANDS, J.:—The system of land registration in force in this Province is a statutory one, the provisions of which are set forth in the "Land Titles Act." No instrument can therefore be registered in a land titles office unless it is one of the instruments whose registration is provided for, and in form and execution conforms with the requirements of that Act.

Amongst the instruments whose registration is provided for are mortgages and encumbrances, and whenever in any such instrument any land is intended to be charged with, or made security for the

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payment of an annuity, rent, charge or sum of money in favour of any encumbrancee, the instrument must contain an accurate statement of the estate or interest intended to be mortgaged or encumbered, and must, for description of the land intended to be dealt with, refer to the certificate of title on which the estate or interest is held, or give such other description as is necessary to identify the land: Land Titles Act, sec. 98, sub-sec. (2), (3).

In this case the instrument offered for registration (which the Inspector of Land Titles Offices directed the Registrar to refuse to accept, it not being in compliance with the provisions of the Act, and from whose decision this appeal was taken) was a mortgage or encumbrance, it described specifically certain land and therein complied with the Act, but by a clause in the same another instrument was referred to, called a mortgage trust deed, as being annexed to and thereby embodied in and made part of such mortgage or encumbrance. By this reference this mortgage trust deed became a part of the instrument offered for registration, and it is therefore necessary to consider whether, taking into consideration the terms and provisions, the mortgage or encumbrance offered for registration is such an instrument as the Land Titles Act provides for being registered.

By the inclusion of this instrument in the mortgage or encumbrance not only are the lands specifically described made security for the payment of money, but the mortgagor "(2) . . . doth hereby grant and convey unto the trustee, its successors and assigns for ever all and singular the lands and premises of the company wherever situate, together with all buildings, improvements, fixed and unfixed machinery, plant, poles, wires, conduits, franchises, licenses, leases, and fixtures, now or at any time during the continuance of these presents, in, upon, about or belonging to or, used in connection with all or any of the said lands and premises, together with all ways, watercourses, rights, privileges, easements, hereditaments and appurtenances whatsoever to all or any of the said lands and premises or any lands or premises over, upon or under which the company has or may hereafter have or acquire any rights or way or easements of any kind together with all the estate, right, title and interest whatsoever of the company in and to and upon or under the said lands and every part thereof and their and every of their appurtenances to have and to hold all the said lands and premises

unto and to the use of the trustee, its successors and assigns, forever, but upon and for the trusts and purposes herein contained; subject, however, to the reservations, exceptions and conditions mentioned in the original grant thereof from the Crown. (3) The company do hereby further grant, assign and convey to the trustee, its successors and assigns, all the freehold and leasehold lands and hereditaments that may hereafter be acquired by the company during the continuance of these presents together with all buildings, improvements, fixed and unfixed machinery, poles, wires, conduits, plant and fixtures at any time during the continuance of these presents in, upon, about or belonging to or used in connection with the same together with all franchises, licenses and easements that may be hereafter acquired by the company upon, over or under any lands or premises upon the same trusts."

Now there is no question that this instrument (provided that it is properly executed and that the mortgagor have power to make same, questions that I do not think it necessary for me to consider) is a binding and effective instrument between the parties, and that its intention and effect is to make all the lands of the mortgagors now owned by them, as well as such they may thereafter acquire during the continuance of such instrument, security for the payment of money, and that being the case I need only say that sec. 98 of the Land Titles Act has not been complied with, such land not being given a description by which to identify it, and that therefore the instrument cannot be registered. It was argued by Mr. Ross, for the appellant, that the Registrar should ignore the provisions of this mortgage as to lands not described, as well as after acquired lands, and only register the instrument against the lands specifically described. This argument resolves itself simply to this, that the Registrar should ignore the provisions of the Land Titles Act, and stated in that way it contains its own refutation, the Registrar's duty being to carry out the provisions of the Act, not to ignore them.

I think it is unnecessary for me to discuss what would be the effect of the Registrar ignoring the Act and registering an instrument such as this one. I need only say that for his action the assurance fund would be responsible, and a subsequent transferee of the mortgage, if not the mortgagees themselves, might have an action against that fund because the Registrar did not, when he registered

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the instrument, register it against all the property of the mortgagors, in the event of the specifically described lands not being all their property.

For these reasons I think the appeal should be dismissed.

Appeal dismissed.

[CHAMBERS.]

1909

Nov. 25.

MOOSE MOUNTAIN LUMBER AND HARDWARE CO. v. PARADIS.

Injunction—Restraining Order—Disobedience of—Motion for Attachment for Contempt—Service of Injunction Order—No Notice under Rule 330 Judicature Ordinance—Necessity for in Orders Restraining—Original Order not Exhibited to Defendant when Served—Necessity for—Knowledge by Defendant of Contents—Delay in Service of Order Continuing—Effect of.

An order was made in this action restraining the defendant from interfering with the crop on certain land until further order, and a summons was granted with the order calling on the defendant to appear and shew cause why the injunction should not be continued until the trial of the action. A copy of this order was served upon the defendant personally, and he appeared by counsel on the return, and after hearing the injunction was continued until trial. The defendant afterwards entered on the land, drove off the plaintiffs' servants who were threshing the crop, and removed it. On a motion for attachment it was objected by the defendant that no memorandum under rule 330 of the Judicature Ordinance was indorsed on the copy of the order served; that it did not appear that a copy of the original order was exhibited to the defendant when service was effected, and that, as the order continuing the injunction was made on the 25th of September and was not served until the 21st of October after this alleged contempt, there was undue delay on the part of the plaintiff:—

Held, that it is not necessary to indorse the memorandum required by rule 330 of the Judicature Ordinance on a restraining order, the provision only applying to mandatory orders.

2. While inclining to the opinion that it was necessary to exhibit the original order when making service, yet as it appeared that the defendant was aware of the terms of the injunction order, and as in such circumstances there may be a contempt without service, the objection was not a valid one.

3. That while the plaintiffs had been guilty of undue delay in serving the order continuing the injunction, yet, inasmuch as the original order restrained the defendant until further order it was the duty of the defendant to ascertain if the order was still in force before interfering with the property.

THIS was an application for an order for attachment of the defendant for contempt in disobeying an order of the Court restraining him from interfering with certain property, and was argued before WETMORE, C.J., in Chambers.

P. H. Gordon, for the plaintiff.

E. W. F. Harris, for the defendant.

November 25. WETMORE, C.J.:—This is an application for an order to commit the defendant for disobedience to an injunction order granted in this case. Mr. Harris appeared on behalf of the defendant at the hearing of the application, and raised a number of objections.

On the 17th September last an injunction order was granted by my brother Lamont restraining "the defendant, his servants, workmen and agents from removing or destroying the buildings erected on the lands in question herein, namely, the south-west quarter of section four (4), in township eight (8), in range seven (7), west of the second meridian in the Province of Saskatchewan, or cutting or removing or in any way interfering with the crop raised on the said lands in the year 1909, until Monday the 27*th* day of September, 1909, or *until the disposition of this motion to be made as hereinafter mentioned;*" and there was embodied in the order a summons calling upon all parties concerned to attend before the presiding Judge in Chambers at the courthouse in Regina on the 24th September, at 10 a.m., on the hearing of an application on behalf of the plaintiff that the injunction order be continued until the trial of the action. A copy of this injunction order, of course including the Chamber summons referred to, was served upon the defendant personally on the 20th September, and on the 25th of that month, after hearing counsel for the plaintiff and Mr. Harris, who then appeared for the defendant, my brother Lamont made an order that the interim injunction should be continued until the trial of the action. This last mentioned order was personally served on the defendant on the 21st of October, together with a copy of the original interim injunction order. On the 20th October one McKee, who was employed by the plaintiffs to do so, proceeded to the quarter section mentioned in the original injunction order, for the purpose of threshing a quantity of flax then being upon that land. Such flax was at the time lying in winrows upon the land. Upon reaching the land and entering it he was forbidden by the defendant to enter thereon, or to in any way touch or interfere with the flax. McKee went upon the land, commenced to thresh, and the defendant thereupon entered with his threshing crew and engine, compelled McKee to cease his threshing operations, and proceeded to thresh the flax with his threshing outfit, and having done so loaded the flax so threshed upon his wagons and removed the same from the land.

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MOOSE MOUNTAIN LUMBER AND HARDWARE CO. v. PARADIS.

A number of objections were taken to the order for commitment going. In the first place it was objected that the copy of the injunction order served was not indorsed with the memorandum prescribed by rule 330 of the Judicature Ordinance. That rule is identical with rule 5 of order XLI. of the English Rules of Court. That objection is disposed of by *Selons* v. *Croyden Rural Sanitary Authority* (1886), 53 L.T.R. 209, and *Hudson* v. *Walker* (1895), 64 L.J. (Ch.) 204, where it was held that the rule referred to a mandatory judgment or order to do something, and did not apply to a restraining order, as was the injunction order herein.

It was further objected that the affidavits of service did not shew that the original injunction order was, at the time of service, shewn to the defendant. I incline to the opinion that where there is no other means of ascertaining that the party served was aware of the order of the Court, or will be presumed to have been so aware, the proper practice is to exhibit the original order to the party proposed to be moved against at the time of the service of the order. Rule 1, order LXVII., of the English Rules, which I am of opinion is in force in this Province, provides as follows: "Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shewn if an office copy of it be accepted." The author of "The Yearly Practice for 1909," in a note to this rule, states as follows: "The meaning seems to be except in the case of an order disobedience to which may be punished by attachment." I incline to the opinion that that is the proper interpretation to be put upon the rule, but I am further of opinion that the proceedings in this case clearly shew that the defendant was aware what the order of the Court was and that the plaintiff intended to pursue the injunction. My reasons for stating that are, that Mr. Harris (a solicitor), as I have before stated, appeared to shew cause against the summons, and the summons was included in the injunction order. That order was served upon the defendant, and Mr. Harris must have got his instructions to appear from him, and he therefore must have been aroused to the necessity for employing counsel by reading that order. It is very difficult for me, under such circumstances, to believe that he was aware of that part of the order requiring him to appear at Chambers, and was not aware of the restraining part of it. In fact, I find that he was aware of it.

In the *United Telephone Co.* v. *Dale* (1884), 25 C.D. 778, 53 L.J.Ch. 295, 50 L.T. 85, Pearson, J., in dealing with the question of this character, lays down at p. 787 the following: "The Court would be to a great extent incapable of doing its duty to itself, as well as to Her Majesty's subjects, if it were to say that, with perfectly accurate knowledge of the order of the Court, a defendant is at liberty to defy the Court's authority and then come to the Court and say, 'You cannot visit me for that breach of your order, because the order has not been served upon me.' What is the necessity for serving an order upon a defendant if he knows perfectly well without that service what it is which he is bound to obey?" If that is correct in a case where there was no service of any sort, *a fortiori*, it is correct where a copy of the order has been served and the parties served act upon it.

But it was urged, inasmuch as the order of the 25th September continuing the injunction order was not served until the 21st October, and after the alleged breach of the injunction had been committed, that there was undue delay on the part of the plaintiffs in serving such continuing order, and therefore on this they cannot succeed. That application is the only question in this case which has given me any serious difficulty, but when I consider the provision of the original injunction order which restrained the defendant until the 27th September "or *until the disposition of the motion to be made as hereinafter mentioned*," I have come to the conclusion that the delay under the circumstances will not warrant my refusing the application to commit. The defendant must have been aware of the terms of the order which I have just quoted, for the reasons before stated. The question that arises is, was the defendant led to believe by reason of the delay in taking out and serving the order extending the injunction, that the original order had been abandoned, and was he justified in so believing? I come to the conclusion that under the circumstances of this case that he was not justified in so believing. I think it natural to suppose that he must have been aware that if the application had been refused his solicitor would know it and would have advised him, and would have taken out an order setting the injunction aside or refusing to continue it. Not having received any notification to that effect, he ought reasonably to have supposed either that the Judge still had the matter in deliberation, or that the order continuing had

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been made. It was not a case where the injunction restrained him up to a certain date and gave leave to apply at a time before that date to continue the injunction, but he was restrained until *the disposition of the motion to be made, as mentioned in the summons which was served upon him.* There is no doubt that an unreasonable delay upon the part of the party taking out the injunction order and in serving it would be fatal. In the *United Telephone Co.* v. *Dale, supra,* at p. 786, Pearson, J., in commenting upon the remarks of Lord Eldon in *Vansandau* v. *Rose,* 2 Jac. & W. 265, states as follows: "But in giving judgment Lord Eldon said: 'In this case, if the warrant of committal is sent to me, I think that I shall not hesitate to sign it. What I have now stated must be subject to this observation, that there has been no delay in endeavouring to get the order drawn up, and the injunction under seal, and serving it when obtained.' There, again, I think he is merely stating the general rule that, in any case in which the plaintiff has been guilty of such *laches that he may possibly have misled the defendant,* this Court will not interfere if he has not served the order, shewing by its service that he intends to act upon it. I use the word 'possibly' in its largest and widest sense, to shew that this Court will never run the risk of doing that which may be harsh or unjust to the defendant in a case of this kind, by committing him to prison for a breach of an injunction, if there be the slightest doubt whatever that, owing to the conduct of the plaintiff, he may not have been drawn into the idea that it never was the plaintiff's intention to enforce the injunction. But I do not believe the rule to be, and I shall not act upon the rule as it has been stated to me, that in no case will the Court enforce obedience to its injunction by means of a committal to prison, simply upon the ground that the order has not been served, when it appears beyond all doubt or dispute that the defendant is aware that the injunction has been granted, and that it is the intention of the plaintiff to enforce it."

I am of opinion that that lays down the rule correctly, but I am also of opinion that the original injunction having been served, and the defendant having notice of the restraining part of it as I have stated, and the party having been restrained until the motion was disposed of, it was incumbent upon the defendant before he did that which the injunction order restrained him from doing to ascertain whether or not the motion referred to had been disposed

of. I can quite understand that where a party obtaining an injunction order allows a great length of time to elapse without serving the order continuing the injunction, that the party moved against might reasonably come to the conclusion that it was abandoned, but that is not the case here, because the original restraining order had been served. It is also material to the question under consideration that the plaintiff's agent, before the defendant entered on the land to deal with this flax, had entered and actually commenced threshing. This ought to have put the defendant on his guard and apprised him that the plaintiffs were pursuing their injunction. Nevertheless he actually drove the agent away and proceeded to thresh and remove the flax himself.

There is another objection that presented itself to my mind, and that is, there is no direct evidence that the flax which the defendant removed was a part of the crop grown upon the land in question for the year 1909, but, in view of the fact, first, that such objection was not raised by Mr. Harris, and second, that the flax was lying in winrows, I think I am justified in coming to the conclusion that it was part of the crop of 1909.

The order will be that the commitment issue, and the defendant pay the costs of this application.

[COURT EN BANC.]

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THE KING v. DUFF (No. 2).

Nov. 20.

Criminal Law—Crown Case Reserved—Charge Preferred Before Supreme Court by Deputy Attorney-General—No Preliminary Hearing—Leave of Presiding Judge not Obtained—No Direction from Attorney-General.

After the conviction of the accused on a charge preferred against him by the agent of the Attorney-General, the Deputy Attorney-General, who appeared in person, without obtaining the leave of the Judge or a direction from the Attorney-General, no preliminary hearing having been held, preferred a further charge signed by himself against the accused, on which, after trial, he was convicted. Objection having been taken to the charge on the ground that the Deputy Attorney-General had no authority to prefer such charge without leave of the Judge or direction of the Attorney-General, and on the ground that no preliminary hearing had been held, a case was stated by the presiding Judge to the Court *en banc*.

Held (JOHNSTONE, J., dissenting), that the Deputy Attorney-General is not an agent of the Attorney-General within the meaning of the term as used in the Criminal Code, and is not, therefore, authorized to prefer a charge as agent of the Attorney-General.

2. That while by the General Interpretation Act (Dom.) it is provided that words directing or empowering any minister to do any act or thing includes the lawful deputy of such minister, such provision is controlled by the special interpretation sections of the Criminal Code, and as the deputy is not referred to therein, it must be held that the Deputy of the Attorney-General is not by reason of his office authorized to prefer a charge under the provisions of sec. 873a of the Criminal Code.

3. The Deputy Attorney-General, not being an agent of the Attorney-General under the provisions of sec. 873a of the Code authorized to prefer a charge, the conviction of the accused must be quashed, not having been preferred with the leave or by the order of the Court.

THIS was a case stated by LAMONT, J., upon the conviction of the accused upon a charge preferred by the Deputy Attorney-General, and was argued before the Court *en banc* (WETMORE, C.J., PRENDERGAST, NEWLANDS, and JOHNSTONE, JJ.) at Regina.

Frank Ford, K.C., for the Crown.

W. B. Willoughby, for the accused.

November 20. WETMORE, C.J.:—The accused, William L. Duff, was tried before my brother Lamont at Moose Jaw, for an offence under sec. 398 of the Criminal Code, and convicted. At the close of that trial the Deputy Attorney-General of the Province preferred a charge against him for an offence under sec. 188 of the Code. The charge was preferred without any consent on the part of the learned Judge, and without any express direction or written consent of the Attorney-General, or any direct proof that the Deputy

Attorney-General was the agent of the Attorney-General. No preliminary trial of the accused had been had before any justice of the peace, or magistrate. Before pleading to the charge, the accused by his counsel raised the following objections:—

"1. That there had been no preliminary hearing, and

"2. That the charge had not been preferred with the written consent of the trial Judge, or the Attorney-General, or by the Attorney-General, or by anyone acting under his direction, or by any person shewn to have been an agent of the Attorney-General, or by any person by order of the trial Judge."

The learned Judge allowed the trial to go on, the accused was found guilty, and a case was stated for the opinion of this Court.

Section 873*a* of the Code, as enacted by the Criminal Code Amendment Act of 1907, ch. 8, is as follows:—

"In the Provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged.

"Such charge may be preferred by the Attorney-General or an agent of the Attorney-General, or by any person with the written consent of the Judge of the Court or of the Attorney-General, or by order of the Court."

The question that arises is whether the Deputy Attorney-General has the authority to prefer a charge under this section without the written consent of a Judge of the Court or the Attorney-General, and without an order of the Court.

In my opinion it is narrowed down to two propositions. First, is the Deputy Attorney-General an agent of the Attorney-General within the meaning of the section? Second, is he embraced in the definition given by the Interpretation Acts for the word "Attorney-General," or by the language of clauses *l* or *m* of sec. 31 of the General Interpretation Act (R.S.C.)?

In the first place, I am of the opinion that he is not an agent of the Attorney-General within the meaning and intention of sec. 873*a*. Before this Province was constituted as such, and of course, while it was embraced in the government of the North-West Territories, an amendment was made to the North-West Territories Act by sec. 11 of ch. 22 of the Acts of 1891, as follows:—

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"In lieu of indictments and forms of indictment as provided by the 'Criminal Procedure Act,' the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing, setting forth, as in an indictment, the offence wherewith he is charged."

There was no provision as to who might prefer the charge under that provision of the law, but it was customary to do it by persons who were called Crown prosecutors, and who were appointed by the Department of Justice at Ottawa to act at the respective Courts to which they were appointed. Since provincial autonomy was granted, however, persons were appointed by the Attorney-General's Department at Regina, who perform the same duties and who are styled "agents of the Attorney-General." After this change was brought about, the amendment of 1907, which I am now discussing, was made, and I am of opinion that the expression "agent of the Attorney-General" mentioned in the section in question was intended to cover the person so appointed to attend to criminal business, and styled "agent of the Attorney-General." It was not intended to embrace the Deputy Attorney-General, who is not an agent of the Attorney-General for the purpose embraced by the section.

Clauses *l* and *m* of sec. 31 of the General Interpretation Act have not, in my opinion, any application to the question at all. I am of opinion, for the purposes of considering the language of the Criminal Code, in so far as the matter under consideration is concerned, that we must go to the defining provisions of that Code, and we cannot give the words a more extensive meaning than the Code permits. That is, if the Code, for instance, gives a limited meaning to the term "Attorney-General," we cannot go to the General Interpretation clause for the purpose of giving it a wider meaning. Now the interpretation provisions of the Code does define the term "Attorney-General." Section 2, par. 2, is as follows: "'Attorney-General' means the Attorney-General or Solicitor-General of any Province in Canada in which any proceedings are taken under this Act, and, with respect to the North-West Territories and the Yukon Territory, the Attorney-General of Canada."

The Deputy Attorney-General is not brought within that definition, and if he is not, his general duties as Deputy of the Attorney-

General will not give him the authority, because he is Deputy of the Attorney-General not for the purpose of anything within the legislative authority of the Dominion Parliament, but only as to his duties within the legislative authority of the local Legislature. If it is desired to extend his duties and authorities over anything in the direction claimed, more specific legislation on the part of Parliament will be necessary.

I have therefore arrived at the conclusion that the Deputy Attorney-General had no authority to lay this charge, and therefore that the conviction should be quashed.

I do not consider it necessary to express any opinion upon the question raised as to there not having been any preliminary hearing.

NEWLANDS, J.:—Two objections were taken at the trial of this case by the prisoner's counsel:—

(1) That the charge preferred by Frank Ford, K.C., Deputy Attorney-General, was preferred without the written consent of the Judge of the Court, or the Attorney-General, or by order of the Court; and

(2) That no preliminary examination had been held before a justice of the peace.

The learned trial Judge overruled the objections and allowed the charge to be preferred, upon which the accused pleaded guilty. The trial Judge then reserved for the opinion of this Court the question, "Was I right in allowing the indictment to be preferred?"

It was contended on behalf of the Crown that the Deputy Attorney-General is included in the Attorney-General mentioned in sec. 873*a* by virtue of the Interpretation Act, ch. 1, R.S.C. 1906, sec. 31, sub-sec. (1): "Words directing or empowering a minister of the Crown to do any act or thing, or otherwise applying to him by his name of office, include a minister acting for, or, if the office is vacant, in the place of such minister, under the authority of an order-in-council, and also his successors in office and his or their lawful deputy."

Now, by sec. 31, "in every Act, unless the contrary intention appears," words directing or empowering a minister of the Crown to do any act or thing include his lawful deputy. This interpretation must be controlled by the Criminal Code, sec. 2, sub-sec. (2), where the words Attorney-General, when used in that Act, mean "the

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Attorney-General or Solicitor-General of any Province in Canada in which any proceedings are taken under this Act, and with respect to the North-West Territories and the Yukon Territory the Attorney-General of Canada." The interpretation to be given to the words "Attorney-General" as used in sec. 873 of the Code, which is similar to 873*a* under the provisions of which the charge in this case was preferred, was considered in *Abrahams* v. *The Queen* (1881), 6 S.C.R. 10. In delivering the judgment of the Court, Ritchie, C.J., said: "In acting under this statute the Attorney or Solicitor-General or Judge, as the case may be, exercises what is in the nature of a judicial function, he is judicially to decide whether the indictment is proper to be presented to or found by the grand jury," "and the duty of exercising this judicial discretion . . . is vested in the Attorney-General or Solicitor-General or Judge to be by them personally exercised." "I think, therefore, this being a special statutory power, it must be strictly pursued; the propriety of sending a bill before the grand jury having been confided to the judgment and discretion of the Attorney-General, he cannot extend the provisions of the Act and delegate to the judgment and discretion of another the power which the Legislature has authorized him personally to exercise, no power of substitution having been conferred."

Now, as the words Attorney-General as used in the Code are interpreted by that Act to mean the Attorney or Solicitor-General of the Province, and as the powers conferred upon him by this section are to be personally exercised by him, can the provincial Legislature by authorizing the appointment of a Deputy Attorney-General, enlarge the interpretation of Attorney-General as given in the Code so as to include the Deputy Attorney-General appointed under the provincial statute? Bouvier's Law Dictionary, at p. 549, under the word "deputy," says: "In general ministerial officers can appoint deputies, Comyns, Dig. Officer (D1), unless the office is to be exercised by the ministerial officer in person; and when the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be made for the performance of a judicial act." As the duties required of the Attorney-General by sec. 873*a* are judicial duties, they cannot, in my opinion, be performed by his deputy.

That the Deputy Attorney-General is not included under an

agent of the Attorney-General is, I think, clear, there being an officer in each judicial district of the Province appointed and acting as an agent of the Attorney-General, and he is the person referred to in that section.

As to the second objection that no preliminary examination was held in this case, it is argued on behalf of the Crown that under sec. 873*a* of the Code neither a preliminary investigation before a magistrate nor the preferring of a bill of indictment before a grand jury is required in this Province, but that a charge for any criminal offence may be preferred by the Attorney-General or an agent of the Attorney-General direct to the Court having power to try the offence without either of these preliminary steps having been taken. If these powers have been conferred upon these officers in this Province and Alberta they are far in excess of the powers conferred upon the Attorney-General or Solicitor-General of the other Provinces. There, in cases of emergency, as was pointed out by Gwynne, J., in *Abrahams* v. *The Queen*, *supra*, the discretion of the Attorney or Solicitor-General as officers responsible to the public may be substituted for the preliminary examination, and they may prefer an indictment to a grand jury.

Sections 871, 872 and 873 of the Code do not apply in this Province, as they all refer to the preferring of a bill of indictment to a grand jury. Section 873*a* is therefore substituted in place of them, and is the only method by which the trial of a person charged with a criminal offence can be commenced. That section provides that in the provinces of Saskatchewan and Alberta it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth, as in an indictment, the offence with which he is charged. In my opinion that section means that instead of preferring a bill of indictment to a grand jury it shall be sufficient to commence the trial with a formal charge in writing preferred as provided in sub-sec. 2 of that section.

It is, I think, clear under the Criminal Code that no indictment can be preferred unless preceded by a preliminary examination before a magistrate except under the provisions of sec. 873. Now, if this section does not, as I have pointed out, apply to this Province, it follows that no charge can be preferred in this Province without

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a preliminary examination, and sec. 873*a* does not take away that right, and, as stated by Ritchie, C.J., in *Abrahams* v. *The Queen*, *supra*, this section, being a special statutory power, must be strictly construed. To put upon it the construction contended for by the counsel for the Crown would be to confer upon not only the Attorney-General but upon each one of his agents throughout the Province the power to prefer a charge against any person without there being a preliminary examination before a magistrate or an investigation by a grand jury. Such wide powers so derogatory to the rights of the subject could only be conferred by express legislation, and not by extending the meaning of a section, which, in my opinion, only confers upon these officers the duties of a grand jury.

PRENDERGAST, J., concurred.

JOHNSTONE, J. (dissenting):—The accused Duff was tried and convicted at Moose Jaw before my brother Lamont, with a jury, for an offence under sec. 398 of the Criminal Code, after which the Deputy Attorney-General preferred a further charge against the convict for an offence committed contrary to the provisions of sec. 188 of the Code.

Counsel for the accused thereupon objected, as the fact was—

1. That there had been no preliminary hearing, and

2. That the indictment charge had not been preferred with the written consent of the trial Judge or of the Attorney-General, or by the Attorney-General, or by anyone acting under his direction, or by any person shewn to have been an agent of the Attorney-General, or by any person by order of the Judge.

The trial of the said charge so preferred by the Deputy Attorney-General under the circumstances aforesaid was allowed to proceed, with the result that the accused person was convicted, whereupon the learned trial Judge stated a case for the opinion of the Court *en banc*, as to whether he was right in allowing such charge to be preferred.

The procedure as to the preferring of charges under the Criminal Code in this Province is now regulated by sec. 873*a* of the Code, which reads:—

"In the Provinces of Saskatchewan and Alberta it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any such person charged with a criminal offence be commenced by a formal charge in writing

setting forth as in an indictment the offence with which he is charged.

"2. Such charge may be preferred by the Attorney-General or any agent of the Attorney-General, or by any person with the written consent of the Judge of the Court or of the Attorney-General, or by order of the Court."

The first question in this case to be determined is whether the Deputy Attorney-General can, in virtue of his office as lawful Deputy to the Attorney-General of the Province, prefer a charge and place upon trial an accused person for having committed an offence against the criminal laws, when such person has been committed for trial upon a preliminary hearing, where the depositions taken at such hearing warrant the preferring a charge.

By the Act of Confederation, the administration of justice in each of the Provinces is entrusted to the Provincial Government, and it is therefore the provincial law officers of the Crown whose duty it is to conduct or supervise, as the case may be, criminal prosecutions such as that conducted against Duff by the Deputy Attorney-General.

The Deputy Attorney-General is not mentioned in sec. 873*a* of the Criminal Code, and in this respect he is in the same position as the deputy heads of the several departments of the Government of Canada. In nearly every Act of the Dominion affecting the various departments of the Government of Canada there is used the word "Minister," an interpretation of which word is given at the front of the Act. Take, for instance, the Government Railway Act, the Railways Act, the Public Works Act, the Militia Act, the Marine Fisheries Act, the Customs Act, there is in each an interpretation in these words: "In this Act, unless the context otherwise requires, Minister means the Minister of Railways and Canals," or as the case may be. The word "Minister" is used throughout each Act, and no reference is made to the deputy head of the department. This official in each department of the Government service does a great deal towards the control and management of the departmental business. This is because he is empowered to do so by virtue of sub-sec. *l* of sec. 31 of the Dominion Interpretation Act. These sections read:—

"(*l*) Words directing or empowering a Minister of the Crown to do any act or thing, or otherwise applying to him by his name

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of office, include a Minister acting for, or, if the office is vacant, in the place of such Minister, under the authority of an order-in-council, and also his successors in such office, and his or their lawful deputy;

"Sub-section (*m*). Words directing or empowering any other public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, include his successors in such office, and his or their lawful deputy."

Upon reference to the Criminal Code, we find legislation very similar to that already pointed out as to the word "Minister." This is in sub-sec. 2 of sec. 2 of the Criminal Code, which provides that in the Act, "Attorney-General means the Attorney-General or Solicitor-General of any Province in Canada in which any proceedings are taken under this Act." I fail to see why a different and stricter interpretation should be given to the words "Attorney-General" in sec. 873*a* than that which would be given to the word "Minister," so as to exclude the lawful deputy in the one case and include him in the other.

The words used in sec. 31 of the Interpretation Act, "In every Act, unless a contrary intention appears," are certainly very clear, and they must mean such contrary intention shall appear in the Act the provisions of which are to be construed.

There is no intention, as far as I can see, appearing in any of the provisions of the Criminal Code that sub-section (*m*) of sec. 31 shall not apply and thereby exclude the lawful Deputy of the Attorney-General, one of the provincial officers of the Crown. In view of these sub-sections, if I should be right, one would expect to find words in sec. 873*a* excluding from its application the deputy to shew only a contrary intention. To hold that no one, other than the persons mentioned in sec. 873*a*, or persons named by the Parliament of Canada, may prefer a charge and thereby have the conduct of criminal prosecution in the Provinces, has, to me, the appearance of extending to the Dominion Parliament powers intended by the British North America Act to have been conferred upon the provincial legislative bodies.

This is not a question of the power in the Attorney-General to delegate to another the performance of his duties, but a question as to whether or not that other has been named by legislation; in other words, whether the Deputy Attorney-General of this Province is the lawful Deputy of the Attorney-General within the meaning

of sec. 31, and under a similar provision contained in the Provincial Interpretation Act. In my opinion he is. To my mind the *Queen* v. *Abrahams* is not an authority to the contrary. All that was held and could be held in that case, which would be binding upon this Court, was that a Crown counsel could not, of his own mere motion alone, prefer a bill of indictment before a grand jury; that counsel had not the power to do so. He could not be said to be a lawful deputy within the meaning of sec. 31.

As to the other objection raised by counsel for the accused—that no preliminary hearing upon the charge had been held before a magistrate—there is no law that a preliminary hearing shall take place before a charge can be preferred. It has been of common occurrence in this Province in the past, and in the Territories forming the Provinces of Saskatchewan and Alberta for years before the foundation of these Provinces, to commence the prosecution of persons for criminal offences without first having had a preliminary hearing before a justice of the peace. It is said in *The Queen* v. *Lepine* (1900), 4 Can. Crim. Cas. 145, at p. 152: "Prior to the adoption of the Criminal Code, it was permissible to lay a charge before a grand jury and to ask and obtain indictments without any preliminary commitment or even inquiry. As a previous investigation before a magistrate was not an essential condition . . . Since the Code (in the Provinces of Canada other than Saskatchewan and Alberta), this section of which requires a previous commitment or the order of the Attorney-General or the consent of the Judge is an essential preliminary condition before a charge can be laid before a grand jury."

It is provided by sec. 873*a*, before referred to, that in Saskatchewan and Alberta it shall not be necessary to prefer a bill of indictment before a grand jury, but it shall be sufficient that the trial of a person charged with a criminal offence shall be commenced by a formal charge in writing setting forth, as in an indictment, the charge and the offence. The provisions of sub-sec. 4 of sec. 873, "that except as in this part previously provided no bill or indictment shall be preferred in any Province of Canada," can have no application to the Provinces named in sec. 873*a*. Section 873*a*, as to Saskatchewan, takes the place of secs. 870, 1, 2 and 3, of the Code, sections relating to other Provinces.

I think the question submitted by the learned Judge, in his stated case, should be answered in the affirmative.

Conviction quashed.

[COURT EN BANC.]

EN BANC. 1909 Oct. 20.

CANADA LIFE ASSURANCE CO. v. VANCE.

Mortgage—Foreclosure—Order for Sale on Application for Foreclosure—Jurisdiction of Judge to Make Without Application by Party.

The plaintiff instituted proceedings under a mortgage, for foreclosure. On the hearing of the application the Judge in Chambers made an order for sale. None of the defendants applied for sale or offered to guarantee costs. On appeal:—

Held, that, except in a few cases such as in case of infants, the mortgagee has a strict right to foreclosure unless the mortgagor, a subsequent encumbrancer, or some person claiming through or under him or them, appears and asks for sale, and deposits such sum as may be determined as security for the performance of any terms such as security for costs which the Court may impose on granting sale.

THIS was an appeal by the plaintiff from an order of Lamont, J., made in Chambers, on the return of an originating summons for foreclosure of a mortgage, whereby sale was directed instead of foreclosure, and was heard by the Court *en banc* (WETMORE, C.J., PRENDERGAST, NEWLANDS and JOHNSTONE, JJ.)

H. V. Bigelow, for the appellant: The question in this case is whether the doctrine in *Excelsior* v. *Prestniak* (1908), 8 W.L.R. 780, will extend to the extent of supporting the order for sale herein. Foreclosure is a necessary incident of every mortgage: Robbins on Mortgages (1897 ed.), p. 14; and the Court will give the benefit of foreclosure in every case where money is lent on mortgage: Robbins, p. 999. The only authority the Court has to order a sale is derived from the Chancery Amendment Act, 15 & 16 Vict. ch. 86, sec. 48. By that section a sale can only be ordered upon application of a party to the proceedings who is willing to guarantee the costs. There being no such application here, the learned Judge erred in making such order.

No one *contra*.

October 20. The judgment of the Court was delivered by JOHNSTONE, J.:—The appellants, mortgagees under the Land Titles Act of 1904 of the defendant Vance, who was then in default, on the 23rd December, 1908, obtained an originating summons in Chambers calling upon the mortgagor and his co-defendant, a creditor, to appear on an application to be made in Chambers on

the appellant's behalf for an order foreclosing the interest of the defendant covered by the lands in question.

From the affidavit of one Young, the plaintiff's manager in Winnipeg, which affidavit was used in support of the application for the originating summons, it appears there was then due the plaintiffs less than $1,000, and the lands covered by the mortgage were worth $1,850.

On the return of this summons the learned Judge refused to order foreclosure, and made an order that in default of payment of principal, interest and costs, at the date fixed for the payment thereof, the lands be sold at public auction. From this order the plaintiffs appealed.

There was no request by the mortgagees or any subsequent encumbrancer of the mortgagor, or of any person claiming under them, to the Judge, at the hearing, to direct a sale instead of foreclosure.

As required by the Chancery Act of 1852, 15 & 16 Vict. ch. 86, sec. 48, that section provides: "It shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request."

Subject to the provisions of this section, the mortgagee had, except in a few cases where, by reason of the existence of special circumstances, as, for instance, in the case of infants, a strict right to foreclosure.

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Johnstone, J.

Under the section referred to, the request from some one of the persons named for a sale instead of foreclosure was a condition precedent to the making of the order.

I think the appeal should be allowed with costs, such costs to be added to the appellant's claim.

Appeal allowed with costs.

[COURT EN BANC.]

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Nov. 20.

WOOD & MCCAUSLAND v. BARKER.

Master and Servant—Assignment of Wages Earned—Hiring at Monthly Wage—Gross Immoral Conduct by Servant—Seduction of Master's Infant Daughter—Continuing Offence—Right of Servant to Recover Wages.

Defendant employed a servant for the season at a monthly wage. During the term of his employment the servant seduced the master's fourteen-year-old daughter, and it appeared that such offence had been committed during every month of the hiring. The master did not become aware of the servant's conduct until the expiration of the term, and immediately laid an information against the servant and caused his arrest, and he was subsequently convicted. The servant assigned his wages to the plaintiffs, who brought action against the master to recover the amount alleged to be due. The claim was dismissed, and the assignees appealed:—

Held, that a servant who is, during his term of service, guilty of grossly immoral conduct affecting his master is not entitled to recover wages for the period in which he was guilty of such conduct, and the conduct of the servant in this case was such as to debar him from recovering the wages earned.

2. That while the wages were due monthly, yet as the servant had during each and every month of his employment been guilty of immoral conduct, no wages ever became due to him.

3. The fact that the master was not aware of the servant's conduct until after the expiration of the term does not entitle the servant to recover.

THIS was an appeal by plaintiffs from the judgment of Rimmer, D.C.J., dismissing the plaintiff's claim for moneys due by defendant to his servant and by the servant assigned to the plaintiffs, and was argued before the Court *en banc*.

N. MacKenzie, K.C., for the appellant (plaintiff): The only substantial matter of defence is pleaded by way of counterclaim, and that being dismissed and no appeal taken, the defendant cannot now open it. The claim for set-off of damages cannot be pleaded: Odgers on Pleading, 6th ed., 231-234; Ann. Prac. (1909), p. 299; *Young* v. *Kerchin*, 3 Ex.D. 127; *Government of Newfoundland* v. *Newfoundland R.W. Co.*, 13 A.C. 199; *Little* v. *Thomas*, 1 W.L.R.

467. There was no legal forfeiture of wages, because the contract was completed and the servant was not dismissed prior to completion of contract, and if there was any forfeiture it could be for one month's wages only: *Robertson* v. *Jenner*, 15 L.T. 574.

J. T. Brown, K.C., for the respondent (defendant): The gross and habitual misconduct of Holloway affords ground for dismissal, and constitutes a bar to recovery of wages even though otherwise the wages were due and the contract at an end: Smith on Master and Servant, 6th ed., p. 105; *Brown* v. *Croft*, 6 C. & P. 16; *Turner* v. *Konwenhoven*, 100 N.Y. 115.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.) was delivered by—

November 20. NEWLANDS, J.:—In this action the plaintiffs sue as assignees of one Holloway, who was employed as a farm servant by the defendant for the season of 1908 at $25 per month and 50 cents per day extra for the time he was threshing. The defence is the gross immoral conduct of the servant, by the seduction of the defendant's infant daughter during said term of service, and which only came to the defendant's knowledge on the 23rd October, 1908, when the servant was leaving the defendant's employment at the completion of his term of service. The District Court Judge, before whom the action was tried, held that the servant had forfeited all right to his wages by such conduct, and gave judgment for defendant. From this judgment the plaintiffs appeal.

The following proposition, which is laid down in 26 Cyc., p. 1040, is, I think, a correct statement of the law as applicable to cases of this kind: "A breach of the contract of employment other than by quitting the service may prevent a recovery of any wages thereunder, as where the employee embezzles the money of his employer, or commits other criminal offences, although not immediately injurious to the person or property of the employer."

In *Callo* v. *Brouncker* (1831), 4 Car. & P. 517, where a yearly servant was dismissed before the expiration of the year and the servant sued for his wages, Parke, J., told the jury "that there was an implied agreement that, if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience or habitual neglect, the defendant should be at liberty to part with the plaintiff."

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The same principle is laid down by Lord Tenterden, C.J., in *Atkins* v. *Acton* (1830), 4 Car. & P. 208; and in *Turner* v. *Robinson* (1833), 6 Car. & P. 15; *Cunningham* v. *Fonblanque* (1833), 6 Car. & P. 44, and numerous other cases, all going to shew that gross immoral conduct on the part of the servant is a breach of his contract which entitles the master to dismiss him.

In this case the servant was not dismissed, because the master (the defendant) knew nothing of the seduction of his daughter until after the completion of his term of service. This, however, makes no difference, because, as found by the District Judge, "the defendant in no way condoned the offence or waived the forfeiture. So soon as he discovered the offence he laid an information." Nor does the fact that the wages were due periodically make any difference, as the District Judge has also found that the immoral acts of the servant commenced in the winter of 1907 and 1908, and continued to July, 1908, at least, and that there never was a time from the date the service commenced on March 23rd, 1908, to the date Holloway left that he was not liable to be dismissed for cause.

Gross immoral conduct is, as I have said, a breach of the contract of service, and I know of no immorality on the part of a servant more gross nor more detrimental to the interests of his master than the seduction of his daughter, who, in this case, was only fourteen years of age. The servant having broken his contract, and that breach not having been waived, he cannot recover, and as the gross immoral conduct was continued during the whole term of service, it is a defence to his whole claim for wages, that is, he broke his contract each month, and therefore never earned a month's or any wages.

In *Brown* v. *Croft* (1833), 6 Car. & P. 174 N., Lord Tenterton, C.J., ruled that if a servant habitually embezzled his master's property the amount embezzled is wholly immaterial; and, although the arrear of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to anything, shewing, I think, that damages for the embezzlement are not to be set off against the wages that would otherwise be due, but that no wages were due at all, on account of the breach of contract by the servant.

An American case was cited on the argument where the law laid down is similar to what I have stated, and as *Brown* v. *Croft* is

given as the authority for the proposition there contained, it bears out the interpretation I have put on that case. This case is *Turner* v. *Kouwenhoven*, 100 N.Y.R. 115, at p. 119, where Miller, J., says: "The rule is well settled in this State that if the master, for good and sufficient cause, discharge the servant before the expiration of the term of service, or if the servant, without good cause, quit service before the end of the term, he can recover nothing for the part of the term past, nor for the future. But where the servant has served his full term this rule has no application and has never been upheld by the decisions of the Courts. Cases may, no doubt, arise where the dishonesty of the servant is of such a character as would justify the conclusion that his contract had been violated in a most material and substantial part and to an extent which would bar any recovery whatever, but the act in such cases, to bar a recovery, must be misconduct and unfaithfulness, which substantially violates the contract of service."

In another American case, *Peterson* v. *Mayer*, 46 Minn. R., 468, Mitchell, J., says: "The allegations of the complaint are that the plaintiff performed labour and work for defendant for seven and a fraction months at an agreed sum per month, payable at the end of each month. The answer admits the employment at the sum alleged for each and every month that plaintiff should work for defendant, and that the plaintiff worked the length of time stated, but alleges, by way of defence, that during *all* the time of his service the plaintiff stole and appropriated to his own use large sums of defendant's money which came into his hands in the course of his employment, and that, as soon as defendant discovered the fact, he discharged the plaintiff from his service. While the whole services were not performed under one entire contract, yet, as to each and every month by itself, the contract was an entire one, *viz.*, to work an entire month for an entire price. A contract to pay a certain sum for a month's service is as entire in its consideration as is a contract to pay a certain sum for a single chattel: *Beach* v. *Mullin*, 34 N.J. Law 343. Therefore, to entitle plaintiff to recover the specified wages for one month, he must have substantially performed the contract of service for that month. According to the settled doctrine of this Court, had plaintiff, before the expiration of the month, abandoned the service without excuse, and by his own wilful fault, he could have recovered nothing for

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the portion of the month he worked, because he would not in such case have performed his contract: *Nelichka* v. *Esterly*, 29 Minn. 146 (12 N.W. Rep. 457); *Kohn* v. *Fandel*, 29 Minn. 470 (13 N.W. Rep. 904). The same result would have followed, and on the same ground, had the defendant during the month, for good and sufficient cause, discharged the plaintiff from his service. *But it was an implied condition of the contract that plaintiff should serve the defendant faithfully and honestly.* Although only implied, this was as much a part of the contract as was the express condition as to the time of service, and the breach of the one was just as much a failure to perform the contract as would have been a breach of the other, and the consequences in both cases would be the same. Indeed, if there is any case of non-performance of an entire contract which should prevent a recovery, it is where a servant has been habitually embezzling his master's money which came into his hands in the course of his employment; for, in such cases, not only is the breach the result of positive dishonesty, but it goes to the very root of the subject-matter of the contract of service."

The law being the same in this Province, the above reasons apply equally to this case, and I am therefore of the opinion that Holloway never earned any wages and that there was nothing for him to assign to the plaintiff, and that the judgment of the District Court Judge should be affirmed with costs.

Appeal dismissed.

[COURT EN BANC.]

ANDERSON v. OLSON.

EN BANC.
1909
Nov. 20.

Pleading—Amendment at Trial—Embarrassing—Allowance of—Material Facts—What Necessary to Make Good Plea—No Defence to Amended Plea—Finding by Trial Judge on Improper Plea—Effect of.

Plaintiff sued to recover commission alleged to be due under an agreement whereby he assigned an agency held by him to the defendant. After action brought, and upon the examination of the defendant for discovery, it transpired that after making the contract with the plaintiff he retired from business, and his business was acquired by a concern which secured the agency in question. Plaintiff thereupon applied at the trial to amend by pleading alternatively that if the deffendant gave up the agency he did so of his own accord and in violation o the expressed and implied terms of the contract, whereby the plaintiff suffered damage. No facts were set out in support of the plea. The trial Judge on the trial allowed the amendment subject to objection.

No defence was delivered to the amended plea. After trial, and in his judgment, the trial Judge decided that the amendment should not have been allowed, and dismissed the plaintiff's original claim, but found for him on a breach of contract, notwithstanding his finding that the amendment was an improper one. On appeal:—

Held, that the proposed amendment, lacking as it did any allegation of fact to support it, should have been disallowed, and the plaintiff, therefore, could not recover.

2. That an embarrassing plea should not be allowed by way of amendment.

3. That no defence having been pleaded to the amended plea, there was no issue before the Court.

THIS was an appeal by the defendant from a judgment of the District Court Judge, at Saskatoon, allowing the plaintiff's claim on an amendment made at the trial, and was argued before the Court *en banc* at Regina.

F. W. G. Haultain, K.C., for the appellant (defendant): The amendment of the plaintiff's claim allowed at the trial should not have been allowed, as the amendments are evasive and embarrassing and do not disclose sufficient facts to justify the relief claimed, and should be disallowed: *Newley* v. *Sharp*, 8 C.D. 39, at pp. 49-51; *Raleigh* v. *Goschen* (1898), 1 Ch. 73; *Edwain* v. *Baker*, 41 C.D. 563. If the amendment is disallowed there is no evidence to support the original claim, and the action should be dismissed.

W. M. Martin, for the respondent (plaintiff): The amendment in question was properly allowed, being necessary to properly determine the matters in dispute between the parties, and the amendment being allowed there was evidence to support the findings of the trial Judge thereon.

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November 20. The judgment of the Court (WETMORE, C.J., JOHNSTONE, and LAMONT, JJ.) was delivered by WETMORE, C.J.:—This is an appeal from the judgment of the District Court Judge for the Judicial District of Saskatoon.

The plaintiff's statement of claim is as follows:—

"1. The plaintiff is a merchant residing at Saskatoon, and the defendant is a merchant residing at Dundurn.

"2. The plaintiff had the agency for the sale of binder twine known as the Plymouth twine, and the plaintiff transferred this agency to the defendant O. T. Olson, and the defendant O. T. Olson agreed to pay to the plaintiff for the transfer of the said agency of the said Plymouth twine half a cent a pound for all twine sold by the defendant during the year 1908, and to be paid on or before the 31st day of December, 1908, to the plaintiff.

"3. The agreement hereunder was made in writing bearing date October 31st, 1907, signed by both parties.

"4. During the year 1908 the defendant sold 35,500 pounds of said binder twine, for which he agreed to pay the plaintiff under the said agreement the sum of half a cent a pound.

"5. There was also about 3,000 pounds on hand at the time the contract sued on hereunder was made, and the defendant also agreed to pay half a cent a pound on this twine on its sale, but has failed and neglected to do so, although defendant has sold same.

"6. The plaintiff claims in all—

"(1) One-half a cent a pound on 35,500 pounds, being $177.50, with interest from the 31st December, 1908, till payment or judgment.

"(2) One-half cent a pound on 3,000 pounds, being $15.00, the plaintiff having refused to pay the said amounts or any part thereof.

"The plaintiff claims in all the sum of $192.50, and interest from December 31st, 1908, as aforesaid, and costs."

The defendant, by his plea, admitted paragraphs 1, 2 and 3 of the statement of claim, but denied that he sold 35,500 pounds, or any amount whatever, of such binder twine or any other binder twine, or that any person sold binder twine on his behalf during the season of 1908, and that he had not contracted with any person to receive any commission for the sale of binder twine during that season.

He admitted paragraph 5 of the statement of claim, and paid $20 into Court in settlement thereof on the 1st March, 1909.

In the meanwhile, but before the trial, the defendant had been examined for discovery, and it there appeared that before the season for selling twine had arrived the defendant retired from business, and a concern known as the Home Lumber Company, of which the defendant was manager, secured from the manufacturers the privilege of selling twine, and the defendant sold no twine himself during the season, and there was no evidence to establish that he had sold twine during that season. It may possibly be gathered from the defendant's testimony that he handed over to the company the agency for selling this twine for which the plaintiff had previously been the agent, and which had been assigned to him, the defendant, and thereby put it in a position to acquire the agency which it did acquire. I do not consider it necessary, in view of the conclusion I have reached, to express any opinion on that question.

After such examination, I presume, and before the trial, the plaintiff gave notice to amend the statement of claim by adding thereto three paragraphs to be numbered 5*a*, 5*b* and 5*c*. What the contents of the proposed paragraph 5*b* were does not appear in the appeal book, the learned Judge having refused to allow the amendment as to that clause, but 5*a* and 5*c* are as follows:—

"5*a*. The plaintiff says that if the defendant gave up the agency for Plymouth twine in the month of June, 1908, that he did so of his own accord and without notice to the plaintiff, in violation of the provisions of the agreement, express and implied, sued on herein, and therefore committed a breach of agreement and caused damage to the plaintiff.

"5*c*. The plaintiff, in addition to the claim in paragraph six, claims the sum of $250 for breach of contract by the defendant by reason of the facts set forth herein."

And by the proposed amendment the plaintiff also claimed by way of relief "that the defendant should be made to account to the plaintiff for all Plymouth twine sold by him or by the Home Lumber Company Limited during the year 1908, and that the defendant be made to account to the plaintiff for all twine sold by the Home Lumber Company Limited in the same manner as if sold by

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the defendant and for which the defendant is liable to pay half a cent a pound on agreement sued on herein."

Application accordingly was made to the trial Judge to allow such amendment, and he allowed paragraphs 5*a* and 5*c* thereof, and I presume also the prayer for relief which I have quoted.

The trial Judge states in his judgment that there was no serious objection raised to this amendment, and therefore he allowed those paragraphs, but goes on to state "that in looking into the matter further he was clearly of opinion that he was in error in so doing."

The minutes of trial shew distinctly that the amendment was objected to by the defendant. The objection was serious enough to be noted, and that being so, I am of opinion that the defendant is entitled to the benefit of his objection if it was well taken. I am of opinion that the objection was well taken. The proposed amendment lacked any allegation of fact to support it. Looking at the pleading as it would stand if amended, as allowed by the Judge, and looking at it as a record, it would not be very easy to understand it. In fact, were it not for the examination for discovery of the defendant, it would be utterly incomprehensible. Looking at it from the standpoint of a pleading, it must be of such a character as amended as to make it a good pleading without having resort to some other document or transaction. How could the plaintiff bring an action based on a contingent allegation—that if a person did so and so he would be liable to damages? I never knew of such a pleading. I could understand a pleading in the alternative, alleging *as a matter of fact* that the defendant, in contravention of the implied agreement set out in the third paragraph of the claim, had committed a breach of such implied agreement, but the way it is alleged here, to my mind, is contrary to the rules of pleading. Consequently, the proposed amendment was bad, and to say the least was embarrassing, and I am of opinion that a Judge ought not to allow an embarrassing pleading by way of amendment. If such a pleading had been made in the first instance and not by amendment, the defendant could have moved to have it struck out as embarrassing, and it most undoubtedly would have been struck out, and I am of opinion that a pleading which would be bad if originally pleaded and which would be struck out as embarrassing ought not to be allowed at the trial.

Another objection to the amendment is that the learned trial

Judge went on and dealt with the case without any defence being pleaded to it. The defence pleaded to the original cause of action clearly is not applicable to the claim as raised by the amendment. I may ask then, what issue did the learned trial Judge try out? If no answer is given to the allegations in a statement of defence, the matter is at issue, but the allegations in the statement of claim are not at issue, because no defence has been entered to them.

The appeal book does not disclose what objections were raised to this proposed amendment at the trial, but the notice of appeal raises the objections that I have disclosed, and I did not understand it to be claimed that such notice was, in that respect, improper or irregular.

Although the learned trial Judge held, after consideration, that he was in error in allowing the amendment, he still proceeded to give judgment holding that the original cause of action was not proved, but that the cause of action set up by the amendment was. I will not follow him in his judgment in that respect, because I consider it unnecessary to do so. The amendment ought not to have been allowed, and if the amendment ought not to have been allowed it was not within his province to pronounce judgment upon it.

The cause of action set forth in the fifth paragraph of the claim was admitted by the defence, and the defendant paid into Court $20 in settlement thereof.

The appeal therefore should be allowed with costs; the order authorizing the amendment and the amendment made thereon struck out; the judgment of the trial Judge set aside, and judgment entered for the defendant on the issues joined as to the second and third paragraphs of the statement of defence, which were the only issues in the cause; that the plaintiff should have the costs of the action down to the time of such payment into Court, and that the defendant should have the costs of the action subsequent to that time, including the costs of the trial, and he should also have his costs incidental to the cross-examination of the defendant by the plaintiff; that the costs so allowed to the plaintiff and the $20 paid into Court by the defendant should be deducted from the costs so taxed to the defendant, and the defendant should have execution for the balance, and the $20 paid into Court should be paid out to the defendant.

Appeal allowed.

[COURT EN BANC.]

EN BANC. 1909 Nov. 20.

IMPERIAL BANK v. KIEVELL.

Sale of Goods—Inspection of by Purchaser—Ascertained Goods—No Implied Warranty.

Defendant purchased a fanning mill and gave a note therefor. Before purchasing he examined the mill, which was delivered to him. In an action on the note he alleged that the mill was not capable of doing good work, and claimed breach of warranty. The trial Judge found that no express warranty had been proved, and gave judgment for the plaintiff.

On appeal:—

Held, that there was evidence to support the trial Judge's finding that there was no express warranty, and the appellant having purchased the mill after inspecting the same and relying entirely on his own judgment, there was no implied warranty.

THIS was an appeal by defendant from the judgment of RIMMER, D.C.J., allowing the plaintiffs' claim in an action on a lien note given for goods agreed to be sold, and was argued before the Court *en banc* at Regina.

W. H. Williams, for the appellant: The seller expressly warranted the goods sold to do good work, and the goods failing to comply with the warranty, of which failure notice was given, the purchaser is entitled to set up breach of warranty in extinction of the purchase price: Sale of Goods Ordinance, sec. 51, sub-sec. (*a*). The sale was of a specified article sold by description, and there was an implied warranty that the machine was reasonably fit for the purposes sold: Sale of Goods Ordinance, sec. 16; and the machine was not so reasonably fit.

A. M. Matheson, for the plaintiff (respondent): The trial Judge has found that the machine was sold by a trade name, and there was, therefore, no condition of fitness for any particular purpose or implied condition as to defects: Sale of Goods Ordinance, sec. 16, sub-sec. 1 and 2; *Frost & Wood* v. *Eberle*, 3 W.L.R. 70.

November 20. The judgment of the Court was delivered by LAMONT, J.:—This is an appeal from the decision of the District Court Judge for the Judicial District of Cannington in favour of the plaintiff in an action to recover the amount of a lien note made by the defendant to Smith & Ingolls, and duly assigned by them.

The note was given for the price of one Superior disc harrow

and one Hero fanning mill. The defendant does not deny his liability on the note in so far as the price of the disc harrow is concerned, but he does dispute liability as to $45, the price of the Hero fanning mill, on the grounds that he did not order a Hero mill at all, but a "Fosson," and Smith & Ingolls sent him instead the Hero mill, and that this mill could not be made to work. And, further, that Mr. Lowe, who was Smith & Ingolls' salesman, gave an express warranty that the mill would do as good and satisfactory work as any cleaner, and if it failed to do that, they would take it back.

The learned trial Judge has found as a fact that the defendant purchased a Hero mill and not a Fosson, and with that finding I agree. The defendant went to the place of business of Smith & Ingolls for the purpose of purchasing a mill. They had no Fosson mills on hand, but had a Hero mill on exhibition in their warehouse. Mr. Lowe swears that he shewed this mill to the defendant, and that, after seeing it, the defendant purchased the same, and gave a note for the price of the mill and the price of a harrow which he also purchased. In this statement he is corroborated by the note itself, which on its face contains the following clause: "This note is given for one 12/16 Superior wheel disc harrow and one Hero fanning mill." The defendant says these words were not on the note when he signed it. He, however, admits that they promised to deliver the mill to him in four days. He also admits that they had no Fosson mills in stock. The Fosson mill is manufactured at Minneapolis, and the evidence shews that it would take at least two weeks to get one delivered to the defendant. Smith & Ingolls shipped him the Hero mill the day he signed the note, and he admits receiving it within four days, as promised. The learned trial Judge was, in my opinion, justified in finding as a fact that the defendant purchased a Hero mill.

As to the warranty. The only express warranty claimed by the defendant is that contained in a leaflet setting out the advantages to the farmer, not of a Hero mill, but of a Fosson. The document does not contain any reference whatever to a Hero mill. The defendant says that when he signed the note he asked, "What guarantee have I that the mill will be as represented, as you hold my note for same," and that Mr. Lowe turned and picked up the leaflet, and said, "This is our guarantee. We will stand behind it

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every time." Mr. Lowe admits that he may have handed the leaflet to the defendant, but denies that he ever said it was their guarantee. On this point the learned trial Judge, who had the witnesses before him, has accepted the testimony of Lowe as against that of the defendant, and has found that there was no express warranty given. There is nothing in the evidence to satisfy me that the conclusion of the trial Judge was not correct. But, even if the defendant's version were right, the only warranty which he contends was given was that contained in the leaflet. That document, however, does not contain any such warranty as claimed by the defendant. It contains a large number of paragraphs setting out the mechanical structure of the Fosson mill and the superior advantages thereof, and then contains this clause, which is relied upon by the defendant as containing the warranty: "Now we have told you the facts about the Fosson Automatic Grain Cleaner and Grader. We will stand right behind these statements all the time, and we are willing to place the mill in competition with any cleaner made at any time, and if we cannot make the machine do all we claim for it, we do not want you to keep it."

Here they say that if they cannot make the mill do all they claim for it, they do not want the purchaser to keep it, but nowhere do they say that it will do good and satisfactory work, or anything from which such a warranty could be spelled. There was, therefore, no express warranty given with the sale of the mill. Is there any implied warranty attaching thereto?

As the evidence shews that the defendant bought the Hero mill which Smith & Ingolls had in their warehouse at the time, it was the sale of a specific and ascertained article which the defendant had examined and which he purchased, as he admits, relying entirely on his own judgment. Under these circumstances, there is no implied warranty as to the quality of the mill or its fitness for any particular purpose: Sale of Goods Ordinance, sec. 16.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed.

[COURT EN BANC.]

CANADIAN PACIFIC R.W. CO. v. FOREST CITY PAVING AND CONSTRUCTION CO.

EN BANC.
1909
Nov. 20.

Common Carrier—Goods Received for Shipment—Contract to Pay Charges—Parties to—Consignor Presumed to be Agent for Consignee—Liability of Consignee—Action for Freight—Remedies of Consignee—Completion of Contract—Acceptance by Consignee.

Defendants purchased a quantity of cement for shipment to them at Regina, and it was so shipped by the consignors. The contract of shipment provided that delivery should be made in the railway company's shed at destination or when the goods had arrived at the place to be reached on the company's railway. The goods arrived at Regina and were with the consent of the defendant placed for unloading at a point indicated by the defendant's manager. The goods were subsequently taken away by another party who had purchased them from defendant and who did not pay the freight, and the defendant refusing to pay the same the plaintiff brought action to recover the charges:—

Held, where goods are with the consent or by the authority of the purchaser consigned by the vendors as consignors to be carried by a railway company as common carriers to be delivered to the purchaser as consignee, and the name of the consignee is known to the carrier, the ordinary inference is that the contract of carriage is between the carrier and consignee, the consignor being the agent of the consignee to make it, and the contract in this case was therefore between the carrier and the consignee.

2. That the plaintiff company could therefore maintain an action for recovery of the freight charge from the consignee.

3. That the plaintiff completed its contract and became entitled to recover its charges when the car containing the goods was placed for unloading with the knowledge and consent of the consignee.

THIS was an appeal taken to the Court *en banc* by the railway company from a judgment of RIMMER, D.C.J., dismissing the plaintiff's claim for recovery of freight charges on goods consigned on the plaintiffs' railway to the defendants, and was argued before the Court at Regina.

J. A. Allan, for the plaintiff (appellant): By the terms of the bill of lading the delivery of the goods consigned was completed when the goods arrived at Regina, and the defendants, having been notified of the arrival of the goods and sold them, thereby accepted the goods, and cannot now be heard to say they did not receive the same. In any event the consignee is the agent of the consignors, who primarily are liable for the freight: *Dawes* v. *Peck*, 8 T.R. 330; Elliot on Railroads, vol. 4, pp. 2419 and 2421; *Cork Distilleries* v. *Great Southern and Western R.W. Co.* (1874), L.R. 7 H.L. 269.

T. S. McMorran, for the defendant (respondent): The defen-

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dant, on the facts, can only be liable on one or other of two theories —first, that they are liable under express contract; or, second, under an implied contract arising out of their actions at Regina. As to the first, there was no privity nor is there any evidence of agency. He referred to *Dickenson* v. *Lano*, 2 F. & F. 188; *G.W. R.W. Co.* v. *Bagge*, 54 L.J.Q.B. 599; Halsbury's Laws of England, vol. 4, p. 91. The only remedies open to the consignor are to sue the consignor or exercise their right of lien. In order to establish an implied contract an actual delivery must be proved, together with acceptance: *Evans* v. *Bristol and Exeter Ry.*, 10 W.R. 359; *Barnes* v. *Marshall*, 18 A. & E. 785 There was no evidence of actual delivery or of a taking of the goods by the respondent.

November 20. The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.) was delivered by NEWLANDS, J.:—This is an action for freight on goods carried from Owen Sound to Regina, and the defence is that the goods were not carried for the defendants, but by virtue of a contract entered into between the plaintiffs and the Imperial Cement Company, Limited, and that said goods were never delivered to defendants.

The facts are, briefly, that in the fall of 1907 the defendants purchased from the Imperial Cement Co. at Owen Sound, Ontario, 1,200 bags of cement, which were shipped by the vendors to the defendants at Regina by the plaintiffs' railroad. The shipping bill was signed by the Imperial Cement Co. as consignor, and by the agent of the plaintiffs at Owen Sound, and the goods were consigned to the defendants at Regina. Under these circumstances, to use the words of Mellor, J., in *Cork Distilleries Co.* v. *Great Southern and Western R.W. Co.*, L.R. 7 H.L. 269, at p. 277, approved of by the House of Lords: "There is evidence in the present case that these goods were with the consent or by the authority of the purchaser consigned by the vendors, as consignors, to be carried by the plaintiffs as common carriers, to be delivered to the purchaser as consignee, and that the name of the consignee was made known to the plaintiffs at the time of the delivery. Under such circumstances the ordinary inference is that the contract of carriage is between the carrier and the consignee, the consignor being the agent for the consignee to make it."

The remedy of the common carrier in such a case is "by enforcing his lien upon the goods or by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party": *Sewell* v. *Burdick* (1885), 10 App. Cas. 74, at p. 91, 54 L.J. Q B. 126, 52 L.T. 445.

It, therefore, only remains for me to consider whether the plaintiffs have earned the freight sued for by completing the contract of carriage. A term of the contract is "the delivery of the goods shall be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's sheds or warehouse (if there be convenience for receiving the same) at the final destination, or when the goods shall have arrived at the place to be reached on the said company's railway." The defendants had been receiving shipments of cement all summer by plaintiffs' railway, and it had not been the custom to put the same in the freight sheds. The defendants' manager at Regina gave the following evidence:—

"Q. Then you had requested them—you said so yourself—to place the first ones at Miller's track? A. Yes, sir.

"Q. That is right, is it? A. Yes.

"Q. And you requested them to place the subsequent ones on the track opposite the Independent Lumber Company's premises? A. Well, I could not say that it was a request on my part. That was probably because it was just as handy for them as it was for me.

"Q. It was, at all events, consented to by you? A. It was consented to by me, yes. That is, when the cars came in I accepted them on that siding."

I think, therefore, the plaintiffs completed their contract, and earned the freight sued for by putting the cars containing said goods upon this track, as it was proved at the trial they had done, and of which fact they notified the defendants.

What happened after the placing of the cars on this track and notifying the defendants is, I think, not material to this action, as there is no claim on the part of the defendants for damages against the plaintiffs for negligence in allowing the Western Supply and Agency Company to take away such goods without paying the

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freight, nor was there any evidence that the plaintiffs had entered into a new contract with the Western Supply and Agency Company by which said company became liable for the freight and the defendants released from their obligation to pay same. The learned trial Judge properly ruled out secondary evidence of the order given by defendants to the Western Supply and Agency Company, requesting the plaintiffs to deliver these goods to them upon their paying the freight, and even if this order had been produced, it was proved that the plaintiffs had never seen same, and that the Western Supply and Agency Company took the goods without their knowledge, and therefore there was no consent on the part of the plaintiffs to any such agreement: *Lewis* v. *McKee*, L.R. 4 Ex. 58, 38 L.J. Ex. 62, 19 L.T. 522. I cannot, therefore, agree with the finding of the learned trial Judge that, "in allowing the Western Supply Company to take the goods, the plaintiffs entered into a fresh contract, and disobeyed the defendants, even if they were under an implied contract to pay the freight, in view of the express terms of the bill of lading."

The appeal should, in my opinion, be allowed with costs.

Appeal allowed with costs.

[TRIAL.]

ELLIS v. FOX.

1909

May 8.

Landlord and Tenant—Cancellation of Lease—Action upon Covenant After—Right of Lessor to Maintain—Tillage by Lessee—Right to Compensation for.

Plaintiff leased certain land to defendant, and with the land supplied 800 bushels of seed wheat and 800 bushels seed oats, which the lessee covenanted to return—the wheat the following fall, the oats at the expiration of the lease. There was also a covenant in the lease that either party might cancel the lease within ten months from the date thereof, giving reasons therefor. There was also a provision for cancellation by the lessor in the event of sale, in which case the lessee was to be compensated for improvements. The lessor subsequently cancelled the lease, and the lessee having neglected to return the wheat and oats the lessor brought action to recover the value thereof. The defendant counter-claimed for summer fallowing done during the term:—

Held, that cancellation of a lease by mutual consent of the parties does not destroy the term vested in the lessee, and therefore, notwithstanding such cancellation, the lessor could maintain an action for the recovery of the wheat.

2. That in the absence of an agreement to that effect the lessee is not entitled to compensation for tillage upon cancellation.

THIS was an action for the recovery of the value of certain wheat and oats delivered to a lessee by his lessor, and was tried before JOHNSTONE, J., at Moosomin.

Levi Thomson, for the plaintiff.

B. P. Richardson, for the defendant.

May 8. JOHNSTONE, J.:—On the 20th March, 1907, the plaintiffs leased to the defendant the south half and north-west quarter of sec. 16, and the north-east quarter of sec. 17, township 17, range 9, west of the second meridian, in the Province of Saskatchewan, for the term of two years and three hundred and sixty-four days to be computed from the 1st March, 1907. This lease contained a covenant by which the lessors agreed to supply the lessee with seed grain for the year 1907 as follows: 800 bushels of seed wheat and 800 bushels of oats, which the lessee covenanted to return to the lessors as to the wheat in the fall of 1907 and as to the oats at the expiration of the lease. This lease also contained a provision that either party thereto should have power to cancel the lease within ten months from the date thereof by serving a notice in writing to that effect on the other party, giving reasons

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for the wish of such party to cancel such agreement. The lease further provided that the lessors should have the option of selling the described lands at any time during the term whereupon the lease should become cancelled upon the terms that the lessee should be reimbursed by the lessors for any expense he had incurred in preparing any portion of the described lands for crop or otherwise incurred in properly farming the said lands; and in case a sale should take place and the defendant had broken any of the lands for crop (the cropping of which by the tenant was prevented through any such sale), the tenant should have $6 per acre for breaking.

On the 9th November, 1907, the plaintiffs caused to be served upon the defendant notice in writing cancelling the agreement for several named reasons. The defendant, however, remained in possession until late in the winter of 1907 and 1908, when he quit and delivered up possession to the plaintiffs, but neglected and refused to return to the plaintiffs the seed delivered by the plaintiffs to the defendant in the spring of 1907, namely, wheat 714 bushels, and seed oats 600 bushels.

The plaintiffs thereupon brought their action on the 9th day of January, 1908, claiming for 800 bushels of wheat at 95 cents per bushel and 800 bushels of oats at 50 cents per bushel. The defendant denied the delivery of both the wheat and the oats and the hire of the team, and, in the alternative, set up that the plaintiffs, through the improper cancelling of the lease, the reasons given having been insufficient, were not entitled to recover either for seed wheat or seed oats, and also counterclaimed for summer fallowing done during the year $600, for carpenter work on well $3, moving and work on granary $18, 75 oat sheaves $3, 300 oat sheaves $12, drawing 256 bushels of seed wheat $10.54.

I find as a fact that the plaintiffs delivered to the defendant seed wheat consisting of 714 bushels, for which they are entitled to be paid at the rate of 95 cents per bushel and as to the seed oats the plaintiffs delivered to the defendant 600 bushels, for which they are entitled to be paid at the rate of 30 cents per bushel.

The notice of cancellation did not amount to a surrender, and no surrender actually took place until a considerable time after the defendant had committed a breach of the covenant as to the return of the wheat. Cancellation of a lease by the mutual con-

sent of both parties does not destroy the term vested in the lessee, and, therefore, notwithstanding such cancellation, the lessor may maintain an action of debt for the recovery of the rent: *Ward* v. *Lumley*, 5 H. & N. 87; *Doe d. Courtail* v. *Thomas* (1829), 9 B. & C. 288, 32 R.R. 680. As the lease was not terminated until some time after action brought, there had been no breach committed by the defendant of the covenant to return the oats. This fact having during the trial been brought by me to the attention of the counsel, it was agreed that the question of payment or non-payment for the oats should abide by the result of the determination of the question as to the plaintiffs' right to succeed as to the wheat. The plaintiffs will, therefore, be entitled to recover for the number of bushels stated, viz., 600 at the price agreed upon between counsel as that which should be assessed in case the plaintiffs should be entitled to anything—namely, 30 cents a bushel.

As to the defendant's counterclaim. The lease contained a provision requiring the defendant to leave, upon the demised premises at the termination of the lease, the same number of acres of summer fallow as were got by him on entering into possession. He had the advantage of the summer fallow of the plaintiffs for the year 1906 in the year 1907 through cropping the same.

The defendant is not entitled to claim for tillage unless it was so agreed. The lease contains no such provision nor was there any evidence of any agreement between the parties to that effect. The only provision contained in the lease as to reimbursing the defendant for labour performed is that of the one I have already referred to. In *Whittaker* v. *Barker* (1832), 38 R.R. 588, 1 C. & M. 113, where the tenant by mutual arrangement left before the end of the term, it was held that he was not entitled to the value of the tillage or improvements which he left on quitting, in the absence of any agreement to that effect.

[IN CHAMBERS.]

1909

June 22

UNION BANK v. MCELROY.

Mortgage—Foreclosure—Order Nisi for—Service of—Necessity of Serving—Service by Posting—Sufficiency.

Plaintiff secured an order *nisi* for foreclosure, and served the defendant, who had not appeared, by posting a copy of the order in the office of the Local Registrar. On an application for final order after default, the Local Master refused the application on the ground that the service of the order *nisi* was not sufficient. Upon reference to a Judge of the Supreme Court:—

Held, that under the practice it is not necessary to serve the order *nisi* upon the defendant before entering final judgment thereon.

2. That as the practice does not require entry of appearance in proceedings instituted by originating summons, the provisions of sec. 82 of the rules of Court as to service by posting in default of appearance do not apply.

THIS was a reference by a Local Master, under the provisions of the Judicature Act, to a Judge in Chambers of an application made to him for a final order of foreclosure, and was argued before JOHNSTONE, J., in Chambers, at Regina.

T. S. McMorran, for the plaintiff.

No one *contra*.

June 22. JOHNSTONE, J.:—This is a proceeding instituted by way of originating summons issued by His Honour the Judge of the district court of Cannington, as Local Master, on the 13th day of October, 1908, calling upon the defendants to shew cause why an order should not be made for the sale or foreclosure of the interest of the defendants in the land in question.

Upon the return of the summons, 28th November, 1908, the learned district Judge made an order finding the amount then due the plaintiffs to be $1,253.90, which amount, together with interest thereon from the 28th day of November, 1908, at the rate of eight per cent., should be paid into Court within six months from the date of such order, in default of which payment it was ordered the defendants should be absolutely foreclosed and that title to the said premises should be vested in the plaintiffs free from all claim, right, title, interest or equity of redemption on the part of the defendants and all of them, or of any person or persons claiming through them, but subject, however, to certain other mortgages entitled to priority over the plaintiffs' mortgage. It was further

ordered that the defendants, each of them, and all persons claiming through or under them, or any of them in possession of the mortgaged premises or in receipts of the rents or profits thereof, should deliver up such possession or receipts to the plaintiff within ten days after service on them of the order for possession.

Default was made in payment of the moneys as ordered, and the plaintiffs applied before His Honour for an order absolute for foreclosure, such application having been supported by the affidavit of one McLellan, who swore that on the 2nd June, 1909, he did personally search at the office of the Local Registrar at Arcola for the purpose of ascertaining whether or not any money had been paid into Court to the credit of the cause, and that no money whatever had been paid either by the defendants or by any person or persons on their behalf.

Upon application for order for foreclosure absolute, the learned Judge refused to make the same, on the ground that no evidence had been adduced before him to shew that a copy of the order *nisi* had been served on the defendants, and upon request of counsel the matter was referred by His Honour to a Judge under sub-sec. 4, sec. 50, Judicature Act, 1907.

The documents filed shew that on the 14th January, 1909, the defendant Ellsworth William McElroy was served with a true copy of the order *nisi* issued herein and dated the 28th day of November, 1908, by posting such copy in a conspicuous place in the office of the local Registrar at Arcola. This was the only evidence of service of the order *nisi* on any of the defendants.

In my opinion, unless so directed, service of a copy of the order *nisi* is not necessary. The form of the originating summons is prescribed by statute, and the summons was issued accordingly, and contains the provision: "If you do not attend either in person or by your advocate at the time and place above mentioned such order will be made in your absence as may seem just and expedient." This is notice to the defendant of the action that may be taken under rule 473, which rule is as follows: "Upon proof by affidavit of the due service of the originating summons or on the appearance in person or by advocate of the parties served the Judge may pronounce such judgment as the nature of the case requires." I do not think that rule 82 applies, nor do I think rule 330 applies.

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Under our practice no appearance is entered in matters commenced by originating summons.

The direction in the order *nisi* for payment into Court of the moneys found to be due under the mortgage is not an order coming within rule 330: *Hulbert* v. *Cathcart* (1894), 1 Q.B. 244, 63 L.J.Q.B. 121, 70 L.T. 558.

An order for the payment of money by a certain date does not require to be served under the practice laid down in *Hopton* v. *Robertson*, a full report of which case will be found in the notes to *Farden* v. *Richter* (1889), L.R. 23, Q.B.D. 126, 58 L.J.Q.B. 244, 60 L.T. 304. It was here held that an order giving leave to sign judgment under order 14 of the English Rules, unless a certain sum was paid into Court before a certain named day, need not be served on the defendant before judgment is signed upon it. Field, J., who was sitting in Chambers and gave the judgment, lays down the practice as follows: "The proposition as to the necessity in certain cases of drawing up and serving the order does not apply when the party to be served has himself to take the next step under the order." The learned Judge goes on to say: "It is when the other side may suppose that the order is abandoned that the necessity of service arises. Where, for instance, an order is made giving a party time to plead, such party must draw up and serve the order on the other side. But in the present case an order for judgment was made unless a certain amount was paid by the defendant before a day named. I do not think it was necessary to serve this order before signing judgment in default of this sum named being made." See also, as to service of orders which may be made *ex parte*: Daniells Chancery Practice, 778 and 1166; Seton, 6th ed., 1904; Yearly Practice, 544; Encyc. of Laws of England, vol. 6, 156; *Withall* v. *Nixon*, 28 Chy.D. 413 (which holds that where an order *nisi* for foreclosure and possession had been made, the order absolute which provided for possession was made *ex parte*); *Craven Bank* v. *Hartley*, W.N. 1886, 189, where a similar order was made.

There will be an order for foreclosure absolute, and for delivery of possession as asked for.

[TRIAL.]

WIRTH v. COOK.

1909

Nov. 4.

Sale of Land—Vendor not Owner nor in Position to Compel Conveyance—Rescission by Purchaser—Right to.

Plaintiff applied to defendant to purchase a quarter section of land, and defendant agreed to sell such land and accepted the first payment thereon, which he paid over to his principal. Subsequently he discovered that he had sold the wrong land, and thereupon he entered into negotiations with the owner of the land which he had actually sold with a view to securing it for his purchaser. This he was able to do, but instead of securing from the purchaser an agreement with his principal at the stipulated price, he took an agreement in his own name and at an increased price. The defendant did not deliver any copy of the agreement to the plaintiff, and as a result the plaintiff after repeated demands repudiated the contract and demanded the money paid by him. The defendant subsequently, on default of the second payment, served notice of cancellation. In an action for rescission:—

Held, that the defendant, not being the owner of the land sold or in a position to compel a conveyance, the plaintiff was entitled to repudiate the contract, and, having done so before the notice of cancellation was served, the contract was rescinded, and the money paid thereon should be refunded.

THIS was an action for rescission of a contract for sale of land and return of the purchase price, and was tried before PRENDERGAST, J., at Regina.

J. C. Secord, for the plaintiff.

J. F. L. Embury, for the defendant.

November 4, 1909. PRENDERGAST, J. :—The defendant as vendor and the plaintiff as purchaser entered into a certain agreement for the sale of land, and the latter now brings this action for rescission, return of a cash payment of $260, and $420 damages for loss of improvements.

The defendant, who was a real estate agent, had for sale, amongst other land, the south-east quarter of section 16, township 20, range 19, west of the second principal meridian, belonging to one Brice, together with a certain other quarter section owned by the Bank of Montreal, and had commissioned the Capital Land Company to sell the same as sub-agents.

On April 27th, 1907, the plaintiff went to the said company's office in this city, and, after inquiring about the terms and conditions at which they held the said south-east quarter of 16, which is near his homestead, was told that the price was $1,440, of which $260 was to be paid down, and the balance in certain instalments,

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which were then stated. The plaintiff then and there expressed his willingness to buy, paid $10, for which he got a receipt (exhibit A), and, having returned on May 2nd, paid $250, which completed the cash payment, and for which he also got a receipt (exhibit B). In these two receipts the description of the said south-east quarter, which was intended to be conveyed, is fully set out. This, as already stated, was Brice's quarter.

The company reported the sale to the defendant, referring to the quarter by description and not under the owner's name, and handed him the cash payment of $260 which they had received.

J. M. Scott, the clerk in the employ of the company who effected the sale, received the money from the plaintiff, and handed it to the defendant, says that the plaintiff "was to get his agreement then," that "he was to get it that day," that "the defendant was supposed to prepare the agreement and get it ready."

The defendant, either through some mistake in his notes or error of memory, thought that the quarter section reported to him as sold was the one that the Bank of Montreal had listed with him, and he consequently paid them the $260, and had an agreement prepared, in which the land described was the bank's quarter-section.

The plaintiff, however, did not stay to execute the agreement that day, as he was to do, but went on the quarter-section he had intended to buy and described in the receipts and broke, disced and harrowed sixty acres of the same. He came back to execute the agreement about five or six weeks later, which would be about June 12th, and upon production in the defendant's office of the agreement with the bank which he had caused to be prepared, the error was discovered, and the plaintiff refused to sign.

I may state at once that the bank still has the $260. The defendant appears to have informed them that a mistake having been made, he would take over the bargain; but the matter has apparently not yet been closed between them.

Upon discovering the mistake he had made, the defendant told the plaintiff that he, in fact, had for sale the south-east quarter he wanted, but that it was listed with him at $1,600, instead of $1,440, and that the conditions were somewhat different. The plaintiff, nevertheless, appears to have then expressed a willingness to pay $1,600 rather than lose the sixty acres of improvements he had

made. The defendant, at all events, told him not to do any more breaking, and that he would in the meantime communicate with the owner to see if he could not adjust his terms so that they might be satisfactory.

The defendant, accordingly, went the next day to see Brice, who lived some thirty miles away. On the evidence of the plaintiff, of the defendant, and of Scott, I do not see that this could have been later than about June 15th. The defendant, however, having learned on the road that Brice was not at home, left word for him with one Ellis, living in that locality, and came back to the city. Brice's answer to Ellis, dated August 24th (exhibit 2), was duly transmitted by the latter to the defendant, and must have reached him about September 1st. Brice's terms were, in short: $1,440, of which $250 was to be cash, $200 on November 1st of the same year, and the balance in four equal annual instalments, with interest at six per cent.

It does not appear why Brice, who apparently had received word from Cook about June 15th, was two and a half months before replying. It is, at all events, only natural that the plaintiff, who had paid $260, had been made to understand that there might be difficulty in procuring the land he wanted, and that even then he would probably have to pay $160 more for it, should have felt uneasy, as he says he did; and I believe, as he asserts, that, in the course of these two and a half months, he did go to see the plaintiff several times—to get his paper, as he puts it. This is, again, the more likely, as Scott says that when he made his cash payment the understanding was that he was to get his agreement then.

I should here observe that the plaintiff is a German farmer of very little education, and that, as far as I can judge, although understanding some English on general topics, he would probably confuse many of the expressions used in that language in a transaction of this kind.

After the receipt of Brice's answer, nothing of moment happened for about a month. Possibly the defendant was waiting for the plaintiff to come in.

In the first week of October the plaintiff did come in, and executed as purchaser an agreement (exhibit C) for the said quarter of section 16, wherein, not Brice, but the defendant is the vendor.

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The consideration is therein stated to be $1,600, and not $1,440, as was at first agreed upon by the Capital Land Company (see receipts A and B); and it was also $1,440 and not $1,600 that Brice was asking (exhibit 2). What I wish to point out is that the defendant raised the price of the land on the plaintiff without that being at all required to secure the same from Brice, and that the difference would go, not to Brice, but to the defendant.

The agreement also contains the following clauses:—

"The vendor agrees to convey and assure or cause to be conveyed and assured to the purchaser a good and sufficient transfer in fee simple, etc.

"The vendor shall and will suffer and permit the said purchaser to occupy and enjoy the same until default be made in the payment of the said sums . . . subject, nevertheless, to impeachment for voluntary or permissive waste.

"The said vendor agrees to deliver up possession of the said land on or before the —— day of October, A.D. 1907.

"Provided that in default of payment . . the vendor shall be at liberty to determine and put an end to this agreement . . . and to retain any sum or sums paid thereunder . . . in the following method, that is to say, by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchaser at Kennell P.O. And at the end of twenty days from the time of mailing the same, the said purchaser shall deliver up quiet and peaceable possession of the said lands, etc. . . . ."

It does not appear even from the plaintiff's own testimony that he was dissatisfied to enter into an agreement with the defendant. Nor does he say that he did not know that the defendant was only an agent. I will at the same time casually observe, even if this does not perhaps matter, that I do not see the reasons which called for the agreement being made that way. Even if the plaintiff was made to consent, the fact remains that it gave him at the time no security on the land.

The plaintiff says that the defendant was to send him a duplicate of the agreement in eight or fourteen days. He is corroborated as to this by his wife, whose want of knowledge of English, I must say, detracts somewhat from her testimony, and also by one Keiser. The defendant, on the other hand, asserts that it

was quite clearly understood that he was to keep the duplicate agreement until the second payment was made, and he is supported by the witness to the execution of that agreement, who was then a typewriter in his office. My conclusion is that the defendant did not consider that it was a matter that the plaintiff should be consulted about, that he just told him that it was to be so, and the plaintiff yielded or, at all events, did not object at the moment.

I, however, see no reason why the defendant should have kept the agreements. He says: "No copy was given to the plaintiff on account of the previous mix-up, and on account of it being so close to the second payment of $260, and because of the peculiar position it would place me in if he did not make the second payment, and I did not want to take the risk of assuming $2,800 of liability." These are no reasons at all. What he calls "the previous mix-up" was his own blunder, with which the plaintiff had nothing to do, and he could not be placed in any "peculiar position" by the plaintiff defaulting later on in the second payment, if he (the defendant) had followed what was the reasonable and fair course—that is, bring the plaintiff and Brice together, and close the matter between them as principals. There is no more significance in what he says about "assuming $2,800 of liability." If he assumes any liability with the Bank of Montreal, it will be to save himself from his own blunder, and the plaintiff never asked him to assume any liability with Brice.

Having, however, secured the agreement with the plaintiff, the defendant, on October 11th, writes to Brice (exhibit 4): "I have succeeded in getting my purchaser on an agreement for sale, and as soon as I secure the cash payment I will advise you."

Now, this is not in accordance with the actual facts. The defendant had received from the plaintiff a cash payment of $260 ever since the beginning of May, which was five months before. He had, moreover, just bound the plaintiff to himself under the agreement. His duty at that moment, as I hold that the implied covenant was that he should at least do, was to turn over the $260 to Brice and secure the land. But that was the last communication that the plaintiff ever had with Brice, and he never made the least attempt to secure the land.

Whether the understanding at the time was or was not that the defendant should keep the duplicate agreement, I find that the

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plaintiff came back after that several times and again asked for his papers. On two occasions, upon being refused, he seems to have said that he was ready to take back his cash payment, with compensation for the loss of his improvements, and on the last I find that he then intimated to the defendant that, having no assurance whatsoever in his possession, he would pay no more money on the bargain. This, I, moreover, find, was before November 1st, and he then abandoned the land, if he had not abandoned it before, which is somewhat uncertain under the evidence.

At all events, on December 14th, the defendant sent the plaintiff by registered package, addressed to Kennell P.O., a notice of cancellation (exhibit 6), which the defendant says he never received.

With respect to compensation for loss of improvements, I do not think the plaintiff has any claim. I feel that if he had asked when he made the cash payment whether he could go on the land, the reply would have been in the affirmative. But the fact is that he did not so ask. He had entered into no agreement when the improvements were made, and the two receipts (exhibits A and B), not satisfying the Statute of Frauds, were not in any aspect a license for him to take possession.

On the question of rescission and the return of the $260 I am of opinion that he should succeed.

Counsel for the defendant laid much stress on the fact that the vendor under the agreement covenants not "to convey and assure," but "to convey and assure or cause to be conveyed and assured." This, I think, is establishing a distinction where there is no difference. In one case he covenants to convey it himself; in the other case, to have it conveyed by another; but in both the obligation is that the land shall be conveyed and assured, and the undertaking that this shall be done is equally binding.

Possession was never delivered to the plaintiff under the agreement. and he never was but a trespasser on the land.

The defendant was a trustee under the agreement, and was bound as such, even if the plaintiff knew the condition of affairs, to at least protect the trust. This he never did, nor ever attempted to do. There was, moreover, in my opinion, apart from any obligation resulting from the trust, as already stated, an implied undertaking on the part of the defendant to pay to Brice the $260

received from the plaintiff, which he has also neglected to do. That the defendant understood that to be his duty is shewn by the fact that, when the cash payment was handed to him by the Capital Company, he turned it over to the Bank of Montreal, whom he then thought to be the owners.

I hold that the plaintiff's declaration to the defendant, on the occasion of their last interview, when, upon being refused any further assurance, he declared that he would make no further payments, was a rescission, preceded or followed at once, as it was, by abandonment of the land.

The defendant sent to the plaintiff on December 14th a notice of cancellation based on his defaulting in the payment due November 1st. I have held that the plaintiff had already rescinded at that time. But even if he had not, the plaintiff, who was aware that the defendant had not attempted and was not attempting to secure the slightest interest in the land, and who, moreover, had not a scrap of paper to rely on, was not bound to continue to make his payments, knowing that the first that he had made six months before had not yet been applied as it should have been.

I do not think that the present case is governed by the principles laid down in *Flureau* v. *Thornhill* (1776), 96 Eng. Rep. 635, and 2 W. Bl. 1078; *Bayne* v. *Fothergill* (1871), L.R. 7 H. of L. 158, qualifying the former; and *Day* v. *Singleton* (1899), L.R. 2 Ch. 320, distinguishing the first two, and in all of which the question was, whether and when the purchaser is entitled to compensation for loss of his bargain when the vendor cannot make title. No such compensation is asked for here, and this case is, moreover, obviously distinguishable in almost all of its main features.

Counsel for the plaintiff relied strongly on *Forrer* v. *Nash* (1865), 35 Bevan 167, where the Master of the Rolls said: "I am of opinion that when a person sells property which he is not able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person who has the power, to join in making a good title to the property sold."

I may observe that in the case just cited the question was in respect to an executed contract ("when a person *sells*," etc.),

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while we have to do in this case with an executory contract. But I find that in two cases where the contract was executory, the decision in *Forrer* v. *Nash* was referred to as being applicable.

In *Brewer* v. *Broadwood* (1883), L.R. 22 Ch. D, p. 105, 52 L.J. Ch. 136, 47 L.T. 508, a vendor contracted to sell to a purchaser an agreement for a lease, and the purchaser afterwards repudiated the contract. At the date of the agreement and of the repudiation, the agreement to lease was voidable at the will of a third party. This third party was not taking any steps to avoid the agreement to lease, and was even willing to confirm it on certain conditions. It was, nevertheless, held that the purchaser was entitled to repudiate the contract. Fry, J., in the course of his judgment, after citing the above quotation from *Forrer* v. *Nash*, said: "That principle has, of course, nothing whatever to do with cases in which there are outstanding interests which the vendor has the power of gathering in, because in that case he is able and he is under an obligation to get them in; but it has a great deal to do with a case in which the only title of the vendor is contingent upon the will and volition of a third person."

In the present case the only title of the defendant is and always has been contingent upon the will and volition of Brice, and he never had otherwise a shred of title.

The other case referred to is *Bellamy* v. *Debenham* (1891), L.R. 1 Ch., p. 412, 60 L.J. Ch. 166, 64 L.T. 478, where there was an agreement for the sale of certain property, and the purchaser, upon discovering that there was a reservation of mines on the land, rescinded. It was held by the Court of Appeal that, as the vendor had not power to convey the mines, nor power to compel a conveyance of them from other persons, the purchaser was entitled, upon discovering this, to rescind the contract, though the time to be allowed for completion had not expired. And, with reference, to repudiation, Lindley, L.J., said, in his judgment (p. 420):— "The defendant's solicitor, in his letter of 20th May, says that, as the plaintiff cannot give his client the mines and minerals, he cannot advise his client to complete, and that advice is communicated to the client and adopted by him. It appears to me, therefore, that there was on the 20th May a plain repudiation on the part of the defendant of all liability to complete, and he has never flinched from that possession."

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I may also refer to *Hoggart* v. *Scott*, 1 Russ. & Mi. 293, where the vendor, as in this case, had no power whatsoever to sell; and to the judgment of my brother Johnstone in *Bannerman* v. *Green* (1908), 1 Sask. L.R. 394, 8 W.L.R. 441, where the action was for specific performance, but the same principles were in question.

This dispute has arisen simply from the defendant misconceiving his position, owing to his having either to lose the $260 which he paid by mistake to the Bank of Montreal or to take over the bargain, which may not prove a profitable one. But nobody is responsible for this but the defendant himself. He should have dismissed that consideration from his mind, and not have allowed it to influence him in carrying out what he had agreed upon with the plaintiff.

There will be an order for rescission.

And for a return to the plaintiff of the $260, with interest since May 2nd, 1907.

And costs.

[IN CHAMBERS.]

IN RE WARK CAVEAT.

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May 17.

Land Titles Act—Caveat—Application to Continue Claim under Verbal Trust—Right of Cestui que Trust to File Caveat—Statute of Frauds—Jurisdiction of Judge—Determining Matters in Controversy on Summary Application.

Wark filed a caveat against certain lands, and a motion was made, on behalf of the owner, to have such caveat removed. On a motion to continue the caveat, it appeared that Wark claimed an interest in the land as *cestui que trust* under a verbal declaration of trust, the conveyance from him to the owner being absolute, although, as he claimed, subject to a trust as to the profits to be derived from the sale. This the owner denied. It was objected that under the provisions of the Land Titles Act no caveat could be filed by Wark, as he did not claim an interest under document in writing, and the Statute of Frauds was also invoked:—

Held, that, under sec. 136 of the Land Titles Act a *cestui que trust* claiming a beneficial interest of any sort may lodge a caveat whether the declaration is in writing or not.

2. That as to the Statute of Frauds and other objections, these matters should not be determined on a summary inquiry, and there being a question to be determined, the caveat should be continued for a sufficient time to enable action to be brought in a competent Court to determine the matters in question between the parties.

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THIS was an application to continue a caveat, and was argued before WETMORE, C.J., in Chambers.

J. F. L. Embury, for the caveator.

Alex. Ross, for the owner.

May 17. WETMORE, C.J.:—This is an application to continue a caveat registered by Wark, the applicant, against the south-west quarter of section two (2), south-east section three (3), and the east half of section four (4), in township twenty-two (22), range seventeen (17), west of the 2nd.

The material on which the summons in this case was obtained is very meagre, and consisted merely of the affidavit of the applicant, Wark. There is nothing to shew who is the registered owner of the land in question, nor is there anything to shew what grounds are set forth in the caveat upon which the caveator claimed. Leave was granted to produce further affidavits at the return of the summons, and further affidavits were read, but they threw no further light upon the matter to which I have just referred.

The facts are that the caveator made an arrangement with one McPherson to purchase the lands in question, and made a deposit of $100 on account of such purchase. He endeavoured to negotiate a re-sale to one Recor, but without effect. Eventually the arrangement with McPherson was completed, but upon an increase of 50 cents on the purchase money, and a formal agreement in writing was entered into between McPherson and Wark, and the first instalment of the purchase money paid in full. The money to pay this first instalment, and therefore to enable the agreement of sale to be completed, was advanced by one L. A. Hamilton, against whom the caveat in question was issued. Wark subsequently assigned the agreement to Hamilton, and his contention, supported by his own affidavit, is that Hamilton took the agreement and the land over on the understanding that he was to pay the purchase money, finance the matter, apply the proceeds of re-sales to the moneys he advanced, and the balance, which would represent the profits, was to be equally divided between Wark and himself. This arrangement as to financing the matter and dividing the profits was admitted by Wark to be entirely verbal. Hamilton, on the other hand, by his affidavit expressly denies that there was any such arrangement. He states, in fact, that the purchase by him of the

agreement and the lands was absolute, and he states the particulars under which he acquired this purchase, and, if true, such circumstances are reasonable and quite likely to have occurred. If Wark's version of the transaction is correct, Hamilton would hold the property in trust for the purposes as alleged by Wark. The transfer to Hamilton, however, is absolute upon its face, and it was urged at the return of the summons, on behalf of Hamilton, that inasmuch as there was no writing by any person declaring such trust, that it was void under sec. 7 of the Statute of Frauds, 29 Car. 2 C. 3. It was also urged that Wark was not in a position to file a caveat, because such an instrument could only be lodged under sec. 136 of the Land Titles Act, ch. 24, 1906, by a person claiming to be *interested* in the land, and that by virtue of sec. 79 of the last mentioned Act no trust can be registered; and even if the instrument of assignment contained any notice of trust, the Registrar was obliged by that section to treat it as if there was no trust, and the trustees shall be deemed to be the absolute and beneficial owners of the land for the purposes of the Act.

Dealing with the last objection, the Land Titles Act was never intended to abolish trust estates. It has, however, provided that a trust shall not be registered, and that the trustees shall be deemed the absolute and beneficial owners of the land, but that is only for the purposes of the Act—that is, for the purposes of registration, because the Land Titles Act is an Act which deals, and is intended principally to deal, with matters of registration. The Court still holds its jurisdiction to deal with matters of trust and trust property with respect to lands, as well as other property, and so long as the trustee happens to be the registered owner of the land in question the Courts can compel him to carry out his trust and will restrain him from appropriating the property to purposes not in accordance with the trust. I go no further than that at present, for it is not necessary; it may be that the Court may exercise its jurisdiction as against a subsequent registered owner who took the property with the knowledge of the trust or took it in collusion with the trustee for the purpose of defeating the trust. It is not necessary for me to discuss such a case, as this is a matter which comes up as between the *cestui que trust* and the trustee, and in the absence of evidence to the contrary I will assume that Hamilton still holds the land in question.

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The expression in sec. 136 of the Act, that "any person claiming to be *interested* in the land" . . . "may lodge a caveat with the Registrar," is not governed by sec. 79. The word "claiming" gives this section a wider significance, and I apprehend that it is good, therefore, to enable any person claiming a beneficial interest of any sort to lodge his caveat so as to prevent the land being disposed of, and obtaining a decree of the Court retaining his rights against the person whom he deems likely to be disposed to interfere with them.

In this case Hamilton has repudiated the arrangement as alleged by Wark. With respect to the other question raised, arising out of the Statute of Frauds, I express no opinion. I am of the opinion that that question must be decided by the Courts. If the material before me was of such a character as to satisfy me clearly and beyond all doubt that the caveator had no rights with respect to the property, I would, I think, be justified in directing that the caveat be removed, but where there is a fair *bonâ fide* ground for setting up his alleged rights, the Court is the proper jurisdiction to deal with the question, not a Judge under proceedings under the Act. The fact that there was no written declaration of trust in this case is not by any means conclusive—that is, there is room for discussion. The cases appear to me to be possibly of somewhat a conflicting character. *In re the Duke of Marlborough, Davis* v. *Whitehead* (1894), 2 Chan. 133 (63 L.J.Ch. 471), Stirling, J., at p. 141, states as follows: "The general principle that the statute is not to be used as a protection to fraud has long been recognized by Courts of equity, but this does not seem to have always been applied in a uniform manner." Now, if Wark's version of what took place is true, Hamilton's claim—that the purchase was an absolute one—and his attempt to deal with the property for his own benefit exclusively as he has done, would be a fraud on Wark. I express no opinion as to what effect the Statute of Frauds may have on the question under the circumstances of this case. The jurisdiction to determine this question of fact is with the Court in an action properly instituted for the purpose. I, therefore, am of the opinion that my duty is to maintain the *status quo* between the parties and to continue the caveat. I will therefore continue the caveat, but if Wark does not, within twenty days from the date of this judgment, commence an action in a Court of competent jurisdiction to have

his rights declared and lodge a *lis pendens* with the Registrar, the caveat shall, without further order, lapse. If he complies with this direction the caveat will be continued until further order. But in any event, if Hamilton lodges security with the Local Registrar in such amount as a Judge may deem proper to pay any damages or sum of money which the Court may award to Wark in such action, then, upon a certificate of such security being filed with the Registrar of Land Titles, the said caveat shall lapse. The question of the costs of this application will be reserved.

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[CHAMBERS.]

IN RE OUTLOOK HOTEL CO.

1909

Nov. 12.

Company—Winding Up—Insolvency—Proof of—Admissions of Insolvency by Officers—Effect of—Affidavit Verifying Petition—Sufficiency of.

An application was made to wind up a company on the grounds of insolvency under the provisions of the Companies Winding-up Act (Dom.). The petition set out that the petitioner was a creditor, and that the company was indebted to other persons in large amounts; that the company was unable to pay these debts, and that certain persons in charge of the company's business had admitted its insolvency. This petition was verified by affidavit, which stated "that such of the statements in the petition as relate to my own acts and deeds are true, and such of the statements as relate to the acts and deeds of others I believe to be true." No other evidence was filed with the petition, nor was notice of any other affidavit served until two days before the application was to be heard, when three further affidavits were served and leave was asked to read them:—

Held, that the affidavit did not verify the petition as required by the rules, and was insufficient to support it.

2. That the original affidavit filed being totally insufficient, there was no evidence on file when the petition was presented to support it, and leave should not be given to file further affidavits in an endeavour to make out a case after the return of the motion.

3. That insolvency can only be established in winding-up proceedings in the manner provided by the Act, and admissions of officers of the company of its insolvency are not sufficient to bring the case within the Act.

THIS was a motion to wind up a company alleged to be insolvent, and was argued before the Chief Justice in Chambers.

W. B. Scott, for the petitioner.

W. J. Leahy, for the company.

November 12. WETMORE, C.J.:—This is an application on behalf of Marshall A. Lougheed, under the Dominion Winding-up Act, Rev. St. Can. 1906, ch. 144, for a winding-up order against

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the company. The petition is not dated, but the affidavit of the petitioner, purporting to verify the facts set forth in it, was sworn on the 4th October last, and a copy of this affidavit was served on the president of the company with the petition and the notice of application. The fact that the petition was not dated is therefore immaterial.

The petition sets forth:—

1. How and when the company was incorporated.
2. Where the head office is situate.
3. The object for which the company was incorporated.
4. The nominal capital stock, the number of shares into which it is divided, the number of shares subscribed for as appears by the memorandum of association on file in the office of the Registrar of Joint Stock Companies for the Province, and the ignorance of the petitioner as to how many shares have been subscribed for, and what amount has been called up.
5. That the company immediately after incorporation commenced to carry on business, and has continued to carry on business until the 4th October last.
6. That the petitioner is a creditor of the company for $1,547.47, which is overdue and unpaid, and that the company is indebted to other persons in large amounts which are overdue and unpaid.
7. That the company is unable to pay the petitioner's claim, or to meet its other liabilities, and that the company is insolvent, as has been admitted by the parties who are carrying on its business at the town of Outlook, and then follows the prayer that the company may be ordered to be wound up, etc.

The affidavit before referred to as purporting to verify the facts set forth in the petition merely refers to the petition as an exhibit, and states: "That such of the statements in the petition . . . as relate to my own acts and deeds are true, and such of the statements as relate to the acts and deeds of any other person or persons or body corporate I believe to be true."

I cannot find set out in the petition any "acts or deeds" of the deponent or of any other person or persons or body corporate, except as stated in the fifth paragraph, which I think would be the act of the company. All the other matters stated in such petition are facts, but not "acts or deeds"; and in so far as the deponent is concerned he states what is mentioned in such fifth paragraph

as a fact, not as a deed or act of his. This affidavit, however, appears to be in the form prescribed by the rules framed under the provisions of the Companies Act, 1862 (Imp.): see *In re the New Callao*, 26 Sol. J. 403.

It is quite clear that the facts set forth in the petition require to be verified under oath, and I must say that I cannot understand how an affidavit in the form presented in England can, under very many circumstances, be applicable.

I am of opinion that I am not bound by the English rules referred to, and I hold that the affidavit in question does not verify the facts set forth in the petition.

The rules and orders under the Winding-up Act formulated by the Supreme Court of the North-West Territories on the 9th July, 1903, are in force, and applicable to the Winding-up Act I am discussing and the procedure to be taken thereunder. Rule 47 provides that a copy of the petition indorsed with or accompanied by the notice of the application shall be served as therein prescribed. Rule 48 provides that such notice shall mention the affidavits upon which the applicant intends to rely in support of his application, and that copies of such affidavits and other material, or of any portion thereof, shall be furnished to the advocate or any officer of the company requiring the same within twenty-four hours after demand.

The notice served in this case stated that the affidavit to which I have referred would be read in support of the petition, and no other affidavit or material was mentioned. This service was effected on the 4th October, and stated that the petition would be presented on the 11th October. The matter was adjourned from time to time, and eventually was heard before me on the 8th November, when counsel for the applicant applied for leave to read three other affidavits, *viz.*, of William Cornelius Kent, James Archibald Fraser, and Marshall A. Lougheed, respectively. Copies of these affidavits were served on the agents of the company on the 6th November. The last two affidavits were irregular. Counsel for the company stated that he would not object to these affidavits by reason of the irregularities, and he would consider that by the reference made by Fraser in his affidavit to "the above-named company" he intended the Outlook Hotel Company, but he objected to the affidavit being now received to bolster up the applicant's case or to set up new grounds for the application.

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

Of course, neither of those three affidavits were filed on or before the day of service of the notice of application. They were only served between the 25th October and the 4th November. Consequently, that rule was not complied with, and unless special leave is obtained from me to read these affidavits, the only material to support the application is the affidavit of the applicant, which was mentioned in the notice, and which I have held does not verify the facts set out in the petition. This affidavit so absolutely and entirely fails to verify the facts set forth in the petition, or any of them, that I am of opinion that leave to read the additional affidavits should not be allowed. As a matter of fact, on the day of service of the notice there was not on file, as required by rule 52, a scintilla of evidence to establish any one fact set forth in the petition. I therefore refuse to allow those affidavits to be read.

I will not, however, turn this case off on that ground alone. This company is a trading company as defined by the Act, and was incorporated under the Territorial Companies Ordinance, ch. 20 of 1901, and as held by me in *In re the Nelson Ford Lumber Co.* (1908), 9 W.L.R. 438, applications can only be made against it under the Winding-up Act in question, when it can be brought under either par. (a) or (b) of sec. 6 of that Act. It is clear that par. (b) does not apply to the circumstances of this case. The proceedings, therefore, can only be sustained on the ground that the company is insolvent. Section 3 of the Act states, "when a company is deemed insolvent" (of course under the Act).

In *Re Wear Engine Works Co.* (1875), L.R. 10 Ch. 188, 44 L.J. Ch. 256, 32 L.T. 314, James, L.J., dealing with similar provisions in an Imperial statute, lays it down at p. 191: "We wish it to be understood that a winding-up petition must allege facts which justify a winding-up order. No doubt, if there is any slip in the

statements the Court can allow an amendment, so that the real point may be tried; but, subject to this power of amendment, it is not enough for a sufficient case to be shewn in evidence; a sufficient case must be stated on the petition, that the order may be *secundum allegata et probata.*"

It will not be sufficient to state generally in the petition that the company is insolvent. Facts must be stated which will bring the company within some one or more of the provisions of sec. 3. The only paragraph of the petition under which it can be set up that the case is brought within any of the provisions of that section are paragraphs 6 and 7. I have in effect set both of those paragraphs out in a preceding part of this judgment, and they attempt to set up in the first place that the company is not able to pay its debts as they become due, and to bring it within clause (a) of sec. 3 of the Act. Section 4 provides, when it shall be deemed that a company is unable to pay its debts as they become due, the creditor must serve a demand in writing on the company requiring it to pay the sum due, and if the company fails to pay the same or to secure or compound the same within the time prescribed by the section, it shall be deemed to be unable to pay its debts as they become due. Nothing of this sort appears in the petition. Paragraph 7 of the petition, however, alleges: "That the said company is insolvent, as has been admitted by the parties who are carrying on the business of the said company at the town of Outlook." The attempt by this allegation is to bring the company within clause (d) of sec. 3, which is as follows: "If it has otherwise acknowledged its insolvency." That means if the company has otherwise acknowledged its insolvency.

Who are the three parties who have made this admission? Are they officers of the company, who are in a position as such to make admissions of such a character to bind the company, or are they persons who are merely put in the hotel by the company to manage it? If the latter, I am very clear that any admissions made by such persons would not amount to an acknowledgment of insolvency on the part of the company. And I am of opinion that the admissions of insolvency by an officer of the company would not amount to such an acknowledgment by the company.

In *Re Qu'Appelle Valley Farming Co. Ltd.*, 5 Man. L.R. 160, Taylor, C.J., at p. 164, dealing with an exactly similar clause

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in the Winding-up Act, ch. 129 of the Rev. Stat., 1886, says: "It is, however, sought to bring them within clause (d), and it is urged that the company has acknowledged its insolvency by not paying the debt, allowing itself to be sued, judgment to be recovered, and execution to be returned *nulla bona*. I do not think so. These are all circumstances from which perhaps a state of insolvency might be inferred, but that is not what the statute means by acknowledging its insolvency. To bring a company within the clause there must, I think, be something actively done by it as an acknowledgment. This seems plain from the clause, standing as it does immediately after two other clauses, saying a company is deemed insolvent 'if it calls a meeting of its creditors for the purpose of compounding with them; if it exhibits a statement shewing its inability to meet its liabilities.'"

In *In re the Lake Winnipeg Trans. L. & T. Co.*, 7 Man. L.R. 255, an affidavit was read made by the president of the company, who was the petitioner, stating that "from his knowledge of the company's affairs he knows it to be unable to pay its debts in full." That learned Judge held that that was not sufficient evidence of insolvency (see p. 260 of that case), and I agree with him.

A fortiori—then a verbal admission made by the president or other officer of the company would not be evidence of insolvency under the Act. The acknowledgment contemplated by clause (d) of the section must be something *ejusdem generis* with what is required by clause (b) or (c) of the section.

Now, clearly the affidavit of the applicant served with the petition, even supposing it verified the facts set out in such petition, carries the matter no further.

The further affidavit of the petitioner, Marshall, which was sought to be put in at the hearing, would be of no assistance. It merely verifies the indebtedness of the company to him, states that he has repeatedly asked the manager and other officers of the company for a settlement of his claims, and that these officers have stated that the company was unable to pay its debts in full. That does not comply with sec. 4 of the Act. The affidavit also stated that Mr. Marshall was present at a meeting of creditors of the company, when it was admitted by the manager and secretary of the company that the company was unable to meet its liabilities. He does not depose that a statement was exhibited by the company,

as required by clause (c) of the section. The affidavit of Kent does not help the petitioner. He merely states that the company in question owes a company of which he is manager some rent, and that a distress warrant was issued on the 2nd November for its recovery and the amount has not been paid. If it is thought that this brings the case under the provisions of clause (h) of the section, all I have to say is that that clause refers to an execution, not a distress warrant, and, anyway, the issue of the warrant was after the service of the notice of this application. The fifteen days from the date of seizure has not yet expired, and there is no evidence as to what time was fixed for the sale of the goods seized, if any seizure was made, which is left very doubtful.

Neither will Fraser's affidavit assist the petitioner. It is of the same character as the other affidavits. It alleges that he was present at two meetings of creditors, when the manager and secretary of the company admitted "that they" (I presume he means the company) "were unable to meet their liabilities." I have already dealt with allegations of this character. He alleges, however, that the company called a meeting of its creditors for the ..... day of September, 1909, for the purpose of compounding with them. In the first place, this is very vague. What day of September has he reference to? But the great objection to this is that it is something entirely new. It is not mentioned in any other affidavit, and there is not the slightest reference to it in the petition. As far as I know, it was not brought to the notice of the company until over a month after the petition and notice of application were served.

I certainly would not, under such circumstances, if I had the power to do so, allow the petition to be amended to correspond with that allegation. I may add that I was not asked to amend the petition, neither will I receive this allegation to influence me in the conclusion I have reached. I am very much inclined to the opinion (although I do not decidedly lay it down) that an amendment should not be allowed in a case like this. There is not merely a "slip in the statements," as mentioned by James, L.J., in the citation I have made from his judgment. The proceedings are absolutely bad from the beginning. No case whatever was presented at the time of serving the petition and the notice.

Application dismissed, with costs to be paid by the applicant.

[COURT EN BANC.]

EN BANC. 1909 Nov. 20

McCALLUM v. RUSSELL.

Principal and Agent—Commission on Sale of Land—Right of Agent to—Payable Only on Payment of Purchase Price—Cancellation by Vendor—Effect of on Agent's Right to Commission.

Defendant listed certain land with plaintiff for sale on certain terms, and a commission of $200 was agreed upon. Plaintiff sold the land to a purchaser who could not pay the agreed amount as deposit, but the defendant accepted the purchaser and signed an agreement to sell. At this time it was arranged that the payment of the plaintiff's commission should be postponed until the purchasers could get a loan to pay for the property or sell it. Subsequently no payment being made under the contract other than the deposit of $50, the vendor cancelled the contract:—

Held (LAMONT, J., dissenting), that, the plaintiff, having secured a purchaser who was willing to purchase for the price agreed and who was accepted by the defendant, was, in the absence of any agreement to the contrary, entitled to his commission.

2. That, even if the time of payment of the commission had been postponed, yet, as the defendant had by his action in cancelling the contract made it impossible for the purchaser to complete his contract, so that the plaintiff would be entitled to receive his commission, the plaintiff was entitled to recover notwithstanding the arrangement for postponement.

THIS was an appeal from the judgment of RIMMER, D.C.J., dismissing the plaintiff's claim, and was argued before the Court *en banc* at Regina.

F. W. G. Haultain, K.C., for the plaintiff (appellant): The plaintiff, being a real estate agent, is entitled to recover the amount claimed on a *quantum meruit* as a reasonable remuneration for his work and services, even though the terms of sale are different to those named at the time the employment was given: *Ings* v. *Ross*, 6 W.L.R. 612; *Mansel* v. *Clements*, L.R. 9 C.P. 139; *Toulmin* v. *Miller*, 58 L.T. 96; *Weycott* v. *Campbell*, 31 U.C.R. 584. The amount claimed is reasonable and the usual remuneration for such services. If there was any agreement that payment of commission should be postponed until payment of the purchase price, defendant by cancelling the agreement made performance impossible, and the parties were thereupon restored to their original positions.

Avery Casey, for the defendant (respondent): An agent is not entitled to recover his commission until he finds a purchaser who is not only ready and willing, but also able to make the purchase: *Conrad Investment Co.* v. *Lloyd*, 11 W.L.R. 338 & 340; *Hunter* v. *Bunnell*, 3 W.L.R. 229; *Chapman* v. *Winston*, 91 L.T. 17; *Lott* v. *Outhwaite*, 10 Times L.R. 75. The agent cannot recover on

a *quantum meruit* where there has been an express agreement: *Lott* v. *Outhwaite, supra; Re Slater's Claim,* 7 Times L.R. 602; *Green* v. *Males,* 30 L.J.C.P. 343.

November 20. WETMORE, C.J.:—This is an appeal from the judgment of his Honour Judge Rimmer, sitting as Judge of the Regina District Court.

The action was brought to recover $149.75, the balance of $200 alleged to be the agreed commission upon the sale by the plaintiff, who was a land broker, of a lot of land owned by the defendant situate in Regina.

The property was admittedly listed by the defendant with the plaintiff; whether to find a purchaser or a sale is not material, because the plaintiff not only found a purchaser, but he sold the property to a person whom the defendant accepted.

The terms of the agreement, in so far as they are material to this action, upon which the property was listed are as follows: The "rate of commission to be $200 paid out of the deposit, viz., city, town or village property; five per cent. of purchase price. Farm lands, per acre, $1." Therefore, the commission agreed to be paid was $200.

The terms of sale were: "Price $4,200; cash payment, including the above deposit, $500, or $50 per month" (*sic*). Between the figures "$500" and the words and figures "or $50 per month" the words "balance as follows" appears in print. This is marked out by a pencil mark going through it.

The plaintiff found a purchaser, one Mary M. Smith, for $4,200. She paid $50 down to the plaintiff on account of the purchase money.

The defendant and Mary M. Smith then entered into an agreement for the sale of this land, dated the 3rd November, 1908. The plaintiff agreed to sell the property in question to Smith for $4,200; $50 down and $50 on the 1st January, 1909, and $50 on the first day of each and every month thereafter until the whole sum of $4,200 and interest at the rate of six per cent. per annum was paid and receipt of the payment was acknowledged.

Smith went into possession of the property.

I may say here that the agreement listing the property with the plaintiff is dated the 12th October, 1908, and I have no doubt

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that the $50 mentioned in the agreement of sale as being received was the deposit which Mrs. Smith paid the plaintiff on the purchase of the property, and which the plaintiff retained.

The evidence as to what took place between the plaintiff and defendant when the property was listed, and subsequently, is very contradictory. The defendant swore that the property was listed for $4,000, and the plaintiff was to get his commission the best way he could. I presume by that was meant he would get as commission whatever he could sell the land for over the $4,000. Looking at the original agreement listing the property, it would appear that the figures "$4,000" in it may have been changed to $4,200, but the evidence is not sufficient, in my mind, to warrant the Court in holding that this change was made after the defendant signed it. In the first place, the trial Judge does not so find. In the next place, the appearance of the figures in the original document indicate that the change, if any, was made immediately after the $4,000 was written—the colour of the ink and the general characteristics indicate that. Moreover, $4,200 was the price for which the defendant agreed to sell the property to Smith, and the provision that the commission was to be $200 would not be consistent with the property being listed at $4,000, leaving the plaintiff to get his commission for whatever he might secure over and above the $4,000. There was no evidence that there was any alteration after signing as to that being the commission stated in the agreement.

The defendant also swore that this document had been altered after he had signed it by scratching out the word "and" and substituting therefor the word "or." The learned trial Judge has found that the words "balance as follows," which I have referred to, were struck out after the defendant signed this agreement. There was no evidence to warrant that. As before stated, the evidence of the defendant was that the word "and" was struck out and "or" substituted. He swore to no other alteration after signing, and the plaintiff distinctly denies that any change was made in that paper after it was signed. The document does not bear the appearance of having been altered in the way the defendant speaks of.

If the testimony stopped there, I am of opinion that the plaintiff would be entitled to recover his full commission, because he

did everything that he was called upon to do under this agreement. He not only found a purchaser, but he brought about a sale on the terms under which the property was listed with him. It is true that he did not secure the $500 deposit, but he did secure the $50 per month, and that was what the agreement warranted. It is true that $500 could not be paid out of the first instalment, $50, but, at the same time, having sold the property in accordance with the terms under which it was listed with him, he would be entitled, in my judgment, to recover the commission agreed to be paid, the defendant having accepted the purchaser.

However, before the agreement of sale between Mrs. Smith and the defendant was executed, the defendant objected to signing it, and said to the plaintiff, "What about your commission?" to which the plaintiff replied, "I am not in a hurry for my commission. I will wait until they get a loan or sell it," and thereupon the defendant signed the agreement. The plaintiff denied all this.

I am of opinion that, the defendant having signed under such circumstances, and the Judge having found that he so signed and there being evidence to warrant that finding, that the case is brought within *Lindley* v. *Lacey* (1864), 17 C.B.N.S. 578, and if the *status quo*, as a result of the defendant signing that agreement under such circumstances had continued, I am inclined to think that the plaintiff would not be entitled to recover the amount of the balance of his commission until Smith had got a loan or sold the property. But the difficulty I find is that the defendant afterwards cancelled the agreement of sale. Now, it seems to me, under such circumstances, that being his own act, he cannot say to McCallum, "It is true you earned your money, but you agreed with me not to press for payment until one of certain events happened, and I have rendered it impossible for either of these events to happen by cancelling the agreement of sale which you brought about, and therefore I am not bound to pay you anything for your services." I am of opinion, therefore, that the defendant having so cancelled the agreement of sale and put it out of Smith's power to raise the means contemplated for paying the plaintiff, that the defendant is bound to pay the commission.

And I may just add that I cannot see that the cases cited by the learned trial Judge in his judgment—*Taylor* v. *Caldwell* (1863),

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3 B. & S. 826, and *Krell* v. *Henry* (1903), 2 K.B. 740, 72 L.J.K.B. 794, 89 L.T. 328—have any application to this case.

I am of opinion that the appeal should be allowed, the judgment of the trial Judge reversed; judgment entered in the Court of Appeal for the plaintiff for the full amount of his claim with costs, and that the defendant should pay the costs of this appeal.

PRENDERGAST, NEWLANDS and JOHNSTONE, JJ., concurred.

LAMONT, J. (dissenting):—The defendant, by an agreement in writing, bearing date October 12th, 1908, appointed the plaintiff his agent to sell lot 6 in block 411, Regina. The agreement provided that the plaintiff's commission was to be "$200 paid out of the deposit," and the terms of sale were: "Price $4,200. Cash payment, including above deposit, $500, or $50 per month." The plaintiff did not find a purchaser able and willing to purchase the property and make a cash payment of $500, but he did find a purchaser, a Mrs. Smith, who was willing to buy the property at $4,200 and make a cash payment of $50. The plaintiff then prepared an agreement between the defendant and the purchaser providing for a cash payment of $50 and $50 per month thereafter until the full purchase price was paid, and he received $50 from the purchaser. He then took the agreement to the vendor for execution. After several weeks' delay, the vendor signed the agreement. The purchaser remained in possession of the property for only one month, and did not make any further payments, and the agreement was subsequently cancelled. The plaintiff retained the $50 paid, and sued the defendant for the balance of the $200 commission, less a 25 cent item which he credited to the defendant. In the alternative he sued for $149.75 on a *quantum meruit*. The matter was heard before the Judge of the District Court, who held that the plaintiff was not entitled to recover under either the agreement or on a *quantum meruit*. From this judgment the plaintiff appeals to this Court.

In his notice of appeal the plaintiff does not claim to be entitled to commission under the agreement, but does contend that he is entitled to recover on a *quantum meruit* for services rendered because he found a purchaser who agreed to purchase on terms which the defendant agreed to accept. The defendant admits that he executed the agreement with the purchaser, but he claims

that he refused to do so until the plaintiff agreed to wait for his commission until the purchaser could get a loan through or sell the property. The learned trial Judge found the facts to be in accordance with the defendant's statement, and a perusal of the evidence satisfies me that this finding is correct. The trial Judge also found as a fact that "Smith only paid $50, and at the end of the month abandoned the property." And this finding is not appealed against nor questioned. We have not a verbatim report of the evidence given at the trial, but only the notes taken by the Judge, but where there is an important finding of fact, and that finding is not questioned by either parties to the appeal, I think we may take it to have been duly proven, although the Judge's notes do not shew the evidence that led up to that conclusion. On the argument counsel for the plaintiff took no exception to this finding, although the defendant set it up as a finding of fact in his factum.

In February the defendant cancelled the agreement, having received no money whatever on account of the sale. The defendant having cancelled the contract, it is argued that he thereby made the obtaining of a loan or payment by Smith impossible, and therefore the plaintiff is now entitled to recover the full commission. I cannot think this contention well-founded. If effect were to be given to it, what position would the defendant be in? His agreement with the plaintiff, as I find, was this, that he would pay the balance of the commission when Smith obtained a loan or sold the property—in other words, he would pay the plaintiff as soon as he received the amount from Smith. Smith, at the end of the month, abandoned the property, without making any further payment. In these circumstances, what was the defendant to do? If the contention of the plaintiff is right, he could not cancel the contract without rendering himself liable to pay at once the balance of the commission. If he does not cancel the contract, the plaintiff certainly is not entitled to the commission, but the defendant cannot deal with the property as the contract with Smith is still subsisting. So that the defendant would have neither the purchase money nor the use of the property. Must he, then, bring an action against Smith for the balance of the purchase money in order to demonstrate that the contract is not an enforceable one before he can be relieved of his obligation to

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pay the commission? Under the circumstances of this case I do not think so. The defendant was under obligation to pay the commission when he received it from Smith, and not before. Then he cancelled the contract. This, it is said, put it out of the power of Smith to carry out the agreement. But we have no evidence that Smith ever intended to carry out the agreement, and we have the distinct finding of fact that Smith had, previous to the cancellation, abandoned the property. Can we, therefore, say that but for the cancellation of the contract by the defendant, Smith would have paid the purchase money and the plaintiff have thus become entitled to his commission? Yet, it seems to me, that is what we must hold to give effect to the plaintiff's contention. Before he is entitled to recover, the plaintiff must shew that the defendant received the money from Smith, or that, but for his own act or neglect, he would have received it. The defendant did not receive the money, and, with very great deference, it does not seem to me that we should hold that he would have received it but for the fact of his having cancelled the agreement, in the face of the fact that Smith had previously abandoned the property. Where, as in this case, the purchaser had previously abandoned the property, I think the onus was upon the plaintiff to shew that the condition upon which he was to receive his commission would have been fulfilled but for the defendant's act.

The appeal should, in my opinion, be dismissed with costs.

Appeal allowed.

[IN CHAMBERS.]

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Nov. 26

Practice—Default in Delivery of Defence—Motion for Judgment—Affidavit of Merits—No Grounds of Information and Belief—Sufficiency of—Objection to Plaintiffs' Case in Point of Law—Letting Defendant in to Defend on Account of Arguable Point of Law.

Plaintiff brought an action against defendant for rescission of a contract for sale and return of purchase money on account of vendor's default. The vendor appeared, but did not deliver a defence within the time limited. On a motion for judgment, an affidavit was filed by defendant's solicitor stating that in his belief defendant had a good defence on the merits, but no grounds for this belief were stated. It was also objected by counsel for the defendant that in any event in point of law the plaintiffs' claim was not sufficient to entitle him to the relief asked for:—

Held, that an affidavit of merits filed by defendant on an application for judgment in default of defence must disclose facts shewing a good defence, and if sworn on information and belief must disclose the grounds of such information and belief.

2. That if there appears to be a substantial question of law to be determined and arising out of the plaintiffs' claim, the Court may, even in the absence of an affidavit, allow the defendant in to defend.

THIS was an application by the plaintiff for leave to sign judgment against the defendant in default of defence, and was argued before the Chief Justice in Chambers at Regina.

Alex. Ross, for the plaintiff.

H. F. Thomson, for the defendant.

November 26. WETMORE, C.J.:—According to the statement of claim the plaintiffs entered into an agreement with the defendant Ross to purchase from him a lot of land in North Battleford, for which they agreed to pay him $925 on the execution and delivery of the contract, $412.50 on the 22nd October, 1907, and $412.50 on the 22nd April, 1909. The plaintiffs paid the $925 and the first instalment of $412.50 due on the 22nd October, 1907, and were ready and willing to pay the final instalment of $412.50 on the 22nd April, 1909, but that he, Ross, was not then and never had been the registered owner of the land and was unable to give a transfer. The plaintiffs became aware of that fact after the final payment became due, and they repudiated the contract and pray for a declaration that the contract is rescinded, for repayment of the sums paid to Ross on account of it, and a declaration that the plaintiffs are entitled to a lien on the interest of the defendant Ross in such land.

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Entry of appearance on behalf of both defendants was made by Mr. Panton. An order for security for costs was granted and was practically complied with on the 18th day of June, 1909, and notice of such compliance was served upon the agents for Mr. Panton on the 15th day of October. No statement of defence has been delivered by Ross, and the plaintiffs applied for judgment against him for default in pleading. A summons was granted for leave to sign judgment for such default.

Objections were raised to the plaintiffs' right to the relief claimed, by reasons of objections appearing as was alleged on the face of the statement of claim, only one of which I consider to be worthy of consideration, and that is, that the claim does not allege a demand for a transfer of the land when the last instalment of the purchase price became due, because if a demand had been made the defendant might have procured a title. *Hamilton* v. *McNeil* (1894), 2 Terr.L.R. 31, was cited in support of that contention. I am not disposed under any circumstances to determine that question upon an application of this sort. It is possible that a case may arise, on an application to set aside a judgment and let the defendant in upon the merits, where the facts or the question, as the case may be, are very clearly against the defendant having any defence at all, where the meritorious nature of the defence might be considered. That course seems to have been adopted in *Richardson* v. *Howell*, 8 Times L.R. 445. This is an entirely different application. A defendant, on an application to set aside a judgment regularly signed, comes to ask the indulgence of the Court, and his application will not be granted unless he satisfies the Court that he has reasonable grounds of defence or for inquiry. In this application the plaintiff applies for what he is entitled to under the practice, and the defendant will not be allowed to dispute the application on grounds which would have opened grounds of defence if properly pleaded, or set up by some substantial application on his part. But application was made to let the defendant Ross in on the merits, which I think was quite in order. In support of that application, an affidavit of Mr. Panton, and no other affidavit, was read. It is now the acknowledged practice that, as a general rule, on application to set aside a regular judgment on the merits an affidavit should be produced setting forth what the character of the defence is, and by that I understand that this must be es-

tablished in a general way at least. It must not be merely an affidavit setting forth the character of the defence, but there must be something to shew that the defence is real and not merely imaginary, and that it is a defence worthy to be entertained. I see no reason where the defendant is in default—as the defendant Ross is here—and wishes to prevent a judgment being signed against him which the plaintiff is entitled to sign, why the merits of the proposed defence should not be proved in the same way. Mr. Panton, in so far as his affidavit affects this question is concerned, merely set out as follows: "I believe that the defendants have a good defence as set out in the statements of defence drawn herein, and that they should be permitted to try such action on their defences." Annexed as exhibits to this affidavit are the defences which he proposed to put in for each of the defendants, and referring to the proposed defence of Ross it sets up what I consider to be a good and valid defence if the facts therein stated are true. Mr. Panton's affidavit does not shew that. It would not be sufficient even under the old practice, where the character of the merits were not required to be set forth. In *Bromley* v. *Gerish* (1843), 6 M. & G. 750, Erskine, J., referring to the requirements of the affidavits, states as follows: "The ordinary form of affidavit is that the defendant has 'a good defence *to this action* on the merits.' Where it is made by the party the words, 'as he is *advised* and believes,' are added; where by the attorney or managing clerk to the attorney, the form is, 'as he is informed and verily believes.' " If an affidavit of this character would not be sufficient under the old practice, *a fortiori* it is not sufficient under the present. If a defendant was allowed to come in on such an affidavit, he might in very many instances very easily get a judgment set aside when there was no justifiable cause for doing it. It might be a very easy matter for a person to convince his solicitor that he has a good defence, and so enable him to swear as Mr. Panton has done. I am not prepared to say that if Mr. Panton had stated as the reasons for his belief that "he had been so informed by the defendant," it might not have been sufficient on an interlocutory application like the present. But the rule of practice is that only facts in the knowledge of the deponent must be stated in an affidavit, except on interlocutory applications, when statements as to his belief may be admitted *with the grounds of such belief*. Mr. Panton cannot possibly state anything here

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within his knowledge. At any rate he does not state that the facts are so within his knowledge, and he does not state the grounds of his belief. If the defendant's application to be let in rested entirely upon that affidavit, it would not be granted, but, as I have stated before, counsel for Ross at the hearing of the application raised a ground of defence in law appearing on the face of the statement of claim which I believe to be worthy of consideration. Can I allow Ross to file his defence in view of that fact? In *Fardon* v. *Richter*, 23 Q.B.D. 124, at p. 129 (58 L.J.Q.B. 244; 60 L.T. 304), Huddleston, B., in dealing with the question of the necessity for an affidavit in order to set aside a regular judgment, states as follows: "During the argument I was inclined to doubt whether such an affidavit could be always necessary. But in *Smith* v. *Dobbins*, 37 L.T. (N.S.) 777, the present Master of the Rolls appears to have stated that it was 'an inflexible rule' that a regular judgment properly signed could not be set aside without such an affidavit, and there are statements in the manuals of practice to much the same effect. The expression is perhaps strong, but, where there is no such affidavit, it is only natural that the Court should suspect that the object of the applicant is to set up some more technical case. At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason."

Evidently there that learned Judge contemplated that there might be a sufficient reason for granting leave to defend when there was no affidavit. I agree with that conclusion, and I think that it equally applies to a case like the present where no judgment has been signed but the defendant asks to be let in, and I am of opinion, entirely outside of Mr. Panton's affidavit and the question of law so suggested by counsel, there is quite sufficient to allow the defendant to come in and defend.

I have therefore arrived at the conclusion that the defendant Ross should have leave to enter his defence, and having arrived at that conclusion I see no reason why I should limit him to defending only on the ground so set up by counsel at the hearing. Having concluded to let him in, I see no reason why he should not be allowed to set up any matter of defence which he may consider to be open to him. No injustice can be done to the other side by so doing. The plaintiff has not been allowed to sign judgment, and that being so the defendant, it seems to me, should have open to him all available matters of defence.

[IN CHAMBERS.]

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Nov. 29.

Injunction—Restraining Disposition of Personal Property—Adequate Remedy at Law—Fraudulent Conveyance—Action to Set Aside by Simple Contract Creditor—Right to Maintain—No Allegation that there were Other Creditors —Necessity of.

Plaintiff claiming as creditor under a bond conditional upon delivery of certain grain to them, which, it was alleged, had not been done, brought action to set aside a conveyance of that grain. In the claim it was alleged that the plaintiff sued on behalf of all creditors of defendants, but it was not alleged that there were creditors other than plaintiff, nor was it alleged that defendants were insolvent. An injunction was obtained from the local Master restraining the party to whom the grain had been sold from disposing of same, and restraining the defendants from dealing with any securities given in respect of the purchase price thereof. There was no allegation in the claim that the plaintiff did not have an adequate remedy on the bond.

On a motion to continue the injunction:—

Held, that an injunction should not be granted to restrain actionable wrongs where there is an adequate remedy at law, and as there was nothing to indicate that the plaintiff had not an adequate remedy on the bond, the injunction should not be continued.

2. That a simple contract creditor, who has not obtained a judgment and issued execution thereon, cannot maintain an action to set aside a fraudulent conveyance unless he sue on behalf of all creditors.

3. To support such an action it should appear and be alleged that there are other creditors of the defendant.

THIS was an application to continue an injunction, and was argued before WETMORE, C.J., in Chambers, at Regina.

H. F. Thomson, for the plaintiff.

P. H. Gordon, for the defendant.

November 29. WETMORE, C.J.:—The statement of claim sets forth that the defendants Weedin and Gurney T. Walker entered into a bond with the plaintiff in the penal sum of $810.64, conditioned for the paying by the defendants Walker to the plaintiff of the sum of $810.64, by delivering to the elevator at Radisson a sufficient amount of grain to discharge such obligation immediately upon the threshing of the grain harvested on section 35-40-10, W. 3, and the south-west quarter 3-41-10, W. 3.

That the indebtedness above mentioned was incurred by the defendants Walker to the plaintiff as tenants to her of the above lands.

That the crop on the lands has been harvested and delivered to the elevator, but the defendants Walker refused to pay either

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the sum of $810.64 or to deliver to the plaintiff the grain necessary to liquidate that indebtedness, and, instead of paying the plaintiff (the landlord of the said Walker) that amount for the rental of such lands, they entered into a fraudulent conspiracy with the defendant Hingley to defeat the claim of the plaintiff by delivering to Hingley a bill of sale, dated the 27th September last, of all the grain the defendants Walker grew upon the said lands for the pretended consideration of $1,500, and that the defendants Walker delivered such grain to the elevator company at Radisson in the name of the defendant Gurney T. Walker.

That the defendant Hingley has not paid to the Walkers or either of them the sum of $1,500, but has given to them a promissory note or some other instrument representing the consideration of the bill of sale.

That the grain is warehoused in the elevator of the defendants the elevator company.

That the bill of sale and all transfers made in connection therewith are to the knowledge of the plaintiff, other than the elevator company, a fraud upon the plaintiff and all the other creditors of the defendants Walker, and were made and entered into to defeat, hinder and delay such creditors, and that this action is brought on behalf of all the other creditors of the defendants Walker, as well as the plaintiff, and they pray an injunction restraining the Walkers from negotiating or transferring, or in any way dealing with any instrument given by Hingley as consideration for or in connection with the bill of sale, and restraining the defendant Hingley from paying to the defendants Walker any monies or delivering to them any note or other instrument in connection with such bill of sale, and restraining the elevator company from paying any of the defendants or their assignees for any grain now stored with them by the defendants Walker or either of them in their warehouse, or delivering such grain to said defendants or their assignees. And also an order setting aside the bill of sale and transfer.

His Honour Judge MacLean, of the Battleford District Court, granted an injunction order restraining the defendants for eight days under the terms of the prayer in the statement of claim for an injunction. A summons was taken out before a Judge of this Court to continue that injunction, and it came on for hearing

before me. Objection was taken to the continuation of such injunction on the grounds that it was improperly granted for a number of reasons. The action is practically alleged in the statement of claim to be brought under the Preferential Assignments Act of this Province (ch. 25 of 1906) and under 13 Elizabeth, ch. 5.

The facts set forth in the statement of claim purport to be verified by the affidavit of the plaintiff, and, possibly with the exception of the bond referred to, that affidavit deposes merely to matters of belief, without setting forth the grounds of such belief. There is also an affidavit of the plaintiff's solicitor, in which he deposed that the defendant Weedin Walker, at an interview on the 28th September, when requested to pay the plaintiff's claim, stated that he had got things fixed so that he would not have to pay it, and that the plaintiff could not make him pay it; that he would see that a portion of the plaintiff's claim which related to seed grain would be paid, as it was protected by a chattel mortgage, but that he and Gurney T. Walker would never pay the balance of the plaintiff's claim; that, upon being asked how he had fixed things to defeat the plaintiff's just claim, he stated that he did not consider it was a just claim, but in any event he had sold all the interest of himself and Gurney T. Walker in the grain to Hingley on the 27th September, and given a bill of sale therefor, and that Hingley had paid him $1,500 for his interest in the crop, and he (Hingley) was now the owner of it; that he had assigned the warehouse receipt to Hingley, and that he had had it fixed by a lawyer so that it would stand law, and defied the plaintiff to collect the debt. The only evidence which could possibly be held to deny that Hingley had paid the $1,500 for the grain is that the solicitor went to the only bank in Radisson and ascertained that no transaction had been put through the bank whereby $1,500 had changed hands, and he did not believe that the defendant Hingley ever paid to the Walkers that sum, and that, if there was ever any consideration for the bill of sale, he believed it was in the form of a note or other evidence of debt. There are some other matters of belief stated in the solicitor's affidavit, but the grounds of such belief appear to me to be all conjecture and imaginary.

In *London and Blackwall Railway Company* v. *Cross* (1886), 31 C.D. 354 (55 L.J.Ch. 313, 54 L.T. 309), Lindley, L.J., at p. 369,

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stated the following: "The very first principle of injunction law is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy."

That is very well-settled law, and it may be carried further by stating that *primâ facie* you do not obtain injunctions to restrain actionable wrongs when there is an adequate remedy at law. I can find nothing in the statement of claim of the affidavits used to indicate that the plaintiff has not an adequate remedy by suing upon the bond. Evidently the grain did not belong to her; she had no lien upon it; she chose to rely upon the security of the bond and of the parties to it. It does not follow that, because this grain has been transferred to Hingley, that the Walkers have no other property upon which a judgment against them for the amount of the bond could be realized. There is no allegation that the Walkers are insolvent or that the property assigned to Hingley was all the property they had. I will just merely say that I consider the statement of claim and the affidavits in support of it very weak in those particulars.

Since the decision in *Longway* v. *Mitchell*, 17 Grant 190, it has been generally accepted in this country as good law that a simple contract creditor who has not obtained a judgment and issued execution cannot maintain an action on his own behalf to set aside a deed, conveyance or transfer alleged to be fraudulent under the statute of Elizabeth, but he might possibly obtain relief, however, by suing on behalf of himself and other creditors. See also *Hepburn* v. *Patton*, 26 Grant 597, and *Morphy* v. *Wilson*, 27 Grant 1. The title of the statement of claim does not allege that the plaintiff is suing on behalf of herself and other creditors, but, in the body of the claim, as before stated, she alleges that she is so suing. However, I do not know that that makes any difference. There is, however, no allegation whatever in the statement of claim or in any affidavit used on the application, that there are other creditors than the plaintiff. The authorities to which I have referred must contemplate that, in order to warrant a simple contract creditor bringing an action in the name of other creditors to set aside a fraudulent deed under the statute of Elizabeth, there must be other creditors, because, if there are no other creditors, the allegation that she is so suing must be false. A plaintiff would be merely stating a false fact in order to en-

deavour to bring himself within the letter of the law. It is quite evident she could not be suing on behalf of other creditors if there were no other creditors, and, therefore, he must be suing on behalf of himself in that case. I do not consider it necessary to elaborate the case any further, except to refer to the judgment of Richards, J.A., in *Traders Bank* v. *Wright* (1908), 8 W.L.R. 208, in which that learned Judge, while agreeing with the reasons given by Howell, C.J.A., for dissolving the injunction, also based his judgment on the same grounds as those upon which I base my judgment herein. The injunction order, therefore, was improvidently granted and must be dissolved. So far as the Preferential Assignment Act is concerned, it is not applicable, because the assignment does not pretend to be made to a creditor of the Walkers.

The injunction will be dissolved with costs.

[IN CHAMBERS.]

MOOSE MOUNTAIN LUMBER AND HARDWARE CO. v. PARADIS. (No. 2.)

1909
Dec. 4.

Appeal—Contempt of Court—Application for Leave to Appeal from Order Committing for—Right of Appeal.

Defendant had been committed to prison for contempt of Court by disobeying an order forbidding him to interfere with the crop on certain lands. He applied for leave to appeal from the order of commitment:—

Held, that while in a case of wilful disobedience the Court will not entertain any application on behalf of the person in contempt, yet, if there are any facts which might lead to a conclusion that he had not wilfully disobeyed the order, the Court will give leave to appeal from the order of commitment.

2. That disobedience of an order in a civil proceeding is not a criminal act so as to preclude any appeal in respect of the order for commitment.

THIS was an application by defendant for leave to appeal from an order committing him to gaol for contempt of Court, and was argued before WETMORE, C.J., in Chambers.

P. H. Gordon, for the plaintiff.

E. W. F. Harris, for the defendant.

December 4. WETMORE, C.J.:—This is an application on the part of the defendant for leave to appeal from my judgment given

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in this matter on the 25th of November last ordering the defendant to be committed for disobedience to an injunction order. The facts of the case are fully set forth in that judgment. The application was opposed on the ground that the defendant, having been adjudged guilty of a contempt of an order of the Court, will not be allowed to appeal, at any rate until he has purged the contempt. I have come to the conclusion that the defendant has a right of appeal. I am, however, not very clear that it is necessary for him to obtain leave to do so. Oswald on Appeal, 2nd ed., p. 223, states that it is not necessary; and the Judicature Act of 1894 (Imp.), by sec. 1, par. (b), sub-clause (i), provides that leave is not necessary where the liberty of the subject is concerned. (See Ann. Prac., 1910, p. 655.) However, if leave is not necessary, the granting of such leave cannot prejudice the right of appeal, and, as the liberty of the subject is involved, it is better, I think, that I should grant it than put the party to the risk of losing such right.

A number of authorities were cited on the part of the plaintiff in support of his contention, some of which I will refer to. The first case in point of time is *Wenman* v. *Osbaldiston et al.*, 2 Brown's H.L.C. 276. In that case the appellant deliberately omitted to obey the order of the Court, and an order absolute for his committal had been made and a warrant issued. The appellant keeping out of the way, a sequestration was ordered, and appellant then appealed from all the orders on the ground that it was unreasonable for reasons alleged that his estate should be any longer continued under sequestration. The Court affirmed the orders appealed against, and further ordered a reference to the Master to ascertain the amount due to the respondents to tax their costs, and that upon the appellant bringing the money into Court, and complying with some other conditions mentioned, the appellant might be at liberty to apply to the Court to discharge the sequestration. I do not consider this a very strong case in favour of the plaintiffs' contention, but if it is there had, in that case, been a clear and wilful disobedience of the order of the Court. In *Garstin* v. *Garstin* (1865), 34 L.J. Mat. 45, there had also been a deliberate and wilful disobedience of the order of the Court. The appellant had taken from the petitioner her youngest child, and he was ordered by the Court to deliver it up to her. He refused to do so, and the Court granted an attachment against him, whereupon he

left England, taking the child with him. He had entered an absolute appearance apparently by mistake instead of a conditional appearance, intending to raise the question that the Court had no jurisdiction to entertain the suit, which was for a divorce. He then applied, after the attachment had been issued, to amend his proceedings by filing a conditional appearance in order to enable him to raise the question of jurisdiction. The Court refused the application, holding that while he set the authority of the Court at defiance he could not be heard in support of the application. In *Cavendish* v. *Cavendish* (1867), 15 W.R., p. 182, the facts were very similar to those in *Garstin* v. *Garstin*, and the disobedience of the order of the Court had also been deliberate and wilful. This case, however, differs from the last mentioned case inasmuch that it does not appear that an attachment had been issued against the appellant. (That, however, is not material to the question I am discussing.) The Court held that, being in contempt, he could not be heard on an application for a new trial on the grounds that the decree dissolving the marriage had not been justly made.

I can quite understand the principle upon which those cases have been decided. If a party against whom an order has been made is aware of what the order is and has no reason to believe that it has been abandoned, and so wilfully disobeys it, he is so clearly in contempt that the Court will not entertain an application from him in the suit until he purges that contempt. It is not for a party to say, where the restraining order is clear on its face, that the Court had no jurisdiction to make it; it is his duty to obey the order, and if the order is not properly made to appeal against it, but the Court will not submit to having its orders deliberately put at defiance. That may not have been the case in the proceedings now under review. In this case, at the hearing of the application for a committal to issue, it was urged with some shew of reason that the defendant, owing to the delays of the plaintiffs in issuing and serving the order for continuing the injunction, had reasonable grounds for believing that the proceedings had been abandoned; and he also set up that he had not been properly served with the order. In this case, therefore, he does not come to the Court deliberately attempting, as in the other cases, to put the order at defiance, and I am of opinion, as at present advised, that under such circumstances there is a right of appeal. At any rate I feel that I ought to give

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him an opportunity of at least asserting that right before the Court of Appeal.

It was also contended, under the authority of *O'Shea* v. *O'Shea* (1890), 15 Prob. D., p. 59, 59 L.J.P. 47, 62 L.T. 713, that the appeal asked for is an appeal in a criminal cause or matter. It seemed to be very clearly laid down by the authorities that an appeal (in the sense in which I am now using the word) cannot be taken in any criminal cause or matter. I am of opinion that this is not an appeal in a criminal cause or matter. In *O'Shea* v. *O'Shea* the party against whom the process for contempt issued was held guilty, by his contemptuous act, of a criminal act because he had done something calculated to prejudice the Judge or jury in the trial of an action. Counsel for the petitioner in that case, at p. 61, are reported to have said: "No doubt there are two kinds of contempt of Court; when it is a mere disobedience of an order in the Court in a civil action it is not criminal, and then there may be an appeal; for in that case the attachment only issues to enforce the order in the civil action." And Cotton, L.J., p. 62, lays down the following: "Of course there are many contempts of Court that are not of a criminal nature; for instance, when a man does not obey an order of the Court made in some civil proceeding, to do or to abstain from doing something . . . that is really only a procedure to get something done in the action, and has nothing of a criminal nature in it." And at pp. 63-4 he states as follows: "But in the present case the whole proceeding is to punish the appellant for a wrong which he has done, and not to obtain the doing of anything for the petitioner's benefit in the action in the Divorce Division. It was a proceeding, therefore, entirely outside the divorce action, and its object was only to obtain that fair trial to which every suitor has a right." The Court dismissed the appeal in that case squarely on the ground that the contempt of Court was of a criminal nature.

I cannot bring my mind to the conclusion that the defendant in this case committed a criminal act. I would ask (as was done by some of the Judges in a case to which my attention has been drawn), if one was to charge this man with a criminal act, what offence would you charge him as being guilty of, and in whom would you lay the right of property? No receiver had been appointed by the Court, and the injunction order itself was obtained for the purpose, as Cotton, L.J., states, of getting something done in the action. The order was one made in a civil proceeding.

I will also refer to *Barnardo* v. *Ford* (1892), A.C. 326. I am of opinion that the *ratio decidendi* in that case is in accordance with the views I hold, although it may possibly not go so pronouncedly in the direction for which it has been cited in the text books. I will, therefore, give the defendant leave to appeal. I will make an order authorizing his release from the imprisonment upon terms which will be found in the order, provided, however, that this last mentioned order will not be held in any way to prejudice him if he does not comply with the terms I have imposed therein from making such application for his release from imprisonment as he may be advised.

[IN CHAMBERS.]

BASHFORD v. BOTT.

1909
Dec. 8.

Practice—Injunction—Motion to Continue—Regularity of Procedure—Material Used in Support—Withholding Material Facts.

Plaintiff obtained an interim injunction restraining defendant from dealing with certain land, and by the order leave was given the plaintiff to move on notice on a certain day to continue the injunction. On the motion it appeared that the plaintiff had previously filed a caveat against the land in question, but the right set out in the caveat and that in the statement of claim were not identical. This fact did not appear in the material on which the injunction was obtained. It was objected that the application to continue could only be made by summons, and that the injunction should be dissolved on account of suppression of material facts:—

Held, that when leave is reserved in the order granting an injunction to move by way of notice to continue it, a motion to continue may properly be entertained upon notice.

2. That, while withholding of a material fact on an *ex parte* application for an interim injunction may be ground for refusing to continue it, still it is a matter in the discretion of the Court, and the fact here alleged to have been withheld did not so affect the case as to justify refusal to continue the injunction.

THIS was an application to continue an interim injunction, and was argued before WETMORE, C.J., in Chambers.

Avery Casey and *H. F. Thomson*, for the plaintiff.
P. H. Gordon, for the defendant.

December 8. WETMORE, C.J.:—On the 4th of November last I granted an interim injunction order restraining the defendant, his agents, etc., from transferring, mortgaging, incumbering or in any way dealing with the north-east quarter of section 14, township 24,

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range 28, W. 2, until the 30th day of November last, and it was further directed by the order that the plaintiff should be at liberty to serve notice of motion on the defendant returnable on the 25th of November to shew cause why the injunction should not be continued until the trial or final disposition of this action or further order. Notice of motion was served accordingly, and when the matter came up in Chambers in response to that notice, objection was taken on the part of the defendant that the proceedings to continue the injunction should have been by summons and not by notice of motion. This objection was founded on rule 458 of the Judicature Ordinance, which contains the following: "Applications for summonses, rules and orders to shew cause and applications authorized to be so made by the 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."

In a form of interim injunction order given in Seton on Decrees, 6th ed., 452, there is a provision for leave to give notice of motion to continue the injunction similar to that contained in the interim injunction order granted herein. The practice laid down in Kerr on Injunctions, 4th ed., p. 565, is the same as that given by the form in Seton. In Chitty's forms, 13th ed. 219, however, there is a provision incorporated in the order for leave for summonses to issue. Probably what was laid down in Seton and Kerr had reference to the practice to make applications to the Court to continue the injunction, and not to an application in Chambers. I am of opinion, however, that the practice as set out in the interim injunction order in this case is allowable, and certainly it is more convenient in cases like the present to proceed by notice of motion than it is to proceed by summons. Very frequently, owing to the urgency of the matter, a person appearing for an interim injunction order is forced to get his material together in a very hurried manner, and does not purpose to rest his whole case upon the evidence that he is able to produce on the spur of the moment, but intends to rely upon further evidence when the time comes to move or to apply to continue the injunction. If his proceeding, then, is by notice of motion, he can, at the same time that he serves his notice, serve (in addition to that used at the application for the original order) copies of other material upon which he intends to also rely on his

application to continue the injunction. Where the proceeding, however, is by summons, and that summons is embraced in the order for an injunction, or by the leave granted to issue it contained in that order, the plaintiff cannot, without leave of the Court, use any other material except that on which he obtained such order or summons. The Judge, in granting an interim injunction, can, in my opinion, without any breach of the rule 458, prescribe in the order the method by which the plaintiff may proceed to have that order continued, and when that is done the party can proceed, not under the rule, but he can proceed by virtue of the leave which the Judge has granted. I am therefore of opinion that the proceeding by notice of motion was properly granted and the matter came properly before me under the notice.

Another objection raised was that in the application for the interim injunction, which was granted *ex parte*, material facts had been withheld from the Judge. I will not set out fully what appear to be the facts of this case as set out in the affidavit. It is only necessary to say that according to the plaintiff's affidavit and statement of claim this action is brought, among other things, for the purpose of obtaining a declaration that he is entitled to a vendor's lien in respect to the land above mentioned, and the fact alleged to have been withheld is that he (the plaintiff) had previously lodged with the Registrar of Land Titles a caveat against any dealing with that land. The caveat and the plaintiff's statement of claim are not based on the same grounds. The claim sets up a right in the plaintiff on a vendor's lien. The caveat sets up an agreement apparently in writing, giving the date whereon the defendant is alleged to have agreed to execute a mortgage of the property to the plaintiff, or transfer it to him, to secure a payment of $3,121.50. There is a letter from the defendant to the plaintiff, verified by his affidavit, and I presume it probably contains the alleged agreement to give the mortgage or transfer. I am not prepared to say that that letter amounts to an agreement at all: I express no opinion with respect to it. No mention was made of this caveat in the *ex parte* proceedings for the injunction. It came up on the return of the notice of motion. Am I bound, therefore, by the practice to send this application out of Court because of the withholding of a material fact? Undoubtedly that was the old practice where an injunction order had been obtained and the defendant applied to

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dissolve it. In Kerr on Injunctions, 4th ed., at p. 586, it is stated: "If on a motion to dissolve an *ex parte* injunction, it appears that the plaintiff has mis-stated his case, either by misrepresentation or by the suppression of material facts, so that an injunction has been obtained which would not have been obtained if a more accurate statement of the case had been made, the injunction will be dissolved on that ground alone."

I was under the impression that the rule was more harsh than that. All I can say is that if the fact that the caveat in question had been filed had been presented to me on applying for an interim injunction order, I would have granted it. This, however, is not an application to dissolve an injunction: it is an application to continue an interim order. At p. 566, dealing with the practice on an application for an interim injunction order, the learned author says: "Where the application is *ex parte* it is necessary that the Court should be informed of all material facts."

Fuller v. *Taylor* (1863), 32 L.J. Ch., p. 376, was cited for that, but I am not prepared to say that it bears the text out. Wood, V.C., in that case, at p. 377, speaking of these interim orders, states as follows: "It is quite true they are not exactly like *ex parte* injunctions, which put the other side to the necessity of coming here to dissolve them, and in many respects there is a convenience in the present course of proceeding, but, on the other hand, it is necessary that the Court should be informed of every fact whenever an interim order is asked for. This rule ought not, perhaps, to be carried to that extreme degree of nicety to which it formerly was in the case of *ex parte* injunctions, when the very smallest scrap of paper that was omitted was held almost to disentitle to the injunction."

I can quite understand that cases may arise where material facts have been withheld where the Court would refuse to continue the injunction,—for instance, if the Judge is satisfied that fraud had been used or the withholding of a fact had been done for the purpose of unfairly dealing with or misleading the Court or perverting the course of justice. Section 31, rule 8, of the Judicature Act, ch. 8, 1907, provides that "An injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be *just or convenient* that such order should be made."

That provision was contained in all the Ordinances affecting the administration of justice in the North-West Territories—at any rate from the time of the institution of the Supreme Court of the Territories—and was carried forward into the Judicature Act. The provision is taken from sec. 25, par. 8, of the Judicature Act, 1873 (Imp.), and the authorities are clear, it seems to me, that these words increase the powers of the Court very materially. In *Aslatt* v. *The Corporation of Southampton* (1880), 16 Ch.D., p. 148, 50 L.J. Ch. 31, 43 L.T. 464, Jessel, M.R., at p. 148, lays down the following: "Of course the words 'just or convenient' did not mean that the Court was to grant an injunction simply because the Court thought it convenient: it meant that the Court should grant an injunction for the *protection of rights*, or for the prevention of injury, according to legal principles, but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere."

In *Cummins* v. *Perkins* (1899), 1 Ch. 16, Lindley, L.J., at p. 20, lays down the following, dealing with the provision in the Imperial Act: "But the introduction of that section does not curtail the power of the Court to grant injunctions or to appoint receivers: it enlarges it. It has not revolutionised the law, but it has enabled the Court to grant injunctions and receivers in cases in which it used not to do so previously."

The power of the Court to grant injunctions to preserve property or continue the *status quo* in respect thereto *pendente lite* is well recognized, and being so recognized the language both of Jessel, M.R., and Lindley, L.J., would apply to an application for an injunction to so preserve property.

It was further urged, however, that there was no necessity for an injunction in this case because the caveat would serve the purpose, and no notice had been given the plaintiff as provided by the Land Titles Act to remove it. I am of opinion, however, that the obtaining an injunction in this case was prudent. In the first place (without expressing any opinion on the merits of the action), it is clear, in reading the two letters that passed between the parties to this suit, that there was reasonable ground on the part of the plaintiff to bring it, if for nothing else than to endeavour to establish the alleged vendor's lien with respect to the property. And it was

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of the utmost importance that the defendant should be restrained from disposing of the property. Now, in the meanwhile, all the effect that the caveat has is to prevent the Registrar passing a title to a transferee on registering an incumbrance or mortgage by or from a registered owner without putting a memorandum of the caveat upon the certificate of ownership or other document. And the person purchasing, on taking the mortgage or acquiring the incumbrance, is bound to take notice of what the caveator has claimed in his caveat, and takes his right to the property subject to those rights, whatever they may be. But it seems to me that a plaintiff, under the circumstances in which this plaintiff is placed, has the right to go further and ask the Court to insist that the property shall be held in the hands of the person against whom he is proceeding for relief until the question involved in the action is disposed of, and not become complicated by being transferred to a third person, possibly involving change of parties to the action and all that. As to whether a *lis pendens* would suit the purpose, I am of opinion that a *lis pendens* would be of no use at all. A *lis pendens* is only notice that an action has been brought.

I consider, therefore, that it is both just and convenient that the injunction order be continued until the trial or final disposition of this action or until further order, and order accordingly. The costs of this application and of the application for the interim injunction will be costs in the cause to either party.

[IN CHAMBERS.]

COCKSHUTT PLOW CO. v. GRAY & SMITH.

1909

Dec. 11.

Mortgage—Account Under—Mortgagee Trustee for Benefit of Creditors—Mortgage for Benefit of Two Creditors Only—Moneys Received Distributed pro Rata—Account by Plaintiff as Mortgagee only for Moneys Received from Trust Fund—No Account as Trustee—Necessity for—Pleading—No Claim by Defendant for General Account.

Defendants, being indebted to plaintiff and the Fairchild Co. in large amounts, gave a mortgage to secure such indebtedness. At the same time they turned over to plaintiff as trustee all their assets to be distributed rateably among all their creditors. Large sums of money were received by plaintiff as trustee, and from time to time such moneys were distributed rateably, the share of plaintiffs and Fairchild being applied on the mortgage. The mortgagee being in default, sale proceedings were taken and an account was ordered. On taking account, the local Registrar ruled that the plaintiff need only account as mortgagee, and the accounts were taken on this basis, no account of the trust fund being taken. On motion to confirm the Registrar's report, it was objected that the plaintiffs should have accounted as trustees. In the defence of defendant Gray no claim for an account as trustee was made nor was the trusteeship of plaintiff pleaded:—

Held, that, the mortgagee and trustee being the same and the trust created for the payment of the indebtedness under the mortgage, the transactions should be considered as one deed, and the plaintiffs should, therefore, account not only as mortgagees but as trustees.

2. That, while the defendants had not pleaded the trust agreement, yet the transactions were so intermixed that on a reference even in default of appearance account must necessarily be taken of both accounts, and the defendant should be in no worse position, having appeared and defended.

THIS was a motion to confirm the report of the Local Registrar on taking accounts in a mortgage action, and was argued before WETMORE, C.J., in Chambers.

Alex. Ross, for the plaintiff.

L. B. Ring, for the defendant.

December 11. WETMORE, C.J.:—This action was brought under the ordinary practice by writ of summons practically for foreclosure. The property alleged in the statement of claim to be mortgaged, or equivalent thereto, were lots 22, 23 and 24 in block 166 in the town of Qu'Appelle. The mortgage is alleged in the statement of claim to have been made by the defendants in favour of the plaintiff company. The defendant Smith did not appear to the action, but the defendant Gray did, and filed a statement of defence in which he alleged (1) that he never executed the mortgage mentioned in the statement of claim, or any other mortgage to the plaintiffs; (2) that he never executed or delivered to the plaintiffs any assignment of his rights in lot number 22; (3) that he did not deposit with

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the plaintiffs the certificate of title to that lot by way of equitable assignment; (4) in the alternative, if the defendants were at any time indebted to the plaintiffs such indebtedness had been fully paid and satisfied.

An order was obtained from my brother Johnstone for delivery of particulars of the payments alleged in the last mentioned paragraph by a prescribed time, and that, in default of delivery within that time, such paragraph should be struck out. It was alleged by the plaintiffs' counsel at the hearing before me that the particulars not having been delivered this paragraph was struck out. This was practically conceded on behalf of Gray to be true.

The matter came before my brother Lamont on the hearing of an application on the part of the plaintiffs for an order that the plaintiffs should be at liberty to sign judgment in this action against the defendant Smith for default and against the defendant Gray upon admissions made by him on his examination for discovery, and an order was made by that learned Judge directing a reference to the Local Registrar to take an account as between the plaintiffs and the defendants and to ascertain the balance, if any, now due under and by virtue of the mortgage, and declaring that the plaintiffs were entitled to a charge upon lot 22 in block 166 under and by virtue of an equitable mortgage by way of assignment and deposit of documents of title in respect of the moneys due under and by virtue of the mortgage (which did not on its face embrace lot 22); and the order further directed the defendants within three months from the date of the order to pay into Court the amount found due by the Local Registrar, with interest at eight per cent., and, on default, sale of the premises.

The Local Registrar held his inquiry under this order and lodged his report, and application is now made on behalf of the plaintiffs to confirm that report. Counsel appeared on behalf of the defendant Gray on this application. He raised no objection to the finding of the Local Registrar as far as it went, but he claimed that the matter should be sent back to him to inquire as to the amount of moneys received, or which ought to have been received by the plaintiffs except for their default under a certain trust agreement. I am not called upon to go back of the order made by my brother Lamont. The mortgage and the trust agreement were produced before the Local Registrar at the inquiry. It appears

that this mortgage was made, not in favour of the plaintiffs alone, but in favour of the plaintiffs and the Fairchild Company Limited, and it embraces other property than lots 23 and 24. The mortgage and the trust agreement are both dated 24th of March, 1904. The trust agreement was made between the defendants and both the mortgagees mentioned in the mortgage. It provided that the Cockshutt Plow Company and the Fairchild Company (whom I hereafter call the mortgagees) jointly were to send to Qu'Appelle on the first of May, 1904, or sooner if deemed advisable, a man as their joint representative, the salary and expenses of whom were to be paid by the defendants; that the defendants were to turn over to this man all stock on hand, open accounts, notes of hand, and all other assets of the firm (meaning the firm of Gray and Smith); that such representative was to proceed to convert the same into cash, notes, notes received from sale of stock, and securities, and remit the same semi-monthly to the Cockshutt Plow Company (the plaintiffs), who were to act as trustees and to distribute the same as collected *pro rata* among the following creditors:—

The Cockshutt Plow Company claim	$12,578.00
The Fairchild Company claim	7,700.20
Merrick & Anderson.....	1,720.00
Great West Saddlery Company.....	900.00
Mrs. Raymond	300.00

The division of cash receipts was to be made on the first day of each month between those five creditors, and it provided that, in consideration of the defendant Smith executing a mortgage to the mortgagees jointly on certain lands, the mortgagees agreed to extend the time of payment of Gray and Smith's present indebtedness to the first of January, 1905. These half sections are not mentioned in the mortgage on which this action was brought; that mortgage embraces only lots situated in the town of Qu'Appelle. The mortgage in question sets out the indebtedness to the mortgagees respectively as stated in the trust agreement, making the total amount of the mortgage $20,278.20. There can be no doubt that the money secured to the mortgagees by the mortgage in question was the indebtedness alleged to be due to them respectively by the trust agreement.

Gray's counsel insisted before the Local Registrar that he

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should take an account of the moneys received by the plaintiffs as trustees under the trust agreement. The Local Registrar refused to do so, holding that he was only at liberty under the order to take an account of the moneys received by the mortgagees under the mortgage. I am of opinion that the Local Registrar was not correct in this respect. So far as I can gather, nothing was ever heard of this trust agreement until after the Local Registrar opened his inquiry. Although the defendant Gray appeared, as I have stated, and pleaded, he never set up the trust agreement or claimed that the plaintiffs were entitled to account under it; he never set up before Lamont, J., any such claim, and the matter of taking an account under the trust agreement was not specially referred to the Local Registrar. It was urged on behalf of the plaintiffs that by reason of the facts just mentioned the Local Registrar could not go into the matter of the receipts and accounts arising out of the trust agreement, and *Sanguinetti* v. *Stuckey's Banking Co.* (1896), 1 Ch. 502, 65 L.J.Ch. 340, 74 L.T. 269, was cited in support of that contention. The headnote of that case is as follows: "Any special circumstance or fact affecting the amount due from the mortgagor to the mortgagee in a foreclosure action—such as a valuation of the security in bankruptcy—should be pleaded, or brought to the attention of the Court, before the usual foreclosure judgment is made, in order that a direction may be given to the chief clerk to have regard, in taking the account, to such special circumstance or fact; if this is not done at the trial no such question can be subsequently raised on taking the account." That case was decided by a single Judge, but a very able one. I am not by any means confident that the judgment bears out the headnote to the very general extent specified in such headnote, or that the judgment can be taken to support the plaintiffs' contention. If it can I am unable to follow it. But I conceive that there is a distinction to be drawn between that case and this one. In the *Sanguinetti* case the special circumstance that arose was the question of the valuation of a security in bankruptcy. The special circumstance that arises in the case I am now considering is the amount that ought to have been paid or considered as paid an amount of the mortgage. Suppose the defendant Gray had not appeared or pleaded at all, and application had been made for foreclosure and sale, what would have been liable to happen? The first step to be taken would have

been to ascertain the amount due under the mortgage. That might have been done by the Judge himself by computing it under the plaintiffs' affidavits; he might have referred it to the Local Registrar or other officer to so compute; or he might have referred it to the officer to hold an inquiry, and that without any request from the defendant. I have frequently done so. In case a reference had been made the defendant would have had a right to appear before the officer and seek to establish that he was not credited according to the plaintiffs with what he should have been credited. When it is referred to an officer to take an account, as was done in this case, the very object of the reference is to ascertain what was due under the mortgage; that is, to ascertain how much was or ought to have been credited and what balance is due after such crediting, and what the mortgagor has got to pay to redeem. I cannot see why on equitable principles the defendant should be placed in a worse position because he appeared and pleaded. The question is entirely one of finding the amount due on the mortgage. In this case the trust agreement was made for the purpose of affording a means of raising money to apply on account of the claims of the creditors mentioned therein, including the amounts secured by the mortgage to the mortgagees. Although the mortgage and the trust agreement were separate documents, they were, in my opinion, one and the same transaction. Surely, then, when the Local Registrar came to hold his inquiry the plaintiffs would be obliged to account for and be charged on the mortgage with any amount they received under that trust agreement and applied to such mortgage. I apprehend that the Local Registrar required that much when holding his inquiry. (As a matter of fact he informs me that the plaintiffs did credit the amounts they admitted so receiving and applying.) Right on the threshold he had thrust upon him an inquiry as to what had been received under the trust agreement. Was it open, then, to the plaintiffs to say to the Local Registrar: You can go into this matter just so far as we choose to allow you, but no further? Can the Cockshutt Plow Company, as the trustees, say to the Cockshutt Plow Company, the mortgagees: We apply so much of the moneys received by us as trustees on the mortgage which we hold, and then prevent the mortgagee attempting to shew that they had received more money as trustees than they have so applied, and which ought to be applied to it? I must say that I

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cannot bring my mind to the conclusion that that would be equitable or a proper accounting. I am quite well aware that the going into the receipts under the trust agreement will involve a consideration of the expenses of executing the trust and the *pro rata* amount after deducting such expenses that the plaintiffs would be liable to have charged against them on the mortgage. That cannot be helped. It is possibly the unfortunate position the plaintiffs have got themselves in by accepting a trust which was to be executed largely for their own benefit. If some indifferent trustee had been elected probably this matter might not have got in the position it is in.

The matter must be referred back to the Local Registrar to take an account of the moneys received by the plaintiffs under the trust agreement, or which ought to have been so received except for the plaintiffs' default, and if any moneys were so received other than what have been already charged against the plaintiffs on the mortgage, or any moneys which ought to have been received except for their default, to charge the same against the mortgage amount *pro rata* according to the terms of the trust agreement.

[IN CHAMBERS.]

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Dec. 11.

CANADA PERMANENT MORTGAGE CORPORATION v. MARTIN ET AL.

Mortgage—Sale Under—Charge for Taxes—Not Provided for in Decree—Liability of Purchaser to Assume—Effect of Land Titles Act.

Certain lands were sold under decree in an action under a mortgage for an amount in excess of that due under the first mortgage. No mention was made in the decree or at the sale of any claims to which the sale would be subject, but it subsequently transpired that there was a large amount due for unpaid taxes. On a motion to distribute the money in Court, the purchaser claimed that the amount of these taxes should be paid out of the fund in Court:—

Held, that under the Land Titles Act a purchaser takes title subject to unpaid taxes, and the sale therefore was subject to any amount due for taxes, and the purchaser was not entitled to be reimbursed in respect thereof.

THIS was an application for payment out of moneys in Court after sale of land on a mortgage sale, and was argued before the Chief Justice in Chambers.

T. S. McMorran, for the Canadian Port Huron Co. and other defendants.

E. B. Jonah, for the creditors.

H. E. Sampson, for the purchaser.

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December 11. WETMORE, C.J.:—This is an application on behalf of the defendant the Canadian Port Huron Co. to have certain moneys paid into Court paid out to them to the extent of their claim and costs. Two actions were brought to foreclose mortgages held by the plaintiffs, one against the south-east quarter of section 32-9-14, west 2 meridian, and the other against the south-west quarter of the same section respectively. The properties were sold under decrees of the Court, and the claim of the plaintiffs on their mortgage was satisfied, and a balance remained of $2,787.23 in the whole realized from the sale of both properties. The Port Huron Co. had a second mortgage which covered both the quarter sections. The other defendants are execution creditors whose executions were registered subsequent to the mortgage of the Canadian Port Huron Co. Wilson, who purchased both the quarter sections, claims that he should be paid out of the money in Court $217.48 standing as a charge against both quarter sections under the Noxious Weeds Ordinance, ch. 24 of 1903. The orders for sale directed that, in default of payment of the amounts assessed as due under the mortgages, "the mortgaged property should be sold." An affidavit of Wilson's was read in which he stated that at the time of the sale nothing was said by the officer under whose directions the sale was made, or by the auctioneer, that the sale was made subject to any charge whatever, and that he was not aware that any charge was against the land. Some Ontario cases were cited to me, and it was urged that they supported the proposition that the purchaser was entitled to get the property discharged from these taxes, and *Turrill* v. *Turrill*, 7 Prac. R. (Ont.) 142, was especially relied on. That case certainly appears to go the length. I am not prepared to say that the others do. I am of opinion, however, that these authorities are not applicable in this Province, where the Land Titles Act (ch. 24 of 1906) is in force. It is stated sometimes that that Act deals entirely with matters of registration. I am of opinion that that is not correct. It undoubtedly was intended to and does deal largely with matters respecting the registration of land titles, but it also deals to some considerable extent with the question of title. For instance, the Act provides for the issuing of certificates of title to the owner, and that if there are any registered mortgages or encumbrances or notices authorized by the Act, or executions, that they shall be

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noted on the certificate of ownership so issued, and that the owner takes his title subject only to the mortgages, etc., so noted on the certificate, except as stated in sec. 76 of the Act. That section provides as follows: "The land mentioned in any certificate of title granted under this Act shall, by implication and without any special mention therein, unless the contrary is expressly declared therein, be subject to . . . (b) All unpaid taxes."

When a suit is brought to foreclose a mortgage given upon land which has been brought under the Land Titles Act (as the mortgages in this case were), a mortgagee from the owner takes his right subject to what appears upon the certificate of title, and of course subject to taxes and the other matters mentioned in sec. 76, if any. The Court in decreeing a sale can only take notice of what appears on the abstract of title received from the Registrar of Land Titles, and any charge for unpaid taxes would not appear on that. If there is a prior encumbrance, mortgage, etc., the order of sale will direct that the sale shall be subject to such prior encumbrance, mortgage, etc. A purchaser under the order of sale will, however, acquire the titles and rights of the owner or mortgagor and of all parties whose rights or titles are duly registered, and in point of time subsequent to the mortgage proceeded upon, provided of course that all the subsequent parties have been brought before the Court, and it is the practice of the Judges to require an abstract of title for the purpose of ascertaining whether the proper parties who may be bound by the decree are brought before the Court. The Court, however, is not bound or called upon to insist upon information or proof respecting charges such as those mentioned in sec. 76, and which are not registered. Every intending purchaser is informed by the order for sale whether the land is to be sold subject to other registered mortgages, etc., or not, but he has no knowledge from the order whether it is subject to a charge for taxes or not. But every person is supposed to know the law, and an intending purchaser must take notice that the property may be charged at the time of sale with a charge for taxes. There is a place where it can be found out whether there are any such charges or not, and he must make inquiry there. If there are such charges, and whether he inquires or not, he is bound to take notice that such charges exist, and whatever he purchases therefore is subject to such charges. If it turns out that he has not made proper inquiries,

and purchases without doing so, and that there are such charges, he has got to take the land subject thereto. That, in my opinion, is the intention and purview of the Act. It seems to me that it is not unreasonable. Take this very case, for instance: The plaintiff had leave to bid. It was natural that other mortgagees would attend to protect their securities and see if the land was worth it and that they did not lose the benefit of such securities by its being knocked down below its value, and they have the right to bid. In this case the land realized more than the plaintiffs' claim. It is fair to assume that the Port Huron Co., the next registered mortgagee, would be present to see that the property was bid up to the amount of their mortgage at least, and over, so as to make them secure, and if the defendant had not bid the price for which the property was knocked down to him they might have done so and taken the property. Again: Another bidder may be present at the sale who is aware of the encumbrance by virtue of the taxes, and prepared to go to the extent of his last bid, possibly a few dollars below that which the purchaser has bid; the purchaser by going higher puts him out. If the purchaser had not bid over his last bid he was prepared to take the land subject to the charge. Surely under such circumstances it does not lie in the purchaser's mouth to turn around and say, "I did not know there was an encumbrance upon this land; if I had known it I would not have bid so much."

Of course counsel for Wilson urged that the taxes in question were a charge against the land. These taxes were $6.48 for the year 1908, and $211 for the year 1909. Section 13 of the Ordinance provides that any amount which has been expended for the purposes mentioned by the Ordinance in destroying or disposing of noxious weeds "which has not been satisfied on or before the 1st day of January next following its expenditure shall be added to and form part of the local improvement assessment of such lands in all respects as if it were an original tax, and it shall have the same effect on the land and may be recovered in any of the modes available for the recovery of such taxes." It was not questioned that the taxes for the year 1908 are a charge on the land. That was no disputed, but it was claimed that the taxes for 1909 are not a charge and would not become so until January 1st, 1910. I do not consider it necessary to decide that question. If they are a charge

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on the land, under my judgment Wilson has got to assume it; if they were not a charge on the land at the time of the sale, then it is clear from any standpoint that the amount should not be discharged out of the moneys paid into Court.

The order will be that out of the moneys paid into Court altogether in both suits the Canadian Port Huron Co. be paid to the extent of their claim and costs of both suits and of this application; and that the balance, if any, be distributed *pro rata* among the execution creditors according to the amounts of their respective claims. But the paying out under this order will be stayed for fifteen days from this date in order to allow Wilson an opportunity to appeal from this judgment if he desires to do so.

[TRIAL.]

1909

Dec. 27.

JAGGER v. TURNER & CO.

Assignments and Preferences—Proof of Insolvency—Inability to Pay Debts—Preferential Assignment—Knowledge of Insolvency.

Defendants, just prior to the assignment for the benefit of creditors by a debtor of the defendants, secured an order from the debtor for payment to them of a portion of the moneys payable on the sale of his business, of which they subsequently obtained payment. The debtor having shortly afterwards made an assignment to the plaintiff for the benefit of his creditors, the assignee brought an action to secure the return of the money so paid. It appeared that the defendants had knowledge of the insolvent condition of the debtor at the time of the giving of the order. The debtor was not available at the trial to give evidence, and no direct evidence of insolvency could be given. It appeared, however, that for some time prior to the assignment he had been unable to pay his debts in full, and the assignee shewed that the liabilities exceeded the assets which had come into his hands:—

Held, that the evidence was sufficient to establish that the debtor was unable to pay his debts in full, and the defendants being aware of this, and the assignment of the money to them having the effect of giving them a preference, the assignment of such money should be set aside and the plaintiff have judgment for the amount paid.

THIS was an action to recover certain moneys paid to defendant by a debtor when in insolvent circumstances, and was tried before JOHNSTONE, J., at Moose Jaw.

W. B. Willoughby, for the plaintiff.

G. E. Taylor, for the defendant.

December 27. JOHNSTONE, J.:—The plaintiff is an official assignee under the Assignments Act, and sues as such assignee.

On the 5th day of February, 1909, one Howard W. McConnell, merchant, of Moose Jaw, carrying on business under the name and style of "McConnell Brothers," claiming to be at the time in insolvent circumstances and unable to pay his debts in full, made an assignment of his estate under the said Act to the plaintiff for the benefit of his creditors.

Prior to the 18th January, 1909, one T. J. McCammon, also a merchant of Moose Jaw, became indebted to the said McConnell in a sum exceeding $1,514.39, the purchase price of the business of McConnell Brothers sold to him by the said McConnell, and on the said date McConnell, at the request of McCammon, signed a document in the following words:—

"T. J. McCammon, Esquire,—

"Please pay to James Turner & Co. Ltd., the sum of $1,514.39 full of account out of the balance of purchase money due by you to me in payment of the above account less proper reductions. Dated January 18th, 1909."

The amount called for by this order was subsequently paid by McCammon to the defendants, and the plaintiff alleges in the statement of claim that McConnell on the date referred to was in insolvent circumstances and unable to pay his debts in full, and with such knowledge, and with intent to give the defendants a preference over his other creditors, signed the said order, and the plaintiff claimed that as the assignment for the benefit of creditors had been executed within sixty days after the signing of the said order in favour of the defendants, the making of the said order constituted a fraudulent preference under the Assignments Act, and was void against the plaintiff and the creditors of H. W. McConnell. The plaintiff claimed judgment of this Court declaring said order of the 18th January and the payments thereunder to be a fraudulent preference within the Assignments Act and void, and the plaintiff further claimed judgment for the payment of the said moneys by the defendants to the plaintiff, as assignee.

The defendants contended that the order of the 18th January made by the said Howard W. McConnell was not a fraudulent preference or made with intent to prefer these defendants, nor had it that effect, nor was it made at a time when McConnell was in insolvent

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circumstances or unable to pay his debts in full, or knowing that he was on the eve of insolvency, and for these and other reasons did not constitute a fraudulent preference under the said Act.

The trial of the action took place before me at Moose Jaw on the 11th day of October, 1909, and judgment was reserved.

At the conclusion of the trial I had some doubt as to whether as against the defendants there was sufficient evidence of insolvency of McConnell at the time of the giving of the order referred to. I now think, however, the evidence amply sufficient to warrant me in finding that at the time of the giving of the order by McConnell to the defendants, namely, on the 18th day of January, 1909, H. W. McConnell was unable to pay his debts in full and was insolvent, and that the giving of the said order had the effect of giving to the defendants a preference over the other creditors of McConnell, and I so find.

McConnell, it was shewn, was absent from the Province at the time of the trial, and that his attendance at the trial to give evidence could not be secured; there was therefore no direct evidence as to his insolvency, but his financial condition had to be gathered from his acts and the surroundings.

It appears McConnell, on April 10th, 1908, purchased from one T. J. McCammon, of Moose Jaw, the person already referred to, all the stock-in-trade, good-will, etc., of the latter, at and for the price of $10,722, on terms that he, McConnell, should pay for same in certain stipulated sums on certain named dates. According to the statement of the brother of H. W. McConnell, who claimed to have had at one time an interest in the business, and who was employed in the store and had a knowledge of the financial standing of his brother H. W. McConnell, there was put into the business by the brothers, in all, the sum of $3,000. Calls for money were frequently made upon H. W. McConnell during the fall and winter of 1908 up to the time of his assignment by McCammon and his other creditors, without avail; the invariable reason for non-payment given by the debtor being his inability to pay, and for which reason McCammon on the 6th day of January, 1909, obtained from McConnell, who was still indebted to him in a large sum of money, a return by way of sale of all the stock-in-trade of the business carried on by the latter, including good-will, etc. McConnell, on the 6th January, 1909, and for some time prior thereto,

had been unable to pay certain promissory notes given by him to the defendants in payment of goods purchased from them, as well as moneys due other of his creditors. On several occasions during the months of December, 1908, and January, 1909, McConnell admitted his insolvency, and the official assignee's statement shews the liabilities of McConnell to have been $6,464, as against $2,223.93 assets.

There is no real distinction between being in insolvent circumstances and being unable to pay debts in full: see *Dominion Bank* v. *Cowan*, 14 O.R. 465; *Bertrand* v. *Canadian Rubber Co.*, 12 M.R. 27, Killam, J., 29. In *National Bank of Australia* v. *Morris* (1892), A.C. 287, at p. 290 (a case arising under the provisions of the Insolvency Acts, 5 Vict., ch. 17, and amendments, whereby it was enacted that every payment made by a debtor to his creditor, except in certain cases mentioned, should be a valid payment, provided such creditor should not at the time of payment have known that the debtor was then insolvent), it was said: "If the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent."

On the 31st December, 1908, a letter was written by McCammon to the defendants (which letter, by the way, was not produced at the trial, nor a press copy thereof obtained, although time was given for its production), from which and the reply thereto, and from subsequent letters and communications between Turner & Co. and McCammon, it must be inferred that the defendants knew perfectly well McConnell was in insolvent circumstances, or on the eve of insolvency. No other reasonable conclusion could be arrived at. The letter of the 5th January, in reply to that of 31st December, reads as follows:

"Hamilton, Jan. 5, '09.

"Mr. T. J. McCammon,

"Moose Jaw, Sask.

"*Re McConnell Brothers.*

"Dear Sir:—

"Your esteemed favour of 31st ult. reached us yesterday and while we regret the state of affairs referred to, we thank you very much for the information given us. Not having received a wire

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from your good self since, we presume you have failed so far in arranging to purchase the business, and of course if an assignment is made we would be unable to take any steps with regard to protecting ourselves, other than filing our claim in the usual manner with the assignee. They are owing us at present time about $1,500. part of which is overdue and we are quite willing to leave the matter in your hands to protect our interest as far as possible. Of course if we should receive a wire before hearing further by letter we will do what we can in way of issuing garnishee proceedings, should a sale of the stock take place to your good self.

"Thanking you again, we are

"Yours truly,

"(Sgd.) James Turner & Co. Limited."

Again, on the 15th of January, the defendants wrote to McCammon as follows:

"Hamilton, Jan. 15, 1909.

"Mr. T. J. McCammon,

"Moose Jaw, Sask.

"*Re McConnell Bros.*

"Dear Sir:—

"Your esteemed favour of 11th inst. reached us this morning and we also have your telegram dated 14th inst., *viz.*, 'You must act quick if you want protection,' to which we have replied per press copy herewith and now confirm.

"We now enclose statement in full of account with acceptances due 8th and 22nd Oct., 22nd Dec. and 6th Jan. You will see there is one amount to mature on 21st inst. and we have instructed our bank to advise Moose Jaw to hand this over to you if unpaid at maturity.

"We would ask you to hand this statement and vouchers to your solicitor at once with instructions to garnishee money in your hands for purchase of stock from above firm.

"Trusting this matter will have your kind and prompt attention and thanking you for the interest you have taken on our behalf.

"We are, yours truly,

"(Sgd.) James Turner & Co. Limited."

I think this case is entirely distinguishable from that of *Newton* v. *Lilley* (1906), 16 Man. L.R. 39, 3 W.L.R. 537, referred to by

defendant's counsel. There it was held, upon the evidence, that the creditor did not know and had not sufficient reason for believing the debtors were unable to meet their liabilities at the time the transaction attacked was entered into, whereas in the case now under consideration I hold the contrary. In the *Newton* case it appeared the transaction was made between the parties in good faith, and there was no intention on the part of the debtor to give, or the creditor to receive, a preference over the other creditors. In this case I think this intention to prefer was present on the 18th January as to both the creditor and the debtor.

There will therefore be judgment declaring the order in question and the payment thereunder to the defendants for the reasons above set out void as against the plaintiff, and the plaintiff will be, and he is hereby declared, entitled to judgment against the defendants for $1,514.39; the plaintiff to have the costs of the action.

[TRIAL.]

BROWNSBERGER v. HARVEY.

1909
Dec. 29.

Sale of Goods—Agreement in Writing—Collateral Verbal Agreement—Evidence of—Admissibility.

Plaintiff sued to recover the price of a threshing machine, for which the defendants had given a lien note. The defendant pleaded that they signed the note on the express verbal understanding that the plaintiff should furnish all necessary repairs to put the machine in good condition:—
Held, that evidence was admissible to shew that a written contract was subject to a collateral verbal agreement.

THIS was an action to recover the price of a threshing outfit for which the defendants gave a lien note, and was tried by the Chief Justice at Regina.

H. V. Bigelow, for the plaintiff.
J. F. Frame, for the defendant.

December 29. WETMORE, C.J.:—The defendants purchased from the plaintiffs a 10-h.p. Waterous engine and one 28-inch cylinder Premier separator, for $500, and on the 17th September, 1903, they gave two lien notes therefor, one for $300, payable on the 1st December, 1903, the other for $200, payable on the 1st

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December, 1904, and these notes specified that they were given for the engine and separator above mentioned. The action is brought upon those notes.

The defendants took possession of this property before the order therefor was given or the lien notes signed. The order was in writing, but has been lost, and when the plaintiff was asked as to its contents gave them in a most unsatisfactory character. There is a good deal of evidence as to what was not in it, but there is practically no evidence to shew what was in it.

The defendants set up that there was a verbal agreement by which the plaintiff agreed to furnish certain repairs and necessary things to make the machinery work properly, and that if after being tested it did not work properly they would be at liberty to return it and would not be requested to pay the price charged for it, which was represented by the notes.

It is quite evident that there was a collateral verbal agreement to the written order, and which was recognized as existing by the plaintiff himself.

The plaintiff testified: "I was to furnish repairs to put in running shape. That meant fit for threshing grain . . . that a man could make wages on it." On cross-examination he was asked categorically whether he had not promised to supply certain specified repairs and parts, some of which he admitted that he had agreed to supply, some of which he denied, and some of which he stated that he did not remember. Those on the list which he denied agreeing to supply were very few. Those with respect to which he did not remember were comparatively numerous. The difficulty is, however, that while the plaintiff does not remember, the defendants do, and they state specifically what those articles were. Consequently, with the exception of one or two articles so denied by the plaintiff, the defendants' testimony stands uncontradicted in respect to the items that were specified by them as being required when they signed the order for the machine, and the notes. The plaintiff testified that the things mentioned, whatever they were, were the things which he agreed to furnish at the time that the order was so signed and the notes given as being necessary to put the machine in running shape.

So far, therefore, as this phase of the case is concerned, there is no difficulty in reaching a conclusion, because the plaintiff has prac-

tically admitted it. A great many of the things agreed to be furnished were not furnished. The evidence establishes to my satisfaction that the machine did not work satisfactorily. It did not work so as to enable the defendants to make wages by it at all. There was evidence that pointed in the direction that the machine did not work properly because it was not properly handled; that after it was returned it was sold to another person without any further repairs being put upon it, and it worked, for a second-rate machine (as this machine was), very satisfactorily. But it certainly did not work properly in the hands of the defendants.

I do not feel called upon in this case to decide whether the reason for the machine not working satisfactorily was because the defendants did not know how to handle it or not, or whether it worked satisfactorily in the hands of the purchaser from the plaintiff, because the weight of evidence establishes to my satisfaction, looking at the reasonable probabilities of the case (and in this particular I have nothing else to guide me except the testimony of the two defendants on the one hand and the plaintiff on the other), that it was part of the agreement that if after a fair test the machine would not do its work properly it might be returned.

I find that the machine not working satisfactorily the defendants did return it, and the plaintiff received it and resold it. The plaintiff having so received it puts an end of all necessity for an inquiry as to what was the cause of its not working, or as to whether it was returned in time or not.

I may say, in conclusion, that this case is really one entirely of fact. The question whether a binding verbal agreement of the character I find existed in this case can be made, where there has been a written agreement, has been discussed by me in two or three cases decided recently. Here I find the plaintiff agreed and did sign the notes and the order for the machine on the express understanding and in consideration of the promise made to furnish these repairs and parts. I draw attention to *Cross et al.* v. *Douglas* decided by the Court *en banc* at its last sittings. I delivered a dissenting judgment in that case, but I am of opinion that this case comes directly within *Lindley* v. *Lacey* (1864), 17 C.B.N.S. 578, cited by me in that judgment.

There will be judgment for the defendants with costs.

[TRIAL.]

1909

Dec 31.

BANTON v. MARCH BROS. & WELLS.

Vendor and Purchaser—Specific Performance—Action for—Refusal to Execute Transfer to Nominee of Purchaser—Cancellation of Contract—Right of Purchaser to Repayment of Instalments Paid.

Plaintiff purchased certain land from defendant and paid a portion of the purchase price thereon, and went into possession. The purchaser being in default under the agreement, the defendants served notice of cancellation under the terms of the contract. The plaintiff then procured a third party to make a tender of the purchase price, and demanded that the defendants execute a transfer to such third person. There was at that time no assignment of the original contract to the plaintiff's nominee, nor was the original contract produced, and there were to the knowledge of the defendants executions against the land of the plaintiff. The defendants refused to execute the transfer, and retained the money paid by plaintiff, who sued for specific performance, or return of the purchase money paid:—

Held, that there was no tender by the plaintiff, and the defendants were under the circumstances justified in refusing to execute the transfer to plaintiff's nominee, and the plaintiff was not entitled to specific performance.

2. That, following *Hall* v. *Turnbull* (1909), 2 Sask. L.R. 89, the plaintiff was entitled to a return of the purchase money paid on account of the sale.

THIS was an action for specific performance of a contract for sale of land, and was tried before JOHNSTONE, J., at Yorkton.

C. D. Livingstone, for the plaintiff.

W. R. Parsons, for the defendant.

December 31. JOHNSTONE, J.:—The plaintiffs claim that on the 8th day of December, 1905, the defendants agreed to sell to him and he agreed to buy the south half 32-20-30 west of the first meridian in the Province of Saskatchewan, for the sum of $3,200, $600 of which it was agreed should be and was in fact paid in cash; a further sum of $325 on or before the 1st day of December, 1906, and a similar sum on the 1st December in each and every of the years 1907 to 1913 inclusive, together with interest at six per cent. per annum. The agreement referred to, exhibit A, amongst other provisions, contained the following provisions:—

"And the purchaser, in consideration of the premises aforesaid, hereby covenants and agrees with the vendor to pay the purchase money and interest thereon to the vendor at the times and on the terms above mentioned, and that, on default in payment of any instalment of interest, such interest shall at once become principal and bear interest at the rate aforesaid. Provided that in the case

of default in the payment of any instalment of either principal or interest or taxes of any kind the whole of the principal sum and interest thereon and taxes then remaining unpaid on this contract shall at once become due and payable.

"The purchaser further agrees and covenants to pay and discharge, on or before January 1st, in each year, all taxes, liens, rates and assessments, whether municipal, Parliamentary or otherwise wherewith the said lands may be rated or charged, and that he will, on or before February 1st in each year, leave with the vendor a receipt for the payment of all said taxes, liens, rates and assessments upon said lands and in default of payment as aforesaid, the vendor may pay the same and the sum so paid shall be deemed to be secured hereby and shall be, without demand, payable forthwith with interest at the rate herein provided. All buildings and improvements now on said lands, or that shall hereafter be placed thereon shall not be removed therefrom, but shall be and remain the property of the vendor until this agreement shall be fully performed by the purchaser. If the purchaser shall pay the several sums of money and interest thereon and the taxes as aforesaid, strictly at the times above limited, and shall faithfully and promptly perform each and every of said covenants and agreements by him to be performed, the vendor will, upon request and surrender of this agreement, execute and deliver to the said purchaser, or his approved assigns, a good and sufficient deed or transfer of said land.

"And it is further agreed that if the purchaser shall fail to make the payments of principal or interest aforesaid, or any of them, or the taxes, strictly at the times above limited, or shall fail in the performance of any of the covenants, or agreements herein contained, then, and in such case, the vendor shall have the right, at any time, to declare the whole amount remaining unpaid upon this contract due and payable and to take action to collect the same and to deliver to the purchaser a deed to said land when all of said sums are collected or in place of the foregoing to declare this agreement null and void by giving thirty days' notice in writing to that effect, personally served upon the purchaser or mailed in a registered letter addressed to him at the post-office named below, and all rights and interests hereby created or then existing in favour of the purchaser or his approved assigns, or derived under this agreement shall thereupon cease and determine, and the premises hereby

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agreed to be conveyed shall revert to and revest in the vendor, without any further declaration or forfeiture or notice or act of re-entry and without any other act by the vendor to be performed, or any suit or legal proceedings to be brought or taken and without any right on the part of the said purchaser or his assigns to any reclamation or recompensation for moneys paid thereon. No assignment or transfer of any interest in or to this agreement of the lands described, less than the whole thereof, will be recognized by said vendor under any circumstances, or in any event whatever, and no assignment shall be binding upon the vendor unless approved by its authorised officers, and no assignment shall in any way relieve or discharge the purchaser from liability to perform the covenants and pay the moneys herein provided to be performed and paid.

"And it is further agreed that time is to be the very essence of this agreement.

"Except as herein otherwise provided, this contract shall inure to the benefit of the respective heirs, representatives, successors and assigns of both parties."

The plaintiff went into possession of the lands in question on the 8th day of May, 1905, and remained in possession until the summer of 1909, and until after the issue of the writ, when he quit possession. Save as to the $600, nothing further was paid by the plaintiff on account of the purchase money or interest, or for taxes, and on the 7th day of April, 1909, the defendants caused to be delivered to him a notice of cancellation of the contract and declaring the contract null and void.

On this date, one A. C. Matthews caused to be tendered to the plaintiff the sum of $3,307.93, with a request from the plaintiff that the defendant should deliver to the said Mathews a transfer of the lands in question under the Land Titles Act. At the time of the tender the agreement for sale had not been assigned to Mathews, nor, as provided by the agreement for sale, was this document produced at the time of the tender. This request is in the following words:—

"Messrs. March Bros. & Wells,

"Langenburg, Sask.

"I hereby authorize and require you to issue a transfer of the south half of section thirty-two (32), township twenty (20) in

range thirty (30) west of the principal meridian in the Province of Saskatchewan in favour of Alonzo Charles Matthews, and I hereby tender you the full amount due under the agreement of sale between yourselves and me respecting the above-mentioned land.

"And take notice that in case you fail to deliver a transfer to the said Alonzo Charles Matthews, an action will be brought for specific performance within five days from date.

"Dated at Langenburg, Sask., this 21st day of April, 1909.

(Sgd.) Harry W. Banton."

There was never any assignment of the contract between the plaintiff and the defendants to Matthews, nor was there any document other than the above request which would enable Matthews to claim an interest in the lands in question.

It was claimed by the defendants in their statement of defence, and not denied, that certain executions against the plaintiff had issued and had been registered against the lands of the plaintiff in the land titles office for the registration district covering the lands in question, and for the reason that Matthews had no assignment of the interest of the plaintiff in the lands in question, and that the duplicate of the agreement for sale between the plaintiff and the defendants was not produced by Matthews at the time of the tender, and because of the executions against the plaintiff having been registered against the said lands the defendants refused to execute the transfer.

The plaintiff asks for specific performance, or, in the alternative, for a refund of the $600 paid by him on account of the purchase money which the execution of the agreement referred to, but he makes no other claim.

The defendants make no claim for mesne profits, and set up by way of defence that this sum has been forfeited to them under the provisions of the agreement for sale.

In *Sawyer & Massey* v. *Bennett* (1909), 2 Sask. L.R. 516, which was decided at the last sittings of the Court *en banc* in October, 1909, it was determined in case of a transfer from the purchaser from the owner of the fee, under an agreement for sale, that although an action could not be brought by the transferree against the vendor, (for specific performance) that where the purchase moneys and interest had been paid, the transferrees could bring an action as

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equitable assignees against the vendors and the transferror declaring the purchaser from the owners in fee simple a trustee for the transferrees, the plaintiffs in such action.

Apart from the question of the rights of the plaintiff, because of his default in the payments under the agreement, there was no tender by the plaintiff, and as Matthews was not his assignee, and for the reason that the agreement between the plaintiff and the vendors had not been produced, and for the further reason that there were executions registered against the plaintiff to the knowledge of the defendants, in my opinion the defendants were justified in refusing to sign the transfer.

At the time of tender the plaintiff was in possession of the lands in question, and the contract between him and the defendants had to be cancelled before action could be taken for recovery of the land, and I therefore think that the giving of the notice did not operate as a waiver of any right to take advantage of the default of the plaintiff.

In my opinion the plaintiff is not entitled to specific performance: *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171 (1908); *Battel* v. *Hudson Bay* (1908), 1 Sask. L.R. 169.

As to the right of the plaintiff to repayment of the $600 paid by him on the execution of the agreement for sale, I agree with the conclusion arrived at by my brother Newlands in *Hall* v. *Turnbull* (1909), 2 Sask. L.R. 89. I might also refer to *The Public Works Commissioner* v. *Hill* (1906), A.C., p. 368.

There will therefore be judgment for the plaintiff for $600, with the general costs of the action, but no costs of the claim for specific performance.

The defendants will be entitled to the costs occasioned through the claim for specific performance and of the issue thereof. There will be one taxation, and the amount found to be due to the defendants on account of their costs to be deducted from the costs of the plaintiff; the plaintiff to have judgment for $600 and the balance and costs found due them on taxation.

[TRIAL.]

HUDSON v. FLETCHER ET AL.
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Company—Sale of Property—Resolution Authorizing Conveyance—Non-compliance with Provisions of—Conveyance Invalid—Seizure by Sheriff—Breaking Open Door—Premises Occupied as Dwelling and Store—No Connection Between—Right of Sheriff to Break—Effect of Unlawful Entry upon Seizure—Claim to Goods Seized—Subsequent Claim to Other Goods—Estoppel—Insolvency—Fraudulent Conveyance.

The Mortlach Mercantile Company being indebted to several parties, the defendant Belcher was appointed a trustee for creditors, and with his consent the business was transferred to a company known as Hudsons Ltd., which agreed to assume the liabilities of the previous company and to pay the same in regular payments. The new company being behind with its payments, a resolution was passed authorizing the sale of the business and conveyance thereof to J. W. Hudson upon execution of certain notes, which it was found as a fact were never made. Notwithstanding, the conveyances were made by the officers of the company, and Hudson went into possession. After the delivery of these documents Belcher recovered judgment against the company, and execution was issued to the sheriff, the defendant Fletcher, who issued a warrant for seizure. The plaintiff Hudson at this time lived over the store premises in which the business was carried on. When the bailiff arrived he found the store premises locked and Hudson refused to open, whereupon the bailiff forced an entrance. There was no connection between the living apartments and the store premises. After the seizure Hudson first verbally claimed all the goods as his. Subsequently, however, he filed a written claim, which was admitted. In an action for wrongful seizure he alleged other goods were his, and claimed damages.

In an action to set aside the conveyance of the land, it appeared that at the time of the transfer Belcher was pressing his claim, that other claims were outstanding, that the goods were mortgaged in a considerable sum, and that the assets if sold would be insufficient to meet the liabilities, and that Hudson must have been aware of the state of affairs:—

Held, that the notes to be given in payment of the goods not being delivered, the conveyance thereof to Hudson was not in accordance with the resolution of the company authorizing it, and was therefore invalid; and the property in the goods never passed to him.

2. That the store and dwelling, while not connected, being under one roof, the breaking by the sheriff of the door of the store premises was technically a breaking of the dwelling, and therefore an unlawful breaking.

3. That Hudson having made a formal claim in writing to certain goods after seizure, under the provisions of the rules of Court, could not afterwards allege that other of the goods seized belonged to him, and maintain an action for unlawful seizure in respect thereof.

4. That the company, at the time of the transfer of land to Hudson, being unable, if its assets were presently realized and if compelled to sell at a forced sale, to pay its debts in full, must be deemed to have been insolvent at that time, and Hudson being aware of this, and the conveyance to him being apparently to defeat the creditors of the company, the conveyance must be deemed to have been fraudulent under the Act respecting Assignments and Preferences, and should be set aside.

THE action was brought by plaintiff Hudson against the sheriff for damages for unlawful seizure, and a further action was brought by plaintiff Belcher against Hudson and others to set aside the

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conveyance of the goods seized and of certain real estate to him as being in fraud of creditors, and both actions were tried together at Moose Jaw before the Chief Justice.

H. V. Bigelow, for Hudson.

Colin H. Campbell, K.C., and *G. E. Taylor*, for the sheriff and Belcher.

October 22. WETMORE, C.J.:—These two actions were tried together. I will first deal with the action of

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The Mortlach Mercantile Company Limited was a company carrying on a general mercantile business at Mortlach.

This company was composed of William J. White, Alexander B. Hudson, and William T. Hudson, and these persons, on the 11th of January, 1907, transferred their goods and chattels, which were situated in a store hereinafter mentioned in this judgment, to Henry C. Clements, in trust, practically, for the Hudsons Limited, upon that company being properly incorporated, and the Hudsons Limited agreeing to carry out the terms of assignment, which was to assume and pay all debts and liabilities of the Mortlach Mercantile Company for the approximate amounts as set out in the schedule annexed to such assignment. Belcher became party to this assignment for the purpose of assenting to it.

I will just state here that the gross amount of those debts was $16,684.53.

The Hudsons Limited having become incorporated, Clements, on the 2nd of February, 1907, assigned the property to them, they agreeing to assume and pay all the debts and liabilities of the Mortlach Mercantile Company above referred to.

Hudsons Limited entered into possession of this property, and also the store in which it was situated.

Belcher, who is the plaintiff in *Belcher* v. *Hudson et al.*, was the trustee for the creditors to whom the Mortlach Mercantile Company was indebted.

The plaintiff, Hudson, in the case of *Hudson* v. *Fletcher et al.*, was the president of Hudsons Limited.

By memorandum of agreement dated the 2nd of February, between Hudsons Limited and Belcher, the company agreed to

pay the indebtedness of the Mortlach Mercantile Company, as follows: $500 on the 15th February, 1907; $500 on the 15th of March, 1907; $1,000 each month thereafter until the whole amount was paid.

The Hudsons Limited made these payments for a time satisfactorily, but eventually they fell behind-hand, and, as a result, Belcher brought an action against the company to recover the amounts for which he was trustee, and on the 21st of April, 1908, recovered judgment, upon admissions in the defendants' pleadings for $1,010.60, being a portion of his claim. Execution was issued upon this judgment, and the stock-in-trade of Hudsons Limited situated in this store, seized, but the execution was satisfied by money advanced by Cameron & Heap upon a mortgage on the property and the note of Hudsons Limited, and the property was released from seizure. Belcher, however, went on and recovered judgment at the Moose Jaw sittings for the balance of his claim, being $3,387.22 and costs, and by leave of the Judge immediate execution was ordered for the amount of such judgment. Execution was issued accordingly against both lands and goods for the $3,387.22 on the 28th of May, and lodged forthwith in the hands of the sheriff, the defendant Fletcher.

The plaintiff, Hudson, set up that before this execution was lodged with the sheriff he had entered into an agreement with Hudsons Limited whereby that company agreed to sell to him lots 1 and 2 in block No. 17, in the townsite of Mortlach, being the lots on which the store is situated, and also lots Nos. 21 and 22 in the same block. This alleged agreement is dated the 5th of May, 1908; that he obtained a transfer from the company of this land on the 13th of May, 1908, and that a certificate of title thereto issued to him on the 15th of May. He also claimed to have obtained from Hudsons Limited an assignment of the stock and merchandise and book accounts and general assets of that company, also dated the 5th of May.

In order to appreciate the character of the agreement, assignment and transfer, I have got to state what took place between J. W. Hudson and Hudsons Limited with the object of obtaining the same.

The negotiations, if I may so call them, that took place between J. W. Hudson and Hudsons Limited, took place on the 4th of May,

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1908. The Hudsons Limited was composed of the following shareholders: J. W. Hudson (who was president), W. T. Hudson (who was secretary), A. C. Baker (vice-president), Nellie E. Baker (his wife), Lottie Hudson (wife of W. T. Hudson), Theoline Hudson (wife of A. B. Hudson), and C. L. Metcalf (wife of W. H. Metcalf).

No written notice was given calling a meeting of shareholders for the purpose of passing on the proposed transfer and assignments.

J. W. Hudson, W. T. Hudson and A. C. Baker were engaged in the store on the 4th of May. A. B. Hudson was also there, and W. H. Metcalf (who happened to be in town) was called in, and the resolution, which I am about to set out, was passed. Neither Nellie E. Baker or Lottie Hudson or Mrs. Metcalf were present, and they had not received any notice of the proposed meeting or of its object. A. B. Hudson professed to act for Theoline his wife under a general proxy, and A. E. Baker for his wife (under a similar proxy), Metcalf for his wife, and W. T. Hudson for his wife. A messenger was, two or three days afterwards, sent with a copy of the resolution to Mrs. Baker, who signed it. These ladies were never present at any meeting of shareholders at which any such resolution was passed, or did they have any notice of such meeting, as I have before stated.

I will not stop here to discuss whether under such circumstances the resolution was valid or not, because from the view I take of the case it is not necessary to do so.

The resolution passed was as follows:—

"Mortlach, May 4th, 1908.

"A meeting of the shareholders of Hudsons Limited was held in the registered office of this company this day.

"Moved by Theoline Hudson, seconded by C. L. Metcalf: That the offer of John W. Hudson to purchase the assets of Hudsons Limited for $8,000, repayable $100 per month, with interest at six per cent. per annum, payable yearly, with the privilege of paying additional amounts from time to time, be and is hereby accepted, and that an agreement for sale of the real property of Hudsons Limited be executed in favour of John W. Hudson for $2,000, repayable $40 per month, with interest at six per cent. per annum, and that a bill of sale for the stock-in-trade, business, etc., of the said Hudsons Limited be executed in favour of the said John

W. Hudson for $6,000 repayable $60 per month, with interest at six per cent. per annum, payable yearly, upon the said John W. Hudson executing in favour of Hudsons Limited certain notes for $6,000, repayable $60 per month, with interest at six per cent., payable yearly, and that upon execution of the said papers possession will be delivered to the said John W. Hudson."

Acting in alleged pursuance of that resolution, the alleged contract for sale of the lands hereinbefore mentioned was entered into between Hudsons Limited and J. W. Hudson, the expressed consideration being the sum of $2,000, payable in monthly instalments of $40 each, as provided in the resolution, the first of such instalments to come due on the 1st of July, 1908, with interest at six per cent., and the balance was to be paid on the 1st of May in each and every year, and it went on to provide that on payment of such sums of money with interest as aforesaid, the vendor—that is, the company—promised and agreed with the purchaser to convey and assure, or cause to be conveyed or assured, to him, the said parcels of land by deed or transfer.

Assuming that agreement to be a valid agreement, the condition upon which the transfer was to be made was never filled, because the payments were not made, and therefore there was no authority whatever for the transfer from Hudsons Limited to J. W. Hudson.

It will be observed that the resolution of the 4th of May authorising a sale of the stock-in-trade, business, etc., to be executed in favour of J. W. Hudson, provided that it should be executed upon Hudson executing in favour of the company certain notes for $6,000, which notes were repayable (such was the expression used) at $60 per month of the $6,000 for which the stock-in-trade, etc., was to be sold. J. W. Hudson never executed these notes. I doubt whether, at the time the sheriff made the seizure hereinafter stated, he had even executed one of them. He did sign four notes for the amount of $240 in the whole, but that is all. It has not been made to appear to my satisfaction when these notes were signed. The alleged assignment or agreement to assign of the 5th of May in J. W. Hudson's favour (put in evidence) was therefore utterly unwarranted by the resolution, and that being so, I hold, in so far as the goods and other property embraced by that assignment are concerned, that they did not pass, and the right of property therein still remained in the Hudsons Limited.

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Upon the execution on the last-mentioned judgment, which I have hereinbefore mentioned, being delivered to the sheriff on the 28th of May, he sent them with a warrant to his bailiff, the defendant Grant.

The goods were in the store on lots 1 and 2 before referred to.

The plaintiff, Hudson, lived above the store. It was his dwelling. He had practically, I think, lived there before the alleged assignments to him—that is, he sometimes stayed there and sometimes at his farm. However, be that as it may, on the 29th of May, when the bailiff entered the premises, he was living over the store. The building was all under one roof. There were three entrances to the store, two in front and one in the rear. All these entrances were fastened. The bailiff went upstairs and interviewed Hudson, and told him he had the executions and requested him to open the store, and he refused to do so. The bailiff then forced open one of the outer doors of the store with a pry. It was fastened with some sort of a catch over the door, but he forced this open and entered. I hold that to be a breaking open of the store.

It is claimed, in the first place, against the defendants Fletcher and Grant, that this entry was unlawful; that the dwelling-house being over the store rendered the breaking of this outer door a breaking of the outer door of the dwelling-house.

There was no communication in any way between the apartments upstairs, which Hudson occupied as a dwelling-house, and the store. This upstairs portion was reached by stairs, which were outside the building altogether, through a door on the upstairs flat. The question, therefore, arises, was this a breaking of the outer door of the dwelling-house, because if it was the sheriff and his bailiff were guilty of an unlawful entry, and would be responsible in damages.

Were I to decide this question upon my own unaided judgment, I think I would have little difficulty in reaching the conclusion that the sheriff's bailiff was justified in entering this building in the way he did. In *Lee* v. *Gansel*, Cowp. 1, Lord Mansfield, C.J., in delivering the judgment of the Court, states at p. 6 the reason for the law that the outer door of a man's dwelling-house may not be broken open to execute process. He says: "This has been long and well understood. The ground of it is this: that otherwise the consequences would be fatal, for it would leave the family within

naked and exposed to thieves and robbers." It seems to me that in a building situated as the one in question, the family living upstairs would be no more exposed to thieves and robbers by one of the doors of the store being forced open than they were before such breaking, because the thieves and robbers could not get into the dwelling part of the building from the store. I am satisfied that as the law now stands, by virtue of recent enactments both here and in England, the breaking and entry of a store situated as this one would not constitute burglary. But, assuming that, I could not be aided in this matter by the consideration whether this store was a dwelling-house so as to make it the subject of a burglary under the statutes: I must be governed by the common law and not the statute law. *Hodder* v. *Williams* (1895), 2 Q.B. 663, 65 L.J.Q.B. 70, 73 L.T. 394, is the latest case I can find dealing with the question of what building may be broken into through the outer door to execute process. In that case the sheriff's bailiff broke open the outer door of a building occupied as a workshop and for storage of goods, no one living in it and it not being connected with the dwelling-house; the Court held that the breaking was justifiable. The authorities bearing on the question, from *Lemayne's Case*, 1 Smith L.C., 9th ed., 99, down, were discussed, and while the Court held, as I have stated, that the breaking of the outer door of that building was justifiable, the several Judges very clearly laid down that they so held because the rule did not include buildings *not connected* with the dwelling-house. Lord Esher, M.R., at p. 666, says: "It seems clear that 'house' in that maxim means 'dwelling-house' and does not include other buildings such as *barns* or *outhouses not connected* with a dwelling-house," and Lopes, L.J., at p. 667, says: "It has frequently been stated as the law that this privilege only extends to the dwelling-house, and not to a barn or other building not connected with or *within the curtilage* of the dwelling-house . . . The doctrine relied upon has never been supposed to apply to anything but a dwelling-house, and has never operated to prevent a sheriff from breaking open the door of any building not being a dwelling-house or *connected* with a dwelling-house," and Kay, L.J., at p. 667, says: "A barn or outhouse not connected with the dwelling-house may be broken open in order to levy execution." It will be observed that all the Judges lay it down—it seems to me by clear implication—that in order to justify

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the breaking of an outer door the building must not be connected with the dwelling-house or within its curtilage. I am therefore reluctantly forced to the conclusion that the breaking open of the door of this store was unlawful. *Regina* v. *Higgs* (1846), 2 C. & K. 322, was the strongest case brought under my notice for the defendant. In that case the prisoner was indicted for burglary. He broke into a dairy of the prosecutor. This dairy adjoined a kiln one of the walls of which supported one end of the dairy, and the kiln adjoined the dwelling-house, one end of it being supported by one of the walls of such dwelling-house. There was no internal communication from the dwelling-house to the dairy. To get from the dwelling-house to the dairy a person had to go from the dwelling-house by a door into the yard, and from the yard by another door into the dairy. It was held that the dairy was not a part of the dwelling-house, but it will be observed that in that case neither the kiln or the dairy were under the same roof as the dwelling-house, and that the roofs of the kiln and the dairy were lower than that of the dwelling-house.

The next question that arises is as to the effect of the unlawful entry upon the seizure made under the execution. It is urged that the seizure is void, and that the plaintiff is entitled by way of damages to the value of the whole property seized (excepting, of course, the portion of it returned to the plaintiff as hereinafter stated). It is quite possible and very probable that if an application had been made to the summary jurisdiction of the Court the seizure would have been set aside. No such application, however, was made. I have come to the conclusion that under the circumstances of this case it is not necessary for me to decide this question in its general aspect. It is one upon which, when so considered, the authorities do not appear to be decided. I have above held that the stock-in-trade and other personal property of Hudsons Limited claimed to have been assigned to J. W. Hudson did not pass to him; it remained the property of Hudsons Limited. The bulk of the property seized by the sheriff consisted of property which I so hold to be that of Hudsons Limited, and was liable to seizure under the execution. It would, in my opinion, be manifestly unjust to hold that J. W. Hudson, who does not own the property seized, is entitled to damages to the value of it, or to hold that *quoad* the Hudsons Limited, who have not complained that the seizure is invalid.

There was some property seized which J. W. Hudson claimed was purchased in his own credit after the alleged assignment of the business to him. I am inclined to think that such is the case, but if so it was comparatively trifling in amount. I have not scrutinised the evidence in this respect very carefully, for the reason which I am now about to state. I hold that J. W. Hudson is precluded not only as regards that property but also as regards the whole property seized and sold by the sheriff.

At the time that the bailiff seized this property he promptly notified the plaintiff of the seizure and what he had seized, and the plaintiff then claimed that it belonged to him and not to the execution debtors, Hudsons Limited. This was stated verbally to Grant, the bailiff. Subsequently, however, Hudson appeared before the sheriff, and he put in a claim in writing to certain portions of this property, specifying them. The sheriff, acting under rule 432 of the Judicature Ordinance, as enacted by sec. 3 of ch. 8 of the Ordinance of 1903, gave notice of this claim to the execution creditor, and he abandoned any right to the property mentioned in such written claim of the plaintiff, and the property was restored to him. The claim was prepared in the following manner: the plaintiff appeared at the sheriff's office with a list in writing of what he claimed was not liable to seizure. It was very badly written, so much so that it was suggested that he, the plaintiff, should read the articles from this list and the sheriff should write them down on another piece of paper. This was done. But the plaintiff alleges that he did not claim in this writing more than he did because the sheriff would not take down what he desired him to take down. That he said when he, the plaintiff, mentioned one article, for instance, "Well, if I take down that I might as well give you the whole thing," and he did not take it down. I do not believe the plaintiff in this respect. The sheriff utterly denies that he ever said anything of the sort. On the contrary, he stated that he took down everything the plaintiff mentioned except part of a bag of flour, which he told him he could have anyway, and he would have been very glad if the plaintiff had put in a claim to everything, and I can quite understand why the sheriff would be. It would relieve him of all responsibility in the matter, and it would be quite unnatural, in my judgment, for the sheriff to decline to take down anything which the plaintiff had claimed. Moreover, the plaintiff

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signed the claim as written by the sheriff. I accept the sheriff's statement of this transaction.

Having reached this conclusion, I am of opinion that the plaintiff has no cause of action with respect to any of the property. I do not hold that a party claiming property seized by the sheriff is bound to interplead, and that if he does not he loses his remedy. It is not necessary for me, for the purposes of this case, to go that far, but I have no hesitation in holding that when a party so claiming puts in a claim to a portion of the property, and that is dealt with by interpleader proceedings, as in this case, it does not lie in his power to bring an action for other property which was under seizure at the time by virtue of the same writ to his knowledge, and which was not included in the notice of claim. Interpleader proceedings are provided for the protection of the sheriff, and it gives a person who states that his property has been wrongfully seized by the sheriff, under execution against another person, a right to put in a claim, and then the law provides the means by which that claim can be adjudicated upon and settled. Having selected his remedy, the claimant must stand by it; he cannot make use of it in so far as a part of the property is concerned and insist upon his common law right of action as to another portion of the property. To hold otherwise, in my judgment, would be to lead the sheriff into a trap and cause him to go forward with his execution in confidence, merely to find out that the claimant had lulled him to sleep by claiming a portion of the property. For this reason I am of opinion that so far as the property seized by the sheriff and not claimed by the plaintiff in writing is concerned, that the plaintiff has no right of action. It is important to bear in mind that rule 432 of the Judicature Ordinance requires the claim to be in writing, and the sheriff cannot interplead unless it is. The plaintiff, therefore, having put in a written claim in accordance with the rule, the sheriff had a right to assume that he had abandoned the verbal claim stated to the bailiff. The sheriff could only apply for interpleader in respect to the property mentioned in the written claim.

It was also set up in the course of the trial that the sheriff remained in possession an unreasonable length of time, and that he sold the property at an unreasonable and unfair price. I find against the plaintiff in so far as both questions are concerned.

I am of opinion that the damages by reason of the wrongful

entry should not in this case be very heavy; in fact, I think that they should be not much more than nominal. Technically, under the law, the outer door of the dwelling-house was broken open. In good practical common sense the outer door of the dwelling-house was not broken open at all. The plaintiff's occupation of the dwelling portion of the building was not interfered with in the slightest degree. I will therefore only award $20 as damages.

There will therefore be judgment to the plaintiff upon the issues joined arising out of the first and second counts in the statement of claim for $20 and costs. There will be judgment for the defendant upon the issues arising out of the third and fourth counts of the statement of claim with costs. The plaintiff to have the general costs of the action, but no costs with respect to the proceedings relating to the issues found for the defendants. The costs so taxed to the plaintiff shall be taxed as if the action had been brought in a District Court. In so far as witness fees are concerned, the attendance and travel of the plaintiff only will be allowed to the plaintiff, and only three days will be allowed him for coming, attendance and returning. The breaking of the door of the shop was practically conceded, and all the rest of the testimony, in so far as this case was concerned, was directed towards the right of property in the goods so seized under the execution, and that has been proved in favour of the defendants. One judgment will be set off against the other, and the party in whose favour the balance may be will have execution therefor.

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As stated in *Hudson* v. *Fletcher*, the assignment of the personal property to J. W. Hudson was unwarranted, and therefore he has no interest in the property so alleged to have been assigned. Of course, this is immaterial now as regards the moveable property, because the sheriff has swept the whole of it away. If any of the personal assets of Hudsons Limited, such as book debts, promissory notes, and the like, was not seized by the sheriff, this judgment will apply thereto, as the property therein did not pass to J. W. Hudson. I must hold the sale and transfer of the real estate also invalid, and that the same, as well as the assignment of the personal estate and assets of Hudsons Limited, were made with the intent of delaying and hindering creditors of the company.

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At the time the alleged agreement for the sale of the lots of land and transfer thereof and the sale of the personal property respectively were made, the Hudsons Limited were insolvent or on the eve of insolvency, and the management knew it. I find that the shareholders of the company, who were present on the 4th of May when the alleged agreement of sale was claimed to have been authorised, including J. W. Hudson, were aware that Belcher was pressing for the balance of his claim. J. W. Hudson testified that he was not aware of it. I cannot believe him. Notice of motion for 28th April to set the case down for trial was served on the company's solicitor on the 23rd April. The order setting down was made on the 4th of May—the very day on which the shareholders met. It is very difficult for me to believe that the solicitors did not keep their client advised as to such an important step in the cause, and Baker, one of the shareholders, testified that he and J. W. Hudson were aware at the time of this meeting that Belcher was proceeding with his suit.

There were a number of other creditors, but there is not any evidence to shew that any of them had taken any proceedings to enforce their claims at the time of this meeting, but they subsequently did take such proceedings, with the result that, after the Belcher executions were lodged, executions at the suit of other creditors were lodged amounting to $1,614.53, and I think, under the circumstances of this case, it is fair to assume that the debts on which the judgment supporting their executions were based were outstanding at the time when the assignments and sales of the 4th and 5th of May were claimed to have been authorized and made.

Then there was the mortgage to Cameron & Heap of $1,010 outstanding. The mortgage to Cameron & Heap was made on the 1st of May, 1908. The loan advanced on the security of this mortgage and the note of Hudsons Limited was obtained through Mr. Burton, the manager of Cameron & Heap. He was under the impression that the judgment for $1,010 obtained by Belcher represented the whole of his claim, and that he had no further claim, and assuming that, he advised J. W. Hudson if possible to change the business, on account of the reputation that Hudsons Limited had—that they would have a hard time in getting credit anywhere. And Mr. Burton went on to state that this company had a poor reputation through trouble with their creditors, and also as man-

agers, as business people, and I accept this testimony as correct. Now, if added to this situation as Mr. Burton understood it, we add $3,387 of liability (Belcher's judgment), which he did not understand to be outstanding, the difficulty for the company to get credit would be very considerably increased. The management and shareholders who met on the 4th of May were aware of all this. After the seizure by the sheriff the value of the stock in the store was appraised by one Strathearn. I see no reason why his appraisement should not be accepted, and he valued it at $4,560.71. After some goods amounting in value to about $160 were deducted from this in consequence of representations made by the defendant Hudson, the rest of the stock was sold at 35 cents in the dollar, and the fixtures at $120. The fixtures were sold subject to some liens which attached against them. The stock was not sold subject to Cameron & Heap's mortgage, and the amount of that mortgage was paid out of the proceeds of the sale. I have no reason to hold that that sale was not a fair one, and the evidence establishes that it realised as much as would be realised from a sale made under the circumstances. In *Davidson* v. *Douglas*, 15 Grant 347, Spragge, V.C., at p. 351, lays down the following: "In considering the question of the solvency or insolvency of a debtor I do not think that we can properly look upon his position from a more favourable point of view than this: to see and examine whether all his property, real and personal, be sufficient, if presently realized, for the payment of his debts, and in this view we must estimate his land as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it will bring in the market at a forced sale, or at a sale when the seller cannot await his opportunities but must sell." And at p. 353 he says: "There is no doubt as to the meaning of the words 'in insolvent circumstances.' That it is not necessary that the debtor should be either technically a declared insolvent or openly and notoriously insolvent." This is quoted with approval by Boyd, C., in *Warnock & Co.* v. *Kleopfer*, 14 Ont. Rep., at p. 291. The decision of the Chancellor was upheld by the Court of Appeal in *Warnock & Co.* v. *Kleopfer*, 15 Ont. App. 324, and the learned Judges who constituted the majority of that Court, who dismissed the appeal in express terms, agreed with the view that the Chancellor took of the meaning of the expression "insolvent circumstances." This case went on

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appeal to the Supreme Court of Canada, 18 S.C.R. 701, and the appeal was dismissed. I must admit, however, that the report last mentioned is not very satisfactory as to what constitutes knowledge of insolvency. I refer to the *National Bank of Australia* v. *Morris* (1892), A.C. 287, where, at p. 290, Lord Hobhouse lays it down: "If the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent." It is obvious that what is so stated in respect to a creditor is equally true with respect to any other person to whom it is necessary to bring home knowledge of insolvency. In view of what was so laid down by Spragge, V.C., and Lord Hobhouse, and taking into consideration all the circumstances that I have mentioned, coupled with the further facts that Hudsons Limited were unable to meet the payments to the plaintiff as they fell due, that in April the sheriff had taken possession of the goods in the store under the execution for $1,010, and that Hudsons Limited had in consequence to shut down for a time, that J. W. Hudson had before the 4th of May given Mr. Burton a statement shewing other liabilities against Hudsons Limited than to the plaintiffs, that they were large, and that J. W. Hudson had stated to him that these other creditors would jump in, and to prevent any further law costs and judgments the proposed sales and assignments were to be made, I am forced to the conclusion that Hudsons Limited were at the time of the execution of the contracts of sale and assignments in question, both of the land and personal property and of the transfer of the land, in insolvent circumstances, and the management, including J. W. Hudson, knew it, and at any rate Hudsons Limited were at the time in question on the eve of insolvency, and the management and J. W. Hudson knew it. It is also worthy of comment that the minute book of the company never turned up. J. W. Hudson stated that it was kept in the safe, but when the sheriff broke into the safe (as he had to) that book was not there. I also find that such contracts of sale, assignment and transfer, were made with intent to prejudice, hinder and delay creditors, especially the plaintiff. This conclusion is irresistible when I consider the testimony given by Burton above referred to, and the fact that Hudsons Limited had given an agreement by which it had bound itself to pay Belcher $1,000 a month,

and that by the proposed assignments and transfers it was intended that the whole of the property of that company should be transferred to J. W. Hudson so that the creditors would not have a single asset of the company to proceed against, and that all the creditors would have had to enable them to realise anything on their claims would be $100 a month and six per cent. interest, which J. W. Hudson had agreed to pay: and that even that means of realisation was not very clearly expressed; I hold the contract for the sale of the land, the assignment of the stock-in-trade, the assets, and the transfer of the real estate, to be void under sec. 38 of the Assignments Act, ch. 25 of 1906 of the Statutes of Saskatchewan.

It may be as well to repeat here what I found in respect to the transfer of the land in *Hudson* v. *Fletcher*, namely, that it was invalid because the condition upon which such transfer was to have been made was not performed.

In arriving at the conclusion I have reached, I have not lost sight of the fact that the lands were valued in the contract of sale at $2,000, but even at that value the assets of the company, viewed from the standpoint of the cases I have cited, were not sufficient to pay the debts. They were not sufficient to pay the plaintiff's judgment alone.

There will, therefore, be judgment for the plaintiff with costs to be paid by the defendants. The agreement to sell the land in question and the certificate of title issued to J. W. Hudson will be set aside, and the name of Hudsons Limited restored to the register in the land registration office as the registered owner of the land, and the agreement to sell the personal property will be set aside, this, however, not to interfere with the seizure and sale by the sheriff under the executions, or the right of the execution creditors (if any) under the Creditors' Relief Ordinance, and it will be referred to the Local Registrar to hold an inquiry as to the assets of the Hudsons Limited, retained or held by the defendants or either of them under the said agreements of sale and transfer or otherwise howsoever, and such defendants and each of them shall account to such Local Registrar at such inquiry; the plaintiff to be at liberty to move for further directions either as to costs or otherwise.

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IN RE E. J. BROOKS, INSOLVENT.

Land Titles Act—Assignments and Preferences Act—Assignment for Benefit of Creditors—Executions Registered against Insolvent—Transmission to Assignee—Removal of Executions—Right of Assignee to Require—Duty of Registrar—Section 8 of Assignments and Preferences Act—Meaning of.

B. made an assignment for the benefit of creditors to one C., under the provisions of the Act respecting Assignments and Preferences. At the time of the assignment and subsequently thereto, but before the assignee applied for transmission to him of the land of the insolvent, some eighteen executions were registered in the land titles office. On transmission of the land to the assignee, the Registrar endorsed upon the assignee's title memoranda of these executions. It appeared that the costs of the execution creditors had been paid. The assignee applied to the Registrar to cancel these endorsements, which the Registrar refused to do, and in this action he was sustained by the Inspector. From this decision the assignee appealed:—

Held, that by virtue of sec. 8 of the Act respecting Assignments and Preferences the rights of execution creditors are expressly subordinated to those of the assignee, save only as to costs, and the execution creditors having, save as to costs, which are proved to have been paid, no charge on the land, the Registrar was not justified in endorsing a memorandum charging the land with such executions on transmission to the assignee.

2. That the Registrar, on an assignment being proved, has jurisdiction to issue a title to the assignee free from executions, notwithstanding the provisions of sec. 129 of the Land Titles Act, inasmuch as the Legislature has expressly declared that, after assignment, the assignment takes priority to all such executions.

THIS was an appeal by an assignee for creditors from the decision of the Inspector of Land Titles confirming the refusal of the Registrar of Land Titles at Regina to issue a certificate of title to the assignee, except subject to executions recovered against the assignor, and was argued before the Court *en banc* at Regina.

A. L. Gordon, for the appellant: The Inspector of Land Titles having held that he is not clothed with the necessary judicial powers to determine the matters in question herein, it is submitted that he is the authority to determine such matters: Land Titles Act, 64 to 69, inclusive. The case is merely a question of construction of statutes. Section 6 of the Land Titles Act, with reference to assignments for benefit of creditors, and making an assignment of land by general words effective, "subject to the provisions of the Land Titles Act," relates to procedure only and as to the mode by which title is to vest. By the Assignment Act the assignment has precedence over all judgments save only as to the lien for costs. Here all costs have been paid, therefore the assignee is entitled to be registered owner of insolvent's land free from executions.

Frank Ford, K.C., for the Registrar (respondent): The assignment is a transfer under the provisions of the Land Titles Act, and the Registrar is required to issue certificate of title subject to the rights of the execution creditors: Land Titles Act, sec. 129, subsecs. 3 & 4. The Assignments Act, in vesting the property in the assignee, provides that such vesting shall be subject to the provisions of the Land Titles Act: sec. 6, Assignments Act. No provision is made in the Land Titles Act for issue of certificate to assignee free from encumbrance. Section 128, Land Titles Act, must be read in conjunction with sec. 6 of the Assignments Act, and implies an exemption of executions registered against the land prior to the assignment. The question whether the assignee's title is exempt from execution is, in certain cases, at least, a question both of mixed law and fact, in which event an issue is necessary to decide the facts: *Federal Life* v. *Stinson* (1906), 13 O.L.R. 127, affirmed 39 S.C.R. 229, *sub nom. Scott* v. *Swanson*; *Baker* v. *Gillum* (1908), 9 W.L.R. 436. There being a question of fact to be determined, the Registrar is not justified in ordering without notice to interested parties what can only be ordered by the Court as a result of an action: *Farmer* v. *Clark* (1909), 10 W.L.R. 28; *Morris* v. *Bentley*, 2 Terr. L.R. 268.

November 20. The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE and LAMONT, JJ.) was delivered by LAMONT, J.:—This is an appeal from the Inspector of Land Titles upholding a refusal of the Registrar of the Assiniboia Lands Registration District to issue to H. H. Campkin, assignee of Edwin J. Brooks, a certificate of title to lots 4, 5 and 6 in block 22, Indian Head, freed from certain executions issued against Brooks, copies of which had been registered in the land titles office.

On December 21st, 1907, Edwin J. Brooks made an assignment for the benefit of his creditors, under the Assignment Act, to H. H. Campkin, of all his personal property and all his real estate, credits and effects which might be seized and sold under execution, and pursuant to the assignment Campkin entered into possession of the assigned property. Between November 7th, 1907, and January 16th, 1908, eighteen separate executions were issued against the said Brooks by his respective creditors, and copies of these executions were transmitted to the Registrar of Land Titles. After the

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registration of these executions the assignee made application to the Registrar to be registered as owner of lots 4, 5 and 6 in block 22, Indian Head, the title to which had up to that time been in the name of the debtor Brooks. The Registrar issued a certificate of title for the said lands in the name of the assignee, but indorsed thereon a memorandum that the assignee's title was subject to the executions registered against Brooks. Campkin then applied to the Registrar to cancel the indorsement of the executions on his certificate of title. This the Registrar refused to do. Campkin then applied by way of petition to the Inspector of Land Titles for an order directing the Registrar to remove these executions from his title. The Inspector upheld the decision of the Registrar, and from the Inspector's decision the assignee now appeals to this Court.

The reason given by the Registrar for refusing to issue the certificate of title to the assignee freed from the executions was that the Assignments Act, under which the property of the debtor became vested in the assignee, expressly stated that as regards lands the vesting of the debtor's property in the assignee shall be subject to the provisions of the Land Titles Act, and that the provisions of the Land Titles Act, sec. 129, require him to indorse the executions on the certificate of title. Section 6 of the Assignments Act, which came into force on August 1st, 1906, is as follows:—

"Every assignment made under this Act for the general benefit of creditors shall as to the description of the property comprised therein be valid and sufficient if such description is in the words following, that is to say: 'All my personal property and all my real estate, credits and effects which may be seized and sold under execution,' or if it is in words to the like effect; and an assignment containing a description so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects whether vested or contingent belonging at the time of the assignment to the assignor except such as are by law exempt from seizure or sale under execution or other legal proceedings, subject, however, as regards lands, to the provisions of the Land Titles Act."

The provisions of the Land Titles Act dealing with executions is sec. 129, the first sub-section of which requires the sheriff, upon delivery to him of an execution affecting lands, to deliver or transmit to the Registrar of Land Titles a certified copy of the writ, and indorsements thereon. Sub-sections 2, 3 and 4 of said section are as follows:—

"(2) Such writ shall bind the land covered thereby only from the time of the receipt of a certified copy thereof by the Registrar for the registration district in which such land is situated.

"(3) From and after the receipt by the Registrar of such copy no certificate of title shall be granted, and no transfer, mortgage, incumbrance, 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.

"(4) The Registrar, on granting a certificate of title and on registering any transfer, mortgage or other instrument executed by the execution debtor affecting such land, shall, by memorandum upon the certificate of title in the register and on the duplicate issued by him, express that such certificate, transfer, mortgage or other instrument is subject to such rights."

It will be observed that this section enacts that after the registration of an execution no transfer of the lands shall be effectual except subject to the rights of the execution creditor under his writ of execution, and the Registrar is enjoined on issuing a certificate of title to indorse on the certificate a memorandum that such certificate is duly subject to such rights.

What are the rights of an execution creditor under a writ of execution registered against the lands of a debtor who has made assignment for the benefit of his creditor under the Assignments Act? The answer to the question seems to me to be found in sec. 8 of the Assignments Act, which reads as follows:—

"An assignment for the general benefit of creditors under this Act shall take precedence of all attachments of debts by way of garnishment where the money has not been actually paid over to the garnishing creditor as well as of all other attachments and of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of execution or attaching cerditors for their costs."

By this section the rights of an execution creditor under his execution are expressly subordinated to the rights of the assignee under his assignment, which takes precedence of all executions not completely executed by payment, but subject to the lien, if any, of the execution creditors for their costs. The assignee, therefore, is entitled to the land of the execution debtor which passes under

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the assignment for the benefit of creditors freed from all executions, subject only to the lien of the execution creditors for costs if they or any of them have such lien. In the present case no question arises as to the lien of the creditors for their costs, because evidence was produced to the Registrar, to which he took no objection, that the assignee had paid to all of the execution creditors their costs of suit, including the costs of executions. I am therefore of opinion that the assignee was under these circumstances entitled to have a certificate of title issued to him freed of the executions.

At the hearing of the appeal it was argued that even if the intention of the Assignments Act was to give the assignment for the benefit of creditors priority over executions against the debtor that it was not the duty of the Registrar to determine the question as to whether the executions should be omitted from the certificate of title to the assignee—that the vesting of the land in the assignee under the assignment was made expressly subject to the provisions of the Land Titles Act, which by sec. 129, above quoted, require the Registrar to indorse on the certificate of title a memorandum that the title was subject to the rights of execution creditors. If subsec. 4 of sec. 129 requires this literal interpretation I am satisfied that it is continually violated. As I understand the practice of the land titles office where an execution creditor registers an execution against the land of his debtor and subsequently obtains a transfer of the land, the Registrar on issuing to him a certificate of title does not indorse thereon a memorandum that his title is subject to his own execution. The Registrar himself determines what are the rights of the execution creditor under his execution, and decides that these rights are merged in the transfer, and he issues a certificate of title to the execution creditor without indorsing thereon a memorandum of the execution. As to his duty in respect to mortgages, see *Reeves* v. *Konschur* (1909), 10 W.L.R. 680. If, under these circumstances, it is the duty of the Registrar to determine whether the certificate of title should or should not be issued without indorsing thereon the execution, it seems to me equally his duty to determine whether or not an execution should be indorsed on the certificate of title issued under an assignment for the benefit of creditors where the Legislature has expressly enacted that the assignment shall take precedence of the executions subject only to a lien for costs, which lien it has been satisfactorily proven to

him had been satisfied. If this were not so, the assignee in the present case must take the title to the land of the debtor charged with eighteen executions, and before he can deal with the land and carry out the object of the Assignments Act he must bring eighteen separate actions to have these executions removed, and as the object of the Act was to effect a speedy and equitable distribution of the assets of the debtor among the creditors, the Court should not put a construction upon the language which will render nugatory the object of the Act, unless there is no other reasonable interpretation at which to arrive.

It was further contended that the case of the *Federal Life Assurance* v. *Stinson* (1906), 13 O.L.R. 129, affirmed in 39 S.C.R. 229, shews that an execution creditor might in certain cases acquire an interest or a charge under his execution by consolidating it with a preceding mortgage which would take priority of an assignment for the benefit of creditors, and that it could not be the duty of the Registrar to determine such questions. As I read that case it does not affect the question in this appeal. There the Court expressly stated that the right of the defendant to priority for the amount of his executions was not by virtue of the executions at all, but by virtue of the adjudication of the Court; that the moment he had proved his debt in the Master's office in the foreclosure proceedings his executions in the sheriff's hands might have been allowed to expire without affecting his lien on the lands. This lien he held, not by virtue of his executions, but by virtue of the order of the Court made prior to the assignment for the benefit of creditors.

The appeal should, in my opinion, be allowed, and the Registrar directed to remove the memorandum of the executions from the assignee's certificate of title, and also from the certificate of title to Alexander M. Fraser, to whom the assignee has transferred lot 4.

[COURT EN BANC.]

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KASINDORF v. HUDSON BAY INSURANCE CO.

Practice—Action by Foreign Partnership in Firm Name—Right to Maintain—Irregularity—Appearance by Defendant—Effect of—Waiver.

Plaintiff, a partnership carrying on business in the United States, issued a writ in the Supreme Court of Saskatchewan, in the firm name, against the defendant. The defendant company appeared to the writ and applied for and obtained an order for security for costs. After security had been given, the defendant moved to set aside the writ on the ground that the issue thereof by a foreign partnership in the firm name was unwarranted by the rules and a nullity. The Local Master before whom the motion was heard gave the plaintiffs leave to amend, and this order was, on appeal to a Judge in Chambers, upheld. On a further appeal:—

Held, that the issue of the writ was an irregularity which was waived by the defendants appearing in the action.

THIS was an appeal by the defendants from a judgment of Newlands, J., in Chambers, sustaining an order of the Local Master at Moose Jaw giving plaintiffs leave to amend their writ of summons and proceedings by setting out the names of the members of the plaintiff firm as plaintiff in the cause, and was argued before the Court *en banc* at Regina.

J. F. Hare, for the defendant (appellant): The Local Master and Judge in Chambers erred in allowing plaintiffs to amend setting out the names of the individual partners, because two or more persons cannot sue in a firm name unless they are carrying on business within the jurisdiction: Judicature Ordinance, rule 37. The plaintiffs, having no place of business in the jurisdiction, are not carrying on business within the jurisdiction: *Singleton* v. *Roberts*, 70 L.T. 687; *Hernham* v. *Hall* (1891), 2 Q.B. 83. The carrying on business within the jurisdiction is a condition precedent: Piggot on Service *ex Juris*, 92; Annual Prac. (1904), 672; *Western* v. *Perez Triane Co.* (1891), 1 Q.B. 304; *Russell* v. *Cambefort*, 23 Q.B.D. 526; *Abrahams* v. *Dunlop* (1905), 1 K.B. 51. The process, having been issued without the warrant of any rule, is a nullity and cannot be amended: *Smurthwaite* v. *Hannay* (1894), A.C. 501; *Hunt* v. *Worsfold* (1896), 2 Ch. 227; *Annalby* v. *Praetorious*, 20 Q.B.D. 765; *Phillipson* v. *Emmanuel*, 56 L.T. 858.

W. B. Willoughby, for the plaintiff (respondent): The appellant was too late in making his application: Jud. Ord., R. 539. After an unconditional appearance it is too late to object to any irregu-

larity in service on issue of the writ: *Re Orr Ewing*, 22 Ch.D. 456; *Mulhern* v. *Doerke*, 53 L.J. Q.B. 526; *Tozier* v. *Hawkins*, 15 Q.B.D. 685; *Mayer* v. *Claretie*, 7 T.R. 40; *Forth* v. *De Las Lervas* (1893), 1 Q.B. 768; *Sears* v. *Meyers*, 15 P.R. 381 & 387; *Forbes* v. *Smith*, 10 Ex. 717; *L'Honeux* v. *Hong Kong Corpn.*, 33 Ch.D. 466; *Western National Bank* v. *Perez Triane Co.* (1891), 1 Q.B. 304. Incorrect description of parties is an irregularity which may be amended in the discretion of the Judge: Jud. Ord., R. 538; *The Assunta* (1902), p. 150; *Hunt* v. *Worsfold* (1896), 2 Ch. 224; *Wilmot* v. *Fairhold House Property Co.*, 51 L.T. 552. On a similar state of facts to those in this case leave was given to amend: *La Banca Magionala* v. *Hamburger*, 8 L.T. 548; *Singleton* v. *Roberts*, 70 L. T. 587. He also referred to *Imperial Bank* v. *Hull*, 4 Terr. L.R. 331. Inasmuch as leave was given to amend in these various cases, it is evident that an action in which the parties are improperly described is irregular only and not a nullity, and not being a nullity the irregularity is waived by the appearance.

November 20. The judgment of the Court (WETMORE, C.J., PRENDERGAST, JOHNSTONE and LAMONT, JJ.) was delivered by JOHNSTONE, J.:—The plaintiffs reside and carry on business in New York City as Kasindorf Brothers. The defendant company has its head-office at Moose Jaw.

The plaintiffs, who were and are foreigners, on the 7th October, 1908, issued a writ in the firm's name against the defendants for the recovery under a contract of insurance with the defendants of $541, alleged loss sustained by fire to goods in New York City.

The defendants entered an appearance in the said action through their solicitor, on the 26th day of said month of October, and as the result of an application made for that purpose in November following, on the 11th of December secured an order for security for costs with a stay of proceedings.

On the 12th of February last the required security, $200, was deposited in Court to the credit of the cause.

The defendants on the 22nd of the same month obtained a summons from the Local Master at Moose Jaw calling upon the plaintiffs to shew cause why the writ of summons and the statement of claim should not be set aside.

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On the 24th of April, 1909, this summons was by the Local Master dismissed with costs.

The defendants, under Judicature rule 37, on the 15th day of April demanded from the plaintiffs in writing particulars as to the names, addresses, etc., of the plaintiffs. This demand was satisfied finally on the 22nd April, 1909.

The defendants on the 26th of the same month, for what reason does not appear, obtained a second summons to set aside the writ and statement of claim, on the ground that the issue of the writ was irregular and not warranted by the procedure under our rule, rule 37, the plaintiff's firm never having carried on business in the Province.

On the return of this summons, the Local Master made an order giving leave to the plaintiffs to amend their said writ and statement of claim by inserting the names of the individual partners comprising the firm.

From this order the defendants appealed to a Judge in Chambers, and the matter came before my learned brother Newlands, who dismissed the appeal.

From this judgment the defendants further appealed to the Court *en banc*, on several grounds, as follows:—

2. That the writ of summons and statement of claim herein were issued without the warrant of any rule or enactment, and are null and void.

3. That the plaintiffs' firm, not being a firm or partnership carrying on business within the jurisdiction, cannot sue in the firm name.

4. That the plaintiffs are unknown to this jurisdiction.

5. That the plaintiffs did not satisfy the Local Registrar before the issue of the writ of summons that the plaintiffs carried on business within the jurisdiction.

6. That the writ of summons and statement of claim having been issued without the warrant of any rule or enactment, and being null and void, cannot be amended.

I agree with the reasons of the judgment of my learned brother who heard the appeal.

The question arising in the case cited by counsel for the appellants, *Smurthwaite* v. *Hannay* (1894), A.C. 494, 63 L.J.Q.B. 737, 71 L.T. 157, was a different question altogether, and one under a

different rule—Eng. rule 1 of order 16. In that case it was a question of misjoinder of plaintiffs, and where it was admitted that the claims of the plaintiffs were several, that they had no joint cause of action or claim to relief, and that before the Judicature Act they could not have been joined as plaintiffs in such an action, but it was contended that order 16, r. 1, justified the course which had been pursued in making them co-plaintiffs, but the Court held otherwise, and that the rule did not warrant such course. Lord Herschell, in giving judgment, said: "I cannot accede to the argument urged by the respondent, that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on this was a mere irregularity of which the appellants, by virtue of order 70, could not now take advantage. If unwarranted by any enactment or rule it is, in my opinion, much more than an irregularity." Lord Russell gave expression in similar language at p. 506.

I can very well understand how the joining of several plaintiffs in the same action having different and several causes of action could not be treated as an irregularity. Such joinder of plaintiffs, as stated by Lord Russell, was the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure, and in a way that was not capable of being remedied by order 70, our rule 538. The proceedings could not be carried on, nor could a trial take place with all the parties of different interests and claims before the Court. Some plaintiffs with divergent interests would have to be struck off the record. Moreover, order 70 could have no application to such a state of affairs. It was never so intended.

The question in the case at bar arises under rule 37:—

"Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms if any of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a Judge for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action co-partners in any such firm, to be furnished in such manner and verified on oath or otherwise as the Judge may direct.

"(2) Any person carrying on business in the name of a firm

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apparently consisting of more than one person may be sued in the name of such firm. (E. 648A & 648B) C.O. 21, R. 37."

Corresponding to Eng. ord. 48a, r. xl., which now takes the place of rules 6 and 7 of order 9, the difference consisting in the use in our rule 37 and O. 48, r. 1, in the English, of the words: "Carrying on business within the jurisdiction."

Most of the cases cited turned upon the question of jurisdiction in the Courts to deal with foreigners. In *Russell* v. *Cambefort*, 23 Q.B.D. 526, 58 L.J.Q.B. 498, 61 L.T. 751, it was held that a foreign partnership, the members of which were foreigners resident out of the jurisdiction but carrying on business in England, could not be served under rule 6 of order 9 by service on the manager at the principal place of business within the jurisdiction, that such rule did not apply to foreigners not resident in England though carrying on business there. It was further held, that though an Act of Parliament can give jurisdiction to the Court against British subjects, as to foreigners Parliament has not and does not assume to have jurisdiction against those residing abroad and who have not submitted to the jurisdiction of the English Courts.

Lopes, L.J., said, in delivering judgment: "I think the rule does not give jurisdiction as against foreigners . . . I think the rule only applies to English subjects." All that was done in this case was to set aside service on the manager. *Western National Bank of the City of New York* v. *Perez Triana Co.* (1891), 1 Q.B. 304, 60 L.J.Q.B. 272, 64 L.T. 543, is another case where the question of jurisdiction was raised, a question not material in the case under discussion because the plaintiffs have submitted to the jurisdiction. The defendants have appeared and taken steps in the action. In the latter case a writ was issued against a foreign partnership firm in the firm's name, which firm carried on business abroad with no place of business in England. The writ was served on a person, an alleged partner, temporarily in England. This partner entered a conditional appearance, after which he entered an unconditional appearance, and in his own name applied to set aside the service of the writ. A Divisional Court refused to set aside the service.

Held by Lord Esher, M.R., that the service was good service on the firm.

By Lindley and Bowen, L.JJ., on the authority of *Russell* v.

Cambefort, that rule 6 of order 9 did not apply to the case of a foreign firm, but that the defendant (appellant) had by appearing waived the irregularity, and it was ordered that if the plaintiffs would elect to amend the writ by naming the appellant, the service would stand as against him.

The Master of the Rolls said: "If the person attempted to be served desires to submit there was no proper service, he must move to set aside the alleged service, but he must do so before he appears, because if he appears any irregularity in the service is waived by his appearance.". At p. 317 of the report, Lord Bowen says: "But the defendant is really himself sued together with others, since the plaintiff intends to include him, and to shew at the trial that he is properly included, among the members of the firm, and the irregularity of the nomenclature in the writ the defendant has waived as against himself by appearance, since he might, if he had chosen, have moved, under order xii., rule 30, to set aside the service upon himself, and was not obliged to appear to enable him to move." The same doctrine is laid down in *Dobson* v. *Festi Raisini & Co.* (1891), 2 Q.B., in appeal, 92, at p. 94, Lindley, Lopes and Kay, L.JJ., 95, 60 L.J.Q.B. 481, 64 L.T. 551.

Heinemann v. *Hale & Co.* (1891), 2 Q.B.C.A. 83, 60 L.J.Q.B. 650, 64 L.T. 548, a case decided since the alteration in the rules, relied upon by the appellants, the Hudson Bay Insurance Co., as in their favour, I read as approving of the decision in *Russell* v. *Cambefort and the Western National Bank*. In *Heinemann* v. *Hale* a writ was issued against a foreign firm in respect of a breach of contract made and to be performed in England. The writ was issued in the firm name and was served on one of the three partners who was resident in England, the other two residing out of England. On an application of the partner resident in England before appearance to set aside the writ and service, the decision of the Queen's Bench Division was reversed and the writ set aside. Fry, Lord Justice, in concluding his judgment, says: "In coming to the conclusion I have expressed I am fortified by both the cases of *Russell* v. *Cambefort* and *The Western National Bank of New York* v. *Perez Triana & Co.*"

I think, therefore, the defendants having appeared as they did, the appeal should be dismissed, with costs.

Appeal dismissed with costs.

[COURT EN BANC.]

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SAWYER & MASSEY CO. v. BENNETT ET AL.

Vendor and Purchaser—Sale of Land Held under Agreement for Sale—Covenant in Agreement Restricting Assignment without Approval of Vendor—Effect of—Transfer of Land by Purchaser in Fee Simple—Refusal of Vendor to Approve—Effect of Refusal on Estate of Transferee—Equitable Estate Created—Subsequent Assignment by Original Purchaser—Approval thereof by Vendor—Rights of Transferee and Assignee—Priorities—Fraud on Part of Agent of Assignee—Obtaining Approval of Vendor by—Effect of on Right of Transferee and Assignee.

Defendant Bennett purchased from the Canadian Pacific Railway Company certain land on deferred payments, and received a contract whereby the company agreed to convey the land to him on payment, and which contract also contained a clause providing that no assignment of the purchaser's interest in the land should be valid or effectual unless and until approved of by the company. Subsequently Bennett, being indebted to plaintiff, was approached by one J. D. McLeod, an agent for plaintiff, and asked for security, and by way of security the defendant gave to the plaintiff a transfer in fee simple of the land, the legal estate being still in the railway company. The plaintiffs applied to the railway company for their approval of the transfer, which approval was refused on the ground that the conveyance was not in the form of an assignment of Bennett's equitable interest in the land.

Some time after McLeod again saw Bennett, and made an arrangement with him to sell the same land for him, and, in pursuance of the assignment, McLeod sold the land to one M. J. McLeod, and procured an assignment of the railway company's contract in proper form, which assignment was duly approved by the company. This approval was, however, secured by the fraud and criminal acts of J. D. McLeod, who forged the name of M. J. McLeod to the assignment, made a false affidavit of execution, and also forged the name of M. J. McLeod to an affidavit accounting for the absence of the original agreement for sale, which affidavit also contained false allegations. In an action to set aside the conveyance to M. J. McLeod:—

Held (LAMONT, J., dissenting), that the clause in the agreement requiring the approval of the vendor to any assignment was effective only as between the vendor and purchasers, and, therefore, an assignment without the approval of the vendor would be valid and binding as against all the world except the vendor, and create an equitable estate or interest in the land in question in the transferee or assignee.

2. That transfer in fee simple given by Bennett to the plaintiffs, while it did not convey his estate at law, the fee simple being vested in the railway company, was sufficient to create an equitable estate in the plaintiff.

3. That the equities between the plaintiffs and M. J. McLeod being equal, the approval of the assignment to McLeod by the railway company would give McLeod a better equitable estate than the plaintiff.

4. But (LAMONT, J., dissenting), in determining the rights of parties in cases of contest between persons having equitable interests, all the circumstances must be taken into consideration in order to determine which has the better equity, and the approval of McLeod's assignment having been procured by fraud and criminal acts on the part of his agent, the approval so obtained could not give him any better position in equity than if the approval had not been obtained, and, therefore, the plaintiffs' equitable estate, being first in point of time, should prevail.

5. That in equity the assignment to McLeod was subject to the estate previously conveyed to the plaintiffs, and, that being so, McLeod, by securing the approval of the railway company and thus bettering his equitable

position, the plaintiffs have a right to attack the means by which such approval was obtained, and to shew that such approval was improperly obtained.

6. That (LAMONT, J., dissenting) the knowledge of McLeod's agent of the previous transfer, when the approval of the railway company was obtained, was notice to McLeod of such previous transfer.

THIS was an appeal by the plaintiff from the judgment of WETMORE, C.J., dismissing the plaintiff's action, and was argued before the Court *en banc* at Regina.

N. MacKenzie, K.C., for the plaintiff (appellant): The signature of the defendant McLeod being forged and approval of the railway company to the assignment being secured by forged documents and fraud, no effect can be given in equity to an assignment and approval thereof so obtained, and such document is not capable of being ratified: *Brook* v. *Hook*, 40 L.J. Ex. 50, at p. 52; and, consequently, there never was any contractual relation between the three respondents. The transfer given by Bennett to appellant was operative in equity: *Davis* v. *Earl of Strathmore*, 16 Ves. 419, 33 E.R. 1046; Pomeroy, vol. 2, sec. 660; and in the event of a conveyance by the railway company to Bennett, the appellant in equity would have been entitled to have Bennett declared a trustee for it, and any subsequent assignee with notice would have taken subject to such claim: *Maundrell* v. *Maundrell*, 10 Ves. 260, 261, 270. The respondent McLeod had notice by his agent, J. D. McLeod, of the previous assignment. The knowledge of the agent is the knowledge of the principal: *Sheldon* v. *Cox*, 27 E.R. 404; *Le Neve* v. *Le Neve*, 21 Rul. C. 774, 26 E.R. 1172; *Agra Bank* v. *Barry*, 21 Rul. C. 784; Pomeroy, vol. 2, sec. 672; *Atterbury* v. *Wallis*, 6 DeG. McN. & G., at p. 466; *Fuller* v. *Bennett*, 2 Hare 394, at p. 402; *Majoribanks* v. *Hovenden*, 6 Ir. Eq. 238, at p. 241. This rule applies equally strongly where the agent is, in addition to acting as an agent, also acting as vendor or mortgagor: *Sheldon* v. *Cox*, *supra;* Pomeroy, vol. 2, sec. 667, and note 6; Dart on Vendors and Purchasers, vol. 2, 7th ed., 889; *Atterbury* v. *Wallis*, *supra*. Respondent McLeod, having notice through his agent of appellants' rights, is liable to the same equities as Bennett: Storey on Equity, 2nd ed., p. 255; Pomeroy, vol. 2, sec. 730; *Le Neve* v. *Le Neve*, *supra*. Where fraud has been committed and notice presumed, mere concealment of facts by the agent will not make the rule inapplicable: Pomeroy, vol. 2, sec. 673; Dart's Vendor

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and Purchaser, vol. 2, 7th ed., 902; *Rolland* v. *Hart*, L.R. 6 Ch. Ap. 678; *Bradley* v. *Riches*, L.R. 9 Ch. D. 189. Where the principal has constituted the agent his general agent for the purposes of the transaction, he is affected with notice of all the agent knew: *Dixon* v. *Wynch* (1900), 1 Ch. 736; Dart, vol. 2. p. 902. The fact would indicate that respondent McLeod had constructive notice of the claims of appellant: Pomeroy's Equity, vol. 2, sec. 604, 605, 606; *Boursot* v. *Savage*, 2 Eq. Ca. 135 & 142. The appellant's assignment was the earlier, and the equitable doctrine is that where the equities are equal, the first in point of time will prevail: *Phillipps* v. *Phillipps*, 4 DeG. F. & J., at p. 215; Pomeroy, vol. 2, secs. 591 *et seq.*, 682, 718; *Cave* v. *Cave*, L.R. 15 C.D. 646. The transfer to appellant conveyed all Bennett's interest, and the respondent McLeod took nothing: Pomeroy, vol. 2, sec. 714; *Phillipps* v. *Phillipps*, 31 L.J.Ch. 321; *Ullerson Lbr. Co.* v. *Remire*, 2 S.C.R. 218, 226. Equitable charges may be created under a non-assignable contract: *In re Turcan*, 58 L.J.Ch. 101, at p. 105. The clause in the railway company's contract gave them a right to refuse an assignment not satisfactory and continue to act under the contract and convey to the original purchaser, but they had no right to adjudicate on the regularity or validity of conflicting assignments.

W. B. Willoughby, for the respondent M. J. McLeod: By the original contract of sale between the defendant Bennett and the Canadian Pacific Railway Company it is provided that no assignment of such contract shall be valid until approved by the company. The plaintiffs never procured such consent, and the respondent contends that it was a condition precedent to the right of the plaintiff to succeed that such consent to the assignment should be procured. In view of the nature of the personal covenants in the original contract, such an assignment is reasonable. Contracts are generally assignable except in the following cases: (1) Where the contract is personal to the parties; (2) where there is an express provision against assignment; and (3) where assignment is illegal and against public policy: Fry on Specific Performance, 4th ed., par. 232. Such restrictions are valid: *Grosvenor* v. *Green*, 28 L.J.Ch. 173; *In re Hart* v. *Wishart-Langan Co.*, 9 W.L.R. 519, at p. 525; *Brice* v. *Bannister*, 3 Q.B.D. 569, at p. 581. A limitation on the fee simple is

imposed repugnant to the estate. The purchaser in this case procured the right to the conveyance to him of the fee simple only on the performance by him of his covenants, and there was nothing repugnant in exacting, as the condition of the conveyance to him, the performance of such covenants and conditions. The plaintiffs are guilty of laches, and thereby induced the defendant Bennett to believe that the plaintiff had abandoned any intention of relying on the transfer as security, and he was therefore justified in dealing with the land: *Savage* v. *Foster*, 2 White & Tudor L.C., 6th ed., 678; *Clough* v. *L. & N.W. Ry.*, 41 L.J.Ex. 17. The transfer was a conditional one, the condition being that the plaintiffs would pay the instalments of principal and interest due and save the contract from forfeiture. This they did not do, and the condition not being carried out and no present value being given, the assignment was revocable and was revoked when the second assignment was given: *Weylson* v. *Dunn*, 34 Ch. D. 569. The defendant McLeod is a *bonâ fide* purchaser for value, and, having obtained the title papers, is entitled to the protection of the Court: *Bassett* v. *Nosworthy*, 21 Rul. Ca. 703. Even if J. D. McLeod was the agent of the defendant McLeod, he was such agent only to secure the consent of the railway company, and his knowledge of the prior transaction cannot be imputed to defendant McLeod: Pomeroy, 2nd ed., sec. 675.

A. L. Gordon, for the defendant the Canadian Pacific Railway Company: Three grounds are urged against the company: (1) that, being aware of the transfer to the plaintiff, they should not have approved of the transfer to McLeod; (2) that, knowing of such transfer, they should either have conveyed to plaintiff or refused to recognize any assignment; and (3) that by their defence they have waived their rights under the clause in the contract restricting assignments. As to the first ground, it is contended by the plaintiff that the clause in the contract is invalid as being a restraint on alienation. The respondent claims that, in view of the special covenants contained in the contract, the clause was a reasonable one and valid in law: *Re MacLeay*, L.R. 20 Eq. 186; *Earles* v. *McAlpine*, 6 App. R. 145. As to the second ground, it is submitted that the company have an absolute right under their contract to say who shall or shall not occupy

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the position of purchaser: *Weatherell* v. *Goering*, 12 Ves. 504; *Sergeant* v. *Nash* (1903), 2 K.B. 304, at pp. 310 and 312. As to waiver, the pleadings in this case on the part of the company simply express their willingness to convey the land under the direction of the Court, the provisions of the contract being complied with.

November 20. NEWLANDS, J.:—On the 10th of May, 1902, the defendant Bennett entered into an agreement of sale with his co-defendant the Canadian Pacific Railway Company to purchase the south-west quarter of 17-19-26 W. 2. On the 6th day of May, 1905, the said defendant Bennett, being indebted in a large sum to the plaintiff company, executed in their favour a transfer of the said quarter-section. On the 15th day of June, 1906, the defendant Bennett sold the said quarter-section to the defendant M. J. McLeod, and assigned to him the agreement of sale with the Canadian Pacific Railway Company. The plaintiffs in the action dispute this last-mentioned sale, and ask to have the plaintiff company declared the owner of the said quarter-section, and a further declaration that the assignment to the defendant McLeod is void against the plaintiff company and was ineffective to convey any rights to the said McLeod to the said land as against them. The defendant Bennett makes no defence to this action nor does the defendant the Canadian Pacific Railway Company; they merely recite the facts and submit their rights in the premises to the Court. The real defendant is M. J. McLeod, and his defence is, practically, that he is a purchaser for value of the said premises without notice of the plaintiff company's claim, and that the assignment to him has been approved of by the Canadian Pacific Railway Company, the holders of the legal estate in the said property.

The case was tried before the learned Chief Justice, who gave judgment in favour of the defendant McLeod, on the ground that there was a clause in the agreement of sale between the defendants the Canadian Pacific Railway Company and Bennett which provided that "no assignment of this contract shall be valid unless the same shall be for entire interest of the purchaser and approved and countersigned by the Commissioner of the Land Department or other duly authorised person, and no agreement or conditions

or relations between the purchaser and his assignee or any other person acquiring interest or title from or through the purchaser shall preclude the company from the right to convey the premises to said purchaser on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said commissioner or other person as aforesaid," and that under this clause the said company had refused to recognise the transfer to the plaintiff company as a valid assignment; that they had approved of the assignment from Bennett to McLeod; and that, although the approval of this latter assignment had been obtained by the fraud of the agent of the defendant McLeod who obtained such approval, the plaintiff company had no *locus standi* to attack the transaction; that the fraud was on the Canadian Pacific Railway Company, and they could, if they so desired, attack it, but, as they had not done so, the plaintiff company could not.

I do not think that it is necessary for me to consider the reasons given by the learned Chief Justice for holding that this clause in the agreement between the Canadian Pacific Railway Company and Bennett is a valid one, but, with all due deference to that learned Judge's opinion, I must differ from him on the interpretation he has put upon this clause. This interpretation is that any assignment by the defendant Bennett of his interest in the land would be void if the company refused to approve of it, and that he considered it similar to the covenant in a lease not to assign or sublet without leave.

Now, a covenant in a lease not to assign, if broken, allows the lessor to enter and terminate the lease, and the lease being determined, the estate of the assignee would also be determined. In this case no such effect can follow the assignment of the agreement of sale to a person of whom the Canadian Pacific Railway Company will not approve. The estate which Bennett, the purchaser, had in the land before the assignment is not affected, nor is there any provision for its being terminated, but there is a special provision in the clause itself which provides for the effect which will follow an assignment by him without the consent of the company having been obtained—that upon the completion of the terms of purchase the company may convey their estate

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in such land to Bennett, the original purchaser, notwithstanding such assignment. Taking the clause as a whole, its intention seems to be that any assignment to be valid as against the company must be approved by them, and that, in the event of an assignment without their approval, they may ignore the same, and convey their interest in the land to Bennett, their original purchaser, notwithstanding such assignment by him. Once the terms of the agreement of sale are complied with and the land conveyed by the company to Bennett, the original purchaser, he would hold the same in fee simple without any restrictions, and a transfer or assignment of his estate made by him would take effect. Upon this construction of this clause in the agreement the transfer from the defendant Bennett to the plaintiff company would not be void. It would be good against Bennett and all the world, excepting the Canadian Pacific Railway Company. It would not, however, be binding upon them nor prevent them from conveying the land to Bennett, who, in that event, would become trustee of the said lands for the plaintiff company.

The company refused to approve of this transfer to the plaintiff company solely because it was in the form of a transfer under the Land Titles Act, which is a form provided by that Act for the transfer of the title to land by a registered owner, and is not a form of conveyance which would convey the legal estate apart from that Act. Now, in this case the legal estate was in the Canadian Pacific Railway Company, and they were registered as owners of this property, and a transfer under the Land Titles Act was not, therefore, a proper form of conveyance for Bennett to use; it would not convey his estate to the plaintiff company at law, but it would in equity give them the right to call upon him to give them a proper assignment of his title to this land, and the plaintiffs, therefore, had an equitable estate in these lands.

Subsequent to the plaintiff company getting this transfer, the defendant McLeod purchased from the defendant Bennett his interest in the said land, or, as he states in his pleading and evidence, he purchased from one John D. McLeod, who purchased from the defendant Bennett, and procured for the defendant McLeod an assignment of his agreement of sale direct from Bennett. At this time the legal estate was still in the Canadian Pacific Railway Company, as it is to this day, and the estates, therefore, of both

the plaintiff company and the defendant McLeod to this land are equitable estates; and up to the time that the Canadian Pacific Railway Company approved of the assignment from Bennett to McLeod the equitable estates of both the plaintiff company and McLeod were in every way similar estates. It is true the plaintiff company did not pay any money to Bennett at the time he transferred this land to them, but at that time he owed them a considerable sum of money, the payment of which was forborne by the plaintiff company on account of such transfer, and, therefore, the consideration they gave was a valuable one.

Now, if these estates were similar in all other respects, the maxim, *qui prior est tempore potior est jure*, would apply, and the transfer to the plaintiff company, being the first in time, would prevail: *Rice* v. *Rice*, 2 Drew. 73; *Cave* v. *Cave* (1880), 15 C.D. 639, 49 L.J.Ch. 505, 42 L.T. 730. It is, therefore, necessary for me to consider whether the fact of the approval by the land commissioner of the Canadian Pacific Railway Company of the assignment to the defendant McLeod gives him a better estate than the plaintiff company, and, if it is a better estate, whether it is one that equity will not interfere with. In *Rice* v. *Rice* Kindersley, V.C., held that the possession of the title deeds by a subsequent equitable mortgagee gave him a better equity, and there was, therefore, no room for the application of the maxim, *qui prior est tempore potior est jure*. Now, in this case McLeod's assignment has been approved by the Canadian Pacific Railway Company, the holders of the legal estate, which would, I think, all other things being equal, give McLeod a better equitable estate than the plaintiff company. But, to quote Kindersley, V.C., again, in *Rice* v. *Rice*, at p. 82: "I must, however, guard against the supposition that I mean to express an opinion that the possession of title deeds will in all cases and under all circumstances give the better equity. The deeds may be in possession of a party in such a manner and under such circumstances as that such possession will confer no advantage whatever. . . . So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person which constituted a breach of an express trust as against the person having the prior equitable interest. In such a case it would be contrary to the principles of a Court of equity to allow the subse-

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quent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest. Indeed, it appears to me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration in order to determine which has the better equity."

If we examine the conduct of the parties in this case, especially to find out how the defendant M. J. McLeod obtained the approval of the Canadian Pacific Railway Company to the assignment from Bennett to himself, which would give him the better equity, what do we find? The learned trial Judge has found that the approval to this assignment was obtained in the following manner: "Having procured the assignment to Malcolm J. McLeod, it became necessary to obtain the approval of the railway company, and here fraud and criminal acts were unquestionably perpetrated. But the fraud, in my opinion, was upon the Canadian Pacific Railway Company. The company required, as I have already stated, that an assignment of the character in question should be executed by the assignee, as well as by the original purchaser of the land. Malcolm J. never executed the assignment in question. John D., without any authority whatever, put his name to it, and deliberately swore to the execution of the instrument by Malcolm before a commissioner for taking oaths. So the signature by Malcolm to that instrument was a forgery, and the affidavit of execution was false. I say the signature of Malcolm was a forgery because it was done with the intent to lead the railway company officials to believe that Malcolm had really signed it, and so to induce them to approve of the assignment to him. For some reason or other, apparently, the railway company required that Bennett's copy of the original contract of sale between them and him should be produced. It was not produced, and John D. McLeod, thinking it necessary that the non-production of it should be accounted for, prepared a solemn declaration, purporting to be made by Malcolm J. MacLeod, setting forth that he was the purchaser of the assignment, and that he had lost the purchaser's copy of the original contract, and that there was no assignment endorsed on such contract, and that he had not delivered it to any person for any purpose whatever. John D. McLeod, without any authority, affixed Malcolm J. McLeod's name to this declaration, and then

signed a certificate in his own name, as commissioner for oaths, that the declaration had been made before him by Malcolm. I hold both these acts to be criminal acts, and therefore fraudulent. John D. McLeod obtained an approval of the assignment of the contract of sale from Bennett to Malcolm J. Had it not been for these fraudulent documents to which I have referred, such approval would not have been granted. There was to my mind, therefore, a clear fraud with respect to the Canadian Pacific Railway Company. I entirely acquit Malcolm J. McLeod of being an actual party to these fraudulent and criminal acts—he knew nothing about them. Nevertheless, John D. McLeod, in endeavouring to procure an approval by the company of this assignment to Malcolm J., was acting as his agent, and Malcolm must take the consequences of his agent's acts."

Now, can an approval of the assignment, procured in such a manner, confer any advantage upon McLeod, and is it true that the plaintiff company have no *locus standi* to avail themselves of such conduct on the part of a subsequent purchaser? As I have already stated, I am of the opinion that the transfer from Bennett to the plaintiff company is not rendered void by the clause in the original agreement of sale providing for the approval of an assignment by the land commissioner of that company. The plaintiffs, therefore, obtained by that transfer an equitable estate in said land, and when the defendant McLeod bought this land and had the agreement of sale assigned to him, he got an equitable estate, subject to the plaintiff company's prior equitable estate. Lord Chancellor Westbury, in *Phillips* v. *Phillips*, 4 DeG., F. & J., at p. 214, says: "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence, grantees and incumbrancers claiming an equity take and are ranked according to the dates of their securities; and the

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maxim applies, *qui prior est tempore potior est jure.* The first grantee is '*potior*'—that is, '*potentior.*' He has a better and superior—because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers, at the time when they took their securities and paid their money, had notice of the first incumbrance or not."

These remarks of the Lord Chancellor only apply where the equities are in all other respects equal, because, as was pointed out by the Lord Chancellor in that case and by Kindersley, V.C., in *Rice* v. *Rice*, where a purchaser or incumbrancer who is later or last in time succeeds in obtaining an outstanding legal estate, or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants, he will not be deprived of this advantage by a Court of equity. If, therefore, MacLeod took subject to the estate of the plaintiff company, they certainly have the right to attack the means he used to get a legal advantage over them by having his assignment approved by the Canadian Pacific Railway Company, and as these means were found by the trial Judge to be both fraudulent and criminal, and for which McLeod was held responsible, I cannot think that he thereby acquired any better title than he had before that approval. To hold that a man could better his position in equity by such means would be to put a premium upon fraud and be against all principles of a Court of equity. Without this approval, as I have already said, McLeod's equitable estate is no better than the equitable estate of the plaintiff company, and, all other things being equal, the maxim, *qui prior est tempore potior est jure*, applies, and the plaintiff company's estate, being first in time, must prevail.

I have not considered the question of notice, so ably argued by counsel for the plaintiff company, and all I need say in reference to it is that it is an additional reason why the defendant McLeod should not be allowed to take advantage of the approval of his assignment by the Canadian Pacific Railway Company, because at the time this approval was obtained by his agent, John D. McLeod, he (the agent) knew of the prior transfer to the plaintiff company, he having himself obtained it, and it is no answer to say that, not having used this transfer for a year, he supposed it was abandoned by them. The knowledge he had of the trans-

action was sufficient to put him upon inquiry, when he would have ascertained that the plaintiff company were relying upon the same.

There should be a reference to the Local Registrar to ascertain the amount due by the plaintiff company on said lands both to the Canadian Pacific Railway Company and McLeod.

PRENDERGAST and JOHNSTONE, JJ., concurred.

LAMONT, J.:—I agree with the judgment of the learned Chief Justice in so far as he holds that the clause in the agreement setting out that no assignment of the contract shall be valid unless approved and countersigned by the defendant company, gives to that company, so long as any part of the purchase money remains to be paid or any of the covenants to be performed by Bennett remain unperformed, the right to refuse to accept any assignment by Bennett at all, or the right to refuse one assignment and accept another. The clause being a valid one, the rights which Bennett acquired in the land were limited by that clause, and whoever acquired Bennett's rights acquired them with the limitation attached thereto. As against the Canadian Pacific Railway Company, therefore, the action was properly dismissed. This was practically conceded on the argument by counsel for the plaintiffs, but they contended that, even though the Canadian Pacific Railway Company approved of the assignment to Malcolm J. McLeod, they were still at liberty to ask the Court for a declaration that Malcolm J. McLeod was a trustee of the land for them. In this contention I am of opinion that the plaintiffs are right. If the circumstances under which a purchaser of land acquires title be such that some other person is entitled to the beneficial interest in the land, the Court may declare that the purchaser holds that land as a trustee. The question, then, is, are the circumstances of this case such that Malcolm McLeod should be declared a trustee for the plaintiffs? The plaintiffs contend he should be, for two reasons: (1) Because they hold an equitable title which is prior in point of time to McLeod's assignment; and (2) because McLeod acquired his title after notice of the plaintiffs' prior equitable right. For McLeod it was contended that he had no notice of the plaintiffs' transfer, and, further, that by their acts and omissions

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the plaintiffs have lost whatever priority they had by virtue of their transfer being of an earlier date. The plaintiffs' transfer was obtained on May 26, 1905. The assignment to the defendant McLeod was executed after June 15, 1906. As the Canadian Pacific Railway Company held the registered title, the plaintiffs' claim was purely an equitable one. The defendant McLeod obtained the consent of the Canadian Pacific Railway Company to his assignment, which gave him a right to call for the legal title, and this gave him a title superior to the plaintiffs. In securing the approval of the Canadian Pacific Railway Company to his assignment John D. McLeod, whom the learned Chief Justice has found was the agent of Malcolm McLeod to secure such approval, was guilty of fraud on the defendant company. Malcolm McLeod cannot, therefore, as has been pointed out by my brother Newlands, take advantage of the fraud to uphold his right to call for a legal estate, and without that approval he has also only an equitable title. The title of both parties, therefore, being purely equitable, the question to be decided is which has priority.

It is a well-known rule that as between equitable claimants, where the equities are in all respects equal, the first in point of time will prevail. In this case are the equities equal? If so, the plaintiffs are entitled to succeed. The facts upon which the defendant McLeod must rely as giving him a better equity than the plaintiffs are that the plaintiffs' agents received the transfer from Bennett upon the condition that the plaintiffs would make the payments to the Canadian Pacific Railway Company as set out in the contract, with the possible exception of one payment, about which there is some conflict of testimony; that the plaintiffs' agents had no authority to take the transfer upon that condition and that, therefore, it was not a binding arrangement until accepted by the plaintiffs; that no notice of acceptance thereof was given; and that no payment or offer of payment was made to the Canadian Pacific Railway Company until after McLeod had his assignment. Also the further facts that the plaintiffs, having taken a transfer of the land, left Bennett not only in possession of the land, but also in possession of his contract with the Canadian Pacific Railway Company, which was the only evidence of title he had to the land, and which John D. McLeod received from Bennett on June 15th, 1906. Are these facts sufficient to give Bennett a better equity than the plaintiffs?

In Dart on Vendor and Purchaser, 7th ed., at p. 858, the learned author says: "Where the contest lies between parties having mere equities, anything which raises a positive equity against the one, 'upon the principle which in equity, as distinct from law, is designated by the term "estoppel," ' will give the other, though his equity is posterior in creation, a better claim on the assistance of the Court."

In *Rice* v. *Rice* (1853), 23 L.J. Ch. 289, it was held that the equitable interests of two parties, the vendor in respect of his lien for unpaid purchase money, and the equitable mortgagee for moneys advanced, being in all respects equal, the equitable mortgagee, by the possession of the title deeds, had a better equity, and that the rule *qui prior est tempore potior est jure* can only apply where the equitable interests are in every respects equal. In that case Kindersley, V.C., said: "In examining into the relative merits of two parties having adverse equitable interests, the points to which the Court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstance and manner of their acquisition, and the whole conduct of each party with respect thereto."

In *Farrand* v. *Yorkshire Banking Company* (1888), 40 Ch. D. 182, 58 L.J. Ch. 238, the facts resembled those of the present case. There the plaintiffs' testator advanced £200 to one Prince, to enable him to purchase a certain property, and took from him a bond for the payment of the money and an agreement that, as soon as he had obtained title, Prince would execute a legal mortgage and hand over to him the title deeds. Prince purchased the property, but did not give the legal mortgage or deposit the title deeds with the plaintiffs' testator. About a year afterwards Prince deposited the title deeds with the defendant bank as security for a loan. The bank claimed priority, and the plaintiffs brought action to have it declared that their claim had priority over that of the bank. In giving judgment, Lord North, after pointing out that for about a year after the purchase was made the testator, although entitled to the possession of the title deeds, did not call for them and took no steps to obtain them, but left them in Prince's hands, thus enabling him to borrow on the faith of them from the bank, said: "The question is, under these circumstances, which of the two, the plaintiffs or the bank, ought to be

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preferred? It is said that they have what are called 'equal equities.' Of course, one equity is always prior to the other in date, and the expression 'equal equities' does not refer to equality in date. When equities are equal in other respects, the earlier in date is preferred, but, when equities are not equal, then the priority of date is easily got over, at any rate, as between equitable incumbrancers. Now, if the plaintiffs' testator had asked for the deeds, which under his agreement he was entitled to have, the bank could not have been defrauded by Prince by his depositing the deeds with them, for it is clear that Prince obtained advances from the bank without communicating to them the fact that there was another security on the property. The way in which they were originally induced to lend their money to Prince and to continue dealing with him for twenty years and more arose simply and solely from the fact that the plaintiffs' testator first, and the plaintiffs after his death, had not chosen to ask for the deeds, or to make any inquiry about them. The testator allowed Prince to receive the deeds on the completion of his purchase, and the testator and the plaintiffs allowed him to retain them for his own purposes, so that he had power to deal with them as he pleased without any claim on their part. It seems to me that in this state of things the equities are not equal, and the plaintiffs are not entitled to set up against the defendants that they are prior to them in point of date."

In *Lloyd Banking Company* v. *Jones* (1885), 29 Ch. D. 221, 54 L.J. Ch. 931, 52 L.T. 469, Mr. Justice Pearson said: "Where there are equities which are otherwise equal, the possession of the deed gives priority to the person who has got them." And in *The National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1, 55 L.T. 458, Cotton, L.J., says: "As between equitable claims, the question is whether one party has acted in such a way as to justify him in insisting upon his equity as against the other."

In the present case the conduct of the plaintiffs in not notifying Bennett of their acceptance of the transfer with the conditions on which it was given attached, and their neglect to make the payments to the Canadian Pacific Railway Company, led both Bennett and John D. McLeod to the conclusion that the transfer had not been accepted. It seems also to have led Johnston, the

head of the Massey-Harris collecting department and an agent of the plaintiffs, to the same conclusion, for, when John D. McLeod informed him of the sale of the said land to Malcolm McLeod, he raised no objection whatever on the ground of the plaintiffs' prior transfer, although he himself had been the one who forwarded that transfer to the plaintiffs' office in Winnipeg. Their conduct also in leaving Bennett in possession of all the title papers to the property enabled him to hold himself out to McLeod as being in possession of all the interest which he obtained under the contract with the Canadian Pacific Railway Company. I, therefore, think that the defendant McLeod has the better equity, unless, indeed, he had notice of the plaintiffs' claim when he purchased the property. Had he such notice? He had no actual notice. But it is said he had constructive notice; that John D. McLeod was his agent in the transaction, and he had knowledge of the plaintiffs' prior transfer. The learned Chief Justice has found as a fact, and I entirely agree with that finding, that John D. McLeod was not an agent for Malcolm McLeod at all until after Malcolm had obtained the assignment from Bennett, but that, having obtained the assignment, he employed John D. McLeod as his agent to secure the approval of the Canadian Pacific Railway Company to the assignment. John D. McLeod certainly knew of the plaintiffs' transfer having been taken. Is this sufficient to charge Malcolm McLeod with knowledge of plaintiffs' claim?

In his Laws of England, vol. 1, at p. 215, Lord Halsbury lays down the law as to notice as follows: "456. Where an agent, in the course of any transaction in which he is employed on his principal's behalf, receives notice or acquires knowledge of any fact material to such transaction, under such circumstances that it is his duty to communicate it to the principal, the principal is precluded, as regards the persons who are parties to such transaction, from relying upon his own ignorance of such fact, and is taken to have received notice of it from the agent at the time when he should have received it, if the agent had performed his duty with due diligence. But, in the absence of such duty, the principal is not bound by any notice given to, or any knowledge acquired by, the agent, if at the time when the agent received such notice or acquired such knowledge he was not acting as agent on the principal's behalf."

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In *Re Hampshire Land Company* (1896), 2 Ch. 743, it was held that where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed upon him to communicate his knowledge to the company sought to be affected and some duty imposed on him by that company to receive the notice. This principle was approved in *Young* v. *David Payne & Co., Ltd.* (1904), 2 Ch. 608, 73 L.J. Ch. 849, 91 L.T. 777.

The case of *Kettlewell* v. *Watson*, 21 Ch. D. 685, furnishes a number of valuable illustrations of the principles applicable to notice. In that case Fry, L.J., said: "The first question is, did the principal know of the charge? If he did not, had he an agent who knew of the charge? Then the next question is, was it the agent's duty to communicate that fact to the principal." And he held in that case that where a sub-purchaser, who had bought a small lot from the purchasers, and who had allowed the purchasers, at their suggestion, to employ their own solicitors, who knew of the vendor's lien, to prepare the conveyance, there was no duty cast upon the solicitors to communicate to the sub-purchaser the existence of the lien, and the sub-purchaser was not charged with notice thereof, the solicitors employment being in that case simply to draw the conveyance.

From these authorities it seems to me clear that, before the knowledge of the agent can be imputed to the principal, there must be a duty on the part of the agent cast upon him by virtue of his employment to receive and communicate that knowledge to the principal. Applying these principles, the present case seems to me to resolve itself to this: had John D. McLeod, by virtue of his employment to obtain the approval of the Canadian Pacific Railway Company, any duty cast upon him to ascertain and communicate to his principal the fact of there being outstanding equitable claims against the property? In my opinion, there was no such duty. His employment was limited simply to one thing, and that was the obtaining of the approval of the Canadian Pacific Company to the assignment. Whatever knowledge he had or obtained which it was his duty by virtue of that employment to ascertain and communicate to Malcolm J. McLeod

is knowledge which can be imputed to the principal, and by which the principal must be bound. But where it was no part of his duty as agent of Malcolm McLeod to ascertain the existence of the plaintiff's claim, I am of opinion there was no duty cast upon him to communicate to his principal the fact that the claim existed.

In no sense was John D. McLeod Malcolm McLeod's general agent in the transaction. Therefore the knowledge which he had, but which his employment cast upon him no duty to communicate, cannot be imputed as knowledge to Malcolm McLeod. The defendant McLeod, therefore, having no knowledge of the plaintiffs' claim, and having, as I have held, the better equity, is entitled to succeed. In my opinion, the appeal should be dismissed with costs.

Appeal allowed.

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visions of sec. 39 of the Assignments Act, there must be knowledge of the insolvency on the part of both parties and concurrence of intent to obtain an unlawful preference over other creditors.

(2) That the chattel mortgage attacked having been given and taken with knowledge of the insolvency of the mortgagor, was as to the past indebtedness of $500 void, but was valid as to the advance of $250, which, although not actually advanced until a few days after the mortgage was given, was intended to be a present advance on the security of the mortgage.

(3) That under the Assignments Act any creditor may maintain an action to set aside a fraudulent conveyance under the provisions of the Act, whether his claim has been reduced to judgment or not. *Douglas* v. *Hourie*, 34.

2. *Proof of Insolvency — Inability to Pay Debts—Preferential Assignment—Knowledge of Insolvency.*]—Defendants, just prior to the assignment for the benefit of creditors by a debtor of the defendants, secured an order from the debtor for payment to them of a portion of the moneys payable on the sale of his business, of which they subsequently obtained payment. The debtor having shortly afterwards made an assignment to the plaintiff for the benefit of his creditors, the assignee brought an action to secure the return of the money so paid. It appeared that the defendants had knowledge of the insolvent condition of the debtor at the time of the giving of the order. The debtor was not available at the trial to give evidence, and no direct evidence of insolvency could be given. It appeared, however, that for some time prior to the assignment he had been unable to pay his debts in full, and the assignee shewed that the liabilities exceeded the assets which had come into his hands:—

Held, that the evidence was sufficient to establish that the debtor was unable to pay his debts in full, and the defendants being aware of this, and the assignment of the money to them having the effect of giving them a preference, the assignment of such money should be set aside and the plaintiff have judgment for the amount paid. *Jagger* v. *Turner & Co.*, 476.

3. *Fraudulent Conveyance — Statute of Elizabeth—Intent.*]—Defendant McDonald being indebted to the plaintiffs and others, conveyed a farm to his co-defendants, his wife and father-in-law, for an expressed consideration of $4,000.00 to be paid in cash, notes, and by the proceeds of a loan. The evidence as to payment was contradictory, but the weight of evidence seemed to shew that $1,400.00 was paid. Beyond contradictory evidence between the defendants as to the mode of payment there was no evidence of fraud:—

Held, that no actual and express intent to defraud or delay creditors being shewn in both parties, the transfer, being for valuable consideration, ought not to me set aside. *Manitoba Brewing & Malting Co.* v. *McDonald*, 223.

4. *Land Titles Act—Executions—Effect of Assignments and Preferences Act Upon.*]— *See* LAND TITLES ACT, 1.

5. *Company—Sale of Property—Resolution Authorizing Conveyance — Non-compliance with Provisions of—Conveyance Invalid—Insolvency — Fraudulent Conveyance.*] — The Mortlach Mercantile Company being indebted to several parties, the defendant Belcher was appointed a trustee for creditors, and with his consent the business was transferred to a company known as Hudsons Ltd., which agreed to assume the liabilities of the previous company and to pay the same in regular payments. The new company being behind with its payments, a resolution was passed authorizing the sale of the business and conveyance thereof to J. W. Hudson upon execution of certain notes, which, it was found as a fact, were never made. Notwithstanding, the conveyances were made by the officers of the company, and Hudson went into possession.

In an action to set aside the conveyance of the land, it appeared that at the time of the transfer Belcher was pressing his claim, that other claims were outstanding, that the goods were mortgaged in a considerable sum, that the assets if sold would be insufficient to meet the liabilities, and that Hudson must have been aware of the state of affairs:—

(1) That the company, at the time of the transfer of land to Hudson, being unable, if its assets were presently realized and if compelled to sell at a forced sale, to pay its debts in full, must be deemed to have been insolvent at that time, and Hudson being aware of this, and the conveyance to him being apparently to defeat the creditors of the company, the conveyance must be deemed to have been fraudulent under the Act respecting Assignments and Preferences, and should be set aside. *Belcher* v. *Hudson*, 489.

ASSIGNMENTS OF DEBTS.

1. *Contract for Sale of Land —Instalment Payable Thereunder—Attachment before Due—Liability to Attachment.*]— The purchaser under agreement for sale of land was served with a garnishee summons for a debt due by the vendor. At that time no instalment was due. When the next instalment became due he paid into Court an amount sufficient to satisfy the debt. In an action by the purchaser for specific performance the vendor objected that the instalment was not attached and the payment improperly made:—

Held, that an instalment under an agreement for sale of land

BILLS OF EXCHANGE AND PROMISSORY NOTES.

and Agent—Commission on Sale of Land—Duty of Agent—Sale Without Agent's Knowledge.]—Plaintiffs, as executors, sued on a promissory note. Defendant admitted the note, but alleged a verbal agreement for the extension of time for payment. He also counterclaimed for commission on sale of land, it appearing that deceased had promised him a commission if he could procure a purchaser. The defendant interested a party in the property, but the latter, finding it impossible to raise sufficient money to carry the sale through, mentioned the property to a third party, who went to the deceased and purchased on the terms stated to the defendant, without the defendant's knowledge, and without the deceased being aware that the purchasers had learned that the property was for sale through any efforts on the defendant's part:—

Held, that the date of payment expressed in the promissory note could not be varied by parol evidence.

(2) That in order to entitle the agent to commission on sale of land it must be shewn that the sale is the direct result of the agent's efforts, and it is not sufficient that he mention the property to another person who is not his agent, nor the agent of the purchaser, and who afterwards mentions it to a third party, who purchases. *Vachoe* v. *Stratton*, 72.

3. *Bills of Exchange—Action Upon—Bill Drawn to Order of Bank—Not Indorsed — Action by Drawer Upon — Holder of Bill — Pleading.*] — Plaintiff, the drawer of a bill of exchange accepted by the defendant, brought action thereon. The bill was drawn payable to the order of the Dominion Bank, and was not indorsed by the bank, but in the statement of claim it was alleged that upon dishonour the bill was returned by the bank to the drawer, who was then the holder thereof. The defendant appeared and filed a defence which was struck out on a motion for speedy judgment. On such motion the defendant filed no affidavit, but relied on the objection that the bill had not been indorsed to the plaintiff, who could not, therefore, maintain the action:—

Held (*per* WETMORE, C.J., and JOHNSTONE, J.), that as the defendant had, in answer to the motion, raised a difficult question of law which might be an answer to the plaintiff's claim, he should be permitted to defend.

Per NEWLANDS and PRENDERGAST, JJ., that it was not necessary for the plaintiff in pleading to allege any facts which would be presumed in his favour, and it was therefore unnecessary to allege that the Dominion Bank were the holders for value, and it might be presumed that when they returned the bill to the plaintiff they were paid by him, and it was therefore unnecessary to allege payment in order to entitle the drawer to recover.

COMPANY.

CONDITIONAL SALE.

—*What Constitutes—Intention of Parties—Right of Bailor to Remove.*]—Defendant sold certain land to one P. under contract for sale upon deferred payments, and B. went into possession. While so in possession he purchased from plaintiff a windmill, pump, tank, piping and a sawmill for the operation of which shafting was attached to the windmill.

This machinery was not paid for, but was sold upon terms that the property therein should not pass until paid for. The machinery was set up on the land, being affixed by bolts to posts set into the soil and fastened there, and could not be used unless so fastened. The defendant cancelled P.'s contract for purchase of the land and took possession. The plaintiff demanded delivery of the windmill and appurtenances and the defendant refused, whereupon the plaintiffs brought action for detention:—

Held, that the windmill in question having apparently been intended to be a permanent improvement and to enhance the value of the premises, and being affixed thereto, became part of the freehold, and while the contract whereby the property therein was to remain in the plaintiff until payment would be enforceable as against P., it was not enforceable as against the owner of the freehold in possession after P.'s contract had been cancelled.

(2) That the sawmill being part of the windmill, also went with the land. *Cockshutt Plow Co.* v. *McLoughry,* 259.

2. *Conditional Sale of Goods—Alteration of Agreement After Signature—Effect of—Letters Changing Order — Effect on First Order—New Contract.*]—Plaintiff applied to the defendant Jones to purchase certain goods on the terms that he would pay a certain sum in cash and the balance in fifteen monthly payments, the property in the goods to remain in the seller until payment. Subsequently the defendant Jones found that all the goods offered could not be supplied, but suggested others in substitution, and to this the plaintiff agreed. The alteration had the effect of reducing the price by the sum of $40.00. In shipping the goods an invoice was sent out wherein the terms of payment were incorrectly stated. The plaintiff accepted the goods and made the cash payment thereon, but claimed to pay the balance on the terms as stated in the invoice. It also appeared that when the order was altered by the plaintiff agreeing to the substitution of other articles for those ordered, the defendant Jones had made the necessary corrections in the original order. As a result of the dispute over the terms of payment the defendants, under the terms and conditions of the original order, seized and sold the goods. The plaintiff thereupon brought action for damages alleging the original contract to be void on account of

the alteration, and that a new contract had been made when the plaintiff accepted the goods on the terms of the invoice:— .

Held, that the goods were sold and delivered upon the terms of the original order, with such changes as were necessary, and to which the plaintiff had agreed, and as the defendant Jones could not have collected more than the value of the goods shipped, the alterations in the order were not material and did not have the effect of voiding the contract. *Gogain* v. *Drackett*, 253.

3. *Goods Seized under Agreement for Conditional Sale—Previous Sale of Same Goods Without Reservation of Property—Re-sale to Original Seller—Validity of Lien—Change of Possession on Re-sale—Sale to Innocent Purchaser—Intention of Alleged Bailor and Bailee—Bills of Sale Ordinance—Ordinance Respecting Hire Receipts and Conditional Sales.*]— Defendant sold a team of horses to one A., taking promissory notes in payment. When one of the notes became due he learned that A. would not likely be able to pay, and made inquiries as to his position, and was advised that if he could get possession of the horses he could re-sell them to A., taking lien notes which would afford him security. Accordingly he went to see A., and asked for payment, and on A. stating that he could not pay, the defendant proposed that he buy back the horses for the amount due and he would re-sell them to A., at the same time taking lien notes for the purpose of securing the purchase price. This arrangement was carried out, lien notes being given. The horses were at this time in a livery stable, and there was not any apparent change of possession during the transaction. A immediately afterwards sold the horses to the plaintiff. The defendant, learning of the sale, took possession of the horses under the lien notes, and the plaintiff sued for detention:—

Held, that the whole transaction between the defendant and A. was one devised to evade the provisions of the Ordinance respecting Hire Receipts and Conditional Sales, and there being no actual *bonâ fide* re-sale to the defendant the lien notes under which he claimed were not operative, he having no right, title or interest in the horses in question which could be retained under an agreement for conditional sale.

(2) In any event the transaction was void under the Bills of Sale Ordinance because there was at the time of the alleged re-sale no actual or continued change of possession, nor any memorandum in writing duly registered. *Taegar* v. *Rowe*, 159.

4. *Seizure of Goods under Previous Mortgage.*]—*See* CHATTEL MORTGAGE, 1.

CONTRACT.

1. *Action for Damages for Non-performance — Failure of Plaintiff to Perform Conditions —Mutual and Dependent Covenants.*]—Defendant agreed to plough a certain quantity of land in consideration of receiving a portion of the crop to be grown thereon. The plaintiff, on his part, agreed to provide a granary for the purpose of storing the grain to be grown. Defendant failed to plough the land agreed upon, and plaintiff did not erect the granary. In an action by the plaintiff for damages for failure to plough the land, defendant pleaded that by reason of the plaintiff's failure to provide the granary he had to haul away the grain, and the time occupied in doing so prevented him completing the contract before frost prevented him doing so:—

Held, that neither the covenant of the plaintiff to furnish the granary nor that of the defendant to plough went to the whole consideration, and the covenants were not mutual conditions the one precedent to the other, and therefore the failure of the plaintiff to furnish the granary was no defence to the plaintiff's action for damages on the other branch of the contract. *See* v. *Branchflower,* 20.

2. *Building Contract—Completion by Contractor—Recovery of Contract Price.*]—*See* ATTACHMENT OF DEBTS, 2.

3. *Alteration after Signature —Effect of—Change in Contract by Correspondence—New Contract.*]—*See* CONDITIONAL SALE, 2.

4. *Contract of Hiring—Evidence of.*] — *See* MASTER AND SERVANT, 2.

5. *Contract for Sale of Land.*] —*See* VENDOR AND PURCHASER.

CRIMINAL LAW.

1. *Crown Case Reserved — Bringing Stolen Property into Canada—Evidence of Theft — Recent Possession — Sufficient Evidence to go to Jury.*]—Accused was convicted of bringing stolen property into Canada knowing it to have been stolen. It was proved that the property was stolen in North Dakota on the 6th of March, 1909, that on the 12th of the same month it was found in the possession of the accused in Canada, and there were circumstances from which the jury might find that the accused brought the property into Canada. It appeared that the accused was in the locality where the goods were stolen at the time they disappeared and he gave no account of his possession. On a Crown case reserved:—

Held, that the evidence was sufficient to warrant the jury in finding that the accused stole the property and brought it into Canada. *The King* v. *Duff,* 323.

2. *Crown Case Reserved — Charge Preferred Before Su-*

preme Court by Deputy Attorney-General — No Preliminary Hearing—Leave of Presiding Judge not Obtained—No Direction from Attorney-General.]—After the conviction of the accused on a charge preferred against him by the agent of the Attorney-General, the Deputy Attorney-General, who appeared in person, without obtaining the leave of the Judge or a direction from the Attorney-General, no preliminary hearing having been held, preferred a further charge signed by himself against the accused, on which, after trial, he was convicted. Objection having been taken to the charge on the ground that the Deputy Attorney-General had no authority to prefer such charge without leave of the Judge or direction of the Attorney-General, and on the ground that no preliminary hearing had been held, a case was stated by the presiding Judge to the Court *en banc*.

Held (JOHNSTONE, J., dissenting), that the Deputy Attorney-General is not an agent of the Attorney-General within the meaning of the term as used in the Criminal Code, and is not, therefore, authorized to prefer a charge as agent of the Attorney-General.

(2) That while by the General Interpretation Act (Dom.) it is provided that words directing or empowering any minister to do any act or thing includes the lawful deputy of such minister, such provision is controlled by the special interpretation sections of the Criminal Code, and as the deputy is not referred to therein, it must be held that the Deputy of the Attorney-General is not by reason of his office authorized to prefer a charge under the provisions of sec. 873a of the Criminal Code.

(3) The Deputy Attorney-General, not being an agent of the Attorney-General under the provisions of sec. 873a of the Code authorized to prefer a charge, the conviction of the accused must be quashed, not having been preferred with the leave or by the order of the Court. *The King* v. *Duff*, 388.

3. *Appeal to District Court from Conviction by Two Justices —Reference by District Court Judge of Question of Law to Court en banc—Jurisdiction of Court.*]—An appeal from a conviction by two justices of the peace having been taken to the District Court, and a question having arisen as to the regularity of the proceedings, the District Court Judge referred such question to the Court *en banc*:—

Held, that in such matters the Court appealed to, and in this case the District Court, is the absolute judge of facts and law, and the Court *en banc* had no authority to advise in the matters. *Mischowsky* v. *Hughes*, 219.

4. *Appeal by Way of Stated Case—Failure of Justice to Deliver Case Within Time Limited —No Particular Judge Named in Stated Case—Recognizance—*

(2) That as the practice provided by the Controverted Elections Act in respect to delivery of particulars differed from that prescribed by the rules of Court, and the practice under the Act was sufficient, the provisions of the rules of Court could not be invoked to support the application, and must be deemed to be excluded by the specific provisions of the Act. *Bowe* v. *Whitmore*, 82.

2. *Controverted Election Act —Protested Election—Regularity of Nomination — Voter — What Constitutes.*] — The respondent was declared elected as a member of the Legislature, and a petition was filed against his return. On the trial it was proved that the respondent had been nominated by four persons, and it was sought to shew that one of these was not qualified, not being on the voters' list, and not having resided in the province for one year. The nominator objected to was called and sworn, and stated that he could not remember when he came to the province, nor did he know if he was qualified to vote. The voters' list was also produced and shewed his name erased:—

Held, that in an election held under the provisions of secs. 269 to 284 of the Saskatchewan Election Act the entry of a voter's name on the list is not an essential qualification as a voter, and therefore the absence of the name of the nominator from the list did not in itself disqualify him as a voter.

(2) That the receipt given by the returning officer under the provisions of sec. 122 is conclusive only as to the matters in such receipt contained, and does not apply to the qualification of the nominators.

(3) That the onus of proving lack of qualification being on the petitioner, in the absence of positive evidence of lack of qualification, the negative evidence given by the party whose qualification was attacked was not sufficient to discharge the onus and prove lack of qualification. *Boice* v. *Anderson; Last Mountain Election Case*, 245.

3. *Local Improvement Act—Controverted Election—Irregularity in Proceedings to Avoid—Intituling Affidavits—No Statement that Election Held—Irregularity in Proceedings Prior to Election—Insufficient Notice of Election—Effect of—No Evidence that Result Affected.*] — The applicant applied to have one Stribbell ousted from office as a councillor of a local improvement district on the ground that the notice of election had not been posted as required by law. No evidence was given that the result of the election was affected thereby, or that all the voters had not voted. The summons and affidavit for the purpose of the application were not intituled in any Court:—

Held, that it was not necessary that the proceedings under the

Local Improvement Act should be intituled in any Court.

(2) That every irregularity will not defeat an election, and the effect it may have on the final result must be considered, and as there was no evidence that if the notice required by law had been posted the result of the election would have been different, and as it did not appear that all the voters had not voted, the application should be dismissed. *In re Local Improvement District, No.* 11-*A*-3, 80.

4. *Local Improvement Act—Controverted Election—Admissibility of Affidavit to Prove Election Void—Evidence as to Disqualification of Voters—Conviction for Non-payment of Taxes — Chambers Summons — Signature of by Chamber Clerk —Judge persona designata.*] — An application was made under the provisions of the Local Improvement Act to oust a councillor on the ground that three of the voters voting for him had not paid their taxes and were therefore disqualified. Evidence in support of this allegation was given by affidavit, which shewed that the voters in question had been convicted for non-payment of taxes, and which also contained an allegation that their taxes had not been paid, the kind of taxes not being specified:—

Held, that the provisions of the Act contemplated evidence in support of the application being given by affidavit, and therefore affidavits of which no notice of intention to read had been given might be read.

(2) That the conviction by a justice of the peace of the voters objected to for non-payment of taxes was not sufficient evidence that they had not in fact paid their taxes.

(3) That, as the affidavits did not shew that the taxes which it was deposed had not been paid were local improvement taxes due the district, the fact was not sufficiently proved.

(4) That the summons was irregular, being signed by the chamber clerk, and not by the Judge granting the same, who alone had jurisdiction under the Act to sign such a summons. *The King ex rel. Dale* v. *Lanz,* 78.

EXECUTION.

Company—Sale of Property—Resolution Authorizing Conveyance—Non-compliance with Provisions of—Conveyance Invalid —Seizure by Sheriff—Breaking Open Door—Premises Occupied as Dwelling and Store—No Connection Between — Right of Sheriff to Break—Effect of Unlawful Entry upon Seizure — Claim to Goods Seized—Subsequent Claim to Other Goods — Estoppel—Insolvency—Fraudulent Conveyance.] — The Mortlach Mercantile Company being indebted to several parties, the defendant Belcher was appointed a trustee for creditors, and with his consent the business was transferred to a company known as Hudsons Ltd., which agreed

to assume the liabilities of the previous company and to pay the same in regular payments. The new company being behind with its payments, a resolution was passed authorizing the sale of the business and conveyance thereof to J. W. Hudson upon execution of certain notes, which it was found as a fact were never made. Notwithstanding, the conveyances were made by the officers of the company, and Hudson went into possession. After the delivery of these documents Belcher recovered judgment against the company, and execution was issued to the sheriff, the defendant Fletcher, who issued a warrant for seizure. The plaintiff Hudson at this time lived over the store premises in which the business was carried on. When the bailiff arrived he found the store premises locked and Hudson refused to open, whereupon the bailiff forced an entrance. There was no connection between the living apartments and the store premises. After the seizure Hudson first verbally claimed all the goods as his. Subsequently, however, he filed a written claim, which was admitted. In an action for wrongful seizure he alleged other goods were his, and claimed damages.

In an action to set aside the conveyance of the land, it appeared that at the time of the transfer Belcher was pressing his claim, that other claims were outstanding, that the goods were mortgaged in a considerable sum, and that the assets if sold would be insufficient to meet the liabilities, and that Hudson must have been aware of the state of affairs:—

Held, that the notes to be given in payment of the goods not being delivered, the conveyance thereof to Hudson was not in accordance with the resolution of the company authorizing it, and was therefore invalid, and the property in the goods never passed to him.

(2) That the store and dwelling, while not connected, being under one roof, the breaking by the sheriff of the door of the store premises was technically a breaking of the dwelling, and therefore an unlawful breaking.

(3) That Hudson having made a formal claim in writing to certain goods after seizure, under the provisions of the rules of Court, could not afterwards allege that other of the goods seized belonged to him, and maintain an action for unlawful seizure in respect thereof.

(4) That the company, at the time of the transfer of land to Hudson, being unable, if its assets were presently realized and if compelled to sell at a forced sale, to pay its debts in full, must be deemed to have been insolvent at that time, and Hudson being aware of this, and the conveyance to him being apparently to defeat the creditors of the company, the conveyance must be deemed to have been fraudulent under the Act respecting Assign-

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EVIDENCE.

EXTRADITION.

FALSE IMPRISONMENT.

In an action against justices of the peace for false imprisonment the defendant at the trial applied to amend by pleading not guilty by statute:—

Held (following *Gesman* v. *City of Regina*, 1 Sask. L.R. 39), that such an amendment should not be allowed at this stage.

The defendants then claimed to have the right to avail themselves of the statutes in question without pleading same; particularly as to no notice of action being given, the notice which had been given being, it was claimed, defective:—

Held, that this could not be allowed and in any event the defendants not having pleaded that the notice was defective could not attack the same.

In an action for false imprisonment against two justices of the peace it appeared that a dispute was pending as to the ownership of a certain building, to the knowledge of the defendant Tedford. The plaintiff having attempted to remove this building the other claimant laid an information before the defendant Tedford charging the plaintiff with entering on the premises of the claimant and attempting to remove a house. It also appeared that before acting on the information Tedford was notified by the plaintiff that he owned the house in question and there were other circumstances to his knowledge from which he might reasonably believe the plaintiff's claim to be well founded. He was also advised by a police officer that the dispute was not within his jurisdiction; but notwithstanding he issued a warrant for the arrest of the plaintiff who was brought before the two defendants in custody and after various irregular proceedings was committed to gaol to stand his trial, being released by the agent of the Attorney-General as soon as possible but not until he had been subjected to all the indignities attendant on arrest and imprisonment. There was no evidence that the defendant Hossie was aware of the circumstances set out. In an action for false imprisonment:—

Held, that in an action for malicious prosecution the existence or non-existence of probable cause must be determined by the Court although the facts from which the Judge is to draw the inferences are matters for the jury, except where the facts are not in dispute when the Judge decides such matters himself.

(2) That upon the facts set out and undisputed there was no evidence of reasonable and probable cause justifying the action of the defendant Tedford to go to the jury. *Baker* v. *Tedford and Hossie*, 307.

FIRE INSURANCE.

1. *Application — Misrepresentation in—Policy Void on Account of—Knowledge of False Representation by Agent of Company—Effect of.*] — Plaintiff insured a building with de-

fendant company, and made certain statements in the application as to fires used on the premises which were found to be false. The premises were destroyed by fire, and the company disputed liability. In answer to the defence of misrepresentation, the defendant pleaded that the company's agent, who had filled out the application, was aware of the condition of the premises:—

Held, that the policy was void on account of the mis-statements contained in the application.

(2) That even if the plaintiff's agent had been aware of the condition of the premises, as it appeared that he had filled out the application and had filled in the answer to the questions upon which the misrepresentations were based, he would be acting as agent of the plaintiff and in fraud of the company, and the company would not be bound by the policy or affected by his knowledge. *Parsons* v. *Alberta-Canadian Insurance Co.*, 76.

2. *Premium — Payment by Bill of Exchange—Default in Payment of Bill—Effect of—No Notice of Loss—Notice a Condition Precedent—Waiver of Notice—Appointment of Adjuster —Effect of.*] — Plaintiffs insured in the defendant company against loss by fire a stock of goods for $2,000. The application contained a clause that if the premium was not paid as agreed the insurance should be void until "such settlement is made." The premium was never paid in cash, but a bill of exchange was drawn upon plaintiffs and accepted by them, but this was never paid. The property was shortly afterwards destroyed by fire. The policy contained one of the statutory conditions, namely, that the insured should forthwith after loss give notice to the company in writing. No such notice was given by the insured, although the company's agent gave notice and told plaintiffs he had done so. It was contended, however, that notice had been waived: first, because the company did not draw attention to the omission; second, because they sent an adjuster to adjust the loss; and third, because the manager of the company made an appointment to discuss the claim. The policy, however, contained a clause that no condition should be waived except in writing. The policy also required that the proofs of loss should shew when and how the fire originated to the best of the claimant's belief, while in the proof of loss filed the claimant stated the cause of fire to be unknown, while from his examination for discovery it appeared that he believed it started from an explosion of the furnace. In an action to recover the amount of the policy:—

Held, that the defendant, having drawn a bill of exchange upon the plaintiffs which was by them accepted and became a floating security which might be passed from hand to hand, must be deemed to have accepted "set-

tlement'' within the meaning of the terms of the application.

(2) That compliance with the term of the policy requiring notice of loss was a condition precedent to the right to recover, and while if some sort of notice had been given which was defective the Court might possibly relieve, yet no such relief could be granted where there was an absolute non-compliance.

(3) That the acts pleaded in support of waiver were not sufficient to support the plea, but in any event the policy provided that no waiver should be effective unless in writing, and there being no writing that would constitute a waiver, the plaintiffs could not succeed on that ground.

(4) That the proofs of loss were insufficient, as the statement of the cause of the fire being in the belief of insured unknown, was untrue. *Bell Bros.* v. *Hudson Bay Insurance Co.*, 355.

FIXTURES.

1. *Windmill and Appurtenances — Attached to Freehold — What Constitutes.*] — *See* CONDITIONAL SALES, 1.

2. *Buildings Laid on Freehold.*]—*See* REAL PROPERTY.

FOREIGN JUDGMENT.

Action Upon—Right to Maintain.]—*See* SALE OF GOODS, 6.

FRAUD AND MISREPRESENTATION.

1. *See* COMPANY, 1.

2. *Insurance Policy—Misrepresentation in Application — Effect of.*]—*See* FIRE INSURANCE.

3. *Sale of Goods—Misrepresentation on.*] — *See* SALE OF GOODS, 2, 6, 8.

4. *Sale of Land.*]—*See* VENDOR AND PURCHASER, 4, 8, 10, 11.

GUARDIAN.

Sale of Goods of Ward—Sale Before Appointment—Right of Guardian to Maintain After Appointment.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

INJUNCTION.

Practice as to.] — *See* PRACTICE, 6, 7 and 8.

LANDLORD AND TENANT.

1. *Cancellation of Lease—Action Upon Covenant After — Right of Lessor to Maintain — Tillage by Lessee — Right to Compensation for.*]— Plaintiff leased certain land to defendant, and with the land supplied 800 bushels of seed wheat and 800 bushels seed oats, which the lessee covenanted to return—the wheat the following fall, the oats at the expiration of the lease. There was also a covenant in the lease that either party might cancel the lease within ten months from the date thereof,

giving reasons therefor. There was also a provision for cancellation by the lessor in the event of sale, in which case the lessee was to be compensated for improvements. The lessor subsequently cancelled the lease, and the lessee having neglected to return the wheat and oats the lessor brought action to recover the value thereof. The defendant counterclaimed for summer fallowing done during the term:

Held, that cancellation of a lease by mutual consent of the parties does not destroy the term vested in the lessee, and therefore, notwithstanding such cancellation, the lessor could maintain an action for the recovery of the wheat.

(2) That in the absence of an agreement to that effect the lessee is not entitled to compensation for tillage upon cancellation. *Ellis* v. *Fox,* 417.

2. *Lease for Years—Repair of Premises by Landlord—Tenant Out of Possession During Repairing—Right of Landlord to Rent During Such Period — Consent of Tenant—Distress for Rent—What Constitutes — Detention of Goods.*] — Plaintiff leased certain premises from the defendant for a period of three years, and carried on business therein. The premises being out of repair the plaintiff complained to the defendant of the condition of the premises, and the defendant thereupon proposed that the plaintiff vacate the premises for about one month and that he would then have the necessary repairs made. To this the defendant agreed and moved out. The repairs were not completed until after about two and one-half months, and the plaintiff ultimately told the defendant he would not continue in the occupancy of the premises, and the defendant thereupon re-let them. When the plaintiff vacated the premises he left a range thereon, and this he demanded from the defendant, who refused to give it up until the rent for the two months during which the repairs were being made was paid. The plaintiff thereupon sued for detention, and the defendant counterclaimed for the rent. The learned trial Judge found for the plaintiff and dismissed the counterclaim. On appeal:—

Held, that the plaintiff having vacated the premises at the request of the defendant without any compulsion, and apparently without any objection the dispossession during the period in which the repairs were being made did not amount to an eviction, and in order to effect a suspension of rent the dispossession must amount to an eviction, and therefore the defendant was entitled to rent during such period.

(2) That even if the language used by the defendant were sufficient to constitute a seizure for rent, he had not proved that such seizure was made between sunrise and sunset, and as the onus was upon the defendant to prove that the seizure was law-

fully made, which had not been done, the plaintiff was entitled to recover on the claim for detention. *Mah Po* v. *McCarthy*, 119.

3. *Interpleader — Lease of Land—Rent Payable by Delivery of Portion of Crop—Assignment of Lease by Lessor—Seizure of Crop by Sheriff under Execution Against Lessor—Validity of Assignment—Growing Crop—Bills of Sale Ordinance—Property in Crop.*]—Defendant was the owner of a farm, which he leased on terms that he was to receive one-half of the crop, when threshed, by way of rent. Being indebted to one Emerson, he executed a deed by way of security whereby he did "assign and grant . . . all that certain parcel of land . . . together with the residue unexpired of the said term of years and the said leave and all benefit and advantages to be derived therefrom." The sheriff, under writ of execution of the plaintiff, seized the defendant's half of the crop which was claimed by Emerson, and the sheriff interpleaded. Whether the crop was standing or cut, threshed or divided, did not appear by the material before the Court:—

Held, that the intention of the parties in making and accepting the assignment of lease in question was that it should be by way of security upon a growing crop, and was therefore, by the provisions of sec. 15 of the Bills of Sale Ordinance, void as regards the crop uncut at the time of execution.

(2) That the assignment of the lease, being intended as a conveyance of the crop, was as to the portion of the crop cut, void, as such an agreement was not registered nor was there any actual or continued change of possession. *Robinson* v. *Lott*, 150.

4. *On Appeal.*]—*Held*, rent is a chose in action, and as such is assignable, and the doctrine applies to future rent as well as past due rent.

(2) That until the grain was threshed and divided the property therein remained in the lessee, and in the absence of evidence of division and delivery there was no evidence that the debtor had any interest in the crop liable to seizure.

(3) That (JOHNSTONE, J., dissenting) the assignment by the lessor of the benefits of a lease, the rent under which is payable by a portion of a crop, is not an assignment of a growing crop within the meaning of the Bills of Sale Ordinance. *Robinson* v. *Lott*, 276.

5. *Trespass — Conversion of Goods—Landlord and Tenant—Distress for Rent — Irregular and Excessive Distress — Sale Without Appraisement—Unreasonable Delay in Selling.*] — Plaintiff and one B. carried on business in partnership in premises owned by the wife of B. There was a verbal arrangement between B. and plaintiff by which they were to become the joint owners of such premises,

but the wife of B. did not appear to have been a party to such arrangement. It was also a part of such arrangement that the partnership should assume and make the payments due under a mortgage on the property. The partnership was dissolved, plaintiff continuing the business. After the dissolution defendant became the owner of the premises, and served a notice on plaintiff demanding rent at $20 per month, to begin from a date some months previous to the date of the notice. Plaintiff never agreed to pay any rent, and not paying same defendant distrained for 8⅓ months' rent, locked up the premises, and after a delay of nearly three weeks sold the goods of plaintiff and of other parties which were then on the premises, without appraisement, the defendant himself buying in at a very low price. The plaintiff sued for damages for trespass, conversion and illegal distress:—

Held, that to give a right to distress there must be a fixed rent, and there being no such rent fixed by agreement there was no right of distress.

(2) That a landlord cannot by notice fix the amount of rent to be paid unless the amount is assented to or fixed by implication. *White* v. *Cusak*, 106.

LAND TITLES ACT.

1. *Certificate of Title—Procured by Fraud — Equitable Jurisdiction of Court to Relieve.*]—*Turner* v. *Clark*, 200.

2. *Assignments and Preferences Act — Assignment for Benefit of Creditors — Executions Registered Against Insolvent—Transmission to Assignee — Removal of Executions — Right of Assignee to Require—Duty of Registrar—Section 8 of Assignments and Preferences Act—Meaning of.*]—B. made an assignment for the benefit of creditors to one C., under the provisions of the Act respecting Assignments and Preferences. At the time of the assignment and subsequently thereto, but before the assignee applied for transmission to him of the land of the insolvent, some eighteen executions were registered in the land titles office. On transmission of the land to the assignee, the Registrar endorsed upon the assignee's title memoranda of these executions. It appeared that the costs of the execution creditors had been paid. The assignee applied to the Registrar to cancel these endorsements, which the Registrar refused to do, and in this action he was sustained by the Inspector. From this decision the assignee appealed:—

Held, that by virtue of sec. 8 of the Act respecting Assignments and Preferences the rights of execution creditors are expressly subordinated to those of the assignee, save only as to costs, and the execution creditors having, save as to costs, which are proved to have been paid, no charge on the land, the Registrar was not justified in endorsing

a memorandum charging the land with such executions on transmission to the assignee.

(2) That the Registrar, on an assignment being proved, has jurisdiction to issue a title to the assignee free from executions, notwithstanding the provisions of sec. 129 of the Land Titles Act, inasmuch as the Legislature has expressly declared that, after assignment, the assignment takes priority to all such executions. *In re E. J. Brooks, Insolvent,* 504.

3. *Caveat—Right of Caveator to Require Registration Before Issue of Crown Grant for Land —Duty of Registrar—Judicial Discretion — Caveator's Claim Founded on Unregistered Mortgage—No Evidence which would Support Right to Register Mortgage.*]—The appellants secured a mortgage from one Ebbing on certain lands, and applied to the registrar to register a caveat against such land claiming an interest therein under such mortgage. At the time of such application grant from the Crown for such land had not been received, and the appellants produced no evidence that such grant had issued or that the mortgagor was entitled to mortgage such land. The registrar refused to register such caveat, and the appellants appealed from his decision:—

Held, that, as the registrar could not accept and register the mortgage under which the caveator claimed until the Crown grant was received by him or until he was satisfied by affidavit in form K. to the Land Titles Act that the mortgagor was entitled to create the mortgage, he could not accept and register a caveat claiming under such a mortgage in the absence of the Crown grant or evidence of the right of the mortgagor to create such mortgage. *In re Ebbing,* 167.

4. *Caveat—Summons to Continue—Powers of Judge Upon—Determination of Rights of Parties—Jurisdiction of Judge — Dismissal of Summons — Substantial Question in Issue — No Opportunity Given to Bring Action—Power of Judge to Dismiss — Caveat in Respect of Mortgage of Crown Land Before Patent—Right to Maintain — Interest in Land—What is Sufficient to Support Caveat.*]— The appellant the Gaar Scott Company filed two caveats against the respondent Guigere's land, one under a mortgage which was shewn to have been given in respect of Crown lands before the issue of the patent, and the other under a judgment recovered against the respondent under the name of Gaar as to land of which the respondent was registered as owner under the name of Guigere. The respondent served a notice requiring the withdrawal of the caveats, and a summons was taken out by the appellants to continue them. On the hearing, the Judge in Chambers dismissed the summons, without giving any time for bringing an ac-

tion to maintain the rights asserted:—

Held, that if there is any *bonâ fide* question of law or equity to be decided as to the right of the caveator to the estate or interest claimed under the caveat, such question should be disposed of in the Supreme Court, and the caveat should be continued for a sufficient time to allow an action to be brought in which to decide such question.

(2) That (following *In re Ebbing* (1909), 2 Sask. L.R. 167) as to the claim under the mortgage, such mortgage being given in respect of Crown lands before the issue of the patent, and there being no evidence of the mortgagor's right to create the mortgage, the Registrar should never have accepted the caveat, and the Judge in Chambers properly refused to continue the caveat.

(3) That as to the caveat filed under the judgment against land of which the debtor was the registered owner under another name, the land could properly be said to be registered in the name of "some other person," and being so registered the appellants had a right to file a caveat, and the Judge in Chambers should have continued the caveat to give the appellant an opportunity to amend the proceedings so as to charge the land in question under the judgment.

(4) The question of whether or not the land was the homestead of the respondent and not liable to be charged by the appellants' judgment was not such a question as should properly be determined in summary proceedings under the Land Titles Act. *Gaar Scott Company* v. *Guigere*, 374.

5. *Mortgage Against Specific Land—Reference Therein to Unspecified Land—Refusal of Registrar to Register—Right of Registrar to Refuse.*]—The company executed a mortgage of specific lands in the form provided by the Land Titles Act, but by the covenants contained therein embodied in and made a part of the mortgage a trust deed whereby the company mortgaged generally all its lands, such lands not being specifically described. This mortgage the Registrar refused to register. On appeal:—

Held, that by embodying the trust deed in the mortgage the mortgagor purported to mortgage both described and undescribed lands, and this being contrary to the provisions of the Land Titles Act the Registrar was justified in refusing to register the instrument. *In re North-West Telephone Co., Limited*, 379.

6. *Caveat — Application to Continue Claim Under Verbal Trust — Right of Cestui que Trust to File Caveat—Statute of Frauds—Jurisdiction of Judge —Determining Matters in Controversy on Summary Application.*] — Wark filed a caveat against certain lands, and a motion was made, on behalf of the owner, to have such caveat re-

moved. On a motion to continue the caveat, it appeared that Wark claimed an interest in the land as *cestui que trust* under a verbal declaration of trust, the conveyance from him to the owner being absolute, although, as he claimed, subject to a trust as to the profits to be derived from the sale. This the owner denied. It was objected that under the provisions of the Land Titles Act no caveat could be filed by Wark, as he did not claim an interest under document in writing, and the Statute of Frauds was also invoked:—

Held, that, under sec. 136 of the Land Titles Act a *cestui que trust* claiming a beneficial interest of any sort may lodge a caveat whether the declaration is in writing or not.

(2) That as to the Statute of Frauds and other objections, these matters should not be determined on a summary inquiry, and there being a question to be determined, the caveat should be continued for a sufficient time to enable action to be brought in a competent Court to determine the matters in question between the parties. *In re Wark Caveat*, 431.

7. *Merger of Mortgagee's Interest in Fee—Effect of Act.*]—*See* MORTGAGE, 7.

8. *Application to Bring Under the Act—False Statement on —Effect of.*]—*See* TRUST AND TRUSTEE.

9. *Land — Conveyance in Fraud—Effect of.*]—*See* VENDOR AND PURCHASER, 10.

LIEN.

Detinue — Boarding House Keeper — Goods of Lodger — Lien for Board and Lodging — Goods not Brought for Purpose of Journey—Extent of Right of Detention.]—Defendant was a boarding house keeper, and plaintiff, while staying with him in a transient manner, brought a large quantity of personal property, consisting of household effects and other articles, to the defendant's house, and left them there, in the meanwhile becoming indebted to the defendant for board. There was some dispute as to the amount due, and the defendant refused to deliver the goods until payment, and claimed a lien on goods to the value of about $1,000 for a small balance due for board:—

Held, that a boarding house keeper's lien extends to all goods brought to the premises by the lodger while a guest, and not merely to goods brought for the purpose of the journey.

(2) That the lien extends to all the goods, no matter how great the value as compared with the amount due. *Newman* v. *Whitehead*, 11.

MASTER AND SERVANT.

1. *Agreement as to Wages — Evidence of—Weight of Evidence — Direct Contradiction Between two Witnesses of*

Equal Credibility.] — Plaintiff was employed by defendant for a number of years, entering such employment without making any agreement as to wages. In an action for wages the plaintiff swore and the defendant denied that after the plaintiff had been in the employment some time the defendant asked what wages the plaintiff would expect, to which the plaintiff replied "$50 per month." To this defendant made no reply, and the plaintiff continued in his employment. There was no corroborative evidence in support of this evidence on behalf of either party, and the learned trial Judge found both parties to be of equal credibility, and held that, according to the authorities, where one party alleges the occurrence of an incident which the other denies, both being of equal credibility, credit should be given to him who swears affirmatively; and found the above conversation proved, and gave judgment for the plaintiff. On appeal:—

Held, that, assuming that the testimony of the plaintiff as to the conversation to be true, the learned trial Judge was justified in finding a contract to pay wages at the rate alleged.

(2) That there is no rule of law affecting the question of credibility where the evidence is evenly balanced, as in this case; but the Judge must deal with each case as it affects his mind, and the learned trial Judge having found for the plaintiff and there being evidence to warrant such finding, the appellate Court should not interfere. *Watt* v. *Watt*, 141.

2. *Assignment of Wages Earned—Hiring at Monthly Wage — Gross Immoral Conduct by Servant—Seduction of Master's Infant Daughter—Continuing Offence—Right of Servant to Recover Wages.*]—Defendant employed a servant for the season at a monthly wage. During the term of his employment the servant seduced the master's fourteen-year-old daughter, and it appeared that such offence had been committed during every month of the hiring. The master did not become aware of the servant's conduct until the expiration of the term, and immediately laid an information against the servant and caused his arrest, and he was subsequently convicted. The servant assigned his wages to the plaintiffs, who brought action against the master to recover the amount alleged to be due. The claim was dismissed, and the assignees appealed:—

Held, that a servant who is, during his term of service, guilty of grossly immoral conduct affecting his master is not entitled to recover wages for the period in which he was guilty of such conduct, and the conduct of the servant in this case was such as to debar him from recovering the wages earned.

(2) That while the wages were due monthly, yet as the servant had during each and every

month of his employment been guilty of immoral conduct, no wages ever became due to him.

(3) The fact that the master was not aware of the servant's conduct until after the expiration of the term does not entitle the servant to recover. *Wood & McCausland* v. *Barker*, 400.

MECHANIC'S LIEN.

1. *Contract with School District—Right to File Lien Against Lands of—Construction of Statute — Enforcing Judgment Against School District.*] — A school district duly organized in Saskatchewan and declared to be a corporation let a contract for the erection of a school building. A sub-contractor filed a mechanics' lien against the building, and not being paid brought action to enforce the lien. It was objected that the lien was not enforceable against the lands of a school district:—

Held, that the lands of a school district were liable to be sold under the provisions of the Mechanics' Lien Act.

(2) The provisions of sec. 9 of the School Assessment Ordinance providing a means of realizing the amount of a judgment against a school district do not exclude other remedies. *Lee* v. *Broley*, 288.

2. *Time of Registration — Goods Supplied — Entire Contract — All Goods of Same Class —Notice of Lien of Sub-Contractor to Owner—Waiver—Building Contract — Acceptance — Architect's Certificate — Damages for Non-completion—Right to Set-off Against Lien-Holder.*] —Defendant B. contracted with defendant F. to build a house for the latter. Plaintiff supplied at different times during the work hardware and installed plumbing and heating apparatus and not being paid filed a lien. The last work done was on the furnace on January 3rd, the other work done by plaintiff having been completed and material supplied at an earlier date. The lien was filed on February 2nd. No formal notice was given by Smith to Fry of his claim as a sub-contractor but payment of the account had been discussed between them on several occasions, and Fry had promised to protect Smith. Fry also claimed that the work had not been finished by Bernhardt in accordance with the contract, that no architect's certificate had been produced and that he was entitled to set off certain damages. It appeared however that he had taken possession of the premises and that accounts had been stated to some extent and a balance found due:—

Held, that the plumbing, heating and building hardware were all supplied with the same object by the one party on the one hand to the one party on the other, standing in the same relationship and were so supplied as material and labour coming within the scope of the plaintiff's business and were so bound into one as to form an entire

contract and not as separate contracts or deliveries and the last work on the whole being done on the 3rd of January the lien was filed in time.

(2) That the defendant Fry by his conversation with plaintiff and assurance of protection of the account had waived notice of claim of lien.

(3) That by taking possession of the premises, selling the same and stating accounts with Bernhardt, Fry had accepted the work and waived the presentation of an architect's certificate.

(4) Damages for delay in performance can not be set off against a lienholder. *Smith* v. *Bernhardt & Fry*, 315.

MORTGAGE.

1. *Foreclosure — Order for Sale on Application for Foreclosure—Jurisdiction of Judge to Make Without Application by Party.*]—The plaintiff instituted proceedings under a mortgage, for foreclosure. On the hearing of the application the Judge in Chambers made an order for sale. None of the defendants applied for sale or offered to guarantee costs. On appeal:—

Held, that, except in a few cases such as in case of infants, the mortgagee has a strict right to foreclosure unless the mortgagor, a subsequent encumbrancer, or some person claiming through or under him or them, appears and asks for sale, and deposits such sum as may be determined as security for the performance of any terms such as security for costs which the Court may impose on granting sale. *Canada Life Assurance Co.* v. *Vance*, 398.

2. *Sale Proceeding Under — No Bid Except by Plaintiff — Land Sold for Twenty-five Cents —Application to Confirm Sale —Refusal to Confirm—No Consideration.*]—Plaintiff instituted foreclosure proceedings under a mortgage, and on the application of one of the defendants an order for sale was made with leave to the plaintiff to bid. No one appeared to bid at the sale save the plaintiff's agent, who bid twenty-five cents, and the land was knocked down to the plaintiff for that sum. On an application to confirm the sale, the Judge before whom the application was made refused to confirm. The company appealed:—

Held, that having regard to the nature of the property, the amount bid and for which the land was knocked down was so puerile that the Court was warranted in treating it as no sale, and refusing confirmation.

Held, also, however, that no substantial bid having been made, the sale should be treated as abortive, and an order for foreclosure made. *Canada Permanent Mortgage Corporation* v. *Jesse*, 251.

3. *Sale Under — Charge for Taxes—Not Provided for in Decree—Liability of Purchaser to Assume—Effect of Land Titles Act.*]—Certain lands were sold

under decree in an action under a mortgage for an amount in excess of that due under the first mortgage. No mention was made in the decree or at the sale of any claims to which the sale would be subject, but it subsequently transpired that there was a large amount due for unpaid taxes. On a motion to distribute the money in Court, the purchaser claimed that the amount of these taxes should be paid out of the fund in Court:—

Held, that under the Land Titles Act a purchaser takes title subject to unpaid taxes, and the sale therefore was subject to any amount due for taxes, and the purchaser was not entitled to be reimbursed in respect thereof. *Canada Permanent Mortgage Corporation* v. *Martin et al.*, 472.

4. *Account Under—Mortgagee Trustee for Benefit of Creditors —Mortgage for Benefit of Two Creditors Only— Moneys Received Distributed pro Rata — Account by Plaintiff as Mortgagee only for Moneys Received from Trust Fund — No Account as Trustee — Necessity for—Pleading — No Claim by Defendant for General Account.*]—Defendants, being indebted to plaintiff and the Fairchild Co. in large amounts, gave a mortgage to secure such indebtednes. At the same time they turned over to plaintiff as trustee all their assets to be distributed rateably among all their creditors. Large sums of money were received by plaintiff as trustee, and from time to time such moneys were distributed rateably, the share of plaintiffs and Fairchild being applied on the mortgage. The mortgagee being in default, sale proceedings were taken and an account was ordered. On taking account, the local Registrar ruled that the plaintiff need only account as mortgagee, and the accounts were taken on this basis, no account of the trust fund being taken. On motion to confirm the Registrar's report, it was objected that the plaintiffs should have accounted as trustees. In the defence of defendant Gray no claim for an account as trustee was made nor was the trusteeship of plaintiff pleaded:—

Held, that, the mortgagee and trustee being the same and the trust created for the payment of the indebtedness under the mortgage, the transactions should be considered as one, and the plaintiffs should, therefore, account not only as mortgagees but as trustees.

(2) That, while the defendants had not pleaded the trust agreement, yet the transactions were so intermixed that on a reference even in default of appearance account must necessarily be taken of both accounts, and the defendant should be in no worse position, having appeared and defended. *Cockshutt Plow Co.* v. *Gray & Smith*, 467.

5. *Sale Under—Regularity of Sale—Time for Holding Sale—*

Local Time—Standard Time.]—Certain land was ordered to be sold under mortgage at 12 o'clock noon at Esteven. In Esteven what is known as local or fast time is observed, such time being one hour faster than Standard time. The land was offered for sale and was sold at 12 o'clock noon local time. On application to confirm the sale:

Held, that as, under the provisions of sec. 31 of the Interpretation Act, what is known as Mountain Standard time is declared to be the time for the Province, the sale should have been held at 12 o'clock noon, Standard time, and not having been so held, it was irregular. *Great West Life Assurance Co.* v. *Hill*, 158.

6. *Foreclosure — Amending Order Nisi—Payment of Taxes made after Order—Increasing Amount to be Paid to Redeem—Costs.*]—Plaintiff obtained an order *nisi* for foreclosure. After the order had been made he, under the terms of the mortgage, paid a further sum for taxes. There was, however, no evidence that such payment was necessary to protect the security. He now applied for an order increasing the amount to be paid upon redemption, and fixing a new date for redemption. The mortgagor had been served but did not appear:—

Held, that as the mortgagor had not appeared and would in any event be required to pay the taxes and as reasonableness and convenience should be the basis of practice an order should be made for a new account and a new date for redemption.

(2) That as it had not been shewn that the payment of taxes was necessary to protect the security and as the mortgagee could have insisted upon payment before redemption, the costs of the application should be borne by the mortgagee. *Mathew* v. *McLean*, 301.

7. *Transfer of Land by Way of Security — Assignment of Mortgage Thereon to Owner of Fee—Effect of—Merger — Intention of Registered Owner when Taking Assignment of Mortgage—Effect of Land Titles Act—Equitable Jurisdiction of Court to Relieve—Res judicata.*]—Defendant Konschur was the registered owner of a half section of land, subject to a mortgage to the Mutual Life Assurance Co., a second mortgage to the plaintiff, and an execution recovered at the suit of the defendant Riddell. The assurance company began to forclose, and to protect her claim under the execution the defendant Riddell paid off the company, taking an assignment of the mortgage and securing a transfer of the fee simple from the defendant Konschur, who at the same time signed a memorandum acknowledging his indebtedness to her in respect of the amount advanced to pay off the mortgage. The assignment of the mortgage was then registered and endorsed on the title. On

the same date she also registered the transfer, whereupon the Registrar issued a new certificate without any memorandum of the mortgage transferred to Riddell, holding that the mortgage upon registration of the transfer merged in the fee simple, or was extinguished by the transfer. On the question being referred to the Chief Justice under the Land Titles Act, he held, on the evidence then before him, which was simply the documents in the registrar's possession, that the registrar had acted in accordance with the provisions of the Act. The plaintiffs then instituted an action for foreclosure or sale under their mortgage. The defendant Riddell by her defence asked a declaration that she was entitled to a charge in priority to the plaintiffs' claim for the amount of the Mutual Life Assurance Co.'s mortgage. The evidence shewed that the transfer to Riddell of the fee simple was intended as security only for the moneys advanced and her judgment against Konschur:—

Held, that as, when the defendant Riddell took and registered the assignment in question, it was her intention to keep alive the security, it was not extinguished, but remained to her benefit as a valid charge upon land in priority to the plaintiffs' mortgage. *Reeves* v. *Konschur*, 125.

8. *Foreclosure of—Mortgage Given to Secure Performance of Contract — Covenant to Pay Fixed Sum — Assignment of Mortgage — Partial Failure of Consideration—Rights of Assignee to Recover Full Amount—State of Accounts between Mortgagor and Mortgagee — When Assignee Bound by—Estoppel —How Mortgagor Estopped.*]—Defendant W. employed one D. to break certain land, and executed a mortgage for the contract price to secure payment of the same. The mortgage in question was on the face of it absolute, and contained the usual clause acknowledging receipt of the principal. D. assigned the mortgage to plaintiff, who proceeded to foreclose the same. It appeared that D. had never completed his contract, and of the work done only a small portion was of any value, and in respect of the balance it was so badly done that, in another action, the present defendant had recovered judgment against D. for damages to the land. The plaintiff claimed the whole amount of the mortgage covenant, and alleged that defendant was estopped as against the assignee from denying that the full consideration had not been advanced (1) by acknowledging receipt of the principal sum, and (2) that having recovered judgment on breach of contract in respect of the breaking, he must look to that for relief:—

Held, that an assignee of a mortgage takes, subject to the state of accounts existing between the mortgagor and mort-

gagee at the time of the assignment, and when the mortgagor shews that the amount advanced or the amount due is less than the face value of the mortgage, the assignee can only recover the full amount if he shew that he gave full value for the mortgage without notice that a less amount only was due, and that the mortgagor has enabled the mortgagee to deceive the assignee or has led the assignee to believe that the greater amount was due, and this not being shewn, the assignee could recover only the amount actually due.

(2) That it being the duty of the assignee to enquire into the state of the accounts, the defendants were not estopped from denying the amount due unless some act of the mortgagor justified the belief that the full amount was due, and the mere execution of the acknowledgment in the mortgage was not sufficient.

(3) That the judgment recovered by the mortgagor being for damages to the land by the work done and not for non-performance, the recovery of such judgment did not estop the defendant from claiming a reduction in the amount payable under the mortgages. *Swan* v. *Wheeler*, 269.

9. *Description of Land—Mortgage Covering Specified and Unspecified Land.*] — *See* LAND TITLES ACT, 5.

MUNICIPAL CORPORATIONS.

1. *Highway — Closing of by Municipal Corporation—Effect of By-law Closing Streets Passed Without Notice—Validity of — Effect of sec.* 101, *Municipal Ordinance—Defect of Substance or Form.*]—By a plan duly recorded in the proper land titles office, the area incorporated within the bounds of the city of Regina was shewn as divided into blocks and lots, streets and lanes. The defendant the city acquired block 197, excepting one lot, which was subsequently acquired by the plaintiffs, and other land, and being desirous of creating a number of warehouse sites, the city decided to close the streets and lanes leading to and through block 197, and for that purpose passed a by-law. No notice of this by-law was given to the registered owner of the lot subsequently acquired by plaintiffs. The defendants, having passed the by-law, proceeded to sell block 197 and portion of the streets and lanes so closed, and buildings were erected which obstructed the way of egress and ingress to plaintiffs' lot, and plaintiffs sued for a declaration that the streets and lanes closed were public highways, and for the removal of the obstructions:—

Held, that until notice is given to the registered or assessed owners of all land abutting upon any street or lane which it is proposed to close by by-law, under the provisions of sec. 5 of ch. 28 of the Ordinances of 1903 the

city council has no jurisdiction to pass any by-law closing such streets.

(2) That if any by-law is so passed without notice, the provisions of sec. 101 of the Municipal Ordinance (ch. 70, C.O., 1898) and sec. 307 of the Regina Charter (ch. 46 of 1906), now sec. 193, City Act, ch. 16, of 1908, will not validate any act done under such by-law, the lack of jurisdiction to pass such by-law without notice not being "a want of substance or of form." *Gesman* v. *City of Regina*, 50.

2. *Distress—Arrears of Taxes Due School District — Unlawful and Excessive Distress—Assessment of Interest of Occupant of Crown Lands—Regularity—Distress for a Greater Amount than Actually Due—Regularity of—Excessive Seizure.*]— Plaintiff had been for a number of years an occupant of Crown lands for which he had been assessed by the school district. No taxes were paid by plaintiff, and other parties subsequently assessed for the same land paid none. In 1908, these taxes being unpaid and the plaintiff having 73 head of horses on the land, the defendant school district authorized the defendant Hopper to seize the goods of plaintiff and the other occupants for such arrears. In pursuance of such warrant Hopper seized 73 head of horses belonging to plaintiff and 2 belonging to the other occupants. At most there was only $200 due for taxes. The proceedings connected with the seizure appeared to be regular. It was objected, however, that the assessment was irregular, but it had not been appealed from, nor were any grounds laid which would invalidate all the assessments. In an action for trespass and excessive seizure:—

Held, that while Crown lands cannot be assessed, yet the occupant thereof can be assessed in respect of his interest therein.

(2) That even if certain of the assessments were irregular, some of the taxes were properly due, and distress for a greater amount than that actually due is not *per se* actionable.

(3) That the seizure of 73 head of horses to satisfy a debt not exceeding $200 was an excessive distress for which the plaintiff was entitled to damages. *Robertson* v. *Hooper and Trustees of Glen Morris School District*, 365.

3. *Assessment — Occupant of Crown Land—Assessment in Respect of—Value to be Placed Thereon—Assessment of Real Property—Actual and Comparative Values.*] — Appellant was a lessee of Crown land and was assessed therefor by the respondent for the full cash value. He claimed to be liable for assessment only in respect of the value of his interest therein, and in any event that the assessment was excessive:—

Held, that in view of the provisions of sec. 26, sub-sec. 2, of the Schools Assessment Ordin-

PARTNERSHIP.

PRACTICE AND PLEADING.

will not entertain any application on behalf of the person in contempt, yet, if there are any facts which might lead to a conclusion that he had not wilfully disobeyed the order, the Court will give leave to appeal from the order of commitment.

(2) That disobedience of an order in a civil proceeding is not a criminal act so as to preclude any appeal in respect of the order for commitment. *Moose Mountain Lumber & Hardware Co.* v. *Paradis* (No. 2), 457.

3. *Appeal — Not Perfected—Motion to Dismiss—Practice—Costs.*]—Plaintiffs having given notice of appeal to the Court *en banc*, neglected to perfect the appeal within the time limited, and the defendant moved to dismiss. It was objected on the authority of *Griffin* v. *Allen*, 11 Ch.D. 913, that no costs of the motion should be allowed, as no demand had been made for costs of the appeal:—

Held, that *Griffin* v. *Allen*, *supra*, did not lay down the established practice in these matters, but merely indicated the course the Court would pursue in such cases, and no such practice having been established in this Court, the application should be allowed with costs, but the rule in *Griffin* v. *Allen* was a very proper one, and in the future the Court would not, in the absence of good cause, allow costs of an application to dismiss for want of prosecution of an appeal, unless the applicant has made a previous demand for costs of the appeal, which has not been complied with. *Wessell* v. *Tudge*, 231.

4. *Attachment of Debt — Judgment Against Garnishee — Order for Made ex Parte—Application to Set Aside—Regularity of Order—Summons to Set Aside—Grounds of Irregularity not Stated—Leave to Defend—Merits — Promissory Note not Due — Attachable Debt — Mistake by Clerk of Court—Effect of—Costs.*] — The garnishee not having, so far as the record shewed, disputed his liability to the defendant, an order was made *ex parte* giving leave to the plaintiff to enter judgment and issue execution against the garnishee, which was done. The garnishee then moved to set aside the order on the ground that it was made *ex parte*, and also on the ground that he had a good defence on the merits. These grounds were not, however, set out in the summons:—

Held, that an order for judgment against the garnishee in default of appearance may be made *ex parte*.

(2) The grounds of the alleged irregularity not having been stated in the summons, the application should not be granted on that ground.

(3) The garnishee having shewn that he had what might be good ground for disputing his indebtedness, and having accounted for his apparent default, should be allowed to dispute his liability.

(4) The plaintiff should not be prejudiced by reason of the mistake of the clerk of the Court in omitting to file with the record a letter written by the garnishee disputing his liability, and that the garnishee must therefore pay the costs of the judgment and of the application to secure the same. *Hunter* v. *Collings*, 207.

5. *Default in Delivery of Defence—Motion for Judgment—Affidavit of Merits—No Grounds of Information and Belief — Sufficiency of — Objection to Plaintiff's Case in Point of Law —Letting Defendant in to Defend on Account of Arguable Point of Law.*] — Plaintiff brought an action against defendant for rescission of a contract for sale and return of purchase money on account of vendor's default. The vendor appeared, but did not deliver a defence within the time limited. On a motion for judgment, an affidavit was filed by defendant's solicitor stating that in his belief defendant had a good defence on the merits, but no grounds for this belief were stated. It was also objected by counsel for the defendant that in any event in point of law the plaintiff's claim was not sufficient to entitle him to the relief asked for:—

Held, that an affidavit of merits filed by defendant on an application for judgment in default of defence must disclose facts shewing a good defence, and if sworn on information and belief must disclose the grounds of such information and belief.

(2) That if there appears to be a substantial question of law to be determined and arising out of the plaintiffs' claim, the Court may, even in the absence of an affidavit, allow the defendant in to defend. *Miller & Smith* v. *Ross*, 449.

6. *Injunction—Motion to Continue—Regularity of Procedure —Material Used in Support — Withholding Material Facts.*]— Plaintiff obtained an interim injunction restraining defendant from dealing with certain land, and by the order leave was given the plaintiff to move on notice on a certain day to continue the injunction. On the motion it appeared that the plaintiff had previously filed a caveat against the land in question, but the right set out in the caveat and that in the statement of claim were not identical. This fact did not appear in the material on which the injunction was obtained. It was objected that the application to continue could only be made by summons, and that the injunction should be dissolved on account of suppression of material facts:—

Held, that when leave is reserved in the order granting an injunction to move by way of notice to continue it, a motion to continue may properly be entertained upon notice.

(2) That, while withholding of a material fact on an *ex parte*

application for an interim injunction may be ground for refusing to continue it, still it is a matter in the discretion of the Court, and the fact here alleged to have been withheld did not so affect the case as to justify refusal to continue the injunction. *Bashford* v. *Bott*, 461.

7. *Injunction — Restraining Disposition of Personal Property —Adequate Remedy at Law — Fraudulent Conveyance — Action to Set Aside by Simple Contract Creditor—Right to Maintain—No Allegation that there were Other Creditors—Necessity of.*]—Plaintiff claiming as creditor under a bond conditional upon delivery of certain grain to them, which, it was alleged, had not been done, brought action to set aside a conveyance of that grain. In the claim it was alleged that the plaintiff sued on behalf of all creditors of defendants, but it was not alleged that there were creditors other than plaintiff, nor was it alleged that defendants were insolvent. An injunction was obtained from the local Master restraining the party to whom the grain had been sold from disposing of same, and restraining the defendants from dealing with any securities given in respect of the purchase price thereof. There was no allegation in the claim that the plaintiff did not have an adequate remedy on the bond.

On a motion to continue the injunction:—

Held, that an injunction should not be granted to restrain actionable wrongs where there is an adequate remedy at law, and as there was nothing to indicate that the plaintiff had not an adequate remedy on the bond, the injunction should not be continued.

(2) That a simple contract creditor, who has not obtained a judgment and issued execution thereon, cannot maintain an action to set aside a fraudulent conveyance unless he sue on behalf of all creditors.

(3) To support such an action it should appear and be alleged that there are other creditors of the defendant. *Lankin* v. *Walker*, 453.

8. *Injunction — Restraining Order—Disobedience of — Motion for Attachment for Contempt—Service of Injunction Order—No Notice under Rule* 330 *Judicature Ordinance — Necessity for in Orders Restraining—Original Order not Exhibited to Defendant when Served—Necessity for—Knowledge by Defendant of Contents —Delay in Service of Order Continuing—Effect of.*] — An order was made in this action restraining the defendant from interfering with the crop on certain land until further order, and a summons was granted with the order calling on the defendant to appear and shew cause why the injunction should not be continued until the trial of the action. A copy of this order was served upon the de-

fendant personally, and he appeared by counsel on the return, and after the hearing, the injunction was continued until trial. The defendant afterwards entered on the land, drove off the plaintiffs' servants who were threshing the crop, and removed it. On a motion for attachment it was objected by the defendant that no memorandum under Rule 330 of the Judicature Ordinance was indorsed on the copy of the order served; that it did not appear that a copy of the original order was exhibited to the defendant when service was effected, and that, as the order continuing the injunction was made on the 25th of September and was not served until the 21st of October after the alleged contempt, there was undue delay on the part of the plaintiff:—

Held, that it is not necessary to indorse the memorandum required by Rule 330 of the Judicature Ordinance on a restraining order, the provision only applying to mandatory orders.

(2) While inclining to the opinion that it was necessary to exhibit the original order when making service, yet as it appeared that the defendant was aware of the terms of the injunction order, and as in such circumstances there may be a contempt without service, the objection was not a valid one.

(3) That while the plaintiffs had been guilty of undue delay in serving the order continuing the injunction, yet, inasmuch as the original order restrained the defendant until further order it was the duty of the defendant to ascertain if the order was still in force before interfering with the property. *Moose Mountain Lumber and Hardware Co.* v. *Paradis*, 382.

9. *Judgment — Motion for Summary—Affidavit Verifying Claim — Sufficiency of — Time for Making Application—Issue Joined.*]—Plaintiff applied to strike out appearance and enter judgment against the defendant under Rule 103 of the Judicature Ordinance. The affidavit filed alleged a judgment recovered against the defendant in the Alberta Court for a certain sum, but did not set out that he was still indebted to the plaintiff in that or any sum:—

Held, that the affidavit did not sufficiently establish the cause of action. *Gaetz* v. *Hall*, 184.

10. *Pleading — Amendment —Fraud—No Damages Alleged —Plea Only Open to Party Immediately Affected.*] — Plaintiff applied to amend his statement of claim by adding an allegation that the instrument which he sought to have set aside was executed by defendant Carrigan by the fraud of the other defendant. It was not alleged that the defendant Carrigan was defrauded or damaged:—

Held, that the defendant could not plead such fraud, as it raised an issue not between the plain-

an agreement whereby he assigned an agency held by him to the defendant. After action brought, and upon the examination of the defendant for discovery, it transpired that after making the contract with the plaintiff he retired from business, and his business was acquired by a concern which secured the agency in question. Plaintiff thereupon applied at the trial to amend by pleading alternatively that if the defendant gave up the agency he did so of his own accord and in violation of the expressed and implied terms of the contract, whereby the plaintiff suffered damage. No facts were set out in support of the plea. The trial Judge on the trial allowed the amendment subject to objection.

No defence was delivered to the amended plea. After trial, and in his judgment, the trial Judge decided that the amendment should not have been allowed, and dismissed the plaintiff's original claim, but found for him on a breach of contract, notwithstanding his finding that the amendment was an improper one. On appeal:—

Held, that the proposed amendment, lacking as it did any allegation of fact to support it, should have been disallowed, and the plaintiff, therefore, could not recover.

(2) That an embarrassing plea should not be allowed by way of amendment.

(3) That no defence having been pleaded to the amended plea, there was no issue before the Court. *Anderson* v. *Olson*, 405.

14. *Probate — Application for Ancillary Letters—Evidence in Support—Exemplification Under Seal of High Court of Justice for England.*]—This was an appeal from the decision of a Judge of the Surrogate Court refusing a petition for ancillary letters probate upon petition of the executor supported by an exemplification of letters probate under the seal of the High Court of Justice for England:—

Held, that the production of an exemplification of probate under the seal of the High Court of Justice for England, together with the affidavits under the Succession Duty Ordinance, was sufficient to entitle the executor to ancillary letters probate. *In re Chesshire*, 218.

15. *Service — Mortgage — Foreclosure—Order Nisi for — Service of—Necessity of Serving—Service by Posting—Sufficiency.*]—Plaintiff secured an order *nisi* for foreclosure, and served the defendant, who had not appeared, by posting a copy of the order in the office of the Local Registrar. On an application for final order after default, the Local Master refused the application on the ground that the service of the order *nisi* was not sufficient. Upon reference to a Judge of the Supreme Court:—

PRAIRIE FIRE.

ance—"Permitting Fire to Escape" — Interpretation.] — Plaintiff's buildings and other property were destroyed by a prairie fire alleged to have spread from the ashes of a stack of straw burned by the defendant. The evidence shewed that before the stack was fired a guard of about 40 yards in width was burned around it, and there was also a fire guard three furrows in width about 300 yards to the west. The prairie fire did not occur until four days later, on which day a high wind was blowing, and indications pointed to the remains of the straw stack as the origin of the fire:—

Held, that in view of the climatic conditions prevailing in the Province, a man bringing fire upon his land must exercise the greatest caution, and under those conditions precautions must be taken to prevent the fire spreading until such time as it is absolutely extinguished, and the defendant, having failed to take such care, was liable to the plaintiff in damages.

That if a person does not properly watch a fire started by him and see that it does not get away, and it escapes, he thereby "permits" it to escape within the meaning of sec. 2 of the Prairie Fire Ordinance (ch. 87, C.O. 1898). *Roberts* v. *Morrow*, 15.

See RAILWAY COMPANY, 1.

PRINCIPAL AND AGENT.

1. *Commission on Sale of Land—Right of Agent to—Payable Only on Payment of Purchase Price—Cancellation by Vendor—Effect of on Agent's Right to Commission.*]— Defendant listed certain land with plaintiff for sale on certain terms, and a commission of $200 was agreed upon. Plaintiff sold the land to a purchaser who could not pay the agreed amount as deposit, but the defendant accepted the purchaser and signed an agreement to sell. At this time it was arranged that the payment of the plaintiff's commission should be postponed until the purchasers could get a loan to pay for the property or sell it. Subsequently no payment being made under the contract other than the deposit of $50, the vendor cancelled the contract:—

Held (LAMONT, J., dissenting), that, the plaintiff, having secured a purchaser who was willing to purchase for the price agreed and who was accepted by the defendant, was, in the absence of any agreement to the contrary, entitled to his commission.

(2) That, even if the time of payment of the commission had been postponed, yet, as the defendant had by his action in cancelling the contract made it impossible for the purchaser to complete his contract, so that the plaintiff would be entitled to receive his commission, the plaintiff was entitled to recover not-

withstanding the arrangement for postponement. *McCallum* v. *Russell*, 442.

2. *Commission on Sale of Land—Duty of Agent—Sale Without his Knowledge.*]—The principal promised the agent a commission if he could procure a purchase of certain land. The agent interested a party in the property, but the latter being unable to purchase mentioned the property to a third party who purchased from the principal on the terms stated without the agent's knowledge and without the principal being aware that the purchaser had learned of this sale through the agent:—

Held, that in order to entitle an agent to his commission the sale must be the direct result of his efforts, and the sale in this case could not be said to be the direct result of the agent's efforts, and he was not entitled to commission. *Vachoe* v. *Stratton*, 72.

RAILWAY COMPANY.

1. *Destruction of Property by Spark from Locomotive—Negligence of Defendant—Proximate Cause.*]—Plaintiff was the owner of a warehouse in close proximity to defendant's railway. Within six feet of the warehouse he piled a quantity of hay, which became ignited by a spark from a locomotive on the railway, and the fire spread to the warehouse, which was totally destroyed. The jury found that the fire originated from the defendant's engine, but that the plaintiff had been guilty of negligence in storing the hay in such close proximity to the railway:—

Held, that as the jury had found the plaintiff negligent, and such negligence was the proximate cause of the damage, he could not recover. *Cairns* v. *Canadian Northern R.W. Co.*, 19.

2. *Common Carrier — Goods Received for Shipment—Contract to Pay Charges—Parties to —Consignor Presumed to be Agent for Consignee—Liability of Consignee — Action for Freight—Remedies of Consignee —Completion of Contract—Acceptance by Consignee.*]— Defendants purchased a quantity of cement for shipment to them at Regina, and it was so shipped by the consignors. The contract of shipment provided that delivery should be made in the railway company's shed at destination or when the goods had arrived at the nearest place to be reached on the company's railway. The goods arrived at Regina and were with the consent of the defendant placed for unloading at a point indicated by the defendant's manager. The goods were subsequently taken away by another party who had purchased them from defendant and who did not pay the freight, and the defendant refusing to pay the same the plaintiff brought action to recover the charges:—

Held, where goods are with the consent or by the authority of the purchaser consigned by the sellers as consignors to be carried by a railway company as common carriers to be delivered to the purchaser as consignee, and the name of the consignee is known to the carrier, the ordinary inference is that the contract of carriage is between the carrier and consignee, the consignor being the agent of the consignee to make it, and the contract in this case was therefore between the carrier and the consignee.

(2) That the plaintiff company could therefore maintain an action for recovery of the freight charged from the consignee.

(3) That the plaintiff completed its contract and became entitled to recover its charges when the car containing the goods was placed for unloading with the knowledge and consent of the consignee. *Canadian Pacific R.W. Co.* v. *Forest City Paving and Construction Co.*, 413.

REAL PROPERTY.

Buildings Placed Thereon — Property in.] — An execution debtor placed certain buildings on land, the property of the defendant in the issue, for which it appeared ground rent was paid. These buildings were of wood resting on loose stone foundations to which they were not affixed nor were the foundations let into the earth, but the earth had been levelled to make the foundation level. A cellar had been dug in the earth under one building. A judgment creditor seized these buildings, and the defendant, the owner of the fee simple, claimed them as part of the freehold, and an issue was directed:

Held, that to be a parcel of the freehold a building must be affixed to it or something connected with it, or there must be evidence to shew that it was intended that the buildings should be part of the freehold; the buildings in question not being affixed to the freehold, and there being no evidence that they should be a part of it, the buildings were the property of the debtor and liable to seizure. *Hamilton* v. *Chisholm*, 227.

SALE OF GOODS.

1. *Manitoba Grain Act—Storage of Wheat to be Specially Binned — Storage Tickets Issued—Agent Agreeing to Specially Bin Wheat Contrary to Instructions—Liability of Elevator Company — Delivery of Wheat—Amount to which Bailor Entitled—Place of Delivery.*] — Plaintiff delivered a quantity of wheat to defendants' elevators at Saskatoon and Osler, receiving tickets or receipts therefor in the form of storage tickets mentioned in the Manitoba Grain Act. The agent marked the words "specially binned" on these tickets; but it was shewn he had express instructions not to accept any wheat to be specially binned. The

amount of wheat shipped from the bins in which plaintiff's wheat was stored was greater than that mentioned in the tickets, and he claimed this wheat. The plaintiff also claimed damages by reason of the defendants' failure to deliver the wheat to him at Palmerston, Ont., the wheat being in fact delivered at Fort William:—

Held, that the plaintiff having accepted ordinary storage receipts under the Manitoba Grain Act calling for the delivery to him of the "above quantity grade and kind of wheat," could not claim that the wheat was specially binned under the provisions of the Act, and was entitled only to delivery in accordance with the provisions of the Act when the grain is stored under storage tickets.

(2) That the indorsement of the words "specially binned" on the ordinary storage receipt would not give any greater privilege than those to which the plaintiff was entitled under storage tickets.

(3) That the contract between the parties being for delivery of the wheat in car lots at any terminal elevator in the district, the delivery of the wheat at Fort William was sufficient compliance with the contract. *Caswell* v. *Western Elevator Co.*, 153.

2. *Entirety of Contract—Intention of Parties—Sale by Description—Misrepresentation—Admissibility of Parol Evidence to Vary Written Contract—Acceptance by Buyer—Reasonable Opportunity of Inspection.*] —Plaintiffs agreed to sell defendant certain threshing machinery, consisting of "a second-hand, portable John-Abell engine, known as the Sutcliffe engine," separator, and other accessories. The engine was second-hand, and the other articles were new. The memorandum of the agreement was embodied in two documents, the reason given by the agent of the plaintiff being that they would not warrant the second-hand goods, but would warrant the new goods, the document relating to the engine containing no warranty. It was alleged that the engine was represented as having been recently re-built and as good as new. When the goods arrived, the defendant, who knew nothing of engines, made a cursory examination of the articles, and then signed the notes for the purchase price. Subsequently his engineer examined the engine and refused to have anything to do with it, on the ground that it was so badly out of repair as to be unsafe. The defendant thereupon refused to accept the goods. In an action for the purchase price:

Held, that as the agreement was for articles necessary to constitute a complete threshing outfit, and the memorandum of sale was only severed on account of the warranty, the contract must be deemed to be an entire contract, and the defendant was not required to accept any portion

of the goods if he was not required to accept all.

(2) That the representations as to the character of the engine were not of a collateral nature, but were a description of the property to be sold, and the sale was therefore a sale by description, and as the goods delivered did not correspond with the description the purchaser was entitled to reject them.

(3) That as the character of the engine to be sold was not sufficiently stated in the memorandum of sale, parol evidence was admissible to prove the description of the engine to be delivered.

(4) That the execution of the notes for the purchase price after a cursory examination by the defendant, who was not capable of judging whether the engine was as described, was not an acceptance of the goods, but he was entitled to a reasonable opportunity of examining the goods with the assistance of one qualified to judge of the quality of the goods delivered, and to reject them if they did not comply with the description. *J. I. Case Threshing Machine Co.* v. *Fee*, 38.

3. *Inspection of by Purchaser —Ascertained Goods—No Implied Warranty.*] — Defendant purchased a fanning mill and gave a note therefor. Before purchasing he examined the mill, which was delivered to him. In an action on the note he alleged that the mill was not capable of doing good work, and claimed breach of warranty. The trial Judge found that no express warranty had been proved, and gave judgment for the plaintiff. On appeal:—

Held, that there was evidence to support the trial Judge's finding that there was no express warranty, and the appellant having purchased the mill after inspecting the same and relying entirely on his own judgment, there was no implied warranty. *Imperial Bank* v. *Keivell*, 410.

4. *Action by Foreign Partnership in Firm Name—Action by Foreign Company — Right to Maintain—Acceptance of Goods —Damages for Breach of Warranty—Evidence of Breach.*] — Defendant ordered a car of apples, which the plaintiff shipped on terms that it should be accepted on delivery at point of shipment. The car was received in due course and unloaded by the defendant, who first complained that one box was short and one bad, and later that ten boxes were bad, and at a subsequent date that the whole shipment was bad. There was no evidence as to the condition of the goods when delivered for shipment.

At the trial it was objected that a foreign partnership (the plaintiffs being resident out of the Province) could not maintain an action in the firm name, and subsequently, when it transpired that the plaintiff was a corporation, that being a foreign

corporation not registered they could not maintain an action. In an action for the price of goods sold and delivered:—

Held, that defendant, having appeared to the writ of summons, waived any objection to the plaintiff's right to bring an action in the firm name if the plaintiffs were a firm.

(2) That the contract being made by correspondence, and delivery having taken place out of the Province, the plaintiff could not be said to be a foreign company carrying on business in the Province.

(3) That the defendant not objecting to the condition of the whole shipment when received, and having taken possession of the car and sold some of the contents, must be deemed to have accepted the goods.

(4) That it was, however, a condition of the sale that the goods should be in merchantable condition when delivered for shipment, and the defendant could accept the same and sue for breach of warranty if the goods were not as ordered.

(5) That while the defendant's actions raised a very strong presumption that the goods were practically satisfactory when delivered, yet as the plaintiff had given no satisfactory evidence that the goods were in good condition when shipped, and the defendant having shewn damages, he was entitled to an allowance for such damages. *Shinn* v. *McLean,* 336.

5. *Ordinance — Memorandum in Writing—Connecting Different Documents — Admissibility of Parol Evidence—Inconsistency Between Documents—Acceptance—Receipt.*] — The defendant gave plaintiff's traveller an order for certain goods, a memorandum of the sale being made and delivered to the defendant; but not signed by him. Some of the goods were shipped, when the defendant wrote a letter to the plaintiffs referring to "an order given to your traveller," but not specifically referring to the written memorandum. When the goods reached their destination the defendant opened the cases, examined the contents, but did not take delivery, claiming the goods were not as ordered. This, however, was not pleaded as a matter of defence:—

Held, that where in the letter signed by the party to be charged a reference is found to something which may be a conversation or may be a written document, parol evidence is admissible to shew that it was a written document which was referred to, and the document referred to having been proved, it may be put in as evidence and so be connected with the one already admitted or proved, and parol evidence was therefore admissible to connect the letter and the previous order.

(2) That opening the case and examining the contents was an act of the buyer, which recognized a pre-existing contract of

sale and constituted a sufficient acceptance to take the case out of the statute. *Steine* v. *Korbin*, 6.

6. *Agreement in Writing — Collateral Verbal Agreement — Evidence of—Admissibility.*]— Plaintiff sued to recover the price of a threshing machine, for which the defendants had given a lien note. The defendants pleaded that they signed the note on the express verbal understanding that the plaintiff should furnish all necessary repairs to put the machine in good condition:—

Held, that evidence was admissible to shew that a written contract was subject to a collateral verbal agreement. *Brownsberger* v. *Harvie*, 481.

7. *Foreign Judgment—Defendant not in Jurisdiction of Court —Effect of—False Representations—Grounds of Belief in Truth of—Right of Buyer to Rescind.*] — Defendants ordered certain butter making machines from plaintiff on the representation that with these machines butter could be made from milk fresh from the cow. On receiving the machines they found that they would not make butter as represented and immediately returned them. The representation in question was made by the plaintiff's agent who did not give evidence, but it did not appear that he had any ground for believing the representations to be true. In fact the plaintiff's own literature shewed the representations to be unture. The plaintiff recovered judgment in the Supreme Court of Alberta for the price of the goods, the defendants not being resident in Alberta and not appearing and now sued upon the foreign judgment or alternatively for goods sold and delivered:

Held, that the representation being untrue and the agent having no ground for believing it to be true the Court could infer that it was fraudulently made and the defendants were therefore entitled to rescind the contract and return the goods.

(2) (Following *Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670), the defendants not being residents of or domiciled in Alberta and not having appeared in the action there the plaintiff could not now recover upon the foreign judgment recovered by default. *McCullough* v. *Defehr and Dyck*, 303.

8. *Sale of Wheat by Sample— Right of Inspection—Rejection.*] —Plaintiffs purchased from defendant by sample a quantity of wheat to be shipped. The wheat was duly loaded and the bill made out to defendant, but some days afterwards the defendant, having been paid for the wheat, transferred the bill of lading by indorsement to the plaintiff. The car was delayed in shipment, and when it reached its destination the plaintiffs found the wheat in one end of the car not equal to sample,

being badly heated. The plaintiffs refused to accept the shipment, and notified defendant, who sent an agent to inspect it, and as a result of this inspection the agent requested the plaintiffs to unload the car and make the best possible out of it, which was done. The plaintiffs then brought action for damages. The defendant's evidence went to shew that the wheat was in good condition when loaded in the car, while expert witnesses for the plaintiffs were of the opinion that it must have been tough when loaded. In explanation of heating it was shewn that after the car was loaded and before the door was closed a violent rainstorm had occurred, and that the wheat in the end of the car which, from the direction of the wind, would naturally have been reached by the rain, was that which was damaged. This storm took place before the indorsement of the bill of lading. The plaintiffs having obtained judgment for damages, the defendant appealed:—

Held, that the reasonable explanation of the condition of the wheat was, that it had become dampened by the rain, and as this took place while the wheat was still at the risk of the defendant, the plaintiffs were entitled to recover.

(2) That the true measure of damages was the difference between the price agreed to be paid for the good wheat and the amount realized from the sale of the damaged wheat. *Moore Milling Co.* v. *Laird*, 369.

9. *Fraud — Substitution of Other Goods for Those Ordered — Payment of Notes Given Therefor After Knowledge of Fraud—Action for Damages—Right to Maintain—Measure of Damages.*]—Plaintiff offered by correspondence to purchase by description a certain horse. The defendants agreed to sell at the price offered and shipped a horse to the plaintiff. The horse shipped was not that ordered but the plaintiff did not know this and accepted the horse as the one ordered, it being however a very much inferior animal. He shortly afterwards learned that he had been defrauded, but notwithstanding retained the horse and continued to use it and paid the notes given for the purchase price. He now sued for damages:—

Held, that the plaintiff notwithstanding his retaining the horse and making payments after knowledge of the fraud was entitled to maintain an action for damages for the delivery of an inferior animal in place of that ordered. *Perry* v. *Kidd*, 330.

10. *Cancellation of Order before Shipment—Acceptance by Buyer Under Mistake as to Consignor—Conversion — Establishment of Relation of Bailor and Bailee.*]—Defendant ordered a car of apples from plaintiff but before shipment cancelled the order and placed an order

elsewhere. The plaintiff shipped the car originally ordered and this reached the defendant without notice and he, thinking the car to be the one subsequently ordered, accepted it. When the second car arrived however he discovered his mistake and immediately notified the plaintiffs that he held the goods at their risk. Some of the apples had been sold, and subsequently to prevent loss a further quantity was sold. In an action for conversion or for goods sold and delivered:—

Held, that there was no conversion, the defendant not being aware that the car had been shipped by plaintiff, nor was there any sale and the relation between the parties was merely that of bailor and bailee and the defendant therefore should account only for moneys actually received less freight and expense of sale. *Pioneer Fruit Co.* v. *Litschke*, 325.

SALE OF LAND.

See VENDOR AND PURCHASER.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER.

TRUST AND TRUSTEES.

1. *Trust — Crown Grant to Trustees—Sale by Trustee—Subsequent Conveyance to Other Trustees—Notice of Agreement to Sell—Issue of Certificate of Title—Effect of Land Titles Act —Application to Bring Under Act—Effect of False Statement Therein — Fraud—Statute of Limitations — Time—Effect of Fraud Upon.*]—By Crown grant certain lands were conveyed to trustees upon certain trusts. These trustees entered into an agreement to sell to the plaintiff upon deferred payments. Before such payments were completed the trustees from the Crown conveyed to other trustees the deed containing a reference to the sale to one C., who assigned to the plaintiff. These last mentioned trustees made application to have the land brought under the Land Titles Act, filing a declaration that they knew of no interests in the land other than their own, and upon such application a certificate of title was issued. Subsequently other trustees were appointed and a new certificate issued. It appeared that each body of trustees had express notice of the plaintiff's claims. The plaintiff, after the conveyance by the trustees from the Crown, paid the balance due and secured a conveyance from the original trustees in 1896, but on account of the title being vested in the other trustees he could not register this transfer. The second body of trustees were registered as owners of the land in question in 1893. The plaintiff took no action until 1906, when he filed a caveat, and subsequently, the registered owners refusing to recognize his claim, he brought action for a declaration that they held the land in trust for

him. All the various bodies of trustees were connected with and held in trust for the Presbyterian Church in Canada, and in the original grant it was expressly provided that the Church might at any time change the trust, but subject to all existing rights:—

Held, that the trustees claiming under conveyance from the trustees from the Crown, being voluntary transferees, were subject to the trusts contained in the original grant from the Crown, which preserved rights created by the original trustees.

(2) That notwithstanding that the subsequent trustees were registered owners of the land, the Court under its equitable jurisdiction could give relief to the plaintiff if the certificate of title were obtained by fraud, and the suppression of information by the applicants, when the land was brought under the Act, as to the rights created in favour of the plaintiff, of which they were aware, constituted fraud.

(3) That under the provisions of sec. 25 of ch. 27, 3 & 4 Wm. IV., the defendants were not entitled to avail themselves of the provisions of the Real Property Limitations Act, not being transferees for value, and being trustees. *Fish* v. *Bryce*, 111.

2. *Verbal Declaration of Trust —Registration of Caveat Respecting.*]—*See* LAND TITLES ACT, 6.

VENDOR AND PURCHASER.

1. *Specific Performance — Action for—Refusal to Execute Transfer to Nominee of Purchaser — Cancellation of Contract—Right of Purchaser to Repayment of Instalments Paid.*] —Plaintiff purchased certain land from defendant and paid a portion of the purchase price thereon, and went into possession. The purchaser being in default under the agreement, the defendants served notice of cancellation under the terms of the contract. The plaintiff then procured a third party to make a tender of the purchase price, and demanded that the defendants execute a transfer to such third person. There was at that time no assignment of the original contract to the plaintiff's nominee, nor was the original contract produced, and there were to the knowledge of the defendants executions against the land of the plaintiff. The defendants refused to execute the transfer, and retained the money paid by plaintiff, who sued for specific performance, or return of the purchase money paid:—

Held, that there was no tender by the plaintiff, and the defendants were under the circumstances justified in refusing to execute the transfer to plaintiff's nominee, and the plaintiff was not entitled to specific performance.

(2) That, following *Hall* v. *Turnbull* (1909), 2 Sask. L.R. 89, the plaintiff was entitled to a return of the purchase money

paid on account of the sale. *Banton* v. *March Bros. & Wells*, 484.

2. *Sale of Lands — Specific Performance — Tender — Payment Attached—Tender of Balance—Sufficiency — Laches — Waiver — Time Essence of Agreement—Intention of Parties.*]—Plaintiff agreed to purchase certain land from the defendant and made the first payment thereon, it being also understood that the defendant should retain possession for some time. Before the second payment became due the plaintiff was served with a garnishee summons at the instance of a creditor of defendant, and pursuant to such summons paid into Court the amount attached. When the second payment became due plaintiff tendered the amount less the amount attached, which defendant refused to accept, apparently basing his refusal on the deduction of the amount paid into Court. Nothing further was done until the time came for the defendant to deliver possession, when several conferences took place, during which the plaintiff asked for a definite statement from the defendant as to his intentions, stating that he must have the land or his money back. At the last of these conferences the defendant, without committing himself, promised to give an answer later. He never made any further communication. The plaintiff did not tender the next instalment, and about a year after the time when he should have received possession he brought action for specific performance. After action brought the defendant served notice of cancellation. In an action for specific performance:—

Held, that an instalment due under an agreement for sale containing a covenant by the purchaser to pay is a debt which is attachable.

(2) That tender of the balance of the instalment after deducting the amount paid into Court was a sufficient tender.

(3) That the defendant's conduct in refusing to give a definite refusal to complete the contract and deliver possession, and promising an answer which he never gave, would excuse any laches on the part of the plaintiff in claiming relief. *Campbell* v. *MacKinnon*, 345.

3. *Sale of Land and Business —Default in Payment of Purchase Price — Cancellation of Contract—Notice—Sufficiency of —Forfeiture—Relief Against—Breach of Contract by Purchaser.*]—Plaintiff agreed to sell defendant a tailoring business, including the premises, stock-in-trade and tools, part of the purchase price to be paid in cash and the balance in instalments. The agreement provided that "the purchaser to have sixty days' notice of each of his quarterly payments being due before the contract can be declared void." The defendant made default in payment, and the plain-

tiff gave notice that "unless those notes with interest are paid in full within the next 60 days I will proceed to foreclosure," and brought this action for a declaration that the contract was cancelled. The agreement also contained a provision that the plaintiff would not carry on business in the vicinity for ten years, and it transpired in evidence that he had carried on business after the sale:—

Held, that the agreement evidently contemplated that the contract might be declared void on default, and as the notice substantially complied with the terms of the agreement and sufficiently conveyed the plaintiff's intention to the defendant it was sufficient to determine the contract, but as the plaintiff had himself been guilty of a breach of the contract the Court would relieve against the forfeiture. *Dobson* v. *Doumani*, 190.

4. *Action for Purchase Price —Misrepresentation by Vendor as to Price Paid for Land and Buildings—Effect of.*] — Plaintiff sold defendant a house and lots and sued defendant for the purchase price. The defendant alleged that he was induced to purchase on the plaintiff's representation that he had paid $375 for the lots and $400 for the house. The plaintiff admitted that the lots cost him only $175 and the house $300. The defendant, before purchasing, examined the property, and after purchasing made inquiries as to the value:—

Held, that the representations in question must be regarded as representations respecting the value, and there being no fiduciary relationship between the parties the purchaser was not justified in placing confidence in them.

(2) That in order to avoid a contract for misrepresentation, the representation must not only be untrue, but the purchaser must have been induced to act upon that representation, and as the vendor had examined the property before purchasing, and after purchasing had made inquiries as to the value, it would appear that he had not relied solely upon the representations and so been induced to enter into the contract on the strength of such representations. *Flemming* v. *Bonnie*, 30.

5. *Agreement for Sale of Land on Deferred Payments—Default by Purchaser—Cancellation of Contract—Specific Performance—Right to—Delay — Forfeiture of Purchase Money Paid—Jurisdiction of Court to Relieve.*]—Plaintiff purchased a section of land from defendant on deferred payments, the contracts containing a clause providing for cancellation upon non-payment of any of the instalments, and that in the event of cancellation the vendor should be entitled to retain all purchase money paid. Default was made in payment of the second instal-

ment, and the defendant cancelled the contract and declared the moneys paid forfeited. After a lapse of about a year the plaintiff tendered the balance due and demanded a conveyance, which being refused, he brought an action for specific performance:

Held, that the plaintiff was not entitled to specific performance by reason of his delay.

(2) That the purchase money paid not being in the nature of a deposit, and being a substantial payment, its forfeiture on cancellation would constitute a penalty against which the Court would relieve. *Hall* v. *Turnbull*, 89.

6. *Default of Purchaser — Rescission of Contract—Forfeiture of Payments—Possession of the Premises—Time Essence of Contract—Intention of Parties —Peaceable Possession—What Constitutes.*]—Plaintiff was the owner of certain property in Yorkton, upon which were certain buildings in which she carried on business as dealer in implements and as a keeper of a feed stable. The implement business consisted largely of selling goods on commission as agent for several different machine companies. She entered into an agreement to sell the property in question to the defendant, together with the business carried on by her, and to use her best efforts to procure for the defendant the agencies for the several companies represented by her. The agreement provided for quiet possession of the premises by the purchaser until default, and that upon default the plaintiff could cancel the contract and retain all moneys paid by the purchaser in respect thereof. The defendant being in financial difficulties, was unable to secure the agencies in question, notwithstanding that the plaintiff gave assistance to secure such agencies. The defendant made default in payment of the second instalment and the plaintiff served notice of cancellation. Subsequently the plaintiff entered into possession of the premises in the absence of the defendant, who on his return resisted the plaintiff's right to possession. The plaintiff sued for a declaration that the contract was cancelled, while the defendant claimed the return of the purchase price on the ground that he had not secured the agencies:—

Held, that the agreement having declared time to be of the essence of the contract, and there being nothing in the dealings between the parties to indicate that it was not really the intention of the parties that it should be so, it must be held that time was of the essence of the contract.

(2) (Following *Steele* v. *McCarthy*, 1 Sask. L.R. 317) that time being of the essence of the contract and the defendant having made default under such agreement, and the plaintiff having performed her part of the contract, the plaintiff was en-

titled to cancel the contract under the provisions thereof, and such cancellation was not in the nature of a forfeiture against which the Court could relieve, but was distinctly a matter of agreement between the parties to which effect must be given.

(3) That the Court could only order the return of the payments made by the defendant as an alternative to specific performance by the plaintiff, which could not be ordered, as the defendant was not ready and willing to perform his part of the agreement. *Hole* v. *Wilson*, 59.

7. *Sale of Land on Deferred Payments—Default by Purchaser—Cancellation and Forfeiture of Moneys Paid—Land Encumbered for Amount Greater than that Due by Purchaser—Right of Vendor to Insist on Payment.*]—Plaintiff purchased a section of land from defendant upon deferred payments. The plaintiff made default in one payment, and such default continuing for two months the defendant served notice of cancellation of the contract in accordance with the terms thereof, and claimed the right to retain all moneys paid thereon. At the time of cancellation the defendant had encumbered the land for an amount greater than that which was due by the plaintiff. The plaintiff tendered the balance due and brought action for specific performance:—

Held, that the defendant, having encumbered the land for an amount greater than that due by the plaintiff at the time default was made, was not entitled to be paid or to receive the balance due in respect of the land by the plaintiff, and not being entitled to such payments could not cancel the contract because payments were not make to him. *Keinholz* v. *Hansford*, 86.

8. *Sale of Land Held Under Agreement for Sale—Covenant in Agreement Restricting Assignment Without Approval of Vendor—Effect of—Transfer of Land by Purchaser in Fee Simple—Refusal of Vendor to Approve—Effect of Refusal on Estate of Transferee—Equitable Estate Created—Subsequent Assignment by Original Purchaser—Approval Thereof by Vendor Rights of Transferee and Assignee—Priorities — Fraud on Part of Agent of Assignee — Obtaining Approval of Vendor by—Effect of on Right of Transferee and Assignee.*]—Defendant Bennett purchased from the Canadian Pacific Railway Company certain land on deferred payments, and received a contract whereby the company agreed to convey the land to him on payment, and which contract also contained a clause providing that no assignment of the purchaser's interest in the land should be valid or effectual unless and until approved of by the company. Subsequently Bennett, being indebted to plaintiff, was approached by one J. D. McLeod, an agent for plaintiff,

and asked for security, and by way of security the defendant gave to the plaintiff a transfer in fee simple of the land, the legal estate being still in the railway company. The plaintiffs applied to the railway company for the approval of the transfer, which approval was refused on the ground that the conveyance was not in the form of an assignment of Bennett's equitable interest in the land.

Some time after McLeod again saw Bennett, and made an arrangement with him to sell the same land for him, and, in pursuance of the assignment, McLeod sold the land to one M. J. McLeod, and procured an assignment of the railway company's contract in proper form, which assignment was duly approved by the company. This approval was, however, secured by the fraud and criminal acts of J. D. McLeod, who forged the name of M. J. McLeod to the assignment, made a false affidavit of execution, and also forged the name of M. J. McLeod to an affidavit accounting for the absence of the original agreement for sale, which affidavit also contained false allegations. In an action to set aside the conveyance to M. J. McLeod:—

Held, that the clause in the contract providing that no assignment thereof should be valid unless approved of by the company was a reasonable provision and not void as being a restraint on alienation, the vendor having the right while the contract remains uncompleted to decide with what persons he shall be brought into contractual relations.

(2) That the railway company having refused to approve of the transfer to the plaintiff, and the fraud which had been perpetrated having been perpetrated upon the railway company, the plaintiffs had no *locus standi* to attack the transaction. *Sawyer, Massey* v. *Bennett*, 93.

9. *On Appeal.*] — *Held* (LAMONT, J., dissenting), that the clause in the agreement requiring the approval of the vendor to any assignment was effective only as between the vendor and purchasers, and, therefore, an assignment without the approval of the vendor would be valid and binding as against all the world except the vendor, and create an equitable estate or interest in the land in question in the transferee or assignee.

(2) That transfer in fee simple given by Bennett to the plaintiffs, while it did not convey his estate at law, the fee simple being vested in the railway company, was sufficient to create an equitable estate in the plaintiff.

(3) That the equities between the plaintiffs and Mr. J. McLeod being equal, the approval of the assignment to McLeod by the railway company would give McLeod a better equitable estate than the plaintiff.

(4) But (LAMONT, J., dissenting), in determining the rights of parties in cases of contest between persons having equitable interests, all the circumstances must be taken into consideration in order to determine which has the better equity, and the approval of McLeod's assignment having been procured by fraud and criminal acts on the part of his agent, the approval so obtained could not give him any better position in equity than if the approval had not been obtained, and, therefore, the plaintiffs' equitable estate, being first in point of time, should prevail.

(5) That in equity the assignment to McLeod was subject to the estate previously conveyed to the plaintiffs, and, that being so, McLeod, by securing the approval of the railway company and thus bettering his equitable position, the plaintiffs have a right to attack the means by which such approval was obtained, and to shew that such approval was improperly obtained.

(6) That (LAMONT, J., dissenting) the knowledge of McLeod's agent of the previous transfer, when the approval of the railway company was obtained, was notice to McLeod of such previous transfer. *Sawyer & Massey Co.* v. *Bennett et al.*, 516.

10. *Land Titles Act—Transfer under Power of Attorney—Subsequent Conveyance by Registered Owner—Action to Set Aside Conveyance—Fraud and Collusion.*] — Defendant C. gave a power of attorney to his wife to sell and convey certain land, and in pursuance of that authority she did convey to the plaintiff. She subsequently disappeared and could not be found. The plaintiff did not take immediate steps to perfect his title, and on applying he was unable to produce the power of attorney and so secure title. In the meantime defendant C. conveyed to the defendant M., taking a note in payment of the purchase price, and M. registered his transfer. To procure registration a new certificate of title had to be procured, and this was done by order of a Judge on production of an affidavit which indicated the loss of the originals. It appeared, however, that when this affidavit was made the defendants were aware of the plaintiff's claim, but no mention of it was made in the affidavit, nor was it disclosed to the Judge. It also appeared that C. had told M. of the giving of the power of attorney, and there was also evidence to lead to the belief that the defendants, when the transfer to M. was made, were afraid of such outstanding title. The note given for the purchase price was never paid, nor did it appear that C. had ever made any effort to collect it. It also appeared that M. had purchased the property without seeing it, and having no idea of its value:—

Held, that the Land Titles Act preserved to the Court jurisdiction to deal with questions of fraud and with other equities that may arise affecting land, and which would properly be cognizable on the equity side of the Court, and, as the evidence indicated fraud and collusion between the defendants, the transfer to the defendant M. should be set aside. *Turner* v. *Clark*, 200.

11. *Specific Performance — Vendor Owner of Uncertain Equitable Interest—Relief to which Plaintiff Entitled—Misrepresentation—Laches — Property Traversed by Public Road — Divisibility of Contract.*] — The plaintiff and defendant agreed to an exchange of certain properties in which they, at the time of the agreement, had some equitable interest. The plaintiff subsequently acquired title to his land and brought an action against the defendant for specific performance, the defendant having then only an equitable interest of an indefinite character in the property he had agreed to convey. The defendant pleaded misrepresentation, and particularly that the plaintiff had not a good title, owing principally to the fact that part of the property in question was traversed by a road which had been used by the public for upwards of twenty-four years:—

Held, that in view of the uncertain nature of the interest of the defendant in the land in question, the Court could not decree specific performance of the contract.

(2) That the property in question being traversed by a highway in use for over twenty years, and in respect of which the owner might at any time be involved in a litigation, the Court would not compel the purchaser to accept the property subject to a prospective lawsuit.

(3) That even though the road in question affected only a portion of the land, yet the contract was an entire one, and the Court could not decree specific performance as to part. *Wellwood* v. *Haw*, 23.

12. *Sale of Land—Vendor not Owner nor in Position to Compel Conveyance—Rescission by Purchaser—Right to.*] — Plaintiff applied to defendant to purchase a quarter section of land, and defendant agreed to sell such land and accepted the first payment thereon, which he paid over to his principal. Subsequently he discovered that he had sold the wrong land, and thereupon he entered into negotiations with the owner of the land which he had actually sold with a view to securing it for his purchaser. This he was able to do, but instead of securing from the purchaser an agreement with his principal at the stipulated price, he took an agreement in his own name and at an increased price. The defendant did not deliver any copy of the agreement to the plaintiff, and

WINDING UP.

LAW SOCIETY OF SASKATCHEWAN.

Synopsis of proceedings of the adjourned regular meeting of the Benchers held at Regina on Thursday the 24th day of June, 1909.

After the minutes of the previous meeting had been read and adopted a considerable number of complaints against solicitors were dealt with. Certain of these were referred back to the complainants for proof of their several allegations, but matters relating to two members of the Society were placed in the hands of the Society's solicitor for immediate action.

Leave was given for the enrolment of the following named gentlemen as barristers and solicitors:—O. R. Regan, A. M. McIntyre, C. W. Hoffman, P. M. Anderson, A. E. McDougall, R. D. McMurchy.

Admission as student-at-law was allowed in the following cases:—A. Gowler, J. P. Pfeiffer, T. C. Davis, A. N. Grant, E. A. Gee, P. D. Tanner, Henry Ward, J. McL. Swain, Mattie M. Wilson.

The following students obtained permission to study for a term at Osgoode Hall:—D. McKenzie, F. W. Deutschmann, F. B. Bagshaw, John Martin.

It appeared from correspondence between the secretaries that the Benchers of the Law Society of Alberta would probably arrange at their next meeting for reciprocity with this Society so that students who were admitted by the Law Society of the North-West Territories, upon completion of their term of service and upon passing the required examinations in either province, could be enrolled as barristers and solicitors in both provinces upon payment of a single enrolment fee. The following resolution was therefore passed.

"That Rule 49 be amended by adding thereto the following provisos:—

"Provided that students enrolled and in good standing on the fifteenth day of September, A.D. 1907, under the Law Society of the North-West Territories may continue their course in the Province of Alberta, and services performed and examinations taken in the Province of Alberta shall be recognized in this province; and proof of enrolment as barrister and solicitor in

the Province of Alberta shall in such cases permit enrolment as barrister and solicitor in this province without further formality when half the fee of one hundred dollars collected by the Law Society of Alberta for enrolment is remitted to this Society.

"Provided further that the preceding proviso shall come into effect and remain in force when and for so long as the Law Society of Alberta adopts a similar provision."

Rule 55, sub-rule c. was amended by inserting after the word "is" where it occurs in the second line thereof, the words "so far as his official records shew."

It was resolved that barristers and solicitors, after enrolment, be supplied at the expense of the Society with the Saskatchewan Law Reports beginning with the first number of the volume commencing next after their enrolment; and that, in cases of alleged non-delivery of parts, upon proof of mailing by the publishers, duplicate parts be not supplied at the expense of the Society.

The secretary was instructed to point out to the publishers of the Western Law Reporter that very few Saskatchewan cases are now appearing in that publication, and to say that in order to maintain its usefulness to practitioners in this province, Saskatchewan cases should receive as much attention as those of other provinces.

An opportunity having occurred to obtain excellent portraits in oils of the Hon. Chief Justice, and the Hon. Hugh Richardson, formerly senior Judge of the Supreme Court of the North-West Territories, the same were ordered to be purchased and hung in the Court House at Regina, and a special committee was authorized to obtain similar paintings of the other members of that Court, *i.e.*, Chief Justices McGuire and Sifton, and Judges McLeod, Rouleau and Scott.

As it appeared that the accommodation in the several libraries is very limited no extensive purchases of law books was authorized.

An interim balance sheet to May 31st last, and an estimate of receipts and expenditure for one year submitted by the secretary-treasurer is appended.

N. MACKENZIE, *President.*

C. H. BELL, *Secretary-Treasurer.*

Estimate of receipts for a period of One Year from May 31st, A.D. 1909.

Annual fees, 196 cases, as for last 12 mos.	$ 1,955.00
Enrolment fees, 15 at $410, 14 at $100, as for last 12 mos.	7,605.00
Students' fees, 33 cases, as for last 12 mos.	2,045.00
Interest on bank balance, as for last 12 mos.	448.81
Examinations, 3 per annum, 15 candidates each, based on last 12 mos.	450.00
	$ 12,503.81
Estimated expenditure, without further purchases of books	10,785.36
Estimated surplus for the year	$ 1,718.45

Estimate of expenditure for a period of one year from May 31st, A.D. 1909.

Saskatchewan Law Reports,		
Editor	$ 800.00	
Printing, 1 vol. of 650 pp. say, with insurance on stock	1,400.00	
Reporters, for copies judgments	200.00	
		$2,400.00
Territories Law Reports,		
Say 3 parts at $290.00, based on cost of last three parts		870.00
Libraries,		
Librarian at Regina	420.00	
7 other librarians at $50 and $100	500.00	
Back pay to two librarians when catalogues furnished	103.86	
Balance due on C. L. B. Co. contract	336.50	
Continuations, based on last seven months (If based on last 12 months, $2,235.00) Note increase.	2,680.00	
		4,040.36
Examinations,		
3 examiners at $150	450.00	
5 presiding examiners at $16, 3 exams. each, based on last year	80.00	
		530.00
Discipline,		
Say 4 cases at $75 each		300.00
Carried Forward		$8,140.36

Brought Forward		$8,140.36
Convocation,		
4 meetings, based on last 5 meetings		550.00
Insurance,		
Falls due March, 1910, for three year term, say		1,000.00
Office Expenses,		
Secretary-Treasurer	$720.00	
Postage	50.00	
Petty cash	20.00	
Premiums on Treasurer's bond	25.00	
Stationary, printing, additional insurance and incidentals, say	255.00	
		1,095.00
		$10,785.36

Balance Sheet to May 31st, A.D. 1909.

Bank balance, 31 October, 1908		$ 14,570.12	
Annual fees		1,910.00	
Enrolment fees		5,355.00	
Students' fees		980.00	
Interest on bank deposit		448.81	
Law Society, N.W.T.		16.67	
Expense			$ 1,207.79
Examinations			246.30
Territories Law Reports			442.41
Saskatchewan Law Reports			1,596.00
Arcola Law Library			980.40
Battleford Law Library			319.30
Moose Jaw Law Library			946.95
Moosomin Law Library			350.20
Prince Albert Law Library			310.05
Regina Law Library			1,270.73
Saskatoon Law Library			997.85
Yorkton Law Library			228.40
Balance on hand,			
Bank	$ 14,354.22		
Cash	30.00		
			14,384.22
		$23,280.60	$23,280.60

Paid to Canada Law Book Co., Ltd.	$ 5,088.36
Paid to The Carswell Co., Ltd.	235.00
Sundry payments on library accounts	80.52
Total payments on library accounts	$ 5,403.88