THE OFFICIAL LANGUAGE OF THE COURTS IN SASKATCHEWAN.*

I may preface my discussion by adverting to the fact that the right of the Court to require all proceedings in the English language has been raised before me in Court at least twice, that I remember. It fell to me to open the first sitting of the King's Bench Court in the Judicial District of Gravelbourg, and, the matter being raised, a direction was made that all proceedings be had and taken in English. Subsequently at a Court in the same place counsel was denied the right of addressing a jury in French. These were practical decisions as justice could not otherwise have been intelligently administered. The recent discussions have prompted me to delve deeper into the question and I am happy to put before you for your consideration the result of my research and cogitation so far as it has gone.

Saskatchewan was part of the North-West Territories, and, prior thereto part of Rupert's Land under the sovereignty of "The Company of Gentlemen Adventurers trading into the Hudson's Bay," commonly known as The Hudson's Bay Company. The Hudson's Bay Settlement, being an English settlement, was held to have introduced English Law into the settlement. Imperial statutes were passed as to some measures of law, concerning the trial of offences in the Indian territories in the Courts of Upper Canada (Ontario). These were subsequently repealed on the surrender of the territory by the Hudson Bay Charter; and after its surrender, special legislation of the Dominion Parliament still carried into the express law of Manitoba and into the express law of Saskatchewan, introduced English law in so far as it was applicable, as of the 15th day of July, 1870.

It is necessary, therefore, to turn to discover the law of England on the use of languages in the Courts. An historian could interestedly trace the use of Anglo-Saxon languages in the Courts before the Norman Conquest. It is recorded in all histories that with the Norman Conquest, French became the language of the Court and in the transaction of all the business of all Courts, save that official records were in Latin. Such was the practice down to 1362. In that

*Address on the introduction of the English Language as the language of the Courts in Saskatchewan by Mr. Justice Taylor at a meeting of the Moose Jaw Bar Association.

year, in the reign of Edward III the matter was dealt with by statute. The section thereof relating to the matter is sufficiently interesting to be given in full:

15. Item, because it is often showed to the king by the prelates dukes earls, barons, and all the commonalty, of the great mischiefs which have happened to divers of the realm, because the laws, customs, and statutes of this realm be not commonly known in the same realm, for that they be pleaded, showed, and judged in the French tongue, which is much unknown in the said realm: so that the people which do implead or be impleaded, in the king's court, and in the courts of other have no knowledge nor understanding of that which is said for them or against them by their sergeants and other pleaders; and that reasonably the said laws and customs shall be the more soon learned and known, and better understood in the tongue used in the said realm, and by so much every man of the said realm may the better govern himself without offending of the law, and the better keep, save, and defend his heritage and possessions: and in divers regions and countries where the king, the nobles, and other of the said realm have been, good governance and full right is done to every person, because that their laws and customs be learned and used in the tongue of the country: the king, designing the good governance and tranquility of his people, and to put out and eschew the harms and mischiefs which do or may happen in this behalf by the occasions aforesaid, hath ordained and established by the assent aforesaid, that all pleas which shall be pleaded in his court whatsoever, before any of his justices whatsoever, or in his other places, or before any of his other ministers whatsoever, or in the courts and places of any other lords whatsoever within the realm, shall be pleaded, showed, defended, answered, debated, and judged in the English tongue, and that they be entered and inrolled in Latin; and that the laws and customs of the same realm, terms, and processes, be holden and kept as they be and have been before this time; and that by the ancient terms and form of pleaders, no man be prejudiced, so that the matter of the action be fully showed in the declaration and in the writ: and it is accorded by the assent aforesaid, that this ordinance and statute of pleading begin and hold place at the fifteenth of Saint Hilary next coming.

Lawyers continued in the use of a mongrel language which seems to be a cross between Latin and French. Law reports as late as the reign of Queen Elizabeth are printed in this language.

However, so far as England is concerned, the use of any foreign language in the Courts, or its records, was emphatically abolished by a statute introduced by Sir Robert Walpole in 1731, 4 George II, c. 26, which I also give in full:

Whereas many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language, those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practising the law: to remedy these great mischiefs, and to

protect the lives and fortunes of the subjects of that part of Great Britain called England, more effectually than heretofore, from the peril of being ensnared or brought into danger by forms and proceedings in courts of justice, in an unknown language, be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons of Great Britain in parliament assembled, and by the authority of the same, that from and after the twenty-fifth day of March one thousand seven hundred and thirty-three, all writs, process and returns thereof, and proceedings thereon, and all pleadings, rules, orders, indictments, informations, inquisitions, presentments, verdicts, prohibitions, certificates, and all patents, charters, pardons, commissions, records, judgments, statutes, recognizances, bonds, rolls entries, fines and recoveries, and all proceedings relating thereunto, and all proceedings of courts leet, courts baron and customary courts, and all copies thereof, and all proceedings whatsoever, in any courts of justice within that part of Great Britain called England, and in the court of exchequer in Scotland, and which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever, and shall be written in such a common legible hand and character, as the acts of parliament are usually engrossed in, and the lines and words of the same to be written at least as close as the said acts usually are, and not in any hand commonly called court hand, and in words at length and not abbreviated; any law, custom or usage heretofore to the contrary thereof notwithstanding: and all and every person or persons offending against this act, shall for every such offence forfeit and pay the sum of fifty pounds to any person who shall sue for the same by action of debt, bill, plaint or information in any of His Majesty's courts of record in Westminster Hall, or court of exchequer in Scotland respectively, wherein no essoin, protection or wager of law, or more than one imparlance, shall be allowed. . . .

USE OF ENGLISH LANGUAGE IN THE LAW COURTS MADE OBLIGATORY.

That statute seems to stand unamended since that date.

Therefore the rule of law in England on the 15th of July, 1870, was that all proceedings in the Courts or which concerned the law and administration of justice were to be in the English tongue and language only, and not in Latin or French or any other tongue or language whatsoever.

It might be suggested that any judge in England who disobeyed that mandatory statute would leave himself open to impeachment before the Houses of Parliament, and dismissal from office.

That, therefore, may be taken to be the state of the law which was introduced into the North-west Territories as of the 15th day of July, 1870.

In the period prior to Confederation in Canada generally, saving Quebec, English law had been introduced. Save in Quebec it was the prevailing language.

USE OF ENGLISH AND FRENCH LANGUAGE.

In the miscellaneous provisions of the British North America Act, 1867, the matter is dealt with in a section:

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

The suggestion immediately arises whether this statute impliedly, save as excepted, recognises English as the only lawful language for Canada, and whether thereafter it was open for any legislative body in Canada to deal with the question or alter that rule of law. Certainly thereafter no Canadian enactment could curtail the right to use French to the extent covered in the section. Can it be argued that no Canadian statute could extend the right to the use of the French language beyond the section? It may be noted that Manitoba has assumed to pass such legislation making provision for the use of French language in the Courts and in its assembly, and has provided for mixed juries of jurors speaking French and English.

To continue with the history of the legislation pertinent to the matter we find after the 15th of July, 1870, provision made for a legislative assembly of limited jurisdiction in the North-West Territories and for Courts therein, and a special provision which seems to have originated in 1877, 40 Vict. c. 7, s. 11, amended and carried in the various revisions, until repealed by the Parliament of Canada in 1906. This section provides for the use of either English or the French language in the legislative assembly of the Territories, and "in the proceedings before the Courts." The wording is that "either the English or the French language may be used "by any person in the proceedings before the Courts." It will be noted that this section did not leave it to the discretion of a presiding judge or officer to permit or allow any person to use French in the Courts. It conferred on any person the right to use French in any proceedings in the Court. That section was number 110 in the North-West Territories Act. The last enactment of this provision is to be found in 1891 (54 and 55 Vic. s. 18). The prior corresponding provision was in that year repealed, and in section 18 a new section to be numbered 110, was substituted to the same effect. On its first

enactment the Courts governed by the direction, would be the Courts of the stipendiary magistrates in the Territories, and on the passing of the statute constituting The Supreme Court of the North-West Territories (49 Vic. c. 25) that Court as well. The Supreme Court of the North-West Territories was continued by appropriate legislation until in turn it was abolished by legislation of the Province of Saskatchewan, in 1907, and in its place and stead the Province constituted The Supreme Court of Saskatchewan, succeeded in turn in 1918 by the Court of Appeal and Court of King's Bench for Saskatchewan. It was in 1907 also that the District and Surrogate Courts were first created and constituted. The Courts to which these express directions in the statute were then applicable, are not now in existence.

We also find that the commissioners revising the Dominion Statutes in 1906 state that the above provision to which I have referred, enabling French to be used in the Court, was superseded by the provisions in the Act of 1905 disestablishing the Court. It was recommended for repeal, and was in fact subsequently repealed. There is not, therefore, any Dominion legislation expressly touching the question, save the provision in the British North America Act.

Turning to legislation on practice and procedure emanating from local autonomy the general observation may be made that with the establishment of the Supreme Court of the North-West Territories and the creation of a legislative assembly of the Territories, legislative jurisdiction over the practice and procedure of that Court was conferred on the Legislative Assembly. In the first Judicature Ordinance of this assembly 1893, No. 6, are two pertinent provisions, as follows:

> Section 3. The jurisdiction of the Supreme Court of the North West Territories shall be exercised, so far as records procedure and practice, in the manner provided by this ordinance, and where no special provision is contained as nearly as may be as in the High Court of Justice in England.

And rule 556 (which came into force on the 1st January, 1894)

> Subject to the special provisions of this ordinance the procedure and practice existing at the time of the coming into force of this ordinance in the High Court of Justice in England shall as nearly as may be, be held to be incorporated herewith.

JURISDICTION, PRACTICE AND PROCEDURE.

In the Consolidated Ordinances 1898, N.W.T., the section was re-drafted to read:

3. The jurisdiction of the Supreme Court of the North-West Territories shall be exercised so far as regards procedure and practice in the manner provided by this Ordinance and the rules of Court, and where no special provision is contained in this Ordinance or the said rules it shall be exercised as nearly as may be as in the Supreme Court of Judicature in England as it existed on the first day of January, 1898. No. 6 of 1893, s. 3. No. 12 of 1898, s. 3.

and the above quoted rule was re-enacted as part of the Statute itself (C.O. 1898, c. 21, sec. 21):

Subject to the provisions of this Ordinance and the rules of Court the practice and procedure existing in the Supreme Court of Judicature in England on the first day of January, 1898, shall as nearly as possible be followed in all causes, matters and proceedings.

These provisions will be found carried from revision to revision and standing as expressing the legislative will of to-day.

Is the language in which proceedings are to be conducted in the Courts a matter of practice and procedure? It will be noted that in both the English Statutes above quoted it is dealt with as a matter of practice and procedure and referred to as such. We find C. J. Haultain in the Court of Appeal for Saskatchewan in Karst v. *Berlinsky*, 1930, 24 S.L.R. 536, stating that "Rules of Evidence are rules of "procedure," citing English authority therefor.

No Saskatchewan legislation appears to touch the question, save that it is to be noted that where statutory forms are provided these forms are all in the English language. It can be said that from cover to cover there is not in any Saskatchewan statute now in force a suggestion to permit the use of French in the Assembly, in any Court, or school in the Province. All the Courts to which the Dominion special legislation, to which reference has been made, could apply, were dis-established by provincial legislation; and if the Dominion Commissioners (the Chairman of which body was a Judge of the Supreme Court of Canada) were correct in their view that the legislation was superseded as to the Dominion by the dis-establishing of the Court of the North-West Territories, it might be contended that that was an opinion that the dis-establishment of these Courts in Saskatchewan also superseded the legislation in question, and that without express enactment this Dominion Statute cannot be taken as applicable to the newly constituted Courts in the Province of Saskatchewan; and that the true rule must be sought through the reference to the English law relating to practice and procedure as it existed on the first day of January, 1898. This much is clear that so far as the Dominion Parliament has power to repeal the provision dealing with the use

of French in the Court, the provision has been expressly repealed. It never was adopted by express legislation as a rule of practice and procedure by the legislative assemblies of the North-West Territories or Saskatchewan, and since 1893 there has been express legislation introducing the English practice and procedure in civil matters.

It would be interesting to pursue the enquiry as to wherein any jurisdiction to permit the use of French in a Provincial Court (other than Quebec) would reside. Reference has been made to the provisions of the British North America Act, s. 133, relating to the use of languages in Canada. In addition thereto the division of legislative jurisdiction between the Federal and the Provincial Legislative enacting authorities must be considered. Could a province enact legislation enabling criminal proceedings to be had and taken in French? Could a Province substitute for the forms in the criminal code or in the Bankruptcy Act, for example, forms to the same effect, but in French, or Latin, or any other language? On the other hand, would it be open to the Dominion Parliament to enact legislation providing that a trial of a matter falling in the Provincial field might be had in French? Dominion legislation is not wholly silent concerning the administration of criminal justice, for not only are the forms provided for use (other than in the Province of Quebec), all in English, but in the Criminal Code, s. 852, it is provided that statements in the indictment may be made in popular language without technical averments, &c.

Since the establishment of the Supreme Court of the North-West Territories no practice permitting the use of French in the Courts seems to have been countenanced. Even at Prince Albert where with Prendergast, J., whose mother tongue is French, and all the Court officials could speak French, with counsel learned in French, such as MacKay, J.A. and Turgeon, J.A., who then practised at that city, all proceedings were had and taken in English.