THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS AND IN ADMIRALTY,

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED

AND

A DIGEST OF THE PRINCIPAL MATTERS.

7492

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THE LAW SOCIETY OF BRITISH COLUMBIA,

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JUDGES

OF THE

Court of Appeal, Supreme and County Courts of British Columbia and in Admiralty

During the period of this Volume.

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

IN RE MABEL PENERY FRENCH.

MORRISON, J.

1911

Oct. 24.

COURT OF APPEAL

1912

Jan. 9.

IN RE MABEL P. FRENCH

Statute, construction of—Legal Professions Act, R.S.B.C. 1897, Cap. 24, Sec. 37, Sub-sec. 3, (b), 4 (b)—Interpretation Act, R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-secs. 13 and 14—Right of women to admission to Legal Profession.

The Legislature, when framing the Legal Professions Act, had not in mind the probability of women seeking to enter the profession; therefore any remedy for the omission lies with the Legislature and not with the benchers of the Law Society.

Judgment of MORRISON, J. affirmed.

APPEAL from the judgment of MORRISON, J. on a motion for a writ of *mandamus,* heard at Vancouver in September, 1911, refusing an order directing the benchers of the Law Society to accept the application of Miss Mabel Penery French for enrolment on the books of the Law Society as an applicant for call and admission. Statement

J. A. Russell, in support of the motion: The applicant is a bachelor of civil law, an attorney, solicitor and barrister of the Supreme Court of New Brunswick: see *In re Mabel P. French* (1905), 37 N.B. 359. The benchers of the Law Society of Argument

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British Columbia are given power to call to the bar "any person being a British subject," etc., in connection with which see section 10, sub-section (13) of the Interpretation Act, R.S.B.C. 1897, chapter 1, which is entirely without limitation. Therefore, even if the right of women to be called to the bar does not exist at common law, it has been given them by express legislation in British Columbia. Further, section 37, sub-sections 3 (*b*) and 4 (*b*), makes special provision for call and admission of barristers and solicitors from other Provinces. The applicant here is a barrister and solicitor, duly qualified, of another Province, and relies on the provision in the British Columbia statute and rules, which virtually invites barristers and solicitors from other portions of the British dominions to apply for admission to the profession in British Columbia. It is submitted that, there being no distinction as to sex in New Brunswick, and a New Brunswick barrister being eligible as such for call in British Columbia, the applicant has all the necessary qualifications. The fact that the framer of the British Columbia rules was of opinion that the Act referred to the male sex only, and used the pronoun "he" throughout the rules is not an argument against the present application. It is also submitted that the fact that Ontario and New Brunswick passed enabling legislation, was merely declaratory of the existing law, and is not opposed to the present application. In short, the language of the Legal Professions Act and the Interpretation Act is sufficiently comprehensive to include both sexes, and to hold otherwise would be a strained construction.

Argument

L. G. McPhillips, K.C., contra: At common law a woman could not be admitted to the practice of law; express legislation is necessary, and this is confirmed by *In re Mabel P. French* (1905), 37 N.B. 359. It is to be noted that throughout the statute the words "he" and "his" are used, and the rules framed in pursuance of the statute follow in the same line, even to using the word "son" in the form of the articles of clerkship. The definition of "person" in the Interpretation Act does not assist the applicant: see sub-section 14 of section 10. It was held in *In re*

Mabel P. French, supra, that the New Brunswick Interpretation Act did not apply. See also the last part of section 10 of our Interpretation Act. The Inns of Court in England refuse to call women, and the Incorporated Law Society declines to admit them, and there is no way in which the matter can be brought before the Courts, as a *mandamus* will not lie: see *The King* v. *The Benchers of Lincoln's Inn* (1825), 4 B. & C. 855. It is submitted that a *mandamus* will not lie in this case. To consider the contention made that barristers and solicitors from other Provinces being eligible, and certain other Provinces permitting women to enter the profession, therefore the applicant is entitled by virtue of her New Brunswick status, would be to extend to women of other Provinces a right and privilege denied to British Columbia women. It is submitted that this is a question for the Legislature and not for the benchers.

Argument

Russell, in reply.

24th October, 1911.

MORRISON, J.: The Legislature in the Legal Professions Act has dealt with a particular class of British subjects within this Province, *viz.*: male persons—adults. To the like class coming from other British possessions they have extended the rights and privileges thus accorded that class in this Province upon compliance with certain prerequisites. If, as is invariably urged in construing and interpreting statutes, the intention of the Legislature is to be sought and considered, then, in my opinion, the Legislature had not in mind the contingency that women would invoke the provisions of the Act, and I do not think it applies to them.

Judgment

Counsel for the applicant laid great stress upon sub-section 13 of section 10 of the Interpretation Act. But, in applying this alternative meaning which may be put upon words importing the masculine gender, regard must be had to the context—to what the Legislature was specifically dealing with. Nor yet do I think that the interpretation of the word "person" in sub-section 14 of section 10 supports the applicant's contention. There is nothing in the whole scope of the Act or in the long usage and history of the Courts calling for extension of the

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meaning of the words "he" and "she" as sought in the present application.

The rejection of the applicant by the benchers was not capricious or partizan. They took the ground that the enactment which she invokes does not expressly or by necessary implication empower them to entertain the application. If I am right, then her only remedy is by way of aid from the Legislature, before a committee of which, doubtless, Mr. *Russell's* gallant argument may prevail.

The applicant appealed and the appeal was argued at Vancouver on the 5th of December, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

J. A. Russell, for appellant.
L. G. McPhillips, K.C., for respondent Society.

9th January, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: If at common law women are not eligible to the legal profession, then I think it is quite clear that the Legal Professions Act cannot be construed as extending to them. It has been often affirmed by the highest authorities that a statute will not be construed to change the existing law unless the intention to do so is clearly expressed, or can fairly be inferred from the language and scope of the enactment, and our statute does not, in my opinion, respond to either of these tests.

The trend of authority at common law is that women are not eligible. No case can be found in English or Canadian jurisprudence in support of the appellant's application. The only direct authority is the other way, and there are many inferentially against it. In the United States the cases are conflicting, but the one which was decided by the highest authority there—the Supreme Court—and which is based upon the common law of England, is against the appellant.

That there are cogent reasons for a change based upon changes in the legal status of women, and the enlarged activities of modern life, may be admitted, but if we were to give effect to these considerations, we should be usurping the functions of the

Legislature rather than discharging the duty of the Court, which is to decide what the law is, not what it ought to be.

I would dismiss the appeal.

IRVING, J.A.: In reading section 10 of the Interpretation Act, and its sub-sections 13 and 14, with which we are concerned, it is well to remember that section 2 of the same Act provides that the Interpretation Act shall not take effect where the provision is inconsistent with the intention and object of such Act, or "where the interpretation which such provision would give to any word is inconsistent with the context."

An interpretation clause should be understood to define the meaning of the word thereby interpreted in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation.

What is the subject-matter of the statute we are discussing? It was passed in 1884, and relates to the incorporation of the Law Society, to which body is committed power to make rules for the education and examination of students, and for their call to the bar or admission as solicitors, and it also enables them to admit to practice barristers and solicitors of certain other countries upon complying with certain conditions.

The present applicant bases her application upon her admission in 1906 to practise as an attorney in New Brunswick, and her call in the following year to the bar of that Province, and it is argued that there is nothing in the context of the Legal Professions Act, 1895, to prevent the section relating to admission of barristers and solicitors from New Brunswick being read so as to include a lady.

In the event of her admission or call, she would become a member of the Law Society, and in reading the particular section upon which she bases her application, we must have regard to the whole Act.

Some three years after the Act in question was passed, a decision was given by Chitty, J. in *In re Duke of Somerset* (1887), 34 Ch. D. 465, on refusing to appoint a woman guardian *ad litem* to an infant defendant. In the course of his judgment he said:

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"To grant the application would be a dangerous innovation, as a married woman, so far as I can see, would not be responsible for the costs of an improper action, or liable to pay those of an improper defence, or, at most, would only be responsible for such costs to the extent of her separate estate, which would necessitate an inquiry as to her separate estate, with all its attendant inconveniences."

That was the position then; but before that it was laid down in the Mirror of Justice, a work issued at the time of William the Conqueror, *"femes ne poient estre attorneys,"* c. 5, s. 1 & 3: Pulling on Attorneys, 3rd Ed., p. 8. Nor could they be articled because they were not *sui juris*. Marriage, by the common law of England (which we took over as of 19th November, 1858) merged the *persona* of the wife in that of the husband, and operated as a gift to the husband of the enjoyment of every kind of property of which she was possessed during the coverture—an absolute right to the personal estate; a right to her choses in action if he reduced them into possession; and a right to the rents and profits of her real estate.

On the 19th of November, 1858, the admission of attorneys in England was regulated by 6 & 7 Vict., chapter 73, passed 22nd August, 1843. That Act contains an interpretation clause—48—to the effect that a word importing the masculine gender only shall extend and be applied to a female as well as a male. That Act governed until 1877, when the Solicitors Act, 1877, was passed, vesting in the Incorporated Law Society the powers of admitting to practice theretofore vested under 6 & 7 Vict., chapter 73, and certain amending Acts, in certain judges.

IRVING, J.A.

The expression used in all these Acts is "person."

I think we can take judicial notice of the fact that no woman has been admitted in England as an attorney or solicitor.

To my mind, having regard to the common law disability above referred to, this fact that no woman has ever been admitted in England, is conclusive that the word "person" in our own Act was not intended to include a woman. The context of our Act refers to a profession for men, and men alone.

It is not necessary to go through all the earlier British Columbia statutes. They are very interesting, but it is sufficient to say that by the order in council of the 4th of April, 1856, establishing the Supreme Court of Civil Justice of the

Colony of Vancouver Island, the Court was authorized to admit certain "persons"; and the same expression is used in the Order of Court made by "Matthew Baillie Begbie, judge in the Court of British Columbia" in 1858, for the admission of attorneys to practise in the Colony on the Mainland; and in all the Acts since passed, the word "person" has been used.

In the case of *Nairn* v. *University of St. Andrews* (1909), A.C. 147, Lord Loreburn, L.C. at p. 161, says:

"It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes so imperfect and obscure as they often are."

And Lord Robertson says, at p. 166:

"A judgment is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities."

In *Hall* v. *Incorporated Society of Law Agents* (1901), 3 F. 1,059, it was decided that a woman could not become a law agent in Scotland, because the common law there was that men only could become law agents.

IRVING, J.A.

In England no woman can be admitted a student of an Inn of Court: 2 Halsbury's Laws of England 363, note (*q*); therefore no woman can be called to the bar in England.

In the Province of Ontario, the benchers declared they had no power to call a woman to the bar, and the Ontario Legislature recognized the correctness of their decision, empowering them to do so, if they thought proper.

In the Province of New Brunswick, *In re Mabel P. French* (1905), 37 N.B. 359, an application similar to the one now before us was made. The application was refused. All that has been urged here was urged before that Court, and from my point of view nothing can be said more than was said by Barker, J., concurred in by McLeod and Gregory, JJ., in giving his reasons.

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Shortly stated, his opinion was that as at common law a woman could not be admitted to practice, and as the Interpretation Act could not be used to bring about so radical a change, she was not entitled to succeed.

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In that opinion I concur.

GALLIHER, J.A. concurred in dismissing the appeal.

Appeal dismissed.

IN RE MABEL P. FRENCH

Solicitors for appellant: *Russell, Russell & Hannington.*
Solicitor for respondent: *Oscar C. Bass.*

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CANADIAN FINANCIERS, LIMITED v. HONG WO.

Principal and agent—Sale of real estate—Fraud of agent—Collusion with purchaser—Knowledge by principal of fraud.

CANADIAN FINANCIERS v. HONG WO

Where a real estate agent directly or indirectly colludes with a purchaser, and so acts in opposition to the interests of his principal, he thereby disentitles himself to any commission, and the principal is bound to refund to the party with whom his agent has contracted on his behalf, the money he has received through the fraud of his agent, whether the principal authorized the fraud or not.

Statement

APPEAL by defendant from the judgment of MCINNES, Co. J. in an action for commission on the sale of certain real estate. The facts are stated in the reasons for judgment.

The appeal was argued at Vancouver on the 27th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

L. G. McPhillips, K.C., for appellant, on stating the facts, was stopped.

Sir C. H. Tupper, K.C., called upon on the point of fiduciary

relationship between the plaintiffs and defendant, cited *Holmes* v. *Lee Ho* (1911), 16 B.C. 66.

McPhillips, in reply.

Cur. adv. vult.

On the 9th of January, 1912, the judgment of the Court was delivered by

IRVING, J.A.: The plaintiffs sue for a commission for selling the defendant's property. A defence raised is that the plaintiffs were guilty of a breach of their duty to the defendant, in that they permitted a sale to be made to one of their clerks without informing the defendant of the identity of the purchaser.

The facts are very simple. The defendant entrusted his property to the plaintiffs for sale, the listing being done with Mr. Snyder, a clerk in the sales department of the Company. A few days later Snyder brought to the defendant's house Mr. Smiley, a clerk in the audit department, and introduced him to the defendant as a gentleman recently arrived from England, who was anxious to buy some property. Hong Wo wanted $240 a foot frontage, but Smiley having been previously informed by Snyder that the property could be bought for $215, refused to pay so much. Then Snyder, without disclosing that he and Smiley were in the plaintiffs' office, and that Smiley had seen the listing, or that he (Snyder) had told Smiley the minimum figure at which Hong Wo would sell, took part in the discussion that was going on between the defendant and Smiley, and acting as well for the seller as the buyer, brought the parties together, with the result that Hong Wo agreed to accept from Smiley $215 a foot. The defendant afterwards refused to complete the sale to Smiley.

Judgment

Under these circumstances, are the plaintiffs entitled to recover their commission?

The plaintiffs are responsible for Snyder's misconduct—the act being within the scope of his authority. Besides, it is well established that a principal (the plaintiffs) cannot retain a profit made by the fraud of their agent, whether the principal authorized the fraud or not: *Kettlewell* v. *Refuge Assurance Company* (1908), 1 K.B. 545.

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Then the rule of law applies that an agent is not entitled to any remuneration in respect of which he has been guilty of any misconduct or breach of faith. *Salomons* v. *Pender* (1865), 3 H. & C. 639, seems to me very much in point. There, Martin, B. points out something that too many real estate agents seem to forget, that is that the seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may. He states the rule to be this: That if a man employed as agent becomes himself to any extent a principal, he thereby annihilates any right which he may have as agent. It is not a question of profit or not; the rule is the same whether the principal has been damnified or not.

In *Andrews* v. *Ramsay & Co.* (1903), 2 K.B. 635, Lord Alverstone hits the nail on the head at p. 638. A principal is entitled to an honest agent, and it is only the honest agent who is entitled to any commission.

Judgment

In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interests of the principal, he is not entitled to any commission. The same principle underlies the decision in *Hodson* v. *Deans* (1903), 2 Ch. 647, where the sale by a mortgagee Friendly Society to one of its officers was set aside.

I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *McPhillips & Wood.*
Solicitors for respondent: *Tupper & Griffin.*

ROYAL BANK OF CANADA v. FULLERTON LUMBER AND SHINGLE COMPANY, LIMITED.

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1912

Jan. 17.

ROYAL BANK v. FULLERTON

Practice—County Court judgment in default of appearance at trial—Application to set aside—Omission by solicitor—Rules of Court—Discretion—Exercise of—Imposition of terms—Severity of.

Where the judge has absolute discretion, and it is not or cannot be shewn that he has exercised it improperly, the Court of Appeal will not readily interfere.

Where, therefore, through a slip in the solicitor's office, counsel was not notified in time to appear at the trial, and judgment was entered on default of appearance, and, as a term of being allowed in to defend, defendant was required to pay all costs and also pay into Court the amount of the judgment:—

Held, that it would be inadvisable for the Court of Appeal to interfere with the ruling, but

Semble: In this case the term imposed appeared to be severe.

APPEAL from an order of HOWAY, Co. J. at New Westminster, on the 18th of December, 1911, giving defendant leave to defend, after judgment had been entered by default, on paying the costs of the action up to judgment, and also paying into Court the full amount of the judgment to abide the result of the trial. The default of the defendant's counsel was due to an oversight in the solicitor's office, as to the date of the trial. Defendant appealed. Statement

The appeal was argued at Victoria on the 17th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Senkler, K.C., for appellant: The order is an improper one and should not have been made. Defendant has sworn that he has a good defence, and is and was ready to defend. He is willing to pay the costs occasioned by the oversight in the solicitor's office, but in view of the fact that he has sworn to having a good defence, he should not in equity be compelled to pay into Court the full amount of a judgment which, when the action is tried out, may never be rendered against him. The order is oppressive, and works a hardship. In effect such an order Argument

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might prevent a defendant from litigating his just claim, because financially, he might be unable to comply with the order, and thus be denied justice in the Courts. *Burgoine* v. *Taylor* (1878), 9 Ch. D. 1 and *Wolffe* v. *Hughes* (1881), 17 C.L.J. 427, are cases directly in point, where the Court decided that a litigant who had a good or proper case, should not suffer or be deprived of his right to litigate his claim on account of the fault or omission of his solicitor. It is true he should be put on terms, but here the terms are unreasonable. It is not a case here of a party against whom a judgment has been properly and after full litigation, obtained, asking for a stay of execution pending appeal. In such a case it would be reasonable that he should be required to put up the amount of the judgment. Here the defendant merely wishes to get an opportunity to litigate the claim against him.

Argument

Griffin, for respondent, was not called upon.

MACDONALD, C.J.A.

MACDONALD, C.J.A. did not think that if he had been in the place of the learned judge below, he would have made the order appealed from. The law, however, gives the judge a wide discretion; he has exercised that discretion, and unless it is plain that it has been wrongly exercised, it is inadvisable to interfere. It is a mistake, as a rule, to impose a term which might have the effect of preventing a person from litigating his rights, and a judge should exercise great care to see that no injustice of that kind is done, but it is a well-known rule of all Courts of Appeal that the Court will not interfere with the exercise of discretion save in exceptional cases. His Lordship did not see anything fundamentally wrong, where a solicitor or counsel fails to reach the place of trial and then asks to be allowed to come in and defend, in imposing security such as had been imposed in this case.

IRVING, J.A.

IRVING, J.A. was of the same opinion. It is a pity to make any departure from the usual course. In this case probably the proper course would have been to have gone to the judge and asked him to make another order, but as the matter stood, the Court of Appeal could not very well interfere.

GALLIHER, J.A. was of opinion, in the absence of any evidence shewing that the discretion vested in the trial judge had been wrongly used, that the Court could not interfere. With all respect to the learned judge who made the order, the term imposed seemed a very severe one, but as far as his Lordship could see, the Court of Appeal could not very well disturb the ruling.

Appeal dismissed.

Solicitors for appellant: *Senkler, Spinks & Van Horne.*
Solicitors for respondent: *Tupper & Griffin.*

REX v. DEAKIN.

Criminal law—Speedy trial—Procedure—New trial—Right of accused to re-elect—Evidence given by accused at first trial—Use of by prosecution on second trial—Evidence sufficient to convict—Refusal of judge to reserve a point upon.

An accused appealing from a conviction in a County Court Judge's Criminal Court, and securing a new trial, is sent back to that Court, and has not any right to re-elect whether he shall be tried speedily or go before a jury.

Where an accused submits himself to give evidence and be cross-examined upon such first trial, the evidence so given is admissible in the second trial.

In this case the trial judge refused to reserve a point that there was no evidence warranting the finding of guilty arrived at, and the Court of Appeal refused to disturb the ruling.

APPEAL by way of case stated from the judgment of HOWAY, Co. J. in the County Court Judge's Criminal Court. The accused had been tried before on the charge of stealing and killing a cow, and was given a new trial by the Court of Appeal on the ground that the principal witness against him had not

Statement

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REX v. DEAKIN

Statement

been properly sworn: *Rex* v. *Deakin* (1911), 16 B.C. 271. On appearing for the second trial, he claimed the right to re-elect whether he should be tried speedily or take a jury, which was refused. He, on the trial, entered a plea of not guilty under protest. The trial judge reserved this question for the opinion of the Court of Appeal. The other question reserved was: "At the first trial of the accused he gave evidence as a witness on his own behalf. At the second trial the prosecuting counsel offered in evidence as admission evidence, the examination, cross-examination, re-examination and examination by the judge of the accused, being the evidence of the accused so given in the first trial, to which the counsel for the accused objected on the ground that such testimony could not be used against him, and I allowed the same. Was I right in allowing said evidence of the accused so given upon his first trial to be used by the prosecution as evidence upon this trial?"

The judge refused to reserve the point taken by the accused's counsel that there was no evidence warranting the finding of guilty against the accused.

The appeal was argued at Victoria on the 31st of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Aikman, for the accused: We submit that the accused is entitled to a trial *de novo,* and that means he must go back to where he commenced and re-elect. The County Court Judge's Criminal Court is a tribunal of limited jurisdiction; it obtains its jurisdiction by virtue of the election of the accused to be tried by it. Therefore, a new trial having been ordered, he must go back and observe all the procedure.

[MACDONALD, C.J.A.: We only set aside the trial.

IRVING, J.A.: We send him back to the Court whence he came.]

See *Reg.* v. *Riel* (1885), 1 Terr. L.R. 20 at p. 60.

[IRVING, J.A.: That was where there was a defect in the charge. He goes back to the place where the error occurred and re-commences there. You might as well say there should be new depositions.]

On the other points: It is submitted that the evidence

given on the first trial should not have been used on the second. The judge is "a person in authority" within the principle of warning a prisoner. Besides, it is not legal evidence, because there is no provision for taking evidence in the Speedy Trials Court by the stenographer, and the extended report or transcript of the stenographer's notes is not proper evidence. In any event, the evidence of the chief or prosecuting witness is not sufficient.

Maclean, K.C., for the Crown, was not called upon.

Per curiam: The prisoner undoubtedly was not entitled to re-elect. The election is no part of the trial at all; it is a preliminary required to give the County Court judge jurisdiction. The accused is brought before the County judge, and elects to be tried by him; that is taken down and made of record. Afterwards the trial takes place, which in this case turns out to be a mis-trial. This Court sends it back to the Court where it came from, that is, back to the Court which the prisoner elected to be tried by. It cannot reasonably be contended that the form of election should be gone through again.

Judgment

The second question was answered in the affirmative, and on the point on which the trial judge refused to reserve a case, the Court was of opinion that there was sufficient evidence, if believed, to convict.

Conviction sustained.

MURPHY, J.

1912

March 12.

BROWN v. ROBERTS.

Agreement—Notice—Cancellation—Forfeiture—Necessity for strict compliance with requirements of deed—Tender before action.

BROWN v. ROBERTS

It is incumbent on a person seeking cancellation of an agreement for sale of land to shew that the cancellation notice relied upon is in strict accord with what the agreement requires it should be.

Therefore, a notice of cancellation of an agreement, dated the 23rd of December, delivered on the 21st of January, calling for payment within "thirty days from this date," and demanding compound interest, was held to be bad.

Where a purchaser had shewn a continuous intention to fulfil his bargain, to the knowledge of the vendor (almost half the purchase money being paid on the first instalment) and a readiness and ability to pay the overdue instalment within two or three days after the expiration of the limit in the cancellation notice, and vendor had indicated the futility of attempting to pay, a tender before action was not necessary.

Statement

ACTION for specific performance of an agreement for sale or in the alternative damages and return of moneys paid. Tried by MURPHY, J. at Vancouver on the 5th of March, 1912. The agreement, dated April 1st, 1910, was that the defendant agreed to sell to plaintiff a certain lot for $1,800, payable $800 cash, $332 October 1st, interest at 7 per cent. The plaintiff paid $800 in cash, but made default in payment of instalment due 1st October, 1910. Defendant and plaintiff had several interviews between approximately 1st November, 1910, and 24th February, 1911. On the 14th of December, 1910, defendant wrote plaintiff demanding payment by an ordinary letter, stating that he would take proceedings to foreclose if not paid. On the 21st of January, 1911, a notice of cancellation and forfeiture within 30 days, dated 23rd December, 1910, was served on the plaintiff. About the 24th or 25th of February, the plaintiff had a conversation with defendant. The trial judge found as a fact that plaintiff told defendant he would pay up, and wanted a statement, but defendant stated he was too late, as the agreement had been foreclosed a day or two before. On the 22nd of March, 1911, the plaintiff attempted to tender the

defendant the balance due; not finding him, the plaintiff's solicitors wrote the defendant, informing him that they were prepared to make the payment overdue, and in due course the payment falling due on April 1st. The defendant received the letter but did not accept the money, or signify his willingness to accept.

Gwillim, for plaintiff.
M. A. Macdonald, for defendant.

12th March, 1912.

MURPHY, J.: In the particular circumstances of this case I think the plaintiff is entitled to succeed. As to the question of tender, I have already found as a fact that on the 24th or 25th of February, 1911, plaintiff made inquiry of defendant as to amount due, plaintiff being then in a position to make the overdue payment, but defendant put an end to all discussion by stating the cancellation had become effective and the agreement was at an end. This relieved the plaintiff from any necessity of making a valid tender before bringing action. The parties here set out in their agreement machinery for a short way out of it in case of default. In my opinion, where the facts are as here, no change having taken place in the position of the parties, a continuous intention on the part of the purchaser to fulfil his bargain, which intention was communicated to vendor, almost half the purchase money paid as a first instalment, and a readiness and ability on the part of the purchaser to pay the overdue instalment within two, or at the most three days after the 30 days given by the alleged cancellation notice had elapsed, communication of which state of facts to the vendor was prevented by the vendor's declaration that the agreement was at an end, it is incumbent on defendant to shew that the cancellation notice relied upon is in strict accord with what the agreement requires it should be. Here the notice of the 23rd of December, 1910, failed in at least two particulars—it demanded compound interest, and being served on the 21st of January, 1911, it called for payment within 30 days, not from date of service, but from "this date," *viz.*, the date it bore, 23rd December, 1910.

Judgment

MURPHY, J.

1912

March 12.

BROWN v. ROBERTS

As to the notice of the 14th of December, 1910, I do not think defendant can rely upon it, as he went to trial and based his case on the notice of the 23rd of December, 1910. Even if he can, such notice likewise is not the notice required by the agreement, since it states if immediate payment is not made, "proceedings of foreclosure will follow."

As to the point that objection is not taken to the form of notice in the pleadings, the onus is on the defendant to shew that he properly followed the procedure agreed upon. There will be a declaration that the agreement is valid and subsisting and that the defendant is liable to perform and observe the terms, provided that the plaintiff within three days after taxation of costs pay to defendant the amounts and interest now due under the agreement after deducting therefrom the amount of taxed costs which are hereby awarded to plaintiff, taxation to take place within one week of entry of formal judgment.

Judgment

Judgment for plaintiff.

WADDELL v. RICHARDSON.

CLEMENT, J.

1911

Nov. 20.

WADDELL v. RICHARDSON

Trespass—Enclosure of part of road—Possession—Invasion of—Taking down fences—Abatement of nuisance—Injunction—Damages.

The plaintiff's fences enclosed part of the highway abutting on his land. The defendant tore down the fences, although his right of passage along the highway was not really interfered with:—

Held, that the plaintiff was in possession, and could maintain trespass; and the defendant, as a private individual, had no right to abate the nuisance caused by the obstruction of the highway.

Injunction and damages awarded.

ACTION for trespass, brought against the defendant for tearing down certain fences of the plaintiff. It appeared that at the time the plaintiff purchased the farm where the trespass was committed, and for several years previously, the fences had been standing on the registered highway, and enclosing a part of the same, and that the road-bed in actual use was about 16 feet wide, and had a deep ditch on either side. The municipal council had considered the matter of removing the fences back to the boundary lines, but had done nothing. Although the defendant knew this, he drove over that part of the road allowance enclosed within the plaintiff's fences. The action was tried by CLEMENT, J. at Vancouver on the 17th and 20th of November, 1911. Statement

The evidence at the trial shewed that the land lying on either side of the travelled road-bed, and being that portion of the road which was enclosed by the plaintiff's fences, was in a much worse condition than the road-bed itself; and this was alleged to shew malice on the part of the defendant; besides which, it was contended that the plaintiff, having the road enclosed by his fences, was in possession, and the defendant had no right to take the law into his own hands.

McCrossan, for the plaintiff.

Sir C. H. Tupper, K.C., for the defendant.

CLEMENT, J.: I have never tried a clearer case than this. CLEMENT, J.

CLEMENT, J.

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WADDELL v. RICHARDSON

Here is the case of a man clearly in possession of certain fields, those fields surrounded by certain fences—whether they had gates and those gates were from time to time in disrepair and not used, is perfectly immaterial. It now transpires that, as a matter of fact, his boundaries are wrong, and that the fence along this road is not on his land. None the less, he is in possession of it and in possession of the field and that part of the road which lies to the east of the fence; and, if there is any principle of law that is well founded, I think it is this: if there is an obstruction, a nuisance of that sort on a public highway, no private person has the right of abatement. There are certain proceedings that may be taken to force Waddell to put his fence on the right line; but the law certainly does not give the right to a private individual to remove the obstruction, unless his right of passage is really interfered with, which is not the case here.

To my mind, the actions of the defendant are absolutely reprehensible. He has undertaken to be himself the administrator of the law in that section of the country.

Judgment

It is not a case where the plaintiff has suffered very much damage from the destruction of the fences and loss of time. I think justice will be done if I give judgment for the plaintiff for $100, with full costs of his action; and there will be a perpetual injunction against the defendant from interfering with those fences. That injunction is entirely without prejudice to any proceedings Richardson or any other person may take legally to have those fences put in proper position.

Judgment for plaintiff.

HARRIS v. HICKEY & CO.

GREGORY, J.

1912

Jan. 31.

HARRIS v. HICKEY

Malicious prosecution—Reasonable and probable cause—Honest belief—Advice of counsel—Motion for nonsuit—Findings by jury—Order XIX., r. 13.

Plaintiff, who was in the employ of defendants, was discharged. Subsequently one of the defendants obtained a search warrant and had plaintiff's rooms searched for certain tracing paper, etc., alleged to have been taken by plaintiff from their place of business. The detectives who made the search arrested the plaintiff and he was prosecuted in the police Court for stealing a lamp shade, a show case reflector and $4. The magistrate dismissed the charge, and plaintiff brought action, claiming $3,000 damages. The claim for wrongful dismissal was abandoned on the opening of the trial. The defendants, as to the charge of malicious prosecution, did not deny the falsity of the charge, but submitted that they had reasonable and probable cause and did not proceed with malice.

Held, that this plea amounted to an admission of plaintiff's innocence, under Order XIX., r. 13, and this being supported by the depositions in the magistrate's Court, upon which the charge against him was dismissed, the plaintiff had proved his innocence.

Held, on the facts, that there was want of reasonable and probable cause. That whilst the taking of counsel's advice was evidence in defendants' favour, it was not a complete answer. Therefore, a motion for nonsuit was refused.

ACTION for malicious prosecution, tried by GREGORY, J. at Victoria on the 25th of January, 1912. The jury answered all the questions in favour of the plaintiff, and fixed the damages at $150, but at the conclusion of the plaintiff's case leave was reserved to move for a nonsuit on the grounds that (a) the plaintiff had not proved his innocence of the charge made against him, and (b) that the plaintiff's own evidence shewed that the defendants had reasonable and probable cause for the prosecution. Statement

M. B. Jackson, for plaintiff.
Higgins, for defendants.

31st January, 1912.

GREGORY, J.: In support of the first contention, Mr. *Higgins* referred to the judgment of Bowen, L.J. in *Abrath* v. *North* Judgment

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Eastern Ry. Co. (1883), 11 Q.B.D. 440 at p. 455, where he distinctly says that the plaintiff must prove that he was innocent, and that his innocence was pronounced, etc. When this case was before the House of Lords, (1886), 11 App. Cas. 247, no reference was made by the House to the above remarks of Lord Justice Bowen, and doubt as to its correctness is suggested in Halsbury's Laws of England, Vol. 19, where, at p. 677, it sets out the essentials required to be proved by the plaintiff; and at p. 682, note (*q*), reference is made to Lord Justice Bowen's remarks. Mr. *Higgins* referred to *Watt* v. *Clark* (1889), 18 Ont. 602, as following the judgment of Bowen, L.J., but a reference to that case shews that Rose, J., who delivered the judgment of the Court, expressly refrained from pronouncing any opinion on the point. It is also unnecessary for me to express any opinion on the matter, as I think the plaintiff has proved his innocence. In paragraph 5 of the statement of claim, the plaintiff alleges that the defendants falsely and maliciously prosecuted him; and the defendants in their defence, paragraph 4, do not deny the falsity of this charge, but allege that they did so on reasonable and probable cause and without malice. This seems to me to dispose of the matter, for under Order XIX., rule 13, this is an admission of the falsity of their charge, or, in other words, an admission of the plaintiff's innocence, and, supported as it is by the depositions in the Court below, on which clearly the charge against Harris was rightly dismissed, it seems to me that the plaintiff has done all he is required to do under this head, and had my attention been drawn to the pleadings during the hearing of the motion, I would have disposed of it at once.

Judgment

As to the second point, whether it was necessary for me to leave the questions touching on probable cause to the jury, my own opinion is that there was a want of reasonable and probable cause. In the circumstances disclosed it seems to me that the defendants acted most rashly, particularly with reference to the ink and paper alleged to have been stolen; and it is at least open to doubt if they really believed that the plaintiff intended to steal; and the honesty and reality of that belief is of great importance in actions of this kind; and even if there

is an honest belief, it is an elementary principle of law that it does not assist them unless there was reasonable ground for such belief. Their taking advice of counsel is evidence in their favour, but I do not think that our Court of Appeal intended, as argued by counsel, to lay down the doctrine in *Prentiss* v. *Anderson Logging Co. and Jeremiason* (1911), 16 B.C. 289, 18 W.L.R. 340, that it is a complete answer to the claim of want of reasonable and probable cause—there are too many strong expressions of opinion against this by many of the great English judges, and Clerk & Lindsell on Torts, 1908, p. 654, and Addison, 18th Ed., p. 256, both say that it is no defence. Roscoe's Nisi Prius Evidence, 18th Ed., p. 884, says it is evidence, but he does not say it is necessarily a complete answer. From the evidence given by the defendants before the magistrate, and also on the trial, I would think that the best that could be said is that they tried to rely entirely on their solicitor without forming any opinion of their own on the guilt or innocence of the plaintiff.

Judgment

Mr. *Higgins* must fail on his motion, and as the answers of the jury are entirely in favour of the plaintiff, Mr. *Jackson's* motion for judgment must prevail, and there will be judgment for the plaintiff for $150, with costs.

Judgment for plaintiff.

COURT OF APPEAL

1912

Jan. 9.

CLARKSON v. NELSON AND FORT SHEPPARD RY. CO.

CLARKSON *ET AL.* v. NELSON AND FORT SHEPPARD RAILWAY COMPANY.

Practice—Trial by jury—Local investigation—Destruction of timber by fire—Valuation of—Extent of—Expert evidence—Order XXXVI., r. 5 —Discretion.

Order refusing a jury in which the principal issue was the amount of damage caused by fire to standing timber, which would have to be found by a large number of expert witnesses, upheld as coming within the authority conferred by Order XXXVI., rule 5.

Statement

APPEAL from an order made by HUNTER, C.J.B.C. at chambers refusing the plaintiffs' application for an order for trial by a jury. The plaintiffs claimed damages for injury to timber lands by fire, alleged to have been caused by the operation of defendant Company's railway. The question which would occupy the greater part of the time of the Court and witnesses at the trial would be the ascertainment of the quantity of timber destroyed or injured, to be attested by expert witnesses, or witnesses skilled in estimating the quantities of standing and down timber on the lands in question, and the extent to which the same was destroyed, injured or affected by reason of the wrong complained of.

The appeal was argued at Vancouver on the 21st of December, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, J.J.A.

Davis, K.C., for appellants.
A. H. MacNeill, K.C., for respondents.

On the 9th of January, 1912, the judgment of the Court was delivered by

Judgment

MACDONALD, C.J.A. (after stating the facts): The plaintiffs desire to have the damages assessed by a jury, but the learned Chief Justice of British Columbia, by the order appealed from, refused a jury. If the case falls within Order XXXVI., so as

to give the judge jurisdiction to dispense with a jury, then the exercise of his discretion will not be lightly interfered with. Rule 5 is comprehensive, and gives a large discretion to the judge; it gives him discretion to order a trial without a jury, of any cause requiring local investigation. The term is wide enough to cover almost any case, but it is obvious that it should not receive such wide interpretation. The application of this rule must in every case depend upon the facts. I do not think that by the term "local investigation" a mere "view" was meant. The practice of taking a view is as old as trial by jury. The Legislature meant something different when it used the term "local investigation." As there can be no local investigation other than a view by either a jury or a Court except through the evidence, then I take it that the term must have reference to the nature of the evidence.

Judgment

It seems to me that the case before us is the best example we could have of what is meant by that term. We are told that a large number of witnesses are to be called on both sides who are not witnesses in the primary sense of the word, but who qualify themselves to give evidence by an investigation of the *locus in quo*. If this case does not fall within rule 5, I cannot conceive of one where that part of the rule now under consideration can be applied. The appeal should be dismissed.

Appeal dismissed.

COURT OF APPEAL

1912

Jan. 30.

KING LUMBER MILLS, LIMITED v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Practice—Discovery—Examination of officer of railway company—Past officer—Rule 370c.

KING LUMBER MILLS v. CANADIAN PACIFIC RY. CO.

A person in the employ of a railway company, in the capacity of a fire warden, with other persons under him to make reports to him of fires in the district over which his jurisdiction extends, is an officer of the company within the meaning of rule 370c, examinable for discovery.

MACDONALD, C.J.A. *dubitante.*

APPEAL from an order of WILSON, Co. J., sitting as a local judge of the Supreme Court, granting an application for the examination of one McDonald, a fire warden, in an action for damages caused by fire alleged to have been started by one of defendant Company's engines. This was a motion for a stay of proceedings under that order pending an appeal, but by consent it was allowed to be taken as a hearing of the appeal, and was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A. at Victoria on the 30th of January, 1912. The facts were somewhat indefinitely before the Court, but in effect they were that one Cook had been examined for discovery in the action. Cook was a fire warden of the railway Company, having a large area to cover. It developed from his evidence that the witness McDonald was the warden who patrolled the particular area covered by the fire. It was alleged for the defendant Company that the fire occurred on the 4th of July, and that McDonald did not enter their service until the 18th, and he is not now in their employ. For the plaintiff Company it was alleged that the fire smouldered until the 31st of July, when it broke out and did the damage. The question was whether (1) McDonald was an officer of the Company who could bind them by any admissions or statements so as to come within the rule, and (2) if not, then, not now being a servant of the Company, was he examinable as such?

Statement

Argument

Bodwell, K.C., in support of the motion: We say that the

rule distinguishes between a past and present officer or servant of the corporation, and we submit in any event that this fire warden would not be an officer within the rule. It would be wrong to bind a corporation by the statements of a person (who had been in their employ) after he had left their service. As to who is an officer, see *Morrison* v. *Grand Trunk R.W. Co.* (1902), 5 O.L.R. 38. If McDonald were at present in the service there is no doubt he could be examined.

[MACDONALD, C.J.A.: Is he not a past officer?]

He came into the Company's employ after this fire. He commenced on the 18th and the fire broke out on the 4th. He can have no knowledge of it.

Maclean, K.C., contra: We say the fire started on the 4th and smouldered until the 31st, and McDonald was given superintendence over this area. He, therefore, was on the ground from the 18th to the 31st, and must of necessity have knowledge. He is also an officer, examinable under the rule: see *Dawson* v. *London Street R.W. Co.* (1898), 18 Pr. 223, where a motorman and a conductor were held to be officers of the company for purposes of discovery. See also *Watson* v. *Rodwell* (1876), 3 Ch. D. 380.

Bodwell, in reply: The *Dawson* case is distinguishable; the men there were present servants, and the company were given the election of which man should be examined.

MACDONALD, C.J.A.: As both my learned brothers are satisfied that the person sought to be examined had been an officer, not merely a servant of the Company, and therefore examinable under the rule, there is no need to reserve judgment, although I may say I have some doubt.

MACDONALD, C.J.A.

IRVING, J.A.: I think he was an officer. Whether a person is an officer or not depends upon the circumstances of each particular case. This man was one to whom subordinates would report from time to time, and would be in a position to state what reports he had received from his assistants.

IRVING, J.A.

GALLIHER, J.A.: I think that while he was in the employ of the Company he was an officer liable to examination, and the

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KING LUMBER MILLS *v.* CANADIAN PACIFIC RY. CO.

fact that he had left the employ would not take from him any information that he had gained while he was an officer; in fact, he is a past officer.

Appeal dismissed, Macdonald, C.J.A. dubitante.

GREGORY, J.

1912

March 8.

EDMONDS *v.* EDMONDS

EDMONDS v. EDMONDS.

Divorce—Evidence—Corroboration—Cruelty—Adultery.

On a petition for divorce, the respondent is entitled to know clearly the charges he is called upon to meet. Thus, the cruelty alleged should be such as to cause danger to life, limb or health, bodily or mental, or a reasonable apprehension of it; and where there is an admission of adultery, corroboration will be required unless the admission is entirely free from suspicion.

Remarks on the necessity of strict compliance with the rules and practice.

PETITION for divorce heard by GREGORY, J. at Victoria on the 1st of March, 1912.

Maclean, K.C., for the petitioner.

Respondent not represented.

8th March, 1912.

GREGORY, J.: This is a petition for divorce brought by the wife against her husband on the ground of cruelty and adultery. It does not appear to me that either charge has been satisfactorily proved, nor that the allegation of cruelty has been properly made in the petition.

Judgment

The respondent is entitled to know the charges that he is expected to meet. The cruelty charged should be such as would cause danger to life, limb or health, bodily or mental, or a reasonable apprehension of it: *Russell* v. *Russell* (1895), P. 315; *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168; and the acts

alleging such cruelty should be specifically set out: *Suggate* v. *Suggate* (1858), 28 L.J., P. & M. 7. See also *Tims* v. *Tims* (1910), 15 B.C. 39.

Apart from the allegations in the petition, the evidence offered in support is exceedingly general and vague.

As to the question of adultery, it is the practice of Courts to require corroboration of an admission by the guilty party unless the admission is entirely free from suspicion.

In *Robinson* v. *Robinson and Lane* (1859), 1 Sw. & Tr. 362 at pp. 393-4, Cockburn, C.J. says:

"The admissions . . . . unsupported by corroborative proof, should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind."

These remarks of Cockburn, C.J. are referred to in *Williams* v. *Williams and Padfield* (1865), L.R. 1 P. & D. 29.

The case of *Maxwell's Divorce Bill* (1911), W.N. 220, referred to by Mr. *Maclean,* is meagrely reported, but the letter accepted by the House of Lords as evidence of adultery was evidently more definite and explicit than the one here, and it is quite consistent with the report of that case that there was also some evidence of corroboration.

Judgment

The evidence of adultery relied on by the petitioner is a letter from the respondent, and the petitioner's oath that one day, on her husband's return from town (presumably after an absence of less than one day), she "accused him of having been away with other women, and he said yes he had, and he did not see any reason why he should not. He said, it is quite allowable for a man to do that sort of thing." This is a very equivocal statement, and may mean many discreditable things short of an admission of adultery, and I cannot accept it in any way as an admission of adultery. It is suspicious, but suspicion is not sufficient, and I have no right, in the absence of other circumstances, to allow that suspicion to control my mind while interpreting the language actually used.

The letter goes further. It says: "No, I will not live with you any longer; you have found out I have been unfaithful and

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prefer being with Flo." In the statement of the petitioner and the quotation from the letter I have, I believe, set out every word of evidence offered to support the charge of adultery. To accept it as sufficient would, I think, be to entirely disregard the language of Chief Justice Cockburn that an uncorroborated admission should be received with the utmost circumspection and caution. The suggestion of counsel is that the respondent was openly living with another woman, but the petitioner gives no evidence of it; she does not even pledge her own oath that there is such a woman as "Flo," referred to in the letter. The letter says the petitioner has found out respondent's unfaithfulness, but she herself tells the Court nothing of this. The community in which the parties lived is small, and if the fact were so, there should be no difficulty in shewing that the respondent had at least been seen with Flo or other women, or some other circumstances corroborative of the admissions.

A divorce will not be granted upon an admission of adultery unless the Court is satisfied that the admission is true. It is not inconceivable that a man might be willing to admit (not under the sanctity of an oath) that he had been guilty of such an act if he thought he would thereby enable his wife to obtain a divorce, while he would decline to commit the act for the same purpose.

The letter was written just before the presentation of the petition. It is apparently an answer to a previous verbal or written communication which has not been disclosed to the Court.

Judgment

The petition will be refused, but in view of the fact that it may be possible to furnish some evidence of corroboration, it will be without prejudice to the right of the petitioner to present a fresh petition.

I wish again to draw attention to the tendency to loose practice in divorce matters: see *Tims* v. *Tims,* above referred to.

I heard the evidence in this case after reserving the right to examine into the regularity of the proceedings if the evidence proved sufficient, etc. On looking at the papers on file, I find that the affidavit of non-collusion and verifying the statements in the petition does not identify the affiant with the petitioner; that the affidavit of service of the citation is made by the deputy

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sheriff and sworn before the sheriff; that the citation was not as required by rule 13 filed in the registry forthwith after service, in fact, it was not filed until the day of the making of the order for trial. Until the citation is filed the Court is not properly seized of the matter, and no application for trial or otherwise can be made until then. Rule 21 has not been complied with, inasmuch as there has been no order obtained determining whether there should be a trial with or without a jury, or whether the trial should be by oral evidence or upon affidavit.

Judgment

In undefended divorce proceedings, it is the duty of the judge to carefully scrutinize every step and see that every rule of practice and trial is strictly complied with; it is the duty of counsel to give the Court every assistance, and prepare their cases even more carefully than when they know they are to be defended.

Petition refused.

IN RE MUNICIPAL ELECTIONS ACT.

GREGORY, J.

1912

Jan. 5.

IN RE MUNICIPAL ELECTIONS ACT

Statute, construction of—Commissioners for taking affidavits—Limitation of powers to specific acts—Provincial Elections Act, B. C. Stats. 1903-04, Cap. 17—Municipal Elections Act, B. C. Stats. 1908, Cap. 14.

A commissioner appointed under the provisions of the Provincial Elections Act "for the purpose of acting under (the) Act in the electoral district in which he resides" is restricted in the scope of his duties to taking affidavits and declarations of persons claiming to vote under the Provincial Elections Act only.

Where, therefore, certain persons, otherwise qualified, claiming to vote at a municipal election, but who made their declarations before such a commissioner, and whose names were rejected by a court of revision, it was

Held, that the names were properly struck off the list.

APPLICATION on the part of certain persons for an order that the names of such persons be added to the voters' list, as

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IN RE MUNICIPAL ELECTIONS ACT

revised at the court of revision of the City of Victoria. Heard by GREGORY, J. at Victoria on the 2nd of January, 1911. At the last meeting of the court of revision for the City of Victoria, the names of a large number of persons otherwise entitled to be entered upon the list of voters for the Municipality were stricken from such list on the ground that the declarations made by them were not taken before a properly authorized officer.

The declarations in question were taken before a commissioner appointed to take affidavits under the provisions of the Provincial Elections Act in the electoral district in which such commissioners resided. All declarations were made and taken in good faith.

Maclean, K.C., in support of the application: These persons were qualified to vote and the action of the court of revision practically disfranchises them. The Courts lean in the strongest way against an act operating as a disfranchisement of a citizen. The Elections Act should be liberally construed: *Davies* v. *Hopkins* (1857), 3 C.B.N.S. 376. Commissioners appointed under the Provincial Elections Act are competent to take affidavits in the Supreme Court, not especially for the purposes of that Act: See also *Nuth* v. *Tamplin* (1881), 8 Q.B.D. 247 at pp. 252 and 253.

McDiarmid, and *Copeman, contra*: *Davies* v. *Hopkins* is not applicable, because the statute governing that case and this case are dissimilar. The British Columbia statute definitely states before whom declarations can be made. The statute also provides for the only thing which the clerk has power to check, *viz.*: the delivery of a statutory declaration to him within a prescribed time, and the statute further provides for the duties of the court of revision. A declaration is not valid if made before a person who has no authority to take the same. Such declaration is not an instrument upon which perjury could be assigned. A commissioner appointed under the Provincial Elections Act is appointed as a commissioner for taking affidavits for the purposes of that Act in the electoral district in which he resides, and is restricted not only to that district, but to the purposes of that Act. Numerous cases demonstrate the strictness with which the Courts look upon affidavits: *Boyd* v. *McNutt* (1883), 9 Pr.

Judgment

493; *Pollard* v. *Huntingdon* (1880), 16 C.L.J. 168. An affidavit sworn before an official having no power to take a deposition is invalid: *Reynolds* v. *Williamson et al.* (1875), 25 U.C.C.P. 49; Ontario Evidence Act, R.S.O. 1887, chapter 61. The Court has power to put only such names of voters on the list as have been improperly omitted.

5th January, 1912.

GREGORY, J. This is an application under the provisions of the Municipal Elections Act, section 17, chapter 14, British Columbia statutes, 1908, by a number of householders, to have their names placed on the voters' list for the City of Victoria.

The names were originally placed on the list by the clerk of the Municipality under section 6 of the Act, but were struck off by the court of revision, acting under the authority of subsection (*c*) of section 14 of the Act, on the ground that the applicants had not made the statutory declaration required by section 6 before a commissioner for taking affidavits in the Supreme Court, but before a special commissioner for taking affidavits appointed under the Provincial Elections Act (section 13, chapter 17, British Columbia statutes, 1903-04).

Mr. *Maclean,* for the applicants, raises two points, *viz.*: First: The court of revision had no jurisdiction to review the finding of the clerk as to the authority or qualification of the commissioner before whom the declaration was taken. Second: That a commissioner appointed under the Provincial Elections Act is qualified to take the declaration, inasmuch as he is a commissioner for taking affidavits, and the Court will ignore the qualification in the statute that he is appointed "for the purpose of acting under the Act," or will treat the words merely as a declaration of the reasons for making the appointment.

Judgment

It is undisputed that the applicants have the necessary qualifications, and are entitled to go on if the declarations are properly made.

Mr. *Maclean* lays great stress upon his first point, and he frankly admits that his argument goes the length of holding that if the clerk put names on the list without any declaration at all, the court of revision would have no jurisdiction to remove them on that ground, citing Registration Appeals, *Davies* v.

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Hopkins (1857), 3 C.B.N.S. 376, where, although a very similar contention was successfully maintained, I do not think it assists him, because that decision turned upon the wording of the statute (6 & 7 Vict., c. 18) then under consideration, and Cockburn, C.J. and Williams, J. expressly drew attention to the peculiar wording of that statute, Williams, J. stating, at p. 387, that if the application before the Court had been one to insert a name omitted by the overseer, the decision of the Court would have to be different, as in such case it had to be proved before the revising barrister that the proper notice had been given, and that the applicant possessed the qualification named in that statute; but as the case before the Court was one to strike out a name on the list, the revising barrister could only inquire into such matters as the statute permitted him to inquire into in such cases, and the sufficiency of the notice was not one of them. Now, our statute makes no distinction. The duties of the court of revision are the same whether a name has been improperly placed on the list or improperly omitted from it. Sub-section 2 of section 14 of the Municipal Elections Act provides that the court of revision shall correct and revise the list, and shall have power "to determine any application to strike out the name of any person which has been improperly placed thereon, or to place on such list the name of any person improperly omitted," etc.

Judgment

If there has been no declaration, or a declaration made before an unauthorized person, and yet the name of the declarant appears on the list, it is beyond dispute that the requirements of section 6 of the Act have not been complied with, and the name has been improperly placed there; that is the exact situation which the court of revision is empowered to deal with under our statute.

It seems to me, therefore, clear that Mr. *Maclean's* first contention is unsound.

As to the second point, there may be some doubt. My attention has been called to the case of *In re Provincial Elections Act* (1903), 10 B.C. 114, and particularly to the remarks of WALKEM, J. at the bottom of p. 120, to the effect that franchise Acts are to be liberally construed, as their object is to

enfranchise and not disfranchise persons possessing the necessary qualifications. In that case the language of the Act itself was broad, and the Court held that it could not be cut down by implication from the form of the *jurat* given in a specimen affidavit set out in a schedule to the Act. No one will be inclined to question the soundness of that decision, or Mr. Justice WALKEM'S remarks; but neither seems to justify me in ignoring the plain qualification of the powers of a commissioner appointed under section 13 of the Provincial Elections Act. That section is as follows:

"The Lieutenant-Governor in Council may appoint any person who is a British subject as a commissioner for taking affidavits in the Supreme Court for a limited period without payment of any fee, *for the purpose of acting under this Act* in the Electoral District in which he resides."

The commissioners before whom the declarations in question were made were appointed under that section, and the order in council appointing them, and their official notification of appointment expressly state that the appointment is "for the purpose of acting" under that Act. The applicants argue that the words of qualification in the Act, the order in council, and the notification mean nothing, are merely a declaration of the reason why the appointments are made, and that once made, the appointees have, as Mr. *Maclean* puts it, "the full appointment," and have full power and authority to take any declarations made in any cause or matter pending in the Supreme Court. I cannot agree with that; to me the language appears perfectly plain, and in addition, the temporary nature of the appointments, the limitation of the appointees' activities to the electoral district in which they reside; the fact that there is no fee payable and that they are not appointed by a judge of the Supreme Court under the Oaths Act (changed in 1911), and under which appointment on payment of a fee they receive a formal commission under the seal of the Supreme Court, and were entered on the roll of commissioners in the registry of that Court, all indicate, I think, that the Legislature intended expressly to restrict the powers of such appointees to the purposes of that Act. To accept the applicants' contention would be to treat these qualifying words as surplusage.

Judgment

It is a well known rule of interpretation of statutes that such

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a sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent: Craies Statute Law, 2nd Ed., 112.

If the persons taking the declarations had no authority to do so, then they cannot be looked at—they are not declarations under the Act: see *Reynolds* v. *Williamson et al.* (1875), 25 U.C.C.P. 49, and other cases referred to by Mr. *McDiarmid.*

Although the declarants are possessed of the qualifications entitling them to be placed on the list on making the proper declaration, the making of that declaration is a condition precedent which must be complied with. The Municipal Elections Act, sections 6 and 7, provides not only that the declaration shall be made, but also the form of it, the particular month in which it shall be made, and that it must be filed with the clerk within 24 hours after it is made. That these provisions cannot be ignored will not be disputed; then, surely, neither can the provision directing before whom the declaration is to be made.

The only possible doubt appears to me to arise from the fact pointed out by Mr. *McDiarmid* that both the Provincial and Municipal Elections Acts use the same expression, *viz.*: "Commissioner for taking affidavits in the Supreme Court," and strictly speaking, there is no such officer known outside of those Acts, the Oaths Act, section 1, stating that commissioners appointed under it "shall be styled commissioners for taking affidavits within British Columbia." But that Act goes on to provide that the acts of such commissioners are valid in all Courts of the Province, and it is common knowledge that they are always spoken of as commissioners for taking affidavits in the Supreme Court, which they in fact are. Neither of the Election Acts states that the commissioners therein named shall be styled in any particular way; and to hold that because of the mere similarity of the expression in those Acts, commissioners under the Provincial Elections Act are the persons named to take declarations under the Municipal Act, would not only greatly enlarge the powers of the former commissioners, in direct antagonism to the express words of that Act, but it would exclude commissioners as generally understood from taking them. I cannot

Judgment

think that the Legislature intended to do any such thing in so indirect a way, and by such uncertain language.

The application will be dismissed, but by agreement between the parties, the City will pay the costs, fixed at $100.

Application dismissed.

POWELL RIVER PAPER COMPANY, LIMITED v. WELLS CONSTRUCTION COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK

Practice—Particulars—Contract—Failure of contractor—Work taken over from contractor—Cost of execution of work in such circumstances to be ascertained by architect—Whether Surety Company entitled to particulars of architect's finding.

A contract for the execution of certain work was guaranteed by the bond of a surety company conditioned to indemnify the plaintiff Company against loss or damage by reason of failure of the Construction Company to perform its contract. The contract provided that in certain circumstances the work might be taken out of the hands of the Construction Company, and executed by the plaintiff Company, the cost and charges thereof to be ascertained by the architect and paid for by the Construction Company.

Held, on appeal (GALLIHER, J.A. dissenting), that the Surety Company was not bound by the decision of the architect as to the cost of executing the work by the plaintiff Company, and therefore the Surety Company was entitled to particulars of the plaintiff Company's loss and damages in executing the work taken over from the Construction Company.

APPEAL by plaintiff Company from an order made by MURPHY, J. at Chambers in Vancouver, on the 20th of November, 1911, directing the delivery of particulars of amount of loss and damage referred to in the statement of claim, such order being made upon application of the defendant, the American Surety Company of New York.

Statement

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The Wells Construction Company entered into a contract with plaintiff for the construction of a dam, bulkhead, etc., at Powell River, B.C., in accordance with specifications attached to and forming part of the contract. By the specifications the architect was empowered, under certain circumstances, to take the work out of the hands of the Construction Company and to employ workmen and procure material for the execution of the work; and the specifications further provided that the cost and charges of so executing the work should be ascertained by the architect and paid for or allowed to the plaintiff Company by the Construction Company.

By the bond of the American Surety Company of New York, it became bound jointly with the Wells Construction Company to plaintiff Company in the sum of $50,000, the condition being that if the Wells Construction Company should indemnify the plaintiff against any loss or damage directly arising by reason of the failure of the Wells Construction Company to faithfully perform its contract, the bond should be void. The work had been taken out of the hands of the Construction Company by the architect and completed by plaintiff Company under his direction, and the statement of claim alleged that the cost and charges incurred by plaintiff Company in so doing were ascertained by the architect at $155,250; that such amount had not been paid for or allowed to plaintiff Company by the Construction Company; that the work should have been completed by the Construction Company under the contract for the sum of $118,561; that the architect settled and determined the amount payable to plaintiff Company by the Construction Company in respect of the completion of the work by plaintiff Company to be $36,688, against which the Construction Company was entitled to a credit of $5,056, leaving the amount of $31,632 as the amount of damage suffered by plaintiff Company by reason of the Construction Company's failure to complete its contract.

Statement

The order appealed from directed plaintiff Company to deliver particulars of its loss and damage, being the said sum of $31,632, with full details as to how the loss and damage arose.

The appeal was argued at Victoria on the 16th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Ritchie, K.C., for appellants: Plaintiff Company's claim is based on the amount of loss and damage, ascertained by the architect, in accordance with the provisions of the contract, and the order appealed from, in effect, requires plaintiff Company to give particulars of the way in which the loss and damage were ascertained by the architect. This is practically requiring a person in whose favour an arbitrator's award has been made to give particulars of how the arbitrator made up the amount adjudged by the award to be paid. The way in which the arbitrator made up his award is not a matter within the knowledge of the plaintiff Company. Even if there is a question whether the American Surety Company is bound by the ascertainment of the architect, that is a question to be threshed out at the trial, and furnishes no justification for an order for particulars.

Argument

Davis, K.C., for respondent, American Surety Company of New York: The architect in the contract was plaintiff Company's architect, and they are possessed of full information as to the loss and damage claimed. The American Surety Company is not bound by the amount of loss or damage as ascertained by the architect, his determination being binding only upon the Wells Construction Company: *Ex parte Young, In re Kitchin* (1881), 17 Ch. D. 668. Plaintiff Company can only claim against the American Surety Company for the actual amount of loss or damage caused by the Construction Company's breach of contract, irrespective of the determination of the architect as to such amount, and as to such loss or damage, plaintiff Company must furnish particulars.

MACDONALD, C.J.A.: I think the appeal should be dismissed. I cannot take the view so strongly urged by Mr. *Ritchie* that this contract of suretyship is one which renders the Surety Company liable and bound by the finding of the architect as between a principal debtor and creditor—that they agreed to abide by the decision of the architect. I cannot find that the Surety Company has decided to have the architect established as a tribunal to settle the differences between the parties.

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IRVING, J.A.: I agree.

GALLIHER, J.A.: I take a different view from my learned brothers. The specifications provide:

"To prevent any disputes, doubts, differences or litigations arising or happening, touching or concerning the said work, or any portion of it, or relating to the quantities, qualities, description, classification or manner of work done and executed, or to be done and executed by the contractor, or to the quality, or classification of the materials, to be employed therein, or in respect to any additions, deductions, alterations, or deviations made in, to or from the said work, or any part of it, or touching or concerning the meaning or intention of the specifications and of this agreement, or any part thereof, or of any contract entered into by and between the Company and the contractor pertaining to work herein described, or of any plans, drawings, instructions or directions referred to in the said specifications or the contract, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order or award which may have been made by the architect, or in anywise whatsoever relating to the interests of the Company, or of the contractor in the premises; it is expressly agreed that every such question, doubt, dispute and difference shall from time to time be referred to and be settled and decided by the architect, who shall be competent to enter upon the subject-matter of such question, doubt, dispute or difference, with or without formal reference or notice to the parties to this agreement, or either of them and that he shall judge, decide, order and determine thereon; and that to the architect shall also be referred the settlement of this contract, and the determination of the sum or sums or balance of money to be paid or to be received by the contractor from the owner, and it is further expressly agreed that such decision as to any and every question, doubt, dispute and difference, and said determination and estimate of the quantities, qualities, classifications, and of the sum, values, and all other matters hereinbefore mentioned and described shall be a condition precedent to any right of the contractor to receive, demand or claim any money or other compensation under this agreement, and a condition precedent to any liability on the part of the owner to the contractor or on account of this contract, or for any labour or materials furnished in connection therewith."

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That conveys to my mind, at all events, one meaning: there is a contract, which contract is referred to in and attached to this bond. There is a provision in the contract that the loss shall be for a specified sum or a sum to be found by the architect, and when the architect does find that sum, that is the sum that will be due, and could not be disputed by a principal in the first instance; that is the sum which, as I read the paragraph in the bond, the principal has agreed to pay. If the architect had found a much smaller sum, it does not seem to me that the principal could recover any more than he had agreed to

recover from the obligors under the bond. Holding that view I, with great respect, dissent.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*

Solicitors for respondents: *Davis, Marshall, Macneill & Pugh.*

Appeal dismissed, Galliher, J.A. dissenting.

SICKLER v. SPENCER.

County Court—Mechanic's liens—Architect—Assignment by—Right of assignee—Posting payrolls—Substantial performance of contract—Pleading—Evidence.

Where the assignee of an architect superintended for the defendant the work of constructing a building, brought action to recover the money due for the architect's services, and to enforce payment thereof by filing a lien for the sale of the land and building, it was

Held, that the defendant should have raised in the pleadings the objection that the architect had not posted upon the building or delivered to the owner a receipted pay roll pursuant to section 15 of the Mechanics' Lien Act, or led evidence upon that point. Therefore, that defence was not open.

Held, also, that, the lien being assignable, every remedy for its enforcement went with it.

Held, further, upon the facts, that there was a sufficiently substantial performance of the contract to entitle the architect or his assignee to a lien, notwithstanding that some portion of the material contracted for had not been supplied by one of the contractors at the time he received his final certificate from the architect.

ACTION to recover $6,534.24, balance due by defendant as assignee of E. W. Houghton, an architect, engaged by the defendant to design and have general supervision of all the work and render all the services which might be necessary or required of an architect during the construction of an eight storey steel frame office building. In addition to the personal judgment against defendant, the plaintiff prayed for a declaration that in default of payment of the said judgment and costs forthwith

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all the estate and interest of the defendant in the said lands and premises, or a competent part thereof be sold pursuant to the provisions of the Mechanics' Lien Act to pay the said claim and costs. Tried by GRANT, Co. J. at Vancouver in September, October and November, 1911.

J. A. Clark, for plaintiff.
J. A. Russell, for defendant.

1st December, 1911.

GRANT, Co. J.: I find that E. W. Houghton was employed by the defendant as architect to design and have general supervision of all the work, and render all the services which might be necessary or required of an architect, during the construction and erection of the building in question, including the getting of all the estimates on each and every branch of the work and the lowest figures possible for same, letting and drawing up of all contracts, subject to the approval of the defendant, thus doing away with a general contractor, and was to be paid therefor an amount equal to ten per cent. upon the actual cost of the building when completed. The date of the above mentioned employment was 22nd November, 1909.

I further find that while the building was still in course of erection, on the 19th of January, 1911, Houghton assigned and set over to the plaintiff, for valuable consideration, all moneys due and accruing due to him from the defendant to the plaintiff, and all his right, title, interest, benefit, advantage, property, claim and demand whatsoever therein, or to arise therefrom, and by said assignment covenanted to complete his said contract with the defendant. This assignment I find was prepared and executed in the office of Russell, Russell & Hannington, under the personal supervision and advice of J. A. Russell, as solicitor for the plaintiff herein, who, as such solicitor, also prepared and had executed notices of the assignment and undertook to have same served on the defendant as a part of his duties to the plaintiff and for which service he was paid by the plaintiff.

Judgment

I further find that the said J. A. Russell afterwards said to one Frank G. Green, the Seattle attorney for plaintiff, that he

(Russell) had had notice of assignment served on the defendant; and further that the defendant told Green that when she was served with notice from Russell of the assignment by Houghton to plaintiff she was much put out, as she did not want to deal with any third party.

I also find that the aggregate of the accepted contracts for the building—exclusive of the cost of the hardware and the cost of fuel and wages for a man to run the furnace during the time the building was being dried out and completed—was $101,792, and that the total cost of the building was $104,673.88.

I also find that the delay in the construction of the building was in no way chargeable to the said architect but was chargeable to the defendant, the funds necessary not being on hand when work should have been begun, whereby the commencement of the work was long deferred and its prosecution was for the same reason interrupted and delayed frequently thereafter.

I also find the building was on the 19th of June, 1911, completed, save and except the supplying and setting of about $50 or $60 worth of glass shelving, bevelled glass, and mirror in the china closet and sideboard of the defendant, said sideboard and closet being in the private apartments of the defendant, then occupied by her as her dwelling place, the same having been overlooked by Pilkington Bros., Ltd., who had the contract for the glass, the failure to supply same being unknown to Houghton or the plaintiff.

I also find that on the 24th of June, 1911, the affidavit for lien was sworn herein and entered in the office of the clerk of this Court and in the books of the land registry, so as to form a charge on said land and premises, and that the writ of summons herein was issued within 31 days thereafter.

I also find that the orders for extras were not all given in writing, but were either given by the defendant or by the architect by her instructions, or were concurred in by her after being so given.

I further find that Houghton, as such architect, in pursuance of his employment with the defendant, did render all the services required by his agreement with the defendant to the value of $10,467.88 and received thereon, previous to said assignment,

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$3,933.64, leaving a balance of $6,534.24 due and unpaid at the time of the commencement of the proceedings herein.

As to the points of law argued by Mr. *Russell* that plaintiff cannot recover because the architect had not posted upon the building, or delivered to the owner, a receipted pay roll shewing payment of wages of the foreman, draughtsman, and other employees of the architect, in compliance with section 15 of the Act, I have only to say that as it was not raised in the pleadings, nor any evidence given upon it, the defendant cannot now avail herself of that defence.

As to the contention of counsel for the defendant that the mere right given by the statute to a material man or mechanic to assert and create a lien by complying with the statutory provisions cannot be assigned by him so as to clothe the assignee with power to create the lien for himself there may be some doubt. Most of the authorities cited by him are from the State of California, where the provisions for assignment of liens are, in my judgment, much more restricted than in our Act, and to which I cannot see much, if any, application. Section 6 of chapter 31 of statutes of British Columbia, 1910, provides that every person who does work or service, or causes work or service to be done, in the making or constructing of any erection, or building, shall, by virtue thereof, have a lien for the price of such work upon the said erection or building and the lands occupied or benefited thereby. In the same section there is a provision that the lien for materials supplied shall not attach or be enforced unless the person furnishing the material shall, either before or within 10 days after supplying the material, have given notice in writing to the owner or his agent of his intention to claim such lien. By this section the workman has a lien by the performance of labour or service on the building, while the material man, in order to perfect his lien for the material supplied, must not only supply it, but he must also, either before or within 10 days thereafter, give notice of his intention to claim a lien. When the materials have been supplied before notice of intention to claim a lien has been given, he may be said to be entitled to a lien to such an extent as to give him the right, under section 13 of the Act, to demand from

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the owner or his agent the terms of the contract or agreement with the contractor for and in respect of which the materials are furnished, but when once the notice is given—if the materials have been previously furnished within 10 days before the giving thereof—the lien attaches. Under section 19 the lien shall cease to exist absolutely after 31 days after the completion of the contract or furnishing or placing of materials, or the completion of the services unless, in the meantime, the person claiming the lien shall file in the nearest County Court registry an affidavit of lien in accordance with the requirements of said section. The filing of this affidavit and the registering of the same in the books of the land registry office of the county where the land lies does not create a lien, but perpetuates it for a period of 31 days from the filing of the affidavit, and, unless proceedings are instituted in the County Court registry where the lien was filed within 31 days from the filing of the affidavit to realize said lien, it shall absolutely cease to exist. Neither the filing nor the registering of the affidavit, nor the instituting of the action herein creates the lien, but keeps it intact while being realized upon.

Under section 22 of the Act, the right of a lienholder may be assigned, and this I take not only includes the indebtedness, but also the rights or security for its enforcement which the Act gives him. The question of the assignability of a mechanic's lien was fully considered in *Brown et al.* v. *School Dist. No. 84 of Neosho County* (1892), 29 Pac. 1,069. Judge Green, in delivering the unanimous judgment of the Court, at pp. 1,070-1, says:

Judgment

"We think, however, the greater weight of authorities, as well as the logic of the rule, supports the proposition that a mechanic's lien is assignable, and that an assignee may maintain an action to enforce the same in his own name. The true rule for the guidance of Courts has been stated in 1 Blackstone, Commentaries, 87:

" 'There are three points to be considered in the construction of remedial statutes,—the old law, the mischief, and the remedy,—that is, how the common law stood at the making of the Act, what the mischief was for which the common law provided, and what the remedy the Parliament hath provided to cure this mischief; and it is the business of judges to so construe the Act as to suppress the mischief and advance the remedy.'

"The right to a lien upon real estate for improvements by labour or material did not exist at common law. The right as it now exists in our American system of jurisprudence, is statutory. It will readily be dis-

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cerned that the object of such a law is to give security to the labourers and the material men who have contributed to the erection of buildings or other improvements, and the Courts have said that the law should receive such a construction as will give force and effect to its provisions. Labourers, contractors, and material men may be compelled, by force of circumstances, to assign their claims for labour and material furnished, it may be by the failure of the owner to meet his obligations for improvements. Why should not the party entitled to a lien have the same right to assign his right to the money due him for labour or material, and with it the security which the law gives him, the same as a party who holds a mortgage or other security? Upon this question the Supreme Court of Virginia has stated the rule, in a case involving the assignability of a mechanic's lien: 'It is said, and authorities have been cited to shew that such a statute has to be construed strictly, and it is contended that it is intended exclusively for the benefit of the builder and material man. No case has been cited affirming that a contract under such a statute cannot be assigned. There is nothing in public policy or in the language or policy of our Act to forbid it, and if the statute be exclusively for the benefit of the builder and material man it would certainly impair the value of his lien to declare it non-assignable. It might prejudice him by depriving him of credit which he might otherwise obtain to prosecute his undertaking, and thus also operate as a disadvantage of the owner, while the latter can in no respect be prejudiced by the assignment, because the assignee takes the obligation subject to the same equity to which it was subject in the hands of the obligee and must first allow all discounts, not only against himself, but against the assignor before notice of assignment': *Iaege* v. *Bossieux*, 15 Grat. 83."

Judgment

While American cases are not binding upon this Court, I think they correctly state the law under the Act as we now have it, and I hold the lien was assignable, and, when assigned, every remedy for its enforcement went with it, and the action was maintainable in the name of the assignee.

If it were considered necessary to meet the various allegations of fact in the argument of Mr. *Russell*, I would find that there was no undertaking on the part of Houghton that the cost of the building would not exceed $70,000 or $80,000, and there is not any evidence worthy of belief that it cost more than $104,673.88, while the accepted tenders, exclusive of hardware and the cost of heating, were $101,792.

The only other question to be considered is the effect of the non-supplying of the glass for the china closet and sideboard in the private apartment of the defendant by the contractor who had the contract for that part of the work. I have already found that when the contractor got his final certificate for

the work on the 19th of June, 1911, the architect honestly believed that the contractor had fully completed his contract and, if it were necessary, the evidence also shews the contractor also thought he had completed his contract. In fact, the only person who seems to have then known that these comparatively small things had not been supplied was the defendant, who seems to have been holding this card up her sleeve until the opportune moment arrived to play it. The defendant, through her counsel, contends that the contract must be completed to the smallest detail before the architect has a right of action. On this point the law is thus laid down in the American and English Encyclopaedia of Law, Vol. 20, pp. 366-7:

"As between the owner and principal contractor a substantial performance by the latter is sufficient to entitle him to a lien. Substantial performance permits only such omissions or deviations from the contract as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice, be paid for by deductions from the contract price."

In this particular case the missing glass was supplied by the contractor when his attention was called to it, and no damage has been sustained whatever. The same authority, on the last-mentioned page, states:

"The question of substantial performance depends somewhat on the good faith of the contractor. If he has intended and tried to comply with the contract and has succeeded except as to some slight thing omitted by inadvertence, he is entitled to a lien."

Judgment

As I am satisfied from the evidence that Houghton honestly and faithfully attempted, and thought he had fully completed his contract with the defendant in accordance with the several contracts drawn, or as changed or concurred in by the defendant from time to time as the work progressed, I hold there was such a performance of the contract of Houghton in this case as to entitle him or his assignee to a lien, and therefore I declare the plaintiff is entitled to a mechanic's lien upon the interest of the defendant in the premises described in the plaint for the sum of $6,534.24 and costs, and in view of section 34 of the Mechanics' Lien Act to a judgment against the defendant, Rose Leigh Spencer, personally, for said sum and costs.

Judgment accordingly.

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McARTHUR v. ROGERS.

Practice—Trial by jury—Refusal of order for—Discretion—Interference by Court of Appeal.

McARTHUR v. ROGERS

While, on the facts here, the judge at Chambers was right in refusing a jury, yet, in any event, having exercised his discretion, the Court of Appeal will decline to interfere.

APPEAL from an order made by MORRISON, J. at Chambers in Vancouver on the 5th of December, 1911, dismissing plaintiff's application for an order for trial with a jury.

The statement of claim alleged breach by defendant of an agreement to supply water for use on plaintiff's lot for domestic and irrigation purposes, and claimed damages and a mandatory injunction to compel the performance by defendant of his agreement.

Statement

The statement of defence, besides denial of the agreement, set up a proviso exempting defendant from liability for causes beyond his control and alleged that any deficiency in the supply of water was caused by drought, and also set up a proviso that if certain payments were not made by plaintiff, his supply of water should be cut off, and alleged that such payments had not been made. The application for order for trial with a jury was made within four days after notice of trial given. Plaintiff appealed.

The appeal was argued at Victoria on the 16th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Ritchie, K.C., for appellant: While Order XXXVI. differs somewhat from the English rule on account of there being no chancery division in British Columbia, its scope and intention is the same, namely, that, subject to certain cases where the judge is given discretion, the mode of trial is to remain as it was before the rules were passed, *viz.*: when equity cases, except where a special issue was ordered to be tried by a jury, were tried by a judge without a jury, and common law cases were tried with a

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jury where the cause does not come within rules 3, 4 or 5, a party making application within due time is entitled as a matter of right, to an order for trial with a jury, under rule 6.

It cannot be said here that the equitable jurisdiction of the Court is invoked. The action is brought to recover damages for breach of contract and an injunction is claimed only as an ancillary remedy. The test is whether the action is in substance a common law or an equity action: see *Coles* v. *Civil Service Supply Association* (1884), 32 W.R. 407; *Gardner* v. *Jay* (1885), 29 Ch. D. 50; *Clairmonte* v. *Prince* (1897), 30 N.S. 258.

Argument

McCrossan, for respondent, not called upon.

Per curiam: The appeal should be dismissed. It does not appear to be a case for a jury, but in any event, seeing that the learned judge below has exercised his discretion, and has come to the conclusion not to grant a jury, we ought not to interfere.

Judgment

Appeal dismissed.

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THE KING v. CHLOPECK FISH CO.

THE KING v. CHLOPECK FISH COMPANY.

Shipping—Foreign vessel—Seizure of within three-mile limit—Customs and Fisheries Protection Act, R.S.C. 1906, Cap. 47, Secs. 10 and 21—Burden of proof on defendant ship.

In an action brought in the Supreme Court of British Columbia by His Majesty, on the information of the Attorney-General for Canada, for the forfeiture of the Edrie for contravention of the Customs and Fisheries Protection Act, the statement of claim alleged that the Edrie, being a foreign vessel, was, on the 21st of February, 1911, found fishing within three marine miles of the coast of Canada, namely, within three marine miles of the shore of Cox Island, British Columbia, and that such ship was legally seized by an officer authorized by the Customs and Fisheries Protection Act, and claimed the forfeiture of the Edrie. The statement of defence denied those facts and alleged that the Edrie was lawfully on the high seas, and was illegally seized by the Canadian cruiser Rainbow.

Section 10 of the Customs and Fisheries Protection Act, R.S.C. 1906, chapter 47, enacts that: "Every ship, vessel or boat which is foreign, or not navigated according to the laws of the United Kingdom or of Canada, which, (a) has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the limits specified and described in the first article of the aforesaid convention, or in or upon the inland waters of Canada, without a licence then in force granted under this Act; or (b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force; shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited"; and section 21: "The burden of proving the illegality of any seizure, made for alleged violation of any of the provisions of this Act, or that the officer or person seizing was not by this Act authorized to seize, shall lie upon the owner or claimant." The judgment on the trial determined that the defendant did not discharge the burden of proof resting upon defendant, and adjudged that the Edrie be condemned as forfeited to His Majesty and be sold by public auction.

Held, on appeal, that the trial judge was right.

Statement

APPEAL by the defendant, owner of the American fishing schooner Edrie, from the judgment of HUNTER, C.J.B.C. at the trial of the action at Vancouver on the 29th of May, 1911.

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The appeal was argued at Vancouver on the 15th and 16th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Ritchie, K.C., and *Reid, K.C.*, for appellant: The trial judge erred in holding that there was a burden upon defendant to shew that the Edrie was not guilty of fishing within territorial waters. His decision was based upon section 21 of the Customs and Fisheries Protection Act, which applies only to actions or claims brought by the owners of property upon the ground that same has been illegally seized, and is not applicable to an action on behalf of the Crown to obtain a decree of forfeiture for illegal fishing. The original provision on this subject was contained in section 10 of the Dominion statutes of 1868, chapter 61. The rule as to burden of proof enacted by this section has never been applied to such actions brought on behalf of the Crown: see *The Ship Kitty D. v. The King* (1905), 22 T.L.R. 191; also *The Queen* v. *The Ship Henry L. Phillips* (1895), 4 Ex. C.R. 419; (1896), 25 S.C.R. 691; *The Queen* v. *The Ship Frederick Gerring, Jr.* (1896), 5 Ex. C.R. 164; 27 S.C.R. 271.

A construction which would enable the ships of foreign friendly powers to be condemned without evidence should, if possible, be rejected: see judgment of Judge Hodgins in *The King* v. *The Kitty D.* (1904), 34 S.C.R. 673 at p. 681. The evidence here that the acts complained of by the Crown were committed within territorial waters is too dubious to support a decree of forfeiture, the action being of a character requiring the clearest possible evidence. The case on the part of the Crown was that the Edrie picked up her dories with fish in them a few hundred yards inside the three-mile limit and this was worked out without any evidence whatever of the distance from the shore of the place where the dories were picked up, other than production of an Admiralty chart and locating the Edrie on such chart by bearings from the shore, the point to which one of the bearings was taken being a distance of six and a quarter miles, at which distance it is submitted that it was impossible to accurately lay down the ship's position within a few hundred yards,

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even assuming that there was not the slightest inaccuracy in the chart. A competent master mariner, on an Admiralty chart identical to that used aboard the Rainbow, located the Edrie outside the three-mile limit, and the witnesses for the Crown could not point out any error in such location, and were forced to the contention that the Rainbow's chart was more reliable because it had a canvas back. There was no evidence of fishing within the limit. It was established by three judges against two in *The Queen* v. *Frederick Gerring, Jr., supra,* that bailing fish out of a net was fishing, but that is very different from saying that hoisting on deck a dory which has fish on board constitutes fishing.

Macdonell, and *Armour,* for respondent: The learned Chief Justice did not mean that section 21 of the Customs and Fisheries Protection Act applied to this action, but meant only that the evidence on behalf of the Crown had shifted the burden of proof to the defendant. The Edrie was carefully and accurately fixed, and her position was within the three-mile limit; this was done after two earlier fixes, which also shewed her within the limit. The evidence of Captain Newcombe, of another cruiser, shews that the bearings were properly taken and the vessel accurately fixed. The conduct of the master of the Edrie shewed knowledge of guilt; he destroyed evidence which, according to his story, would have shewn him outside the limit, by taking up marked buoys. The whole of the fish was packed in ice on board the Edrie, and all acts, from the putting out of nets until the fish were packed in ice on the Edrie, were part of the act of fishing. Even assuming that there was no fishing, the Edrie was liable to forfeiture for being in territorial waters for a purpose other than obtaining wood, water or shelter.

Argument

Ritchie, in reply: There is no allegation in the statement of claim against the Edrie of coming into territorial waters for a purpose other than obtaining wood, water or shelter. The only allegation against her is that she was found fishing, preparing to fish, and had been fishing in British waters. The Chief Justice at the trial expressly based his conclusion as to the burden of proof on section 21 of the Customs and Fisheries Protection Act.

Cur. adv. vult.

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MACDONALD, C.J.A.: In the view I take of the evidence it becomes unnecessary to determine the construction which ought to be placed upon the Revised Statutes of Canada, 1906, chapter 47, section 21; therefore, for the purpose of this opinion, I will assume that the onus of proof of the offence charged was upon the respondent. I have had the advantage of reading the reasons for judgment of my brother IRVING, and I concur in his view of the evidence. I will only venture to add to those reasons by referring to other evidence which to my mind has an important bearing upon the case, and which indicates very clearly how little confidence the captain of the Edrie had in the bearings which he claims to have taken just before the seizure, and upon which appellant relies. He admits that as early as 11.50 he knew the character of the approaching ship. From that time until the seizure was made he was making very strenuous efforts to get in his dories and fishing gear. In other words, he was taking up that which would have proven beyond question whether he was or was not within the three-mile limit. He was destroying the evidence which would, according to his story, have established beyond dispute that he was outside the three-mile limit. The excuse which he gives for this does not appeal to me. I take the following extracts from his evidence:

"I am asking you this—at 11.50 you were absolutely certain that it was a Canadian cruiser? Yes, sir.

"Now, those buoys remained in the water there from 11.50 until 5 or 10 minutes to 1. Yes.

"And your bearings were taken for the purpose of convincing you that you were outside? Yes.

"Now, is there any reason why they should not have remained there 10 or 15 minutes longer to convince the captain of the Rainbow that you were outside? Yes, there is this reason—if those buoys had remained 10 or 15 minutes longer there the men would have had to haul this gear in and look at it for 10 or 15 minutes and would not be doing anything.

"Now, if those buoys remained there when the Rainbow came up, the Rainbow could have taken the bearings just as well as you? I suppose they could.

"The buoys were anchored there? Yes.

"And there was no chance of moving at all? No.

"And the Rainbow was within 200 yards of you when you took up that last buoy? Yes."

I would dismiss the appeal.

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IRVING, J.A.: I would dismiss this appeal.

I reach that conclusion on the facts of the case, and irrespective of the onus which the appellants contend that the learned Chief Justice improperly placed upon them. The contention put forward by the appellants that section 21 applies to a class of action wholly different from this action is, in my opinion, sound.

Coming to the facts of the case, it is established beyond doubt that the Edrie was, on the day in question, in Canadian waters. There were on the bridge of the Rainbow, in addition to the quartermaster at the wheel: (1) Commander Stewart, directing the navigation of the Rainbow, and taking from time to time her bearings and the bearings of the Edrie; (2) Mr. Moore, the first lieutenant, who verified two of the fixes of the Edrie made by Commander Stewart, and who also fixed the position of the Rainbow at R; (3) Lieutenant Edwards, who held the range finder on the Edrie from 14,000 yards down to 750 yards, and who, for the information of Commander Stewart, called out the diminishing distances at every 100 yards; and (4) Lieutenant Holt, who watched the Edrie and her small boats through a telescope, and who from time to time reported to Commander Stewart the movements of the vessel and her dories. From the bearings thus taken, Commander Stewart has placed the Edrie on the chart as being at 12.39 at a point marked 1; at 12.48 at a point marked 2; and at 1.10 at a point marked R. Each of these three places are within the three-mile limit.

IRVING, J.A.

Lieutenant Holt reported that when he first saw the dories they were to the southward of the Edrie, and that later he picked them up with his glass close alongside her.

During the period that elapsed between the time when the Edrie was first sighted until she was at point R, she was engaged in getting the fish out of the dories on to her own deck. It was the final act necessary to reduce the fish into actual possession. That act, or the act of lifting the dories bodily with the fish on board them, seems to me as much a part of the operation of fishing as those things which are admittedly "fishing," *e.g.*, dropping the hooks overboard or pulling the lines in to see if anything has been caught, are.

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At any rate, proof of that operation—of lifting the fish from dories on to the deck of the Edrie, both dories and Edrie being within Canadian waters—raised a sufficient case to require evidence to be adduced by the defendants that they were not fishing: see *Hollis* v. *Young* (1909), 1 K.B. 629; and when that evidence was given it transpired that the Edrie, although pretending to shew their captors where they had been fishing, and that they had picked up all their gear, had, in fact, left a large amount, fully one half of their outfit, in the sea. The deliberateness of this concealment is shewn by the fact that no mention of the circumstance of the loss was made in the Edrie's log, on its face, a very carefully prepared document.

The inference I would draw from this act of abandonment—this suppression of evidence—was that the unrecovered gear was in Canadian waters, and its existence was concealed from the Rainbow's officers in order that it might not be used as evidence against the defendants' ship, which the master then knew was arrested for fishing in Canadian waters.

IRVING, J.A.

Starkie, in his Law of Evidence, 4th Ed., 1853, p. 755, speaks of the suppression or destruction of evidence as a "prejudicial circumstance of great weight," and Wills on Circumstantial Evidence, 5th Ed., 111, reproduces the statement with approval.

The principle of presuming against a spoilator is adopted in international law when papers have been spoilated by a captured party: *The Hunter* (1815), 1 Dod. 480.

GALLIHER, J.A.: The evidence adduced by the Crown satisfies me that appellants were fishing within the three-mile limit.

I agree with my brother IRVING that the dories are a part of the fishing tackle or appliances.

GALLIHER, J.A.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*

Solicitors for respondent: *Macdonell, Killam & Farris.*

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REX v. MAH HUNG.

Criminal law—Procuration—Definition of—Charge to jury—Prejudice of juror—Statement of during trial—Duty of jurors to live up to their oaths.

REX
v.
MAH HUNG

On a prosecution for procuring a female to leave her home for the purpose of embarking her in a life of prostitution, the judge, after defining the crime of procuring, said: "You have to go further and find that she was in a brothel in Vancouver when he procured her to leave here in order to justify the prisoner." There was some doubt upon the evidence as to whether the female in question had any regular place of abode.

Held, on appeal, *per* IRVING and GALLIHER, JJ.A., that the judge had properly defined the crime to the jury.

Per MACDONALD, C.J.A.: That as the onus was upon the prosecution to prove that the woman had a usual place of abode, and as such onus had not been discharged, there should be a new trial.

On the morning of the second day of the trial of an accused person on a charge of procuration, the foreman of the jury informed the judge that one of the jurymen had stated that he was prejudiced, and asked the advice of the judge on the point. The judge refused to take any action further than directing that the trial proceed.

Held, that the course adopted was right; that a juryman ought not to volunteer a statement of that kind. Jurors, after they are sworn, are expected to live up to their oaths.

CRIMINAL APPEAL by way of case stated, from a conviction by MURPHY, J. at the October (1911) assizes at Vancouver. In the case stated for the opinion of the Court, the learned judge said:

"The accused was tried before me and a jury at the October assize on an indictment reading as follows:

Statement

"'(1.) That Mah Hung . . . . unlawfully did procure one Katie Stephens, a woman, to leave her usual place of abode . . . . such place not being a brothel, with intent that she should for the purpose of prostitution become an inmate of a brothel . . . .

"'(2.) That the said Mah Hung afterwards . . . . unlawfully did procure the said Katie Stephens, a woman, to become a prostitute . . . .

"'(3.) That the said Mah Hung . . . . unlawfully did administer to the said Katie Stephens cocaine and other drugs with intent thereby to stupefy her so as thereby to enable a man to have unlawful carnal connection with her, the said Katie Stephens . . . . .'

"After the case for the Crown was concluded, and while witnesses were being examined for the defence to establish the fact that Katie Stephens, named in the indictment, was a prostitute, well known to the police as such since 1907, and that she had prostituted herself to Chinamen and white men in different rooms and places of questionable repute in the City of Vancouver, resorted to by her and such Chinamen and white men for the purposes of prostitution, being fully satisfied that the evidence before the Court, which is attached and made part of this case stated, established at the times mentioned in the indictment the said Katie Stephens was a prostitute, I withdrew the second count in the indictment from the jury, with the consent of counsel for the Crown. The accused was found guilty by the jury on the first count in the indictment and acquitted on the third count, and sentenced to three years' imprisonment with hard labour.

"In my charge to the jury, dealing with the first count, I stated:

" 'The Code says any woman or girl to leave her usual place of abode in Canada—it makes no difference if that woman is a prostitute or not as far as that element of it is concerned—no man has a right to procure her to leave her place of abode for the purpose that is afterwards set out.

" 'The next stage of the case is, such place not being a brothel. That is a very important feature of this crime which you are investigating. A brothel is defined by the Code as follows: A brothel or common bawdy house is a house, room, set of rooms, or place of any kind, kept for the purpose of prostitution, or occupied or resorted to by one or more persons for such purposes. Now you have to find this girl—that is if you find the first element has been proven, that is that he procured the girl to leave Vancouver—you have to go further and find that she was in a brothel in Vancouver when he procured her to leave here in order to justify the prisoner. In that connection you will have to remember what the definition of a bawdy house or brothel is. It is possible for a woman to be a prostitute and not be an inmate of a bawdy house. I have told you it is no justification for a man to procure a woman to go away because she is a prostitute. If she is merely a street walker and not an inmate of a house of ill-fame and if she did not keep a room to which she took men for purposes of prostitution, then the room is not a brothel and she is not an inmate thereof under the Code. On the other hand, if she, as a street walker, did go out and solicit men, and having got men on the street, took them to her room, and kept that room for the purpose of prostitution, then she is an inmate of a brothel. You have to find on the evidence adduced here if this girl was an inmate of a brothel; that is, if she used the room she lived in for carrying on the business of prostitution and that

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was her business and only business. She might be a street walker and prostitute and yet not be the inmate of a brothel. If she merely went out on the street and solicited men and took them to a brothel or a house of assignation for a short time, she would not be an inmate of a brothel; her room is where she lives, but if she makes that room the headquarters of a house of prostitution, then she is an inmate of a brothel. You have to decide and find beyond reasonable doubt that this girl was not an inmate of a brothel, and that is you must decide whether she was rooming in a house of prostitution or ill-fame; that is, whether she kept a room in some part of this city primarily for the purpose of bringing men there to have intercourse with her. I charge you that it is quite possible for a girl, say, being employed in a restaurant and having a bedroom in the city, to occasionally take a man to her room to have intercourse with her, but that would not constitute that room a brothel or her an inmate of a brothel, because the Code says such rooms must be kept for the purpose of prostitution; that is, it must be the main object of the person occupying that room—the purpose of having sexual intercourse with men that she took there—and unless it was being used for that purpose primarily and not as a living room, but for the purpose of prostitution, it is not a brothel; if you find this girl, although a prostitute, was not in a bawdy house in the sense that I have explained—was not using her room as the headquarters of prostitution, taking men there, or carrying on the business of prostitution in her room, then the second element of this crime is made out. In dealing with that element you must remember that if you have any reasonable doubt, then you must give the prisoner the benefit of that doubt; but you must have a reasonable doubt only on the evidence that was adduced before you here, and on that evidence you must affirmatively make up your minds she was not in a brothel at the time he took her away, remembering what I told you as to what a brothel is.'

Statement

"Whilst the jury were being empanelled, Mr. *Russell,* for the defence, challenged several for cause, on the ground that they had served on a previous jury which tried and convicted another Chinaman, Dr. Lew, for theft. In such first trial some evidence was given shewing that Dr. Lew and Mah Hung had together taken two white girls—one McDonald and the Stephens mentioned in this case—to Prince Rupert. The challenges were disposed of by triers.

"After some of such challenges had been disposed of, two men, who had served on such former jury, were called as proposed jurors. Having been in Court whilst the triers were disposing of persons in the same position as themselves and, presumably, having observed that statements made by such persons that they were prejudiced against the accused usually resulted in the triers disqualifying such persons, these two men, without waiting for triers, volunteered the statement that they were prejudiced.

There were, when this happened, several jurors empanelled, and one of these, who had not served on the former trial and had been sworn without objection, on hearing the two men make the statement that they were prejudiced, arose in the jury box and stated that he, too, was prejudiced. I thereupon stated in open Court that to disqualify a man from service as a juror his prejudice must be such as would lead him to disregard his oath, which was that he bring in a verdict according to the evidence; that a juror's prejudice must go to this extent, and that such a statement of prejudice by a juror must mean this and not be a mere subterfuge to escape jury duty. The juror in the box made no further statement and counsel for the accused raised no objection.

"The swearing of the jury was completed just before the Court rose for the evening adjournment.

"On re-assembling next morning immediately after the Court opened, the following remarks passed between the foreman of the jury and myself:

"'Foreman of the jury: Your Lordship, since the adjournment last evening it has come to my attention that one of the jurymen stated that he was prejudiced in this case. Should it be necessary for the jury to bring in a certain verdict, would that enable the accused's counsel to appeal?

"'The Court: I do not think you need worry about that. You are empanelled as a jury and I have no doubt that the gentlemen of the jury will respect their oaths.'

"The trial then proceeded in the usual way without further reference by anyone to this particular matter.

Statement

"The points reserved for the opinion of the Court are:

"(1) Was the extract from my charge above set out a correct statement of the law?

"(2) With reference to the juror's statement of prejudice, was I right in allowing the trial to proceed under the circumstances above outlined?"

The appeal was argued at Victoria on the 9th and 10th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

J. A. Russell, for accused.

W. A. Macdonald, K.C., for the Crown.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: The conviction should be quashed and a new trial ordered.

I think the learned judge's charge was calculated to convey to the minds of laymen a wrong impression of the law upon a very material point in the case. The offence charged was that the accused unlawfully procured a woman to leave her usual place of abode, such place not being a brothel, with intent, etc. The onus was upon the prosecution to prove that she had a usual place of abode and that such usual place of abode was not a brothel. The learned judge charged:

> "If you find the first element has been proven, that is, that he procured the girl to leave Vancouver, you have to go further and find that she was in a brothel in Vancouver when he procured her to leave here, in order to justify the prisoner."

I think that is an erroneous statement of the law; it was calculated to lead the jury to understand that unless the prisoner was able to prove that the woman was taken from a brothel in Vancouver he could not justify himself. Those words were also calculated to lead the jury to believe that the offence was made out if the prisoner procured the girl to leave Vancouver; whereas it was necessary for the Crown to prove, not that she was procured to leave Vancouver, but that she was procured to leave her usual place of abode in Vancouver. Now, there may have been no sufficient evidence that this woman had any usual place of abode in Vancouver. From the evidence which is before us, consisting partly of her own, it would be very difficult to say that she had a usual place of abode. The evidence is that she was a common street walker, that she would stay a night in one place and another night in another. Before going to Prince Rupert she went with the prisoner to Agassiz, where she stayed a night in a Chinaman's hut; on return to Vancouver she stayed the next night in a room provided by the prisoner, and apparently the following night in the house of Dr. Lew, and then departed with the prisoner for Prince Rupert. I refer to this evidence only for the purpose of shewing how necessary it was to give a correct and precise charge to the jury and to point out clearly the elements which constitute the crime charged, and what the Crown was obliged to prove. The Crown was required to prove that she had a usual place of abode, and the character

of that place of abode. If she had no usual place of abode in Vancouver, then the procuring of her to leave Vancouver would not be an offence; or, if she had a usual place of abode and it was not proven that that usual place of abode was not a brothel, then no offence was committed in procuring her to leave. Taking the charge as a whole, I am convinced that the jury could not have had a clear notion of the law governing the case. In fact, the whole charge was calculated to mislead them with regard to the elements of the offence which they were required to consider and pass upon. All through the charge the jury were being impressed with what constituted a brothel, and with the fact that they were to find whether she had been taken from a brothel. In another place the learned judge says: "You have to find on the evidence adduced here if this girl was an inmate of a brothel." Now, clearly, it was not necessary to find this, at all. The fact that the learned judge afterwards said: "You must affirmatively make up your minds she was not in a brothel at the time he took her away" was not sufficient, in my opinion, to remove the impression which the jury were almost bound to receive from the earlier parts of the charge. But even this is inaccurate and calculated to mislead. Neither there nor elsewhere does he lay stress on "usual place of abode." As, in my opinion, substantial wrong was done, and in all probability a miscarriage of justice brought about, I think the conviction ought not to be allowed to stand.

MACDONALD, C.J.A.

On the other question, the refusal of the learned judge to discharge a juryman after he had been sworn, I think the course pursued, in the circumstances of this case, was right.

I would quash the conviction and order a new trial.

IRVING, J.A.: I have not been able to come to the same conclusion as that reached by the learned Chief Justice, for this reason: The judge was dealing here with a definition of the crime with which the man was charged; nothing else. A definition as to the onus of proof of the different facts that went to the making up of proof of that charge would be quite a different matter and could be dealt with separately. The only point submitted to us apparently is, was the definition of the crime he gave

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correct? The statute provides that a prostitute, although she may be known to be a prostitute, if she is not living in a brothel, shall have the protection of the statute; and that is what the judge was endeavouring to point out to the jury. He, as judges often do when they are pointing out something to the jury, went over the case several times, using different language in every instance. In his charge he dealt with the matter four times. In the first place he said: "You have to go further and find that she was in a brothel when he procured her to leave, in order to justify the prisoner." That, it is suggested, is too strong. I do not think it is. But, assuming that it is, he later on says this: "You have to decide and find beyond reasonable doubt that this girl was not an inmate of a brothel; if you find this girl, although a prostitute, was not in a bawdy house, in the sense that I have explained"—which I understand to mean that she was living there and receiving gain. And again: "You must make up your minds that she was not in a brothel." I think that he fairly pointed out to the jury the object of the statute in the conclusion he came to, *viz.*: that she was to be protected if she was not an inmate of a brothel at the time. Charges to the jury must be read reasonably. You cannot pick up two or three lines and say: "Well, now, that remark has put the thing before the jury in a wrong sense." You must consider the whole effect of what was said to the jury, and you have to take the whole thing as it would appear to them, and as it appears to counsel at the trial. This you can judge of according to the objections—if any—advanced by him at the time. On that part of the case I am satisfied that the judge did what was right.

IRVING, J.A.

Then, with reference to the other point, it appears that a juryman volunteered the statement that he was prejudiced, after he had been sworn; but the judge did not think proper to discharge him. In my opinion the judge was perfectly right. A juryman has no business to volunteer a statement of that kind. Jurymen, after they are sworn, are expected to live up to the oath they have taken. A juror is not at liberty to be asked questions in order to found a challenge before he is sworn. And after he is sworn he speaks through his foreman.

In the case of *Reg.* v. *Stewart* (1845), 1 Cox, C.C. 174 at p. 175, we find the following:

"At the commencement of the case, and as each juryman came into the box, C. Jones, Serjt., for the prisoners, asked him whether he was a member of a certain association for the prosecution of parties committing frauds upon tradesmen. Clarkson and Bremridge, for the prosecution, objected to this proceeding.

"Baron Alderson: It is quite a new course to catechise a jury in this way.

"Serjt. Jones: I have a right, my Lord, to challenge, and I submit that I am entitled to ask for information that is necessary to enable me effectively to exercise that right. At all events, your Lordship will perhaps intimate to the jury, that such of them as are members of this association had better retire from the box.

"Baron Alderson: I cannot allow you to cross-examine the jury, nor will I intimate to them anything on the subject you mention. If you like to challenge absolutely you may do so."

There are other authorities on that point. One is to be found in *The King* v. *Edmunds* (1821), 4 B. & Ald. 471.

Another reason the judge could not deal with the case was because it was too late. A prisoner could not be in any better position than if he had endeavoured to challenge the man. The challenge must be made in proper time. The authority for that is *Rex* v. *Sutton* (1828), 8 B. & C. 417, where it was found, after the trial had been proceeded with, that there was an alien on the jury, and Lord Tenterden, C.J. at p. 419, says:

IRVING, J.A.

"I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge."

He had a challenge here and he did not take advantage of it.

Another authority on the same point is *Reg.* v. *Wardle* (1842), Car. & M. 647 at p. 648, where the prisoner having been arraigned and the jury sworn without any challenge, the foreman of the jury stated that the prisoner had a relation on the jury.

"Corbett, for the prosecution: I submit this jury may be discharged without giving any verdict, and a new jury be called and sworn.

"Erskine, J. (having conferred with Tindal, C.J.): I have conferred with the Lord Chief Justice, and we are of opinion that I have no power to discharge the jury [That means, I imagine, on the ground of challenge], and that the case must proceed."

For these reasons I think the judge was right in refusing to discharge the jury on that occasion.

GALLIHER, J.A.: It appears to me that our consideration of the case stated is confined to two points, and two only. First,

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as to whether what the learned trial judge has said is a correct exposition of the law; and second, with regard to the juryman.

Now, in the view I take of the judge's statement here, he was dealing with the section of the Act as to what the legal interpretation of that Act was, and what elements were necessary to constitute a crime or to relieve the prisoner, as the case may be. If I thought that there was any reference to onus at all, or if this stated case was on his charge generally, or if he did not charge the jury as to whom the onus rested upon in regard to whether it was or was not a brothel from which she was taken, I would feel considerable doubt in the way he has put it here. But as I regard it he is dealing simply with the legal phase of the section of the Criminal Code. And I do not think as the case is before us we can go beyond that.

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Being confined to that, I am of the same opinion as my brother IRVING. It is not necessary for me to practically repeat, at all events any considerable portion of what my brother IRVING has said with regard to the other point reserved. I agree with him that the judge was right in not asking the juror to be withdrawn. On the whole I am of the opinion that the conviction should stand.

Conviction upheld, Macdonald, C.J.A. dissenting.

HELSON v. MORRISSEY, FERNIE AND MICHEL RAILWAY COMPANY.

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HELSON v. MORRISSEY, FERNIE AND MICHEL RY. CO.

Railways—Shunting—"Train moving reversely"—What constitutes a train—Coupling cars—When cars become part of train—Duty of Company to have man on rear car—British Columbia Railway Act, R.S.B.C. 1897, Cap. 163, Sec. 100.

Plaintiff, on the occasion in question, had driven across the tracks after having been delayed by a train, and on returning found four dead, or unattached, cars in his way. He diverted from the regular crossing in order to pass behind the cars. As he did so, a train backed down on and coupled with these cars, moving them so that they struck the plaintiff's vehicle, threw him out, and caused injuries which may prevent his being able to walk. The jury found in favour of the defendant Company in a general verdict, and plaintiff appealed.

Held, granting a new trial, that the trial judge should have drawn the attention of the jury to the provisions of section 100 of the Railway Act, R.S.B.C. 1897, chapter 163, which imposes upon the Company the duty of stationing a man on the rear car of any train moving in a reverse direction in any city, town or village, to warn persons standing on or crossing the track; and also that the jury should have been given a definition of what constitutes a "train."

APPEAL from the judgment of MORRISON, J. and the verdict of a special jury, in an action tried at Fernie on the 17th of May, 1911, for damages for injuries received at a level crossing of a railway. Statement

The appeal was argued at Vancouver on the 9th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

McTaggart, for appellant (plaintiff): We submit that the learned judge should have instructed the jury on section 100 of the Railway Act, which requires that a man shall be stationed on the last car of a train moving in a reverse direction, to warn the public of any danger. It is true there was a man on the last car of the train that was moving, but that was the fifth car away from the plaintiff. It is a question whether those unattached cars by the act of coupling constituted them a train. But Argument

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in any event we are entitled to have the jury know of section 100 and its effect. It should also have been made known to the jury what constitutes a train so as to bring it within section 100: see *Hollinger* v. *Canadian Pacific R.W. Co.* (1892), 21 Ont. 705 at p. 708. We are further entitled to know whether the man on the fifth car away was looking in the direction of the plaintiff so as to be able to warn him. See as to construction to be placed on this section: *McGregor* v. *Canadian Consolidated Mines* (1906), 12 B.C. 116; and also see *Bennett* v. *Grand Trunk R.W. Co.* (1883), 3 Ont. 446; Macmurchy & Denison's Railway Law of Canada, 2nd Ed., 428; *Levoy* v. *Midland R.W. Company* (1883), 3 Ont. 623; *McMullin* v. *Nova Scotia Steel and Coal Co.* (1907), 39 S.C.R. 593, 7 Can. Ry. Cas. 198; *Elliott* v. *The South Devon Railway Company* (1848), 17 L.J., Ex. 262.

Argument

Davis, K.C., and *M. A. Macdonald*, for respondent (defendant) Company: This is a general finding in favour of the defendant and it is assumed that the jury, on arriving at that finding, had before them every circumstance in favour of the party against whom the finding has been made. But on the plaintiff's own evidence, his negligence was such that the defendants would be entitled to a verdict. We say, and the record shews, that section 100 was brought to the attention of the jury, and even read to them. The only question was whether or not the cars when coupled up at once became a portion of the train, or whether it became a train as soon as it was coupled up and began to or was ready to be moved on. It is not reasonable to expect that a man is to be stationed on every car, or the last of every lot of cars about to be coupled in the neighbourhood of a crossing such as this. The section must be construed reasonably, and a reasonable understanding of it would be that some proper interval must be allowed for the man to reach the end car after the coupling. Four cars standing alone cannot be said to be a train. Here it was the momentum caused by the coupling which sent the cars backward. Of course the coupling or shunting might be done negligently, but that would be negligence apart from the statute. The question is whether the cars, or the train, continued moving along after the coupling; we submit that it

did not. The Company, we submit, complied with the section by having a man on the car. Of course that man might be negligent in the performance of his duty, but such negligence would be apart from the section, and would not affect the Company's common law liability for negligence.

McTaggart, in reply.

On the 9th of January, 1912, the judgment of the Court was delivered by

IRVING, J.A.: In this case there must be a new trial. The provisions of section 100 of the Railway Act (R.S.B.C. 1897) were not put before the jury by the learned judge in his charge.

It was admitted that the place in which the act occurred was a village. It therefore became the duty of the judge to draw the attention of the jury to the rule laid down by the Legislature under the above section, and give to them a definition of the word "train." What is a "train" is a question for the Court, and it may be that in giving that definition the judge may trench, apparently, on the duty of the jury to deal with the facts.

An engine with its tender has been held in *Hollinger* v. *Canadian Pacific R.W. Co.* (1892), 21 Ont. 705, affirmed (1893), 20 A.R. 244, to be a train. Three trucks without an engine attached have been held to be a train: *Cox* v. *Great Western Railway Co.* (1882), 9 Q.B.D. 106. It seems to me that if a number of cars are connected and are forced backward by the concussion made in coupling, they constitute a train.

Judgment

It was argued that it would be unreasonable to expect that a man should be stationed on the last of a number of cars about to be coupled up, and that a proper allowance ought to be made in order that the man who had been the rear brakesman might reach the new rear end of the train—or at any rate until the newly coupled train got under way that the section should not apply—that there should be a certain space allowed to be traversed by the end of the train ("running out the slack" it was called) before it became necessary to station a man at the end.

None of these arguments, in my opinion, should be allowed to whittle away the meaning of the language of the statute.

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Then, assuming that I am wrong, and that it is permissible to "run out the slack" without a man being placed at the rear of the train, it should have been left to the jury was the "train moving reversely" as a train, or was the accident the result of merely running out the slack?

There was one other portion of the judgment objected to. The learned judge told the jury that if the plaintiff contributed by his own negligence, and that negligence on his part contributed to the accident, then he cannot recover. That, however, must be read with the portion where the learned judge (compare *Jones* v. *Toronto and York Radial R.W. Co.* (1911), 23 O.L.R. 331) pointed out that although the plaintiff himself might have been guilty of negligence, yet if the defendants could have, by taking ordinary care, avoided the mischief, then the plaintiff's negligence would be no defence. It might have been plainer if the extract I have given from p. 149 of the appeal book had followed immediately after that taken from p. 155; but if this objection stood alone I would not be in favour of granting a new trial.

New trial ordered.

Solicitors for appellant: *Dickie, Debeck & McTaggart.*
Solicitors for respondent: *Ross, Macdonald & Lane.*

IRWIN AND PURVIS v. JUNG

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IRWIN AND PURVIS v. JUNG

Practice—Discovery—Further and better affidavit of documents—Contentious affidavit.

Two orders for further and better affidavits of documents were made in an action on an agreement for the leasing of a certain property and the erection of a building thereon. By one of the orders the plaintiffs were required to make a further and better affidavit of documents. This order was based upon the affidavit of defendant's solicitor that a mortgage and lease, not referred to in the pleadings, or in any admissions of the plaintiffs, appeared in the records of the land registry office as affecting the property in question in the action.

Held, following *Jones* v. *Monte Video Gas Co.* (1880), 5 Q.B.D. 556, that this order was erroneous, because "it cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient," but

Semble, in this case the defendant might be entitled to an order such as that made in *Ormerod, Grierson & Co.* v. *St. George's Ironworks, Limited* (1906), 95 L.T.N.S. 694, or *Hall* v. *Truman, Hanbury & Co.* (1885), 29 Ch. D. 307.

An order for particulars of the expenditure of $67,000 was affirmed with some variation.

Remarks as to the impropriety of multiplying appeals.

APPEALS from orders made by MORRISON, J., one directing the plaintiffs to file a further and better affidavit of documents, and the other directing the plaintiffs to furnish particulars of matters referred to in the statement of claim. The action was brought in respect of a document in the nature of a partnership agreement between the plaintiffs and defendant. The statement of claim alleged that the parties agreed together to take a lease of certain property in their joint names and construct a building thereon, which was to be turned to account in a specified manner by certain proposed sub-leases, and otherwise. The statement of claim set forth that in pursuance of this agreement the lease was procured and the plaintiffs did their part in constructing the building, but the defendant failed to contribute or carry out in any manner his part of the transaction, and the plaintiffs were compelled to complete same at their own expense, and at an outlay of upwards of $67,000. By amendment to the statement of claim, the plaintiffs further alleged as follows:

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"The plaintiff, Mossom G. Irwin, on or about the 31st day of April, 1911, purchased, under an order of the Supreme Court of British Columbia, the interest of the said Paul G. Jung in the said lease, and received a conveyance under the provisions of the Judgments Act in his favour, of the interest of the said defendant Jung, therein and thereto, and paid into Court in satisfaction thereof, $625."

On the application for a better affidavit of documents, the defendant filed an affidavit which set forth that the records in the land registry office disclosed a mortgage of the property in question from the plaintiffs to the Westminster Land & Trust Company, Limited, for $25,000, and a lease from the plaintiffs to the Western Canada Amusement Association, which were not referred to in the affidavit of documents, and which were documents in the plaintiffs' possession relating to the matters in question in the action. Upon this material the order of MORRISON, J. was made, from which order the plaintiffs appealed.

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The application for particulars was for an order that the plaintiffs deliver particulars of, *inter alia*, how the sum of $67,000, mentioned in the statement of claim, had been expended, and of the proceedings taken to procure the sale of the defendant's interest in the land under the Judgments Act.

The appeal was argued at Victoria on the 11th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Cur. adv. vult.

R. M. Macdonald, for the appellants.

W. J. Taylor, K.C., for the respondents.

22nd January, 1912.

MACDONALD, C.J.A.: The plaintiffs, by the order appealed from, are required to make a further and better affidavit of documents. The order is based upon the affidavit of defendant's solicitor, that a mortgage and lease, not referred to in the pleadings or in any admission of the plaintiffs, and not so far as appears on the material before us, referred to in the documents (if any) mentioned in the affidavit of documents already filed, appear in the records of the land registry office as affecting the property in question in this action.

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The circumstances in which a further affidavit of documents may be ordered are stated in *Jones* v. *Monte Video Gas Co.*

(1880), 5 Q.B.D. 556, where Brett, L.J. at p. 558, stated the practice which ought to be followed in these words:

"We have consulted all the other members of the Court of Appeal who usually sit and act, and we are of opinion that the rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents; when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit. But except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient."

This rule of practice is also referred to in Halsbury's Laws of England, Vol. 11, p. 52, where the authorities are collected. The case at bar, insofar as the lease and mortgage referred to are concerned, is clearly one falling within the authority above cited, and the order for a further affidavit of documents to include these is, I think, erroneous.

It may be that the defendant would be entitled to such an order as was made in *Ormerod, Grierson & Co.* v. *St. George's Ironworks, Limited* (1906), 95 L.T.N.S. 694; or *Hall* v. *Truman, Hanbury & Co.* (1885), 29 Ch. D. 307, on making out a proper case, but we are not called upon to deal with that, but with the case which is now before us on a summons asking simply for a further and better affidavit of documents.

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The order further directed that the better affidavit should include the documents mentioned in paragraph 16, erroneously referred to in the order as paragraph 9 of the amended statement of claim. Apart from the mistake in the numbering of the paragraph, I think the order is right, and in this respect I would confirm it with the necessary correction.

The plaintiffs also appeal from an order in the same cause directing them to give further particulars of how the sum of $67,000, mentioned in the 12th, erroneously called the 5th paragraph of the amended statement of claim, is made up, and also of the matters mentioned in the said 16th paragraph. The rule relied upon by Mr. *Macdonald* is not inflexible: see *Kemp* v. *Goldberg* (1887), 36 Ch. D. 505 at p. 507. The order as to

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said paragraph 12 was, I think, rightly made. Paragraph 16 reads as follows: [Set out in statement preceding].

And the plaintiffs were ordered to give "particulars of the proceedings taken to procure the sale of the defendant's interest in the said land under the Judgments Act." The style of cause or matter in which the order was made does not appear; there is nothing to identify it except the uncertain date, "on or about the 31st day of April, 1911." While it is not necessary in the case of an order or decree of a superior Court to plead the proceedings leading up to the making of it, which we can presume *prima facie* to be regular, still the order or decree itself should be pleaded with particularity. The order should be confined to greater particularity with regard to the order of sale as above indicated, and the subsequent proceedings taken under it to vest the title in the plaintiffs.

Both the orders appealed from are interlocutory, and in the same cause, and were made on the same day, yet separate appeals are taken and separate appeal books prepared, including in each the same pleadings, which comprise more than half the appeal books. Separate summonses were issued in the first instance, and separate orders taken out, and in both orders mistakes were made which, if the orders were read literally, would produce a result quite different from that intended. The course pursued

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below by the respondent's solicitor was a needless multiplication of costs, as was the course pursued here by appellants' solicitor in taking separate appeals. In addition to this, in one of the appeal books the statement of claim and defence were interwoven together in such a way as to be most perplexing. The sum of which particulars is asked is mentioned in the appeal book twice as $67,000 and twice as $6,700. This appeal book is only another of the very many examples of the want of attention and care on the part of solicitors in the preparation of appeals which come before this Court. We have called attention to mistakes in appeal books over and over again without beneficial result, and I think it time we should indicate in another way that attention must be paid to the proper preparation of appeal books. The result in this case is that the appellant succeeds in part in one appeal, and succeeds in having a variation made in part of the

order in another appeal. I would, in view of the facts just alluded to, give no costs of this appeal to either party, and would deprive the respondent of his costs below.

IRVING and GALLIHER, JJ.A. concurred.

Judgment accordingly.

Solicitors for appellants: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for respondent: *McEvoy, Whiteside, Robertson & Buddle.*

LAYCOCK v. LEE & FRASER.

Principal and agent—Sale of land—Agent purchasing from principal—Fiduciary relationship—Setting aside deed—Estoppel.

On the facts, as set out in the statement following, it was

Held, on appeal, affirming the judgment of GREGORY, J. at the trial, setting aside a sale and conveyance of land to defendants, that there was a relationship between the latter and the plaintiff, which demanded the fullest disclosure to him by them before they purchased the property, and that they had not made such disclosure.

APPEAL from the judgment of GREGORY, J. in favour of the plaintiff in an action arising out of the purchase and subsequent sale by defendants of a piece of property in Victoria in the following circumstances: Plaintiff purchased, through defendants, for the purpose of investment, the lot in question, and left with the defendants the duty of collecting the rents and acting as agents in that respect. After a big fire which swept away a great portion of business property, it was rumored that View street, on which was situated the lot in question, would be opened out to Government street, and defendants asked for, and obtained, on the 2nd of November, 1910, from the plaintiff an

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option on the property for $8,000 as the purchase price. They then advertised it, and on November 19th sold it for $15,500. This purchase from plaintiff gave him a profit of $500 on his investment. In the time between agreeing to give the option and completing it, plaintiff became aware of the rumor as to the probability of the street being extended, but did not make any objection then to carrying out the transaction. GREGORY, J. came to the conclusion that in the circumstances the defendants occupied towards the plaintiff a fiduciary relationship, which cast upon them the duty of disclosing all facts and circumstances affecting or likely to affect the property or its value, and gave judgment accordingly for the plaintiff. Defendants appealed. The appeal was argued in Vancouver on the 13th and 14th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

W. J. Taylor, K.C., for appellants: Plaintiff knew on November 2nd, when he completed the option, that it was probable the street would be extended. It was then his time to object. The mere appointing of defendants to collect the rents and pay taxes did not constitute them agents for sale, and it requires even something more definite than a mere statement that a man will take $1,000 profit to create such an agency, with its liabilities and responsibilities. But even if the circumstances indicate an agency, then plaintiff is precluded from setting it up now, as his act of completing the option, with knowledge of the new conditions as to probable value, amounted to a waiver, and he then proceeded to deal with and treat the defendants as principals.

Maclean, K.C., for respondent (plaintiff): We submit that the case here is not only one of non-disclosure, but one of actual, active concealment. As to the claim that the agency was one to manage property, there is an absolute disability on the trustee to buy the property of his *cestui qui trust*, and there is an onus on the agent to shew that he has not merely not been guilty of deception, but that he has made the fullest possible disclosure, and that after such disclosure the principal then agreed to sell: *Tate* v. *Williamson* (1866), 2 Chy. App. 55; see also *McPherson*

v. *Watt* (1878), 3 App. Cas. 254. Plaintiff had had no professional or independent advice. The agent who takes an interest upon a purchase by himself is bound to disclose the exact extent of his interest: *Dunne* v. *English* (1874), L.R. 18 Eq. 524; *King* v. *Anderson* (1874), Ir. R. 8 Eq. 147 at p. 151. As to the purchaser taking a risk or obligation as well as a benefit under his purchase: *Williams* v. *Stevens* (1866), L.R. 1 P.C. 352 at p. 359. There can be no ratification such as is contended for, because in the circumstances in this case there is every indication of constructive, if not actual, fraud.

Argument

Taylor, in reply: There was a plea of ratification and an amendment was allowed at the trial to put in such plea.

Cur. adv. vult.

9th January, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred in the reasons for judgment of IRVING, J.A., dismissing the appeal.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal. The facts of the case seem to me to establish that there was a fiduciary relationship between the plaintiff and his agents that called for the fullest disclosures from them before they purchased the property from him.

They had advised him to purchase the property in question; they, as his agents, had learned that he would be satisfied to sell under normal conditions at a comparatively small advance. Then came a complete change. The street, which had been an insignificant back street, was possibly, by reason of events which no one could forecast, about to become one of the main arteries of the town. It was the defendants' duty to point this out to the plaintiff and to tell him that he had a right to look for a much greater profit than that which he, under former conditions had been willing to accept. It was their duty to point out to him, in the change of circumstances, that a two weeks' option to purchase this property at a fixed sum was so advantageous to anyone wanting property that the option itself would be worth $500. See on the duty to disclose, judgment of Fry, J., in

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Davies v. *London and Provincial Marine Insurance Company* (1878), 8 Ch. D. 469 at p. 474.

As to the argument that the plaintiff by signing the deed on the 2nd of November implementing the option lost his right to complain. This was founded on an amendment allowed at the trial. The plaintiff says:

"At that time I knew very little about real estate. I had given them a signed option and I was under the impression that the signed option was absolutely binding and that I could not make any objection to it."

The answer to the appellants' argument is that the defendants, on the 2nd of November, still owed him the duty to advise him of the true value of the property, and that he should seek independent advice. If the defendants are entitled to succeed on this plea, it is by virtue of the doctrine of estoppel.

I doubt if that plea is properly pleaded, but assuming that it is, in my opinion the defendants must shew—by clear and cogent evidence—*De Bussche* v. *Alt* (1878), 8 Ch. D. 286 at p. 313—that the plaintiff had presented to his mind proper materials to exercise his power of election. Failing that evidence, the same principles which impeach the original purchase destroy also the effect of any subsequent confirmation made in the same absence of independent advice and assistance.

IRVING, J.A.

GALLIHER, J.A.

GALLIHER, J. A. also concurred in dismissing the appeal.

Appeal dismissed.

Solicitor for appellant: *Geo. A. Morphy.*
Solicitors for respondents: *Elliott, Maclean & Shandley.*

REX v. LEW.

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REX v. LEW

Criminal law—Procuring— Evidence—Accused found with clothing of complainant—Charge to jury—"Substantial wrong" within section 1,019 of the Code.

The prisoner was found with the clothing of the prosecutrix in his valise, but he denied any knowledge of how it came to be there, and the jury discredited his story. The evidence of the prosecutrix was that she had gone to Prince Rupert from Vancouver with the accused and lived there with him; that when she decided to return to Vancouver her clothing, including her boots, were missing, and were found in the prisoner's bag when he was arrested on the dock waiting for his steamer. The defence suggested that the girl herself had placed the clothing in the bag, but she denied this. The trial judge, in his charge to the jury, said: "It is suggested on the part of the Crown, or, if it is not suggested, your common sense would suggest to you, that there would be a motive, we can readily understand, on the Chinaman's part, for the taking of those clothes. There is sufficient evidence here, if you find that the intention of taking the girl to Prince Rupert was to embark her in the business of prostitution, and it is a matter of common knowledge that one of the most usual ways of forcing them to embark in the business of prostitution by men who intend to profit by their becoming prostitutes, is by taking away their clothes." There was no objection to this charge on behalf of the prisoner at the time.

Held (GALLIHER, J.A. dissenting), that no substantial wrong had been done to the prisoner sufficient to justify the Court exercising its powers under section 1,019 of the Criminal Code to direct a new trial.

CRIMINAL APPEAL from a sentence imposed on the accused on the verdict of the jury finding him guilty of stealing or concealing a girl's clothing with the intention of forcing her into an improper mode of life.

Statement

The appeal was argued at Vancouver in December, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, J.J.A.

W. P. Grant, for the prisoner.

W. A. Macdonald, K.C., for the Crown.

Cur. adv. vult.

9th January, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: On the argument I was inclined to the

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opinion that a new trial ought to be ordered, but upon reading the case, and upon further consideration, I think that although that portion of the charge complained of is objectionable, no substantial wrong has been done to the prisoner.

The jury might properly have been told that there was evidence from which they might conclude that the prisoner desired to prevent the complainant from returning to Vancouver on that morning, and that it was open to them to infer that the motive for the alleged taking of the clothes was, by that means, to prevent her from doing so. The objection is one more of form than of substance. Section 1,019 of the Criminal Code imposes upon this Court a duty which it ought not to shrink from performing. The Court is not to quash a conviction, and order a new trial, unless it is convinced that a substantial wrong has been done the prisoner, or that there has been a miscarriage of justice arising out of the matter complained of.

In this case the prisoner was caught with the clothes in his valise, and all the circumstances tend to discredit the truth of his story that he had no knowledge of how they came there. That portion of the judge's charge complained of relates to a matter which, while very proper to be considered by the jury in determining the truth or falsity of the evidence, was one which the Crown was not bound to prove. On the evidence I

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am unable to say how the jury could have done other than convict him irrespective of anything which the learned judge said in his charge. I think section 1,019 was intended to cover just such a case as this, and to prevent the scandal of delay and uncertainty in the punishment of crime. The lack of objection by prisoner's counsel to the charge at the time when the matter could have been instantly rectified, while not necessarily fatal to an appeal, is a matter which we ought to consider both in its relation to the general practice of Courts not to grant new trials where no objection has been taken, and to the probable effect which the words complained of had upon those who heard them. If prisoner's counsel did not apprehend any prejudice to his client, it is not unreasonable to suppose that this phase of the case was not regarded by anyone as of much moment.

I would dismiss the appeal.

IRVING, J.A.: The prisoner complains of that part of the charge set out in the following words: [Set out in headnote].

The case made against the prisoner was that he had stolen her clothes.

The evidence of the prosecutrix was that she had gone to Prince Rupert with him; that he and she lived together in a cabin, and immediately adjoining their cabin, and under the same roof, there lived another Chinaman, named Mah Hung, with another woman—Katie Stephens.

"On the morning she went to come home" (I use her own words) "to Vancouver," her clothes—everything, including boots—were taken from her room and were found in the prisoner's bag when he was arrested. The arrest was made on the dock whilst he was waiting for his steamer. It was suggested by the defence—and this was the only defence—that the woman had placed them there. But the woman denied this, and the evidence of the policeman who made the arrest shews that the prisoner did not make this contention at the time of the arrest.

It was argued before us that there was no evidence of any intention on the part of the prisoner to place her in a house of ill-fame—or to support what the learned judge speaks of as a matter of common knowledge.

There is this evidence, and having regard to the proximity of the two cabins, and the character of the inmates, it seems to me there was evidence from which the inference might be drawn.

IRVING, J.A.

"He said he was going back and I said I wanted to come too, and he said I had better wait and he was going to send me a ticket when he got back.

"I told him (this is in a conversation which must have taken place after the arrest), I told him that he was a pretty foolish fellow to bring all this trouble on himself . . . . I said I did not think he would do it. I said Mah Hung must be a pretty bad fellow to put bad thoughts in his head to get him to do that."

The judge's charge is very clear, and to my mind eminently fair, but it is said that the prisoner is entitled to a new trial because there was no evidence of the practice he speaks of. Jurors are supposed to be men of the world, and they are allowed to act upon matters within their general knowledge. If the judge had said to them:

"It is urged on the prisoner's behalf that he could have no motive for stealing these clothes—that they were of no use to him. That may be

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quite true. He could not wear them himself, but he might sell them, or you may find that he had an ulterior motive. It is not necessary that his motive should be proved; but, in considering whether he had any ulterior motive, you, as men of the world, may use your general knowledge, and determine the question of motive (if you think necessary to go into that), by considering whether the taking away of her clothes was part of a scheme to leave her in Mah Hung's clutches."

Had the learned judge put it that way, I think there could have been no objection to the charge. And wherein do the two ways differ? Only in the matter of words, it seems to me. I do not know that it is common knowledge that a practice of that kind is resorted to, but the existence of the practice is immaterial. It was to put before the jury the suggestion that the detention of the clothes might be done for ulterior purposes.

IRVING, J.A.

It is quite usual and proper for a judge or counsel to refer to notorious matters without proof: see *Reg.* v. *Dowling* (1849), 7 St. Tri. N.S. 381 at p. 390; *Reg.* v. *Charles Gavan Duffy* (1848-9), *ib.* 795 at p. 917, and some authorities cited in *Schnell* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 378 at pp. 382 and 383.

There is another point to be observed that when the matter was fresh, counsel for the prisoner took no objection to the fairness of the charge.

I would uphold the conviction.

GALLIHER, J.A.

GALLIHER, J.A.: I would quash the conviction and order a new trial. There is to my mind no evidence whatever that the prisoner had any thought of forcing the girl to embark in the business of prostitution. It was not necessary to prove such in order to convict the prisoner if the jury believed the story of the girl in preference to that of the prisoner. The judge put it to the jury very pointedly that they might infer intention (of which there was no evidence from which such intention could be inferred), on the ground that it was a matter of common knowledge that the stealing of the clothes was one way of forcing the girl into that life.

I am unable to say that this might not have influenced the jury in reaching their verdict, and if it did, the prisoner has not had a fair trial.

Appeal dismissed, Galliher, J.A. dissenting.

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IN RE TIDERINGTON

Criminal law—Extradition—Habeas corpus—Appeal—Right of—Jurisdiction.

The Court of Appeal has no jurisdiction to entertain an appeal in *habeas corpus* proceedings.

APPEAL from an order made by HUNTER, C.J.B.C. discharging the accused from custody under extradition proceedings. Accused had been remanded for extradition to the State of Washington on a charge of embezzlement. He applied to GREGORY, J. for a writ of *habeas corpus,* which was refused. He then applied to HUNTER, C.J.B.C., who released him on the grounds that there was doubt as to any crime having been committed; that on the facts, the accused was merely an absconding debtor, and that in any event the doubt raised by the evidence was rather against than in favour of being sufficient to justify the case, if tried in Canada, being given to a jury. The prosecution appealed, and the appeal was heard at a special sitting of the Court of Appeal composed of MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A., at Victoria, on the 15th and 16th of February, 1912.

Statement

Bodwell, K.C. (*Mayers,* with him), for appellant.
Lowe, for respondent.

MACDONALD, C.J.A.: Archibald Tiderington was committed by LAMPMAN, Co. J., sitting as an Extradition Commissioner, for extradition to the State of Washington on a charge of embezzlement. An application was made to GREGORY, J. for a writ of *habeas corpus* to discharge the prisoner from custody. This was refused, and a second application was made to HUNTER, C.J.B.C. and granted, and the prisoner was accordingly discharged. This is an appeal from the said order, by the prosecution. The grounds of appeal relied upon are that the appli-

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cation for a writ having been refused by GREGORY, J., no order for discharge could be made by any other judge of the same Court, and that on the merits the order complained of should not have been made. The jurisdiction of this Court to entertain an appeal was raised, and after argument we took time to consider. I have come to the conclusion that the preliminary objection must be sustained. Up to the time of the passing of the Judicature Acts in England, it is quite clear that there was no appeal from an order made in *habeas corpus* proceedings remanding or discharging the person detained. The applicant for a writ of *habeas corpus* could apply to a judge of any Court, and if refused, to the Court itself, and if there refused, then to a judge of another Court, or to that Court itself, and so on successively. But such applications were not regarded as appeals, but as original applications. After the Judicature Act (1873) the question arose as to whether or not the section giving jurisdiction to the Court of Appeal, and which provided that an appeal might be taken from all judgments, orders, and decrees of the High Court to the Court of Appeal, was wide enough to include an appeal in *habeas corpus* proceedings. The question came before the House of Lords in *Cox* v. *Hakes* (1890), 15 App. Cas. 506. In that case the application for the writ was granted by the lower Court, and the person detained was discharged from custody. The majority of their Lordships held that in such a case no appeal was intended by Parliament. As I read the case, their Lordships, while conceding that the general words of section 19 of the Judicature Act were wide enough to give an appeal, yet thought Parliament did not intend to prejudice the liberty of the subject by giving an appeal against his discharge from custody; that if it had been intended to do this, Parliament would have used express words; and in arriving at this conclusion they were much influenced by the consideration that no machinery was provided in the Judicature Act for effectually dealing with the case where the person who had been detained could not be brought before the Court, and could not be remanded to custody by the appellate Court.

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Mr. *Bodwell* pointed out that in the case of *Barnardo* v. *Ford* (1892), A.C. 326, the House of Lords appear to have come to a

contrary conclusion, but that was a different case. In that case their Lordships decided the question which they refrained from deciding in the earlier case of *Cox* v. *Hakes, supra.* In the *Barnardo* case they decided that where the writ of *habeas corpus* was refused, an appeal would lie. That would be in favour of the liberty of the subject, and in such a case the Court of Appeal could effectuate its judgment, the detained person being still in custody.

Mr. *Bodwell* also referred us to *In re Hall* (1883), 8 A.R. 135, which was an extradition case in the Province of Ontario, in which the Court of Appeal entertained an appeal from an order remanding the accused person to custody. That case is based entirely upon a local statute passed before confederation, and at the date of that decision still in force, which expressly gave a right of appeal in *habeas corpus* cases.

It is, therefore, clear to my mind that when the civil and criminal laws of England were introduced into this Province on the 19th of November, 1858, there was, under the laws of England, no right of appeal in a case like the present, and if there is now any such right, it must rest upon some statutory enactment. We have been referred to no Act of the Legislature prior to the incorporation of British Columbia in the Dominion of Canada providing for any such right of appeal. Since confederation the practice and procedure in criminal matters rests entirely with the Parliament of Canada, and no right of appeal to this Court is given in *habeas corpus* cases by any Dominion statute or code. That the present is a criminal cause or matter I think cannot be doubted, especially in view of the decision in *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832. That was a case where the Queen's Bench Division refused an application for a writ of *habeas corpus* on behalf of the person committed to prison under the Extradition Act. As the English Judicature Act, section 47, contained a provision that there should be no appeal to the Court of Appeal in any criminal cause or matter, the question arose as to whether a case like the present was a criminal cause or matter, and the Court there unanimously held it was. I do not find that decision has ever been disapproved of. Now, while

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there is no provision in our Court of Appeal Act that there should be no appeal in any criminal cause or matter, it is not necessary, in my opinion, that there should be such in order to exclude such an appeal, because the Province has no jurisdiction in such a matter at all. Any Act of the Province giving the right of appeal in a criminal matter in the sense in which jurisdiction is given to the Dominion in such matters would be *ultra vires* of the Province. Had this been a case other than a criminal cause or matter, such, for instance, as detention for a breach of a Provincial statute, or detention of a person without any authority at all, such as was the *Barnardo* case, an appeal would probably lie to this Court. It is unnecessary to decide that question now, but the *Barnardo* case would seem to indicate that that would be so.

I think, therefore, the appeal must be quashed, as we have no jurisdiction to hear it.

At the conclusion of the reading of my reasons as set out above, Mr. *Bodwell* asked to be allowed to refer to two cases which were not referred to in the argument. The first is *In re County Courts of British Columbia* (1892), 24 S.C.R. 453. That case involved a question of territorial jurisdiction only, and the language of the learned Chief Justice, relied upon, was *obiter,* and was not, I think, intended to be taken literally and applied to a case like the present. The other case, *Attorney-General* v. *Sillem and Others* (1864), 10 H.L. Cas. 704, calls for more extended notice. There the Barons of the Court of Exchequer made rules which in effect granted new rights of appeal from that Court to the Exchequer Chamber, and to the House of Lords. Those rules were made in pursuance of an Act which gave them the power to make rules respecting "process, practice and mode of pleading." It was held that the power thus given was limited to the making of rules to guide the practice within the walls of the Exchequer Court itself; that it could not in the circumstances have been the intention to give the judges of one Court power to create new rights of appeal and impose on other Courts new duties to hear appeals. The Attorney-General contended that "process, practice and mode of pleading" was equivalent to "procedure," but that view

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was not accepted. Their Lordships pointed out that the words must not be read in the abstract, but in reference to the context and object of the statute there in question.

The Parliament of Canada was given exclusive jurisdiction over criminal law and over "procedure" in criminal cases, not in one Court alone, but in all the Courts of criminal jurisdiction. "Procedure," while it includes practice, is a much more comprehensive term. If the right to give an appeal in criminal cases does not fall within this term, then those sections of the Criminal Code which relate to appeals are *ultra vires* of the Parliament of Canada. If, on the other hand, the right to give an appeal in criminal cases falls within the jurisdiction of the Province by reason of the provisions of section 92 of the British North America Act, which gives to the Province the "constitution, maintenance and organization" of Courts of criminal jurisdiction, then that jurisdiction is exclusive, because it is so declaimed. That the Province has the right to constitute a Court or Courts for the hearing of criminal causes and matters is one thing; that it may say that the Crown or an accused person shall have the right to go from Court to Court is another. I am rather confirmed than weakened in the conclusion to which I had come by the further discussion and a perusal of the fresh authorities.

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IRVING, J.A.: In *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454, the right to appeal was questioned on two grounds: (1) That the men having been released, an appeal would be futile: based on *Cox* v. *Hakes* (1890), 15 App. Cas. 506; (2) that the Courts had no jurisdiction in the premises, as the matter was a departmental matter. The point raised in this case was not discussed at either of the two arguments.

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By section 132 of the B.N.A. Act, all powers necessary or proper for performing treaty obligations are committed to the Federal Parliament.

By section 19 of the Extradition Act the prisoner is advised as to his right to apply for a writ of *habeas corpus,* but the Act makes no provision for its issue; that is unnecessary, because

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the right to the writ is a right which exists at common law independently of statute.

The jurisdiction to issue the writ was part of the inheritance of the Supreme Court of British Columbia from the early colonial Courts, and any person who is in custody under a warrant or order of commitment has a right to have the validity of that warrant or order tested by means of a writ issued out of the Supreme Court, irrespective of the legislative authority governing the issue of the writ.

Then, that Court having given its decision, does an appeal lie to this Court? Mr. *Lowe* argues that the right of appeal being statutory, and the Dominion Parliament not having dealt with the matter, no appeal lies; relying on the reasons adopted by the Full Court in *Rex* v. *Carroll* (1909), 14 B.C. 116, where it was held that there could be no appeal to the Full Court from the decision of a single judge in a criminal case unless such appeal was given by Federal legislation.

IRVING, J.A.

This argument seems to be unanswerable, and I do not think we have any jurisdiction to hear this appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I have come to the same conclusion as my learned brothers: that the appeal should be dismissed.

Appeal dismissed.

NORTH v. ROGERS AND ROGERS.

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Practice—Joint defendants—Election by plaintiff—Action in tort.

In an action against the supposed owner of a building for injuries caused by the falling of a portion of a coping wall, it was, after issue of writ, discovered that defendant's wife was the registered owner, and she was joined as party defendant. After delivery of the statement of claim, an application to have plaintiff elect which defendant should be proceeded against was dismissed, following *Bullock* v. *London General Omnibus Company* (1907), 1 K.B. 264.

APPLICATION for an order directing plaintiff to elect which of the two defendants she would proceed against, on the ground that the statement of claim disclosed the alternative relief sought to be founded on separate torts. Heard by MURPHY, J. at Vancouver on the 19th of February, 1912. Plaintiff was injured by the fall of a portion of the coping wall of a building generally supposed to be owned by the male defendant. Writ was issued against him after some negotiations for a settlement, in which he did not deny ownership. After action brought, it was discovered that the building was registered in the name of his wife, and an application to add her as defendant was allowed. After delivery of statement of claim, defendant moved to have plaintiff elect which defendant should be proceeded against.

Statement

Sir C. H. Tupper, K.C., in support of the application.
Ritchie, K.C., contra.

MURPHY, J.: It has been held that there is no distinction between actions of contract and of tort when the point under consideration is the interpretation of the rules as to joinder: *Bullock* v. *London General Omnibus Company* (1907), 1 K.B. 264 at p. 271. The same view is impliedly held in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Limited* (1910), 2 K.B. 354, in which, though the action was on contract, various cases based on tort are dealt with as shedding light on the point at issue, *viz.*, the interpretation of the

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English rules as to joinder, which rules are identical with those governing British Columbia Courts. That being so, I think the decision in that case, which, so far as I can discover, is the latest of the High Court in England on these rules, disposes of this application whether the matter be placed on the footing of the plain language of the rules, as appears to be done by Fletcher Moulton, L.J., or upon the basis that the alleged alternative liability here is one cause of action as regards the investigation of the facts upon which such alleged liability depends, as seems to be the ground for the decision of Buckley, L.J. This view is in accordance with the comment of Bankes, J. in *Times Cold Storage Company* v. *Lowther & Blankley* (1911), 2 K.B. 100 at p. 107, on the *Compania Sansinena* case. The application is dismissed with costs to the plaintiff in any event.

Application dismissed.

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Vendor and purchaser—Agreement—Specific performance—Sale of land—Default—Cancellation by vendor—Demand by vendee of abstract of title—Non-delivery of, ground for refusal to complete payment.

The holder of an agreement for sale of land is entitled to time to investigate the title, and where he makes a demand for a solicitor's abstract of title, he is not bound to complete his payments until such proof of title as may be required, has been shewn.

Per IRVING, J.A.: According to the law of conveyancing, it is the vendor's duty, in the absence of express stipulations to the contrary, to (1) shew a good title by delivering a proper abstract, and, later, verifying the same; (2) if the title is accepted, to convey free from encumbrances, and give possession. The vendee's duties are (1) to examine the title deeds, and, when a good title is shewn, to accept it; (2) to tender a deed for execution, and the whole amount due.

Semble, per MACDONALD, C.J.A.: The English practice of delivering a solicitor's abstract of title was imported into British Columbia with the common law, and has always been in force here, although more honoured in the breach than the observance.

Affirmed by S.C. of Can.

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APPEAL by defendant from the judgment of CLEMENT, J., in an action for specific performance of two agreements for the sale of lands, tried at New Westminster on the 2nd of June, 1911.

On the 18th of November, 1910, the plaintiff Ryan paid the defendant $500 on each of the two parcels of land in question and received two interim receipts. These two receipts, which were identical in their phraseology in all material respects excepting the description of the land, were as follows:

Vancouver, B.C., Nov. 18th, 1910.

"Received from W. B. Ryan the sum of $500, five hundred dollars, being deposit on account of purchase of 13.74 acres, Lot 15 (fifteen), Block 15, Subdivision 463, Coquitlam, for the sum of $4,830, on the following terms: $500.00 cash, $2,330 on Jan. 1st, 1911. Balance, will assign my agreement, Wakefield to myself. The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Net, no commission. Time is the essence of this agreement, and unless payments with interest are punctually made at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5.00, to be paid by the purchaser. This receipt is given by the undersigned as agent and subject to the owner's confirmation.

"F. M. Newberry,
"Owner."

On the 27th of December the plaintiffs, by their solicitors, sent the following notice to the defendant:

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"Dec. 27th, 1910.

"F. M. Newberry, Esq.

"I hereby beg to notify you that I accept the option given by you to W. B. Ryan and which option was assigned to me, whereby you agree to sell the westerly 54.7 acres of D.L. 382, Gp. 1, N.W.D., and which option was open for acceptance up to the 1st day of January, 1911.

"My solicitors, Whiteside & Edmonds, are preparing the necessary conveyances, and as soon as these are prepared they will be submitted to you for signature, and the money paid you, and I expect you to hold yourself in readiness to execute the conveyances and deliver up all title documents. In the meantime you will please furnish Whiteside & Edmonds at once with an abstract of your title. Yours truly, John F. Langan."

"Witness: Laura E. Sinclair; A. A. Mercer."

The defendant did nothing under this notice. Some time after the 1st of January, one Mercer, an agent for the plaintiffs, called on the defendant and was notified that the defendant had not received the money due under the interim receipts on the

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1st of January, and as a result he had exercised his option to cancel the agreement. The plaintiffs did not pay or tender any money to the defendant before action brought, excepting the amount paid on the original deposit. Plaintiff Langan sued for specific performance of the two agreements. The plaintiffs Ryan and Simpson were added as party plaintiffs on the trial.

The plaintiffs claimed that the defendant repudiated the agreements and refused to complete, and also that the defendant did not produce an abstract of title in accordance with the notice of the 27th of December. The defendant denied that he repudiated the agreement until after the 1st of January, when he did refuse to complete on account of the failure of the plaintiff to pay the money due on the 1st of January, and exercised his option to cancel.

Bodwell, K.C., and *W. J. Whiteside,* for plaintiff.
J. Sutherland Mackay, and *Gwillim,* for defendant.

13th June, 1911.

CLEMENT, J.: Action for specific performance of two agreements for the sale of lands in Coquitlam. A memorandum of the agreements is contained in two "interim receipts," and it is not suggested that these are not sufficient to satisfy the Statute of Frauds, so far as to bind the defendant. These two receipts are identical in their phraseology in all respects material here. It will suffice, therefore, to set out one of them in full, as follows: [as above set out.]

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This receipt, as is suggested upon its face, relates to land which one Wakefield had agreed to sell to the defendant. The other receipt relates to another parcel of land and the price and terms are different, the total purchase price being $10,940, payable "$500 cash, balance $5,440 on January 1st, 1911, balance will assign my agreement Kendall to myself." On November 18th, 1910, the defendant held this parcel under an "interim receipt" signed by Kendall, which was next day replaced by a formal agreement for sale.

The two so-called "balances" of $2,330 and $5,440 respectively were not paid on the 1st of January, 1911, and the

defendant says that he exercised his option to cancel the sales and so notified the plaintiff Ryan. Upon this question of fact there is no dispute. One Mercer, acting for Ryan or Langan, or both, did call upon the defendant a few days after the 1st of January, 1911, and was informed that he was too late, and that the defendant refused to carry out the sales. The exact date of this interview is not material. I think it was some days after the 1st of January. Admittedly it was not on or before that date. If, then, the true intent of the parties is expressed in the receipts, the defendant was within his rights in treating the agreement as at an end, unless, by his conduct, he had precluded himself from insisting on the exact observance by Ryan of the stipulation as to the date of payment of the so-called "balances."

The situation here, as to the lands and as to the state of the realty market, is on all fours with that disclosed in *Butchart* v. *Maclean* (1911), 16 B.C. 243. The whole transaction was highly speculative.

And, in addition, this fact must be borne in mind: that Ryan was not bound to buy, having himself signed no note or memorandum of the bargain; so that practically he held an option. This was evidently the notion the plaintiff Langan and his solicitors had, for in the notices sent to the defendant on the 27th of December, 1910, Ryan's bargains are expressly termed options. The defendant could do nothing with these properties pending the arrival of the 1st of January, 1911. Under all these circumstances I can see no justification for saying that the defendant did not mean exactly what he said in the receipts, that if the "balances" were not paid on the 1st of January, 1911, the sales should be absolutely cancelled if he so desired. To my mind it is a misuse of terms to call his exercise of his option to cancel the sales the imposition or infliction of a penalty or forfeiture upon the unbound purchasers. Essentially it was but a refusal to extend Ryan's option. What I have said upon this head is, I think, in accordance with the principles underlying *Butchart* v. *Maclean, supra.*

If, therefore, as I have said, there was nothing to preclude the defendant from exercising his option to cancel these sales

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for non-payment within the time limited, the right of Ryan (or anyone claiming under him) to enforce the agreements is gone. The agreements no longer exist, or, rather *ex proprio vigore* they relieved the defendant of all obligation when he told Mercer that he, Mercer, was too late. This, to my mind, was a clear intimation that the defendant then and there exercised the option given him by the agreement and cancelled the sales. Whether, if Mercer had not sought him out, the defendant would have been under obligation to bring to the knowledge of Ryan or his assignee the fact that he had exercised or intended to exercise his option by cancellation, I need not stop to discuss. The intimation was in fact given and, in my opinion, within a reasonable time.

But it is contended: firstly, that the defendant had himself, prior to January 1st, 1911, repudiated the agreements and so relieved the purchaser from the duty of making the payments on that date; and secondly, that the defendant was on that date himself in default, inasmuch as he had failed to deliver abstracts of title, as required by notices sent to him on or about the 27th of December, 1910.

Firstly, as to the alleged repudiation: I am not satisfied that there was in fact any such repudiation by the defendant. I may say that the oral testimony on both sides was not very satisfactory, and I should find difficulty in making any affirmative finding on such disputed questions of fact as depend for their solution on the oral testimony alone. Fortunately, the documentary evidence suffices to guide me to a conclusion satisfactory to my own mind. On this question of repudiation, I am not prepared to find that the defendant ever went further than to refuse to acquiesce in certain suggested methods of carrying through the sales.

CLEMENT, J.

And, in any case, I cannot see how any repudiation or expressed intention to repudiate by the defendant would operate to relieve the purchaser from compliance with the terms of the contracts if they chose to take the position that the contracts must be carried out. They did undoubtedly take such position, as is evidenced by the notices already mentioned. Stated shortly, these notices are to the effect that the plaintiff Langan,

as assignee of Ryan, intends to take up the options given to Ryan, and requires the defendant to furnish abstracts of title, and be ready to carry out the agreements. Had there been a repudiation, the purchaser could no doubt have treated the agreements as broken and could at once have sued for damages, or he might at once have brought action for specific performance. Judgment for specific performance pronounced prior to January 1st, 1911, would not relieve the purchaser. Operating *in personam* it would coerce the seller to observe his agreements, but it would in no way operate to lessen the obligations of the buyer under the agreements. Instead of seeking the aid of the Court, the buyer contented himself with serving notice that the agreements must be carried out specifically. If so, surely the buyer must himself observe essential provisions. Both on the facts and on the law, therefore, I must pronounce against the plaintiffs on this question of repudiation.

Secondly, as to the alleged default on the part of the defendant in failing to comply with the demand for abstracts of title: It is, I think, desirable to get a clear idea of the actual bargains, the obligations entailed upon the parties, and the order for their observance. Apart from the fact already adverted to that the Statute of Frauds stood between Ryan and any obligation to carry out his agreements, the agreements were that the defendant sold and Ryan bought the properties for a certain sum; that Ryan should pay his purchase price as mentioned, *i.e.*, so much cash, the balance (so-called) necessary to satisfy what in the real estate vernacular is called the "equity" of the defendant in the property, on the 1st of January, 1911, and the still further and ultimate balance by taking an assignment of defendant's agreements with his vendors and paying to those vendors the amounts remaining due and as they become due to them on their sales to the defendant. The fee in the land would not be acquired until later, and from defendant's vendors, not from defendant. Under such an agreement it seems to me that the obligation to shew title to the fee was intended to rest with the defendant's vendors. What Ryan was to get was an assignment of defendant's agreements so as to put him, Ryan,

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in a position to enforce those agreements against the defendant's vendors. Under such a bargain, in my opinion, no obligation to "shew title," as that phrase is construed in the English authorities, *i.e.*, by delivery of a solicitor's abstract of title to the fee simple, should be lightly implied. Nothing, I venture to say, was further from the intention of these parties. They meant what the agreements say, *viz.*: that upon payment on the 1st of January, 1911, of a named sum, which admittedly represented defendant's "equity" in the properties, the defendant should then assign his agreements and in that way, in effect, drop out from the chains of title. A further, and, to my mind, complete answer to this contention is that the defendant was not in default in the respect mentioned on the 1st of January. A requisition for abstracts of title delivered so late as the 27th or 28th of December, 1910, seems to me to smack of subterfuge; and it would be unreasonable to say that the defendant was in default in not complying with it before January 1st, 1911. In conclusion upon this point, I venture to express very grave doubts of the wisdom of importing into our land law, with its system of registration and certification of title, an implied obligation under an open contract of sale to "shew title" in the English sense by delivery of a solicitor's abstract of title. "Making title" is, of course, a different matter.

CLEMENT, J.

As to any obligation on defendant's part to have the assignments of the Kendall and Wakefield agreements ready for delivery on the 1st of January, 1911, as an act contemporaneous with the payment of the money, I cannot see how such an obligation can be suggested in face of the notices sent to the defendant to the effect that the solicitors of the plaintiff Langan would submit the necessary conveyances for defendant's approval and execution.

On the whole case I am unable to find any good reason for denying defendant's right to exercise as he did the option to cancel these agreements, and this action must therefore be dismissed. The parties were at arms' length when this action was begun, and I think costs must follow the event.

The appeal was argued at Vancouver on the 14th of Novem-

ber, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

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Bodwell, K.C., for appellant.
J. Sutherland Mackay, for respondents.

Cur. adv. vult.

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MACDONALD, C.J.A.: The two agreements in question in this action, dated 18th November, 1910, are for the sale by the defendant to one Ryan, the plaintiff's assignor, of two parcels of land. They are practically in identical terms, the one with respect to one parcel, and the other to the other. One parcel may be conveniently designated the Wakefield lot, and the other the Kendall lot. The defendant, prior to said 18th of November, agreed with Kendall to purchase his lot on deferred payments. He had paid a deposit of $50 and received a receipt therefor. Defendant and one Clark had bought the Wakefield lot on similar terms, but had a formal agreement of purchase, which was registered, at all events before the commencement of this action. It also appears that defendant had an assignment of Clark's interest which was not registered. These agreements were not shewn to Ryan, with the exception of the receipt for the $50. On the 19th of November defendant procured a formal agreement from Kendall, which was not shewn to Ryan.

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By the agreements of the 18th of November, the purchaser was to pay, and did pay, a deposit on each transaction of $500; the balance of the defendant's "equity," as it has been called, amounting to almost $8,000 on the two transactions, was to be paid to the defendant on the 1st of January, and the balance of the purchase price was to be paid to defendant's vendors, Wakefield and Kendall, being the instalments falling due upon their agreements with the defendant. Time was declared to be of the essence of the agreements. Early in December, plaintiffs requested defendant to shew them the agreements under which he held the property, and I think the inference from the evidence is irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on the 27th of December, formally notified the defendant that they

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intended to proceed with the purchase, and demanded a solicitor's abstract of title. This demand was ignored, and the plaintiffs did not make the January payments. When they took the matter up with the defendant within two or three days afterwards, the defendant in effect declared the agreements cancelled for non-payment on the 1st of January. It was contended before us that the agreements of the 18th of November were merely options, and that failure to pay on the day agreed upon, and defendant's election to cancel, put an end to the plaintiffs' right to insist upon having the lots. I do not read the agreements as mere options. The documents themselves purport to be agreements of sale, and while not signed by the purchaser, yet were treated by all parties as agreements of sale. I think the conduct of the parties shews that there was an acceptance either by words or conduct on the part of the purchaser at the time the agreements were made, or at all events long before the notice of the 27th of December. However that may be, the notice of the 27th of December was clearly an acceptance. I do not stop here to inquire whether it would make any difference to this case if I were to treat the agreements as options. The real question I have to decide is whether or not the vendor was under obligation to furnish an abstract on demand of the purchaser, and if he was, whether his failure to do so disentitled him to call for payment of the purchase money until he had complied with the demand. We were not referred to any authority, but on the argument I was strongly of opinion that the plaintiffs' contention was right, and that an abstract should have been furnished, and this has been strengthened by reference to *Townend* v. *Graham* (1899), 6 B.C. 539, where my brother MARTIN, then sitting in the Supreme Court, decided a somewhat similar question. He referred to some Ontario cases, notably *Cameron et al.* v. *Carter et al.* (1885), 9 Ont. 426, in which the learned Chancellor of Ontario, after agreeing with the rule laid down by Esten, V.C. in *Gamble* v. *Gummerson* (1862), 9 Gr. 193, said:

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> "I think that the rule has often been recognized in this Court, that when the price is payable by instalments the purchaser has a right to have a reference as to title, and to have title manifested before he makes a single payment."

The learned judge appealed from was of opinion that in cases like the present the English practice of delivering a solicitor's abstract ought not to be imported into this Province, but it seems to me that that practice was imported into this Province with the common law, and was always in force here. True, it may be more honoured in the breach than in the observance, owing to the loose manner in which the sale of real estate is conducted, particularly by real estate agents, who, in general, appear to be absolutely ignorant of the law governing the transactions in which they engage. There never was any doubt about the right of the purchaser to an abstract under contracts like the present, where no restrictions were imposed upon the seller's liability to shew and make title, and where the purchase money was to be paid at the time of completion. But here, the purchase money in question was to be paid before the time arrived for conveyance, and the question is, in the absence of waiver, had the purchaser a right to call upon the vendor to shew his title before paying the instalments due on the 1st of January? It seems to me that the rule laid down in *Cameron et al.* v. *Carter et al., supra,* is a most salutary one. What might be the result if a purchaser from a person who had only an agreement of sale from another, were not entitled to call upon such person to shew that he could sell what he purports to sell? If such a person were unscrupulous or unfortunate in being unable to meet his own payments, a purchaser from him would be paying his instalments, not on the security of the land, but on that of a worthless vendor.

It was also suggested in the reasons for judgment below that the purchaser having had notice that the defendant's title consisted of agreements from Wakefield and Kendall, and having agreed to accept assignments of these agreements, and pay the balance of the purchase moneys due thereon, must look to Kendall and Wakefield to shew and make title. I do not think such a conclusion could be arrived at from the agreements themselves. The clause is very inaptly worded, but it is plain what it means. It means that the purchaser is to pay the balance of the purchase price, that is, of the price which Ryan agreed to pay to the defendant, by assuming the payments in the Wakefield and Kendall agreements. I do not think the clause can be

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read as tantamount to an agreement to purchase merely all the right, title and interest of the defendant in those two agreements. Ryan had not seen those agreements at the time he agreed to purchase from the defendant, and they came into the transaction only in connection with the payment of the balance of the purchase money. But, even if the learned judge were right in considering that the plaintiffs should be compelled to look only to Wakefield and Kendall to make their title when the time arrived for completion, still I think the defendant was obliged to shew the title from Kendall and Wakefield and Clark to himself, that is to say, the two agreements under which he held these lands, and the assignment from Clark, so that the plaintiffs might satisfy themselves whether or not those agreements gave the defendant the right to the fee.

The defendant's attitude, as shewn by his evidence, was that he was obliged to do nothing until the plaintiffs came with their money on or before the 1st of January. He said that when they came with the money he would hand them over the agreements. That position I do not think is tenable. The plaintiffs were entitled to a reasonable time to investigate. Even if it could be said, as the learned judge thought, in which I do not agree, that the time between the 27th of December and the 1st of January was too short a notice to the defendant to deliver an abstract, yet it cannot be said that the demand for inspection of the agreements, which was made early in December, was not made in ample time to permit the production of these agreements, which the defendant says were in his possession all the time.

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In my opinion, the plaintiffs were not obliged to pay their money on the 1st of January, nor until the defendant had complied with their demand for a solicitor's abstract of title, shewing not only the Wakefield, Kendall and Clark agreements, but also the title back to the fee.

In this view of the matter the plaintiffs were not in default, and they are entitled to specific performance, the costs of the action and of this appeal to be given to the plaintiffs, and unless the parties can agree, there should be a reference to the registrar with regard to title.

IRVING, J.A.: The defendant, holding two contracts for sale to him of two lots, agreed with the plaintiff Ryan to sell the said lots to him, and he executed two separate receipts. As they are identical in terms, it is sufficient to set out one of them: [already set out].

These receipts shew on their face that the purchaser knew that the title to the land then being bought was not then in the defendant. It was agreed that time was to be of the essence; that the cost of the conveyance should be paid by the purchaser. Does this mean the conveyance of the land itself, or of the defendant's interest? As the receipt amounted to an assignment of the defendant's interest, this disposes of the learned judge's contention that Newberry was to drop out, and that, without more, the obligation to shew title to the fee was intended to rest with the defendant's vendors.

It is well to consider what the true position of the defendant and Ryan was. According to the law of conveyancing, it is the vendor's duty, unless there are express stipulations to the contrary: (1) to shew a good title, *i.e.*, by delivering a proper abstract and later verifying the same; (2) if the title is accepted, to convey, free from encumbrances, and to put the purchaser in possession.

The vendee's duties are: (1) to examine the title deeds, and (2) when a good title is shewn to accept it; (3) then to tender a deed for execution, and also the whole amount due.

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Unless definite dates are fixed, these things are to be done within reasonable time, but from the moment the agreement is made, the property belongs to the purchaser.

In these receipts no dates are fixed for the performance of these preliminaries. The expression as to time being of the essence can, therefore, only relate to the dates of payment.

The purchaser called on the vendor and asked to see the documents which he (the purchaser) had obtained from his vendor. This, it may be argued, was a waiver of the production of the abstract. Perhaps it was, but it would only be conditional on the deeds being produced. It is open to the parties to waive any of their rights. In *Barclay* v. *Messenger* (1874), 43 L.J., Ch. 449, it was waived by the conditions; and in *Foot et*

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al. v. *Mason et al.* (1894), 3 B.C. 377, it was waived orally. The waiver, however, of an abstract does not waive the vendor's right to production of the deeds. It was the defendant's duty to produce them when requested, but he refused to do so.

After some little time, Ryan assigned the agreements to Langan, who notified the defendant that he would buy, and on the 29th of December called for abstracts of the defendant's title.

Having regard to the fact that the defendant had been previously asked to produce the evidence of his title, and that he says he had them in his safe, I think this demand was not made unreasonably late, nor the time for compliance unreasonably short.

The learned trial judge regarded this demand as a subterfuge. I do not see that that necessarily follows. It is true the purchaser might allege that non-compliance with this request was an excuse or justification for not paying on the 1st of January, but if that was the object, it did not, in my opinion, excuse the vendor from satisfying the demand. The vendor could very easily have abstracted and produced all the papers he had within half an hour, but he did nothing. I am not, therefore, called upon to say what, if anything, beyond the agreements with his vendors he was bound to abstract and offer to produce.

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I am inclined to the opinion that it was the defendant's duty to shew the whole title in his abstract. He made default, and not only continued in default until after the 1st of January, the day fixed for payment, but afterwards intimated he was not going to complete. On the 2nd of January (the 1st fell on a Sunday), possibly it was the 3rd, the plaintiffs' agent attended him with a deed, and an agreement for execution, but the defendant declined to look at them. Mercer swears this took place on the 2nd of January; Newberry says it might have been in the first week in January, but says it was not the 1st or 2nd. Mrs. Mulholland swears it was after the 3rd or 4th, in fact the second week in January, but I think her evidence is absolutely unreliable. I would be inclined to accept the 2nd or 3rd as the date of Mercer's visit.

From what happened at that interview, I am satisfied that

the defendant was then, and had been at the time when he was requested to shew his title, endeavouring to bring about a deadlock, with a view of preventing this contract being carried out. Tactics like these should not be allowed to prevail. I would direct specific performance and hold that the plaintiffs had not lost their right thereto on the ground that there was no disclosure of the defendant's title. This he impliedly agreed to do before the date for payment. Nevertheless, it is well to remember that parties may so contract and so bind themselves by conditions precluding inquiries into the title, that a purchaser may be bound actually to accept and pay for a bad title; see *per* Archibald, J. in *Waddell* v. *Wolfe* (1874), L.R. 9 Q.B. 515.

GALLIHER, J.A. concurred in the conclusions reached by MACDONALD, C.J.A.

Appeal allowed.

Solicitors for appellant: *Whiteside, Edmonds & Johnston.*
Solicitors for respondents: *Gwillim, Crisp & Mackay.*

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Arbitration and award—Expropriation by municipality—Award of arbitrators—Abandonment of award by municipality—Expropriation of smaller area—Victoria Water Works Act, 1873.

Defendant municipality, under powers conferred upon it by the Victoria Waterworks Act, 1873, and amendments, appropriated certain land for waterworks purposes. The compensation for said land having been settled by arbitration, the municipality sought to abandon the award of the arbitrators and to expropriate a smaller area.

Held, that the land having been appropriated, the defendant municipality could not withdraw.

The option given by the statute to the land owner to resume possession in default of payment of the compensation awarded within the time limited is an additional safeguard to the land owner as a means of compelling prompt payment.

[An appeal from the above was dismissed on the 2nd of April, 1912.]

Statement

MOTION by plaintiff for judgment, heard by CLEMENT, J. at Victoria on the 6th of March, 1912. Plaintiff was the owner of Lot 34, Malahat district, bordering on Sooke lake. The defendant Corporation, under the powers conferred upon them by chapter 20 of the statutes of 1873, took possession of this land in connection with the construction of a waterworks system for the City of Victoria. The parties not being able to agree as to the amount of compensation to be given for the land, the matter was referred to arbitration, and the sum of $13,500 was awarded plaintiff. The City did not pay the amount, but intimated that it proposed to practically abandon the arbitration and take a smaller amount of plaintiff's land. On this decision being arrived at, plaintiff commenced his action, claiming that the City had no power to abandon the award; that they had taken possession of the land, and by virtue of the above named statute, it is vested in them. No motion was made to set aside the award or pay the amount awarded.

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Maclean, K.C., for plaintiff: The plaintiff cannot sue on the award, as the time for payment has not arrived. The City proceeds under chapter 20 of the statutes of 1873, and chapter 64 of the statutes of 1892. Section 6 gives the water commissioner the right to appropriate land for the purposes set forth in the Acts, and section 7 provides that the land so taken shall be vested in the Corporation absolutely. The compensation shall be ascertained, if necessary, by arbitration, and the City has six months in which to make payment of the amount awarded or agreed upon. If the City does not make such payment the land owner has the right to re-enter and resume possession. He is not compelled to resume possession; such right is only an additional remedy. Every act has been done to vest the property in the Corporation, and the vesting in the Corporation is not subject to the ascertainment and payment of compensation. The City's powers are equivalent to those of the Esquimalt Waterworks Company, and this point was decided by the Privy Council in *Esquimalt Waterworks Company* v. *City of Victoria Corporation* (1907), A.C. 499. See also *Tawney* v. *Lynn and Ely Railway Co.* (1847), 16 L.J., Ch. 282; *The King* v. *The Hungerford Market Company* (1832), 4 B. & Ad. 327; *Simpson* v. *The South Staffordshire Waterworks Company* (1865), 34 L.J., Ch. 380. The City cannot withdraw from the transaction.

Argument

McDiarmid, and *Copeman,* for the defendants: We do not require the land, therefore we have no power to take it.

[CLEMENT, J.: This case cannot be decided without evidence if that point is raised.]

It is in the discretion of the City as to how much land it will require. The question turns on the interpretation of sections 6 and 7 of the Act. Subsection (*m*) of section 7, which provides that the award of the arbitrators shall be binding on all parties concerned, must be subject to the divesting clause which operates as a re-conveyance by statute. Under the divesting clause the owner of the land has his rental, in addition to which he is entitled to any damage which he may suffer. The City has a right to refuse to make use of the land. There is nothing analogous under the statutes which give us power to

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act, to a notice to treat under the English statute. Where a general intention is expressed and also a particular intention which is incompatible with the general intention, the particular intention is considered an exception to the general one: see *Churchill* v. *Crease* (1828), 5 Bing. 177; *Pilkington* v. *Cooke* (1847),16 M. & W. 615; *Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395.

12th March, 1912.

CLEMENT, J.: On this record, in my opinion, the plaintiff is entitled to the declaratory judgment for which he asks in his statement of claim.

The case mainly relied on by Mr. *McDiarmid—The Queen* v. *Commissioners of Her Majesty's Woods, Forests, &c.* (1850), 19 L.J., Q.B. 497—was decided upon grounds of public policy which do not exist in the case of a municipal corporation. And, moreover, there is no allegation here that the financial limit, if any, may be overrun. Apart from that case, the line of authority in reference to private corporations is clearly in the plaintiff's favour.

The only doubt arises from the provision in clause (*n*) of section 6 of The Corporation of Victoria Water Works Act, 1873, 36 Vict., chapter 20 (as enacted by 55 Vict., chapter 64, section 3) that the sum awarded is to be paid within six months from the date of the award, etc., and that in default of such payment the proprietor may resume possession of his property, and all his rights shall thereupon revive. On consideration, I construe this as an additional safeguard in the land owner's favour, and not as his only remedy. If the latter were intended one would naturally look for some provision for payment of the damages, and costs incurred by the land owner through the locking up of his land and the time and expense involved in arbitration proceedings. There are no such provisions, and to read the clause as a practical undoing of all that has been done, and as giving to the earlier and leading clauses an interpretation different from that which, according to all authorities, they should naturally bear, would be to make the Act an easy engine of oppression. In short, I think that when once lands have been appropriated, the Corporation is not entitled to withdraw,

Judgment

and that this option given to the land owner to resume possession in default of payment within a certain time limit is not to be treated as subversive of the whole scheme of the Act as indicated in its leading clauses, but simply as a weapon to compel reasonably prompt payment by a municipal corporation, which ordinarily cannot be forced to speedy action. The plaintiff is entitled to his costs.

Judgment for plaintiff.

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Company law—Directors—Powers of—Appointment of managing director—Authority of directors to dismiss him—Meetings of directors—Necessity for notice of meeting to all directors.

Plaintiff Company is an English company incorporated under the English Companies' Act, 1908, with its head office in London. The Company is capitalized at £20,000, in shares of £1 each, of which about £13,000 have been issued. There are six directors of the Company. Early in the year 1911 the defendant was appointed managing director of the business of the Company, which was carried on in British Columbia; in fact, the Company was incorporated for the purpose of taking over a cannery business on the Fraser river. Defendant then came out to British Columbia and entered on his duties. Some months after his arrival in British Columbia, dissatisfaction arose in connection with his management, and another of the directors was sent out, so that matters stood: of six directors, four were in London and two in British Columbia, one being the managing director in British Columbia, and the other having been sent out to represent the English shareholders. In the latter part of 1911 the four directors in London had a meeting at which they appointed a Mr. Sherman managing director. The point was (1) Was it necessary, in order to have a legal meeting of the board of directors in London, to give a notice to the two directors in British Columbia? (2) Whether the directors had power to dismiss the managing director? The trial judge held that there was no power to dismiss, and also that it was necessary to send notice of any meetings to the directors in British Columbia, and that anything done at a meeting held without such notice was irregular and void.

Held, on appeal (varying the judgment of MURPHY, J.), that there was no necessity to send notices of meetings to absent directors, but

Held, also (IRVING, J.A. dissenting), that the directors had no authority in the circumstances to dismiss plaintiff as managing director.

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APPEAL from an order made by MURPHY, J. on a motion to continue an injunction obtained *ex parte,* and a cross motion to dissolve. Heard at Vancouver on the 2nd of December, 1911. The facts in issue are summarized in the headnote.

Armour, for plaintiff.

Sir C. H. Tupper, K.C., for defendant.

MURPHY, J.: In the view I take of the matter, there was no such suppression of material facts as must be shewn to justify the dissolution on that ground, and the cross motion is dismissed.

As to the notice to continue, it is to be noted that this action is brought by the Company. I must assume in the first instance that the use of the Company's name has been duly authorized. If so, I am not concerned with the qualifications of the new managing director—assuming for the moment that he has been properly appointed, as *prima facie* I think I must on the documents submitted—because I take it, the Company, in the absence of fraud, can appoint whom they please to that position. There is no suggestion of fraud in the material before the Court. It is, however, contended that the object of the injunction is to enforce acts of the Company which are illegal. A. Sherman, the alleged new managing director, who instituted the proceedings, produces as justifying the continuance of the injunction a power of attorney from the Company and his appointment to the position of managing director, both apparently duly executed by the Company. It is, I think, not contested, if these documents are really the legal acts of the Company, they constitute a proper ground for the continuance of the injunction. It is, however, contended that they are not because they were authorized at meetings of the directors held in London, England, of which no notice was given to two directors, *viz.*: J. W. Windsor, the defendant, and T. W. Coate, who both presently are, and at the time such meetings were held, living in British Columbia.

Further, it is contended that the power of attorney is executed by only one person legally a director, the other two who sign it not having been on the board as constituted by the articles of association, but having been added by such directors as were in

England, under power contained in the articles, without notice of the meetings at which this action was taken being sent to the defendant, who had been so added to the board at a meeting, notice of which was apparently given to all directors, they being then all in England. Under the articles two directors were necessary to form a quorum. It is not clear from the material before the Court whether Coate was notified of the meetings at which these additions to the board were made or not, but apparently, from the material, he was. If, then, it is the law under the circumstances, that notice should have been given to all directors in order to make legal a meeting of the board, then these meetings were illegal, and the parties allegedly added to the board are not directors. This is not a question between the Company and the defendant only, but one in which all the shareholders are interested. Shareholders apply for shares on the memorandum and articles of association, and the provisions thereof must be lived up to by the Company in its corporate acts. The case of *Halifax Sugar Refining Co.* v. *Francklyn* (1890), 59 L.J., Ch. 591, cited in argument, is decided, I think, on this principle. It was there held that the articles contemplated the possibility of the absence of a director, and because of such provision, it being shewn that two directors were absent in the United States and Canada respectively, it was held that notice to them was not a *sine qua non* of a valid board meeting. It is also clearly laid down that the general rule of law is that every director within reach ought to have notice of every board meeting. In my opinion the articles of the plaintiff Company are, on this point of notice, the converse of those of the *Halifax Sugar Refining Co.* case. Instead of providing for the absence of a director, they expressly stipulate that the travelling and hotel expenses of directors incurred in attending meetings be paid (article 20). This would indicate to a prospective shareholder, I think, that all directors would be at least given an opportunity of attending such meetings by receiving notice of when they were to be held. But it is article 21 to which I particularly desire to draw attention. It reads:

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"21. A resolution determined upon without any meeting of directors or of a committee, and evidenced by writing under the hands of all the directors or of all the members of the committee, shall be as valid and effectual

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as a resolution duly passed at a meeting of the directors or of such a committee."

This is a somewhat unusual provision and would, I think, be taken by a prospective shareholder to have been inserted expressly to meet the case of a director who was at such a distance from London as to make it inconvenient, if not impossible, to attend board meetings. Shareholders not infrequently become such because of their confidence in some one or more of the directors, and they have a right to expect that persons accepting such a position will in fact direct the affairs of the Company. On these articles, therefore, I hold that the Company must either give notice of all board meetings to all the directors or else proceed to obtain any resolution desired under the machinery provided by article 21. Not having done so, no proper authority has been conferred on Mr. Sherman, either by the power of attorney or by the resolution appointing him managing director.

Again, I think the directors had no power to dismiss the defendant under the circumstances so far as disclosed and appoint Mr. Sherman in his place. Possibly under the articles they might have appointed Mr. Sherman an additional managing director, but this is not what they have here attempted. Their action, if it means anything, means the removal of the defendant from that position and the substitution of Mr. Sherman. The articles provide that Table A of the English Act shall apply to the Company, save as they are excluded or varied thereby. Article 72 of said Table A provides for the appointment of a managing director by the directors, but places the power of his removal in the hands of the shareholders. Article 24 of the plaintiff Company's articles of association varies this by giving the directors power to appoint more than one managing director, but makes no modification of the power of dismissal. This, therefore, I think remains in the hands of the shareholders, and the action of the board as set out above is illegal.

MURPHY, J.

The motion to continue the injunction is dismissed and the injunction dissolved.

The appeal was argued at Victoria on the 12th and 15th of

January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

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Davis, K.C., for appellant (plaintiff) Company: There is no statutory duty to send notices to all the directors; there is merely the old common law right that directors, the same as all persons who have a right to vote, shall have notice if within reasonable distance. He referred to *Smyth* v. *Darley* (1849), 2 H.L. Cas. 789 at p. 803; *Halifax Sugar Refining Co* v. *Francklyn* (1890), 59 L.J., Ch. 591 at p. 593; *In re Portuguese Consolidated Copper Mines, Limited* (1889), 42 Ch. D. 160.

Ritchie, K.C., for respondent: Defendant was appointed director for the year and also a committee to make financial arrangements. When Sherman came to British Columbia, defendant had not been discharged. While the board had power to appoint another managing director, yet defendant had not been superseded. In the circumstances here he could be removed only for cause: *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1882), 23 Ch. D. 1. Argument

[*Per curiam*: The Court is of opinion that there was no necessity for notice to the absent directors.]

Davis, in reply: It is merely a question of words as to defendant being a director, and it is an academic question as to whether he was ever dismissed or not. So long as there is no fraud, oppressive action, or collusion, the Court will not interfere with the domestic affairs of a company: see *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred in the conclusions of GALLIHER, J.A., dismissing the appeal.

IRVING, J.A.

IRVING, J.A.: The plaintiffs are seeking to oust the defendant, who is a duly appointed director, from his position as managing director.

The two points are: (1) Can the directors (as opposed to the shareholders) dismiss the defendant from his position of managing director? (2) If there is power to dismiss, was the meet-

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ing of the directors on the 7th of November, at which the resolution rescinding his appointment as managing director was passed, a valid meeting, no notice of the meeting having been given to the defendant, although a director of the Company?

By No. 16 of the Company's articles of association (which article is very similar to article 71 of Table A) the management of the business of the Company is vested in the directors. In the *Automatic Self-Cleansing Filter Syndicate Company, Limited* v. *Cuninghame* (1906), 2 Ch. 34, an article (96) was considered by Warrington, J. and the Court of Appeal. The effect of this article 16 is to give the management to the directors to such an extent that the shareholders cannot interfere with the exercise of those powers, even by a majority at a general meeting. The only way the shareholders can control the board is by ousting the directors, or by inserting limiting clauses in the articles. Dismissal of a director requires an extraordinary resolution of the Company, and therefore is a troublesome and lengthy process.

Bearing in mind, then, that the directors are the managers of the Company, let us turn to article 24, which authorizes the directors to appoint a managing director, and to contract with him as to his remuneration. The words used are "to appoint from time to time." In my opinion, this power to appoint, carries with it the power to dismiss, if the directors shall think fit.

IRVING, J.A.

How can it be said that they are to have the management of the Company's business if they, seeing a managing director making ducks and drakes of the Company's assets, are not at liberty to cancel his appointment at once? The directors, in my opinion, do not denude themselves of their authority to manage the affairs of the Company by appointing a managing director.

It was argued that where the power of appointment has been exercised, a general meeting of the Company was necessary to put an end to the engagement, and clause 72 of Table A was referred to. That clause speaks of a resolution by the Company in general meeting to determine his tenure of office. That provision was inserted to enable the shareholders to overrule the directors by a mere majority, and to avoid the necessity for an extraordinary resolution, with its special notice and three-

fourths majority. It also serves another purpose. It declares and notifies the person about to accept the position of managing director that it is a term of the contract into which he is about to enter, that although the contract may appear absolute on its face for a definite period, the term is subject to determination by a vote of the shareholders. In my opinion this clause does not deprive the directors of their power to dismiss.

I do not go into the question of the defendant's alleged misconduct. That seems to me beside the question for this Court; that is for the directors to decide. If they have removed Mr. Windsor without justification, he, without doubt, has his remedy.

Then, as to the validity of acts done at a directors' meeting of which no notice has been given to one of the directors: the appointment of the plaintiff and the despatching of him to British Columbia to look after the Company's business here, seems to me to be a plain intimation to the secretary that no notice to the absentee would be required. In *In re Portuguese Consolidated Copper Mines, Limited* (1889), 42 Ch. D. 160 at p. 168, the opinion of Cotton, L.J. plainly shews that the decision went on the ground that there were easy means of summoning the absentee. In the following year, Stirling, J., in *Halifax Sugar Refining Co.* v. *Francklyn* (1890), 59 L.J., Ch. 591, held that notice to a director abroad was not necessary.

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The following note appears in the 1910 edition of Palmer's Company Precedents:

"It was long since held that it is not necessary to serve notice on shareholders who have chosen to reside outside the United Kingdom. And this rule being entirely consistent with common sense and common convenience, has been acted on ever since."

I would allow the appeal.

GALLIHER, J.A.: There are really only two points for consideration in this appeal. First: Were the acts of the board of directors in England appointing Sherman a managing director, and the executing of a power of attorney to him, legal? and secondly: had the board of directors power to dismiss the defendant from the position of managing director?

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The objection to the first is that at the meetings at which Sherman was appointed, and the power of attorney executed, no

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proper notices had been sent out calling such meetings. It is admitted that two of the directors, who were in British Columbia, received no notices of these meetings, nor were any sent to them. I agree with Mr. *Davis's* contention that this was not necessary, and I do not regard the fact that the articles of association of the Company provide for the payment of the travelling and hotel expenses of directors attending meetings, or the further provisions of article 21 as, under the circumstances, in any way affecting the question.

The case cited by Mr. *Davis,* I think, clearly indicates that the provisions as to notice must be construed reasonably, so as to permit of the proper and efficient carrying on of the business of the Company.

The second point presents more difficulty. Section 72 of the Companies (Consolidation) Act, 1908 (Imp.), under which the plaintiff Company was incorporated, reads as follows:

"The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

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Under this section the directors appointed the defendant their managing director for the year 1911, and subsequently, in November of the same year, by resolution, dismissed him.

It is objected by Mr. *Ritchie* that they cannot dismiss him, that that can only be done by the Company in general meeting, under section 72.

In the case of *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1882), 23 Ch. D. 1, it was sought to remove two of the directors, and a resolution to that effect was passed at a special general meeting of the company. In appeal, Jessel, M.R. laid down the principle that where there is no power contained in the statute or in the articles of a statutory corporation to remove a director, there is no inherent power to do so; and Cotton, L.J. says, at p. 10:

"In the present case there is not only the charter of incorporation and the memorandum, but there are the articles of association, which, under the Act, are a contract between the shareholders to comply with the regulations in them, and we find in the articles provisions as to the appointment of directors, and the rotation of directors, that they are to go out at a certain period; that, in my opinion, is a contract that those who may be duly appointed by the shareholders to be directors shall continue in the office till under the rotation they are to go out, or until they are to go out under the other provisions of these articles as to disqualification or otherwise."

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In the present case there can be no doubt that the directors could not remove one of their number from the office of director. Is a managing director or manager in a different position? The articles of association provide how the directors shall be appointed, and how their office shall become vacant. The directors are a board or committee appointed at a general meeting of the shareholders, from among the shareholders of the Company, for the purpose of carrying on the business of the Company.

Then section 72 provides they may appoint one or more of their body to act as managing director or manager, for such term as they may decide, and goes on to state how that term may be determined, *viz*: *ipso facto* if he ceases to be a director from any cause, or if the Company in general meeting resolve to determine his tenure of office.

Mr. *Davis* argues that while this gives the Company power in general meeting to dismiss a managing director, it does not take away the inherent right that the board of directors have to dismiss one whom they may have appointed manager among them. It is to be noted in this case that what is sought to be taken away from the defendant is not his rights and privileges as a director, but his position as managing director. But does that make any difference? The board of directors here, under the powers granted in the articles of association, enter into a contract with one of their number for a term certain, and in the same section of the articles it is provided how that tenure of office may be determined. This article 72 deals specifically with the office of managing director, and nowhere else do we find any reference to the manner in which a managing director can be dismissed.

GALLIHER, J.A.

It seems to me the words of Lord Justice Cotton, above quoted,

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as there applied to the office of director apply equally to the office of managing director in the case at bar, and that we must look to the articles of association to see if they have been complied with.

The appeal should be dismissed.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitor for respondent: *H. W. C. Boak.*

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RICHARDS v. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA, VERRINDER, SMITH, McLAREN, SPENCER AND MINOGUE.

Fraud—Conspiracy—Rejection of candidate by College board—Undermarking of papers—Destruction of papers of other candidates at same examination—Discretion of Board—Withdrawal of case from the jury.

Plaintiff tendered himself as a candidate for examination to be admitted to the practice of dentistry, and after examination was informed that he had not passed. He brought an action against the College, the registrar and the examiners for conspiracy in refusing to allow him the full number of marks obtained and thereby excluding him from the practice of his profession. There was some evidence that his papers were undermarked, and it also developed that after the commencement of the action, and up to discovery, the papers of other candidates at the same examination had been kept, but were destroyed during proceedings on discovery, but before a demand had been made for them. It was not shewn that they had been tortiously destroyed, although disposed of before the time limited by the rules of the College. Nor was it shewn that the defendants had acted in any way in concert.

Held, on appeal, that the trial judge was right in nonsuiting the plaintiff in the absence of evidence of conspiracy.

Per GALLIHER, J.A.: That, on the evidence, the applicant was entitled to be enrolled, and had the statute given authority, the Court should have ordered his enrolment.

Semble: That, in the circumstances, there should be no costs.
Semble, per MACDONALD, C.J.A.: That on a proper marking of the papers the plaintiff would have been entitled to admission.

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APPEAL from the judgment of GREGORY, J., nonsuiting the plaintiff, on grounds set out in the headnote, in an action tried by him with a jury at Victoria in January, 1911.

The appeal was argued at Victoria on the 31st of January and the 1st of February, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. J. Taylor, K.C., for appellant: A person applying under the provisions of the Dentistry Act for the right to practise his profession is entitled to have a fair examination. We say that the plaintiff here had not a fair examination; it was fraudulent. We endeavoured to get the papers before the examination for discovery, and were refused. When we did obtain them, we found that plaintiff had obtained an average of slightly over 69 per cent.; the rules permitted an average of 50 marks on any one paper, and an average of 70 for four examination papers. On our marks we make out an average of 79.11. On asking to see the papers of other candidates for the purpose of comparison, it is found that they are destroyed, when the rules of the College provide that they should have been kept for a considerable time longer. It is impossible to say, in the absence of these papers, that the plaintiff has had a fair examination. As to the action of the trial judge in withdrawing the case from the jury, it is submitted that when a question of fraud is alleged, it must be determined by the jury, and the judge was wrong in withdrawing it in this case.

Argument

Bodwell, K.C.: The board acted judicially, and its decision is not reviewable. There is only one question to be decided: Did the examiners mark the papers with a wrongful and malicious intention of excluding the plaintiff from practice? He must shew a conspiracy on their part to attain an unlawful end. A hardship to an individual does not give a cause of action. As to the complaint that the order for discovery has not been met, we produced everything we were asked for. They set out in their pleadings what they wanted, and we have

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given that information. The explanation of the destruction of the papers of the other candidates is a natural and reasonable one. It must be shewn that the papers were destroyed maliciously—tortiously. Further, there is no basis shewn that these papers, if produced, would assist the plaintiff.

Taylor, in reply.

Cur. adv. vult.

1st April, 1912.

MACDONALD, C.J.A.: The plaintiff, having complied with all the preliminaries prescribed by the Dentistry Act, being chapter 2 of the Acts of British Columia, 1908, presented himself for examination for admission to the College of Dental Surgeons. He was denied admission on the ground that he had fallen short of obtaining the percentage of marks prescribed by the by-laws of the College. He then brought this action against the College and the examiners, charging that:

"The defendants and each of them wilfully and fraudulently conspired together to prevent him, the said plaintiff, from entering said College by refusing to give him the full number of marks to which he was properly entitled in such examination by virtue of the answers made by him to the questions put at such examination.

"That the defendants and each of them have subsequently refused to give to the plaintiff any information whatsoever concerning the said examination, either as to the number of marks he obtained, the subjects, if any, in which he failed, or the method upon which marks in the said examination were allotted to each candidate, and the plaintiff will say that by his answers to said questions he was entitled to enter said College, but that the defendants and each of them either marked, or caused to be marked, his papers incorrectly, or not at all, and this for the purpose well known to each of them of fraudulently preventing him from entering said College.

"The plaintiff claims discovery of all matters and proceedings of said council with reference to his aforesaid examination.

"Discovery of the questions put therein and his answers thereto and the report of the examiners thereon.

"Damages.

"Such other relief as the nature of the case may require."

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Before trial, the defendants were ordered to produce the plaintiff's examination papers. Subsequently an application was made to a judge for an order that the defendants should produce the examination papers of the other candidates at that examination. This was contested by the defendants, but on finding that the Court was about to order the production of these

papers, an affidavit of the defendant Verrinder was produced shewing the loss or destruction of these papers.

Such loss or destruction is one of the principal matters relied upon by the plaintiff as evidence of the misconduct charged against the defendants. Only one other matter was seriously relied upon as shewing such misconduct, the alleged under-marking of the plaintiff's papers. At the trial, witnesses were called by the plaintiff to prove that he was not given the number of marks which his answers entitled him to. These witnesses went over the questions and answers and gave their opinions as to how they ought to have been marked. In some cases they would have given higher marks, in others lower; but the net result, according to their evidence, is that the plaintiff ought to have been given in the aggregate about 10 per cent. higher marks than were allowed him by the College examiners.

The case, then, narrows down to this: can it be fairly inferred from the loss or destruction of the other candidates' papers by the secretary of the College, Dr. Verrinder, and from the alleged under-marking of the plaintiff's papers, that the fraudulent conspiracy which the plaintiff alleges existed? Now, with regard to the loss or destruction of the papers, Dr. Verrinder says that he was making changes in his office and destroyed a lot of papers which he regarded as of no further use, and he thinks the papers in question were among them, but is not certain. At all events, he was unable to find them when they were required for production. The learned trial judge accepts that explanation, and I am unable to say that he was wrong. It is true that these papers were destroyed (I do not think they were lost) after the action was commenced, and before the time authorized by a resolution of the College for the destruction of such papers; but as against this suspicious circumstance it appears that up to that time the defendants had received no intimation that discovery of them would be required. Plaintiff had already applied for and obtained discovery of the books of the College, and the examination papers of the plaintiff, and that circumstance may very well have led Dr. Verrinder to take less care of what he did with the papers in question than he otherwise might. But even if it be assumed that Dr. Verrinder destroyed these papers for

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the very purpose of preventing discovery of them, yet it appears from the evidence that the other defendants had no knowledge whatever of such destruction. Hence their destruction in no way implies the conspiracy alleged.

Then, with regard to the under-marking of the plaintiff's papers: the evidence is that each examiner acted independently and without reference to the others, hence the only inference to be drawn from the difference between their marking and that of plaintiff's witnesses is the very natural one of difference of standard, of judgment, or skill. I doubt if two examiners acting independently would ever arrive at the same result in a series of examination papers. It may be that the College examiners' results fail to do entire justice to the plaintiff. On the other hand, it may be that the plaintiff's witnesses do him more than justice. In the circumstances it would clearly be improper to infer the fraudulent conspiracy which plaintiff alleges.

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It was conceded that even if we came to the conclusion, which I should be inclined to, that on a proper marking of the plaintiff's papers he was entitled to admission, we have no power to order the College to admit him. It is to be regretted that the examiners, when they found that the plaintiff had come so near to obtaining the required number of marks, did not review his papers. The duties imposed on them under the Dentistry Act are such as admit of no want of conscientious care in their discharge, and the fact that as members of a calling they have it in their power to keep others out of that calling ought to make them doubly careful to avoid even the appearance of unfairness or selfishness.

I would dismiss the appeal.

IRVING, J.A.: The statement of claim, delivered 17th January, 1910, alleges that the plaintiff presented himself before the examining board of the Dental College, but was refused admission by the said defendants to the College, and that this refusal was not the result of faulty answers to the questions put to him.

IRVING, J.A.

By the 7th paragraph it is alleged: [already set out].

On the 31st of January, 1910, the plaintiff gave to defendants a notice to produce:

"All . . . . reports, documents, questions and answers relating in any respect to the examination, relating to the matters in question in this action."

It is contended for the plaintiff that this notice called upon the defendants to produce the answers of the other candidates, as well as those of the plaintiff. There are cases, *Jacob* v. *Lee* (1837), 2 M. & Rob. 33; *Rogers* v. *Custance* (1839), *ib.* 179; *Morris and others* v. *Hauser and M'Knight* (1841), *ib.* 392, where notices have been held to embrace any document reasonably included in the description. On the other hand, the following notices have been held too vague:

"All the plaintiffs' books of account containing entries of dealings between them and the defendant for September, 1896, and also all letters written by the defendant or any other person to the plaintiffs relating to relevant matters." "Letters and copies of letters, also all books relating to this cause" (*Jones* v. *Edwards* (1825), M'Cle. & Yo. 139); "All letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered" (*France* v. *Lucy* (1825), Ry. & M. 341); 13 Halsbury's Laws of England, 522.

It seems to me that if we test the question whether or not this notice to produce would include the answers of other candidates, we should do so by the practice in making an affidavit of documents. Had the defendants been called upon to make an affidavit of documents, in my opinion he might properly omit all mention of the answers of the other candidates because of the language used in the prayer for relief.

On this ground, I would say that the plaintiff's contention that the defendants ought to have produced the answers of the other candidates is not well founded. IRVING, J.A.

The plaintiff's advisers seem at that time to have taken the same view, because on the 21st of February, after Verrinder had refused to produce any papers, the plaintiff took out a summons to compel Verrinder to produce all documents and examination questions and answers of the plaintiff *relative in any respect to the examination held,* etc.

These answers by the plaintiff were produced on the 10th or 11th of March, 1910. Doctor Verrinder was examined on the 13th of April, and it was not until that date that the plaintiff's advisers thought that it would be necessary to have the answers of the other candidates produced for the purpose of comparison.

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The case came on for trial before GREGORY, J. and a jury, but as the learned judge came to the conclusion that there was no evidence of conspiracy to go to the jury, he dismissed the action.

On the appeal before this Court it was urged that the destruction of the answers of the other candidates, which occurred in or about March, 1910, was strong evidence against the defendants, and that that spoliation, together with the testimony of an expert produced at the trial, shewing that the plaintiff was entitled to more marks than had been awarded him by the examiners, constituted a case sufficiently strong to go to the jury.

The whole of the case—if case there was—depended upon the application of the maxim *contra spoliatorem* to the witness Verrinder on account of his having destroyed the answers of the other candidates before the expiration of twelve months, the period fixed by resolution of the council for their preservation.

It was argued that he had notice that they would be required at the trial. His explanation is that they were destroyed without his knowledge in March; that is, before his examination on the 13th of April, when their importance to the plaintiff was not appreciated.

Mr. *Taylor's* argument was that it was for the jury to pass on the destruction of these papers under all the circumstances, and with the evidence of the expert as to the sufficient number of marks obtained by the plaintiff to qualify, a case of conspiracy was made out.

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The action, it should be remembered, being one for damages, and not for the issuing of a diploma or other certificate, is based on the conspiracy of the defendants: *Saville* v. *Roberts* (1698), 1 Ld. Raym. 374. There must be proved a "breathing together," as Sir Matthew Begbie used to say—that is, a communication of intention, and the assent of each conspirator to the wish or intent and plan of the other which constitutes a common purpose, and which cannot be formed without some external manifestation of the intent or purpose of each conspirator.

Evidence in conspiracy cases is, as a rule, difficult to handle. I speak of the proof of the conspiracy or agreement. The rules of evidence require the existence of the conspiracy to be proved, before evidence can be given of acts done or words spoken behind

the back of the person against whom the evidence is tendered: *Reg.* v. *Blake* (1844), 6 Q.B. 126. When it has been established that two or more persons have so combined, the acts and words of one of them in furtherance of their common purpose is admissible as evidence against the others, whether they were or were not present when the act was done or the words spoken: *R.* v. *Lord Preston* (1691), 12 St. Tri. 646; *Rex* v. *Hardy* (1794), 24 St. Tri. 199 at p. 451; *The King* v. *The Inhabitants of Hardwick* (1809), 11 East, 578 at p. 585; *Dickinson* v. *Valpy* (1829), 10 B. & C. 128.

The difficulty of giving complete proof of the conspiracy before the evidence of words spoken and acts done are allowed to become applicable to the individuals, is got over in practice by the judge receiving that which is evidence against one provisionally, and then at the close of the plaintiff's case ruling how much of the evidence may be considered by the jury with reference to each conspirator or tort feasor.

Now, if we sum up the evidence against each one of these defendants individually, the plaintiff's case vanishes into thin air. That each examiner, in allowing marks to the plaintiff, has reached a different total from the result arrived at by the plaintiff's witnesses is nothing; and because they all four have reached this conclusion, is there anything remarkable about that? It is not unusual to find that men have been plucked in several papers.

IRVING, J.A.

As I have before remarked, the whole case is made to hinge on the destruction of the answers of the other candidates, and Dr. Verrinder's explanation has been given as to that on discovery. On the trial, his examination as to how this happened was put in by plaintiff as part of his case, and there is no contradiction of it.

I shall only refer to one case, *Sweeney* v. *Coote* (1907), A.C. 221, and that only for shewing what evidence is necessary. At p. 222, the Lord Chancellor says:

"It is an action for conspiracy, and no other ground is relied upon. In such a proceeding it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must

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be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them."

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I agree that the action should be dismissed on the ground stated by the learned trial judge, that the jury, if they had, from the destruction of these papers, found that Verrinder had wilfully destroyed them, under the circumstances would be doing violence to every principle of justice. It is well to remember

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that the presumption of innocence is not applicable only to persons placed on trial as criminals, but also to officials or persons in the discharge of their civil duties and rights.

I would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with my learned brothers. I have only to add this, that I regret we are not in a position to order this young man to be enrolled. I, certainly, speaking for myself, would have no hesitation in doing so on the evidence, if I had the power. I also feel that, under the circumstances, there should be no costs.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal is dismissed with costs, Mr. *Bodwell* stating that costs will not be insisted upon.

Appeal dismissed.

Solicitors for appellant: *Eberts & Taylor.*

Solicitors for respondents: *H. D. Helmcken* and *Moresby & O'Reilly.*

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Extradition—Evidence—Sufficiency of—Allegations made on affidavit—Warrant containing more than one charge—Extraditable offences.

A commissioner acting under the powers vested in him by the Extradition Act, is justified in proceeding upon the complaint laid before him without taking any evidence in support of such complaint.

Evidence in support of the charge may be submitted by affidavit.

When the commissioner has decided that there is evidence justifying an order for extradition, his decision cannot be reviewed if the judge to whom the application is made is of the opinion, from the record, that there was such evidence.

APPLICATION for a writ of *habeas corpus* directing the discharge from custody of the accused, held under a warrant remanding him for extradition. Heard by MURPHY, J. at Vancouver on the 26th of April, 1912. Statement

J. W. de B. Farris, for the application.

S. S. Taylor, K.C., for accused.

3rd May, 1912.

MURPHY, J.: As to the first objection, that the commissioner merely acted upon the complaint without taking any evidence, I find that in his reasons for judgment he sets out various steps taken by him, and these, I think, are all that the statute requires, as it is only necessary thereunder that as a result of such proceedings he should be of opinion that the warrant should issue. The objection is therefore overruled.

As to the evidence going to establish the alleged crimes being on affidavit only, the Act expressly authorizes such evidence to be received and makes no restriction as is contended for hereunder, and this objection is also overruled. As to this evidence having been first taken by question and answer and then written out in narrative form and then sworn to, which latter were the only documents produced before the commissioner, I see nothing in the Act vitiating the proceedings because of this course being Judgment

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adopted. Section 16 expressly authorizes statements on oath, taken as these were, to be used as evidence. This objection, therefore, also fails.

The numerous extradition cases reported in the Canadian Criminal Cases also shew that it is no objection to the warrant that it contains more than one charge, and this contention, therefore, is also overruled.

The contention that the first two charges are not extraditable because the Canadian law does not make the compiling and return of returns such as those set out punishable as fraud must also, in my opinion, fail. It is admitted that section 153 of the Bank Act makes such acts criminal. That section makes any wilfully false or deceptive statement in such reports indictable. Surely, if such statement is made fraudulently, *a fortiori* it must be made wilfully. In other words, such statement might conceivably be made wilfully and yet not fraudulently, but it could not be made fraudulently and not be wilfully made.

The commissioner has decided there is evidence justifying the warrant on the charge of embezzling $1,250, and it is not my province to reveiw such decision. I have only to decide as to whether any such evidence exists, and I find there is ample on the record.

Judgment

As to the charge of embezzling $5,837.52, the commissioner, in his judgment, justifies this by citing the evidence in regard to the transaction arising out of the joint ownership of a lot in Wallace. If the charge were in truth based on this evidence, it could, I think, hardly be contended that said evidence was not sufficient for the commissioner, in his discretion, to issue the warrant.

The charge, however, is really based on another transaction altogether, *viz.*: that of the satisfaction in the bank's books of the note given by the Idaho Northern Railroad Company, and indorsed by O'Neill and another, for $80,398.29. According to the evidence of Wyman, O'Neill caused this note to be marked "paid" and surrendered. The transaction was wiped off the bank books by the payment of $74,560.77 and by charging the balance of $5,837.52 to interest and discount account of the bank. In other words, if this evidence is true, O'Neill caused

the bank itself to pay $5,837.52 of this note. There is no doubt such a transaction is embezzlement under the Idaho law, and I think it is theft under sub-section (*b*), section 359 of the Code. True, he did not thereby take the money in specie, but he undoubtedly reduced the assets of the bank by $5,837.52.

Acting, of course, on the assumption of the truth of this evidence, I think he fraudulently and without colour of right converted this money to the use of the Idaho Northern Railway Co. and of himself and his co-indorsee.

Even if this be incorrect, he certainly—on the same assumption—stole the note, for the bank was entitled to hold it until paid in full, and this would undoubtedly bring him under said sub-section (*b*).

Whilst the charge is for embezzlement of the money, I think, under *Rex* v. *Stone* (1911), 17 C.C.C. 377, the warrant can be supported because of his taking the note. As to the charge of embezzling the $375, if the position first above taken as to fraudulently and without colour of right converting the bank's money to the use of another—in this case, O'Neill himself—is correct, Wyman's evidence on this point supports the warrant.

Judgment

As to the various counts for receiving deposits with full knowledge of the bank's insolvency, I think, under *Rex* v. *Stone, supra,* the warrant may be supported under 405 and 405a of the Code. The change made on the 4th of May by the Idaho Legislature, in striking out the words "fraudulently and with intent to cheat and defraud any person," is not material if these sections of our Code apply.

The judgment of the commissioner is affirmed and the prisoner remanded for extradition.

Application refused.

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McKENZIE v. GODDARD.

Contract—Sale of land—Specific performance—Cancellation of agreement by vendor on fraud of vendee—Notification of cancellation to vendee—Assignment of agreement to third party before notice of cancellation received by vendee.

An agreement for the sale of certain real property was entered into between defendant and one Franks on the 31st of December, 1910, in respect of which a first payment of $50 was to have been made. This payment was made partly by cash and a post-dated cheque for $24. The cheque, which was dated the 11th of March, 1911, was dishonoured, whereupon defendant notified Franks of the cancellation by him (defendant) of the agreement. Franks, prior to the receipt by him of this notification, assigned all his rights under the agreement to plaintiff on the 13th of March, 1911. Plaintiff tendered to defendant the balance considered by him to be due under the agreement, *viz.*: $200, and $10 for interest and cost of conveyance, and claimed specific performance.

Held, on appeal, that if the plaintiff relied on his position as an innocent purchaser, and as such claimed an equitable right, apart altogether from the assignment, he should have supported his claim with evidence.

Judgment of GRANT, Co. J. confirmed on different grounds.

Statement

APPEAL from the judgment of GRANT, Co. J. in an action for specific performance of an agreement for the sale of land, tried by him on the pleadings and admissions, on the 4th of November, 1911. The facts appear shortly in the headnote.

Findlay, for plaintiff.

Ritchie, K. C., for defendant.

4th November, 1911.

GRANT, CO. J.

GRANT, Co. J.: In this action the plaintiff seeks specific performance of an agreement of sale entered into between one Joseph Franks and the defendant on the 31st of December, 1910, and assigned by Franks to the plaintiff on the 13th of March, 1911.

Two points were raised in the argument for the defendants: Firstly, fraud on the part of Franks *re* the payment of the first instalment; and, secondly, the non-registration of the agreement of sale to Franks and of the assignment by Franks to the plaintiff.

As to the latter point: It is admitted that the agreement of

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sale was not registered at the land registry office by or on behalf of Franks on or before the 1st of May, 1911, and the certificate of incumbrance referred to on the argument shews no application to register same up to the 23rd of May, 1911—some twenty days after the issue of the writ. It is also admitted that the assignment of the agreement of sale was not registered up to the 1st of May, 1911, and there is no evidence or suggestion of any application to register at any later date.

Without going into the question of fraud as to the non-payment of part of the first instalment, I will dispose of this action on the second point raised, namely, the absence of registration of the agreement of sale and of the assignment thereof. I think this case comes directly within the scope of section 74 of the Land Registry Act and that it is concluded by the decision of the Court of Appeal in *Goddard* v. *Slingerland* (1911), 16 B.C. 329. Under such section the agreement of sale, in the absence of registration, would not pass any estate at law or in equity in such lands, and what plaintiff is asking the Court to order is a conveyance to him of an interest in land which said section says shall not pass in the absence of registration. The action will be dismissed, with costs

GRANT, CO. J.

The plaintiff appealed and the appeal was argued at Victoria on the 16th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Findlay, for appellant: We were innocent purchasers.

Ritchie, K.C., for respondent: In the absence of registration, no rights passed to McKenzie, and, further, Franks cannot insist on Goddard carrying out his agreement in view of the dishonoured cheque. A third party must set up and prove that he is a purchaser for valuable consideration.

Argument

Findlay, in reply.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred in the reasons for judgment of GALLIHER, J.A.

IRVING, J.A.

IRVING, J.A.: It is said that the recital in the deed that the $50 has been paid in full estops the defendant from setting up

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this non-payment: 13 Halsbury's Laws of England, par. 365. That we may assume to be so, if the plaintiff innocently acts upon the faith of the representation. In this case we have no evidence that the plaintiff innocently acted upon the representation. I think the plaintiff must at least pledge his oath to that fact. In *Rice and others* v. *Rice and others* (1853), 2 Drew. 73, evidence appears to have been given.

I would dismiss the appeal.

GALLIHER, J.A.: The learned County Court judge was under the impression (the case not then being reported) that *Goddard* v. *Slingerland* (1911), 16 B.C. 329, decided by this Court, concluded the case at bar, and so decided. That case, however, has no application, as the rights here are *inter partes*.

The plaintiff claims under an agreement entered into between the defendant and one Franks, for the sale to Franks of certain lands in the agreement set out, and which agreement was assigned to him. In the agreement the receipt of $50 is acknowledged as being paid, and the balance, $200, is to be paid in monthly instalments. As a matter of fact only $26 of this $50 was paid in cash, and a cheque for $24, payable some months afterwards, which turned out to be worthless, given for the balance. When the defendant discovered that the cheque was worthless, he notified Franks that the agreement was cancelled, but prior to such notification Franks had assigned to the plaintiff. The plaintiff some time afterwards tendered the balance due and requested a conveyance, but the defendant refused, claiming the agreement was cancelled. This action is for specific performance, the plaintiff paying the amount tendered into Court.

GALLIHER, J.A.

Apart from the Land Registry Act, the defendant relies on the fact, as he contends, that the plaintiff stands in the shoes of Franks and that his rights are subject to any equities existing between the defendant and Franks. If the plaintiff is an innocent purchaser without notice, he does not stand in Franks's shoes, and the defendant is estopped from setting up that he did not receive the payment acknowledged in the agreement: Halsbury's Laws of England, Vol. 13, p. 371, par. 523; *Rimmer* v. *Webster* (1902), 71 L.J., Ch. 561.

In *Winter* v. *Lord Anson* (1827), 3 Russ. 488, cited by Mr. *Ritchie,* Lord Anson purchased with notice of the plaintiff's claim, and retained sufficient out of the purchase money to indemnify him.

The case at bar was submitted to the trial judge upon the pleadings and certain admissions by counsel. It does not appear from these whether the plaintiff had or had not notice that Franks had not paid the whole of the first payment of $50, nor was the point taken before us; but it appears to me that if the plaintiff is relying on an equitable right, outside of the rights he acquired under the assignment, *viz.*: that of a purchaser without notice, he must allege and prove same.

Having failed to do so, I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *A. N. Daykin.*
Solicitor for respondent: *D. S. Wallbridge.*

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FORMAN AND HEISTERMAN v. RYAN *ET AL.*

Will—Construction of—Action to establish—Capacity of testator—Duty of plaintiff to give all his evidence in opening—Evidence in reply.

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On the evidence in this case it was

Held, on appeal, reversing the finding of CLEMENT, J. at the trial, that at the time of making the will in question the testator was mentally competent.

Per CLEMENT, J., at the trial: Where the plaintiff, propounding the will, has not in his opening given all the evidence he had in support of the will, he should be confined in reply to evidence strictly in rebuttal.

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APPEAL from the judgment of CLEMENT, J. in an action to prove a will in solemn form, tried at Victoria in May and June, 1911. James Boyd, an elderly man who lived alone in a cabin, made a will on the 18th of September, 1909, appointing James Forman and B. S. Heisterman his executors, by which he left $1,000 to Sarah Ryan, a sister living in Ireland, $250 to the Jubilee Hospital, $250 to the Protestant Orphans' Home, and the balance of his estate to Susan Maria Cook, of Victoria. Mr. Boyd died in April, 1910. In the action it was sought by his relatives to set aside the will on the grounds of unsoundness of mind and undue influence. In the January previous to his death a petition in lunacy was prepared and allowed appointing Mr. Forman manager of Mr. Boyd's estate, as at that time he appeared unable to authorize the payments necessary for his medical and personal requirements. Mrs. Cook attended to his wants and comfort in his illness and disability.

Statement

CLEMENT, J. came to the conclusion that the testator had not sufficient intelligence to appreciate the nature and extent of the property at his disposal, or to weigh the claims upon his bounty of those who by ties of blood or by reason of kindness shewn to him, might naturally be expected to pass in review before his mind. The principal legatee, Mrs. Cook, was not made a party to the action as at first brought, but was added just before the trial, so that the other defendants did not have the advantage of her evidence on discovery before the trial.

On the whole evidence, the trial judge dismissed the action, ordering Mrs. Cook to pay the costs of all parties other than the plaintiff's (executors); any costs not recoverable from Mrs. Cook to be paid by the plaintiffs; otherwise as between the plaintiffs and Mrs. Cook there were to be no costs. Plaintiffs appealed.

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Bodwell, K.C., and *Tait,* for plaintiffs.
A. E. McPhillips, K. C., and *A. D. Crease,* for defendants.

4th October, 1911.

CLEMENT, J.: At the conclusion of the evidence I felt that the plaintiffs had failed to establish to my satisfaction that the document propounded by them was the last will of a capable testator. Before the argument, I read over the extended notes of the evidence, and since the argument I have re-read them carefully, with the result that I feel constrained to find affirmatively that James Boyd had not on the 18th of September, 1909, (the material date) sufficient intelligence to appreciate the nature and extent of the property at his disposal, or to weigh, even in capricious scales, the claims upon his bounty of those who, by ties of blood or by reason of kindness done him, might naturally be expected to pass in review through his mind.

I cannot see that it will serve any good purpose to trace in detail Boyd's life from his serious and shattering illness in 1905 down to his death in April, 1910. Suffice it to say that from the autumn of 1908 his steps were ordered of others and his own volition seems to have played little part. Of the transaction by him, on his own initiative, of any business of any serious import after August, 1908—his last bank deposit was on the first of that month—I can find no trace in the evidence. Others looked after him and his affairs and did to and for him what seemed best to them without any serious regard for—or any evidence of —any views entertained by the old man, either for or against the actual course pursued. From March 22nd, 1909, Mrs. Cook and Dr. Nelson were practically in sole control. What, perhaps, is more to the purpose, there is positive evidence from the plaintiff, Mr. James Forman, that Boyd had lost all grasp of his business affairs some time before the alleged will was executed.

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For some months prior to March, 1909, the plaintiffs had been mailing their cheques covering rent collections to Boyd. After March, 1909, they found that the cheques were not being cashed. At a date which I fix as not later than August of that year, the plaintiff Forman spoke to Boyd about the matter, and received back the uncashed cheques for March, April, May, June and July on a promise to let the old man have money any time he wanted it. On the subsequent application "in lunacy" made in December, 1909, "in the matter of James Boyd, a person of unsound mind, not so found," the plaintiff Forman puts forward this very transaction as evidence of unsoundness of mind on the part of Boyd, without giving any precise date for it. At the trial he could not fix the date, but he does say: "Yes; I spoke to him about the cheques staying out so long, not going through the bank; and after that we did not issue any cheques, and because—I simply held these." As appears by the plaintiffs' statement of accounts filed, no cheques were issued after that of July 31st, 1909, so that before the end of August, when in due routine of business the next cheque would issue, something had happened to break that routine, and thenceforward no cheque (or even statement) was made out. The affidavit of the plaintiff Forman, sworn on the 12th of January, 1910, and filed on the proceedings "in lunacy," speaks of this particular matter in these words: "five cheques, amounting to about $175, which the said firm gave him some time ago he later handed to me uncashed, and seemed not to realize their value and forgot in a short time all about them." There is other evidence of Boyd's loss of grasp of his business affairs, but I have referred particularly to the dealings of the plaintiffs with Boyd during a period shortly anterior to the execution of the alleged will, not only for their direct bearing on the issue, but as justification also for the disposition I make of the costs of this action, so far as the plaintiffs are concerned.

CLEMENT, J.

As to claims upon his bounty: his sister, the defendant Sarah Ryan, was only remembered at Mr. Forman's instance; Boyd "agreed" to leave her $1,000. His niece is not considered, nor any others of his kin. The bequests to charity had to be suggested, whereas in March or April a bequest to charity bulked

large in Boyd's mind. The claims of Mrs. Ledingham, the same in kind as those of Mrs. Cook, though less in degree, and the strong claim of his old friend James Smith do not seem to have been considered at all. In March or early April he had an intention to "do something" for Mrs. Cook, and perhaps for the Ledinghams. On April 12th a will was drawn by Mr. Elliott under which Mrs. Cook was sole beneficiary, charity and the Ledinghams and ties of blood all ignored or forgotten. The unsuggested first "instructions" to Mr. Forman in September would, if carried out, have resulted in duplicating the will drawn by Mr. Elliott, which Mrs. Cook carried about in her satchel or purse; but, as I have said, suggestions made by Mr. Forman were "agreed" to or acquiesced in by Boyd, and the document in question was the result. In my opinion it cannot stand, for the reasons already given.

Strange to say, the action came before me for trial without Mrs. Cook (the residuary devisee and legatee to whom the alleged will leaves nearly the whole of Boyd's property) and two other legatees for small sums, being parties. This was remedied before the trial began, so that the contest was, in the end, fought out between those really interested, Mrs. Cook supporting the document and the other defendants denying its validity. The result, however, was that the other defendants had not the advantage of any examination of Mrs. Cook for discovery before trial. In another respect, too, the defendants were put at a disadvantage by the course adopted by Mr. *Bodwell* at the trial in resting his case on the evidence of the attesting witnesses alone. While I think I was right in saying that if the case closed then I should have to find for the will, I think I should have warned Mr. *Bodwell* that he could not be allowed to split his evidence, but must offer all the testimony he had for the affirmative, *i.e.*, in support of the will, in opening; his reply being limited to evidence strictly in rebuttal. However, at the conclusion of the evidence for the defendants (other than those taking under the will) no objection was raised to the evidence then put forward by Mr. *Bodwell*. In the result—the defendants succeeded notwithstanding their handicap—no harm has been done; but I

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deem it right to say what I have for fear that the course I took at this trial may be quoted as a precedent.

As to the charge of undue influence: if Boyd had been in possession of his mental faculties to the extent necessary to the valid execution of a will, I should say that the charge should clearly fail; but I cannot but think that in the end the old man became so weak-minded that he surrendered his volition to Mrs. Cook and accepted her guidance in all things. Having lost all realization of the value and extent of his property and all recollection of past services from others, and having lost the habit, if I may so express it, of looking after his own affairs, it was not a surprising thing that he should make a will—if he made one at all—in favour of one so constantly in kindly attendance upon him. That he should make a will had been pressed upon him by several persons, and Mrs. Cook had, on one occasion at all events, joined in the pressure. When other possible claimants upon his bounty had dropped into the forgotten past and Mrs. Cook was an ever-present influence, it was not, as I have said, surprising that she alone was remembered in the alleged will.

Mrs. Cook's evidence was directly opposed to that of the doctors as to Boyd's mental condition in December, 1909, and January, 1910, and I can only conclude that her powers of observation were not in this case to be relied on. Dr. Nelson's evidence along this line was not strong, and its probative force was, in my view, very small in the face of his testimony upon the proceedings in lunacy, and his death certificate.

CLEMENT, J.

I dismiss the action. Mrs. Cook will pay the costs of all parties other than the plaintiffs. Any such costs not recoverable from Mrs. Cook must be paid by the plaintiffs. Otherwise, as between the plaintiffs and Mrs. Cook, there will be no costs. I can see no justification in this case for depleting the estate in the hands of those to whom it rightfully belongs by any direction for payment of costs out of the estate; but I venture to express the hope that the successful defendants will deal generously with Mrs. Cook, as well as with Mrs. Ledingham and James Smith, in respect of their services to the deceased.

The appeal was argued at Victoria from the 23rd to the 29th

of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Cur. adv. vult.

1st April, 1912.

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Bodwell, K.C., for appellant, Mrs. Cook.

A. E. McPhillips, K.C., and *A. D. Crease*, for respondents.

MACDONALD, C.J.A.: This action was brought to propound an alleged will made by James Boyd, who died in April, 1910, at the age of about eighty years, leaving an estate then valued at about $16,000. Probate was resisted on two grounds: that the testator lacked mental capacity to make the will, and that the will was obtained by undue influence by the principal beneficiary, Mrs. Cook. There is, to my mind, no evidence at all of undue influence. The real issue, therefore, in this appeal is as to the mental condition of the deceased at the time he made the will in September, 1909. The learned judge gave very careful attention to the case, and came to a conclusion against the soundness of mind of the testator. Having come to a contrary conclusion, I feel I ought to state my reasons. As the evidence is very voluminous, I shall not do more than refer to what I regard as the most salient facts.

The case is somewhat complicated by proceedings taken in lunacy in January, 1910. Two of the most important witnesses in support of the will were Dr. Nelson, who was the medical attendant of the testator for at least a year before his death, saw him very frequently indeed, and gave evidence at the trial that the deceased was sound in mind up to at least December, 1909, three months after the making of the will, and the executor thereof, James Forman, who was his financial agent, who drew the will and was therefore able to speak of the testator's condition at the time of its execution. These witnesses made affidavits in the lunacy proceedings, which are to some extent at least in conflict with their evidence at the trial. It therefore becomes necessary to consider under what circumstances the evidence was given in each case. The lunacy proceedings were referred to during the argument as "a friendly conspiracy," and I am inclined to think that that term very aptly describes them.

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It may be useful to state briefly how matters stood when these proceedings were commenced.

Witnesses on both sides agreed that James Boyd was always miserly and penurious, and as one witness described him, "cantankerous." Up to July, 1908, it is not disputed that he was of sound mind. Ledingham, one of the witnesses against the will, says that it was in July of that year that he noticed a change in him, physically and mentally. The illness of 1905, referred to by the learned judge, left the deceased physically more feeble and less active, particularly on his feet, than he had been before, but he was able to take care of himself, living alone as he was, and preparing his own meals, until August, 1908, when he requested Mrs. Ledingham, a next door neighbour, to bring him his meals. In November of that year, he had another illness and Dr. Nelson was called in to attend him. The principal trouble was dysentry and a hernia, and the doctor thought that he was threatened with paralysis. It was about this time that the beneficiary under his will, Mrs. Cook, first took charge of him. It was she who called in Dr. Nelson, and attended to his wants until he had somewhat recovered from the severity of his disorder in February, 1909. In the latter month Boyd went to live with an old friend, James Smith, no relative of the family or connection of defendant Smith. He remained at Smith's house until about 20th March, when he quarrelled with Smith, apparently because the Smiths had been persistently urging him to make a will, in which, I infer, they expected to be beneficiaries. He was from there taken to St. Joseph's Hospital, but either would not stay there or the hospital authorities would not keep him. I infer that he made it so unpleasant, and it was so apparent that he was not a hospital patient in the ordinary sense, that he was sent away. He was then induced to enter the Old Men's Home, but, becoming displeased with the manner in which he was treated, he was sent away. The superintendent of the institution, very harshly as it seems to me, sent him to the police station to get rid of him. He was then taken home, and Mrs. Cook undertook the care of him from that time till November, when she herself was taken ill. During this period, between March and November, 1909, Mrs. Cook attended him daily at

his own house, and saw that his wants were supplied; and during that time, while receiving proper care and nourishment, he appears to have been in about the condition of mind one would expect in a man of his age and feeble physical health. He could go about with Mrs. Cook, call on neighbours, chat with friends and talk intelligently about municipal politics, in which he had always been very much interested.

The period of time with which I am principally concerned is, therefore, from July, 1908, to Boyd's death in April, 1910. In the beginning of 1909, Boyd sent for R. T. Elliott, K.C., for the purpose of discussing with him his worldly affairs. Mr. Elliott had known Boyd about ten years previously, but had forgotten him. Boyd, however, remembered Mr. Elliott, and remarked upon the fact that he had grown stouter since he had previously known him. At that time Boyd was ill, but Dr. Nelson says his mind was quite sound. Mr. Elliott entered into conversation with him, and found that he wanted to be advised as to the law governing the disposition of property by will. He spoke of having relatives in Ireland, but said they were not dependent upon him. He wanted to know if he could give his property without recognizing his relatives; he had some notion of giving bequests to charity, and stated he wished to remember Mrs. Cook, who had been very kind to him, and also indicated, without mentioning any names, that he might remember the Ledinghams. Mr. Elliott found him quite intelligent, and could detect no symptoms of unsoundness of mind, although he says he relied a good deal upon the assurance of Boyd's medical attendant that he was in a fit condition mentally and physically to discuss matters of business. Prior to that time Boyd had discussed making a will with his old friend Alexander Wilson, whose evidence I shall refer to more particularly hereafter, and asked Wilson to be his executor. Wilson says Boyd had told him he had no relatives, in fact, had insisted on it, and it is suggested to us that this was an insane delusion. I think that is met by the evidence of Mr. Elliott and other witnesses, which shews that he was under no delusion at all with regard to his relatives, but simply wished to put them aside. Mr. Elliott was not asked then to prepare a will, but in April, Boyd went to

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his office for the purpose of having his will made. He said to Mr. Elliott that he had come to see him again about the will, and wanted him to write it. Of this occasion, Mr. Elliott said, in evidence:

"He kept strictly to the matter in hand from the talk I had at the house. He did not vary a hair's breadth. Of course, he was sick and an old man, but he saw what he wanted to do with his property."

On Boyd's instructions, Mr. Elliott drew his will, giving all he had to Mrs. Cook. After it was read over to him he said he would like to take it away and give it further consideration, which he did. This will was never executed.

I would like to remark here that a good deal of argument was directed to the lack of discussion between Mr. Boyd and Mr. Elliott on this occasion with regard to how he should dispose of his property. It seems to me that that circumstance was not at all significant, bearing in mind the previous interview and discussion. It was in April that this will was drawn by Mr. Elliott, and nothing more was done by Boyd until September, when he went to Mr. Forman, whose firm had attended to Boyd's business for a number of years, to have his will made. Mr. Forman questioned him as to what he wished to do with his property, and to whom he wished to leave it. Boyd mentioned Mrs. Cook. He was asked if he had any relatives, and he said that his relatives were nothing to him. He mentioned his sister. Mr. Forman asked him if he would like to leave something to her, and he "agreed" to leave her $1,000. The will was not drawn on that day, Boyd saying he was not ready to sign it, but would come back the next day. He came back, and Mr. Forman says he further pursued the conversation with him of the day before, and asked him further if he did not want to leave something to charity. He does not remember his answer, but says he agreed to leave something to the Protestant Orphans' Home and the Jubilee Hospital. When asked if Boyd himself named these charities, Mr. Forman said:

"I do know that he mentioned the Orphanage in connection with the late Mr. Taylor, apparently a friend of his,"

and it was Boyd himself who named the sum he would give to his sister.

Mr. Forman had known Boyd for years, and he says he was

not, at the time of the execution of the will, mentally different from what he had ever been; he was very feeble physically, more feeble than usual. Before executing the will, Boyd went to the two banks in which his moneys were deposited to ascertain the balance at his credit, and after its execution, but on Forman's suggestion, deposited the will with one of his bankers, telling him what it was and to take good care of it. There is no question about all this, because the bank manager and clerks who gave him the information were called.

There is considerable other evidence of independent persons having no interest in the result to shew that he was quite capable of recognizing and talking sensibly with his friends. In one case, that of Cameron, whom he had not seen for a number of years, in fact since he was a boy, and who had been in the Yukon for several years, when told who he was, Boyd recollected circumstances of the man's youth, clearly and distinctly, spoke of his father, and inquired how he was getting on in the north.

Some stress was laid upon the fact that small cheques sent to Boyd by Mr. Forman for rents in the early part of 1909 had not been deposited by him, but kept in his possession, and that upon Forman calling his attention to the fact, all cheques were given back to Forman, and an arrangement made that cheques should not be sent thereafter, and that Boyd should get money from Forman when he wanted it. This was relied upon as evidence that he was unable to transact his business and look after his property, but when his physical condition is remembered, I do not see that that circumstance is of much importance. A man in his condition could not safely go about the down town streets.

About the end of November, 1909, Mrs. Cook became so ill as to be unable to attend to Boyd, and Dr. Nelson procured a male nurse, Orton. Boyd soon quarrelled with him, and accused him of illtreating him. While I do not wish to reflect unduly upon Orton, I think there is some evidence, even in Orton's own testimony, that he used him harshly, and without that gentleness and consideration that the age and feebleness of Boyd required of him. At this time Dr. Nelson and Mr. Forman were in a quandary to know what to do. Neither the hospital nor the Old Men's Home, a home for destitute old men, was a

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suitable place for him. He objected to Orton being in his house to take care of him, and as it was apparent that he was nearing his end, something had to be done so that his money could be legally expended for his care, and the expedient was adopted of taking proceedings in lunacy to have a guardian appointed. I therefore come back to the conflict which I mentioned in the beginning between the statements made in the affidavits in lunacy and at the trial by Dr. Nelson and Mr. Forman. The only statement I think it necessary to refer to in the affidavits of Nelson and Forman is that Boyd "has been for some months past feeble both in mind and body and is afflicted with senile dementia, which is gradually becoming more acute." In these proceedings Boyd was examined by two other physicians—Fraser and Hall—who both state that Boyd was then (in the month of January, 1910), suffering from senile dementia. The examinations made by them were, I think, somewhat perfunctory. Neither of them was able to remember at the trial what questions he asked and what answers he received, but they concluded that the man was in the condition I have mentioned. Dr. Hall expressed at the trial no settled opinion as to whether or not the disease existed in September. Dr. Fraser was of the opinion that it had existed for some time, but he fixed no time, but says that it was a progressive disease, and that he thought

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Boyd was in the intermediate stage in January. Neither of these witnesses is a specialist in mental diseases. Their evidence is of no great assistance otherwise than as shewing that senile dementia was present in January, 1910. Senile dementia is an incurable disease, we are told, and its duration is different in different patients. Had Boyd died of this disease, perhaps it could be assumed that its duration in his case was longer than from December to April; but he died of progressive paralysis and old age, and while senile dementia may also have been present and contributed to death, still there is nothing shewn in evidence which entitles me to say that deceased had any mental disease prior to December. Dr. Nelson was confronted at the trial with his affidavit affirming the statement above quoted, and containing the words "for some months past," and asked to harmonize it with his statement at the trial that there were no

symptoms of senile dementia before December. I think his explanation is one which I ought to accept, bearing in mind the circumstances in which the affidavit was made. The doctor says he did not notice the significance of the phraseology and did not intend to state that that condition existed for some months past.

As supporting the contention that the lunacy proceedings were taken for what was really an indirect purpose, I would point out that they were entirely irregular, Boyd not having been served with a copy of the petition, nor examined by the judge, as the Act requires. As between statements made in that inquiry and evidence given at the trial of this action, tested by cross-examination and founded upon most careful consideration and knowledge, I have no doubt which I ought to accept. There is no question of the competency of Dr. Nelson to speak of the condition of Boyd's mind, not only in December and January, but also for more than a year prior thereto, in fact, for the whole period during which it was contended that Boyd was wanting in testamentary capacity. Now, there is no suggestion that Dr. Nelson is not a reputable medical practitioner of good standing in the community, and the same is true in his business of Mr. Forman. Am I, therefore, to reject as not worthy of credit the well-considered evidence of these witnesses at the trial because carelessly or inadvertently or good naturedly, or without thoroughly understanding the affidavits, they made statements in the lunacy proceedings somewhat inconsistent with their evidence at the trial? I think not.

The other witnesses called in support of the testator's capacity appear to me to have appreciated the obligations they were under to give evidence thoughtfully and without prejudice. Mrs. Cook's evidence impresses me most favourably, notwithstanding her very great interest in the result of the litigation. I am unable to come to any other conclusion on the evidence in support of the will, if believed, and it cannot be suggested that it should not be believed, except as affected in Mrs. Cook's and her daughter's case by self interest, and in Mr. Forman's and Dr. Nelson's by their affidavits in the lunacy proceedings, than that the testator, though feeble in body, was of sound and dis-

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posing mind, memory and understanding, in September, when the will was made.

Turning now to the evidence given on behalf of those contesting the will. First, we have James Smith, a very old friend and acquaintance of the testator, and who was very kind to him during his illness in 1905, and again in the beginning of 1908, when he took him to his house to live. Smith says that on one occasion the deceased said: "This is my house" (referring to Smith's house). But it is manifest from Smith's own testimony that there was no insane delusion there. Then we come to the evidence of Alexander Wilson. We have here a witness who is entitled to the highest credit—a very old friend and acquaintance, a man who had no motives of self-interest to serve, and who states what took place between himself and the deceased within a year before his death, in a natural and straightforward manner. He was called by the contestants, but his evidence, I think, really supports the will. He says that Boyd spoke to him on many occasions about making a will, and asked him if he would act as executor; that he sent for him on some occasions to discuss the question of settling up his affairs before his death. Wilson considered him of sound mind. The only things he could speak of which might throw doubt upon that was, first, the testator's habit of putting off making his will.

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Wilson considered this childish, but this is a kind of childishness, if I may say so, common to many men with respect to the making of their wills. That was the only circumstance which Wilson could relate reflecting on Boyd's soundness of mind before December, 1909, with possibly this other, that Boyd, when asked about his relatives, said he had none; but I gather from Wilson's evidence that he was simply reluctant to speak about his relatives. It appears that his relatives none of whom resided in Canada, paid little attention to him for thirty or forty years, nor until he had acquired some property. The other matter which this witness thought might indicate feebleness of mind was his denial in December that he had made a will, but this is not hard to account for. Several of his neighbours had been pestering the old man to make a will in their favour, and he might very naturally be desirous that the fact that he had

made a will should not become known to them and subject him to further persecutions. These people were the principal witnesses against the will. It is a significant fact, too, that after September, in which month the will was made, the deceased no longer continued to ask Wilson to be his executor.

Then there is the evidence of Mr. and Mrs. Ledingham. They shewed him some kindness in the way of bringing him meals when he was unable to cook his own, and I think they expected a will to be made in their favour. There is a general note of exaggeration running through their evidence which greatly detracts, in my opinion, from its value. The incident of the fire in the mattress is a good illustration. The cross-examination of Ledingham, I think, shews that the old man did not wish the mattress to be thrown out, because he wanted it saved. I have great difficulty in understanding the evidence regarding this fire. Ledingham speaks of two such fires, but describes only one, which he says was in April or May, 1909; but when Boyd was sent to the Old Men's Home in March, 1909, we find the witness Mackintosh referring to a mattress which had been partially burned being sent with him; and Williams speaks of being at Boyd's house in the evening of the fire in the mattress, which he says was in the summer of 1909. But, assuming that this mattress was injured by fire earlier than April, 1909, it was clearly not sent in the hopelessly burned condition which the evidence of Ledingham would lead us to believe it was in. Boyd was physically unable to do more than look on while the mattress was being carried out, and his alleged remarks—assuming they were made—only indicate that he was deprecating the seriousness of the danger. Ledingham, while professing to think that Boyd was unfit to do business, nevertheless attempted to buy his property at a date later than the will, and as nearly as I can make out, in December. He very naively says that he wanted to buy it, but would rather get it without buying it. Evidently this witness did not think Boyd was mentally incapable of doing business, even in December.

Shepherd's evidence, I think, needs only to be read to be rejected, and the same is true of the evidence of Mackintosh. Boyd's conduct in the police station was that of a sane old man

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furiously angry at the indignity to which he had been subjected, and at the Home he resented having another person in his room. Apart from the reckless tone of Shepherd's evidence, we have the contradiction between paragraphs 1 and 2 of his affidavit made in the lunacy proceedings and his evidence at the trial. From said paragraphs I gather that within six months of the date of the making of that affidavit, or at all events, within a period of not longer than a year, he had had the conversation on the streets with Boyd, mentioned in paragraph 2. He did not venture to repeat these statements at the trial, but, on the contrary, in the examination in chief, he stated that he had not spoken to Boyd on the streets for a year before that time, and did not want to.

Then there is the evidence of Miss Partridge. Those incidents which she relates in a natural manner as they occurred, without any embellishment of her own, rather confirm than otherwise the soundness of mind of the testator. For instance, his coming to her father's house early one morning for his breakfast and saying that Mr. Grundy wanted him taken to the hospital, and his aversion to going, are quite rational. When a message came from Mrs. Cook that a carriage would be sent to take him to the hospital he appreciated the situation thoroughly and wished to go home at once to avoid, as I think, going to the hospital, and objected to Mr. Partridge accompanying him. All this is rational, and shews a keen appreciation of his circumstances and memory of persons and things. The date of this is not fixed, but the weather was cold, so it must have been late in the year (1909) or beginning of 1910. And again, when Miss Partridge visited him at Mrs. Addington's shortly before his death, he recognized her and seemed quite rational, as indicated by his astute remark when she said goodbye that it was not goodbye. This witness kept a record of Mrs. Cook's movements which, when asked to explain, she said was "to protect myself." How she needed protection I am unable to conceive, unless, as was suggested, she expected deceased to make a will in her or her father's favour, and anticipated that Mrs. Cook would make claim against the estate for her services. If she expected this,

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it had apparently not been present to her mind at that time that the testator was mentally unsound.

Macdowell's evidence is of little importance, and does not, to my mind, indicate unsoundness of mind of the testator.

Williams was, at the time of the trial, very sure that the deceased had been mentally unbalanced for at least three years before his death, which is contrary to the evidence on both sides. A story which he says the deceased told him about an old friend handling his papers is the chief factor in his behalf.

Then, it is said that the will is inofficious, and this is relied upon as evidence of lack of testamentary capacity in the testator. Nothing was given to James Smith, to whom I have already referred; but Smith and the testator were not on speaking terms for a year before his death. Smith is making a claim against the estate for his services to the testator, which he values at $1,000. The Ledinghams also were not remembered in the will. They were merely neighbours, and what they did for him was under an arrangement by which they were entitled to claim for services rendered at his request. They, too, have made a claim against the estate for these services. That the testator had carefully considered the claims of his relatives in Ireland is clearly established by the evidence of Elliott and others. As they were in no way dependent upon him, and had paid him little enough attention, he apparently did not consider that they had any claims upon him. For more than a year before his death the testator had given considerable attention to the disposition which he ought to make of his property at his death. It is quite apparent that he found it difficult to make up his mind. It appeared to him to be a choice between charity and those who had been most kind to him during his declining years. It is, therefore, not surprising that in September, 1909, after he had experienced what he believed to be unkindness from several of his old friends, and had for a year been carefully cared for, and his wishes understood, by a person who had shewn him the affection and kindness which Mrs. Cook undoubtedly did, he should have decided to leave his property to her. I do not attach much importance to the contention that the bequests to his sister and to the two charities were suggested by others.

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It is quite clear that he had considered the claims of his relatives, and had put them aside, and that he had also considered doing something for charity long before the will was made, but assuming that he would not have made these bequests had they not been suggested to him by Forman, though I do not think such an assumption would be quite justified, still his making them only shews his willingness to receive, and capability to act upon advice.

The testator was under no insane delusions even if we believe all the evidence, apart from mere expressions of opinion given by the witnesses against the will.

Sir J. Nicholl, in *Dew* v. *Clark and Clark* (1826), 3 Addams Ecc. 79 at p. 90, gives a much quoted definition of insanity:

> "Wherever the patient once conceives something extravagant to exist, which has, still, no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or, at least, of being *permanently*, reasoned out of that conception; such a patient is said to be under a delusion."

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None of the so-called delusions of Boyd were of this nature. Apart from insane delusions, there may be such weakness of intellect or mental decay as to destroy testamentary capacity, but I think that was not shewn to exist here, certainly not earlier than December, 1909.

I think, therefore, the appeal should be allowed, and the will admitted to probate. As I think there was some justification furnished by the lunacy proceedings for contesting the will, all parties should have their costs of the action and of the appeal out of the estate.

IRVING, J.A.: I do not see how the judgment can be supported.

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If we remember the will was made on the 18th of September, 1910, we have the following positive testimony that the man was perfectly sane and capable of making a will: (1) Dr. Nelson, who had him in charge from February, 1909, and saw him frequently; (2) Mr. Elliott, who drew a will for him in April; (3) Mr. Forman, who saw him twice in September with reference to the will now in question; (4) Rev. Mr. Grundy,

who visited him daily, and who fixes the period of the change in December, 1909.

There are others: Mr. Heisterman, but his evidence shews that he paid but little attention to the man; Mr. Doig, Mr. McConnan, and Mr. McKay, testify to the man's sanity; the four I have mentioned first seem to me, from their association with the deceased, the best able, with the exception of Mrs. Cook, whose evidence I leave out of the question, to testify as to the man's capacity at and before the critical time.

It must be conceded that Dr. Nelson and Mr. Forman, by their efforts in January, 1910, did much to damage the case they now support, but the evidence of Mr. Elliott and Mr. Grundy stands unattacked.

I would allow the appeal.

GALLIHER, J.A.: I have had the opportunity of reading the judgment of my learned brother the Chief Justice, with whom I agree, and would have nothing to add, but out of respect for the views of the learned trial judge, with whom I differ, I wish to emphasize one or two of what appear to me salient features in the issue.

If I read the learned trial judge's judgment aright, I think he practically found that there was no undue influence. This, however, is disputed by Mr. *McPhillips,* counsel for the respondent, Sarah Ryan, and as he strenuously argues that there was undue influence, I will deal with that point.

Mr. *McPhillips* starts out by urging upon the Court the fact that Mrs. Cook, from the moment she took charge of the deceased, did so with the set purpose of so influencing him that he would make a will in her favour, and speaks of her as a clever and designing woman, who had the deceased completely under her control; he depicts how careful she was to hide her designs from others, and cites as an instance of her cleverness and cunning how she, knowing if all his property were left to her it might create suspicion, and to avoid this, and as part of a well-laid plan, she suggested to the deceased that he leave some of his property to his sister.

Now, all this is very well in theory but, unfortunately for

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Mr. *McPhillips's* contention, he introduces the evidence of a male nurse, who, during the latter period of the illness of the deceased, was in charge of him for a time. The evidence of that man is that Mrs. Cook, when she would call to see deceased, would throw her arms around him and kiss him, and make much of him. Now, if this evidence is to be believed, and this was the clever, designing woman, alert at all times to hide from strangers the fact that she was trying to gain influence over the deceased, this act, repeated time and again in the presence of a male stranger, seems to me would be the most foolish act she could commit.

I discard that evidence, but Mr. *McPhillips* maintains it should be given full credit, and if so, it answers his own contention. It is admitted by all that Mrs. Cook was very kind to the deceased, and he was more amenable to her than to any of the others. This fact is urged upon us and against Mrs. Cook. Mrs. Cook had known the deceased (who was her father's friend) since she was a child, and when she took charge of him she found him in a very filthy condition, due no doubt to illness and physical weakness. It is noticeable that all the time she had charge of the deceased, and was able to look after him, the old man improved in health, was always kept clean, was taken out for drives and walks, and the best of care taken of him in the circumstances. Is it unreasonable, then, that he should have been more desirous of yielding to her wishes in respect of his own convenience than to those of others? Nay, is it not the most natural thing that he should? And yet all this is urged against Mrs. Cook. I can only say on this point that, in my opinion, the evidence falls far short of proving any such contention. It would be unfortunate, indeed, if acts of care and kindness bestowed upon those needing it should be regarded as emanating from sinister motives, unless the evidence points clearly to it.

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The only other point upon which I wish to touch briefly, and wherein, in my opinion, lies the germ which has developed all this controversy, *i.e.*, the proceedings taken in lunacy. This was some months after the making of the will, and whatever may be said as to the wisdom or otherwise of those proceedings, a full perusal of the evidence leads me to the conclusion that they

were taken with the view of placing some one in authority for the purpose of providing creature comforts for the deceased, and whether he was mentally capable at that time, he certainly was physically incapable of doing so himself.

Of course, we cannot overlook the testimony given in these proceedings. To do so might in many cases lead to very serious results. But, taking these proceedings as a basis to start from, let us carry our mind back to the occurrences adduced in evidence prior to this time, and upon which the contestants base their contention of testamentary incapacity.

My learned brother has gone very fully into these, and as I agree with him, it would be only repetition for me to go over the same ground, but I wish to point out this, that, having in mind the proceedings that had been taken, a witness, going back to events that occurred previously, might in all honesty regard those events as strange or peculiar, and as acts of one not altogether responsible when such acts at the time left no such impression on his mind.

I must say that I was impressed by the fair and able manner in which Mr. *Crease,* of counsel for some of the contestants, marshalled the facts. Indeed, the counsel on both sides argued the matter very ably before us.

The case is one largely of fact, and I have therefore been at pains to give it my best consideration.

Solicitors for appellant: *Tait & Brandon.*

Solicitors for respondents: *A. E. McPhillips,* and *Crease & Crease.*

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REX v. DANIEL.

Criminal law—Libel—Private prosecutor not bound over to appear at trial —Request to presiding judge to authorize preferment of indictment— Criminal Code, section 873.

REX v. DANIEL

It is no part of the duty of a judge to initiate a criminal prosecution.

CRIMINAL TRIAL for defamatory libel, before HUNTER, C.J.B.C. at the Clinton Spring (1912) assizes. It appearing that the private prosecutor had not been bound over at the pre-

Statement liminary hearing to appear and give evidence, *S. S. Taylor, K.C.,* for the private prosecutor, applied to the Chief Justice, presiding judge at the assize, for his written consent to prefer a bill of indictment against the accused, who had been regularly committed for trial. The application was made under section 873.

Taylor: The Attorney-General, following his usual practice in cases of criminal libel, has left this case to the private prosecutor. Accused is committed for trial at this assize Court. This assize Court ceases to exist as soon as the docket is disposed of, and if the Court will not give the consent directed by the statute, or the Attorney-General does not prefer the bill, the inevitable

Argument result will be that the charge will go by the board. On the other hand, a refusal to consent will tend to have the effect of forcing the Attorney-General to prosecute all criminal libel charges or to disregard the committal for trial.

Maitland, for the Crown, stated that he had been instructed not to take any part in the prosecution.

HUNTER, C.J.B.C.: The function of the judge is not to initiate prosecutions, but to try them. It is only in rare cases, such as where he is an eye-witness of a breach of the law, that

Judgment he should initiate a prosecution, and even then, with the exception of contempt of the Court, he should not be the trial judge.

Subsequently, *Maitland,* for the Crown, stated that he had been instructed to prefer the indictment.

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Landlord and tenant—Lease—Renewal—Surrender—Consideration for—Notice unsigned.—Estoppel.

Under a lease for a term of five years, commencing from the 22nd of September, 1902, the lessee had an option of a further term of five years, provided he gave six months' notice of his intention to exercise such option. He continued in occupation after the termination of the first five years, but on the 8th of February, 1908, he wrote to one of the owners who had purchased from the original landlord, agreeing to "take off" two years from his lease. GREGORY, J., at the trial, held that the lessee had surrendered his lease and gave judgment for plaintiff. Defendant appealed.

Held, that the judgment should be sustained.

APPEAL by defendant from the judgment of GREGORY, J. at the trial of the action, heard at Victoria on the 27th of June, 1911. The facts appear in the reasons for judgment of IRVING, J.A. Statement

Maclean, K.C., for plaintiff.
Aikman, for defendant.

15th July, 1911.

GREGORY, J.: Without making any reflection upon the defendant, I have no hesitation in accepting in its entirety the evidence given by Mr. E. Crow Baker on behalf of the plaintiff, supported, as it appears to be, by all the circumstances of the case. While I think that Mr. Crow Baker misconceived his legal rights, there can be no doubt that he made his claim in the *bona fide* belief that it was sound. His agreement, therefore, not to attempt to enforce the same by suit was a good consideration for the defendant—relinquishment of two years of his term: *Callisher* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449; *Holsworthy Urban Council* v. *Holsworthy Rural Council* (1907), 2 Ch. 62. GREGORY, J.

Mr. Crow Baker having sold the property to the plaintiff under the belief that the defendant's term had been reduced by two years, the Courts would, I think, grant specific performance of the contract, even if there were any difficulty about the surrender not being by deed.

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Mr. *Aikman* contended, under the authority of *Cupit* v. *Jackson* (1824), 13 Price 721, that the charge upon the land having been made by deed, could only be discharged by deed. I need not refer to the circumstances of that case. It is true that Alexander, C.B., in delivering his judgment, makes use of expressions which support that contention, but he does not so decide. At page 731 he says the discharge should have been done by some formal act. This case is not referred to in the latest editions of Addison on Contracts, or Woodfall or Foa on Landlord and Tenant.

The case of *Phelps* v. *Amcott and others* (1869), 21 L.T.N.S. 167, and *In re Garnett*: *Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, cited to support the view that the Court would relieve because the defendant was ignorant of his rights, are not applicable. The defendant here consulted a solicitor and was advised as to his rights, and it was in consequence of that advice that he served the notice: (exhibit 1). In *Phelps* v. *Amcott, supra,* the Court held that the party had no intention of releasing his rights, and *In re Garnett*: *Gandy* v. *Macaulay, supra,* the transaction was between a trustee and her *cestui que trust,* who had no independent advice, and had him brought up by the trustees, and the Court held that no consideration had been given for the release, there having been no dispute or compromise, and the release of £5,000 was set aside.

GREGORY, J.

In his argument, Mr. *Aikman* relied chiefly upon the language of section 3, chapter 6, 8 & 9 Vict., requiring a surrender to be by deed, but both counsel appear to have overlooked section 3, chapter 20, British Columbia statutes 1903-04, permitting a surrender to be made in writing and signed by the party surrendering.

This is practically a re-enactment of the Statute of Frauds, 29 Car. 2, chapter 3, section 3, and the notes of Chitty's Statutes shew clearly that under that statute a deed was not necessary. There will be judgment, therefore, for the plaintiff, with mesne profits at the rate of $85 per month.

I regret that I am unable to give the defendant any relief, even in the way of costs, and I hope that the plaintiff will be lenient in the matter of taking possession.

The appeal was argued at Vancouver on the 8th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Aikman, for appellant (defendant): It is submitted that the document given by defendant does not operate either as a surrender or a new lease. It is simply what it is, an agreement to take two years off the lease; an attempt to vary a written contract, and it would be good if all parties were present. No evidence that Baker (the owner in question) had authority from his co-owner to take part in this change. The notice served is perfectly legal, and we are entitled to our lease. To constitute this document a new lease it must be an enforceable lease, and this, signed by the lessor only, and obtained by one only of the owners, and not signed by either of them, cannot be called an enforceable lease.

[GALLIHER, J.A.: He having signed that letter, is he not bound so far as he is concerned?]

No; there must be mutuality, if all parties are to be bound, and to constitute a lease, both sides must be bound and both sides must be parties.

Maclean, K.C., for respondent (plaintiff): There is sufficient evidence here to justify the judge in coming to the conclusion that Baker was acting for both owners and had authority to do so. This can be inferred from the fact that Baker received the rents and transacted the business connected with the property; *ergo,* it must be assumed that he was authorized, and that the defendant, in transacting business with him, took it that he had authority. There was a surrender by act and operation of law, and it does not require to be in writing, because defendant accepted a three-year lease instead of a five-year lease. He has accepted something which is different from, and inconsistent with his original lease. Further, he is estopped from raising the point at this late date. He never complained of the absence of the other owner from this transaction.

Argument

Aikman, in reply: It was expressly pleaded by plaintiff that Baker was acting for both owners, and defendant denied that. He did not prove his allegations by evidence at the trial, and it was his duty to do so. There is no estoppel here, and no surrender by operation of law or by agreement.

Cur. adv. vult.

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MACDONALD, C.J.A. concurred in the reasons for judgment of GALLIHER, J.A., dismissing the appeal.

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IRVING, J.A.: The defendant, by an agreement under seal, dated the 4th of September, 1902, obtained from Mr. Redfern a lease of the premises known as 45 Government street for a term of five years, to date from the surrender of the then tenants, rent payable monthly in advance, with the option to take the premises for a further term of five years at an annual rental of $1,080, to be payable and paid in the same manner; and it was stipulated that if he should elect to exercise the option aforesaid, he should give six months' notice in writing of his intention. The defendant took possession on the 22nd of December, 1902, I gather, and the term would expire on the 23rd of December, 1907, and on the 4th or 6th of March, 1907, delivered to E. Crow Baker a written notice, dated the 4th of March, 1907, of the exercise by him of his option. The notice was not signed. On the 22nd of November, 1906, Mr. Redfern conveyed to Messrs. Edgar Crow Baker and A. C. Flumerfelt, and on the 17th of November, 1909, they conveyed to the plaintiff, who, on the 21st of March, 1911, brought this action. His claim was that no proper notice of the exercise of the option had been given after the lease had expired, and that later, namely, on the 8th of February, 1908, the defendant had agreed to accept, in lieu of the five year extension, a three year extension, which did terminate on the 23rd of December, 1910. The defendant wrote the letter: (exhibit 2):

"I agree to take off from my lease two years on the premises that I occupied known as old No. 45, new No. 1013 Government St.

"Redfern's Block, City of Victoria, B.C.

"Yours very truly,
"Art. Bancroft."

The plaintiff on the 8th of March accepted two months' rent at $90 for the interval between the 23rd of December, 1907, and the 23rd of February, 1908.

The defendant says that he delivered, on the 6th of March, 1907, duly signed notices, and that the consideration for the letter (exhibit 2) was a verbal promise by E. Crow Baker, that if he would knock off two years from the extension, he (Baker)

would build certain additions which the defendant was anxious to have, and which had been discussed in 1907; for these additions the defendant was to pay $25 extra. The defendant says that this promise has never been fulfilled; that in April, 1908, E. Crow Baker told him that he could not carry out his agreement. All the documentary evidence is against this statement of fact made by the defendant, and the trial judge quite rightly declined to accept his story. The defendant did not give the notice required by the original lease; an unsigned notice did not bind him.

The case of *Fenner* v. *Blake* (1900), 1 Q.B. 426, seems to me to be an authority in the plaintiff's favour on two grounds: (1) that there was a surrender by operation of law; and (2) the letter of the 8th of February, 1910, creates an estoppel which prevents the tenant from saying that his tenancy was to last longer than three years.

IRVING, J.A.

I would dismiss the appeal.

GALLIHER, J.A.: I think the appeal should be dismissed.

I accept the evidence of the witness Baker that the only time when it was agreed that he and his co-owner should erect an addition to the premises for which the defendant was to pay extra rent was in 1907, when the new lease was prepared and tendered, and which lease the defendant, on the advice of counsel, refused to sign. This being so, it forms no part of the consideration for the document, exhibit 2, as alleged by defendant.

It was contended by appellant that other than this promise to improve the premises, there was no consideration for this document, which is in effect a release of two years of the renewal term under the agreement between Redfern and the defendant.

GALLIHER, J.A.

I agree with the learned trial judge that while Mr. Baker misconceived his legal rights, he made the claim honestly and *bona fide,* believing the term had ended, and the forbearance to bring action to enforce that claim was a good consideration for the compromise which was effected: *Callisher* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449.

Mr. *Aikman* also contended that the surrender of a portion of a term granted by instrument under seal must be by writing

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under seal, but this is, I think, fully covered by the words of our statute, chapter 20, section 3, of 1903-04, which are "by deed or note in writing signed by the party . . . . surrendering the same."

The further objection was raised by Mr. *Aikman* that it was not shewn that Baker had any authority to bind his co-owner Flumerfelt, but as this point was not taken in the Court below, and is not raised on the pleadings, or in the notice of appeal, I decline to consider it.

Appeal dismissed.

Solicitor for appellant: *J. A. Aikman.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

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PALLEN v. THE IROQUOIS.

Admiralty law—Practice—Amendment of preliminary act—Application for on evidence discovered after filing of preliminary act.

It is a settled rule not to allow an application for an amendment of the preliminary act at the instance of the party who filed it.

MOTION by the defendant to amend its statement of defence and preliminary act, heard by MARTIN, Lo. J.A. at Victoria on the 28th of June, 1912. No objection was made to the former, but as to the latter it was contended that it is contrary to the practice and spirit of the Rules of Court to permit it to be done. The ground upon which it was asked in the present case (as set out in the solicitor's affidavit) was to the effect that since the filing of the act "further information has been obtained specially through an inquiry (under the Canada Shipping Act) which was held in Victoria relating to the matter in question," and "an amendment . . . . is asked to embody the points on

Statement

which information for the first time came to the knowledge of the defendants on the inquiry in question." The following authorities were cited or referred to on the argument: Rule 60; *The Vortigern* (1859), Swabey 518; *The Frankland* (1872), L.R. 3 A. & E. 511; *The Miranda* (1881), 7 P.D. 185; *The Godiva* (1886), 11 P.D. 20; Williams & Bruce's Admiralty Practice, 3rd Ed., 367-9; Roscoe's Admiralty Practice, 3rd Ed., 325-6; Howell's Admiralty Practice, 35-6.

C. Dubois Mason, for the motion.

J. A. Russell, contra.

13th June, 1912.

MARTIN, LO. J.A. [Having stated the facts as above set out]: After a careful consideration of these authorities, I see no reason for departing from the practice laid down in *The Miranda* case, where it was held that the settled rule was not to allow such an amendment at the instance of the party who filed the act, Mr. Justice Phillimore saying: "I am quite sure that it would be improper for the Court to allow any alterations to be made in the preliminary acts." That there has been no change in this attitude of the Admiralty Court in England, I find by reference to Halsbury's Laws of England, Vol. 1, p. 94, in an article on the subject by Sir Gainsford Bruce (formerly Mr. Justice Bruce) and Mr. E. S. Roscoe, the Admiralty registrar, wherein it is said:

Judgment

"185. Alterations or amendments will not be allowed in the preliminary acts at the instance of the parties who have filed them, but where a question in a preliminary act is insufficiently answered, the Court, on the application of the opposite party, may direct the question to be properly answered and the preliminary act to be amended accordingly."

It follows that the application must be dismissed, with costs to the plaintiff in any event.

Motion dismissed.

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STEVENSON v. SANDERS.

Vendor and purchaser—Sale of land—Purchaser dealing with vendor as agent—Agent becoming principal by purchasing property himself after accepting deposit—Rescission—Offer to return money.

STEVENSON v. SANDERS

Plaintiff, in the belief that defendant was a real estate agent, explained to the latter what he desired. Defendant recommended a certain lot at $2,500, and plaintiff, at a second interview on the same day, said he would take the lot if defendant could get it for him, paying at the same time a deposit of $50 on account of the purchase price, one-third of which was to be paid within a few days. Defendant, on his own account, then procured the lot from the owner for $2,000, less $100 commission. Shortly after the payment of the one-third, plaintiff complained to defendant that he (defendant) had sold his own property, when plaintiff had understood that he was merely an agent. Defendant offered to refund the money paid, which was refused. Plaintiff, some two days after this, having learned what defendant had actually done, wrote defendant, accepting the offer to refund. Defendant refused. Plaintiff sued to recover the profit made by defendant, or, in the alternative, a rescission of the agreement and a return of the moneys paid. GREGORY, J., at the trial, was of opinion that plaintiff had ratified the transaction, and dismissed his claim. Plaintiff appealed.

Held, affirming the finding of GREGORY, J. (MACDONALD, C.J.A. dissenting), that plaintiff had failed to establish a relationship of principal and agent between himself and defendant. A man, as here, may undertake to sell property not his own, but if he secures title before the purchaser rescinds his offer, the latter cannot complain.

Per MACDONALD, C.J.A.: That plaintiff was entitled to a rescission of the contract, and a return of the money paid.

Statement

APPEAL by plaintiff from the judgment of GREGORY, J. in an action tried by him at Victoria on the 6th of November, 1911, in circumstances shortly set out in the headnote.

The appeal was argued at Victoria on the 31st of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

W. J. Taylor, K.C., for appellant (plaintiff): Defendant obtained the option after he gave a receipt for the deposit, and it was not until on examination for discovery that it was ascertained that Sanders paid $2,000 for the property. His actions indicate fraud. He was an agent.

M. B. Jackson, for respondent (defendant): There is no evidence of agency, and fraud has not been proved.

[IRVING, J.A.: The question is whether Sanders was

employed by plaintiff to procure a property at a certain price in a certain locality. If he was, and he went and purchased the property after receiving a $50 deposit, then there was fraud.]

Sanders was a dealer in real estate; not an agent. Stevenson adopted and ratified what he did.

Cur. adv. vult.

1st April, 1912.

MACDONALD, C.J.A.: The defendant was, at the time of the sale in question in this action, a real estate broker, although in his defence he denied that he was such. His sign was that of a person engaged in the real estate business, and, as he himself says: "The principal part of my business in any sale on commission is the re-sale of something I have already sold to a man and he comes to me and asks me to find a buyer for him again." And again:

"Have you ever recommended persons to buy property and handled the transaction for purchase and possibly the sale? I may have done; I cannot tell you."

But, in any case, it is perfectly clear that when the plaintiff went to his office he understood him to be a real estate broker, and that defendant's conversation and conduct were calculated to confirm that understanding. The plaintiff was a new-comer to Victoria, and unacquainted with the real estate market, and this he explained to defendant.

MACDONALD, C.J.A.

The defendant says:

"We discussed things generally. In the course of the discussion I mentioned to him (plaintiff) this particular corner of Bay and Cook. I told him why, in my opinion, it was likely to have a good increase in value.

"Do you remember telling him it was safe for him to take it; you would buy it yourself at that figure, ($2,500)? Yes, that is perfectly correct."

The plaintiff then went to lunch, and, returning about an hour later, said he would take the lot if defendant could get it for him. A deposit of $50 was then paid on account of the purchase money, and it was arranged that a further sum, amounting in all to one-third of the purchase money, should be paid in a few days. After making the sale at $2,500, and after receipt of this deposit, defendant went to the owner of the property, and purchased it in his own name for $2,000, less $100 allowed to him by the owner as commission, being the usual five per cent.

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In this way defendant made, unknown to plaintiff, a profit of $500, besides his commission, on a lot which he had represented to plaintiff was good value, and which he (defendant) himself would be willing to buy at that price, knowing, as he did, that plaintiff was relying entirely on his integrity in the transaction. A few days thereafter, and after one-third of the purchase money had been paid, the plaintiff called on defendant and said that he had learned that defendant had sold him his own property, and complained that he had, at the time of the purchase, not so understood the transaction. The defendant admitted this, but led plaintiff to believe that he had owned it previous to selling it to plaintiff; but defendant said: "If you have been under a misapprehension, you can have your money back." The evidence is not very definite as to how this interview ended. It appears though that plaintiff was not willing at that time to accept his money back, owing to a question of commission, and there was a suggestion by one Sherwood, an acquaintance of the plaintiff, and a sub-agent of the defendant's, that plaintiff should think it over for a few days. This interview occurred on the 28th of the month. On the 30th the plaintiff went to see the lot, and seeing the sign boards of other agents upon it, went to one of these and asked the price. This agent told him that he had sold it only a few days previous to defendant Sanders at a price which plaintiff understood to be $1,400. He then wrote a letter, dated on that day, to defendant, referring to defendant's offer to give him his money back, and saying that he could not help thinking that he had paid an excessive price, and therefore would accept the offer to have his money back. On the 1st of April defendant wrote declining to pay back the money. The plaintiff then brought the action, claiming to recover from the defendant the difference between the price the defendant had paid for the property and the price which plaintiff had agreed to pay, and in the alternative to set aside the agreement, and for the return of all moneys paid by the plaintiff in respect thereof, together with interest thereon. The learned trial judge dismissed the action, and from that judgment the plaintiff appealed to this Court.

MACDONALD, C.J.A.

I think the appeal should be allowed. On the 28th, when

the plaintiff neglected to accept defendant's offer to pay back his money, the plaintiff was not acquainted with all the circumstances of the case. While he then knew that defendant was the owner, he did not know that defendant had, after receiving his deposit, gone out and purchased it at a much lower price than defendant had advised him to pay for it; he had not ascertained this until the 30th. When he did ascertain it, he then promptly demanded back his purchase money. Had he then demanded the difference between the price paid by the defendant and the price charged him, he would have been entitled to succeed on his principal claim, but, with a full knowledge of the facts then for the first time in his possession, he elected to take back his purchase money, and that is the relief to which he is entitled. I am unable to agree that plaintiff is precluded from claiming relief now because he did not on the 28th accept the offer of the return of his money. He then knew nothing of the defendant's secret profit of $500, nor of the underhand and deceitful manner in which it had been obtained. A party is not estopped because he does not repudiate before he discovers the fraud.

MACDONALD, C.J.A.

I would therefore direct that judgment be entered in the Court below for the amount of the plaintiff's alternate claim. He should have the costs of this appeal, and of the action.

IRVING, J.A.

IRVING, J.A.: Plaintiff alleges that he was induced to enter into a contract to buy a lot for $2,500 on a representation by the defendant that he would act as plaintiff's agent, and would procure the lot for him upon the most favourable terms, and he charges that the defendant, in violation of his duty, bought the lot for himself at $2,000 and was selling it to him (plaintiff) for $2,500. He claims payment of the difference between $2,000 and $2,500, or, in the alternative, that the agreement into which he entered with the defendant be set aside, and the moneys paid by him thereunder be returned to him. The learned trial judge, after hearing the plaintiff, came to the conclusion that there was no evidence to support the contention that the defendant had agreed to act as plaintiff's agent. The appeal is against that holding.

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The evidence shews that the plaintiff, with a Mr. Sherwood, called on the defendant and discussed the question of the plaintiff buying some real estate in Victoria. The defendant pointed out what he considered would be a good point at which the plaintiff could buy. He said he would not advise the plaintiff to buy anything that he himself would not buy. A particular lot was mentioned, and the defendant said the price was $2,500. The plaintiff says:

"I do not think the defendant said he would go and buy it for him; nor did he say he owned it. He just recommended it."

The defendant says the word commission was not mentioned between them, but the plaintiff says: "I naturally thought he was selling on commission."

The plaintiff and Mr. Sherwood went to lunch, and afterwards the plaintiff returned to the defendant's office and said:

"I will take that lot. I will pay $50 down and pay the balance in a few days."

The defendant then wrote and signed a receipt. Unfortunately this has been lost, or it might, on its face, shew what the true relation was. The plaintiff paid the balance of the first instalment of $833.33 and received from defendant an agreement for sale in which defendant agreed to sell him lot 15. The plaintiff, having heard from his friends that the price at which he had bought was too high, went to the defendant. The plaintiff and defendant give very much the same accounts as to what took place at that interview. The defendant says:

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"Captain Stevenson told me that he thought I had acted as a broker, and not as a principal in the transaction."

The plaintiff says:

"I told Mr. Sanders that I thought I had paid too much, and that I was not satisfied, and that I thought he was acting as agent and not as principal."

The defendant then said that he was not acting as agent, and was not carrying on business on a commission basis, and that if he (plaintiff) was not satisfied with the transaction, he could have his money back. The plaintiff declined this offer, and went away. At that time there can be no doubt that he knew that the defendant was not acting as his agent, but was selling his own land. Two days later, *i.e.*, on the 30th of March, the plaintiff wrote that he still felt that he had paid too much for

the lot, and that he would now be glad to have his money back, but the defendant said that the matter could not be re-opened now. In this letter he pointed out that the reason he had made the offer to cancel was because the plaintiff seemed to be under the mistaken impression that he was acting as a broker, whereas he was the vendor, and was paying Sherwood a commission upon the sale.

It is a curious thing that the point that the plaintiff now seeks to make against the defendant, *viz.*: that he was the plaintiff's agent, was not advanced in the letter of 30th March. The explanation of this is that the plaintiff's chief grievance was that the defendant had bought the property for $1,400, and was selling it to him at $2,500. In this he was mistaken; as a matter of fact the defendant had bought it at $2,000.

The plaintiff says he thought the defendant was to act as his agent, but that he (defendant) was to get his commission from the vendors; nevertheless—and this seems to me somewhat inconsistent—he thought his friend Mr. Sherwood was entitled to receive from Sanders one half the commission he was to receive from the other side, because he (Sherwood) had introduced him to the defendant. It is owing to the intervention of Mr. Sherwood that the mistake has arisen. Mr. Stevenson entered the defendant's office with a preconceived idea that he could secure the defendant's services, advice and assistance, and that the defendant should obtain his reward for these services by taking a commission from the vendor.

The defendant, on the other hand, thought the plaintiff came to buy land from him, and his evidence and conduct are consistent with that view throughout. When he discovered the plaintiff's mistaken idea, he did, in my opinion, all that could be expected from him, he offered to restore things to their original position, but the plaintiff said, in effect: No, knowing the mistake I was under, I will now affirm the contract.

I think there was some carelessness on the part of the plaintiff in assuming that the defendant would give him the benefit of his services and advice, and look to the vendor for his reward. Perhaps carelessness is too strong a word, but it was the plaintiff's loose way of taking too much for granted. An agent

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may get his remuneration from the other side, as in *Lowenberg, Harris & Company* v. *Wolley* [(1894), 3 B.C. 416] (1895), 25 S.C.R. 51; but that was a very different sort of agency. I do not think there is any evidence of fraud or misconduct on the part of Sanders. If Sanders had been employed to buy, it would have been a fraud on his part to have sold his own property to the plaintiff, who was under the belief that he was dealing with a third party: see *Brookman* v. *Rothschild* (1829), 3 Sim. 153, on appeal (1831), 5 Bligh, N.S. 165; *Gillett* v. *Peppercorne* (1840), 3 Beav. 78; and *Kimber* v. *Barber* (1872), 8 Chy. App. 56. Now, we should not lightly reach the conclusion that a man has been guilty of a dishonourable act. If we start the consideration of the testimony with this presumption in mind, a variance in testimony is more readily attributed to misconception of the facts by an innocent witness than to wilful and corrupt misrepresentations. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject matters.

Assuming that this was a case of mistake—as I believe it was—there was no true contract of agency (or of sale) between them. The plaintiff then might recover back his money on common law principles: *Kelly* v. *Solari* (1841), 9 M. & W. 54, or he might apply in equity to get the contract set aside and to be freed from his liabilities, as in *Paget* v. *Marshall* (1884), 28 Ch. D. 255.

IRVING, J.A.

But the plaintiff declined both these remedies, when the defendant said he might have them, but later on elected to pursue a remedy, *viz.*: to have the property at the price paid for it, a remedy which he would undoubtedly be entitled to if the agency were established. As he has failed to establish that relationship, his action fails.

The plaintiff's counsel, on the appeal, abandoned that portion of the prayer for relief which asked to set aside the contract.

It appears that the defendant did not acquire his title to the property until after he had received from the plaintiff the

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deposit of $50. Much was made of this—and if the relationship of principal and agent existed, it would be a very serious thing; but as that relationship did not exist, there was no harm in it. A man may undertake to sell property he does not own. He does so at his own risk, but if he secures a title to the property before the purchaser rescinds, the latter has no ground of complaint.

GALLIHER, J.A. concurred in the reasons for judgment of IRVING, J.A.

Appeal dismissed, Macdonald, C.J.A. dissenting.

Solicitors for appellant: *Eberts & Taylor.*
Solicitors for respondent: *Peters & Wilson.*

REX v. JAMES.

HUNTER, C.J.B.C.
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May 27.
REX v. JAMES

Criminal law—Evidence—Statement by accused—Admissibility of.

Any statement made by an accused person, if voluntary, is admissible. Here, moreover, the statement was made in open Court, and after a caution by the magistrate.

TRIAL for murder at the Vernon (Spring) assizes, 1912, before HUNTER, C.J.B.C. The accused had been brought up for preliminary hearing on a charge of escape, and at the hearing, after the usual statutory caution had been given, gave an account of the homicide, in which he admitted firing the shot, from the effects of which the injured person had died, after the statement was made.

Statement

R. H. Rogers, for the prisoner, objected to the admission of the statement.

Argument

Burns, for the Crown.

HUNTER, C.J.B.C.: Any statement made against self-interest, if voluntary, whether written or oral, sworn or unsworn, is admissible. Here there is the additional safeguard that it was made in open Court, after a caution by the magistrate. The statement is admissible.

Judgment

Verdict, guilty of murder.

MURPHY, J.

1911

March 15.

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1912

April 2.

ROMANG v. TAMBURRI

ROMANG v. TAMBURRI.

Statute, construction of—Tenancy by the curtesy—R.S.B.C. 1897, Cap. 97, Sec. 22—B.C. Stats. 1898, Cap. 40, Sec. 5.

By proclamation, the Revised Statutes of British Columbia, 1897, were declared in force on and after the 21st of February, 1898. Section 22 of the Inheritance Act, being chapter 97 of the said Revised Statutes, provided: "Nothing in this Act contained shall be held to impair or affect the right of the widow of an intestate to her dower out of her deceased husband's lands, nor the right of a husband to his curtesy out of his deceased wife's lands." By chapter 40 of the statutes of 1898, being The Statutes Revision Act, 1898, it was enacted that the following subsection should be added to section 5 of said chapter 97: "(5) If the intestate shall leave a widow or husband him or her surviving, such widow or husband, as the case may be, shall be entitled, in case the intestate has left no lawful descendants, to one-half of such real estate absolutely, and in case the intestate has left lawful descendants him or her surviving, then to one-third of such real estate for life."

Held, on appeal (affirming the judgment of MURPHY, J.), that section 22 of chapter 97 was repealed by said chapter 40.

Therefore, in the circumstances here, where a husband, entitled upon the death of his wife to a tenancy by the curtesy in her lands, and the lands were put up for sale for taxes and bought in by him and subsequently sold to third parties, it was

Held, that such parties acquired only the one-third interest for his life to which he was entitled.

Judgment of MURPHY, J. affirmed.

Statement

APPEAL from the judgment of MURPHY, J. in an action tried by him at Vancouver on the 22nd of November, 1910. In 1899 the mother of the plaintiff died intestate, leaving plaintiff (a daughter) and a husband. The daughter was under age at the time, and was still a minor at the time of the transaction in question in the action. Her estate consisted of the piece of property now in dispute. In August, 1905, the taxes being in arrear, the property was about to be sold, and plaintiff's father bought it in by paying the taxes. In the following October he entered into an agreement for sale of his interest acquired under the tax sale to one Schofield, and after a further transfer the property came to the defendant. In 1907, within the time

allowed for redemption, the amount of taxes was paid on behalf of the plaintiff, and this action was brought to dispossess the purchaser or holder under the tax sale.

The question involved was whether subsection 5 of section 5 of chapter 40 of 1898 impliedly repealed section 22 of chapter 97 R.S.B.C. 1897. MURPHY, J. was of opinion that there was a clear repugnancy between the two statutes, and that the defendants had by the deed from the husband acquired his interest, *viz.*: one-third of the property for the term of his life, subject to a lien in favour of the plaintiff on the whole property for $115.80 (the amount paid to save the property), gave judgment accordingly and directed an enquiry as to mesne profits. Defendants appealed.

W. A. Macdonald, K.C., for plaintiff.

J. A. Russell, for defendants.

15th March, 1911.

MURPHY, J.: The substantial question to be decided in this case is whether subsection 5 of chapter 40, B.C. statute 1898, impliedly repeals section 22 of chapter 97, R.S.B.C. 1897.

It was argued on behalf of defendants that the two sections are not necessarily so inconsistent and repugnant to each other that the earlier must be taken to be repealed by the later legislation. To support this, it was urged that sub-section 5 of chapter 40 is intended to deal with the devolution of real estate in general, and operates upon every interest in land, legal or equitable, with the single exception of tenancy by the curtesy. Tenancy by the curtesy being created only if certain requisites are present, *viz.*: a valid marriage, birth of a child capable of inheriting, sole seisin of the wife during coverture, and the death of the wife, it is argued section 22 of chapter 97 only applies to estates fulfilling every one of these requirements, while subsection 5 operates on estates or interests which are lacking in one or more of these requisites, and, therefore, the two sections are not necessarily repugnant. This is ingenious, but I hardly think the argument can prevail.

In the first place it is to be observed that section 22 deals with dower, as well as tenancy by the curtesy, and that all in one sentence. One could not urge the same line of reasoning if

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this were a case of dower where there was no issue, instead of tenancy, for, by subsection 5, the widow would, under such circumstances, take half of her husband's real estate absolutely, whilst under section 22 she would be entitled to dower or a life interest in one-third thereof. These provisions, I think, are obviously so repugnant as to be irreconcilable. As dower attaches to any real estate to which a deceased husband had any legal or equitable right, unless held by them in joint tenancy, it would be necessary to divide section 22 into two provisions if defendant's argument is to prevail, and I know of no authority for so doing, particularly when regard is paid to its grammatical construction. Rather, I think, such repugnancy is a clear indication of the intention of the Legislature to repeal the earlier section by the later.

Again, the facts of this case fall directly within the four corners of subsection 5. The mother died seised of an estate in fee simple, intestate, leaving a husband and a lawful descendant. Subsection 5 expressly states that under such circumstances the husband shall be entitled to one-third of such real estate for life. If effect is given to section 22, the husband takes the whole of the estate for life. This is, I think, a clear repugnancy. I hold that defendants have, by the deed from the husband, acquired his interest, *viz.*: one-third of the property for the term of the husband's life, subject to a lien in favour of plaintiff on the whole property for $115.80 and interest at the legal rate for taxes paid on her behalf thereon.

MURPHY, J.

I am asked to order a partition or sale, but as the question was not argued at the trial, I desire to hear counsel further, unless they can agree on this point. There should be an inquiry before the registrar as to mesne profits.

The appeal was argued at Vancouver on the 20th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

J. A. Russell, for appellant.
W. A. Macdonald, K.C., for respondent.

Cur. adv. vult.

2nd April, 1912. MURPHY, J.

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MACDONALD, C.J.A.: I would dismiss this appeal. Chapter 97, section 22, R.S.B.C. 1897, preserved to a husband his tenancy by the curtesy of England. By chapter 40 of the Acts of 1898, being an Act to give effect to the said Revised Statutes of British Columbia, 1897, the said Revised Statutes were given the force of law, subject to the amendments set forth in the first schedule to the said chapter 40. Section 5 of the latter Act must be read in connection with section 1, and, thus read, I think there is no doubt that the amendment made to said chapter 97 by the said schedule, and reading as follows:

"(5) If the intestate should leave a widow or husband him or her surviving such widow or husband as the case may be shall be entitled in case the intestate has left no lawful descendants to one half of such real estate absolutely and in case the intestate has left lawful descendants him or her surviving then to one third of such real estate for life"

is applicable to the facts of this case, and that the husband is, therefore, entitled to a life estate in one-third only of the land in question.

I would dismiss the appeal.

IRVING, J.A.: Prior to the passage of the Act of 1908, the father, Joseph, would, as tenant by curtesy, have been entitled to the whole of his wife's interest for life. The fifth subsection passed by that Act, under the circumstances of this case, has cut his interest down to one-third for life.

I can see many reasons for saying that the tenancy by curtesy has not been abolished, but this case, I think, can be determined upon the statute of 1908, and the facts of this particular case.

I would dismiss the appeal.

GALLIHER, J.A.: I agree entirely in the judgment of the learned trial judge, and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Russell, Russell & Hannington.*

Solicitors for respondent: *Cowan, Macdonald & Parkes.*

MARTIN, LO. J.A.

1912

June 19.

LETSON v. THE TULADI.

Admiralty law—Practice—Affidavit leading to warrant—Discretion of registrar—Rule 39.

LETSON v. THE TULADI

Where the registrar has thought fit, under Rule 39, to dispense with some particulars in an affidavit to lead to warrant, the Court will not review the exercise of his discretion.

Statement

MOTION heard by MARTIN, Lo.J.A. at Victoria on the 28th of May, 1912, in an action *in rem,* for necessaries, to discharge the warrant for the arrest of the defendant ship on the ground that the affidavit to lead to warrant did not contain all the particulars required by rules 35, 36 and 37, and that, therefore, the deputy district registrar at Vancouver had no jurisdiction to issue the warrant.

W. J. Taylor, K.C., for the motion.
Macfarlane, contra.

19th June, 1912.

Judgment

MARTIN, Lo. J.A.: . . . These rules bear a close similarity to the corresponding English rules, Order V., rr. 16 and 17, but there is this important distinction, *viz.*: that while in England the power to dispense with "all the required particulars" is reserved for "the Court or a judge," in this Court the registrar has the like power, rule 39 providing that:

"39. The registrar, if he thinks fit, may issue a warrant, although the affidavit does not contain all the prescribed particulars, and in an action for bottomry, although the bond has not been produced, or he may refuse to issue a warrant without the order of the judge."

The affidavit here does not state the national character of the ship, or that the aid of the Court is required. The first omission is of importance, the latter is almost a matter of inference; in other respects I think the affidavit is sufficient. Were it not for rule 39, I should have thought that as a whole there had not been a substantial compliance with the rules, but I see no escape from the fact that the registrar has, for reasons which must be

assumed to be valid, and which are not required to be disclosed on the record, "thought fit" to dispense with some of the prescribed particulars, and in such circumstances I cannot perceive in what respect I am entitled to review the exercise of that discretion any more than I should be under the English rule. I may say that I have searched carefully for any decisions which would throw light on the subject, as it is of much practical importance, but have been unable to find one.

The motion must be dismissed, with costs, payable to the plaintiff in any event. Judgment

Order accordingly.

MILLS v. MARRIOTT & FELLOWS AND BOYD.

Agreement—Construction of—Forfeiture—Neglect—Specific performance.

In the circumstances of this case, as set out in the statement below, notice of forfeiture under an agreement for sale of land was set aside, and specific performance decreed, IRVING, J.A. dissenting.

APPEAL from the judgment of MURPHY, J. in an action tried by him at Vancouver on the 31st of May, 1911, dismissing the plaintiff's action, which was for a declaration that an agreement for sale of certain lands made between the plaintiffs and defendants was still in force, for an injunction and damages. Plaintiff had been engaged in the defendant firm, and on leaving it made a claim for a certain amount in settlement of partnership or business accounts. Action was brought on this claim by him, but it was settled by his taking the agreement in question in the present action, which agreement gave him a third interest in the property involved. This agreement was in the usual form Statement

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of an agreement for sale of land, and contained a clause that in case of default of payment, the vendors might cancel the agreement by giving 30 days' notice to the purchaser, and that such notice might be effectually given by mailing the notice at Vancouver by registered letter addressed to "Clement Mills, 131 Hastings St. E., Vancouver." The agreement was drawn up and settled by defendants' solicitor and sent to plaintiff for signature, after execution by the other parties. Plaintiff, through some slip or omission, never signed it; but defendants accepted the first payment under it. When the second payment became due, plaintiff was absent in England, but it was alleged on his behalf that he left the money with his partner. Defendants telephoned his office asking where he was, and were told he was in England. Defendants then had two notices typewritten, giving him the 30 days' option of paying up, or suffering forfeiture. One of these notices was posted to his address in England, and the other to his office in Vancouver. The two documents were enclosed in square envelopes, such as would be used in private correspondence and, in addition to being addressed in a lady's handwriting, that sent to his Vancouver office was marked "private." His partner would not open this letter, and it remained. On behalf of the defendants it was alleged that the enclosing of the notices in such envelopes, being addressed in a lady's handwriting, and one of them marked private, was a mere unauthorized act of a stenographer, and that the marking one envelope "private" was due to a question by her whether the notice sent to Vancouver was to be sent to the firm, and she was instructed that that was a private or personal matter, apart from plaintiff's firm's business. Plaintiff alleged that the notice sent to England missed him there and followed him home. The notice mailed to the plaintiff required payment within 30 days after the date of the notice, which was dated 22nd February, 1909. The notice was not mailed until the 25th of February, 1909. The appellant contended that the notice was not a good notice under the agreement, as it demanded payment within 30 days after the 22nd of February instead of 30 days after the 25th of February, when the notice was mailed. Five days after the expiration of the 30 days given in the notice, his partner

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tendered the money, which was refused, and defendants proceeded to exercise their power of forfeiture. MURPHY, J. was of the opinion that as the agreement of sale was never signed by Mills, it was a unilateral contract, and that, therefore, time was of the essence; that the plaintiff was admittedly in default for over five weeks, and while the agreement provided for termination in case of default by giving 30 days' notice, and that they purported to proceed under that clause, yet they did so in the belief that plaintiff had executed the contract, and that such action did not prejudice them. In reply to the argument that because of the inclusion of the forfeiture clause, the agreement could be terminated only by action in accordance therewith, the learned trial judge was of opinion that such a clause in an agreement clearly contemplated execution of the agreement by both parties, and was inoperative where such mutual execution had not taken place. The case, therefore, in his opinion, fell under the ordinary law as to time being of the essence in unilateral contracts, which are in reality simply options, only one party being bound.

Statement

Plaintiff appealed, and the appeal was argued at Victoria on the 11th and 12th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Craig, for appellant.
J. A. Russell, for respondents.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred in the reasons for judgment of GALLIHER, J.A.

IRVING, J.A.

IRVING, J.A.: The plaintiff's application for specific performance cannot be regarded as *bona fide,* or he would have gone into the witness box. I think the plaintiff applying for specific performance or for relief against forfeiture ought, as a rule, to submit himself to cross-examination.

In this case the plaintiff, through his own carelessness, got into default. The true agreement between the vendors and purchasers was that time should be of the essence of the contract.

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Strong, C.J., a great authority on equitable doctrine and practice, said in *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171 at p. 174:

"In order to entitle a party to a contract to the aid of a Court in carrying it into specific execution, he must shew himself to have been prompt in the performance of such of the obligations of the contract as fell to him to perform,"

I break off to ask, does the plaintiff satisfy this requirement by getting from another person, partner or friend, an undertaking to meet the anticipated payment? What follows shews how necessary it was for the plaintiff to go into the box:

"and always [that means hereafter] ready to carry out the contract within a reasonable time even though time might not have been of the essence of the agreement."

In my opinion the notice to the purchaser was not invalidated by writing the word "private" on the envelope. I see no good reason to believe that the use of that word, or of the other so-called devices, constituted a trick to prevent the purchaser receiving the notice. As a matter of fact, it was actually in the hands of the plaintiff's clerk in the plaintiff's office at 131 Hastings Street, E. The fact that the defendants sent a duplicate notice to the plaintiff's address in England rebuts the idea that there was any intention on their part to take an unfair advantage of the plaintiff. No person in the world would be able to anticipate that the plaintiff's partner would act in such an unreasonable way as to send a letter addressed to his absent partner to the dead letter office. The notice, in my opinion, was not sufficient to put an end to the contract. It was not delivered to the postal authorities until the 25th of February. Therefore, the notice was not a 30-day notice. The defendant's notice must be in strict compliance with the power contained in the agreement: see *March Brothers & Wells* v. *Banton* (1911), 45 S.C.R. 338. But, as the plaintiff was aware of the default on the 14th of March, 1910, the day the duplicate notice reached his mother's house in England, and took no steps, he should be refused specific performance. The plaintiff, it appears, did not execute the deed of agreement. Nevertheless, I think the plaintiff, having brought this action on the written agreement, ought to be held to all the conditions imposed by the vendor. It is not possible for him to execute it in part.

IRVING, J.A.

As to the $250 paid down, I would order that to be returned and the contract to be rescinded. The word "deposit" is not used—the word "balance" shews it is part of the purchase money—the amount being an aliquot portion of the purchase money tends to support the idea that it is a payment on account, and the absence of a forfeiture clause—all these circumstances shew we should not regard it as a payment simply on account of and as part of the purchase money.

GALLIHER, J.A.: I would allow this appeal. I think, with respect, that the learned trial judge erred in classing this as a unilateral agreement. It does not follow because one party to an agreement does not sign that it is a unilateral agreement. It may become a binding agreement by the acts of the party.

In the case at bar, the plaintiff paid the first instalment of the purchase money, and, knowing he would be absent, left instructions with his partner to pay the second when it became due, together with the necessary funds for that purpose. This is clearly shewn by Dodson's evidence. His partner, through inadvertence, omitted to do so. The whole question, then, turns upon the insufficiency of the notices sent in accordance with the agreement. The words are:

"The said notice shall be well and sufficiently given if delivered to the purchaser or mailed under registered cover addressed as follows: Clement Mills, 531 Richards street, Vancouver, B.C."

GALLIHER, J.A.

The second payment was due on the 22nd of February, 1910, and was not made, and on that day, or a couple of days afterwards, the defendant Marriott called up the plaintiff's office and obtained his address in England. It is to be noted that he made no mention to Mills's partner, Mr. Dodson, that a payment was due, or any inquiry as to whether Mills had left any instructions regarding same, but instead, he proceeds to have a notice of forfeiture made out, addressed in a lady's handwriting, in an unofficial looking envelope, which was marked private, and same mailed to the address as specified in the agreement, and a duplicate sent to the English address. The notice mailed to the Vancouver address was received there, but on account of its being marked private, and the manner in which it was addressed,

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and the envelope used, was not opened by the plaintiff's partner, but returned to the post office.

These circumstances have created a suspicion in my mind which has caused me to construe that notice with strictness, and the conclusion I have come to is that in the circumstances it was not a good notice. It is not proved that the notice mailed to England was delivered to him there, and, in fact, Mills swears he never received it until after his return to Canada. I may say, however, that I am not very much impressed with Mills's evidence in this regard, but the defendants have failed to satisfy the onus cast upon them if they rely on the notice sent to England as delivery.

GALLIHER, J.A.

I think the defendant Boyd must be taken to have had notice of the plaintiff's claim, as an application to register the Mills agreement, together with the agreement itself, was on file in the land registry office at the time Boyd purchased.

There should be judgment for the plaintiff as in the first paragraph of the plaintiff's prayer, and with costs.

Appeal allowed, Irving, J.A. dissenting.

Solicitors for appellant: *Martin, Craig, Bourne & McDonald.*
Solicitors for respondents: *Russell, Russell & Hannington.*

AUSTIN & COMPANY v. THE REAL ESTATE LISTING EXCHANGE AND CASHER.

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Principal and agent—Warranty of authority—Liability of agent.

C. had property for sale which was listed with the defendant Exchange for some months. Plaintiffs, having inquired from the Exchange whether the property was still for sale, received the information that it had not been withdrawn, and thereupon entered into negotiations for its sale to one of their customers, accepting a deposit on the purchase price and paying same to the Exchange, from which an order was given on C. for the commission. It transpired that C. had previously sold the property.

Held, on appeal (affirming the judgment of GRANT, Co. J. at the trial), that plaintiffs' damages were what they would have gained by the contract which the defendant Exchange warranted should be made, *viz.*: the full amount of the commission involved.

AUSTIN & CO. v. REAL ESTATE LISTING EXCHANGE

APPEAL from the judgment of GRANT, Co. J. in an action tried by him at Vancouver on the 16th of March, 1911, for commission on the sale of certain real estate.

The Listing Exchange carried on business by obtaining from owners of real estate authority to sell their property, of which they made lists to be distributed among their subscribers, agents actively engaged in the sale of land. The contract entered into with such subscribers was in the following form:

Statement

"THE REAL ESTATE LISTING EXCHANGE, VANCOUVER, B.C.

"Received from A. E. Austin & Co., the sum of twenty dollars, being subscription fee to July 14th at rate of $20 per month. For the above amount until date of expiration, we agree to supply you with our exclusive listings of Vancouver city and other municipalities. We also agree to send you a report daily (Sundays and holidays excepted) of all new listings, sales, deposits, options and withdrawals received the previous day. It is also understood that the sale of any property will be considered to have been made by the first subscriber making a deposit on same at our office. On receipt of such deposit we will at once give said broker an order on owner for the full commission on sale and arrange a meeting between buyer and seller to complete sale. We also agree to accept as subscribers only recognized real estate brokers. The monthly subscription fee is payable in advance at our office, 61 Exchange Bldg., 142 Hastings St. W., on the first day of every month.

"The Real Estate Listing Exchange,
"J. M. F."

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The authority from the various property holders was given in the following form:

"To the Real Estate Listing Exchange:—In consideration of your listing this property with your subscribers, I hereby give you exclusive right to list and sell same for May 15th and until notified by me in writing, at the above gross price and terms, which includes a commission to you of 5 per cent. on first $5,000 or any part thereof, and 2½ per cent. on all over $5,000, and in the event of my selling this property before withdrawn, you to get like commission.

"Owner: Mary Casher.
"Address: 1346 Hornby St.

"Listed by F. A. Forell."

The plaintiffs were subscribers to the Exchange, and received a list containing a property belonging to one Mrs. Mary Casher, for sale at $5,750. The original listing was for $6,000, but the Exchange rendered to the plaintiffs, in July, a listing reduced from $6,000 to $5,700. In November following, the plaintiffs, not having received any notice of the property having been sold, or withdrawn, telephoned to the Exchange, inquiring whether the property was still open, and received an answer that it had not been withdrawn. They thereupon advertised, procured a purchaser who paid $50 deposit, which was taken by the plaintiffs' clerk to the Exchange, and paid over in accordance with the contract, the plaintiffs receiving an order on Mrs. Casher for the commission, and at the same time a receipt which purported to relieve the Exchange of any liability on the part of the Exchange in the event of the deal not going through. The latter document, when submitted in evidence, was rejected by the trial judge, on the ground that it could not vary the obligations and rights of the parties which had at that time matured.

Statement

The trial judge found, on a conflict of evidence, that the property had never been listed by Mrs. Casher with the Exchange on the terms alleged; that, consequently, there was no claim against her for commission, and that she was justified in the position that she took, that she had sold the property some time previously. The action for commission was dismissed against her, and the Exchange were found liable for the full amount of the commission. They appealed.

The appeal was argued at Victoria on the 10th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Ritchie, K.C., for appellants.
J. A. Russell, and *R. M. Macdonald,* for respondents.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A. concurred in the reasons for judgment of GALLIHER, J.A.

IRVING, J.A.: We must have regard to the implied warranty of authority which the Exchange is supposed by law to have given Austin when it entered into the contract, *i.e.,* that they had the authority they professed to have.

Where this implied warranty exists, there is an exception to the rule that no damages can be obtained for innocent misrepresentation. The leading case of *Collen* v. *Wright* (1857), 8 El. & Bl. 647, was a decision by the Exchequer Chamber affirming a decision of the Queen's Bench, and was a case of an agent innocently assuming that he had authority to contract. More recent cases have extended the liability to every transaction, *e.g., Firbank's Executors* v. *Humphreys* (1886), 18 Q.B.D. 54; and *Starkey* v. *Bank of England* (1903), A.C. 114; *Simmons* v. *Liberal Opinion Limited* (1911), 1 K.B. 966.

IRVING, J.A.

The measure of damages is discussed in many cases. I shall refer to two only: *Spedding* v. *Nevell* (1869), L.R. 4 C.P. 212; and *Meek* v. *Wendt* (1888), 21 Q.B.D. 126. *Prima facie* the plaintiffs are entitled to what they would have gained by the contract which the defendant Exchange had warranted would be made.

I would dismiss the appeal.

GALLIHER, J.A.: The defendants, the Real Estate Listing Exchange, carry on business in the City of Vancouver, and obtain the listing of properties from various parties for sale upon commission. They do not make the sales themselves, but turn over to their subscribers (real estate brokers) the properties thus obtained for sale.

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Their lists are sent to each subscriber from day to day, and any alterations in terms or otherwise, or withdrawals, or sales, are noted in these lists against the respective properties. For

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this information and opportunity the subscriber pays $20 per month, and the first subscriber obtaining a purchaser for a piece of property, and making a deposit with the Exchange, is deemed to be entitled to the commission, and is given a receipt for the deposit and an order on the vendor for the commission.

The plaintiffs in this case were subscribers to the Exchange, and received a list containing, among others, a piece of property belonging to the defendant Mary Casher, with price, terms, etc. This was in June, and on July 8th the same property appeared in the regular list sent out, with the note: "reduced from $6,000 to $5,700." No sale, however, was made by the plaintiffs, nor does it appear that they made any effort to sell until November of the same year, when, owing to the time that had elapsed since the property had first appeared as listed, inquiry was made by them of the Exchange—to put it in their own words: "Was this property still good?" to which they say they received the answer: "Yes, it has not been withdrawn." The Exchange say their answer was: "It is not marked sold on the list." However, the plaintiffs proceeded to advertise the property and made a sale to one Stimson, took a deposit of $50, which they handed over to the Exchange, and obtained from them a receipt and order on the defendant Mary Casher, for the amount of the commission. It transpired, when the plaintiffs went to Mrs. Casher to complete the deal with Stimson, and for their commission, that she had sold the property herself to another purchaser the previous July. This action was then brought against Mary Casher for the amount of the commission—$275—and alternatively against the Listing Exchange for breach of warranty of authority to list the property.

At the trial Mary Casher denied positively having signed the listing agreement, although she says she did sign a listing form which was good only for fifteen days, and was subject to owner's confirmation; that from the day the canvasser from the Exchange called upon her until the plaintiff's lawyers wrote to her after the sale, she heard nothing of the Exchange people, and had no conversation or correspondence with them, and never gave them any authority to sell except for fifteen days and at $6,000.

The witness, who obtained the listing and turned in the listing agreement to the Exchange, swears positively that Mrs. Casher signed same at her house in his presence, and his name is affixed as having been listed by him. There was a direct conflict between these two witnesses, both of whom gave evidence in Court, and the trial judge has found in favour of Mrs. Casher and dismissed the action as against her. Whatever might be my personal view, I have not had the advantage of seeing the witnesses, and feel I would not be justified in interfering with that finding.

I am satisfied the Exchange received this as a genuine listing, and acted *bona fide* throughout in so holding it out to their subscribers, but that does not relieve them from responsibility if it afterwards turns out, as found by the learned trial judge, that, in fact, there was no such listing as claimed, if a third party has acted upon that guarantee. The case of *Yonge* v. *Toynbee* (1910), 1 K.B. 215, 79 L.J., K.B. 208, fully covers that point in the present case.

A further feature was urged as against the plaintiffs' right to recover from the Exchange, *viz.*: that as a long time had elapsed between the listing in the first place, as set out in the lists furnished the subscribers, before any action was taken by the plaintiffs to sell the property, the plaintiffs should have satisfied themselves, before incurring any expense, or making any efforts to sell, that the property was still in the market, and under the control of the Exchange, and that the plaintiffs should not have relied on the conversation over the telephone. Whether we accept the version of that conversation as given by the plaintiffs, or as given by the Exchange, it seems to me to make no difference.

The Exchange held out and guaranteed to their subscribers that the information contained in their lists sent out was correct, and invited them to act thereon, and at the time the inquiry was made over the telephone in November by the plaintiffs, it was the duty of the Exchange to have satisfied themselves that the property was still under their control, before permitting the plaintiffs to incur expense in connection therewith. That was one of the considerations for the payment of the monthly fee.

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I think the learned trial judge was right, and that the measure of damages is the commission which the plaintiffs would have earned. The appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*

Solicitors for respondents: *MacNeill, Bird, Macdonald & Bayfield.*

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McPHERSON v. FIDELITY TRUST AND SAVINGS CO.

McPHERSON v. FIDELITY TRUST AND SAVINGS COMPANY, LIMITED, AND MOSES GIBSON.

Principal and agent—Authority of agent—Money paid for and on account of principal—Condition attached to payment—Duty of agent, before acceptance, to obtain principal's consent to waiver of condition.

Where an agent, vested with limited authority, receives a payment which does not fulfil the conditions on which he is authorized to receive payments, he should place the money *in medio* until further instructed by his principal.

Statement

APPEAL by defendant Company from the judgment of HUNTER, C.J.B.C. in an action tried at Vancouver on the 11th of April, 1911, to recover $200, paid by the plaintiff as a deposit on the purchase of 5,000 shares of the capital stock of the Grand Trunk British Columbia Coal Company, Limited, and for cancellation and delivery to the plaintiff of a promissory note for $1,550, made by the plaintiff in favour of the defendant Gibson, in payment of the balance of the purchase money in respect of the said shares.

The defendant Gibson was the holder of a large number of shares in the Grand Trunk British Columbia Coal Company, Limited. He appointed the defendant Company his agents to

sell the shares, and agreed to pay them a commission on all shares sold by them. He instructed the Company that he would not accept any application for the purchase of shares unless a cash payment of ten cents per share accompanied each application, but was willing to give time for payment of the balance of the purchase money.

The defendant Company appointed one Simpson a sub-agent for the sale of shares, and agreed to pay him part of the commission to be received by them from Gibson.

On the 5th of October, 1910, at the solicitation of Simpson, the plaintiff signed an application for the purchase of 5,000 shares, and paid Simpson $200 in cash, and gave him a note, made by the plaintiff in favour of the defendant Gibson for $1,550, in payment of the balance of the purchase money. The $200 was less than ten cents per share, which Gibson required as the cash instalment. There was no evidence as to whether Simpson communicated to the plaintiff the fact that Gibson required a cash payment of ten cents per share, and there was no evidence as to what occurred at the time the plaintiff signed the application, except as above stated.

Simpson handed the application for shares, the cash and the note to the defendant Company. It had been arranged between the Company and the defendant Gibson, that the Company would keep all moneys paid on account of the purchase money of shares, and would deduct therefrom their commission, and at the end of each week would send Gibson a cheque for the balance of the cash on hand.

Statement

On receiving the cheque from Simpson, the Company sent it to Gibson, asking him to indorse it to them, which he did. The cheque was then deposited by the Company to their own credit. The Company did not explain to Gibson the fact that the cheque was in respect of an application for shares as to which less than ten cents per share had been paid, and did not submit the plaintiff's application to Gibson. Gibson indorsed the cheque in ignorance of these facts, supposing that the cheque represented a cash payment of ten cents per share. After depositing the cheque to their own credit, the Company then submitted to Gibson the plaintiff's application. Gibson objected to it on the

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ground that the cash payment was less than he had agreed to accept. Interviews took place between the Company and Gibson—the Company endeavouring to induce him to accept the application. One of the reasons advanced by the Company to induce Gibson to accept the application was that he had, by indorsing the plaintiff's cheque, bound himself and could not now refuse to accept the application.

On the 10th of October the plaintiff notified the defendant Company and Gibson that he withdrew his application, and requested a return of the $200 cash, and the $1,550 note. At this time the Company still had the money and note in its possession. The following day, Gibson assumed to accept the plaintiff's application, and the Company then sent the plaintiff's note to Gibson. This action was thereupon brought against the Company and Gibson to recover the $200, and for delivery up and cancellation of the note, and for damages for conversion of the note.

Sir C. H. Tupper, K.C., and *Griffin,* for the plaintiff.
S. S. Taylor, K.C., for the defendant Gibson.
W. P. Grant, for the defendant Company.

HUNTER, C.J.B.C.

HUNTER, C.J.B.C. (oral): I must confess I utterly fail to comprehend how this suit came to be defended. I accept the evidence of Simpson, which, in short, was that the application was made on the 5th of October; that on the 6th he had an interview with Lang and, so far as Lang's authority went, Lang refused to accept it at less than ten cents a share; that, of course, was according to the understanding that existed between his Company and the trustee; that on the following day an interview was had with Irwin, with a similar result; and that on the following day, which was Saturday, the 8th of October, he got the receipts from McPherson, and on the Monday following he had an interview with Gibson, the upshot of which was that the parties could not agree; he would not give more than five cents, and Gibson would not take less than ten, and consequently, on that failure to agree, he naturally asked for the return of his money and his notes. That Gibson refused, or rather turned him over to Irwin.

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I take it, on the refusal of Gibson to agree to the terms offered by Simpson, there at once arose a right of action for the return of the cheques and the notes, and that right of action could not have been defeated by any subsequent acceptance such as that which purports to have been made on the 12th. Not only that, before consulting solicitors, Simpson learned that the cheque had been indorsed in the usual way. We have heard Gibson say that he was utterly unconscious of the fact that he had indorsed the cheques. All I can say is, that a man that will indorse cheques without understanding what they are about must be unusually stupid, to say nothing else about it, and I fail to see how Gibson's stupidity in this matter can afford him refuge as against the demands of the plaintiff. The formal demand was made on the 11th. Even in the absence of that demand, the verbal refusal by Mr. Gibson was quite sufficient for an action.

HUNTER, C.J.B.C.

Both the Fidelity Trust Company, who received the application and cheques and notes and who gave the receipt, and Gibson have been guilty of conversion of this cheque, and are both, in my opinion, responsible to the plaintiff. As to their right *inter se,* I do not feel competent to say anything about that. The pleadings have not been framed with the view of having that matter finally tested. There is no claim over, and I will say nothing as to the position between the two defendants.

Judgment as prayed by the plaintiff, with costs.

The defendant Company appealed; defendant Gibson did not appeal.

The appeal was argued at Victoria on the 18th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

W. P. Grant, for the appellant: The defendant Company merely acted as agents for Gibson. They had no duties towards the plaintiff, and there was no privity of contract between the Company and the plaintiff. The plaintiff's claim was against Gibson only. The plaintiff cannot maintain this action against the defendant Company, even if the Company had the money and note in its possession, because the Company were agents for Gibson, and payment to them was payment to Gibson.

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Craig, for the respondent: The Company could not have acted as agents for Gibson, because their authority from him was expressly limited to accepting applications on which at least ten cents a share had been paid. The evidence warrants the inference that the Company accepted the money and note on the understanding that it would be submitted by the Company to Gibson for acceptance, the Company agreeing to return the money and note to the plaintiff, if the application was not accepted. This is the only honest construction which can be placed on the Company's conduct. The Company were liable for conversion of the cheque.

Cur. adv. vult.

On the 2nd of April, 1912, the judgment of the Court was delivered by

IRVING, J.A.: I would dismiss the appeal.

When the Fidelity Trust were notified that the plaintiff was not willing to pay the amount (10%) Gibson had instructed them to accept, they should have placed the money *in medio* until they could learn whether Gibson would make an exception to his rule in favour of McPherson. Not having done that, I do not think they can now say we have paid this money to our principal, and he alone is responsible.

Judgment

The payment to them being clogged with a condition, they could not, until the condition was assented to by Gibson, treat the money as Gibson's

Appeal dismissed.

Solicitors for appellant Company: *MacGill & Grant.*

Solicitors for respondent: *Tupper & Griffin.*

LEISER v. POPHAM BROTHERS, LIMITED.

CLEMENT, J.

1912

March 18.

LEISER v. POPHAM

Company law—Conversion of public company into private company—Restrictions imposed on disposition of shares.

A public company with a view to changing itself into a private company by special resolution, duly passed, imposed certain restrictions on the disposal of shares by shareholders:—

Held, that such restrictions were not void as being opposed to absolute ownership.

Borland's Trustee v. *Steel Brothers & Co., Limited* (1901), 1 Ch. 279, followed.

Semble, a public company may, although there is no express provision in the Companies Act for doing so, resolve itself into a private company.

ACTION for a declaration that a certain procedure of defendant Company was unauthorized and illegal, tried by CLEMENT, J. at Victoria on the 14th of March, 1912. Plaintiff bought 210 shares in the defendant Company. After the purchase of these shares, plaintiff was notified that it was proposed to pass a resolution of the Company changing it from a public into a private company by altering the regulations contained in the articles of association. By this change it was proposed to provide that a shareholder could not sell his shares except for cash, and could sell only subject to the approval of the directors of the Company. Plaintiff objected to these restrictions on his power to dispose of his shares, and brought action asking for a declaration whether the shareholders had power to convert a public company into a private company and to prescribe regulations such as those indicated, which might render his shares practically unsaleable.

Statement

Maclean, K.C., for plaintiff: The Companies Act, section 130, makes provision for converting a private company into a public company; but there is no provision whereby a public company can be turned into a private company. Therefore, the maxim *expressio unius est exclusio alterius* applies, and it is impossible by any change in the articles of association to convert a public into a private company.

Argument

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Harold Robertson, for defendant Company: Before the provisions in the statute with regard to private companies, it was usual to insert in the articles of association provisions which constitute companies with the powers that are now possessed by private companies, and there is, therefore, no reason why a public company could not be converted into a private company by a resolution of the shareholders.

18th March, 1912.

CLEMENT, J.:

"A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with section 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share": *per* Farwell, J. in *Borland's Trustee* v. *Steel Brothers & Co., Limited* (1901), 1 Ch. 279 at p. 288.

Section 16 of the Imperial Companies Act, 1862, is section 24 of our Act, which reads:

"(1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors and administrators, to observe all the provisions of the memorandum and of the articles, *subject to the provisions of this Act.*"

Judgment

One of the provisions of our Act—section 23—is that in a certain way, *viz.*: by special resolution, a company may alter or add to its articles of association, "and any alteration or addition so made shall be as valid as if originally contained in the articles." This is one of the contractual contingencies upon which a shareholder holds his shares, *viz.*: that a majority may against his will, and, perchance, his interest, place restrictions upon his right of transferring his shares. The restrictions imposed by the articles in question before me are not more drastic than those under consideration in the case above cited, where Farwell, J. upheld the altered articles.

In this case no attack is made upon the proceedings leading up to the passing of the special resolution, and there is no evidence upon which I can find that the majority acted *mala fide* or otherwise than in what they conceived to be the best interests of the Company.

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Judgment

Whether the effect of the changes made in the Company's articles is to turn the Company into a private company within the meaning of the Act, is really beside the mark. As a matter of power, I think the majority has acted within its rights.

That special provision is made (section 130) by which a private company may turn itself into a public company, while no specific provision is made for the reverse process, need not surprise one, because certain provision for publicity is necessary in the former case, and not in the latter. This consideration denies the application of the maxim (said to be a good servant but a bad master: *per* Lopes, J. in *Colquhoun* v. *Brooks* (1888), 21 Q.B.D. 52, 57 L.J., Q.B. 439) *mentio unius exclusio est alterius.*

The action is dismissed with costs.

Action dismissed.

THE KING v. McLEOD.

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THE KING v. McLEOD

Master and servant—Hiring at will—Remuneration "at the rate of $600 per annum of the fees collected"—Dismissal before end of year—Disposition of fees collected in year before date of dismissal—Time for accounting—Harbour Masters' Act.

Where a harbour master was appointed, to be paid "at the rate of $600 per annum of the fees collected by him from vessels entering the port," and he was dismissed at the end of the first month of the year:—

Held, on appeal, affirming the judgment of MURPHY, J., that the appointment was a hiring at will, terminable at the pleasure of the Crown, that the appointee was entitled to be paid only for the month served "at the rate of $600 per annum," and that the fees collected during that period belonged to the Crown (MARTIN, J.A. dissenting).

Statement

APPEAL from the judgment of MURPHY, J. in favour of the plaintiff, at Vancouver, on the 23rd of October, 1911, in an action for the recovery of $179, alleged to have been collected by the defendant on behalf of the Government. Defendant was appointed harbour master and port warden for Vancouver in

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1897 under the provisions of the Harbour Masters' Act. His remuneration was fixed "at the rate of $600 per annum of the fees collected by him from vessels entering the port." On the 25th of January, 1909, defendant received notice that his services would be dispensed with from the first of the ensuing month. Prior to the 25th of January, and during that month, defendant had collected the sum of $229, and the Department of Marine and Fisheries claimed payment of the amount in dispute, being the balance of the $229, after deducting one month's salary "at the rate of $600 per annum." A special case was submitted for the opinion of a Supreme Court judge as to whether the defendant was bound to pay over the amount to the Department, the defendant submitting that he was entitled to all the fees collected by him during his incumbency; that if he collected less than $600 during the year he would have to suffer the loss of the deficiency, and if he collected more he would have to remit the surplus. Thus he might collect his entire salary in two or three months, and would have to discharge his duties for the remainder of the year without further compensation, all the fees going to the Department. The Department submitted that the defendant's was a hiring at will, not a yearly hiring, and if he was discharged at any time he was entitled to salary up to the time his services were dispensed with, and to be paid at the rate of $600 per annum.

Statement

Macdonell, for the Crown.
Sir C. H. Tupper, K.C., for defendant.

27th February, 1912.

MURPHY, J.: On the argument, I was of the opinion that the question submitted ought to be answered in the negative, but further study of the relevant sections of the Canada Shipping Act and of the orders in council appointing defendant, and the authorities, has altered my opinion.

MURPHY, J.

It is admitted that the Crown could dismiss the defendant without notice, that being a common law prerogative. The money claimed in this action cannot, therefore, be retained as damages for wrongful dismissal. It follows also, I think, since the prerogative of the Crown to dismiss on a moment's notice is

not questioned, that the true construction of this contract is that it is a hiring at will, the remuneration depending on either the current collection of sufficient fees to cover the current wage, or the subsequent collection of the amount from fees, provided the defendant continues in his position.

As to the first proposition, there is clear authority that what is *prima facie* a yearly hiring is really in law a hiring at will if either party has the power of terminating the relation at pleasure: *The King* v. *Christ's Parish in York* (1824), 3 B. & C. 459, and *The King* v. *The Inhabitants of Great Bowden* (1827), 7 B. & C. 249.

As to the second, it may be objected that this construction means that the employer has the power to deprive the employee of his wages by removing him from office after a period when fees had fallen short of salary and possibly just prior to a period when such fees would not only pay current salary, but be sufficient to liquidate arrears. Again, the cases lay down, if it can be shewn to have been clearly the intention of the parties that the employer shall decide whether or not any remuneration shall be paid the employee, then effect must be given to such agreement, and failing such decision, or upon a decision to pay nothing, the employee has no right of action: *Roberts* v. *Smith* (1859), 28 L.J., Ex. 164.

MURPHY, J.

As everyone is presumed to know the law, the defendant must be taken to have known, when he accepted the position, that the Crown could dismiss him at any time. As he also knew, from the terms of his hiring, that his salary was dependent on fees only collectible by him whilst he held the position, and the amount and date of payment of which were indefinite, it must, I think, follow, that it was the clear intention of the parties to place the power of payment or non-payment in the hands of the employer in the special event of current fees not satisfying current wages. The question submitted is, therefore, answered in the affirmative, and there will be judgment for the plaintiff for the amount claimed.

The appeal was argued at Vancouver on the 22nd of April, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

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Sir C. H. Tupper, K.C., for appellant: We say that the wage fixed here was a wage of opportunity and not a current wage. Defendant took his chances of collecting his entire salary from the fees of his office.

He was stopped.

Macdonell, for respondent, called upon: The hiring was not a yearly hiring, but one at will, and "at the rate of $600 per annum." We depend altogether on the term "at the rate." There is another aspect to the question whether a man should not be able to collect his entire salary by fees. For instance, an incumbent, after collecting his entire salary in two or three months, might not desire to act for the remainder of the year, and either leave, resign, or do something to incur dismissal. Another man might do the same, and so on indefinitely, whereby the Department would pay remuneration for the service out of all reason.

Argument

Tupper, in reply: We say that the time had not yet arrived for an accounting. The defendant could not be called to account until the end of the year of his incumbency. The Department rendered this impossible by dismissing him almost summarily and claiming an immediate accounting.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.: The defendant was, on the 1st of February, 1909, dismissed from his office of harbour master of the Port of Vancouver. The reason assigned in the letter of dismissal was "to promote efficiency in the public service," and he was informed that a successor was appointed to take over his office from that date.

MACDONALD, C.J.A.

By statute, R.S.C., chapter 113, and the order in council appointing him, his salary or remuneration is fixed and the manner of payment provided for. He was to receive a salary not to exceed "the rate of six hundred dollars per annum," and was required to pay over to the Minister of Finance the harbour fees collected by him each year on the 31st of December, after deducting his salary therefrom, and it was provided that if these fees fell short of $600, then such lesser sum should be his salary.

The defendant collected, in the month of January, 1909, fees to the amount of $229, and claims to retain the same. This action was brought to recover all but $50 thereof, that sum being regarded by the Crown as the proportion of salary apportionable to the period in that year during which defendant held the office.

No provision is expressly made by statute or regulation for the case which has arisen here. If the defendant's contention be right, then, if he collected $600 in January, he would be entitled to retain it; or, if he collected $600 on the 1st day of January, and were then dismissed, he would have the right to retain it. Counsel for defendant conceded that that would follow if his contention in this action is upheld. I do not think this is the true construction to be placed on the provisions of the statute. It is conceded that the Crown had the right to dismiss, with or without notice. The dismissal, therefore, was rightful. I think the fees collected by him belong to the Crown, and not to him, subject only to his right to deduct his salary therefrom. This was merely the mode of payment of his salary, and does not, I think, enlarge the defendant's right. What, then, would have been his position had he had no right to pay himself out of the moneys collected, and had brought action for salary claimed to be due him at the date of his dismissal? Could he have recovered more than a proportionate part of the $600? I think not. Here the Crown concedes his right to a proportionate part of the $600, and to more than that I do not think he is entitled.

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.: The salary of the harbour master is to be such sum, not exceeding $600, as the Governor in Council shall fix, provided that if the fees in any year do not amount to the sum fixed, then he is to accept as his salary for that year the amount he collects.

IRVING, J.A.

The defendant, who held the position of harbour master, was dismissed on the 8th of January, 1909, and a dispute has arisen as to the amount of salary the defendant was entitled to in respect of his services subsequent to the 31st of December, 1909. During January, 1910, prior to his dismissal, he had received in fees the sum of $229, and the Department is willing that he

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should deduct therefrom, as salary, the sum of fifty dollars, but claims that he should remit to Ottawa the balance—$179—to form part of the consolidated revenue fund.

The order in council is: "that the remuneration of Captain McLeod (shall) be fixed at the rate of $600 per annum of the fees collected." Counsel for the Government says this means $50 per month. The defendant says that he is entitled to hold all fees collected by him subsequent to last date fixed by statute for accounting not in excess of $600.

I think there are two separate and distinct things—the amount of his salary, and the accounting for fees. The amount of his salary is not to be determined by the manner and time of the accounting for the fees. On his removal from office he, like any other agent, must at once account for all fees received. His salary must be determined according to the contract of employment. It, like all contracts of service with the Crown, except where otherwise provided by statute, was liable to be determined at any time.

If we read the contract into the statute and order in council, we would find it would run thus:

"The Crown agrees to employ Captain McLeod as Harbour Master during its pleasure. Captain McLeod's salary will be at *the rate of $600* per annum."

IRVING, J.A.

The question of a manager's salary was discussed in *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch.D. 340. There, Ansell's salary was during the broken period of 1885, at a rate varying with the business done. After the 1st of January, 1886, his salary should be "after the rate of £800." The practice was to pay quarterly. "The *agreement* says he is to have a salary after the 1st of January at the rate of £800 a year. That, to my mind," said Cotton, L.J., "is a contract for a yearly service and a yearly payment." Bowen, L.J. at p. 366 said: "He was to be paid at an annual rate." Had this case been the case of an ordinary yearly employment of a person by an individual, and not an employment by the Crown; and had the determination been by dismissal for misconduct, instead of by removal in the interest of economy, Captain McLeod would not be entitled to anything.

The contract being with the Crown, at pleasure, if the salary were simply so much *per annum,* the defendant would be entitled to nothing if he were discharged during the year.

I think Captain McLeod's contention fails, and that the appeal should be dismissed.

MARTIN, J.A.: This is a peculiar case, and, unless the exact position of the plaintiff is clearly understood, there is danger of a misapplication of legal principles to his case which are really foreign to it.

Sections 861, 865 and 866 of the Canada Shipping Act, R.S.C., chapter 113, which govern the payment of harbour masters "solely by the fees hereinafter mentioned" are as follows:

"861. The harbour master shall be remunerated for his services solely by the fees hereinafter mentioned, or such portion thereof as he is, from time to time, authorized to retain by the regulations made by the Governor in Council under this Part.

"865. The salary or remuneration of each harbour master shall, from time to time, be fixed by the Governor in Council, but shall not exceed the rate of six hundred dollars per annum, and shall be subject to the provisions hereinafter contained.

"866. The harbour master of each port shall pay over, as soon as possible after the thirty-first day of December, in each year, to the Minister of Finance, to form part of the Consolidated Revenue Fund, all moneys received by him for fees under this part, during such year, after deducting therefrom the salary or remuneration fixed as aforesaid.

"2. If the moneys received by him for fees in any year amount to a less sum than is so fixed, then such less sum shall be his salary or remuneration for that year."

The order in council of the 14th of January, 1897, by which he was appointed, provided, somewhat ungrammatically, "that he receive as remuneration at the rate of $400 per annum, of the fees collected by him from vessels entering the port." By order in council of the 16th of April, 1898, this amount was increased to $600.

It will be observed that the sole obligation cast upon him in the way of accounting for "moneys received by him for fees" is to pay over "as soon as possible after the 31st day of December" the said moneys "after deducting therefrom the salary or remuneration fixed as aforesaid," and if he did not collect enough fees to make up the full amount allowed to him

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he had to lose the difference. In other words, he was only liable to account for the excess. But on the other hand, if he collected the full amount within the first month of the year, or the first day, he could pay himself in full at that time and continue to collect and use for the balance of the year, all the fees that he lawfully could get into his hands, and no one could call upon him to account even for the excess till the period fixed by statute had arrived. Also, he might not be able to collect anything at all till the last month, or even then only a small amount, or nothing, as vessels might be prevented from "entering the port" wholly or in part, all of which shews that there was no fund to which he could, on the one hand, look for payment, or to which the Crown, on the other, could resort to pay him. It follows from this that no question of "current" salary or "apportionment" or "rateability" of salary, or *quantum meruit* can possibly arise here, because unless there was a fixed and regular fund available at the end of each month out of which an arbitrary monthly apportionment (as contended for by the Crown) could be made effectual, then there is no ground for fixing a regular period, weekly, fortnightly, or monthly, for the payment of the plaintiff at any "rate" whatever, otherwise it might be contended that the plaintiff could on his part call upon the Crown to pay him at the rate of $50 per month, at the end of every month, which

MARTIN, J.A.

is untenable. The fact is clear that his remuneration was not a regular and periodical one in any sense, but a wage of opportunity and once he got the full amount of his salary for a year in his pocket he could not be compelled to give it up by the method of discharging him the following day, or by abolishing the office, which well illustrates the point, because I do not think that it would be seriously contended that in such case he could be compelled to refund anything under $600. On his side the plaintiff took the chance of working perhaps a year for nothing, and the Crown took a similar chance of his paying himself at an early stage. There is nothing unfair in this because the plaintiff ran the risk of being discharged at any time without cause assigned, and the Crown might use his services for six or eleven months and then discharge him without a cent in his pocket.

In such unusual circumstances as these at bar it is only fair to hold that it must have been in the contemplation of the parties that these risks, or chances, should be reciprocal; one does not like to think that the Crown would make a contract or create a relationship by which it would take all the benefits of all the chances and its servant all the disadvantages of all the risks.

Viewed in the light of the statute and circumstances the expression (in section 865) "shall not exceed the rate of six hundred dollars per annum" presents to my mind no more difficulty than it takes to decide that the words "at the rate of" or similar expressions, as used in cases on contracts for fixed periods, have no application to this case. The language, in section 865, before us is not that the plaintiff shall be paid "at the rate of," etc., but that his remuneration "shall not exceed the rate of $600"; this is simply putting a limit upon the amount he may retain, and the word "rate" in such circumstances and in such context has and can legally have no more or further meaning than "sum" or "amount," and should consistently with legal principles be given that obvious construction.

But even if it be held that some "rateable" effect should be given to the words, that view can clearly be satisfied by construing them to mean that though the office was one at will and payable by fees, and might (and did) continue from year to year, yet in no one year was it to exceed the annual rate of $600. I find no weight in the arguments that the plaintiff might in the first month have collected $600, and then refused to perform his duties; or that if the Crown discharged him, say within three months after he had collected $600, and appointed another in his place that the Crown might have to pay the remuneration twice over. It must be assumed that he was a trustworthy and capable servant, and if the Crown chose to prevent him from discharging his duties that is its own affair. The reason assigned here for his dismissal—"to promote efficiency in the public service"—carries with it no stigma and is consistent with the view, *e. g.*, that the increasing responsibilities attached to a rapidly growing port required an official of a higher grade than formerly. The payment of a public officer by fees proceeds upon the assumption that all the fees he receives while he holds

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his office are, and have irrevocably become his property, and there must be clear and unequivocal language to change this principle and require him to hand over moneys which have come into his hands before his office is taken from him. I can find nothing in this statute to detract from this plaintiff's ordinary and well recognized rights. The mere fact that there is a limit placed upon the amount of fees he may retain for himself does not alter the principle or change the fundamental difference between his relationship to the Crown and that of periodical salaried officers in the true meaning of that term. Such a form of remuneration, in my opinion, is fundamentally opposed to the incidents of, or principles attaching to, a yearly or monthly salary or hiring, and I think that it is legally impossible to convert this relationship into a payment *per quantum meruit* which is the real basis of a *pro rata* payment.

In my opinion, with all due deference to the contrary views of my learned brothers, this appeal should be allowed.

Appeal dismissed, Martin, J.A. dissenting.

CROSBIE v. PRESCOTT.

MURPHY, J.

1912

May 2.

CROSBIE v. PRESCOTT

Practice—Preliminary hearing of question of law raised on pleadings—Refusal to adjudicate upon when facts in issue in controversy—Rule 286.

A question of law raised on the pleadings will not be adjudicated upon where the facts on which the question is based are in controversy.

ACTION by the assignee of the vendor under an agreement for the sale of land to recover an instalment of purchase money under the agreement. The defendant alleged fraudulent misrepresentation by the original vendor that the land fronted on the Coquihalla river and included certain bottom lands, and that, on discovery of this misrepresentation, he (the defendant) had repudiated the agreement to purchase. The plaintiff replied, joining issue on the defence and objecting that it did not disclose any defence in law. The plaintiff gave notice of an application to strike out the defence as frivolous and vexatious, or, in the alternative, for an order that the points of law raised by the defence and reply be set down for hearing; and an order was made that the points of law raised by the defence be set down for hearing before the trial. The case was heard upon the points of law so raised by MURPHY, J. at Vancouver on the 25th of April, 1912. Statement

Sir C. H. Tupper, K. C., for the plaintiff.
Ritchie, K. C., for the defendant.

3rd May, 1912.

MURPHY, J.: On this application coming up in Chambers, a discussion arose as to whether it could not more properly be disposed of by granting the alternative order asked for in the notice of motion, *viz.*, that the points of law raised by the plaintiff's reply be set down and disposed of before the trial of the action. The defendant's counsel then stated that it was not contended that the plaintiff had notice of his assignor's alleged fraud, nor that the plaintiff was not an assignee for value. On Judgment

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this statement an order was made as prayed alternatively. On the argument so ordered coming on, the statement of counsel was withdrawn, and I was informed that both the question of knowledge on the part of the assignee and of his having given valuable consideration would be in controversy in the action, and that the only result of any ruling I might make would be to determine upon whom was the onus of proof as to these facts, as, if the decision was adverse to the defendant, he would apply to amend by setting up notice and want of valuable consideration. Had I been aware of this, I would not have made the alternative order, since any decision would not decide the real points of law (to use the language of CLEMENT, J. in *National Trust Co.* v. *Dominion Copper Co.* (1909), 14 B. C. 190), which the facts, as they really exist, do in truth raise, as distinguished from suggested points of law, which the facts, when ascertained, may perhaps raise. Indeed, I think that case, though dealing with a stated case, is applicable to the present motion and precludes me from adjudicating hereon. Whether that be so or not, rule 286 states that a judge "may," not "shall," set down such points of law before the trial; and, as stated, I would not have done so, for the above reasons, were it not for admissions made by the defendant's counsel at the first hearing. I understood the plaintiff's counsel, on these admissions being made, to have abandoned the first part of his motion. This he would not have done but for such admissions clearing the way for the alternative order being made. If both parties will now agree that the first part of the motion be reinstated, it may be placed again on the Chamber list. If not, I decline to make any adjudication on the points of law raised when the facts on which they are based are in controversy; but, under the circumstances, if reinstatement is not agreed to by both parties, the costs should go to the plaintiff in any event. If both parties agree to the reinstatement, the costs are reserved until such reinstated motion is disposed of.

Judgment

Order accordingly.

SCALZO v. COLUMBIA MACCARONI FACTORY.

MURPHY, J.

1912

April 29.

SCALZO v. COLUMBIA MACCARONI FACTORY

Master and servant—Injury incidental to employment—Workmen's Compensation Act, 1902—Finding by arbitrator—Question of fact.

Where there is conflicting evidence, the finding by an arbitrator under the Workmen's Compensation Act, 1902, that the applicant was not engaged on his employers' business at the time of the accident, is a conclusive finding of fact on that point.

An accident occurring to a workman while doing something purely for his personal convenience, and foreign to his duty, is not an accident arising out of and in the course of his employment.

APPLICATION, upon a case stated by an arbitrator under the Workmen's Compensation Act, 1902, for the opinion of a judge of the Supreme Court. Heard by MURPHY, J. at Vancouver, on the 29th of April, 1912.

The arbitrator's findings were as follow:

"I find as a fact that the accident occurred when Scalzo had gone to get the pail to spit in. He had gone across the room, got the pail, and had placed it behind his machine and when pointing to it for the benefit of a fellow workman, in some unaccountable way, not noticing what he was doing, he got caught in the machine and was injured. The pail was used to place the waste in when cleaning the machine and the machine would not be cleaned until the day's work was done, so that undoubtedly the pail was procured for the purpose of spitting in and not for the master's business of being used as a receptacle for waste. The whole evidence between the parties turned on that point, that is, was the applicant placing the pail for his own purposes when the accident happened, or was he behind the machine for the purpose of picking up dough?—and I can see no reason why I should not follow the weight of evidence which to me seems absolutely clear. The question, then, is: Did the accident arise out of and in the course of the applicant's employment? The accident occurred during working hours, while the man was on duty, but while he for a minute or two had stepped across the room to get a pail for his own purposes, namely, to spit in. I cannot distinguish the case from that of

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Smith v. *Lancashire and Yorkshire Railway* (1899), 1 Q.B. 141, (1898), 15 T.L.R. 64, 1 W.C.C. 1. The accident was unfortunate, but the man for that minute or so was not about his master's business, and was not doing something which though not his duty, was for his master's benefit."

The questions submitted were as follow:

(1) Was I right in holding that the accident did not arise out of and in the course of the employment? (2) Was I right in holding that the applicant was disentitled to the benefits of the Workmen's Compensation Act?

M. A. Macdonald, for applicant.
D. A. McDonald, for respondent.

MURPHY, J.: The learned arbitrator has found that the accident happened when the applicant was placing the pail for his own purposes at a point behind the machine. He has also found that the accident was not one arising out of and in the course of the employment. This finding may, dependent on circumstances, be regarded as one of law or of fact. If there is no evidence to support the finding, a question of law arises. If there was conflicting evidence bearing upon the issue raised, the question must be one of fact: *Low and Jackson* v. *General Steam Fishing Company, Limited* (1909), A.C. 523 at p. 534. Here there is evidence that applicant's duty was to stand on the platform, and that he had no business behind the machine. This is disputed by applicant, but the arbitrator has determined this issue against him. The applicant, therefore, had no business to be where he was, and the risk of the accident cannot, on the arbitrator's finding, be held to be one which may reasonably be looked upon as incidental to the employment: *Smith* v. *Lancashire and Yorkshire Railway* (1899), 1 Q.B. 141; *Reed* v. *Great Western Railway* (1909), A.C. 31.

Judgment

The questions are answered in the affirmative.

Order accordingly.

ROOT v. VANCOUVER POWER COMPANY, LIMITED.

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1912

April 2.

ROOT v. VANCOUVER POWER CO.

Master and servant—Negligence—Inspection—Fellow servant—Nonsuit.

Plaintiff was injured by striking his pick in some dynamite in a tunnel of the defendant Company. There was no evidence of how the dynamite happened to be there beyond the inference that it was from a previous blast, and plaintiff did not shew that there had been no inspection after the blast. The jury gave a verdict for plaintiff on the ground that as the defendant Company had not proved that such inspection was made, they were therefore guilty of negligence. The trial judge set aside the verdict as a finding tantamount to negativing negligence, and as wrong in that it was an attempt to throw upon the defendant Company the burden of disproving negligence in the first place.

Held, on appeal, that the trial judge's view should be sustained.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: That the case was properly one under the Workmen's Compensation Act, 1902.

APPEAL from the judgment of GREGORY, J. in an action tried by him, with a jury, at Vancouver on the 12th of April, 1911, in favour of defendants. The action arose out of injuries received by plaintiff while in the employment of the defendant Company through the explosion of powder in blasting operations. The jury found in favour of the plaintiff for $3,000, on the ground that as the defendant Company did not prove that inspection was made after the blast previous to the accident, then they were guilty of negligence. GREGORY, J. was of opinion that this verdict was tantamount to a finding negativing negligence on all other grounds, and set aside the verdict. He was also of opinion that it was an attempt to throw upon the defendant the burden of disproving negligence on its part, the learned judge remarking:

Statement

"An action of this kind is founded on the negligence of the defendant, and the burden is on the plaintiff of proving the negligence and that the accident was caused by it; so, in the present case, if the suggestive negligence would be sufficient to make the defendants liable, it was the plaintiff's duty to prove to the satisfaction of the jury that inspection had not been made, instead of requiring the defendants to prove that it had been: *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193.

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Plaintiff suggests that the defendants are liable under the Employers' Liability Act, but he fails to indicate the particular section or subsection under which he claims, and I am unable to discover any applicable to the evidence and verdict in this case."

Plaintiff appealed.

The appeal was argued at Vancouver on the 6th of December, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

J. A. Russell, for appellant.

L. G. McPhillips, K.C., for respondent Company.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff was injured by an explosion of dynamite into which, as I gather from the evidence, he struck his pick while employed as a mucker in the defendants' tunnel. There is no proof of how the dynamite got there. Whether or not it was a loose piece hidden by muck or silt washed there by the water which had been flowing through the tunnel for some days, or the charge of an unexploded hole, or an unexploded piece in the end of a hole, called in mining parlance a "cut-off," no one can tell. That this dynamite could have been discovered by the most careful inspection or by counting the explosions at time of blasting, is not shewn. It was impossible to fix responsibility for negligence upon the defendants on the evidence in this case, and it therefore follows that the judgment below dismissing the action must be sustained.

In view of the evidence, it seems to me a pity that the plaintiff did not elect to take compensation under the Workmen's Compensation Act, and I venture to express the hope that the defendants will yet do what they offered to do in the beginning —pay such compensation.

IRVING, J.A.

IRVING, J.A.: Juries are not at liberty to find a verdict in favour of a plaintiff upon any statement of facts which they may think are decisive of the question. They must pass upon the statement of facts put forward at the trial, and passed upon by the judge as being sufficient for them to base a decision upon.

Assuming that no inspection was in fact made, the ground the jury went on would have been met by the doctrine of fellow servant. The evidence is uncontradicted that Peterson told the night shift boss, Barney, to make an inspection, and inspections were as a rule made.

We have had this "defective system" before us many times. It is the master's duty to take reasonable care of his employees by associating them with persons of ordinary care and skill, and superintendents competent to discharge their duties. If these men, brother workmen or superintendents, make a slip, and harm in consequence is occasioned to one of the men, that is not proof of a defective system. It was not the fault of the master that caused the injury. It was the negligence of the fellow worker, and there is no reason why the injured man should not proceed against his fellow workman: *Lees* v. *Dunkerley Brothers* (1911), A.C. 5, but the negligence of the fellow servant gives him no cause of action against the master. Here we get back to *Priestley* v. *Fowler* (1837), 3 M. & W. 1. The ground selected by the jury will not support a finding of negligence, and therefore the verdict cannot stand.

The case of *Miller* v. *Kaufman* (1911), 2 O.W.N. 925, was cited to us as an authority for the proposition that we should order a new trial as the proper remedy. We should, in my opinion, discourage new trials as much as possible, and I do not think we should assume in this case that the jury was stupid—that was the trouble in *Miller* v. *Kaufman, supra.*

IRVING, J.A.

Mr. *Russell* refers us to *McArthur* v. *Dominion Cartridge Company* (1905), A.C. 72. There it was shewn that, owing to a fault in the construction of the automatic machine, the cartridges had on many occasions turned upside down, so that a blow intended to fall on the nose of the cartridge sometimes fell on the metal end of the cartridge, in which the primer, or percussion cap, was contained. As it was not an unreasonable inference to draw that the explosion was caused in that way, the verdict of the jury should stand. It was also shewn that the explosion would or might have been comparatively harmless if the outside box which "back fired" had been left as it had been

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originally constructed. The verdict was supportable on that ground also.

This case is quite different. Here we know the cause. It was the pick striking the dynamite; but how or when did the dynamite get there? The defendants can only be responsible if they were negligent in respect of its being there, and on the plaintiff's own case, the negligent system was not proved, nor was anything proved inconsistent with the theory that the dynamite might have got there owing to the carelessness of a fellow workman. In fact, it was too equivocal to constitute a case to go to the jury.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. This seems to me to have been essentially a case for relief under the Workmen's Compensation Act, 1902.

Appeal dismissed.

Solicitors for appellant: *Russell, Russell & Hannington.*
Solicitors for respondent: *McPhillips & Wood.*

REX v. ESTELLE DURLIN *ALIAS* STELLA CARROLL.

MURPHY, J.

1912

July 16.

REX v. DURLIN

Criminal law—Warrant of commitment—Appeal—Whether warrant vacated by appeal—Habeas corpus—Conviction for keeping bawdy house—Release of accused pending appeal—Further arrest under original warrant—Criminal Code, Sec. 751.

A warrant of commitment to prison after conviction on a criminal charge is not vacated by the lodging of an appeal and granting of bail.

APPLICATION for a writ of *habeas corpus* for the discharge of the accused from custody after conviction by the police magistrate on a charge of keeping a common bawdy house, which conviction was confirmed on appeal. Heard by MURPHY, J. at Victoria on the 11th of July, 1912. Statement.

M. B. Jackson, for accused.
C. L. Harrison, for the Crown, *contra.*

16th July, 1912.

MURPHY, J.: This matter comes before me on a writ of *habeas corpus.* Prisoner was convicted of keeping a bawdy house and sentenced to six months' imprisonment. A warrant was issued under which she was taken into custody and detained for a few hours when, upon giving notice of appeal, she was admitted to bail. On the appeal being heard, the conviction was affirmed, and it was adjudged that the appellant be punished according and pursuant to the said conviction. No new warrant was issued, but prisoner is now held under the original warrant drawn up upon conviction before the magistrate. It is contended that because prisoner was admitted to bail this warrant is vacated and that, no new warrant having been issued, her detention is illegal and *Regina* v. *Arscott* (1885), 9 Ont. 541, is cited as authority. I do not consider the contention valid. A careful reading of *Regina* v. *Arscott* shews that the real ground of the decision was that the warrants did not shew a crime (see p. 546). This case went under guise of an action to recover penalties under the *Habeas Corpus* Act to the Divisional Court Judgment.

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(*Arscott* v. *Lilley* (1886), 11 Ont. 153) and finally to the Ontario Appeal Court (*Arscott* v. *Lilley* (1887), 14 A.R. 283). Cameron, C.J. at the trial of this civil action, dealt with the very point raised here, stating "The original warrant of commitment is not vacated by the appeal unless the conviction on such appeal is quashed," and goes on to state that, under the process of the sessions, the person convicted can be placed in custody to undergo the punishment awarded against him by the original conviction and warrant. By "process of the sessions" I take it can only be meant the order directing punishment pursuant to the conviction such as was made by the learned County Court judge herein, in view of the express statement that the original warrant is not vacated by the appeal. And it is to be remembered that the case being dealt with by him is on all fours with the present one, the prisoner there having likewise been admitted to bail. The leading judgment of the Divisional Court seems to confirm this view, and incidentally to dissent *in toto* from the decision reported in (1885), 9 Ont. *ubi supra*. There seems no reason in principle, or in the wording of section 751 of the Code, for holding that the original warrant is vacated by the lodging of an appeal and the granting of bail. The application is dismissed.

Judgment

Application dismissed.

SOUTHWELL v. WILLIAMS AND SCHANK.

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June 28.

SOUTHWELL v. WILLIAMS AND SCHANK

Principal and agent—Agreement—Forfeiture—Assignment of agreement—Assignee continuing payments to assignor's agent—Default of agent.

Defendant Williams entered into an agreement to purchase the land in question from plaintiff. He assigned the agreement to defendant Schank, who continued the payments to one Moss, agent of Williams, according to the allegation of Schank. Williams denied the agency of Moss, who failed to account for the moneys received. GRANT, Co. J. gave judgment against Williams for $750 and costs, dismissed the action for foreclosure, and also dismissed the action against Schank, with costs.

Held, on appeal, that the judgment should be vacated; that the contract between plaintiff and defendant Williams should be rescinded unless all payments in arrear be made within a time certain. In the alternative, in the event of defendant Schank making such payments, he, Schank, should have judgment against defendant Williams, with costs and interest.

APPEAL from the judgment of GRANT, Co. J. in an action tried at Vancouver on the 4th of March, 1912, for forfeiture under an agreement for the sale of land. **Statement**

The appeal was argued at Vancouver on the 11th of April, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

O'Dell, for appellant (plaintiff).
Henderson, K.C., for respondent Williams.
Jamieson, for respondent Schank.

Cur. adv. vult.

On the 28th of June, 1912, the judgment of the Court was delivered by

GALLIHER, J.A.: There should be a decree rescinding the contract and vacating registration of the agreement between the plaintiff and the defendant Williams, and any other registered instruments depending thereon unless all arrears of purchase money and interest payable under the agreement between the plaintiff and defendant Williams, due up to and including the **Judgment**

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date following, be paid to the registrar of this Court at Vancouver, for and on account of the plaintiff, on or before the 30th of September, 1912, before the hour of 12 o'clock noon, by the defendants or one of them. And in case the parties cannot agree, the amount shall be settled by the registrar. The plaintiff to have judgment for his costs of the action and appeal and reference (if any), against both defendants whether said money be paid or not. The judgment pronounced below shall be vacated.

In case the defendant Williams fails to pay the above moneys on the date above mentioned, together with the costs above mentioned, and in the event of the defendant Schank paying the said moneys and costs, there shall be judgment in favour of Schank against Williams for all such sums for principal, interest and costs as he, Schank, shall be obliged to pay by reason of Williams's default under the agreement.

Should the contract be rescinded and the registration of the agreement and other instruments dependent thereon be vacated by reason of default in payment as hereinbefore provided, the

Judgment

defendant Schank shall have judgment against the defendant Williams for all sums paid by him to the defendant Williams, or his agent, Moss, for principal and interest, together with interest thereon at 7 per cent. per annum from the dates of such payments. The defendant Schank is to have judgment against the defendant Williams in any event for his (defendant Schank's) costs of defence of the action, and of appeal, and reference as aforesaid. In the event of rescission, the plaintiff to retain the moneys already paid as liquidated damages.

Leave to apply for further directions to the County Court.

Judgment accordingly.

LATHAM v. HEAPS TIMBER COMPANY, LIMITED.

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April 2.

LATHAM v. HEAPS TIMBER CO.

Master and servant—Negligence—Contributory negligence—Damages—Findings of jury—Questions to jury—Remarks as to necessity for.

Plaintiff sustained injuries while in defendant Company's employment as an engineer, owing, as alleged by him, to his having obeyed a peremptory but negligent order of the foreman. The jury awarded him $3,000 damages.

Held, on appeal (*per* IRVING, J.A.), that the plaintiff not having made out a case sufficient to go to the jury, he should have been nonsuited.

Per GALLIHER, J.A.: That there was evidence of contributory negligence on the part of the plaintiff, and the jury ought to have found contributory negligence.

Per MACDONALD, C.J.A. (dissenting): That as there was evidence of negligence on the part of defendant Company, and an absence of contributory negligence on the part of the plaintiff, as found by the jury, the verdict should stand.

In the result the verdict was set aside and the action dismissed.

Remarks as to the necessity for submitting questions to the jury in damage actions.

APPEAL from the judgment of CLEMENT, J. and the verdict of a jury in a negligence action giving plaintiff $3,000 damages for injuries received while in the employment of the defendant Company. Tried at Vancouver on the 29th of June, 1911. Plaintiff was operating a donkey engine, and while it was being moved it became fast, whereupon the foreman gave a peremptory order to slack off steam and go ahead again, which had the effect of throwing plaintiff off the engine and injuring him. This order was complained of as being negligent and, being peremptory, had to be obeyed. It was also alleged that the footing accommodation on the engine was insufficient and dangerous. Defendant Company appealed, and the appeal was argued at Vancouver, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A., on the 20th and 21st of November, 1911.

Statement

Craig, for appellants: We say that there was no negligence upon which the jury could reasonably find defendants guilty, and also, on the evidence, plaintiff was guilty of contributory negligence. Also questions should have been submitted to the

Argument

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jury. There was a very strong reason for asking questions in this case.

[MACDONALD, C.J.A.: Is that one of the reasons of your appeal? Can we send the case back for a new trial on that ground; and if we do so, and the learned judge refuses to put them, what then?

GALLIHER, J.A.: We cannot dictate to the judge on that.]

I presume the judge would accept your Lordships' suggestion or direction.

[MACDONALD, C.J.A.: But we have no power to order the asking of questions. It is true it has been suggested that such a practice ought to be followed, but so also has a higher tribunal so suggested, but still counsel and judges do not and need not follow it.

IRVING, J.A.: Your proper place is in the Legislature to get that remedied.]

Argument

I should think if counsel insisted it could be accomplished at the trial, but usually when counsel ask for questions to be put the judge is careful to advise the jury that they may ignore them and return a general verdict.

[IRVING, J.A.: That is because counsel for the plaintiff is careful to ask the judge to instruct the jury that the jury need not answer the questions, and the judge being an honest man, so instructs the jury. I do not know whether you have ever done so, but I have known of such cases.

GALLIHER, J.A.: I think I remember a case in which Mr. *Craig* has asked for that right.]

McCrossan, and *St. John*, for respondent.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This appeal turns wholly upon questions of fact, and after a careful perusal of the evidence, I have come to the conclusion that there was sufficient to justify the jury in finding negligence for which the employer was responsible, and the absence of contributory negligence on the part of the plaintiff. The issue of contributory negligence I have found the most difficult. The accident happened while a donkey

engine was being moved from one position to another. The *modus operandi* of moving the engine was by the use of lines ordinarily used for hauling logs. One of these lines was attached to a tree or some other stationary object. The engine with its own steam then would pull on this line, and in this way was dragged along in the direction desired. There were two winding drums, one for hauling, the other for taking in the slack, and projecting from the end of each drum was a crank or lever. In the operation it was necessary for the engineer to place one foot upon what was called the friction lever, so as to put friction on the drum; he had also to have his hand on the throttle of the engine. On this occasion the plaintiff, who was the engineer, stood with one foot upon the projecting lever or crank of the drum which was not being used, and the other on the lever or crank of the drum which was used for friction. Standing thus, he was able to put on friction when required, and to have his hand on the throttle. While so standing, the engine stuck fast, and after two or three ineffectual attempts by putting on additional steam to get it to move, the defendant's foreman, who was there assisting in the operation, angrily shouted to the plaintiff, and with an oath said: "Slacken her up and give her her head." This meant that the plaintiff was to slacken the hauling line and open up the throttle so that the engine would be jerked forward. In carrying out this order the plaintiff was thrown from his position and injured.

MACDONALD, C.J.A.

The defendants' contention is that the plaintiff ought not to have been standing upon the two levers as he was, but should have stood with one foot upon the runner which supported the engine and the other upon the friction lever. There was neither rule nor instructions with regard to how he should stand. The plaintiff and a number of his witnesses say that the runner was too narrow to enable him to safely stand on it; that standing on the runner the revolving crank wheel and the crank pin of the engine would be in front of his body. The evidence is that the runner projected only 6½ inches beyond this revolving crank pin. It is also stated that the upper surface of the runner, which was a log hewn on two sides, was somewhat rounded and slippery, and there is the evidence of Townley, who acted as

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engineer in the moving of the same engine previously on one occasion, and who stood on this runner in performing a like operation, that he was thrown off and had his knee injured by the crank pin. The fact seems to be that there was no really safe place for the engineer to stand, and there appears to have been no general rule followed by engineers with respect to where they should stand.

Sharpley, a witness for defendants, said:

"Some stand facing the side of the donkey, and some stand sidewise; some stand on the haul back lever and sometimes . . . . they all go different anyway."

Roberts, another of defendants' witnesses, was asked: "How does the engineer stand?" And answered: "He stands any way at all, I guess."

And Dineen, defendants' witness, was asked the question: "He ought to know his own engine?" And answered: "Yes, they all stand differently."

Clark, the defendants' foreman, says:

MACDONALD, C.J.A.

"He should stand with his right foot on the main lever and his other foot on the sleigh, or either use his hand to hold the friction. It is up to him to do what he likes."

And Townley, one of the plaintiff's witnesses above referred to, says that some engineers ride on their friction levers.

There is, of course, the expression of many opinions by witnesses as to the proper way to stand, but having regard to the evidence to which I have adverted, it would seem to be a matter of choice between two or more dangerous and awkward positions; but even if it were thought that the plaintiff made a mistake of judgment, the jury might properly absolve him of the charge of contributory negligence.

I would dismiss the appeal.

IRVING, J.A.: The learned trial judge told the jury that there was no evidence of negligence at common law. On that I agree. He did, however, leave to them the question: Was there negli-

IRVING, J.A.

gence under the Employers' Liability Act?

The particular question was: Was the order which Clark gave just before the accident took place, a negligent order under the circumstances?

The jury were also asked to pass on the question of contributory negligence. The verdict was: We find for the full amount for the plaintiff.

The onus of proving affirmatively that the plaintiff was guilty of contributory negligence rests in the first instance upon the defendant. In the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle him to a verdict on that point.

But the other point raised is more difficult, and in considering that question it will be necessary to discuss the plaintiff's conduct, not for the purpose of establishing contributory negligence on his part—that question I have already disposed of—but for the purpose of discovering the true cause of the accident, and determining whether the plaintiff has made out such a case as should go to the jury.

The third subsection of section 3 of the Employers' Liability Act provides that a workman injured by reason of the negligence of any person in the service of the employer to whose orders the workman was bound to conform, and did conform, where such injury resulted from his having so conformed, shall have the same remedies against his employer as if he had not been in the employ of the defendants. To establish a case, the plaintiff must prove, *inter alia,* these two things—the injury must have resulted from his having conformed to the order, and from the negligence of the foreman, who gave the order. *Wild* v. *Waygood* (1892), 1 Q.B. 783, discussed the subsection, and so far as I know that case has never been questioned. The injury must be the result of the two things above mentioned; then if they are so connected together as to cause the injury, the case comes within the subsection.

IRVING, J.A.

The order was to loosen or slack off the main cable upon which the engine was being drawn up a hill, and then to give the engine a good head of steam. There is no trouble in seeing that when the engine, after the steam has been turned on, begins to wind up the cable over the drum, there will come a violent jerk when the slack is used up. The intention was to make use of this jerk in carrying the engine over the obstruction or hill, whatever it was that had caused the stoppage. The foreman

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had, we were told frequently during the argument, addressed his orders to the plaintiff in an angry tone of voice. That does not affect the case, in my opinion, one way or the other, although no doubt it might influence the jury, but where is there any negligence about the order and the evolution? The plaintiff says he does not think he ever did it before, *i.e.*, slacking off the main line and starting the engine up again, when pulling the donkey, but he has when drawing in a train of logs. The case the plaintiff makes is that the order was wrong because pulling the donkey through the woods he had not the same safe platform to stand on when he overcame an obstruction by jerking the engine as he had when the engine was stationary. In moving through the woods, the engine is stripped down to the runners, and on the runner at the right hand side, a man could stand. The plaintiff admits this, but says it would be a very small place, and to work his levers he would have to stand in an awkward position. The plaintiff placed his feet on two iron handles, the handles of the levers which work the drums, one of these levers was loose, and swinging backward and forward. There was no evidence that the foreman knew that the plaintiff had elected to ride with his feet on these handles, instead of on the runner; nor that the plaintiff had ever complained of the insufficiency of the foothold afforded by the runners.

IRVING, J.A.

There seems to me an obvious difference between an order to slack off the cable and give her a head of steam simply, and the same order with a further direction to carry out the manœuvre by standing in a particular place. How can a jury say that there was negligence on the part of the foreman under these circumstances? or that the accident came about through the plaintiff conforming to the order given? This accident took place because the plaintiff placed his feet on the swinging handles—the foothold there was insufficient, and he had no order to put his feet there. I think this is a case where the judge would have been justified in refusing to let the case go to the jury.

GALLIHER, J.A.

GALLIHER, J.A.: After the best consideration I can give to this case, I have come to the conclusion that the appeal should

be allowed. Considering the nature of the operations, and the surrounding circumstances, I think there was a reasonably safe place on the runner where the plaintiff should have stood instead of, as he did, on what might be termed a swinging crank, certainly a much more dangerous position going over rough ground—in fact, he admits negligence:

"So, if a man stood on those handles when he could properly and conveniently have stood on the runner, that man was negligent? Yes."

I do not pick out this one question and answer to base my judgment upon, but have carefully considered the evidence of all the witnesses, and am of opinion that a jury could not reasonably have failed to find contributory negligence.

GALLIHER, J.A.

As to whether the foreman's order was a negligent one, I do not think it was, even allowing for the condition of the engine. It seems a very usual way of starting the engine under such circumstances, and the defects in the engine were not in my opinion such as would warrant the order being so classed.

Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitors for appellant Company: *Martin, Craig, Bourne & McDonald.*

Solicitors for respondent: *McCrossan, Harper & St. John.*

MURPHY, J.

1912

July 23.

LEMBKE v. CHIN WING.

Practice—Order XIV.—Judgment under.

LEMBKE v. CHIN WING

In order to obtain judgment under Order XIV., the indorsement on the writ must shew beyond question that the claim is for liquidated damages.

Where, therefore, in a suit claiming $25 per day for default in a building contract, and no commencement was made on the building contracted for:

Held, that the claim for damages could not be said to be for liquidated damages, entitling plaintiff to sign judgment under Order XIV.

Statement

MOTION for judgment under Order XIV., heard by MURPHY, J. at Vancouver on the 17th of July, 1912.

Griffin, for plaintiff.
Killam, for defendant.

23rd July, 1912.

MURPHY, J.: The indorsement does not shew that the contract to put up the buildings was ever attempted to be carried out. From what was said in argument and from the affidavit of defendant I gather that the fact is that no beginning to build has ever been made. Whether this be so or not, I think in order to entitle a plaintiff to obtain judgment under Order XIV., his indorsement must shew beyond question that the claim is for liquidated damages. It may well be that the claim of $25 per day is a claim for liquidated damages, provided the agreement to build was actually entered upon and the building not completed in time, but the indorsement must clearly shew this.

MURPHY, J. Otherwise, this $25 per day claim never arises, and the action is for unliquidated damages for breach of contract to build, not for damages under the demurrage clause. This $25 per day assessment was clearly only intended to cover delay in completion, not damages for total failure to perform the contract. The wording of the clause shews this, and to hold otherwise would be to make the plaintiff the arbiter of the *quantum* of damages, which he could increase at will by delaying action. The only limit would be that set by the statute of limitations.

The application is dismissed.

Application dismissed.

JOHNSON v. MOORE.

HUNTER, C.J.B.C.

1911

June 18.

JOHNSON v. MOORE

Practice—Costs—Taxation Affidavit of disbursements—Cross-examination on—Taxing officer, jurisdiction of to order.

It is within the jurisdiction of the taxing master to order the cross-examination of a party on his affidavit of disbursements.

Statement

APPEAL by defendant from the order of a taxing master directing the cross-examination of plaintiff on his affidavit of disbursements, presented to the master on the taxation of costs between party and party. Heard by HUNTER, C.J.B.C. at Vancouver on the 18th of June, 1912.

Argument

Harper, for defendant: The taxing officer is given the power contended for by O. LXV., r. 27 (25). See also: *In re Evans* (1887), 35 W.R. 546.

Macdonell, for plaintiff: There being no provision in the rules for an affidavit of disbursements, the taxing officer can have no power to order cross-examination upon such an affidavit.

Judgment

HUNTER, C.J.B.C.: I think the taxing officer has jurisdiction. The appeal is allowed, with costs.

Appeal allowed.

MURPHY, J.

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Dec. 14.

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April 2.

BROWN v. HOPE

BROWN *ET AL.* v. HOPE *ET AL.*

Contract—Breach of—Damages, general, special—Reference to registrar for assessment—Discretion of judge in directing reference—Evidence—Opinion of witness as to probable event—Admissibility of.

By a contract dated the 21st of February, 1910, the plaintiffs agreed to ship to the defendants on or before the 28th of April, 1910, a dredge. The price was $8,080, of which $1,000 was paid in cash. The dredge was not shipped until the 6th of June. The plaintiff then brought an action for the price, and recovered judgment for $7,614. The defendants counterclaimed for damages and specifically claimed (*a*) $5,000, loss of profit on a dredging contract which they expected to obtain when they ordered the dredge; and (*b*) $2,500, loss on cost of scows; this sum being the amount thrown away, or needlessly incurred, in consequence of the plaintiffs' delay in making delivery of the dredge. The learned trial judge thought the case was governed, so far as the delay in delivery of the dredge was concerned, by *Elbinger Actien-Gesellschafft* v. *Armstrong* (1874), L.R. 9 Q.B. 473, and that the defendants were entitled to damages; but he refused to allow any damages in respect of the contract for the bonus paid for hurried construction of the scows, or for loss of profit of an expectation of obtaining a particular contract. The damages which he thought proper to allow were ordered to be assessed by the registrar, not the damages specifically claimed, but general damages which he based on the net earning power of the dredge per day for 39 working days. From this judgment the defendants appealed.

Held, on appeal (affirming the judgment of MURPHY, J.), that the course followed by the trial judge in arriving at the basis of damages was a proper one, and the principle having been determined, it was within his right and discretion to direct the reference for assessment.

Held, further, that the opinion of a witness as to what was likely to happen, or would have happened, but for the delay complained of in completing the contract, was not admissible.

Statement

APPEAL by defendants from the judgment of MURPHY, J. in an action tried by him at Vancouver on the 8th of December, 1911, for the price of a dredge, and a counterclaim for damages for delay in delivery of same.

McCrossan, for plaintiffs.
Burns, for defendants.

14th December, 1911.

MURPHY, J.

MURPHY, J.: Judgment on counterclaim: At the trial there was some mention that the alleged contract (for the loss of which

damages were claimed) was to be made with the Western Construction Company, which was incorporated by defendants subsequent to the date of the contract sued upon. No evidence was given before me whether the dredge in question was ever transferred to this Company, but the case was fought out on the basis that it was built and owned by defendants at least throughout the year 1910, and, for the purpose of my judgment, I must, on the record, take such building and ownership by defendants to be facts. I hold, on the evidence, that there was a breach of the contract by the plaintiffs, and that such breach is not excused by the clause relieving plaintiffs of responsibility for delay in case of strikes, etc. That being so, I think this case is governed by *Elbinger-Actien Gesellschafft* v. *Armstrong* (1874), 43 L.J., Q.B. 211. The Court, at p. 213, said:

"It is obvious that both parties contemplated that the wheels and axles were to be put into immediate use. Under such circumstances the natural and almost inevitable consequences of a delay in delivering a set of wheels would be that the plaintiffs, if they meant the waggon for their own use, or that their customers, if the waggon was bespoke, would be deprived of the use of a waggon for a period equal to that for which the set of wheels was delayed. At all events the plaintiffs were entitled to recover at a rate per day equal to whatever the jury should find to be reasonable compensation for the loss of the use of the waggons: see *Cory* v. *Thames Iron Works Co.* (1868), 37 L.J., Q.B. 68."

Here I think it was clearly in the contemplation of both parties that this dredge was intended for immediate use as soon as high water came on in the river. The defendants therefore can not recover for the bonus paid for hurried construction of the scow as their object in paying it was to have the dredge ready for use at the earliest possible date. They cannot recover for loss of the contemplated dyking contract, for no such contract ever existed. Even if they had had their dredge ready on time it might well be that they would never obtain any such contract. The defendants seek to make plaintiffs insurers first that they would receive such contract, and second that they would make a profit out of it merely because the plaintiffs were told that the defendants expected to get such contract, and the payments for the dredge, as to dates, were arranged so as to be met out of the proceeds of such possible contract if obtained. I can find no authority for such a proposition. In fact the law I think is

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entirely against such a contention, but, under the above case, they are entitled not to nominal damages but damages at a rate per day equal to whatever the jury should find to be reasonable compensation for the loss of the dredge for the number of days they were deprived of its use by the breach of the plaintiffs, because I think, on the facts, plaintiffs should be held to have undertaken that the dredge would be delivered in time to allow of its being set up ready for use by the time of high water. The evidence is that no time was lost by defendants in setting up the dredge, so that the number of days thus lost is 40, being the number from the 28th of April, when the contract called for shipment, and the 6th of June, the date of actual shipment. The loss per day would, I think, be the net earning power per day of the dredge for the 40 days previous to the date she actually was ready for work in the year 1910, based on the average price then being paid for such dredging as this machine could be used for, provided such 40 days would not extend back beyond the period of commencement of high water. As I remember the evidence they would not, but on the reference the fact can be placed beyond doubt and damages allowed only for such number of days as follow the period of commencement of high water.

MURPHY, J.

As no evidence was given before me on which I can make a finding of damages on this basis, the matter is referred to the registrar for determination on the principle above stated and there will be judgment for the amount so found. Plaintiffs are to have the general costs of the action and, subject to this, defendants are to have the costs of the counterclaim.

The appeal was argued at Victoria on the 18th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

McCrossan, for appellant.
Bodwell, K.C., for respondent.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal and cross-appeal.

IRVING, J.A.: [After setting out the facts]. It was said that the only damages asked for were the two items above set out, and no claim had been made for general damages.

It was also objected that as there was no evidence given at the trial which would enable the judge to assess the damages on the basis settled by him as the proper basis of assessment, he should have dismissed the action instead of directing an assessment. In my opinion neither of those objections should be allowed to prevail.

By section 16 of the Arbitration Act (section 56 of the Supreme Court Act) power is given to the Court or judge to refer to the registrar for inquiry and report, and by section 15 the Court or a judge may refer "for trial," whether the judge will deal with the case himself or refer it under these sections is a matter for him to decide. In *Wallace* v. *Sayers* (1890), 6 T.L.R. 356, the Lord Justices complained of the practice of dealing with a common law action as if it were a chancery suit. The report is interesting to read. It would seem that the practice of referring matters to the registrar may be overdone. Although it is usual for the trial judge himself to dispose of damages, I cannot say that there was not jurisdiction to refer this matter. It is perfectly clear that he could grant an adjournment for the purpose of allowing the evidence to be got together.

As to the argument that because of the non-pleading of general damages, and of the omission on the part of the plaintiff to give evidence at the trial as to what damages had been sustained by the delay in delivering the dredge, the judge should have dismissed the action instead of in his judgment ordering a reference, I am of opinion that the discretion of the judge should not be interfered with. I do not think anyone could say he was wrong if he had before reserving his judgment ordered the amendment to be made, and expressed his intention of referring the assessment to the registrar, in the event of his coming to the conclusion that the defendants were entitled to any damages. It was his duty to get to the heart of the dispute. In my opinion, the general damages, though not pleaded, were included in the special damages, and sufficient evidence had been adduced

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to shew that the delay in delivery had occasioned loss to the defendants. The division of damages into special and general has been said by Lord Macnaghten to be more appropriate to cases of tort than to cases of contract. Very often, as in this case, the same evidence that was submitted to prove the specified damage for loss of the expected contract, was sufficient to shew that there was a substantial loss occasioned by the delay, and that the defendants were, at the very outset, aware that such would be the result of delay; and it would be contrary to justice to dismiss the action because the defendants were not prepared to establish what was the exact pecuniary loss. In *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company* (1892), 1 Ch. 120, where the action was rather one for specific performance than an action for damages for breach of contract, and where the pleadings did not ask for damages, Kay, L.J., at p. 152, said:

> "I need not consider these difficulties. If the case were one in which justice required that such damages should be given, the Court would not be prevented, under our present system, by any technical difficulty from doing justice."

The measure of damages proposed by the learned trial judge is practically the same as that adopted by Lord Cairns in *In re Trent and Humber Co. Ex parte Cambrian Steam Packet Co.* (1868), 4 Chy. App. 112 at p. 117.

IRVING, J.A.

As to proving damages for delay, see Lord Halsbury's speech in *Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo y Castaneda* (1905), A.C. 6 at p. 11. The law of damages contemplates that the person complaining should be placed in the same position as he would have been in if the contract had been performed, and the plaintiffs having been informed of or knowing the circumstances from which they could infer the use the dredge would be put to, ought to compensate the defendants for the delay in delivery.

As to the $2,500 for loss on scows, the claim is this, that the dredge was expected to be ready for shipment on the 28th of April. In order to have a scow ready by the date on which the dredge would arrive, had it been shipped on that date, the defendants had to pay a bonus of $2,000. As the dredge did

not arrive when expected, they, the defendants, feel that the bonus was thrown away and that they are entitled to recover it from the plaintiffs. Such a loss does not seem to me to have been in the contemplation of the parties.

As to the $5,000. There is a difference, as pointed out by Mr. *Bodwell,* between determining whether the plaintiff is entitled to any damages, *i.e.,* substantial or nominal, or none at all, and the assessment of the damages. The judge deals with the first. The jury have to deal with the latter. In exercising this duty they have a very wide field, and to assist them the judge gives directions, but in giving those directions the judge does not lay down hard and fast lines, and then send the jury away to work out the result according to his directions. He puts before them the case in a more general way, and then they make an award such as they think proper to give under all the circumstances. But where the judge has to determine the damages without a jury, he lays down for himself with exactness the rule that he thinks ought to be followed. Can the plaintiffs complain that he, by awarding a sum for general damages, took into consideration the established fact that there was plenty of employment to be had? I do not think they can. Can the defendants complain that the judge refused to regard the contract with the commissioners as a settled thing? I do not think they can. The judge, in my opinion, arrived at a fair measure of compensation.

IRVING, J.A.

In my opinion the trial judge was right in stopping the defendants' witness Mathers from giving evidence as to what the commissioners would do.

The general rule is that in a civil action any fact which tends to affect the amount of damages is relevant and admissible, but this question seeks to obtain the opinion of the witness, and that is not permissible.

I would dismiss the appeal and cross-appeal, and refuse the application for a new trial. I would refuse this on the ground that it is unnecessary; the course adopted by the trial judge is sufficient to meet the justice of the case. The amount

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of damages ought to have been settled by the parties themselves: see judgment of Lord Halsbury, L.C., in *The "Greta Holme"* (1897), A.C. 596 at p. 602.

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GALLIHER, J.A.: I would dismiss the appeal.

Appeal dismissed.

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Solicitors for appellants: *McCrossan & Harper.*
Solicitors for respondents: *Burns & Walkem.*

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ALBO v. GREAT NORTHERN RAILWAY COMPANY AND CROW'S NEST SOUTHERN RAILWAY COMPANY.

ALBO v. GREAT NORTHERN RAILWAY CO.

Railways—Common carriers—Damage of goods in transit—Delay—Liability, inference of—Evidence.

A shipment of fruit from Italy to Fernie, in British Columbia, was delivered to the Great Northern Railway Company at St. Paul, Minnesota, on the 24th of December, 1909, to be forwarded to destination, which was not reached until the 19th of January, 1910, when the fruit was found to be frozen.

Held, in the absence of evidence by the Great Northern Railway Company as to what care they took of the shipment while in their possession, that the damage occurred while the fruit was in their care, and that they were liable.

Judgment of WILSON, Co. J. reversed.

APPEAL by plaintiff from the judgment of WILSON, Co. J. in an action tried by him at Fernie on the 26th of April, 1911, In giving judgment, the learned trial judge said:

Statement

The plaintiff claims damages. Certain figs were shipped to him from Italy and in transit were frozen. I think that the plaintiff was justified in refusing the consignment, and if he were entitled to damages, he would be entitled to the amount claimed. However, it seems to me that the agency of Sutherland in this case has not been established. He, in this case, shipped

goods under the bills of the Oceanic Transit Company. Certain evidence was adduced to shew that he was an agent for the Great Northern Railway, but it seems to me that in this case he did not even purport to act as such agent. There is no evidence before me to shew that the Oceanic Transit Company is an agent for the Great Northern Railway. So far as I am concerned, they are an independent company, and for that reason, I think the plaintiff must unfortunately fail. The action will have to be dismissed, with costs.

Plaintiff appealed.

The appeal was argued at Vancouver on the 6th of December, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for appellant: The Great Northern Railway Company are bound by the bill of lading so far as they are concerned, and they, by payment into Court of a certain sum, admit liability to that extent. Four to five weeks' time between St. Paul and Fernie is an unreasonably long period.

A. H. MacNeill, K.C., for respondent, the Great Northern Railway Company: See *The Ida* (1875), 32 L.T.N.S. 541. We are not the persons who made the contract; it was the Oceanic Transit Company (Sutherland). Argument

Davis, in reply: All that we need to shew is that we received the goods from the Great Northern Railway Company, and the onus is on them to prove that they received the goods in proper condition and took care of them while in their possession.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.: I do not find it necessary to decide the legal question which was raised in argument, nor to say whether or not Sutherland, who was the proprietor of the Oceanic Transit Company, the initial carrier, was the agent of defendants. I prefer to rest my judgment entirely upon the fact which is to my mind clearly established, that on arrival of the figs at Fernie they were then in a frozen condition. It was not a case of their having been frosted, but the frost was actually in them at that time. They were received by the defendants, the Great Northern Railway Company, at St. Paul, on the 24th of December, 1909, and were kept in transit to Fernie from that date until MACDONALD, C.J.A.

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the 19th of January, 1910. The defendants gave no explanation of what seems to me an unnecessarily long delay. In January the weather was very cold at Fernie. These figs were in the possession of the defendants for almost a month. The defendants offer no evidence at all as to the care taken to protect them against frost. In these circumstances I have no difficulty in drawing the inference of fact that the figs were frozen while in the possession of the defendants. I say the defendants, because no distinction was made in argument between these two companies, which are operated, as I understand it, as one concern.

I would allow the appeal, and as it was conceded that if the defendants were liable at all, they were liable for the full amount claimed, judgment should be entered below for that amount, with costs there and here.

MACDONALD, C.J.A.

IRVING, J.A.: The bill of lading had across its face, "Goods to be protected against frost." One of the conditions provided that any damage to goods for which the carrier is liable must be claimed against the Company in whose actual custody the same may be at the time of the accident. The acceptance of these goods by the defendants at St. Paul was in effect a contract by the defendants to carry the goods on the terms stated in the original bill of lading.

It seems to me that the plaintiff established a *prima facie* case against the defendants when he proved that the goods were frozen when delivered at Fernie on the 19th of January, and that the defendants had the custody of them from the 21st of December to the 19th of January. It became the duty of the defendants to shew that the goods were damaged when they took them over. The letter of the 28th of January, 1911, in my opinion, ought to be regarded as written without prejudice: see *Pirie* v. *Wyld* (1886), 11 Ont. 422.

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Hennell v. *Davis* (1893), 1 Q.B. 367, is against the plaintiff's contention that the defendants, by paying for the chestnuts, admitted their liability in respect of the figs.

I would allow the appeal.

GALLIHER, J.A.: I think this appeal should be allowed.

GALLIHER, J.A.

I am not sure that Mr. *Davis's* contention that the payment of the $160 for the chestnuts, under the circumstances of this

case, is an admission of the cause of action as to the balance of the claim, is not well founded, but, as I think the appeal should be allowed on another ground, I refrain from deciding that point.

The goods in question, which were shipped from Naples, Italy, were receipted for in good condition. As the only damage to the goods complained of is by frost, the evidence as to the climate of Italy precludes the possibility of their being damaged in that way at the time of shipment.

The defendant Company, the terminal carriers, received these goods at St. Paul, Minnesota, and receipted for same in apparent good order, with this limitation, if I may so term it: "Contents and condition of contents of packages unknown." Under such circumstances, the weight of authority in the United States Courts seems to be that when it is shewn that the goods are received by the first carrier as in good order, it will be presumed in the absence of proof to the contrary, that they were in like good order when received by the (here defendant) Company, and unless this be repelled by evidence (the onus of which is on the Company), they will be held liable. This seems to me, if I may say so, sound common sense.

Moreover, there is this further feature to be considered in the case at bar. These goods were on the road between St. Paul and Fernie between the 21st of December, 1909, and the 19th of January, 1910, an unreasonable period, at a time when, during the month of January, evidence is that the weather was very cold. The presumption is very strong that if these goods were damaged by frost it was during that interval. I am quite satisfied (as the learned trial judge appears to have been), that the figs were frozen, and the plaintiff was justified in refusing them.

At the trial the only evidence put in by the defendants was as to whether the figs were frozen or not. *The Ida* (1875), 32 L.T.N.S. 541, is distinguishable. There it was held that there was no proof of the condition of the cargo when received at the point of shipment, and the defendants successfully met, in their evidence, every contention of the plaintiffs as to damage to the cargo while in transit.

Appeal allowed.

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THE BRITISH COLUMBIA ORCHARD LANDS, LIMITED v. KILMER.

Vendor and purchaser—Sale of land—Specific performance—Default in payment of instalment of purchase money—Forfeiture—Time of the essence.

Defendant purchased from plaintiff Company certain lands for the sum of $75,000, of which $2,000 was paid on execution of the agreement, and of the further instalments, the first was to be $5,000, and interest, on the 14th of June, 1910. Time was of the essence of the agreement, and it was provided that on default in payments, forfeiture should ensue. In addition to the land, defendant also purchased certain personal property on the premises, and, before the first instalment of $5,000 was due, expended some $3,000 in improvements. Defendant, when the instalment fell due, requested grace, and was granted until the 7th of July. He did not then pay, but asked that forfeiture proceedings be suspended until he had had time to have an interview with the Company. On the 9th of July the plaintiff Company declared the contract terminated, and three days later sold at an advance of $25,000.

Reversed by Priv. Council

Held, on appeal (GALLIHER, J.A. dissenting), reversing the finding of GREGORY, J. at the trial, that the transaction being one of a speculative character, plaintiff having defaulted, and been granted an extension of time after default, he was not entitled to either relief against forfeiture, or to specific performance.

Statement

APPEAL from the judgment of GREGORY, J. in an action tried by him at Kamloops, dismissing plaintiff Company's prayer for a declaration that a contract between the parties for the sale and purchase of certain land was null and void, and granting specific performance to defendant on his counterclaim. The facts appear shortly in the headnote and at length in the reasons for judgment of GREGORY, J.

Davis, K.C. and *Fulton, K.C.,* for plaintiff Company.
S. S. Taylor, K.C. and *Macintyre,* for defendant.

19th July, 1911.

GREGORY, J.

GREGORY, J.: This is an action brought by the plaintiff Company to set aside its agreement for the sale of lands to the defendant and for cancellation of defendant's application to register the same.

There is little or no dispute as to the facts, which may be stated as follows: The agreement dated the 14th of December, 1909, provided for the sale to the defendant of the lands therein described for the price of $75,000, payable $2,000 in cash, $5,000 on or before the 14th of June, 1910, $5,000 on or before the 14th of December, 1910, $60,000 in six instalments of $10,000 each on the fourteenth days of June and December in 1911, 1912 and 1913; $3,000 on or before the 14th of June, 1914, "together with interest on so much of the said purchase moneys as may from time to time remain unpaid at the rate of seven per cent. per annum as well after as before maturity at the same rate, payable with each said instalment of purchase money as aforesaid."

The agreement also provided that the defendant was to pay all taxes, etc., apply for and obtain a water record for not less than 1000 inches of water for the lands sold, and do at his own expense all necessary surveys and works to bring said water upon the lands and cause the same to be available for and be distributed in a proper and efficient manner not later than the 14th of June, 1911, and also defray all expenses of managing the lands and cost of surveying and subdividing them. The agreement further provided that the defendant be permitted to occupy and enjoy the lands "until default be made in the payment of the said sums of money above mentioned or the interest thereon or any part thereof on the days and times and in the manner above mentioned," and also contained a clause providing that time should be of the essence.

By a subsequent agreement dated the 4th of February, 1910, the plaintiff Company sold to the defendant its live stock and farming implements and machinery used by it in connection with the land previously sold. There was a default of a few days in making the second payment under this agreement, and the plaintiff Company also attempted to cancel and forfeit the moneys paid by the defendant under it, but it was stated at the argument that that intention had been abandoned since the evidence in this action had been taken.

The defendant in accordance with the terms of his agreement

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made the cash payment, went into actual occupation of the property, made the application for a water record (in his own name) and began the necessary surveys and undertook the management of the property. The defendant and his associates were shareholders in the plaintiff Company and together held one-eleventh of the issued shares.

On the 11th of June, 1910, defendant instructed plaintiff Company by wire to draw on him "for instalment and interest five days send receipt with draft answer" to which they replied by wire on the 13th of June: "Will draw five days instalment and interest."

Plaintiff Company made a draft on defendant, dated the 11th of June, 1910, five days after sight for $7,555, being the amount due on the 14th of June, "with interest from the 14th of June to date of payment at 8 per cent." This draft was accepted by defendant on the 17th of June, but on the 27th of June, being unable to pay it, he wired plaintiff Company asking that the bank be instructed to hold it for ten days, to which plaintiff Company replied the same day, "Will instruct bank to hold until July seventh," and on the 30th of June wrote the defendant a letter, which is admittedly the only notice ever given by them to the defendant of any intention to hold him to the strict letter of his agreement and to cancel the same and forfeit his payments, unless the draft was paid on the 7th of July.

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Defendant was unable to pay the draft on the 7th of July and on Friday, the 8th, wrote stating, *inter alia,* that the "draft will be paid Tuesday sure."

On the receipt of this letter on the 9th of July, a hurry-up meeting of the directors of the plaintiff Company was called, the directors being summoned by telephone. The secretary says that he thinks all the directors were present, but refrains from swearing that they were. It does not appear just what took place at the directors' meeting, but apparently they considered the defendant's letter of the 8th of July and a telegram from Messrs. Ross & Shaw, a real estate firm in Vancouver with whom one of the directors, Mr. J. T. Robinson, a real estate agent, was

negotiating for the sale of the property, and who in case the sale was made would receive a commission from the plaintiff Company of $5,000, notwithstanding the Company's by-law (Table A.) and the general law governing the right of a director to participate in the profits of a contract with his company.

From the evidence, the inference is almost irresistible that Mr. Robinson actually interested himself in bringing about the meeting of the directors; he was present in Court and heard the suggestion of counsel that he did, but he was not put on the stand to offer any explanation. At the meeting he voted with the other directors to cancel defendant's contract and send him the following telegram which was done: "Directors consider deal off. Other parties negotiating."

Two days later the sale to Ross & Shaw was completed and in accordance with the previous undertaking of the directors, one of them, Mr. Robinson, became entitled to $5,000 from the Company, being a commission of five per cent. on the new sale price of $100,000.

How far any of the other directors were personally interested, if at all, we do not know, for, though all lived in Kamloops, where the action was tried, none of them was called, and so no opportunity was afforded of cross-examining them.

On the receipt by the defendant of the above telegram, he wrote asking that no further arrangement be made pending an interview with them.

The defendant was unable to induce the plaintiff Company to alter this decision, and on the 1st of August, 1910, they began this action. On the 12th of August, 1910, defendant tendered to the plaintiff Company the sum of $7,672, which they declined to accept. This amount appears to be slightly in excess of the amount then actually due, but no objection has been raised to the tender on this account. The tender was pleaded, but the amount was not paid into Court until the trial commenced, but the defendant applied for and obtained at the opening of the trial leave to pay the money in, the plaintiff Company not having previously made any objection to its non-payment in.

It is quite clear that the plaintiff Company made it known to

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the defendant that at no time on or after the 9th of July would they accept any money from the defendant on account of his agreement. At the time of the cancellation of the defendant's agreement the plaintiff Company still retained possession or control of the defendant's accepted draft for $7,555 and interest already referred to, and it was not until the 18th of July that their solicitor returned it by letter to the defendant.

In considering the rights of the plaintiff Company herein, it must be kept in mind that the action is not one by a delinquent purchaser for specific performance of an agreement, but one by a vendor seeking to exact his pound of flesh.

It is difficult, if not impossible, to reconcile all the decisions of the Courts in actions of this nature, and I do not propose to discuss those to which I have been referred at any great length, because it appears to me that in practically all of them the Court looked at the conduct of the parties and all the surrounding circumstances and endeavoured to arrive at the real intention of the parties and give effect to it instead of to the strict letter of the contract. Fry on Specific Performance, 5th Ed., section 1,077 says:

"In order to render time essential, it must be clearly and expressly stipulated, and must also have been really contemplated and intended by the parties that it shall be so."

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The Supreme Court Act, section 20, sub-section (7) gives the Court full "power to relieve against all penalties and forfeitures." This is a much greater power than Courts of equity ever exercised at common law, and is in its terms much wider than that granted by any other statute that I am able to find.

It does not seem to me that the insertion of the words "Time shall be of the essence," in a contract can oust the whole system of equity jurisprudence or put it at defiance.

Story's Equity Jurisprudence, 13th Ed. par. 1316, in speaking of this subject, says:

"There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties which are constantly interfered with by Courts of equity upon the broad ground of public policy or the pure principles of natural justice. . . . The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression or harsh and vindictive injury."

In all the cases except *Steele* v. *McCarthy* (1908), 7 W.L.R. 902, there were special circumstances which were particularly noted by most of the judges as a reason for the strict interpretation of the provision as to time.

In *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519, there was a very considerable delay and a failure on the part of the plaintiff to reply to defendant's letters, and the time for the payment of the balance of plaintiff's purchase money was with his knowledge arranged to correspond with the time for the payments required to be made by the defendants for their purchase of the same land, so that the plaintiff's moneys might be used for that purpose.

In *Peirson* v. *Canada Permanent* (1905), 11 B. C. 139, there was apparently no change of possession, the amount paid was only $100, which was treated as a deposit, and the vendor waited 18 days before cancelling his agreement.

In *Scott* v. *Milne* (1908), 13 B. C. 378, there was a delay of several weeks, the vendor made two demands for payment which were ignored, and the purchaser failed in his action for specific performance.

In *Barclay* v. *Messenger* (1874), 43 L. J., Ch. 449, there was deliberate and continued delay on the part of the plaintiff in the performance of stipulation in an assignment of a lease, the non-performance of which would deprive the defendant of his property, and the plaintiff was held not entitled to specific performance.

In *Butchart* v. *Maclean* (1911), 16 B. C. 243 there was no change of possession, there was a delay of months, the land had only a speculative value, the purchaser depended on a re-sale to enable him to make his payments, and there was evidence from which it could be inferred that he had abandoned his contract.

Mr. *Davis* did not contend in his argument in that case for the plaintiff that the contract must be enforced according to its strict letter, but admitted "that the only point is: Are the circumstances such as to induce the Court to relieve against the forfeiture?" He also admitted that, notwithstanding the language of the contract, it did not *ipso facto* became void on non-

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payment, but that it gave the vendor the option to cancel it; see *Barclay* v. *Messenger, supra; Marcus* v. *Smith* (1867), 17 U. C. C. P. 416.

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The contract called for the second payment to be made on the 14th of June, but as the plaintiffs extended the time until the 7th of July, it must be considered as though that date had originally been fixed by the contract: see *Barclay* v. *Messenger, supra.*

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The position of the plaintiffs, therefore, is that without giving the defendant any notice of its intention to exercise its option, they, on the 9th of July, cancel the defendant's agreement and forfeit the moneys paid under it two days after the second instalment became due, notwithstanding the fact that they knew the defendant was most anxious to carry out his agreement, and that he actually had arranged for the money and was only prevented from paying it by the accident of Col. Tracey's absence, and that it would be paid without fail within three days (Tuesday, the 12th) and that the defendant thought the extension carried three days' grace, and would not therefore be due until the 10th of July: see defendant's letter of the 8th of July.

Such conduct appears to be oppressive, harsh and vindictive; and it seems to me that the conduct of the plaintiffs was such as to lull the defendant to sleep and justify him in assuming that he would, notwithstanding the terms of the contract, have a little leeway in the matter of making his payments. The defendant and plaintiff directors were all shareholders in the plaintiff Company; the contract provided for the payment of interest at the rate of 7 per cent. after the dates at which the payments were to be made; at the time of the cancellation the plaintiff Company retained the defendant's accepted draft under which he agreed to pay 8 per cent. interest on the extended time for the second payment.

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The defendant bought the plaintiff Company's plant and machinery used on the land sold, took immediate possession and was actually engaged in making the survey and applying for the water record which his contract required him to do, and all this without a single hint from the plaintiff Company that it was

intended to enforce his contract to the letter. It was suggested on the argument that the defendant had not proceeded expeditiously with the survey, and had not expended any large sum of money on it, but the plaintiff Company never made any such suggestion to the defendant before this action was launched.

It seems to me that in such circumstances the defendant was justified in assuming that he would receive timely notice of any intention to cancel his contract, and forfeit his moneys paid on account of the agreement as well as the money expended on his survey and water records, but all he received was the letter of the 30th of June, already referred to, and, if it was intended to convey the information which common fairness would suggest, such intention has been carefully concealed; it simply "trusts that the draft will be met at maturity" and draws "attention to the taxes which are now due" and an intimation that the Company intended to complete its payments on the Dominion lands purchase "as soon as your purchase is made."

These references to the "taxes" and "Dominion lands" do not indicate to my mind the idea that there is any compelling necessity for haste, but simply that they should be attended to within a reasonable time. As a matter of law, the taxes were no more due than they were on the 2nd of January (see Assessment Act) and it is a matter of common knowledge that no steps are even taken by the Government to enforce payment until after the 31st of December.

I am not impressed with the suggestion made on the argument that to relieve against forfeiture in this case would be practically giving the defendant an option, and tying up a valuable property on a payment of only $2,000, which would not pay the interest on the purchase money for six weeks.

The defendant covenanted to buy, and the contract itself shews that no very substantial payments were to be made until the 14th of June, 1911. I cannot believe that the plaintiff Company's action was *bona fide*. Certainly, Mr. Robinson had a strong personal incentive to get rid of the defendant's contract.

If the plaintiff Company intended to exact their pound of flesh, they should have made their intention known to the defendant and returned his accepted draft before attempting to

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do so. For all the defendant knew, they intended to collect on the draft instead of the contract, because by so doing they would receive a higher rate of interest. The Company acted prematurely, and although the defendant did not actually tender the amount due until the 12th of August, there can be little doubt that the delay was caused by the position taken by the Company, and the necessity of getting legal advice as to his rights and position. It does not seem to me that, in the circumstances, the delay was unreasonable.

I do not consider the position of the plaintiff Company by reason of the new sale as helping them in any way, and if they have rendered themselves liable to the new purchasers as well as the defendant, they have only themselves to blame. They have not seen fit to make these new purchasers parties to the action, and so there has been no opportunity of inquiring what knowledge they had of the agreement with the defendant, and whether or not they acted innocently and without collusion with the plaintiffs.

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I do not think the plaintiffs are entitled to succeed in their action. If their retention of the draft had not prejudicially affected their strict legal rights, *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1,022, and *Cornwall* v. *Henson* (1900), 2 Ch. 298, are sufficient authority for relieving the defendant from any forfeiture or penalties incurred.

The action will be dismissed, with costs.

The appeal was argued at Vancouver on the 20th of December, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for appellant Company.
S. S. Taylor, K.C., for respondent.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff, appellant, an incorporated company, sold to defendant for the consideration of $75,000 "Sunnyside" ranch. The sum of $2,000 of the purchase money was paid down, and the balance was to be paid in instalments, the first of which, $5,000 and interest, on the 14th of June,

1910. Time was declared to be of the essence of the contract, and it was also agreed that if default was made in payment of any instalments, the contract should become null and void, and all sums theretofore paid should be forfeited to the vendor. The defendant afterwards also purchased cattle and other personal effects on the ranch. It appears to have been the defendant's intention to construct irrigation works on the land, and when water had been brought on, to subdivide the land for sale in parcels. Some preliminary work was done by him in the way of surveys, and he applied for water under the Water Act, but it does not appear that very much money was expended—I think less than $3,000. Shortly before the said first instalment of $5,000 and interest matured, the defendant requested the plaintiff to draw upon him for the amount thereof at five days, which was done, but being unable to find the money in time to meet this bill, he requested further delay, which was granted until the 7th of July. The plaintiff Company's secretary, in a letter notifying the defendant of the last extension, said that his directors "trust that the draft will be met at maturity." The defendant did not meet the bill on the 7th of July, but wrote on the 8th making excuses, and stating that the bill would be met on Tuesday (July 12th). On receipt of this letter on the 9th, a meeting of the plaintiff's directors was hurriedly called, and defendant was notified that the "Directors considered the deal off, other parties negotiating," and a re-sale was made to the "other parties" on the 12th at an advance of $25,000.

The action was brought for a declaration that by reason of said non-payment on the 7th of July, the agreement became null and void and should be delivered up to be cancelled. The defendant claims that the time clause in the contract is in the nature of a penalty from which he asks to be relieved; and he relies, amongst other authorities, on *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1,022. While the facts of that case are not very clearly stated either in the above report or in the Law Journal, I think enough appears to shew that that case is distinguishable from this. There, half the purchase money had been paid; the property was not of a speculative nature; it was not bought for speculative purposes; by the terms of the

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forfeiture clause in the agreement, the whole works to be erected thereon, as well as the land, might be forfeited even after conveyance. It is, therefore, not surprising that the Court relieved.

In this case I think it sufficiently appears that the purchase was a speculative one. Defendant appears to have had little or no money of his own, and while he succeeded in finding the $2,000 to make what, to my mind, is nothing more than a deposit, though to be applied as purchase money, yet he had no certainty and nothing more than a probability of securing the balance which would be required from time to time to make his payments. Those whom he relied upon to find the money were not disposed to do so, and there is no evidence to shew that even on the 12th of July the defendant was in a position to make the payment. It was not until at least a month afterwards that a tender was made. The property was of a speculative nature, and rapidly appreciating in value, as is shewn by the very great increase in selling value evidenced by the re-sale.

Now, what are the equities relied upon by defendant to entitle him to the relief claimed? I think he cannot claim that the extension of time was one; that extension simply substituted the 7th of July for the 14th of June. The expression of a hope that defendant would be able to meet the draft at maturity does not, in my opinion, affect the matter, nor should it, as he claims, have led him to believe that strict compliance with his contract would not be insisted on. Neither the drawing of the bill of exchange nor the increased interest to be exacted for the extension could do more than suspend the plaintiff Company's rights under the contract for the period between the 14th of June and the 7th of July, and when the draft was not then met, all the rights of the plaintiff Company under the contract were restored. The delay in returning the bill of exchange was reasonable, having regard to the fact that it had been sent back to Kamloops after default had been made in the payment of it. In any case, he was not misled or prejudiced by its non-return. It seems to me that none of these circumstances raise any equity in the defendant's favour; but it is said that the taking of possession and the purchase of the personal chattels and the preliminary work done and expense incurred, does raise such an equity. I

MACDONALD, C.J.A.

cannot see how the purchase of the chattels can affect the matter one way or the other. Then ought the fact that possession was given, and that a comparatively small sum of money was expended in preliminary work, induce the Court to say that the contract with respect to time shall not be given effect to? Had the matter proceeded further, and larger payments been made, or works erected on the land, it might be fair and equitable to grant relief; but in the present circumstances I do not see that it would be fair and equitable to interfere with what the parties have solemnly agreed to. The taking of possession and the expending of the preliminary moneys was in pursuance of the agreement itself, and in contemplation of the parties when the forfeiture clause was agreed upon. Defendant was not entitled to treat his being let into possession as evidence that a forfeiture would not be insisted upon. To so hold would be to nullify this very common term in agreements for the sale of land. Much stress was laid upon the re-sale at a higher price, and the agreement to pay one of the directors a commission, which, it was alleged, was contrary to law, but I am unable to see how such matters can affect the question at issue in this appeal. If otherwise, then the fact that the price of land had advanced would automatically modify the agreement; or if a director committed a breach of duty towards his Company, the purchaser would be released from an important clause in his contract. The plaintiff may have been ungenerous in its treatment of defendant, but it has done only what he contracted it might do.

MACDONALD, C.J.A.

I would allow the appeal.

IRVING, J.A.: I am not able to agree with the learned trial judge, although I feel, as he does, that the plaintiffs have been very prompt in asserting their rights.

The plaintiffs seek a declaration that the contract entered into by them is null and void, and for an order that the application for the registration of the agreement be cancelled.

IRVING, J.A.

The defendant counterclaims for specific performance, or, if he shall be held in default, for relief against the alleged forfeiture.

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In *Roberts* v. *Berry* (1853), 3 De G.M. & G. 284, where the purchaser was refusing to go on with the contract because the abstract was not delivered within six or seven days of the agreed day, relief was granted on the ground of accident, the accident being the absence of the mortgagee of the property from England. Lord Justice Turner, however, said that it was open to the parties to have made the time essential by an express stipulation, or if the vendor was guilty of delay, by notice.

Lord Cairns, L.J. in *Tilley* v. *Thomas* (1867), 3 Chy. App. 61 at p. 67, referring to this judgment said:

> "Equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract either for completion, or for the steps towards completion, if [*a*] it can do justice between the parties, and [*b*] if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right."

In this case we have "express stipulations."

As to the nature of the property we are considering, the sale was the sale of an estate of 2,100 acres in a district where land is rising rapidly in value. These lands, bought in December, 1909, for $75,000, were sold in July, 1910, for $100,000, and in November, 1910, are said to be worth $125,000. In January, 1910, there was a ready market apparently for lots at $250 per acre, and there was a clause in the deed that the defendant could subdivide and sell, and on paying the Company $75 per acre, or three-quarters of the price the defendant could get, could obtain a conveyance of the lot. Apparently water was required for irrigating the land—we can judicially notice that it was situate in the dry belt—and a clause in the agreement provided for the immediate acquisition of 1,000 inches of water, and for its distribution over the lands not later than the 14th of June, 1911. These considerations point to the speculative nature of the transaction, and the necessity for prompt action.

IRVING, J.A.

The defendant paid $2,000 down, placed a man in possession, and caused surveys to be made for the irrigation scheme.

At one time it was supposed that time could not be made of the essence even by express stipulation of the parties, but in *Lloyd* v. *Collett* (1793), 4 Bro. C.C. 469, reported in a footnote in 4 Ves. p. 690, Lord Hardwicke, after remarking that

"There is nothing of more importance, than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed; and that it should be certainly known, when a man is bound, and when not,"

This is the keynote to the decision in *Barclay* v. *Messenger* (1874), 43 L.J., Ch. 449, where Jessel, M.R. said:

"It is one thing to say, the time is not so essential, that in no case, in which the day has by any means been suffered to elapse, the Court would relieve against it, and decree performance. . . . . But it is a different thing to say, the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract, that if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it."

In later cases, and in text books, *e.g., Seaton* v. *Mapp* (1846), 2 Coll. C.C. 556, 564; *Hipwell* v. *Knight* (1835), 1 Y. & C. 401, 416; the rule has been laid down that where a party applying for specific performance has omitted to perform his part of the contract by the time stipulated in that behalf, without being able to assign sufficient excuse for his omission, and where there is nothing in the acts or conduct of the other party amounting to acquiescence, the Court will not decree specific performance. There seems to prevail a notion that the Courts of Equity will not grant specific performance where the result will occasion to the defendant a loss, or what he calls hardship, such as loss of a deposit, or even of the chance of profit by the purchaser. That is all wrong. Relief against forfeiture and decrees of specific performance can only be granted on grounds of recognized equity. As pointed out by Anglin J. in *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519 at p. 546, the right of a purchaser to specific performance is one thing; his possible equity to relief from forfeiture of purchase money paid on account is quite another.

IRVING, J.A.

In both cases the onus is on the applicant, and the Court, I think, should be satisfied that he was *bona fide,* and that the default is attributable to fraud, accident, surprise or mistake, and not to negligence. It is not necessary for the person resisting specific performance to shew any particular injury or inconvenience.

By his contract, the plaintiff was to pay the first instalment, $5,000, on the 14th of June, 1910. On the 8th of July he wrote

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that he had been unable to raise the money, but hoped to do so in a day or two. On the 9th of July the Company cancelled the contract, and on the 11th re-sold the property.

The contract, on its face, said time was to be of the essence. The draft of the 11th of June, the subsequent extension to the 7th of July, were qualified waivers, that is, waivers if the terms were complied with. The extensions were entirely for the convenience of the plaintiff, and therefore, should not be regarded as operative beyond the day named: see Fry's Specific Performance, 5th Ed., par 1,126.

Between the default and the cancellation, some correspondence took place, and the Company drew on the purchaser. This draft was not returned to the defendant till the 19th of July. Both parties cite *In re A Debtor* (1908), 1 K.B. 344. I do not see any evidence that the bill was indorsed to the bank for value, therefore the mere fact that it was in the hands of the bank for collection at the time of the passage of the resolution should not, I think, prevent the Company proceeding in the way they did.

It was argued that the letter of the 30th of June was not sufficiently peremptory to amount to a demand. I can only say that the expression "we sincerely trust," followed as it was by other statements shewing how important it was to the Company that the bill should be met, was an ample notification to the defendant of what he was expected to do. It certainly could not be regarded as something to lull him to sleep.

IRVING, J.A.

The provision in the margin of the bill for the additional one per cent., if that provision forms part of the note, does not seem to me to be material, in view of the fact that the bill was never paid. The whole incident of the bill of exchange, I think, was wiped out when it was finally dishonoured.

The learned judge expresses the opinion that as the tender was made on the 19th of August there was no unreasonable delay. In *Barclay* v. *Messenger* (1874), 43 L.J., Ch. 449, the notice was given by the vendors on the 16th of August, fixing the 26th of August as the date for payment, and the money not having been paid on that day, Jessel, M.R. at p. 456, thought the vendors were entitled at once to say the contract was at an end.

Under a clause in the agreement, the plaintiffs permitted the defendant to enter into possession, until default in payment, and the defendant agreed

"To forthwith, after the execution of these presents, take all the necessary steps to apply for and obtain a record on Neskanlith Lake for not less than 1,000 inches of water, and carry out and duly perform all necessary surveys and works to bring said water upon the lands above mentioned and cause said water to be available for and be distributed over all said lands in a proper and efficient manner not later than June 14th, 1911, all costs and expenses in any way connected with the obtaining of said record and putting said water on the land as aforesaid to be borne by the party of the second part, who shall also defray all the expenses of managing the said lands as from the date hereof, and all costs of surveying and subdividing said lands."

I confess that had there not been set out in the deed the express understanding that time was to be considered of the essence of the agreement, I would have thought this undertaking of the defendant to bring water onto the land and to defray the expenses of managing the same, would have indicated that time was not of the essence; but, unfortunately for him, he has agreed that it shall be otherwise, and, in my opinion, where time is of the essence, the Court must give effect to the intention of the parties.

It was pressed upon us that as the Company had in February, 1910, sold to the defendant the live stock and implements of husbandry running upon and used in connection with the land, the defendant was entitled to further and better consideration. The argument was that the taking possession of the land and the purchase of the live stock and machinery, and the applying for a water record, brought him within the principles of *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1,022. The *Dagenham* case was, so far as the final instalment is concerned, more in the nature of a mortgage than of an agreement to purchase where payment on the days named is a condition precedent. The Court in that case thought compensation would meet the justice of the case.

IRVING, J.A.

I have referred to the purchase of the stock and implements, but, in my opinion, the purchase of them in February, 1910, is wholly irrelevant to the agreement of the 14th of December, 1909. The fact that this purchase was made tends to shew the

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hardship of the defendant's misfortune, but it does not alter the right to cancel the contract.

The action of Mr. Robinson in busying himself in the re-sale is not a defence and is wholly irrelevant to the case under consideration. His action does not seem to me to be wrong, having regard to what a man may do in his own interests: see *North-West Transportation Company* v. *Beatty* (1887), 12 App. Cas. 589.

The reasonableness of the length of the notice given by the letter of the 30th of June was questioned; a week, it was said, was too short, on the authority of *Webb* v. *Hughes* (1870), L.R. 10 Eq. 281 at p. 286. In my opinion, the fact that there had already been one or two extensions must be considered.

It is noticeable that the defendant did not go into the box. It is hard to believe that the defendant would on his oath declare that he expected that he would be allowed three days' grace on an overdue bill. I think as a general rule, relief against forfeiture should not be granted unless the applicant therefor submits himself to cross-examination. Equity has granted relief where the purchaser has gone into possession and made improvements; but I think these must be proved with precision, and some reasonable explanation of the default would certainly be necessary.

IRVING, J.A.

As the learned trial judge decreed specific performance, it was unnecessary for him to deal with the $2,000 deposit. It is doubtful if the counterclaim asks for its return. The default clause in the agreement provides that the vendor shall be at liberty to re-sell, and all payments shall be absolutely forfeited. In an open contract, no money is payable at all until the vendor has shewn, and the purchaser has accepted the title. Where a purchaser agrees that there shall be a deposit, or as a deposit and part payment of the purchase money, it is taken, not only in part payment of the purchase money, but also as an earnest to bind the bargain, and a guarantee for the due performance by the purchaser of his contract, and the purchaser will lose his deposit if his conduct is such as to amount to a repudiation of the contract: *Howe* v. *Smith* (1884), 27 Ch. D. 89, where the nature and incidents of such a deposit are discussed; *Sprague* v. *Booth* (1909), A.C. 576. But where, as here, the word

"deposit" is not mentioned, it becomes a question to be determined upon the circumstances of the case whether the down payment is to be regarded as a deposit or an instalment of the purchase money. Mr. McCaul, in his admirable work on the Remedies of Vendors and Purchasers, thinks, in the absence of any specific provision, the intent of the parties must be determined to a very great extent upon the proportion that the down payment bears to the whole purchase price (p. 60). That seems to be sound, and, having regard to the total amount payable, the sum of $2,000 bears as much resemblance to an earnest as an instalment of the purchase money can, without being labelled "deposit," and as there are express words that all payments shall be forfeited, I would hold that it is not recoverable.

If it is not recoverable because of the purchaser's default, why should he be relieved? It will be urged, because he is actually seeking performance. That is a fallacious argument. He has brought an action for that purpose, it is true; but he has, at an earlier date, acted in such a way as to justify the other side declaring the contract void.

IRVING, J.A.

I would allow the appeal and make the declaration and order asked for by the plaintiff, and dismiss the counterclaim.

GALLIHER, J.A.: In this case I am satisfied the learned trial judge came to the right conclusion, and would dismiss the appeal.

GALLIHER, J.A.

Appeal allowed, Galliher, J.A. dissenting.

Solicitor for appellant Company: *F. J. Fulton.*
Solicitor for respondent: *J. M. Scott.*

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BROWN AND BAYLEY v. MOTHER LODE SHEEP CREEK MINING COMPANY, LIMITED.

April 1. *Practice—Pleading—Statement of defence—Alleging title in third party.*

BROWN AND BAYLEY v. MOTHER LODE SHEEP CREEK MINING CO.

A person having actual possession of Crown land, with the concurrence of the Crown, can maintain an action for trespass against a wrong-doer. Therefore, where a defendant pleaded that the land in question was vested in the Crown, it was

Held, that the plea was embarrassing.

Order of HUNTER, C.J.B.C. affirmed with a variation, IRVING, J.A. dissenting as to the variation.

APPEAL from an order made by HUNTER, C.J.B.C. at chambers, in Nelson, on the 8th of December, 1911, striking out paragraphs 4 and 15 of the statement of defence. The said paragraphs read:

Statement

"(4) That the said mineral claims were not located on waste lands of the Crown, but were located on lands for which application had been made to the Crown to purchase, and which lands were in consequence reserved insofar as the surface rights are concerned.

"(15) The defendant says that certain timber was cut on Sheep creek in the vicinity of the defendant's millsite, but says that the said timber was cut on lands staked by one John McMartin, and which the said John McMartin has applied to purchase from the Government of British Columbia, and for which part payment has been made to the said Government, and the application for which is still pending, and that all of the said John McMartin's interest in the said application has been transferred to the said defendant."

Defendant Company appealed.

The appeal was argued at Victoria on the 15th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Harold Robertson, for appellant: While the Court or a judge may grant an order at any stage to strike out a pleading as unnecessary, scandalous or embarrassing, yet none of those elements can be said to be present here, and the order should not have been made.

Maclean, K.C., for respondent: We are in possession, and that is sufficient. The appellant has no right to assert the title of the Crown. The allegations complained of in the pleadings are embarrassing, in that we do not know what sort of a title

we have to meet. There is no connection between the two paragraphs: *Davy* v. *Garrett* (1878), 7 Ch. D. 473 at p. 486.

Robertson, in reply, referred to *Atkins* v. *Coy* (1896), 5 B.C. 6.

Cur. adv. vult.

1st April, 1912.

MACDONALD, C.J.A. concurred with GALLIHER, J.A.

IRVING, J.A.: I would dismiss this appeal.

In *Harper* v. *Charlesworth* (1825), 6 B. & C. 574, it was decided that a person having actual possession of Crown land with the concurrence of the Crown, can maintain trespass against a wrong-doer. Holroyd, J. points out in that case that an entry on the possession of another cannot be justified unless it is made by the authority of a person in whom the right of soil is vested. It is useless for the defendants to refer to the interest of John McMartin. He has no vested right of soil: *Wilson* v. *McClure* (1911), 16 B.C. 82.

IRVING, J.A.

The defendant, I think, should be at liberty to plead that the plaintiff's claims were invalid as not being on the waste lands of the Crown.

GALLIHER, J.A.: I would vary the order appealed from to the extent of allowing paragraph 4 of the statement of defence to stand up to and including the word "Crown" in the second line thereof. The remainder of the plea is embarrassing, and was rightly struck out.

GALLIHER, J.A.

Admitting that application had been made by McMartin to purchase these lands from the Crown, that did not give him or his assigns any interest (legal or equitable) in the lands, and is no answer to an action for trespass: see *Wilson* v. *McClure* (1911), 16 B.C. 82, and cases there cited.

As the learned Chief Justice who made the order gave leave to amend, the defendants should pay the costs of appeal.

Judgment accordingly.

Solicitors for appellants: *Hamilton, Lennie & Wragge.*
Solicitor for respondents: *F. C. Moffatt.*

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LAWRANCE, SWIFT AND REAR v. PRINGLE.

Vendor and purchaser—Contract—Sale of land—Option—"Exercising" or "acceptance" of—Time of the essence.

In an option to purchase land, it was provided that 25% of the purchase money was to be paid at the time of "exercising the option." The purchasers had until a certain time to "accept the option," but did not tender or pay the 25% with the letter of "acceptance."

Held, on appeal, sustaining the judgment of GREGORY, J. (IRVING, J.A. dissenting), that the 25% became due and payable at the time of exercising the option, *i.e.*, with the letter of acceptance.

APPEAL by plaintiff from the judgment of GREGORY, J. in an action tried by him at Kamloops on the 26th of October, 1911, for specific performance of two agreements for the sale of certain land at Grand Prairie to the plaintiffs, Lawrance and Swift; and for specific performance of two other agreements for sale to the defendant, Rear and his assigns, the interests of the plaintiffs, Swift and Rear, having been assigned to the plaintiff, Lawrance.

The plaintiffs are real estate agents, and the defendant is a widow. She entered into two agreements with the plaintiffs, Lawrance and Swift, to sell her property. For the sum of $200 these plaintiffs were given an option on the land in question.

Statement

The agreement, although on its face purporting to be an option, might be turned into an agreement of sale by the performance of certain acts by the parties, *viz.*: the first payment of $200 paid, and then there were 30 days allowed for the searching of title, when 25 per cent. of the purchase price was to be paid. The acceptance under the 30-day term should have been given on the 15th of December, and the allegation was that this acceptance was posted on the 11th, but it did not arrive until the 12th. The 25 per cent. of the purchase price was not paid with the acceptance, and, assuming the posting of the acceptance on the 11th to be sufficient, the question was whether the 25 per cent. should have been made at the same time; in other

words, did the plaintiffs exercise their option by posting the acceptance, or was it necessary, in order to exercise the option, for the money to be paid with the acceptance?

GREGORY, J. came to the conclusion that the plaintiffs had failed to exercise their option in the manner required by the agreement, and dismissed the action, with costs.

Ritchie, K.C., for plaintiffs.
Fulton, K.C., for defendant.

29th December, 1911.

GREGORY, J.: This is an action brought by the plaintiff against the defendant, a widow in advanced years, to enforce specific performance of an option to purchase certain lands, and the plaintiffs claim that the defendant shall be directed to execute a proper agreement of sale of the said lands.

The plaintiffs rely upon a memorandum of agreement, dated the 15th of November, 1909, executed by the defendant, and a further writing signed by her on the 11th of May, 1910.

The paragraphs in the agreement are not numbered, but for convenience of reference I assume them to be numbered consecutively from 1 to 11 inclusive. The agreement purports to be an option for the purchase of land, and is apparently an adoption of the form given in O'Brien's Conveyancer, 3rd Ed., pp. 66 and 67.

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Although the statement of claim calls the document an option, the plaintiffs' counsel, while also calling it an option, treats it in his argument as though it is an agreement for sale and purchase; but it appears to me to be an option in the true sense; and there is a distinction between an option and an agreement for sale which must not be lost sight of.

Whatever the nature of the instrument, it is necessary to consider whether time is or is not of the essence of the contract. Paragraph 6 is as follows: "Time shall be of the essence of this agreement." There being nothing in the document itself to in any way qualify this provision, it appears to me that the only reasonable interpretation to put upon it is that it means what it says, and applies to every clause in the agreement dealing with time. In addition, I think it must be assumed that the parties really meant what they said, for the agreement further provides

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that the option shall be open for acceptance up to and *not* after, etc., and the evidence shews that the plaintiffs only wanted the land for speculative purposes, and until there was an actual binding exercise of the option, the defendant would be the only person bound—there would be no mutuality. I cannot, therefore, accept the plaintiffs' contention that "time is only of the essence of the contract so far as relates to fixing the vendor (purchaser) with acceptance of the title at the expiration of the 30 days" allowed for examination of title.

It is urged that the plaintiffs could not be called upon for payment of any moneys until they had searched the title, or the expiration of the 30 days allowed for that purpose; and *Townend* v. *Graham* (1899), 6 B.C. 539 at p. 542; *Thompson* v. *Brunskill* (1859), 7 Gr. 542; and *Cameron et al.* v. *Carter et al.* (1885), 9 Ont. 426, all of which were cases where time was of the essence, were cited in support. But they were all cases of an agreement for sale and purchase; the vendor was bound to shew a good title, and in each case there was an incumbrance or cloud on the title, and it was held that he could not insist on being paid any of the deferred payments (notwithstanding the terms of the agreement), until the purchaser was protected against the incumbrances. That is quite a different thing from deciding that the cash payment accompanying the execution of an agreement for sale is not payable until the vendor shews a good title.

GREGORY, J.

The owner of property has an absolute right to say upon what terms he or she will sell it. The agreement in dispute is nothing more than a standing offer to the plaintiffs to sell the property to them upon the terms set out in the agreement, and that offer can only become a binding contract of sale upon its acceptance in the manner and upon compliance with all the terms and conditions on which it is made.

The consideration for the agreement is the payment of the sum of $100. Twenty-five per cent ($11,000 odd) of the purchase price, of which the $100 was to be considered a part, was payable on the "exercise of the option." The option was open for "acceptance" up to and not after the 15th of May, 1910, subsequently extended to the 15th of November. The pur-

chasers were to have "30 days from the date of acceptance" to examine the title.

Upon the "exercise" of the option, and upon receipt of the moneys then payable, *viz.*: the 25 per cent., the usual sale agreement was to be entered into.

On the 12th of November, the plaintiffs wrote to the defendant accepting the option. Under the terms of the contract the post office was the agent of the defendant, and this was, therefore, good as far as it goes. On the 19th of November, defendant's solicitor wrote to the plaintiffs notifying them that the option was "void" for non-payment of the 25 per cent. of the purchase money. On the 29th of November, plaintiffs attended defendant's solicitor, to tender the 25 per cent. of purchase price, but he had no authority to accept; they then went to the defendant personally, and arriving there late at night, interviewed her through an upstairs window, but she could not recognize them in the dark, and being alone, would have no dealings with them. Some days later another attempt to tender the amount was made, but with no better result.

If this payment of 25 per cent. was not payable until the expiration of the 30 days given for the acceptance of title, as argued by the plaintiffs, then the tender was in time, and the plaintiffs should succeed; but if payable on and not after the 15th of November, then it was too late, and the defendant should succeed. To sustain the plaintiffs' argument they draw a distinction between the "acceptance" and the "exercise" of the option. But I am unable to draw any such distinction; it appears to me they mean the same thing in this contract. Strictly speaking, perhaps the acceptance of an option is the acceptance of the offer of an option. The plaintiffs here have the right to say: "We will buy," or: "We will not buy"; that is their option, and when they say they will buy, they have accepted the offer made to them, and they must perform every condition attached to that offer.

If their saying "We will buy" is an acceptance, but not an exercise of the option, then they must have two options, one which they must accept up to and not after the 15th of Novem-

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ber, and another which they either exercise or not 30 days later —but what is it?

Mr. *Ritchie* urges that it cannot be supposed that the purchaser would be expected to pay 25 per cent. of the purchase price, and also sign an agreement on the mere acceptance of the option, particularly as on cancellation the vendor was only "to return the deposit of $100," and not the 25 per cent. But his argument imports something into the contract which is not there. Paragraph 6 deals with the matter. It provides that in case of objection to the title "the deposit" is to be returned; it says nothing about $100 or any other amount. The earlier paragraph 4 merges that $100 into the 25 per cent. payment, and I take it that the deposit referred to in paragraph 6 is the 25 per cent., and that is the only paragraph which speaks of a "deposit."

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The payment of that 25 per cent. would be quite in accordance with the usual practice in agreements for the purchase of real estate in this Province—in fact it is usually 33 1-3 per cent. that is paid. In case of defective title the money would be returned, and plaintiffs would only lose the interest upon it, whereas, if Mr. *Ritchie's* contention is correct, the defendant would lose the interest on the whole of the purchase money for the 30 days after acceptance, for the defendant is unquestionably bound then (if properly accepted), since paragraph 3 only requires the purchasers to pay interest after the "exercise" of the option.

For these reasons, it seems to me that the plaintiffs have failed to exercise their option in the manner required by the agreement, and having so failed, they are not entitled to succeed, and the action will be dismissed accordingly, with costs.

Plaintiffs appealed, and the appeal was argued at Vancouver on the 3rd of April, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Ritchie, K.C., for appellants: We say that as soon as we posted the acceptance we exercised the option and it became a contract.

Fulton, K.C., for respondent: The time for the payment of the instalment of the purchase money could not go beyond the 11th of December, while acceptance, if any was made, was made on the 12th. If one day over the time may be allowed, why not an indefinite time, but in any event the payment of the $100 is a consideration for the option, and could not be called a deposit. That was not made, and the purchaser not having carried out his part, has lost his right.

Ritchie, in reply.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.: The plaintiffs obtained from the defendant a written option to buy her land, paying a small consideration therefor. They were to have until the 15th of May, afterwards extended to the 15th of November, to "accept the option," which might be done by letter. They posted the letter of "acceptance" in time, but the option agreement provided that 25 per cent. of the purchase money should be paid at the time of "exercising the option." This sum was not paid or tendered either at the time of "acceptance" by letter, or on or before the 15th of November. Time was declared to be of the essence of the agreement, and the defendant now contends that failure to make this initial payment entitled her to put an end to the transaction. The agreement is inartistically drawn, and some confusion arises by reason of the phrase "acceptance of option" being sometimes used, and other times the phrase "exercise of option." It is, however, clear to my mind that "acceptance" of the option means the election of the plaintiff to buy the property on the terms specified, and that "exercising the option" means the same thing. When that election was made the option was "exercised" and the 25 per cent. then became payable, and in view of the time clause in the agreement, it does not appear to me to matter whether payment of this money was an essential part of the "exercising of the option" or was merely an agreement to pay it at that time. If it were to be part of the exercising of the option, then, clearly, the option was not exercised in accordance with the agreement. If it was an independent term in the agreement, then it was not complied with, and

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thus gave the defendant the right which he exercised to treat the agreement as broken and ended.

Mr. *Ritchie* contended that the whole context of the agreement points to the conclusion that the "exercising of the option" was intended by the parties to mean the final closing after title had been settled. If that were the true construction, then the plaintiffs had the right to elect twice, first, on or before the 15th of November, and again within 30 days after that date, that is to say, within the period allowed for searching the title. I am unable to take that view of the intention of the parties as manifested by the writing, and would therefore dismiss the appeal.

IRVING, J.A.: I would allow this appeal. The letter of the 29th of November, 1910, seems to me to make it unnecessary for us to discuss the sufficiency of the tender made to Mrs. Pringle on the 12th of December. The agreement is not, at first sight, clear, but after the wording has been studied for some time, the difficulties fade away. The word "deposit" seems to me to be the $100 paid for the option, and afterwards to be accepted as part payment of the consideration money. The 25 per cent. would go back to the purchasers on rescission by the vendor, as of right; there would, therefore, be no object in the draftsman's providing for its return. For this reason, I take it that he was dealing with the $100. The only objection to that is that Mrs. Pringle would get nothing for the option, but why should she if she cannot make a title to the property? The agreement speaks of the "option being open for acceptance," and also of "exercising the option." These different terms seem to me to denote two different things. The option is to be, or may be, accepted by letter, and a limit of 30 days is given from the mailing of the letter.

IRVING, J.A.

By the agreement, if the option is exercised, the $100 is to be regarded as payment on account of the purchase money; 25 per cent. of the purchase money is to become payable, and a new agreement for the sale of the lands is to be drawn up. By clause 7, 30 days for examining the title is given; those 30 days date from the mailing of the letter.

In my opinion the plaintiffs were not called upon to pay the 25 per cent. until the 30 days given to examine the title had expired. My conclusion is based on the following grounds: (1) There are two different expressions used; (2) there being no place or mode appointed for the payment of the 25 per cent., it would be necessary for the plaintiff to make the tender to the defendant personally, and not by cheque in a letter. So we have these anomalous conditions: the acceptance may be by letter, but the payment which, according to Mr. *Fulton,* ought to be simultaneous with, or within a reasonable time of (*Brighty* v. *Norton* (1862), 32 L.J., Q.B. 38) the acceptance, would be personal: *Toms* v. *Wilson* (1862), 4 B. & S. 442; *Massey* v. *Sladen* (1868), L.R. 4 Ex. 13; (3) the agreement should be read most strongly against the vendor: Dart's Vendors and Purchasers, 7th Ed., p. 118.

GALLIHER, J.A.: I agree with the interpretation placed upon the option by the learned trial judge, and would dismiss the appeal.

Appeal dismissed, Irving, J.A. dissenting.

Solicitor for appellants: *D. S. Wallbridge.*
Solicitor for respondents: *F. J. Fulton.*

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HUMPHREYS v. THE CORPORATION OF THE CITY OF VICTORIA.

Arbitration and award—Expropriation—Compensation—Interest upon amount allowed—Wrong principle—Duties of arbitrators.

On an application to set aside an award of arbitrators upon a question of compensation payable in respect of the expropriation of certain land by a municipal corporation under its statutory powers, GREGORY, J. altered the rate of interest allowed under the award, but refused to set the same aside.

Held, on appeal, that interest was not payable, that the award could not be altered by the judge and must be set aside.

Per IRVING, J.A.: That the arbitrators had exceeded their authority; that the award should be set aside and the matter remitted to the arbitrators for reconsideration.

APPEAL from the judgment of GREGORY, J. on an application heard by him on the 29th and 30th of November, 1911, at Victoria, refusing to set aside the award of arbitrators in pursuance of the expropriation provisions of the Municipal Clauses Act. The appellants expropriated certain land, the property of the respondent, for the extension of a thoroughfare, and the matter was referred to arbitrators to assess the compensation. The amount fixed by the arbitrators included compensation for the removal of the respondent's house, and a sum by way of interest from the date of taking possession. The appellants applied to set aside the award on the grounds that the arbitrators had acted upon a wrong principle in allowing, amongst other things, compensation for removal of the house, and also interest as above mentioned. GREGORY, J. altered the percentage of interest, and refused to refer back the award. The Corporation appealed.

Statement

McDiarmid, and *Copeman,* in support of the application.

Fell, contra.

5th January, 1912.

GREGORY, J.: This is an application by the City of Victoria to set aside an award made by the arbitrators. Mr. *Fell* raised the preliminary objection that before the award could be dealt

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with, the submission should be made a rule of Court. Although there are many cases upon this point, the only one referred to by either side was that of *Bennett* v. *Watson* (1860), 29 L.J., Ex. 357, 5 H. & N. 831, cited by Mr. *Fell*. Russell on Arbitrations and Awards, 8th Ed., 584, states that at common law and under the statute of William, this is necessary, but that it is not necessary in compulsory arbitration under the Common Law Procedure Act, 1854. This shews clearly that the question really depends upon the statute, and I was not disposed on the hearing to examine the cases and compare the statutes with them in the absence of any assistance from counsel. In *Bennett* v. *Watson, supra,* it was held that it was not necessary. The Arbitration Act, R.S.B.C. 1897, chapter 9, section 2 (R.S.B.C. 1911, chapter 11, section 3), provides that a submission shall have the same effect in all respects as if made an order of Court; and section 23 (R.S.B.C. 1911, chapter 9, section 25), provides that that Act shall apply to every arbitration under any Act passed before or after the commencement of that Act except insofar as it is inconsistent therewith. I do not see any inconsistency in the arbitration proceedings under the Municipal Clauses Act, and I therefore overruled Mr. *Fell's* objection.

The City raises eleven objections to the award, but on the hearing formally abandoned objections 5, 10 and 11. Section 251 of the Municipal Clauses Act, B.C. statutes, 1906, chapter 32 (R.S.B.C. 1911, chapter 170, section 396), provides that an award can only be set aside on the ground of misconduct on the part of the arbitrators, or that they award the compensation on a wrong principle. The City's objections to the award are made on the ground that the arbitrators proceeded on a wrong principle to assess the damages, and Mr. *McDiarmid* contended that the sole and only question was the difference in the market value of the property before and after the expropriation, and if his argument is to be sustained in its entirety, it would prevent any evidence being given to the arbitrators except in answer to the questions: What was the value, etc.? and: What is the value, etc.? and Mr. *McDiarmid* practically conceded this. The English cases have nearly all been decided under the English Lands Clauses Consolidation Act, 1854, chapter 18, or other

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special Acts in almost similar terms. Under the Lands Clauses Consolidation Act, sections 18 and 68 are the controlling sections in matters of this kind. Section 68, the one usually discussed, provides that the injured party shall give notice to the expropriator of the nature of his interest, etc., in the land, and "the amount of compensation claimed." Subsection 7 of section 251 of the Municipal Clauses Act, B.C. statutes, 1906, chapter 32 (R.S.B.C. 1911, chapter 170, section 404), requires that the claimant shall give "full particulars of the damages" for which his claim is made. These particulars were given by Mrs. Humphreys, and it is the allowance of items under these headings that the City complains of. It seems to me that whether Mr. *McDiarmid's* suggested test is to be applied or not, it is too late for him to now take the objection that he does. It must be assumed, in the face of the proceedings that have taken place, that it was claimed and admitted that Mrs. Humphreys' property was damaged in its market value, and the particulars furnished are nothing more than the particulars which go to make up that diminished market value damage, *e.g.*, the chief contention is, on the part of the City, that the arbitrators allowed the cost of turning the house round so as to make it face the street. It seems to me that it must be assumed from the evidence before the arbitrators that the market value of the property was only damaged in that respect, because the house was left in the condition it was, with its back upon the street, and that the arbitrators acted properly, and I have no jurisdiction to question the amount awarded.

GREGORY, J.

Mr. *McDiarmid* referred me to cases cited in Halsbury's Laws of England, Vol. 6, at p. 46, as to the method of computing compensation. He apparently overlooked the fact that the test there set out was dealing exclusively with the compensation when no land is taken, and the land is only injuriously affected. The principles are quite different, as will be found by reference to p. 32 of the same work. In the present case, land has been taken, and other property not taken has been injuriously affected. There is, however, an objection raised to the award which appears to me to be good, namely, interest has been allowed at seven per cent., and it has been allowed not only upon the value

of the land taken, but upon the compensation awarded for injurious affection. The English cases are all clear that where land is taken compulsorily, as in this case, interest is allowed on the purchase price: see Halsbury's Laws of England, Vol. 6, p. 5. But interest is not allowed on compensation for injurious affection. The compensation sounding then strictly in damages and being unliquidated, there, of course, is no suggestion of debt or contract, and no interest can be allowed until they are ascertained. It was suggested on the argument that this was not the rule in Ontario, but see remarks of Osler, J.A. in *In re Leak and City of Toronto* (1899), 26 A.R. 351. But the difference in this item only amounts to a trifle compared with the amount involved, and as Mr. *Fell,* on the argument, voluntarily agreed to abandon the excess, I see no reason for setting aside the award or referring it back to the arbitrators, if I have any authority to do so. The interest, however, should be computed only on the value of the land taken, and at the rate of five per cent.

GREGORY, J.

The appeal was argued at Vancouver on the 2nd of April, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

McDiarmid, for appellant Corporation.
Fell, for respondent.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A. concurred in the conclusions reached by GALLIHER, J.A.

MACDONALD, C.J.A.

IRVING, J.A.: On appeal from GREGORY, J., who refused to set aside an award, the City now appeal.

I would allow this appeal.

The arbitrators seem to have been influenced by a desire to make what in their opinion would be a fair and just arrangement between the parties, and in so doing they neglected to pay strict attention to the statute.

IRVING, J.A.

Section 394 of the Municipal Act, chapter 170, R.S.B.C. 1911, lays down exactly what the arbitrators are to consider, and a mistake by them as to the scope of the authority conferred upon them by that section, whereby they exceed their authority,

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constitutes a ground to set aside the award under section 40 of the Municipal Act Amendment Act, 1912, or under section 14 of the Arbitration Act, chapter 11, R.S.B.C. 1911.

In an old case decided in 1564, "Anon," reported in Dyer's Reports, Part 2, p. 242a, the submission was as to "the right title, interest and possession" of certain land called K. The award, instead of dealing with the matter submitted, provided that the defendants should have "the brakes there growing during his life, paying to the plaintiff annually two shillings for the moiety of the royalty of the said brakes."

The mistake of the arbitrators in that case seems very like the mistake in this award, and was held sufficient reason for setting aside the award. The arrangement made was no doubt fair,

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but they were not appointed for any purpose than to determine the question submitted. The allowance of interest at seven per cent. instead of at five per cent. is also objectionable. I think the award should be set aside and the matter remitted to the arbitrators for reconsideration, under the amendment of 1912: see *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672.

GALLIHER, J.A.: This is an appeal from the judgment of GREGORY, J., refusing to set aside an award for $8,126.23 in favour of Caroline Humphreys.

The City of Victoria expropriated certain lands, the property of Caroline Humphreys, for street purposes, and being unable to agree as to the remuneration to be paid, the matter was

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referred to arbitration under section 396, R.S.B.C. 1911.

The award was attacked on several grounds, but the only one argued before us was that the arbitrators had proceeded upon a wrong principle in arriving at the amount of compensation to be paid (a) in that they allowed interest upon the amount awarded for lands injuriously affected but not taken as well as upon lands actually taken, and at seven per cent. instead of five per cent; and (b) in allowing $2,500 for the cost of moving a house upon the premises, which, upon the street being run through, has its back on the line of the street, and which, to make it useful and valuable, would have to be set back some distance facing the new street.

Section 396 provides that the award may be set aside if the arbitrators have been guilty of misconduct, or have proceeded upon a wrong principle.

Upon the first point, when the matter came before GREGORY, J., Mr. *Fell,* of counsel for Mrs. Humphreys, voluntarily agreed to abandon the excess of interest allowed on the compensation awarded for lands injuriously affected but not taken, and to consent to the rate of interest being reduced from seven per cent. to five per cent., and upon this understanding the learned judge refused the application to set aside the award.

It seems to me he could not do this. The award was complete, and he had no authority upon the application to alter or amend it. He was bound by the statute, and what was done was tantamount to an amendment of the award: see *Skipworth* v. *Skipworth* (1846), 9 Beav. 135. I think the learned judge was wrong, and on this ground alone I would allow the appeal and set aside the award.

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In this view it becomes unnecessary for me to decide the second point, although I can conceive that where a building in its present situation is practically valueless—on the principle that the damage should be minimized—an item for moving, which would have that effect, might very well be entertained by the arbitrators.

Judgment accordingly.

Solicitor for appellant Corporation: *F. A. McDiarmid.*
Solicitor for respondent: *Thornton Fell.*

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MACPHERSON v. THE CORPORATION OF THE CITY OF VANCOUVER (STIRLING, THIRD PARTY).

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Municipal law—Defective sidewalk—Non-repair—Negligence—Liability of Corporation—Notice—Third party—Remedy over against—Vancouver Incorporation Act, 1900, Cap. 54, Secs. 149, 219.

A municipal corporation, charged with the maintenance and repair of streets and sidewalks, took up a wooden sidewalk and replaced it with a permanent one. In doing so, they replaced a wooden grating in an area opening, which had been made in the old sidewalk by a former owner of the abutting private property without permission from the corporation. The private owner at the time of replacing the old sidewalk was not consulted by the corporation. The trial judge, in an action for damages for personal injuries sustained by plaintiff in falling through the wooden grating, gave damages, $3,000, against the corporation, with a remedy over against the third party. An appeal was taken by the municipality, and the third party also appealed against the main judgment and against the order that she indemnify the City, but on the argument she confined her appeal to the latter.

Held, on appeal, that the corporation was liable, and that the appeal of the third party should be allowed.

APPEAL by defendant Corporation and the third party from the judgment of MORRISON, J. in an action for damages, tried by him at Vancouver in September, 1909. The facts are shortly stated in the headnote.

Statement

J. A. Russell, for plaintiff.

W. A. Macdonald, K.C., for defendant Corporation.

13th September, 1909.

MORRISON, J.: The plaintiff, a man of slight build, weighing about 130 pounds, whilst coming out of Seymour & Marshall's office, on Granville street, stepped on a wooden grating in the cement sidewalk which is directly in front of the door and some five inches below the doorstep, sustaining injuries for which he is seeking damages from the City. From the evidence it appears that this wooden grating consisted of slats measuring

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about one-half inch to three-quarters of an inch wide and three-quarters of an inch deep, dovetailed into one-half inch wooden cleats which were fastened each by one nail into a wooden frame work. The grating was well worn and shaky and in general construction it was weak. The nails used were small and round and the cleats improperly nailed.

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I am of the opinion that the grating, when put in, was structurally defective and that plaintiff received his injuries solely through this structural defect in this sidewalk. It may be well that there were slats in this grating that would not have broken with even greater weight, distributed in a certain way, than that of the plaintiff, but I am quite satisfied that the slats upon which he unfortunately happened to alight on this occasion were as I find. There was, of course, no attempt by the defendants to attribute negligence contributing to the accident to the plaintiff, but counsel took the ground that the question involved is one of non-feasance for which an action will not lie against the City.

I think it is clearly a case of misfeasance. The old style wooden sidewalk was removed and replaced by sidewalks made of cement or concrete, leaving, in this particular instance, an opening for the purpose of furnishing light to the basement or area of the abutting building. Into this opening was placed the wooden grating in question by the owner of the building opposite which the aperture was placed. It appears that the usual course adopted by persons erecting buildings and requiring areas is to get a written permit therefor from the City. A dispute arose at the trial as to whether permission had been given to put in this particular area and grating. I am satisfied such permission was given, but whether given in the usual form or not, I am quite certain they were put in with full knowledge and consent of the defendants. There seems to me no substantial difference as to liability between putting an originally inadequate defective grating over the hole in the sidewalk and covering it with ordinary window glass. Indeed, if left entirely uncovered, the chance of pedestrians falling into it, it being on a well lighted street and in close to the building,

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would be less than by placing such covering as in this case over it.

Should I be mistaken in the view I hold as to this being a case of misfeasance, I am not prepared to go along with Mr. *Macdonald* in his contention that, this being, as he claims, one of non-feasance, therefore the City is not liable.

I think it was the intention of the Legislature to impose upon the City liability for non-repair. Section 219 enacts that

"Every such public street, road, square, lane, bridge and highway shall be kept in repair by the Corporation."

To this section there is an amendment (B.C. Statutes, 1909, chapter 63, section 10), as follows:

"Provided, however, that the Corporation shall in no case be liable for any damages occasioned by reason of the neglect of the said Corporation to repair any such road . . . . unless notice in writing, setting forth the time, place and manner in which such damage has been sustained shall be left and filed with the city clerk within two calendar months after the date on which such damage was sustained; Provided that in case of the death of a person injured the want of notice shall be no bar to the maintenance of the action."

And the section goes on to provide that in a proper case the Court or trial judge may dispense with such notice. This seems to me a clear interpretation of the meaning and extent of section 219 of the Vancouver Incorporation Act, 1900, chapter 54.

MORRISON, J.

I think that the words of Lord Herschell used in the course of his speech in *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 at p. 145, are apposite here. The purpose of such a statute (The Bills of Exchange Act) surely was that on any point specifically dealt with by it the law should be ascertained by interpretating the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, etc.

There will be judgment for the plaintiff for $3,000 with costs.

24th March, 1910.

The argument on the question of the City's right to a remedy over does not alter the impression I formed at the trial that the

third party is liable. In the face of her admissions which were put in at the trial I cannot see any escape from that conclusion. She admits that the opening referred to in front of the building in question was made by her predecessor in title, and was by her continued or left in the same condition for lighting purposes or for other purposes in connection with the basement of the building, and also that the grating over this opening was put in by the predecessor in title aforesaid, and was by her so continued or left until the present time, and further states that she, the third party, did not do anything to or in any way interfere with the said opening or grating from the time of her ownership up to the date of her admission. These admissions displace the assumptions upon which Mr. *Pugh* based his very able and ingenious argument, which in another state of facts would doubtless have merited more substantial recognition.

MORRISON, J.

The appeal was argued at Victoria on the 10th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. A. Macdonald, K.C., for the appellant Corporation.

J. A. Russell, for respondent: Macpherson submits that the third party (Mrs. Stirling) having withdrawn, her appeal should be dismissed with costs.

Davis, K.C., for the third party: The City being guilty of misfeasance, we are in no way responsible for the accident, which was due to a structural defect in the sidewalk. After our purchase, the City took up the original wooden sidewalk and put down one of cement, making an area opening in which they placed the old grating. We had nothing to do with that; no area permit was given, and we were not consulted. The City having done it, must take the responsibility for it, and cannot take advantage of section 149. In any event we cannot inherit a liability for a tort committed by our predecessor: see *Township of Sombra* v. *Township of Moore* (1892), A.R. 144 at p. 150.

Argument

Macdonald: The third party having had the benefit, *ergo,* why not the liability? She has had the advantage of the area

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opening since 1902 for lighting and other purposes. It was her duty when the sidewalk was being renewed to have put in a proper grating. She is estopped now from denying liability. In any event she is a joint tort feasor: *Atkinson* v. *City of Chatham* (1898), 29 Ont. 518; *Homewood* v. *City of Hamilton* (1901), 1 O.L.R. 266; *Organ* v. *City of Toronto* (1893), 24 Ont. 318; *Stilliway* v. *Corporation of City of Toronto* (1890), 20 Ont. 98.

Davis, in reply: There is no estoppel here. To make the *Atkinson* case applicable, Davidson should have been added. The grating having been relaid without our knowledge or consent does not make the City our agents. We simply took advantage of a condition of affairs which we found in existence.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the City's appeal and allow that of the third party. The grating in question was placed in the new sidewalk by the appellant Corporation itself without any interference on the part of Mrs. Stirling. Whether she would or would not have been liable had the accident occurred while the grating was in the old sidewalk, which had been torn up by the Corporation, is a matter which I need not consider. The appellant Corporation is not entitled to recourse against Mrs. Stirling for damages resulting from its own act.

IRVING, J.A.

IRVING, J.A.: An accident occurred in June, 1909, the defendant sustaining injury by falling through a wooden grating, which the City officials had in 1907 placed in the cement sidewalk opposite a shop or store owned by Mrs. Stirling in Granville street, one of the chief streets of Vancouver, near the centre of the town.

Judgment, which proceeded on the ground that the City was guilty of misfeasance, went against the City in favour of the plaintiff, but the City was given a remedy over against Mrs. Stirling. From that judgment the City appealed, and Mrs. Stirling also appealed.

The appeal of the City was limited to the 7th ground, *viz.*: There was no evidence adduced at the trial of any notice on the part of the defendant Corporation of the non-repair of the sidewalk in question.

There was in my opinion abundant evidence to support this, *viz.*: that the City officials had taken out the grating in question and placed it in the cement sidewalk, and that its construction as part of the sidewalk was as flimsy as it well could be; and that the nails used to support it, or the cleats upon which it rested, were rusted.

The argument of the City was based on the want of notice: *Rice* v. *Town of Whitby* (1898), 25 A.R. 191; *McGregor* v. *The Township of Harwich* (1899), 29 S.C.R. 443, being cited. In those cases the work complained of was done by somebody for whose acts the corporation was not responsible. The transplanting of this well-worn grating from its original board sidewalk to the new granolithic bed was the handiwork of the City officials. Here there was negligent work in the construction of the thing, and it is not necessary to fall back on *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330.

The appeal of Mrs. Stirling is not so easily disposed of, and I confess that I have felt grave doubts as to the correctness of my conclusion with regard to it.

The sections governing the right of remedy over are subsections 149-154 of the Vancouver Incorporation Act, 1900, chapter 54. The provisions of a very similar statute were discussed in *Township of Sombra* v. *Township of Moore* (1892), 19 A.R. 144 at p. 150. Mrs. Stirling bought the property in question in November, 1902, from one Davidson. The opening in the wooden sidewalk was made by Davidson without permission. The cement walk was built by contractors who had a contract with the City to build all work required during the year under the supervision of the City officials. It was built in November, 1907. The third party relies on the exception in the statute and claims this excavation was "made by a servant or agent of the Corporation." The City contends that the third party's liability turns on the fact that Mrs. Stirling left and maintained the excavation. She undoubtedly did "leave" and "maintain" the excavation. It was there for her convenience, but was she

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bound to examine it? and if the City did not strengthen it according to her views, was she at liberty to do the work? In the Manitoba case to which we have been referred, there was an active leaving and maintenance. Here her leaving and maintaining was passive. It would be more correct to say that she permitted the work to remain rather than that she maintained the excavation. On the whole I am disposed to allow the appeal in her case.

GALLIHER, J.A.: The only grounds urged before us by the City as against the judgment in favour of the plaintiff was want of notice of non-repair. In the light of the evidence this cannot prevail, and the appeal must be dismissed with costs.

The third party, Stirling, is appealing against the judgment over against her in favour of the City. The City in 1907, when they took up the old wooden sidewalk and replaced it by cement, left the area or space as it was, and instead of covering the space with a new and substantial grating, took up the old wooden grating which had been in use for five years, and utilized it. This work was done under the supervision of the City, and Mrs. Stirling had nothing whatever to do with it, nor had she any control over it. I think the placing of this old grating in the new sidewalk by the City is faulty construction and misfeasance. I cannot see under what principle the City can claim over against Mrs. Stirling.

GALLIHER, J.A.

The evidence discloses a state of facts which takes it out of the application of section 149 of the Vancouver Incorporation Act.

The cases cited by Mr. *Macdonald* for the City, all of which I have carefully read, are on the facts clearly distinguishable.

The appeal of the third party should be allowed with costs.

Judgment accordingly.

Solicitor for appellant Corporation: *G. H. Cowan.*
Solicitors for respondent: *Russell & Russell.*
Solicitors for third party: *Billings & Cochrane.*

EVERETT v. SCHAAKE MACHINE WORKS, LIMITED.

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Master and servant—"Plant," what constitutes—Machine, being manufactured, attached, for testing, to motive power of factory—Factories Act, R.S.B.C. 1911, Cap. 81, Sec. 32.

Section 32 of the Factories Act, R.S.B.C. 1911, chapter 81, which requires dangerous machinery in a factory to be, as far as practicable, securely guarded, applies only to machinery which is part of the plant used in the manufacture of the product of the factory, and does not include a machine which is in course of construction in the factory, although such machine for the purpose of being tested, is connected with the motive power of the factory, and is being operated as a machine for the purpose of testing. The plaintiff, having received personal injuries while testing a machine, by reason of the machine being unguarded, the trial judge charged the jury that if they considered the machine to be dangerous, the defendants were liable at common law for breach of duty imposed by the Factories Act, and further charged the jury that under such circumstances, it was no defence that the plaintiff voluntarily assumed the risk. The trial judge also charged the jury that the defendants might be liable under the Employers' Liability Act for the negligence of their foreman in telling the plaintiff to work the machine without a guard. The jury found a verdict for the plaintiff for damages at common law.

Held, on appeal, that the Factories Act did not apply, and the action at common law must be dismissed.

Held, further, that the jury, under the judge's charge, did not consider whether the plaintiff had voluntarily assumed the risk, and therefore damages could not be assessed under the Employers' Liability Act. A new trial was ordered as to the liability under the Employers' Liability Act.

APPEAL from the judgment of MURPHY, J. on the verdict of a jury in an action to recover damages for personal injuries sustained by the plaintiff while engaged as a workman in the defendants' factory, tried at Vancouver on the 21st of December, 1911. The defendants were manufacturers of machinery. A machine called a "mortising machine" had been manufactured, and, for the purpose of its being tested, was attached to the motive power of the factory. The plaintiff, an experienced journeyman machinist, had been employed for three weeks prior to the accident in building and finishing the machine; in fact,

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he was the machinist in charge of the construction of the machine. On completion, he made two tests to see that it ran properly. After these tests the foreman directed the plaintiff to make a third test, and it was while making this third test, and oiling the machine while running that he met with the accident. The plaintiff complained of the absence of a guard over the rapidly revolving saws. It appeared that when the machine was installed in the place where it was to be operated, a guard, consisting of a hood, was to be suspended over the saws, with suction tubes to take away the sawdust and shavings, but it was no part of the machine itself. The plaintiff said that he protested to the foreman against making the third test because of the want of a guard over the saws. These tests were made in the factory where the machine was constructed, not in the factory where it was intended finally to be used.

The defendants appealed and the appeal was argued at Vancouver on the 17th of April, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Judgment

Craig, for the appellants: The learned trial judge erred in charging the jury that the provisions of the Factories Act require dangerous machinery to be guarded, applies to a machine which was not part of the plant, but was the product of the factory. The other provisions of the Factories Act and the history of the legislation shew that it is only "plant" that is referred to in section 32. As this is the only ground on which a judgment at common law was claimed, the action at common law should be dismissed. The plaintiff was guilty of contributory negligence. The doctrine *volenti non fit injuria* applies. Otherwise, if the judgment at common law is set aside, the judgment under the Employers' Liability Act cannot be maintained, because the trial judge instructed the jury that if the defendants were liable under the Factories Act, the defence of *volens* did not avail, and the jury, having found the defendants liable under the Factories Act, only considered the question of *volens.*

McCrossan, and *St. John,* for the respondent: Section 32 of the Factories Act applies not only to plant, but to any machinery in the factory. This machine was coupled with the motive

power of the factory, and all the reasons why machinery requires protection exist in this case just as much as if the machine had been part of the plant.

Craig, in reply.

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4th June, 1912.

MACDONALD, C.J.A. [After setting out the facts]: The plaintiff claims, first, that the defendants were guilty of a breach of the Factories Act, R.S.B.C. 1911, chapter 81, section 32, which provides that:

"In every factory all dangerous parts of mill-gearing, machinery, shafting, vats, pans, cauldrons, reservoirs, wheel-races, flumes, water-channels, doors, openings in the floors or walls, bridges, and all other dangerous structures or places shall be, as far as practicable, securely guarded."

The only authority to which we were referred on the scope of this section is *Redgrave* v. *Lloyd & Sons* (1895), 1 Q.B. 876, but in my view of the case we get practically no assistance from that decision. In the case at bar, the point is: does the machine which is no part of the factory plant or machinery, but is the product of the factory, fall within the above quoted section? whereas in *Redgrave* v. *Lloyd, supra,* the point was: did a machine which was not part of the machinery which supplied the motive power, but was a machine operated as part of the plant by machinery which formed part of the motive power, fall within the English Act, which is practically identical with ours? Had this mortising machine been one used in the manufacture of the product of the factory, the cases would be identical, and there would, in my opinion, be no difficulty in holding that it fell within the Factories Act. But not being part of the mill gearing, machinery or shafting of this factory in any true sense of the word, I do not think the Factories Act is applicable. It seems to me neither to fall within the words nor the intention of the Act. The object of guarding machinery which is being used constantly is, at least to a large extent, to provide against the carelessness bred of constant user of the machine. Where a machine is being tested, not only is it important, as pointed out in the evidence, that the different parts should be exposed, in order that it may be observed whether it be working properly

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or not, but those making the test are in a position to guard themselves and others against inadvertent or thoughtless acts.

The case went to the jury on two points: first, as to the common law liability arising by reason of the alleged breach of the Factories Act, and secondly, under the Employers' Liability Act. The jury having returned a common law verdict, which in my opinion is wrong, we have then to consider whether the plaintiff was entitled to succeed on the other branch of the case. That branch turns on the direction given by the foreman to the plaintiff to test this machine, and the fact that the plaintiff called the foreman's attention to the danger of doing so, but his nevertheless carrying out the order which resulted in his injury, I am not prepared to say that the jury could not properly find a verdict on this branch. After returning their verdict, they were asked by the learned judge what damages they would give if they were to decide it under the Employers' Liability Act. They answered $2,880, and if it were not for the difficulty which I shall presently mention, I should hold that the plaintiff is entitled to that sum. The difficulty arises in this way: the jury were directed that as a matter of law the Factories Act is applicable to this case, and that if they found that it was practicable to guard the machine, then there was a breach of the Act, and they were told that the voluntary assumption of the risk by the plaintiff is no defence against a breach of statutory obligation, so that if they came to the conclusion that the plaintiff was entitled to recover at common law, they need not consider the question of *volens*. They were told, however, that if they came to the conclusion that he was entitled under the Employers' Liability Act, then they should consider the question of *volens*. Having brought in a common law verdict, and not having answered the questions submitted to them, there is nothing to shew that they have considered the question of *volens* at all. Hence that element in the case has not been passed upon by the jury.

MACDONALD, C.J.A.

I think, therefore, that there should be a new trial.

IRVING, J.A.

IRVING, J.A.: It seems to be conceded by the writers of all the leading text books that the defence *volenti non fit injuria* is

not available to the employer in an action founded on the violation by him of a statutory duty. This has been decided by the Divisional Court in England: *Beddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, followed in Ontario by the Common Pleas Division in *Rodgers* v. *Hamilton Cotton Co.* (1893), 23 Ont. 425. In *Love* v. *Fairview* (1904), 10 B.C. 330, where it was argued that assuming the plaintiff had suffered injuries from the nonfulfilment of statutory duties, no right of action was given him, the Full Court held that there was, and MARTIN, J. at p. 346, held that the right to statutory protection could not be lost by waiver.

IRVING, J.A.

I think the judgment must be set aside on the ground that the provisions of the Factories Act, R.S.B.C. 1911, chapter 81, section 32, are inapplicable to this machine. It was a product of the mill, and not part of the plant of the factory.

I am of opinion that the order for a new trial should go.

MARTIN, J.A.

MARTIN, J.A.: I concur with the learned Chief Justice. The point of *volens* is covered by *Love* v. *Fairview* (1904), 10 B.C. 330, to which I referred during the argument.

New trial ordered.

Solicitors for appellants: *Taylor, Harvey, Baird, Grant & Stockton.*

Solicitors for respondent: *McCrossan, Harper & St. John.*

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IN RE RAHIM.

Statute, construction of—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 6—Habeas corpus—Appeal—Right of where accused discharged from custody.

IN RE RAHIM

No appeal lies to the Court of Appeal from an order discharging an accused person on a writ of *habeas corpus*.

Per IRVING, J.A.: In this case the person discharged had not come within the operation of the Immigration Act (Dominion) so as to be considered as a person "lawfully landed."

Ikezoya v. *C.P.R.* (1907), 12 B.C. 454 not followed, IRVING, J.A. dissenting.

APPEAL by the Immigration Department (Dominion) from an order of MORRISON, J. reported (1911), 16 B.C. 471, made on the 9th of November, 1911, at Vancouver. The applicant, a Hindu, came to British Columbia in January, 1910, from Honolulu, where he had resided for some two years, carried on business and acquired some property. He was admitted into Canada as a tourist, in which capacity he travelled in Canada, reaching British Columbia again in the following October. The law governing immigration was passed in the meantime, and he was held under the new law for deportation, but without any proper inquiry being held as to his status as provided by the amended law. He applied to MURPHY, J., (1911), 16 B.C. 469, who released him on a writ of *habeas corpus,* holding that the new law was not retrospective, and did not apply to his case, and as the old statute contained no provision for the deportation of a person in his circumstances, he could not be deported under the new law.

Statement

The applicant was again placed in custody under the new law, and an inquiry duly held, under which he was again ordered to be deported. He applied to MORRISON, J., who again released him upon substantially the same grounds as followed by MURPHY, J.

The Department appealed, and the appeal was argued at Vancouver on the 15th of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Macdonell, and *MacGill,* for appellant.
McCrossan, for respondent.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.: Insofar as the right of appeal is concerned, there is no distinction between this case and that of *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at p. 536, unless it is to be found in the difference in the wording of section 19 of the English Judicature Act, and section 6 of the Court of Appeal Act, R.S.B.C. 1911, chapter 51.

Said section 19 provides that:

"The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of the High Court or the judges thereof."

Section 6 of our Act provides:

"An appeal shall lie to the Court of Appeal from all judgments, orders or decrees made by the Supreme Court or a judge thereof."

Certain exceptions are made in both Acts. It was said in *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454, that the English section merely confers jurisdiction to hear and determine appeals, and does not confer rights of appeal except in cases "inherently appealable"; while ours gives the right of appeal as well as the jurisdiction to hear and determine. But the *ratio decidendi* of *Cox* v. *Hakes, supra,* does not support this distinction. The considerations which induced their Lordships to hold that the Legislature did not intend to give an appeal against an order discharging the person detained were, that where the person had been set at liberty and hence was out of the control of the Court, the reversal of the order would be futile, because no judicial machinery had been provided for effectuating the order of the appellate Court in such a case if the order appealed from was reversed; and further, that so grave a change in the existing law affecting the liberty of the subject ought not to be inferred from general words, though wide enough to include such a change. Lord Bramwell summed up the former consideration in the following language at p. 527:

MACDONALD, C.J.A.

"I think that if an order of discharge is a judgment or order of judicature, and so within the very words of section 19, a limitation must be put on them excluding such appeals, to avoid the futility, inconvenience, and incongruity which would otherwise result."

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And at p. 534, Lord Herschell said:

"The jurisdiction of the Courts whose functions were transferred to the High Court, to discharge under a writ of *habeas corpus*, was well known, and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine appeals to extend to such cases."

Practically the same reasons are given by the majority of their Lordships. This indicates very plainly to my mind that the question whether the words of section 19 were wide enough to give a right of appeal where none existed before, or were confined to cases where there was an "inherent right of appeal," was not the one troubling their Lordships, but whether, as Lord Herschell put it in the language just quoted, "the Legislature did not intend the right to *hear and determine appeals* to extend to such cases," that is to say, cases where the detained person had been discharged. In other words, he has left no room for the distinction which was drawn in *Ikezoya* v. *C.P.R., supra.*

Again, in *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.* (1878), 4 App. Cas. 30, section 19 was held to give a right of appeal where none existed before, that is to say, where there was no "inherent right of appeal"; and in *Barnardo* v. *Ford* (1892), A.C. 326, it was held that an appeal in *habeas corpus* was within the section where the appeal was not from an order discharging the person, but from one granting a writ of *habeas corpus,* although there was formerly none. The *Ikezoya* case is also opposed to the unmistakable opinion of the House of Lords in *Cox* v. *Hakes, supra,* on the impossibility of effectuating the order of an appellate Court in such a case as the present. The other consideration which influenced the decision is stated by Lord Halsbury at p. 522:

MACDONALD, C.J.A.

"But your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

This "policy of centuries" was respected by the Parliament of Canada when it gave an appeal in *habeas corpus* from an order of remand, but none from an order of discharge: Revised Statutes of Canada, 1906, chapter 139, section 62.

I have come to the conclusion, which to my mind is irresistible, that the distinction drawn by the Full Court is non-existent, and as to give full effect to it in this case would establish here a practice in conflict with the practice in England, and would prejudicially affect the liberty of the subject, I must, with very great reluctance, decline to follow the *Ikezoya* case. At the same time I wish to make it plain that I fully recognize that judicial comity which leads one Court to follow the decisions of another of co-ordinate jurisdiction. While the rule is a salutary one, I think it must yield in some cases to considerations which are paramount to it in importance.

MACDONALD, C.J.A.

The appeal should be quashed.

IRVING, J.A.: This is an appeal from MORRISON, J., who cancelled the order of deportation made on the 11th of August, 1911, by the chairman of the board of inquiry (Wm. C. Hopkinson) against Hoessan Rahim.

The order was made after the board of inquiry had sat. In my opinion the fact that this inquiry had been held shews that the matter was not the same as that adjudicated upon by MURPHY, J. The point determined by MURPHY, J. was that under the new Act a determination by a board of inquiry was necessary. He also expressed the opinion that under the old Act the applicant had no right to be admitted to Canada as a "tourist." In my opinion the matter now under consideration is not *res judicata*: see *The Duchess of Kingston's Case* (1776), 2 Sm. L.C. 8th Ed., 832.

IRVING, J.A.

The statutes are the Immigration Act (Dominion) 9 & 10 Edw. VII., chapter 27, assented to on the 4th of May, 1910, and 1 & 2 Geo. V., chapter 12.

The point we have to determine is this: Does subsection 10 of section 33 of the Act assented to on the 4th of May, 1910, apply to the case of a man who was permitted to land in Canada on the 14th of January, 1910?

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The old Act was chapter 93 of R.S.C. 1906, amended in 1907, chapter 19, and again in 1908, chapter 33. By the Act of 1908, the Governor-General in Council was authorized to prohibit the landing of "any immigrants who have come to Canada otherwise than by a continuous journey from the country of which they are natives or citizens, and upon through tickets purchased in that country."

On the 27th of May, 1908, an order was passed under this section, and was in force when the respondent landed in Canada. He being a native of India, although for 18 months a resident of Honolulu, and arriving upon a ticket not purchased in India, was prohibited from landing in Canada.

The officer in charge of the immigration agency in Vancouver undertook to allow the respondent to land, by a device not at that time sanctioned by statute. He arranged that the respondent should be regarded as a tourist, making only a short stay in Canada.

It is in consequence of that arrangement that the respondent is able to say that he was "lawfully landed" in Canada when he first came to the country. In his affidavit of the 29th of August, 1911, he says:

"When I first came to Canada I had no intention of remaining in Canada permanently, but have since acquired business and land investments such as demand my personal attention and presence to look after."

IRVING, J.A.

In my opinion, the respondent was only "lawfully landed" in the sense deposed to by the immigration agent. In any other sense the respondent was not "lawfully landed." He was allowed to land on the representation made by himself that he was merely passing through Canada as a tourist; and when that trick (if trick it was) is exposed, or the intention to go on (if such intention there was) is abandoned, the tourist becomes liable to the provisions of the Act. He is still "prohibited," and remains so until his case is dealt with by the proper authorities.

Then, on the 4th of May, 1910, the Immigration Act, chapter 27, was passed, and on the same day another order in council was passed, under section 38 of the new Act, covering the same ground as that made under the authority of the Act of 1908.

The new Act recognized the system of temporary permits,

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and repealed the earlier Acts; and it is argued that under the new Act of 1910 there is no way of dealing with the case of a man who was landed under the Acts repealed.

Section 19 of the Interpretation Act prevents such confusion of rights and duties. The repeal of the earlier Acts and the revocation of the regulation of the 27th of May, 1908, did not affect (b) the previous operation of the Act; nor (c) the obligation or liability of the respondent under the said regulation; nor (e) the legal proceeding or remedy in such liability; and the respondent was therefore liable to be dealt with as if the old Act or regulation had never been repealed.

But by subsection 10 of section 33 a new rule was laid down to the effect that

"Every person who enters Canada as a tourist or traveller or other non-immigrant, but who ceases to be such and remains in Canada, shall forthwith report such facts to the nearest immigration officer and shall present himself before an officer for examination under this Act, and in default of so doing he shall be liable to a fine of not more than one hundred dollars and shall also be liable to deportation by order of a Board of Inquiry or officer acting as such."

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"Such facts" must mean in the present case "change of intention."

Now, if the respondent had wished to avail himself of this privilege (and in my opinion it was his duty to do so if he wished to remain), the statute would be read as having a retrospective effect so as to confer on him and those who had been admitted by the immigration agents prior to the passing of the Act as tourists, an opportunity of being "lawfully landed" in the fullest sense of the words. The extraneous circumstances, as well as the words of the Act, shew that subsection 10 applies to the respondent's case.

I would allow the appeal.

As to the jurisdiction of this Court to hear an appeal from an order of discharge, I would refer to the reasons for judgment of HUNTER, C.J. in *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454 at p. 456. That decision, being a judgment of the old Full Court as to its jurisdiction, should, in my opinion, be followed.

MARTIN, J.A.

GALLIHER, J.A.

MARTIN and GALLIHER, JJ.A. concurred with MACDONALD, C.J.A.

Appeal quashed, Irving, J.A. dissenting.

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Railways—Arbitration—Lands not taken but "injuriously affected"—Increased value—Set off—Misconduct of arbitrators—Claimants misled by course of proceedings—Railway Act, R.S.C. 1906, Cap. 37, Sec. 198.

In constructing their line of railway on a tidal flat conveyed to them by a municipality, the Railway Company cut off the access of abutting owners to the water. In an arbitration to ascertain the amount of damage done such owners, the Company submitted that the increased value which the land of the abutting owners acquired by reason of the construction of the railway should be set off against any damage suffered: section 198 of the Railway Act. To this submission the owners replied that that provision of the Railway Act did not apply, as the Railway Company had not taken, or "passed through or over" their lands. The arbitrators, after having taken evidence, promised to set out in their award the respective amounts found as damages and increased value. In the result this was not done, as the arbitrators failed to agree on the point, although they were agreed that the increased value more than offset the damage, and, on the request of the Company, made an award of one dollar damages. On an application to GREGORY, J. to set aside the award, he was of opinion that the owners had been misled by the promise of the arbitrators to make alternative awards, and, although unintentional, the failure to make the award as indicated constituted misconduct sufficient to justify the setting aside of the award.

On appeal, the Court was evenly divided.

Statement

APPEAL from the decision of GREGORY, J. on an application heard by him at Vancouver on the 14th of February, 1912, to set aside the awards of arbitrators made in a number of cases under the provisions of the Railway Act (Dominion), whereby one dollar compensation or damages was awarded in each case for lands alleged to have suffered damage through the exercise by the Company of the powers conferred upon it. The lands in question abut on False Creek flats, which had been conveyed by the municipality to the Company. There were no lands taken from the applicants, but their access to the water would be cut off by reason of the construction of the railway. The arbitrators came to the conclusion that the benefit caused to the lands by the construction of the railway offset the damage caused, and

gave an award of one dollar. The land owners applied to GREGORY, J. to set aside the award on the ground of misconduct, in that the arbitrators had promised to give alternative awards, but did not do so, and thereby misled or lulled the applicants, who otherwise would have shaped their case differently, into the belief that they were going to get something. GREGORY, J. set aside the awards on the ground that the arbitrators had agreed to leave the matter in such a position that their ruling on certain disputed points could be reviewed, and that the applicants, relying on this, probably conducted their case in a different manner than they otherwise would. The Railway Company appealed.

A. D. Taylor, K.C., for the applicants.

A. H. MacNeill, K.C., for the Railway Company.

28th February, 1912.

GREGORY, J.: This is an application to set aside the awards of arbitrators made in a number of cases under the provisions of the Railway Act, whereby one dollar compensation or damages was awarded in each case for lands compulsorily taken by the Company from the applicants, or which have suffered damage through the exercise by the Company of the powers conferred upon it. It is contended that the arbitrators so conducted the arbitration as to be guilty of legal misconduct.

While the Railway Act only gives the right of appeal when the award exceeds $600, subsection 4 of section 209 of that Act provides that the existing law or practice in any Province as to GREGORY, J. setting aside awards shall not be affected. The Arbitration Act, R.S.B.C. 1911, chapter 11, declares by subsection (2) of section 14 that

"Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

During the arbitration the Company offered evidence of the increased value which the applicants' lands acquired by reason of the construction of the railway, contending that the same should, under the authority of section 198 of the Railway Act, be set off against the damage suffered. The applicants urged that that provision did not apply in the circumstances, as the

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railway did not pass "through or over" their lands, etc., the injury to them being caused solely by their being deprived of their access to the sea—the railway being built in the bed of False Creek (beyond low water) on lands belonging to the City of Vancouver. This raised a very nice legal question, and, although counsel unfortunately do not exactly agree as to what took place, I think their disagreement is more one of language than of substance, and, on the material before me, it seems clear that the arbitrators agreed to take the evidence and to make alternative awards, or to set out in their award the amount they found as damage and also the amount they found as benefit, or increased value, and to make an award for the difference, for I do not see how they could make effective alternative awards. An award in the alternative would be no award at all. The chairman of the board acted as spokesman, but as neither of his co-arbitrators raised any objection, it seems to me that it must be taken that he spoke for them all. The arbitrators did not do as they agreed to for the reason that no two of them could agree as to the amounts—if the benefit was not to be taken into consideration. Had both the benefit and damage been set out in the award, and an award made for the difference in case the damages were the greater, the award would have been bad on the face of it, provided the benefit should not be considered under a true interpretation of section 198 of the Railway Act,

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and if the award was bad on its face it could have been set aside by the Courts.

It seems clear to me that the arbitrators agreed to leave the matter in such a position that their ruling on the disputed evidence could be reviewed, and the applicants, relying upon that, very likely conducted their case in an entirely different manner than they would have done otherwise.

The arbitrators' statement was equivalent to a promise to state a case for the opinion of the Court, which, it is admitted, they had power, but were not obliged to do. The applicants, having full confidence in their contention, would naturally pay little or no further attention to the evidence directed to shew the increased value of the lands by reason of the construction of the railway. In the result, the arbitrators apparently took this

increased value into their consideration, but no two of them ever agreed as to the amount of damage or the amount of increased value, but considered that the increase more than offset the damage, and at the request of the Company gave an award of $1 for damages. If their award stands, the applicants are deprived of the opportunity to obtain the opinion of the Court as to the admissibility of the disputed evidence which the arbitrators, in effect, told them should be preserved to them by the form in which the award would be given. In other words, the applicants have been misled—unintentionally, of course— by the arbitrators, and I think that amounts to such misconduct as enables the Court to set their award aside. If the Company's present contention is accepted, the applicants have no remedy whatever, no matter how great an injustice has been done to them, and the letters of LAMPMAN, Co. J., who was the third arbitrator, indicate that there was no intention of doing this.

There may be ample misconduct in a legal sense to permit the Court to set aside an award, even when there is no ground for imputing the slightest improper motive to the arbitrators, and illustrations of this are to be found in Russell on Arbitrations and Awards, 9th Ed., p. 367. See also Halsbury's Laws of England, Vol. 1, p. 466, section 979, where, under the English Arbitration Act, 1889, it has been held to be misconduct for an arbitrator to make an award after he has been asked to state a special case.

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It may be added that in order to comply with section 198 of the Railway Act it appears that the arbitrators should ascertain the amount of damage and the amount of benefit, otherwise how can they "set off," as the statute requires, "such increased value" against the damage?

If the award fails to decide on all matters referred for arbitration, whether such omission appears on the face of the award or by affidavit, the Court will set the award aside: Russell on Arbitrations and Awards, 9th Ed., p. 370 and cases there cited; see also *In re Marshall and Dresser's Arbitration* (1842), 12 L.J., Q.B. 104, when a disputed amount of money was left unascertained.

Had it not been for the arbitrators' promise there would have

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been no redress, for there would have been no legal misconduct, and the parties would be bound by their findings of fact and rulings of law.

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Mr. *MacNeill* referred to a great many cases, and particularly *In re Doberer and Megaw's Arbitration* (1903), 34 S.C.R. 125, but more fully dealt with in the judgment of MARTIN, J. in the Court appealed from, 10 B.C. 48; also *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418, but these cases are, I think, quite different in principle from that before me.

As there does not appear to be any authority to refer the matter back to the arbitrators, there will be an order setting aside the awards in all the cases.

The appeal was argued at Vancouver on the 15th of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

A. H. MacNeill, K.C., for appellant Company: The failure of the arbitrators to carry out the promise of giving an alternative award is not misconduct such as to justify the setting aside of the award; the misconduct complained of must be something stronger than that. The land owners did not pursue their correct remedy; if they disagreed with the ruling of the arbitrators, they should have applied for a stated case. The whole substantial question at issue is the right or power to offset the benefit of the proposed work against the damage done. There must be a substantial grievance.

Armour, J. R. Grant and *A. W. V. Innes,* for respondents: It is not necessary to shew *mala fides* to constitute misconduct; there may be legal misconduct. The arbitrators here led us to believe that we were going to get a stated case, and we were misled in not getting it. In any event, we submit that there is no award here at all in the circumstances, because the decision given shews that the arbitrators did not agree on any values. They cannot evade their duty by merely saying that the benefit caused offsets the damage. None of our land having been taken, and the incorporeal right of access to the water being interfered

with, the arbitrators could not consider the question of any benefit or damage to the land itself.

MacNeill, in reply: If there were no lands taken, then there is no compensation due.

Cur. adv. vult.

28th June, 1912.

MACDONALD, C.J.A.: This is an appeal from an order of GREGORY, J. setting aside an award under the Railway Act. During the course of the proceedings before the arbitrators, a question was raised as to whether or not section 198 of the Railway Act could be applied to the facts of this case. No land had been taken from the owners claiming compensation. The railway did not touch their land, but they claimed that their lands were injuriously affected because of the construction of the railway between these lands and the sea. During such discussion it was suggested that the question of the applicability of said section be referred to the Court. This suggestion was not acted upon because the arbitrators promised the land owners that they would make it appear on the face of the award whether or not they had applied that section. This promise was not kept. There is no suggestion of bad faith on the part of the arbitrators, but the result was that the land owners refrained from taking advantage of their right, and relied upon an equivalent, namely, to move if necessary after the award was made, which they could do if it appeared on the face of the award that the arbitrators had applied the section erroneously. Evidence was offered to shew that the arbitrators did apply the section. It was objected to on the ground that arbitrators are not permitted to give evidence as to what took place amongst themselves. In my view of the case it is not necessary to decide this question. The evidence shewing the promise is that of one of the solicitors in the proceedings before the arbitrators, and the award itself shews that that promise was not carried out. It does not, therefore, seem to me essential to shew either that the arbitrators did or did not apply the said section. They may have done so, and that, in my opinion, is sufficient to invalidate the award, if, in fact, the section is inapplicable.

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In terms the section deals only with "lands through or over which the railway will pass." The increased value is that created "by reason of the passage of the railway through or over the same, or by reason of the construction of the railway." These two disjunctive clauses refer to lands through or over which the railway will pass. Farther along in the section, reference is again made to the lands with which the section deals. The arbitrators are to set off the increased value against the loss or damage that may be suffered or sustained by reason of the Company "taking possession of or using said lands." To arrive, therefore, at the conclusion that section 198 applies, it is necessary to delete from the section the words "through or over which the railway will pass," and to disregard the plain and ordinary meaning of the words "taking possession of or using the said lands."

As against what I conceive to be the plain and grammatical construction and meaning of the clause, it is urged that the word "such" in the phrase "such value or compensation," at the beginning of the section, refers to the antecedent sections relating to arbitration, and properly includes both classes of claims, namely, those where land is taken, and those where land is not taken or entered upon. This contention is correct, but I think the word "such" must be restricted in its meaning by the rest of the section. It was also contended that it is not reasonable to suppose that Parliament intended to make one rule for one class of claims and another for another class, when there is no apparent reason for doing so. While that is a circumstance not to be overlooked, it does not appear to me to outweigh the obstacles in the way of the construction which the appellants contend for.

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It was also strongly pressed upon us in argument that the railway actually entered upon and took possession of "land" of the respondents within the definition of land in the interpretation clause of the Act; that the respondents' rights to access to the sea are hereditaments within the meaning of that definition, and that when the appellants built their line along the foreshore in front of respondents' property, they in effect took an interest in land by destroying that which was an incident to the enjoyment of the land. The respondents' right to access to the sea

may be an hereditament; if so, it is an incorporeal one. The Railway Company is given by the Act the right to enter in and upon the lands of other persons, and, looking at the whole purpose and context of the Act, I am of opinion that, assuming the right in question to be an hereditament, the definition of land above referred to must be confined to corporeal hereditaments. I think the language of Lord Watson in *Great Western Railway Co.* v. *Swindon and Cheltenham Railway Co.* (1884), 9 App. Cas. 787 at p. 800, is applicable to this case. He says, speaking of the English Lands Clauses Consolidation Act, which contains a definition of land practically identical with that in the Railway Act:

"Now, it is perfectly true that the word 'lands,' as it occurs in many of the leading clauses of the Act of 1845, is, by reason of the context, limited to corporeal hereditaments. Taking that Act *per se*, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate, are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having, by the construction of their authorized works, injuriously affected the dominant land to which the easements are attached."

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The appeal should be dismissed.

IRVING, J.A.: GREGORY, J. set aside the award on the application of the owners.

Section 198 requires the arbitrators to ascertain what amount should be allowed to the owner for inconvenience, loss or damage suffered or sustained by reason of the Railway Company taking possession of or using his land. Although I am of opinion that section 198 does not apply to this case, yet I do not see why the arbitrators should not in ascertaining the compensation payable to the land owner in respect of the incorporeal hereditament adopt for their guidance the principles indicated by section 198. Incorporeal hereditaments are deemed to be in the possession of him who is entitled to them. In this case the railway do not take possession of or use any of the land the property of the respondents. How then can anything be set off against some-

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thing which cannot be ascertained? Section 198, therefore, in my opinion, cannot apply to this case.

That being so, can this award be set aside? Mr. *Grant* contended that as the arbitrators had taken section 198 into consideration, they were guilty of that technical misconduct which is included in section 11 of the Arbitration Act—misconduct only in the sense that they made a mistake as to the scope of the authority conferred on them. There is no doubt that an award will be set aside if an arbitrator has gone wrong in point of law, and the error in law appears upon the face of the award. This was decided many years ago: *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189, and was acted upon by this Court in *Humphreys* v. *Victoria* (1912), 17 B.C. 258.

The principle is this: Courts are unwilling to interfere with the decision of those whom the parties have selected to be the judges of the law and the fact; so, a mistake in law will not be ground for setting aside the award unless it appear on the face of the award: see cases collected in Redman on Arbitrations and Awards, 4th Ed., p. 276.

As pointed out by Parke, B. in *Phillips* v. *Evans* (1843), 12 M. & W. 309 at p. 312:

> "Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case."

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It has always been the inclination of the Courts to uphold rather than set aside awards: *In re Templeman and Reed* (1841), 9 D.P.C. 962; *Cock* v. *Gent* (1844), 13 M. & W. 364, 15 L.J., Ex. 33; *Falkingham* v. *Victorian Railways Commissioner* (1900), A.C. 452; *Adams* v. *Great North of Scotland Railway Co.* (1891), A.C. 31 at p. 39; *Re An Arbitration* (1886), 54 L.T.N.S. 596. *Hodgkinson* v. *Fernie, supra,* is instructive on other points raised in this case. It lays down the rule that there is no difference whether the award is by a professional man or a layman, and it also deals with the question as to an award being sent back for a mistake in law not apparent on the face of the award, but disclosed in a separate writing; and the case of *Jones* v. *Corry* (1839), 5 Bing. N.C. 187, was mentioned as an authority to send the case back on the strength

of a letter written by the arbitrator after the award had been made. In 1861, *Holgate* v. *Killick,* 31 L.J., Ex. 7, 7 H. & N. 418, the Court refused to look at a letter written by a master to whom the case had been referred.

In 1875 *Dinn* v. *Blake* was decided, L.R. 10 C.P. 398; the application to remit was based upon a verbal statement made by the arbitrator as to the grounds on which he had decided. The application was refused because it was not shewn that the arbitrator had admitted that he had decided erroneously—following *Lockwood* v. *Smith* (1862), 10 W.R. 628. There was nothing to indicate to the Court that the selected tribunal was desirous of the assistance of the Court: *per* Archibald, J. at p. 391, and willing to review his decision on the point on which he believed himself to have gone wrong—*per* Brett, J. at p. 390; Denman, J. expressed the same opinion. In the interval the opinion had been given by Baron Cleasby in a decision of the House of Lords in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418 at p. 436, that in an application to set aside an award on the ground of mistake or misconception of the arbitrator, the Court would probably reject no means of informing itself whether the arbitrator had proceeded upon such a mistake or misconception.

The rule is summed up by Strong, J. in *McRay* v. *Lemay* (1890), 18 S.C.R. 280 at p. 284, that to interfere on the ground of mistake in law (1) the mistake must appear on the face of the award, or in some paper which forms part of the award, and is by reference incorporated with it; (2) where the arbitrator has himself shewn that he is not satisfied with the award and is desirous of the assistance of the Court on the point on which he believes he has gone wrong.

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Having reached this conclusion, we may now read what the arbitrators have said or written.

The letters written by LAMPMAN, Co. J. cannot be regarded as an official act—see section 197, subsection 2—so as to amount to an expression of opinion by, or a request of the majority, that the Court should lend its assistance and advice to the board. The land owners, therefore, have not satisfied the onus which is cast on them, that there should be an expression

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from a majority of the board of a willingness to reconsider the matter. Judge Lampman's letter amounts to nothing more than this: "We may have been wrong, and therefore you are in a position to carry it further"; but it is to be noted that, although requested in terms to do so, he does not request nor consent to the application being made.

Then there remains the point, put before us by Mr. *Armour,* that the counsel for the land owners were misled by a remark made at the hearing by the presiding member of the board, and that as a consequence the land owners have been deprived of their right of appeal. It has been truly said that the surest way to have a misunderstanding is to have an understanding. The usual and proper way to take the opinion of the Court as to the scope of a submission to arbitration when either party is dissatisfied with the course taken at a hearing, is to apply to revoke the submission or to ask for a special case: *Hart* v. *Duke* (1862), 32 L.J., Q.B. 55. In this case no request was made to the board for a stated case, nor was there any application to revoke.

It is true that certain evidence was objected to, but the record does not shew that the objection was pressed, or that any agreement was made between counsel, or between the board and counsel. In fact, as already mentioned, there was no request for, and therefore no refusal of, a stated case. The counsel for the land owners chose to rely on what the presiding member said was his intention, but it seems the presiding member was not able to carry out this intention.

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I do not see that the other members of the board were bound by the presiding member's declaration of intention, as the submission was to two. The promise of the presiding member, if promise is the proper word, must be understood as being subject to the speaker's ability to get another to agree with him. I do not think either of the other two members of the board were called upon to express approval, or dissent from the proposed course, nor was counsel for the railway bound to object. An obligation to speak by no means arises from a mere challenge.

I would allow the appeal.

MARTIN, J.A.: While I have reached the same conclusion as the learned Chief Justice, I am far from being free from doubt about the true construction of this difficult section, 198, and I think it desirable to add that in my opinion the definition of "lands" is sufficient to cover the right of access in question, which is a "natural right" and a species of easement: Goddard on Easements, 7th Ed., p. 3; Halsbury's Laws of England, Vol. 11, p. 238; and clearly an incorporeal hereditament according to the authorities, *e.g., Great Western Railway Co.* v. *Swindon and Cheltenham Extension Railway Co.* (1882), 52 L.J., Ch. 306, (1884), 9 App. Cas. 787, 53 L.J., Ch. 1,075; *The Queen* v. *Cambrian Railway Co.* (1871), L.R. 6 Q.B. 422; *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662; *North Shore Railway Co.* v. *Pion* (1889), 14 App. Cas. 612, which also shew that there is no difference in principle between the rights of access of riparian owners on tidal waters or navigable and non-navigable streams. But it would appear from the judgment of Lord Watson in *Great Western Railway Co.* v. *Swindon and Cheltenham Extension Railway Co., supra,* that unless the corresponding English Lands Clauses Consolidation Act "is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion," it does not apply to hereditaments of that nature, and in view of the fact that this opinion of Lord Watson has been applied by the Court of Appeal in *City and South London Railway* v. *United Parishes of St. Mary Woolnoth and St. Mary Woolchurch Haw* (1905), A.C. 1, I think it is a safe guide to follow in this case in construing the effect that is to be given to the crucial words in section 198, *viz.*: "any lands of the opposite party through or over which the railway will pass." Though the expression in our interpretation subsection (15) of section 2 is at first blush somewhat broader than the corresponding interpretation of "lands" in section 2 of the English Lands Clauses Consolidation Act of 1845 (8 & 9 Vict., chapter 18), because it says that land "includes real property, messuages, land tenements and hereditaments of any tenure," whereas the English Act omits "real property,"

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yet that really does not carry the matter any further, because although in the broad conveyancing sense all property must be either real or personal, yet the decision of the Queen's Bench Division in *Laws* v. *Eltringham* (1881), 8 Q.B.D. 283, shews that where the sense of the matter and the context require it, the wide term "any real or personal property whatsoever" will be applied to tangible property only, and not to incorporeal rights.

I therefore agree that the appeal should not be allowed.

GALLIHER, J.A.: This is an appeal from the judgment of GREGORY, J. setting aside an award dated the 9th of December, 1911, made by LAMPMAN, Co. J. and Mr. Howard J. Duncan, two of the arbitrators appointed to act in an arbitration between the Vancouver, Victoria and Eastern Railway and Navigation Company and J. J. Banfield and Evans B. Deane.

The award simply fixes the damage sustained at one dollar per lot, and is valid on its face.

The parties attacking the award contend that it was agreed between the arbitrators and all parties concerned, during the arbitration proceedings, that the arbitrators should in their award set out the amount by which they considered the lots in question were damaged by the construction of the railway, and also the amount by which they considered such lots were benefited. Had this been done, the claimants would have been in a position to apply to the Court to set aside the award on the ground that the arbitrators proceeded upon a wrong principle, provided section 198 did not apply, which was the claimants' contention.

GALLIHER, J.A.

There is nothing on the face of the award which shews whether or not the arbitrators dealt with section 198, but in correspondence which took place, subsequent to the award being made, between the chairman, Judge Lampman, and the solicitors for the claimants, it appears that the two arbitrators who made the award considered that section 198 did apply, and the only reason why they did not shew on the face of the award the amount of damages and the increased value was because no two of them could agree as to the damage to any particular lot, but

two of them did agree that the damage was fully compensated by the increase in value, and awarded the nominal sum of one dollar in respect of each parcel.

Objection was taken that this correspondence is not admissible, and I agree that it is not admissible insofar as it may be sought to shew matters included in or excluded from the award by the arbitrators: *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418 at p. 436.

But we have in the arbitration proceedings the opinion expressed by the chairman, Judge Lampman, and Mr. Duncan, another of the arbitrators, that section 198 did apply, and evidence was taken of increased valuation, subject to objection by the claimants. In looking at the award itself, and having in view the evidence, I think we must reasonably assume that in making their award the arbitrators did apply section 198.

It then becomes necessary to inquire as to whether the agreement as contended for was entered into, and if so, have the respondents been prejudiced in the non-fulfilment of same? I think we must assume from all the evidence before us (and in this respect I consider the correspondence admissible), that the agreement was entered into or the promise, as it is styled, given. When the question of the applicability of section 198 came up, the plain and proper course for the respondents to have taken was to have asked for a reference under the Arbitration Act, and is the one which I think counsel should have pursued, but on the other hand, had the arrangement been carried out as promised, they would have had their remedy, as I have above pointed out. We have, then, to consider whether the failure to carry out the arrangement amounted to legal misconduct, and if so, have the respondents been prejudiced? Under the authorities, a request made to refer and a consent given, but not acted upon by the arbitrators, and an award made without such reference has been held to be legal misconduct, and the award set aside. I can see no distinction between such a case and the one under consideration, but as the Courts should favour the upholding of awards unless some manifest injustice would be done, we should, I think, consider whether the respondents have been prejudiced by reason of the failure of the arbitrators to carry out their agreement.

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Admittedly if section 198 applies, they could not be prejudiced, as under the course the respondents chose to pursue, had the arbitrators carried out their promise, the only ground open would be that section 198 did not apply, and therefore the arbitrators had proceeded upon a wrong principle.

Section 198 is as follows:

"The arbitrators, or the sole arbitrator, in deciding on such value or compensation, shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands."

The short point in regard to this section is: does it apply where the company constructing the railway does not use or take possession of any of the lands of the applicants?

The respondents' contention is that because the Company does not use or take possession of any of the lands of the applicants, no set off under this section can be applied, although they may claim damages in respect of such lands for injurious affection by reason of the construction of the railway.

GALLIHER, J.A.

Under the section, the arbitrators having decided that by reason of the construction of the railway an increased value beyond that common to all lands in the locality has been given to the lands in question, shall take into consideration such increased value. "Shall take into consideration," clearly implies for some purpose, and the respondents say that purpose is qualified by the latter words of the section, "and shall set off such increased value," etc.

I think we should endeavour to get at what was the intention of Parliament in framing this section. The first part of the section directs that the arbitrators "shall take into consideration," not only increased value by reason of the passage of the railway through or over the lands, but by reason of the construction of the railway as well—this latter is wide enough to include lands not touched by the railway, and since the arbitrators are directed to consider increased value in respect of such, direction

in this respect would be useless if it can only be applied to lands actually entered upon.

There are no words in the section directly forbidding such application, and it should not be presumed that Parliament legislates uselessly. It seems to me that Parliament could not have intended (that in a case where compensation for damage is sought in respect of lands not taken, but injuriously affected by the construction of a railway), after directing that increased values to the lands by reason of such construction should be considered, that such increased values could not be set off. If necessary, I would read in at the end of the section the words "or by reason of the construction of the railway."

I think that section 198 is applicable, and if I am right, the respondents are in no way injured by the failure of the arbitrators to carry out the agreement.

The judgment of GREGORY, J. should be reversed, and the award restored.

Court evenly divided.

Solicitor for appellant Company: *A. H. MacNeill.*

Solicitors for respondents: *A. D. Taylor, D. G. Marshall,* and *J. R. Grant.*

Appeal Dismissed
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T. J. TRAPP & CO., LIMITED v. W. S. PRESCOTT.

Principal and agent—Auctioneer—Liability of—Disclosure of principal—Credit given by auctioneer to purchaser on cash sale—Right to recover—Post-dated cheque given by purchaser.

An auctioneer knocked down two horses to a bidder, who, before the sale, stated that he had not sufficient money in the bank at the time, but would have in two days from then and would give his cheque so dated. The auctioneer gave the owners of the animals a cheque for the purchase price, less the commission. The purchaser took possession of the animals, but the following day, on discovering that another person had a lien on the horses, stopped payment of his cheque.

Held, affirming the finding of GRANT, Co. J. at the trial (IRVING, J.A. dissenting), that the auctioneer was entitled to recover the amount paid.

Per MARTIN and GALLIHER, JJ.A.: That the defendant, by notifying the auctioneer of the stoppage of payment of the cheque, had waived presentment.

Per IRVING, J.A.: That on the evidence, the auctioneer had not disclosed the principals.

APPEAL by defendant from the judgment of GRANT, Co. J., at Vancouver, on the 13th of October, 1911, in an action to recover $460 on a cheque given by defendant to plaintiffs, and payment of which had been stopped by him in the following circumstances: Plaintiffs are auctioneers carrying on business at New Westminster, and incidentally with the weekly public market on Fridays there, they held auctions of live stock at the market place. On the 12th of May, 1911, they held such an auction, at which a team of horses, brought there by two Japanese, was put up for sale. Defendant's attention having been directed by the auctioneer to the horses as a bargain, he proceeded to bid upon them, but told the auctioneer that he did so on the understanding that as he had not enough money in the bank to pay immediately, but would on the following Monday, and would give a post-dated cheque accordingly. This was considered satisfactory by the auctioneer, and the horses were knocked down to defendant. Defendant gave over his cheque as agreed, and plaintiffs afterwards, later in the day, gave the

Statement

Japanese their own cheque for the purchase price, less commission. The following day a claim was made by one Brooks to the horses on a lien note, whereupon defendant stopped payment of his cheque. Defendant was informed by the auctioneer at the time of sale that the horses belonged to the Japanese, who had the horses there, were present at the time of sale and were pointed out by the auctioneer.

On the evidence, the trial judge found that the plaintiffs, at the request of defendant, advanced the amount of purchase price of the horses, and gave judgment for plaintiffs accordingly.

D. A. McDonald, for plaintiffs.
Harper, for defendant.

30th December, 1911.

GRANT, Co. J.: The plaintiff Company are auctioneers carrying on business in New Westminster, and the defendant is a horse dealer residing in Vancouver.

This action is brought to recover from the defendant the sum of $460, being the amount of a cheque for money paid by the plaintiffs to one Yamanato for and at the request of the defendant, upon his undertaking to reimburse the plaintiffs. The defendant, by his dispute note, denies that he drew the cheque or that the plaintiffs paid the same as aforesaid.

In addition, the defendant pleads several alternative defences, impeaching the business methods and integrity of the plaintiffs, and which defences have not been supported by a scintilla of evidence of wrong-doing or misrepresentation on the part of the plaintiffs.

The facts of the case are briefly as follow: The plaintiff Company appear upon the public market of New Westminster at regularly stated periods as auctioneers; that, amongst other things brought into said public market for sale by auction was a span of horses by two Japanese. The defendant was in the market at this time and was invited by the auctioneer to bid upon the horses. It is very clearly shewn by the defendant himself that he at this time knew that the plaintiff was selling the horses in the capacity of auctioneer, and not as the owner, and also that the defendant was then told by the auctioneer that

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the horses were the Japs' horses and had been used in the shingle business and that they—the Japs—were selling out. From the evidence I am satisfied that the plaintiffs' representative, T. D. Trapp (who was officiating as auctioneer), the defendant, and the Japs were all present when the horses were being sold, and the auctioneer, at the request of the defendant, asked the Japs if the sale had to be for cash, and was informed that it was for cash, and with the full knowledge that the sale was a cash sale, the sale proceeded, and the horses were knocked down to the defendant for $460. When the horses were knocked down to the defendant, the Japs, at the direction of the auctioneer, took the horses to the spot indicated by him and there hitched them for the defendant, who subsequently took them away. While the auctioneer did not give the name of the Jap or Japs who caused the horses to be sold to the defendant, he certainly brought to the knowledge of the defendant the fact that certain designated Japs, who were present and discussed the terms of sale as cash, were the persons who were selling the horses through the agency of the plaintiff Company, and if the defendant desired any further information as to the name or names of these Japs, or their title to the horses, it was on him to inquire before purchasing. I think the case at bar is clearly distinguishable from the line of cases cited by counsel for the defendant. In this case there was certainly a disclosure of the principal to the buyer. Here the principal was actually present, and through the auctioneer settled the terms with the buyer. In this case the auctioneer was not dealing in his own name or selling for an undisclosed principal. The principal was present to the defendant's knowledge and fixed the terms, as cash, to the defendant's knowledge, and when defendant thereafter proceeded to bid the horses in at $460 he knew he was required to pay cash upon delivery. Defendant says:

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"I told them (the plaintiff Company) I did not have enough money in the bank, and if they would arrange it I would bid for the horses, and he said he would. I told him about making it till Monday—that I had plenty of money but it was not in the bank, and he (Trapp) said it was all right."

On this point Trapp swears:

"I put the horses up and Mr. Prescott asked me if they wanted all cash and he said he would have it on Monday. I said I would have to put up the money to the Japs, and we took his post-dated cheque with the under-

standing we would put up the money, and I said he would have to take his chances as to the horses."

From the evidence, I am satisfied that the plaintiff Company paid over to the Japs the purchase price of said horses and that this took place before any intimation was given to the plaintiffs that there was a lien clause note against the horses.

From the evidence of what took place at the sale, the conditions of sale, what was said at the time by the auctioneer, the seller and the buyer, all the surrounding circumstances, and the subject-matter of the sale, I cannot bring myself to the conclusion that this case falls within the principle laid down in the cases cited by the counsel for the defendant in his very exhaustive argument filed herein, *viz.*: *Franklyn* v. *Lamond* (1847), 16 L.J., C.P. 221; *Fisher* v. *Marsh* (1865), 34 L.J., Q.B. 177; *Williams* v. *Millington* (1788), 3 Camp. R.C. 583; *Payne* v. *Elsden* (1900), 17 T.L.R. 161; *Barker* v. *Furlong* (1891), 60 L.J., Ch. 368; and *Consolidated Co.* v. *Curtis & Son* (1892), 61 L.J., Q.B. 325.

As I view the facts, the case falls within the principle enunciated by Lord Bramwell in *Cochrane* v. *Rymill* (1879), 27 W.R. 776 at p. 777, as follows:

"What if a man were to come into an auctioneer's yard holding a horse by the bridle and saying: 'I want to sell this horse . . . . will anyone buy him? . . . . there would be no act of conversion on the part of the auctioneer; he would be merely a conduit pipe.'"

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That, in my judgment, is practically all that was done here. The Japs brought the horses into the yard and requested the auctioneer to put them up for sale at a sum not less than $450 cash. The defendant, who was present, requested the auctioneer to try if he could not get the Japs to wait until Monday —some three days—which they refused to do. From my view of the law and the evidence, the auctioneer was simply a conduit pipe through which the negotiations proceeded and the sale was made, and in compliance with the request of the defendant the plaintiffs consummated the transaction by actually taking delivery of the horses for the defendant and advancing on his behalf the amount for which the horses were sold, and that there was no implied warranty by plaintiffs of title or quiet enjoyment. See also on this point *Turner* v. *Hockey* (1887),

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56 L.J., Q.B. 301, and *Wood* v. *Baxter* (1883), 49 L.T.N.S. 45, and Halsbury's Laws of England, Vol. 1, section 1,060.

As I view the evidence, the plaintiffs, at the request of the defendant, advanced and paid for the defendant the sum at which the said horses were knocked down to the defendant, *viz.*: $460, and the defendant at the same time drew and delivered to the plaintiffs his cheque, dated as of the 15th of May, 1911, for said sum of $460, payable to the plaintiffs at the Canadian Bank of Commerce, Vancouver, which said cheque has not been paid owing to the defendant, before the date of payment thereof, having stopped payment and notified the plaintiffs to that effect.

Defendant's counsel in his argument filed with me, first raises specifically the question that the plaint is defective inasmuch as there is no allegation that the cheque was presented for payment. In his dispute note the defendant sets out the fact that the defendant stopped payment of the cheque and immediately notified the plaintiffs. Under that state of affairs subsequent presentment and notice were, in my opinion, waived: see *Blackley* v. *McCabe* (1889), 16 A.R. 295, even had it been relied on as a defence.

As to the contention of defendant's counsel that T. D. Trapp —the man who acted for the plaintiff Company in the sale— had no personal licence, and therefore could not collect any commission, I do not think the objection is open to the defendant on the pleadings, as he sets up, among other things, that the horses were purchased at an auction sale held by the said T. D. Trapp as auctioneer. Under section 82 of the County Courts Act, the defendant shall state briefly the several grounds of defence. As this ground was not set up in the first instance, or raised by amendment, it cannot now be availed of. There will be judgment for the plaintiffs for $460 and costs.

GRANT, CO. J.

The appeal was argued at Vancouver on the 18th and 19th of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Harper, for appellant.

D. A. McDonald, for respondents.

Cur. adv. vult.

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MACDONALD, C.J.A.: The appeal should be dismissed. I agree with the trial judge.

IRVING, J.A.: This is an appeal from GRANT, Co. J., who gave judgment for the plaintiffs.

The auction sale took place in the market building and an actual possession of the horses was given to the auctioneer, who did not disclose the names of the vendors. He did say, however, that the horses were the property of some Japs who were in the shingle bolt business, and were selling out. That, in my opinion, does not constitute a disclosure of the principals so as to exempt the auctioneer from liability. In *Mainprice* v. *Westley* (1865), 6 B. & S. 420, 34 L.J., Q.B. 229, there was a suggestion (but dissented from by Blackburn, J.), that an auctioneer might escape personal liability by contracting merely as agent without disclosing the vendor's name, but in *Woolfe* v. *Horne* (1877), 2 Q.B.D. 355, it was held that as the auctioneers had the actual possession of the goods, they must be regarded as the persons who made the contract, and could, therefore, be sued personally for non-delivery, notwithstanding the name of the principal had been disclosed to the buyer at the time of the sale.

IRVING, J.A.

GRANT, Co. J., in his judgment, says the plaintiffs certainly brought to the knowledge of the defendant the fact that certain designated Japs, who were present and discussed the terms of sale as cash, were the persons who were selling the horses. The evidence does not bear out the findings of fact.

It is true the Japs were designated, but as I have mentioned, in a general way; whether they were present or not was not made known to the defendant. "I did not know whether the Jap was the hostler, or the owner, or what"; and the discussion of the terms of sale took place wholly between the plaintiffs' auctioneer and their clients. I cannot reach the conclusion of fact that the principals were present to the defendant's knowledge, or that they, in answer to the defendant's request, fixed the terms as cash, to the defendant's knowledge.

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In *Hanson* v. *Roberdeau* (1792), 1 Peake, N.P. 163, Lord Kenyon said:

"Where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is entitled to look to him personally for the completion of the contract."

There are many authorities which shew that auctioneers may recover compensation from their principals. Why is that the rule? Because there was, as in this case, a contract between the plaintiffs and the Japanese: *Adamson* v. *Jarvis* (1827), 4 Bing. 66; but as the plaintiffs withheld the name of the Japanese from the defendant, it is impossible for the defendants to institute an action against the Japanese.

The learned County Court judge thought the auctioneers were a mere conduit pipe as described by Bramwell, L.J. in *Cochrane* v. *Rymill* (1879), 40 L.T.N.S. 744 at p. 746. The essence of the case put by Bramwell, L.J. was that the possession remained in the principal, and the auctioneer merely introduced the purchaser to a vendor.

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How different is this case. Trapp brought up the horses to auction; he sold them, and after they were knocked down, he said to the Japanese in whose charge they were: "Put them over there," and there they remained in his possession, until the defendant gave his cheque. After that he, with Trapp's permission, took them away.

I would allow the appeal.

MARTIN, J.A.: As to the first objection that the cheque was not presented for payment, I am of the opinion that the action of the defendant (the drawer) in notifying the payees that he had stopped payment of the cheque, constituted a waiver, under section 92 (*e*) of that formality. At first sight it might appear that the case of *Hill* v. *Heap* (1823), D. & R.N.P. 57 (which is also inaccurately and insufficiently reported in 25 R.R. 791), was an authority to the contrary, but it is distinguishable, because in that case the direction to stop payment had not been "communicated" by the drawer to the payee, but voluntarily by the drawees. In the case at bar, it was not the drawees (the Canadian Bank of Commerce), but the drawer himself

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who gave the direct notification, and in that lies the distinction, because it does not appear by the report that it was any part of the drawee's duty in the *Hill* case to communicate the drawer's orders to them to the payees, and therefore the payees had no right to rely upon their voluntary statement, as they were not the drawer's agents for the purpose of making it, and so the payees were not discharged from the obligation of presentment, because, as Lord Ellenborough said in *Prideaux* v. *Collier* (1817), 2 Stark. 57 at p. 58: "It was possible that [he] might change [his] mind," and withdraw his countermand of payment, a thing he could not be expected to do after he had directly notified the payees of his countermand, and they were entitled to act on the assumption that he would not change his mind unless he notified them of his intention to do so.

Second, on the facts, I have no doubt that it was quite open to the learned trial judge to reach the conclusion that he did, that the sale was for cash, and the auctioneer advanced the purchase price to the defendant, who knew the auctioneer was selling on behalf of two Japanese then present in possession of the horses, though no names were given; and in view of that finding, the case is brought within the principle of *Wood* v. *Baxter* (1883), 49 L.T.N.S. 45, wherein the Queen's Bench Division held that (p. 47):

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> "An auctioneer who sells goods not as owner but as auctioneer only, though not naming his principal, does not, without more, warrant the title to the goods sold; he does no more than engage that he is in fact instructed and authorized by his principal to sell."

With respect to the motion for a nonsuit, all I have to say is that if I am right in my view as to the presentment of the cheque, then the learned judge was right in refusing it.

The appeal should be dismissed.

GALLIHER, J.A. concurred in the conclusions reached by MARTIN, J.A.

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Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *McCrossan & Harper.*
Solicitors for respondents: *Craig, Bourne & McDonald.*

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HEDDLE v. BANK OF HAMILTON

HEDDLE v. BANK OF HAMILTON.

Lost property—Purse left in public office of bank and taken possession of by clerk of bank—"Lost," what constitutes—"Laid down and forgotten," distinction between and "lost"—Clerk acting as careful employee—Making claim as finder.

An article laid down and forgotten is not lost property in the sense that the person picking up such article acquires title thereto against any person but the true owner.

Thus, where a clerk in a bank, while attending to his duties behind the counter, noticed lying on a desk used by patrons of the bank in the public portion of the premises, a wallet containing money, and picked it up and handed it over to the manager for the rightful owner, who never was discovered or appeared to claim it:—

Held, affirming the judgment of GRANT, Co. J. at the trial, that the money could not be considered lost within the proper meaning of the term.

APPEAL from the judgment of GRANT, Co. J. in an action tried by him at Vancouver in January, 1912, for a declaration that a sum of money picked up in a bank, by a clerk employed in such bank, was "lost property," the title to which, in the absence of a claim by the rightful owner, was in the finder. The facts are fully set out in the reasons for judgment of the learned trial judge.

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Price, for plaintiff.
Armour, for defendant Bank.

22nd January, 1912.

GRANT, Co. J.: The plaintiff in this action was, in November, 1907, a clerk in the defendant Bank. On or about the 18th of November, 1907, he found the sum of $800 on the defendants' premises, outside the railing of the offices, in that portion of the building left open to and used by the public.

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The facts shew that near the centre of that part of the Bank used by the public, or persons doing business with the Bank, is a large circular desk or place where patrons of the Bank generally do the required writing in and about drawing out or depositing money in the Bank and the indorsing of notes or other work

of that nature. On the 18th of November, 1907, about 11.30 a.m., the plaintiff, while attending to his duties in the savings department of the Bank, observed a wallet lying on this desk and went and picked it up, and on opening it he discovered it contained money amounting to $800. He at once called the attention of the accountant to the matter and the wallet and contents were handed over to the teller and reported to the manager. Notice was at once given to the various banks in the city, to the newspapers, and to the chief of police, and everything reasonable was done by the Bank to find the owner of the money so left, but, so far, without any success. The manager of the local Bank reported the matter to the general manager, who directed the money to be entered in the books of the bank in what is called the "Lost Money Account," where it still remains. No claimant appearing for the money, the plaintiff demanded that it be returned to him as the finder thereof.

This demand the defendants refused to comply with, notwithstanding the plaintiff's offer to pay the Bank all expenses incurred in advertising, and to indemnify it against any claim which might be made by any claimant.

About Christmas, 1908, the defendants gave the plaintiff, in addition to his regular salary, the sum of $25. This sum, the plaintiff says he was informed by the accountant, was for interest on the $800. The manager, on the other hand, swears it was a Christmas gratuity—a reward for his fidelity for reporting and handing over the wallet and contents to the Bank—and that he never authorized the payment of any interest on the money to the plaintiff and never treated him as a depositor of the money. I cannot find that the $25 was a payment of the interest as alleged by the plaintiff, but do find it was simply a gratuity or reward for his fidelity in the matter.

GRANT, CO. J.

The question before me is: Was the money lost money?—for, if it was, the finder of it acquired a title thereto and a right of possession thereof against all the world except the true owner: *Armory* v. *Delamirie* (1722), 1 Str. 504; *Bridges* v. *Hawksesworth* (1851), 21 L.J., Q.B. 75; Cyclopædia of Law and Procedure, Vol. 19, 535-6; and this even though the finder was a servant of the Bank and the finding was made during his hours

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of duty: *Hamaker* v. *Blanchard* (1879), 35 Am. Rep. 664; *Tatum* v. *Sharpless,* 6 Phil. 18.

The aforegoing authorities treat only of articles lost, as distinguished from articles voluntarily laid down and forgotten. Had this wallet been found on the floor, or in some place where it might have fallen or been parted with casually and involuntarily, so that the mind could have no impress of or recourse to the event, there would be strong ground for believing that it was lost.

This point came before the Supreme Court of Oregon in *Severn* v. *Yoran* (1888), 20 Pac. 100, and the following extract is from the judgment of the Court delivered by Lord, C.J.:

"Ever since the decision of Lord Chief Justice Pratt in *Armory* v. *Delamirie* (1722), 1 Str. 504, it seems to be settled law that the finder of lost money has a valid claim to the same against all the world except the true owner, and generally it may be said that the place in which it is found creates no exception to this rule. 'But property,' said Turnkey, J., 'is not lost in the sense of the rule if it was intentionally laid on a table, counter, or other place by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place the finder has no right of possession against the owner of the building': *Hamaker* v. *Blanchard* (1879), 90 Pac. St. 379."

Strictly speaking it may be said that before a thing can be found it must have been lost; and the property which the owner has simply or unintentionally laid down or deposited in some place and for the time forgotten where it was left or put, in legal intendment can scarcely be considered as lost: see *Lawrance* v. *State,* 1 Humph. 229.

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A case almost identical with the one at bar is *Kincaid* v. *Eaton* (1867), 98 Mass. 139. There the chattel was laid down by the owner on a desk provided for the use of such persons as should have business at the bank, and the Court held that the bank and not the discoverer had the right to possession as against all but the true owner. The English Courts as well as the American Courts distinguished between things lost and things mislaid or forgotten, as see *Cartwright* v. *Green* (1803), 8 Ves. 405, and *Merry* v. *Green* (1841), 7 M. & W. 623, and, having regard to said distinction and the evidence and circumstances detailed in the case at bar, I cannot find that the wallet

with its contents can be designated "lost property" so as to give the plaintiff possession thereto against all the world except the rightful owner. The location where the wallet was discovered evidenced that it was not involuntarily dropped, but placed there intentionally by some person, and under such circumstances, as I understand the law, the discoverer of the wallet has no right of possession as against the Bank within whose premises it was found.

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The action will be dismissed, with costs, if the defendants demand same, but, under the circumstances of this case, if the Court had a discretion as to the costs, it would order that the defendants' costs taxable on the trial, together with its costs as between solicitor and client, should be taken from the money in question and be a charge against same.

GRANT, CO. J.

The appeal was argued at Vancouver on the 24th of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Price, for appellant.
Armour, for respondents.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.: The facts of this case are not in dispute. The plaintiff was a clerk in the defendants' employ, and noticing a wallet on the desk provided for the use of customers of the Bank in that portion of the Bank premises used by customers, came from behind his desk, picked up the wallet, and found that it contained $800 in money, which he counted and then had his count checked over by the accountant. He appears to have left the money with his superior as a matter of course, and without any statement that he would make claim to it as the finder, should the owner not be discovered. The defendants advertised for claimants, but none appeared. This occurrence was in November, 1907, and no claimant having appeared, this action was brought in October, 1911. There is evidence that perhaps as early as 1909 the plaintiff asserted his right to possession of the money. The learned County Court judge held

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that in these circumstances the wallet could not be said to have been lost as that term is understood in law; that it was intentionally placed on the desk by the owner and forgotten; and hence was within the defendants' protection, or the protection of its banking house. In *Bridges v. Hawkesworth* (1851), 15 Jur. 1,079 at p. 1,082, Patteson, J., delivering the judgment of the Court, and referring to notes picked up from the floor of a shop by a stranger, said:

> "The notes never were in the custody of the defendant (the shop keeper), nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there."

There are no cases in our own or in the English Courts to indicate the character of the intentional deposit mentioned above, but a number of such cases have been before the Courts in the United States. The general result of these is stated in Cyclopædia of Law and Procedure, Vol. 19, p. 539.

I think the fair presumption is that the wallet was intentionally placed on the desk by the owner of it while there on business with the Bank; that he forgot to pick it up, and while it is true, as evidenced by his not returning for it, that he appears never to have afterwards recollected where he had placed it, yet in the first instance, the placing of it upon the desk was his voluntary act, and anyone seeing it there in a position which would rather rebut than suggest loss, ought to regard it as under the protection of the house. At all events, it seems to me that the plaintiff, a servant of the Bank, seeing it there, should consider it to be within such protection, and I think it was his duty to hand it over to the custody of the proper officers of the defendants, as he did. The evidence of what he did at that time would bear the inference that he was acting, not as a stranger in the Bank, but as one of its servants. He made no claim to possession of the wallet. It was not he, but his superiors, who were at the expense of advertising the finding of the wallet, and I do not think that either the plaintiff or the defendants regarded the relationship between them as that of bailor and bailee.

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I think, therefore, the appeal ought to be dismissed, but in the circumstances, and having regard to the somewhat doubtful

question of law involved, I trust the defendants will not ask for costs.

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IRVING, J.A.: I would dismiss this appeal.

The case of *Bridges* v. *Hawkesworth* (1851), 21 L.J., Q.B. 75, we are told, stands by itself, and on special grounds. It is not necessary to restate the facts of that case, but that decision is not an authority where the bank notes have been left on a table or desk provided for the use of customers, and where the person picking them up was an employee of the Bank.

The general principle, as stated by Lord Russell in *South Staffordshire Water Company* v. *Sharman* (1896), 2 Q.B. 44 at p. 47, is in favour of the defendants. There can be no doubt that the manager of the Bank had a power and intent to exclude unauthorized interference with any articles placed upon the tables or desks in the Bank building. In other words, articles left on the desks or tables are within the protection of the house.

Mr. Heddle does not give much information as to the circumstances connected with the finding of this money.

He goes to work at 9 a.m. He found it before noon sometime. He cannot remember whether or not there was any person in that part of the Bank at the time (he found it). It was on the round desk in the centre of the business part of the Bank. He was in his part of the Bank when he saw it.

There must have been an interval between the time of first noticing the wallet and the time of picking it up, and during that interval it must have become apparent to Mr. Heddle that the wallet was lost—if lost is the proper word to apply—otherwise Mr. Heddle would not have felt at liberty to walk out from his post and pick it up.

Now, during that interval, if some person—say a newsboy selling papers, or a beggar—some person whose appearance would in itself forbid the idea that he was the owner of the wallet—were to come into the Bank, and after an interval pick up this wallet, would not Mr. Heddle have said, "Leave that alone," or reported the matter to the manager? I think he would. I think that would have been his duty, and that satisfies me that this wallet was under the protection of the house.

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Holmes, in his work on Common Law, cites *McAvoy* v. *Medina* (1866), 87 Am. Dec. 733, where it was held that a barber had a better right to a pocket book which had been left on the barber's table than had the finder. The opinion pronounced by the Court is rather obscure, but the learned author seems to think that the Court was of opinion that the barber had possession as soon as the owner left the shop.

Kincaid v. *Eaton* (1867), 98 Mass. 139, is also cited by Holmes. Here, again, the language of the judgment is uncertain. It may be read as implying that what is called the public part of a bank is public only for certain specified purposes.

IRVING, J.A.

That is the ground that I would rest my decision on. For, in my opinion, one of the public who is admitted for the purpose of doing business with the Bank taking possession of an article which he finds on a bank counter, by so doing exceeds the right or privilege given to him.

MARTIN, J.A.

MARTIN, J.A.: This appeal should in my opinion be dismissed on the authority, principally, of *McDowell* v. *Ulster Bank,* a decision of the Lord Chief Baron in the Court of Exchequer, Ireland, which is stated to be reported in 60 Alb. L.J. 346, which volume I have been unable to obtain, but there is a full note of the decision in 19 Am. & Eng. Encyc. of Law, p. 582. That was a case of the porter of a bank who, in sweeping the floor after the bank was closed for the day, picked up a roll of banknotes under a table provided for the use of customers, and it was held that since it was by reason of the existence of the relationship of master and servant, and in the performance of the duties of that service, that the porter had acquired possession of the property, therefore the possession of the servant of the bank was the possession of the bank itself.

The case at bar is even stronger, because the pocket book herein was left during banking hours on a round desk, provided for customers, in the centre of the main business room, and was seen by the plaintiff, who had charge of the savings and collection department, from his place, from which he went out and got it. Strictly speaking, I think, largely on the authority of *Bridges* v. *Hawkesworth* (1851), 15 Jur. 1,079,

that the true inference in the surrounding circumstances would be that the pocket book was involuntarily mislaid, and not lost, in the proper sense of the word, though the point, in my view of the case, is not really material.

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Apart from the relationship of master and servant, different inferences may, and should, obviously, be drawn from the varying circumstances in which lost or mislaid property is found. For example, the bare inference to be drawn from the finding of a fur cape in a bank would be different from that of a roll of notes, because customers bring money to a bank to deposit, or pay promissory notes, etc., but not so fur capes; likewise in the case of bags of grain found in a mill which is in the habit of grinding grain for customers, or buying the same; or a watch requiring repairs found in a watchmaker's shop; or a pair of boots picked up in a cobbler's shop.

MARTIN, J.A.

In the case at bar the inference to be drawn is clearly adverse to the plaintiff's contention, and I think the appeal must fail, with costs.

GALLIHER, J.A.: I agree entirely in the reasons so clearly and ably set out by the learned County Court judge.

GALLIHER, J.A.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *E. M. N. Woods.*
Solicitor for respondents: *D. G. Marshall.*

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CLARK v. CANADIAN PACIFIC RY. CO.

CLARK v. CANADIAN PACIFIC RAILWAY COMPANY.

Master and servant—Railway—Brakeman on freight train injured by water standpipe alongside track—Pipe of standard approved by Board of Railway Commissioners—Statutory protection—General and special orders of Board—Publication of orders—Effect of.

The Board of Railway Commissioners, by an order dated the 2nd of February, 1910, approved of the defendant Company's plan of water standpipes, to be placed not less than seven feet six inches from the centre of the track. By a general order, dated the 9th of November following, the Board directed that "water standpipes shall not be nearer than two feet six inches from the widest engine cab." Plaintiff was injured by being knocked off the side ladder of a freight car by coming in contact with a water standpipe which was only sixteen and a half inches from the cab of the engine pulling the train in question. In an action for damages, the jury found in favour of the plaintiff, but the trial judge set aside the verdict.

Held, on appeal, that as the first order was a special one, and was not overruled or displaced by the second one, and moreover had the effect of a statute, the defendants could not be held guilty of negligence.

Statement

APPEAL by plaintiff from the judgment of GREGORY, J. setting aside the verdict of a jury rendered in his favour in an action tried by him at Vancouver on the 26th of April, 1911. The action was brought for damages for injuries received by the plaintiff while employed as a brakeman, and being knocked off a moving car through, as alleged, coming in contact with a water standpipe. The claim also alleged that the standpipe was too close to the track to permit of a man standing on the side ladder of a freight car. The defence was that the pipe was a proper one, authorized by the Board of Railway Commissioners; that there was contributory negligence; common employment and *volens*. Plaintiff, whilst signalling with his lantern in shunting operations, fell, or was knocked off the car, and lost a hand under the wheels. The jury found defendant Company guilty of negligence; that the standpipe was too close to the track; and gave damages in $3,000.

S. S. Taylor, K.C., for plaintiff.

Sir C. H. Tupper, K.C., and *McMullen*, for defendant Company.

26th June, 1911.

GREGORY, J.: This is an action for damages for injuries received by the plaintiff while acting as brakeman for the defendant Company by being knocked off a moving train through coming in contact with a water standpipe. The statement of claim alleges that the accident happened while the plaintiff, pursuant to his duties as brakeman, was in the act of using his lantern signalling the engineer in shunting operations, and that the standpipe was too close to the track to permit a man standing on the side of the freight car (as plaintiff was) to pass safely by the water pipe on a moving train.

The defence set up: (a) that the position of the pipe was authorized by the Board of Railway Commissioners; (b) contributory negligence; (c) common employment; and (d) *volens*.

Questions were submitted to the jury, and answers returned as follows:

"(1) Was the defendant guilty of negligence? Yes.

"(2) If yes, was it the cause of the accident and what was it? Yes, the standpipe being too close to the track.

"(3) Was the plaintiff guilty of contributory negligence? No.

"(4) If yes, what was it?

"(5) Could either the (a) plaintiff or the (b) defendant by the exercise of reasonable care have avoided the accident? (Answer this question both as to the plaintiff and the defendant, and if the answer is yes in either case, state what could have been done, in the exercise of reasonable care, so as to avoid the accident.) (a) No, not under the circumstances could the plaintiff have avoided it. (b) Yes, the defendant could have avoided the accident by having the standpipe further back from the track.

"(6) What damages is the plaintiff entitled to, if any? Seven thousand dollars ($7,000) with costs.

"Signed by Foreman of Jury,

"Geo. E. Laidlaw, Foreman."

"(8) Did the plaintiff know of the risk due to the position of the standpipe and have a knowledge and appreciation of its danger, and had he at the time of the accident voluntarily accepted the risk as a risk incident to his employment? 'Not answered. Sent back to answer. F. B. G.'

"Question numbered 8. (a) The plaintiff knew of the risk due to the

GREGORY, J. position of the standpipe, but under the circumstances could not appreciate the proximity of the pipe. (b) Yes.

"Signed by Geo. E. Laidlaw,
"Foreman of Jury."

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Question numbered 8, prepared by the plaintiff's counsel, excepting the words "and have a knowledge and appreciation of its danger," inserted by the Court, was not at first answered by the jury, but was returned to them with the instruction that they must answer it unless they brought in a general verdict in addition to the questions already answered. I refused plaintiff's request to instruct the jury that the "knowledge and appreciation," etc., referred to the exact moment of the accident, and instructed them that it referred to a period of plaintiff's employment prior to the accident.

Each side has moved for judgment.

The only evidence before the jury of the matters out of which the accident arose was the evidence of the plaintiff himself, and it seems clear to me that the plaintiff must be bound by that evidence. The plaintiff has himself negatived his own allegation in the statement of claim that he was in the act of signalling the engineer. He says he was 70 feet away from the place where it was necessary to signal the driver; that he was looking for an emergency signal, not any particular signal, but there is no reason suggested why he should expect an emergency signal of any kind, and if he had received one, it is impossible to see what he could, in his position, have done in response to one. He says:

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"I was supposed to ride on that car that night." "I considered it more convenient to ride on the side instead of on top." "I knew the pipe was there." "I forgot it that night." "I forgot it entirely." "If I had remembered it I could have protected myself by climbing up the side of the car and getting on top." "I have often passed the pipe before, but cannot say I was on the side of the car." "Suppose men have passed it thousands of times before." "I know a brakeman's life is risky."

In these circumstances it seems to me to be impossible to resist the conclusion that the plaintiff was the author of his own injury, irrespective of whether the pipe was placed in a dangerous position or not. It was at best a mere passive instrument, which could not have inflicted any injury without the plaintiff's own act.

Even when the defendant is negligent, if, according to the undisputed facts the plaintiff has shewn that the accident was solely caused by his omission to use the care which any reasonable man would have used, the plaintiff has no action: *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70.

This is not a case where the plaintiff has by defendants' act been suddenly put in a position of danger; and where it is not required of him that he must at his peril act with perfect presence of mind and sound judgment; but is one where the plaintiff has for his own convenience placed himself in a dangerous position and carelessly forgotten all about the danger, if any danger really existed, bearing in mind the fact that plaintiff was not in the act of signalling.

In *Dominion Iron and Steel Co.* v. *Day* (1903), 34 S.C.R. 387, a brakeman was injured by being crushed between the side of a car and a post, and it was held he had no action, the Chief Justice remarking that he was not merely guilty of contributory negligence, but was the victim of his own carelessness. It was perfectly in the power of the servant, by keeping his eyes open, to guard himself against a possible danger of which he was fully aware. By substituting the word "mind" for "eyes," these remarks might have been made with reference to the present case.

Ryan v. *Canada Southern R.W. Co.* (1886), 10 Ont. 745, was a case very similar to the present one, the plaintiff being injured through being on the side of the car, as here. In that case the reporter's statement makes it appear that the plaintiff's position should have been on the top of the car; but Cameron, C.J. at p. 750, says: "It was not made to appear at that time or place it was his duty to be on the side of the car," which is the exact position of the present case; and see Rose, J. to the same effect at pp. 754 and 755. At the bottom of p. 754, Rose, J. illustrates the case of an injury arising through plaintiff's forgetfulness of the narrowness of a passage, and the context shews that in his opinion no action would lie, unless (p. 755) it clearly appeared that he was required to be where he was at the time of the accident, etc.

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In these circumstances it is unnecessary for me to consider the effect of the orders of the Board of Railway Commissioners, relied on by the plaintiff and defendants respectively.

There will be judgment for the defendants, with costs.

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The appeal was argued at Vancouver on the 21st and 22nd of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

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S. S. Taylor, K.C., for appellant: We submit that the jury has found negligence on the part of the Company, and the learned judge has not reversed or displaced such finding. In face of the specific finding by the jury, defendants should have cross-appealed. We also submit that the standpipe, the cause of the injury, was unduly close to the track, and therefore was not properly installed.

Sir C. H. Tupper, K.C., for respondent Company, cited *Woodley* v. *Metropolitan District Railway Co.* (1877), 2 Ex. D. 384; *Smith* v. *Baker & Sons* (1891), A.C. 325; *Church* v. *Appleby* (1888), 58 L.J., Q.B. 144; *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70; *Dominion Iron and Steel Co.* v. *Day* (1903), 34 S.C.R. 387. The pipe complained of is a special standard or class of pipe approved by the Board of Railway Commissioners.

Argument

Taylor, in reply: The fact of its being a special plan of pipe approved or prescribed by the Board of Railway Commissioners does not relieve the Company of liability for negligence if it is improperly installed, or installed in such a way as to be dangerous.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action was dismissed at the trial on the ground that the jury could not properly find that the plaintiff had not been guilty of contributory negligence. After a perusal of the evidence, particularly that of the defendants' trainmaster, I am of opinion that there was sufficient upon which the jury could find as they did: that the plaintiff was not guilty of contributory negligence. Brakemen were allowed

to, and made a constant practice of riding on the ladder on the side of the car, and this seems to have been recognized by the officials as proper and convenient to enable the brakemen to perform their duties efficiently. The fact that the plaintiff inadvertently failed to remember the danger on this occasion does not, in the circumstances of this case, disentitle the jury to acquit him of contributory negligence, and if this were the only question involved in the appeal, I should reverse the judgment dismissing the action, and give judgment for the plaintiff. The difficulty, however, in the plaintiff's way is the existence of an order of the Board of Railway Commissioners, dated the 2nd of February, 1910, approving the plan of water standpipes, which shews the distance they are to be placed from the centre of the railway track, namely, not less than seven feet six inches. It was, I think, proved satisfactorily that the standpipe which injured the plaintiff was of this standard type, and was placed not less than seven feet six inches from the centre of the track. The jury found that defendants' negligence consisted in having this water standpipe too near to the track. It therefore follows that if it were placed there with authority equivalent to statutory authority, and if the authority has not been withdrawn or displaced by the subsequent order, which I shall presently mention, the plaintiff could have no right of action. The subsequent order relied on by the plaintiff is dated the 9th of November, 1910, and it provides that "water standpipes shall not be nearer than two feet and six inches from the widest engine cab." It appeared that the water standpipe in question was less than that distance from the widest engine cab. No evidence was adduced to shew that either of these orders was promulgated pursuant to section 31 of the Railway Act, but no objection was taken by counsel to their admission in evidence on that account. That section provides that any order or decision of the Board published by or with the leave of the Board for three weeks in the Canada Gazette, and while the same remains in force, shall have the like effect as if enacted in the Act, and that all Courts shall take judicial notice thereof. What effect failure to prove such publication might have upon

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this case it is not necessary here to consider, because no objection was taken either at the trial, or on the appeal, based upon said section 31, and the trial seems to have proceeded on the assumption that both orders were in full force and effect except as the earlier one might be affected by the later.

The plaintiff's contention is that the order of November overrides the one of February, while the defendant contends that the order of February being a special, and that of November a general one, the later order has no application to the water standpipe in question here. I think that the defendants' contention is right. The order of November, if I may say so, is very loosely drawn. On its face it appears to have been made *ex parte*. If it were intended to be retroactive, or to cancel the previous order, one would expect that the defendants and all other railway companies affected thereby would have been notified of the proposal to make it. It was not a weighty matter to decide and direct that all water standpipes should in future be erected at a specified distance from the tracks, but to direct that all such pipes already erected along many thousands of miles of railway should, *instanter,* where they were within that distance, be removed and made to comply with the order, was a serious matter, and while uniformity is important in securing safety, yet if so sweeping a change were intended, one would expect that reasonable time would be allowed to enable the railway companies to make the change. The language used in the order is peculiar, and I find some difficulty in construing it. It seems to me to be open to the construction that in future water standpipes shall not be erected nearer than a specified distance from the tracks, but it is also capable of the additional meaning that all existing standpipes which are less than that distance from the tracks shall be removed. Having regard however, to the considerations above adverted to, I cannot think it was the intention of the Board to do more than direct that in future the terms of that order should be complied with. In other words, it was not intended to be retroactive. On this point the position of the defendant Railway Company is perhaps stronger than that of other railway companies, because of

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the order of February. Had it been the intention of the Board to rescind that order, I think it would have been so expressed in the order of November. In this view of the case, even apart from the maxim *generalia specialibus non derogant,* the November order cannot be successfully relied upon in aid of the plaintiff.

It follows that the appeal must be dismissed.

IRVING, J.A.: The action was for damages sustained by the plaintiff, a brakeman on a freight train, on the 24th of November, 1910, by striking a standpipe erected close to the track upon which the train was running. The judge permitted the case to go to the jury for precaution's sake: see *Bridges* v. *Directors, &c., of North London Railway Co.* (1874), L.R. 7 H.L. 213 at p. 235. The jury found that the defendants were guilty of negligence, *viz.*: permitting the standpipe to be too close to the track, and that the plaintiff was not guilty of contributory negligence. In answer to question 5, the jury found that plaintiff could not, by the exercise of reasonable care, have avoided the Company's negligence.

In answer to question 8:

"Did the plaintiff know of the risk due to the position of the standpipe, and have a knowledge and appreciation of its danger, and had he at the time of the accident voluntarily accepted the risk as a risk incident to his employment? (a) The plaintiff knew of the risk due to the position of the standpipe, but under the circumstances could not appreciate the proximity of the pipe. (b) Yes."

On these answers the learned judge ordered judgment to be entered for defendants.

By subsection (*g*) of section 30 of the Railway Act, chapter 37, Revised Statutes of Canada, 1906, the Board of Railway Commissioners is authorized to deal with the structures and works to be used by the railway, so as to protect the employees of the company. Under that section the defendant Company obtained, on the 2nd of February, 1910, an order approving of a system of standpipes to be erected on their road, not less than seven feet six inches from the centre of the track. The standpipe in question was erected in compliance with the requirements of that plan.

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Prior to the passing of that order, a general order had been made (16th December, 1908) with reference to all railways in Canada, requiring the water standpipes to be fastened parallel with the main track; and on the 9th of November, 1910, that general order was repealed and a new general order, providing that the water standpipes shall not be nearer than two feet six inches from the widest engine cab, was promulgated. This pipe is only sixteen and a half inches from the widest part of engine No. 575, so that, judged by the order of the 9th of November, 1910, it is thirteen and a half inches too close.

The learned judge, on motion for judgment, came to the conclusion that the plaintiff was the author of his own injury irrespective of whether the standpipe was placed in a dangerous position or not, and gave judgment for the defendants, following *Dominion Iron and Steel Co.* v. *Day* (1903), 34 S.C.R. 387; and *Ryan* v. *Canada Southern R.W. Co.* (1886), 10 Ont. 745. Both of these cases are illustrations of the rule laid down by Lord Cairns in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155 at p. 1,166, that in certain cases a defendant is entitled to have a direction to the jury to find a verdict for the defendant. This right was recognized by the Judicial Committee in *Toronto Railway* v. *King* (1908), A.C. 260 at p. 269. I do not wish to express an opinion as to whether or not this was a proper case for the exercise by the judge of that duty, and it is not necessary for me to do so, because I have come to a conclusion on another point, and that is, there was no evidence of negligence on the part of the Company to go to the jury.

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In *Grand Trunk Railway* v. *McKay* (1903), 34 S.C.R. 81, the Supreme Court of Canada considered section 187 of the Railway Act (now section 30, chapter 37, Revised Statutes of Canada, 1906), and it was there laid down that the standard of duty, if complied with by a railway company, cannot be regarded by a jury as negligence: compare *Canadian Pacific Ry. Co.* v. *Fleming* (1892), 22 S.C.R. 33.

The defendant Company, in my opinion, were governed by the special order of the 2nd of February, 1910, and not by the

general order of the 9th of November, 1910. The general order of the 9th of November, 1910, provides (article 8) that (a) open drains shall be forthwith covered up; (b) that *in future* semaphores shall not be nearer than six feet from the nearest rail, and that existing semaphores shall be changed, so as to comply with this article, within two years; (c) enacts that no structures over four feet high shall *hereafter* be placed within six feet from the nearest rail without first obtaining the approval of the Board; (e) water standpipes shall not be nearer than two feet six inches from the widest engine cab.

I read (e) with (c), that in placing a standpipe *hereafter,* it shall be at least six feet from the gauge side of the nearest rail, and if the engine cabs are so wide that this will not give a two feet six inches space between the stand and the engine, then they must be put back even a greater distance. It is not to be overlooked that subsections (b) and (c) both deal with the erection of semaphores and structures to be erected; and no provision is made in (e) for the removal of existing standpipes, although we find in (d) a time limit for the removal of existing switches, etc. The circumstance that the general order of November, 1910, was to come into force at once, and a penalty was given for every offence, goes to shew that the immediate removal of the standpipes sanctioned by the special order of the 2nd of February, 1910, and the erection of another, was not contemplated.

There is another argument which perhaps is convincing, namely, that the Board, having by the special order prescribed a special minimum measurement for the defendant Company's standpipes of seven feet six inches from the centre of the track, to meet the requirements of the rolling stock used by that Company, were not in November, 1910, dealing with the Canadian Pacific Railway at all. This argument seems to me not as strong as the one I have put forward, because the general order is remedial in its nature.

GALLIHER, J.A.: This is an action for damages for injuries sustained by the plaintiff in the loss of his right hand.

The plaintiff was a brakeman in the defendants' employ, and

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on the night of the 24th of November, 1910, while in the performance of his duties in the yard at Spences Bridge, a point between North Bend and Kamloops, on the defendants' railway, the wheels of the freight car ran over his right arm, cutting off the hand above the wrist. The only evidence as to how the accident occurred is that of the plaintiff, who swears that he was riding on the ladder on the side of the box car which he was ordered to cut off from the train and switch on to a siding in the yard; that while so riding, the night being dark and the yard badly lighted, he did not see the water standpipe erected close to the track, and while passing, was struck by this standpipe and knocked under the wheels of the car, suffering the injury complained of. The plaintiff's case is that the standpipe was placed so near the track as to be dangerous to brakemen, and to the plaintiff in carrying out his duty, and that the placing or maintaining of the standpipe in that position was contrary to an order of the Board of Railway Commissioners, dated the 9th of November, 1910. The defendants set up: (1) contributory negligence; (2) *volens*; (3) that the order of the Board of Railway Commissioners was not retroactive; and (4) that they were not negligent in that the said Board had, by an order of the 2nd of February, 1910, permitted the defendants' standpipes to be in the position and within the distance from the track in which the standpipe in question was. The question of contributory negligence was left to the jury, and they found in favour of the plaintiff. Such being their finding, and in view of the circumstances disclosed in the evidence, I am unable to say that there was not evidence upon which they could so find; and I also am of opinion that it was a case where the evidence was properly submitted to the jury upon that point. If the defendants committed a breach of a statutory obligation in connection with this standpipe, that would be no answer to a plea of contributory negligence; but in the application of the maxim *volenti non fit injuria* it might be quite different. In the case of *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, Bowen and Fry, L.JJ. expressed the opinion (though it is only *dicta*) that

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where a statutory duty exists, and a breach is committed, the maxim *volenti non fit injuria* is not to be presumed to avail (the Master of the Rolls expressing a different opinion), and in the later case of *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, Wills and Grantham, JJ. both expressed the opinion that under such circumstances the maxim does not apply. In any event, it appears to me that where a statutory duty is cast upon a master in any particular work, the fact that the servant continues in that work, even if he knows its dangerous character and appreciates the risk he is running, does not make him *volens* unless it is brought home to him that he undertook the employment, not only with the knowledge of the risk involved, but of the master's statutory duty in respect thereto, and if such knowledge is not brought home to him, and the master commits a breach of his statutory duty, he is not discharged from his liability to compensate the servant for injuries sustained through such breach of duty.

Here there has been no attempt to shew that the plaintiff had any knowledge that the defendants were under any statutory obligation to have these standpipes a certain distance from the track, so that in that sense he could not be said to be *volens* so as to take him out of the protection afforded by statute. Subsection (e) of the order of the 9th of November, 1910, insofar as it affects this case, is as follows:

"Water standpipes shall not be nearer than two feet six inches from the widest engine cab."

The order of the Board of Railway Commissioners of the 2nd of February, upon which the defendants rely, provides that the distance at which the standpipes shall be placed, measuring from centre of track to centre of standpipe, shall be not less than seven feet six inches. The particular standpipe in question complies with this, but applying the measurement as specified in the order of the 9th of November, the standpipe does not conform to that standard.

Two questions are raised in connection with these orders; first, is the order of the 9th of November retroactive; and second, if it is so, are the Company protected by the order of the 2nd of February? It has been laid down that legislation

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is not retroactive unless it says so in express words, or unless it can be inferred from the language of the Act. We have been referred to the case of *The Village of St. Joachim de la Pointe Claire* v. *The Pointe Claire Turnpike Road Co.* (1895), 24 S.C.R. 486, but this case does not assist us very much. In that case the words used were: "the company cannot, however, place any toll or other gate within the limits of any town or village incorporated by special charter or under the municipal code unless the corporation consents thereto." The words so used clearly could not be considered so as to have reference to existing toll gates. The words in the order of the 9th of November, however, appear to me to be very different, and wide enough to include not only placing but maintaining standpipes, and if this view is correct, it would have reference to every standpipe, whether already existing or to be afterwards erected. It seems to me there is a direct prohibition that no water standpipe shall be nearer than the prescribed distance. It may be said that such an order coming into effect at once would be unreasonable, and that the Company should, at all events, if the order was intended to apply to existing standpipes, have been given a reasonable time within which to make all existing standpipes conform to the order. That may be true, but we have to interpret the order as we find it, without regard to whether it may be reasonable or unreasonable, but it is, of course, an element that ought to be considered in deciding whether the order was retroactive or not. If this subsection stood alone, I am inclined to think the order would be retroactive, but I think subsection (c) of section 8 of the same order must be considered and read with subsection (e). This reads as follows:

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"No structure over four feet high shall hereafter be placed within six feet from the guage side of the nearest rail without first obtaining the approval of the Board."

Now a standpipe is a structure and comes within the general class in subsection (c), and the Board of Railway Commissioners have in effect said in subsection (e)—notwithstanding what is said generally in subsection (c) as to distance of structures fom rail: in the case of water standpipes a distance

which may be different is fixed, leaving the word "hereafter" in subsection (*c*) to govern.

If I am wrong in this conclusion, it remains to consider whether the Company, having obtained the order of the 2nd of February, is exempt from the provisions of this order. By virtue of the Railway Act, Revised Statutes of Canada, 1906, chapter 37, section 30, subsection (*g*), the Board of Railway Commissioners may make orders and regulations with respect to the rolling stock, apparatus, cattle guards, appliances, signals, methods, devices, structures and works to be used upon the railway, so as to provide means for the due protection of property, the employees of the company, and the public, and by subsection 2 of said section 30:

"Any such orders or regulations may be made to apply to any particular district, or to any railway, or section or portion thereof, and the Board may exempt any railway, or section or portion thereof, from the operation of any such order or regulation, for such time, or during such period, as the Board deems expedient."

It seems to me that under these provisions the Board of Railway Commissioners would have power to fix a standard such as was fixed in the order of the 9th of November, and exempt from this standard, either in the same order or in a separate one, the present defendants. In the present case, however, the special order of the 2nd of February, confirming plans of the defendants with regard to water standpipes, is prior in date to the general order, and as in the general order there is no exception or exemption, we are called upon to decide whether the general order overrides the special order. A general later order does not abrogate an earlier special one by mere implication: *Kutner* v. *Phillips* (1891), 2 Q.B. 267. In *The London & Blackwall Railway Co.* v. *The Limehouse District Board of Works* (1856), 3 K. & J. 123 at pp. 126-7; 26 L.J., Ch. 164 at p. 166, Wood, V.C. says:

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"I confess I entertain a strong opinion on the law applicable to this railway company's special Act, with which the local commissioners are seeking to interfere. Whenever the Legislature has, by such an Act, vested powers of a special character in a corporate body or any body of commissioners, for the express purpose of carrying out a particular object which the Legislature has in view, no subsequent statute, in merely general terms giving powers which by their generality apply to the special powers conferred by

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the former Act, will override the special powers thereby delegated to the particular body of commissioners or corporation."

While perhaps not on all fours, it seems to me the principle in this case is applicable to the case at bar if we are to apply the same principle to the orders of the Board of Railway Commissioners as is applied to statutory enactments.

Mr. *Taylor,* however, urged that the approval of the Canadian Pacific Railway plans in the order of the Board of the 2nd of February goes no further than permitting standpipes already erected to remain as constructed, and is therefore under their supervisory powers, and not under the legislative powers as the general order is.

I do not think this can prevail when we consider the effect of subsection (2) of section 30 of the Railway Act above referred to, and any order confirming a standard for water standpipes of any particular railway system made under the powers therein granted would be as much within the legislative powers of the Board of Railway Commissioners as would a general order.

GALLIHER, J.A.

It follows, therefore, that as the standpipe in question conforms to this order of the 2nd of February, by which the defendants are protected, they are not guilty of negligence, and the plaintiff's appeal must be dismissed.

I merely desire to add that there was no evidence adduced to shew that these orders of the Board of Railway Commissioners had been promulgated, but as neither side took objection, and the whole matter was argued before us as if they had, I have so dealt with the case.

Appeal dismissed.

Solicitors for appellant: *Taylor, Harvey, Baird & Grant.*
Solicitor for respondent Company: *J. E. McMullen.*

IN RE THE ROYAL TRUST COMPANY, LIMITED.

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IN RE THE ROYAL TRUST CO.

Statute, construction of—Land Registry Act, R.S.B.C. 1911, Cap. 127, Secs. 175, 176—Computation of fees for registration of mortgages—Principle of.

On an application under section 176 of the Land Registry Act to register a mortgage, the mortgage shall be valued at its true value as provided by section 175, dealing with applications for the registration of a fee.

If, therefore, the registrar be not satisfied as to the correctness of the value affirmed, he may require production of other evidence, or of a certificate under the hand of a valuator.

There not having been any such course adopted in this case, but the inspector of legal offices having ruled that the value of a mortgage for registration purposes is necessarily the full amount of money for which it is given as security:—

Held, that there is no provision authorizing the registrar to make such a ruling, but that the procedure set out in sections 175 and 176 must be adhered to, unless the registrar, "for sufficient cause shewn," direct otherwise.

Semble, that the registrar may vary the methods for adducing such further proofs as he may require, on the applicant for registration shewing him sufficient cause why the provisions of section 176 are impracticable or inconvenient.

APPEAL from the ruling of the registrar of land titles on an application to register a mortgage. Heard by MURPHY, J. at Vancouver on the 28th of August, 1912. Statement

Sir C. H. Tupper, K.C., for the applicant.
H. C. Hanington, contra.

5th September, 1912.

MURPHY, J.: Section 176 of the Land Registry Act directs that mortgages shall be valued at their true value in a manner similar to that provided by section 175 for valuation of land, unless the registrar, for sufficient cause shewn, direct otherwise. Judgment

Section 175 directs that value of land is to be ascertained by the solemn declaration of the applicant. If the registrar be not satisfied as to the correctness of the value so affirmed, he may require production of other evidence, or a certificate of

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such value under the hand of a valuator. No such course has been adopted here, but the registrar, by direction of the inspector of legal offices, has ruled that the value of a mortgage for registration purposes is necessarily the full amount of money for which it is given as security. To my mind, there is nothing in the sections quoted authorizing the registrar to make such ruling. The method of procedure is clearly set out in sections 175 and 176, and is to be adhered to unless the registrar, "for sufficient cause shewn," direct otherwise. This means, I think, that the registrar may vary the methods of adducing such further proofs as he may require on the applicant shewing him sufficient cause why the provisions of section 176 in that regard are impracticable or inconvenient. This qualification is not sought to be invoked here. My judgment in this case is that if the registrar is not satisfied with the correctness of the value as affirmed, he must proceed, as directed by section 176, to ascertain the "true value" of the mortgage. Whatever the "true value" may mean, I hold it does not necessarily mean the nominal amount secured by the mortgage. If it did, there would be no need for the elaborate provisions set out in said sections for its ascertainment. The matter is referred back to the registrar to follow the directions herein set out. Should any difference arise between the applicant and the registrar as to the meaning of "true value," the matter may be spoken to again in the present proceedings.

Judgment

Order accordingly.

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Contract—Guarantee—Statute of Frauds—Sufficiency of memorandum.

A memorandum of a contract of guarantee required under the Statute of Frauds is not necessarily insufficient by reason merely that a blank space left therein for inserting the name of the party whose account is guaranteed has not been filled in, if it appears from the whole document that a person of ordinary capacity must have been able to infer whose account it was intended to guarantee.

ACTION tried by MURPHY, J. at Vancouver without a jury on the 27th of September, 1912. The defendant, Catherine Locklin, was the wife of Joseph Locklin, who had at one time carried on a grocery business in partnership with a man named McNair, under the firm name of Locklin & McNair. Before the partnership with McNair, Joseph Locklin had, in partnership with a man named Philips, carried on a grocery business at the same premises under the firm name of Philips & Locklin, which firm became indebted to the plaintiffs for goods sold. Shortly after the firm of Locklin & McNair commenced business the plaintiffs demanded a guarantee from the defendant, which they submitted on a printed form, and which the defendant signed. Many of the blanks, however, in this form were not filled up, so that the guarantee so sued upon read as follows: Statement

"Messrs. Kelly, Douglas & Company, Limited, its successors and assigns:

"In consideration of your supplying Locklin & McNair . . . . with goods on credit, I hereby guarantee you the due and regular payment of such sum and sums as at any time and from time to time hereafter . . . . shall owe you for goods as supplied or for any other account, but I or we are not to be answerable for more than two thousand dollars ($2,000) in respect of their dealings with you.

"And I give you full liberty to extend the period of credit to the said Locklin & McNair, ... and to hold over or renew any bills, notes or other securities which you may at any time hold and grant . . . . and the persons liable upon said bills, notes and other securities any indulgence, and to compound or otherwise compromise with myself and them as you may think fit without the same discharging or in any manner affecting . . . . liability by virtue of this guarantee, or creating a set-off or claim against the said sum of two

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thousand dollars ($2,000) in respect of any dividend or payment you may receive on account from the said . . . . or the persons liable as aforesaid, or on any security you may hold.

"This is intended to be a continuing guarantee;

"And I hereby waive any notice to me .. .. of the sale of any goods made under this guarantee, and I also waive any demand for payment thereof.

"In witness whereof I have hereunto set my hand this twenty-third day of October in the year of Our Lord one thousand nine hundred and eight.

"Witness. J. H. Locklin. Catherine Locklin."

Statement

Among other defences raised was that the memorandum in question was not sufficient to satisfy the requirements of the Statute of Frauds.

Argument

R. M. Macdonald, for the defendant: The memorandum, to satisfy the Statute of Frauds, must be such a memorandum of the contract as shews, either expressly or by necessary intendment, what the promise of the guarantor is. Here the important blank in the printed form, designed to set out the name of the party whose account is guaranteed, has not been filled in. Consequently, there is no memorandum in writing shewing whose account is guaranteed, and the Court cannot guess that it is Locklin & McNair's account. In point of fact, the plaintiffs are seeking to make it cover the former account of Philips & Locklin: *Vandenbergh* v. *Spooner* (1866), L.R. 1 Ex. 316; *Holmes* v. *Mitchell* (1859), 7 C.B.N.S. 361; *In re Alexander's Timber Co.* (1901), 70 L.J., Ch. 767; *Blagden* v. *Bradbear* (1806), 12 Ves. 466 at p. 471; *Baring* v. *Grieve* (1858), 6 W.R. 466; Halsbury's Laws of England, Vol. 15, p. 468; *Wain* v. *Warlters* (1804), 1 Sm. L.C., 11th Ed., 332; *Hawes* v. *Armstrong* (1835), 1 Bing. N.C. 761 at p. 766; *James* v. *Williams* (1834), 5 B. & Ad. 1,109; *Fitzmaurice* v. *Bayley* (1860), 9 H.L. Cas. 78. No proper explanation of the instrument was, or, indeed, could have been given to the defendant: *Chaplin & Co., Limited* v. *Brammall* (1908), 1 K.B. 233.

M. A. Macdonald, for plaintiffs: Section 4 of the Statute of Frauds must be read with section 5, R.S.B.C. 1911, chapter 92, which shews that the consideration for the guarantee need not

appear in writing, or by necessary inference from a written document. The whole of the agreement may be looked at as throwing light on the promise, and from that it appears obvious that the word "they" has been omitted in the blank form. The agreement cannot be rejected if the intention of the parties can be collected from the words used: Chitty on Contracts, 15th Ed., p. 80; Halsbury's Laws of England, Vol. 15, p. 465. The promise here does appear by necessary intendment. As to the case of *Chaplin & Co., Limited* v. *Brammall* (1908), 1 K.B. 233, that was decided on the ground that the defendant had no independent advice, and must be considered as overruled by *Bank of Montreal* v. *Stuart* (1911), A.C. 120.

Argument

2nd October, 1912.

MURPHY, J.: As to the defence of the Statute of Frauds, I think that a person of ordinary capacity must infer from exhibit 1 that it is a guarantee by defendant to plaintiffs of Locklin & McNair's account for goods or for any other indebtedness accruing after its date. It is only necessary for plaintiffs' purposes to make out the first clause of exhibit 1, as it alone is relied on, and in that clause but one blank occurs. As stated, I think the document itself necessarily supplies the missing pronoun "they." It is to be noted that this is a printed form obviously intended for use in obtaining guarantees primarily in the case of contemplated sales of goods on credit. The persons to be supplied appear herein "Locklin & McNair." They are to get goods "on credit." The guarantee is primarily for goods "as supplied," but is confined to a liability of $2,000 in respect of "their" dealings with plaintiffs.

Judgment

Whilst the balance of the document is not necessary for plaintiffs' case, it can, of course, be looked at in dealing with the question before the Court. The signatory gives liberty to extend the period of credit to the "said Locklin & McNair," and waives notice of "sales of any goods under this guarantee." All these terms, taken as they stand in exhibit 1, when its character is apparent from its form, in my opinion fulfil the requirement of the Statute of Frauds.

As to the defence of undue influence, that is answered by the

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principles laid down in *Bank of Montreal* v. *Stuart* (1911), A.C. 120, when applied to the evidence of the defendant herself. Plaintiffs exercised no influence, undue or otherwise, on defendant.

In the argument, some suggestion that defendant did not understand what she was doing was advanced. No such plea is raised on the record and therefore it is doubtful if it is open to defendant to rely upon it. If it is, I hold that the evidence fails to substantiate such contention.

There will be judgment for the plaintiffs for the amount claimed, with costs.

Judgment for plaintiffs.

MARTIN, J.A. (At Chambers)
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Sept. 12.
WILLIAMSON v. GRIGOR

WILLIAMSON v. GRIGOR.

Practice—Stay of execution pending appeal to Court of Appeal—Order LVIII., r. 16—Discretion—Grounds for exercising same—Insufficiency of affidavit.

Unless special circumstances are shewn, stay of execution or adjournment will not be granted.

Leave will not be granted to file further material on such application.

THE plaintiff appealed from the judgment of GRANT, Co. J. awarding the defendant $438.60 and costs on his counterclaim, and applied for stay of execution, which was refused.

Statement

The plaintiff then applied to MARTIN, J.A., under Order LVIII., rule 16, for stay of execution, which was heard at chambers in Vancouver on the 12th of September, 1912.

Argument

W. A. Macdonald, K.C., for plaintiff, in support of the application, after stating the facts, cited Annual Practice, 1912, p. 1,062; *Merry* v. *Nickalls* (1873), 8 Chy. App. 205; *Morgan* v. *Elford* (1876), 4 Ch.D. 352; *Cooper* v. *Cooper* (1876), 2 Ch.D. 492.

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E. J. Grant, for defendant, *contra*: There are not sufficient circumstances shewn on the material filed that the respondent will be unable to repay the amount levied by execution if the appeal is successful: *The Annot Lyle* (1886), 11 P.D. 114; *Barker* v. *Lavery* (1885), 14 Q.B.D. 769; *Attorney-General* v. *Emerson* (1889), 24 Q.B.D. 56; *Reynolds* v. *McPhail* (1907), 13 B.C. 159. Paragraph 4 of the affidavit in support of the application, which is as follows: "I verily believe that in order to properly safeguard the interests of the plaintiff an order should be made allowing payment into Court of the amount of the judgment recovered by the defendant upon his counterclaim," does not shew any special circumstances which will entitle applicant to an order staying execution. Application has been already made to the Court below (which was cognizant of all the facts) and had been refused, and unless special circumstances are shewn to the Court now applied to, it will not interfere to suspend the operation of the judgment: *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch.D. 471 at p. 478. The defendant's solicitors are quite willing to give the usual undertaking for return of costs, but should not be obliged to give undertaking for return of the amount of the judgment.

Argument

MARTIN, J.A.: The affidavit produced on this application does not go far enough to entitle this Court to interfere in suspending the remedies of the defendant, or to deprive him of the right to the immediate benefit of the judgment in his favour. I am satisfied that the judge below properly exercised his discretion. In the face of the decisions of the Court of Appeal in *The Annot Lyle* (1885), 11 P.D. 114, and in *Barker* v. *Lavery* (1885), 14 Q.B.D. 769, unless some special circumstances are shewn as set forth therein, the Court has no right to interfere with the course of the proceedings. The latter case shews that leave will not be given to file further material, the Court laying it down that "those who apply for a stay of execution must come before us prepared with all necessary materials." This application will, therefore, be dismissed, with costs.

Judgment

Application dismissed.

MURPHY, J.

1912

Oct. 17.

M.
v.
M.

M—. v. M—.

Divorce—Practice—Interrogatories—Harsh—Oppressive—Objectionable.

In divorce, as in ordinary actions, where interrogatories are put, they must not be harsh, oppressive or objectionable.

Statement

APPLICATION to deliver interrogatories in an action for a declaration of nullity of marriage on grounds of impotency, as indicated in the interrogatories proposed to be submitted by the petitioner to the respondent. The application was made to MURPHY, J. on the 14th of October, 1912, at Vancouver.

R. M. Macdonald, for the petitioner.
Fillmore, for the respondent.

17th October, 1912.

Judgment

MURPHY, J.: I have been referred to no case where such interrogatories as numbers 3, 4, 5 and 6, here proposed, have been allowed. The divorce practice in British Columbia is in an anomalous condition, but, presumably, it is the practice of the English Divorce Courts as that existed when English law was introduced here insofar as the same was adaptable to local conditions. Now, whilst it is clear that the old ecclesiastical Courts had discovery powers, their extent seems difficult to ascertain (see *per* Lindley, L.J. in *Harvey* v. *Lovekin* (1884), 54 L.J., P. 1 at p. 3), and utilization seems to have been by interrogating the parties as witnesses: (see *per* Brett, M.R. in the same case). It is true that in that case, which was a nullity case as is this, interrogatories were allowed, but it is to be noted that the Judicature Act is relied on, in part, at any rate, in the reasons for judgment. The interrogatories allowed were, moreover, of a very different character from those here proposed. I think, then, it may fairly be assumed that whatever were the old discovery powers, no Court exercising jurisdiction in divorce under the peculiar conditions of law existing in British Columbia with regard to that question would, in the absence of decisions, hold that such powers were to be exercised on other principles than

those in force with regard to the modern practice governing interrogatories in the civil Courts. Those principles are laid down in *Maass* v. *Gas Light and Coke Co.* (1911), 80 L.J., K.B. 1,313. In that case Vaughan Williams, L.J., *arguendo* at p. 1,315, states:

"It is a general principle that interrogatories must not be harsh or oppressive. Each case must depend upon its own circumstances."

The judgment contains the following:

"It is plain that the Court has in all actions a discretion to allow or not to allow an interrogatory. This discretion is in the first instance vested in the master, subject to appeal to the judge, whose exercise of this discretion ought not to be lightly interfered with. In exercising this discretion it is legitimate to have regard, amongst other things, to the nature of the action and the probable consequences which will result from allowing the interrogatory."

Now, having regard to the nature of this action, I can conceive of no questions more harsh and oppressive than the proposed interrogatories numbers 3, 4, 5 and 6, and, having regard to the possible consequences of allowing them under the peculiar conditions surrounding divorce jurisdiction in British Columbia, they are equally objectionable. We have no King's Proctor in British Columbia, and to allow these questions would open the door yet wider than it now is to collusion. On the other hand, supposing the respondent refuses to obey the order, what is to be done? To strike out her answer would be against the whole policy of the divorce law, which must have the interest of society in view fully as much as the rights of the parties. Moreover, to do so would almost amount to a premium on collusion. To commit her for contempt, assuming such process could be invoked, would be to outrage the sentiments of any civilized community. On the other hand, a refusal prejudices the petitioner little, if at all. Our Courts have always exercised the power of directing a physical examination, and if submission is refused, such conduct is given its due weight by the trial judge. Interrogatories 3, 4, 5 and 6 are therefore to be struck out, but as the former ecclesiastical Courts had discovery jurisdiction, I see no reason why 1 and 2 should not be answered, though I express no opinion either of their admissibility at the trial as evidence or of their evidentiary weight if admitted. It may well be that, owing to the condition of the law relative to

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compelling a spouse to give evidence for or against the other spouse at the time we acquired the English divorce law (subject to any change made by the British Columbia Legislature prior to Confederation and to any Dominion legislation subsequent thereto applicable to the matter), such answers given under compulsion may not be admissible in evidence at all. The question of costs is referred to the trial judge.

Order accordingly.

MURPHY, J.
1912
Sept. 5.

WILLIAMS
v.
B. C.
ELECTRIC
RY. CO.

WILLIAMS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Practice—Jury—Notice of trial by—Extension of time for filing—Negligence action—Discretion—Rules 430, 967.

A judge has power, under rule 430, to extend the time for filing a notice of trial by jury.

Here, the action being one for negligence, and peculiarly fitted for a jury, the discretion should be exercised.

Statement

MOTION for an order extending the time for filing notice of trial by jury. Heard by MURPHY, J. at Vancouver on the 5th of September, 1912.

M. A. Macdonald, for plaintiff.
H. S. Wood, for defendant.

Judgment

MURPHY, J.: There seems no doubt that a judge has power to extend the time under rule 430 by virtue of rule 967: *Moore* v. *Deakin* (1886), 53 L.T.N.S. 858.

This being a negligence case is one peculiarly within the province of a jury to try, and in view of the decision in *Clarke* v. *Ford-McConnell, Ltd.* (1911), 16 B.C. 344, is one, I think, in which I should exercise my discretion in favour of the plaintiff.

The application is granted.

Order accordingly.

PERIARD v. BERGERON AND RICKSON.

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PERIARD v. BERGERON AND RICKSON

Contract—Sale of goods—Contract based on invoice prices—Invoices not produced—Breach—Waiver.

In a contract for the sale of a stock of merchandise, the purchase price was fixed at an advance of ten cents on the dollar on the invoice price. The invoices were not produced in several instances where disputes arose as to the price.

Held, on appeal, affirming the judgment of MORRISON, J. (MACDONALD, C.J.A., dissenting), that the failure to produce the invoices relieved the defendants from being held to the contract.

APPEAL from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 7th of June, 1911. Plaintiff entered into a transaction of sale of a stock of gents' furnishings at the rate of $1.10 on the dollar on the invoice price with three per cent. added for freight. The fixtures of the business were to be taken at a valuation to be made by each party, but failing agreement, the matter was to be left to a third party. Plaintiff was unable to produce invoices for a considerable portion of the goods, and defendants contended that this relieved them of the obligation to carry out the contract on their part. Plaintiff submitted a valuation of the fixtures, but defendants refused to agree to it. No appointment of a third party was made. The trial judge came to the conclusion that plaintiff did not act *bona fide* in his dealings with defendants, that the latter were justified in treating the contract as at an end, and gave judgment in their favour accordingly.

Statement

In giving judgment, the learned trial judge said:

"I accept the evidence of Mr. French, who is a man of large business experience and thoroughly familiar with the quality and prices of the kind of goods which formed a substantial portion of the stock dealt with in the transaction in question. If the evidence otherwise were evenly balanced, his testimony would throw the preponderance in favour of the defendants. But I do not think the evidence apart from his testimony is evenly balanced. I am of opinion that the evidence on behalf of the plaintiff, who herself did not appear at the trial, should not be accepted in full. I regret to say that I do not think that the plaintiff's family,

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who apparently were the real parties in the business, were acting *bona fide* in their dealings with the defendants. The defendants under all the circumstances were quite justified in the course they took, and were throughout acting in an open *bona-fide* manner advised by a careful, honourable business man in Mr. French, whose status with the defendants in this matter was thoroughly well known to the plaintiff.

"Accepting as I do Mr. French's evidence, it would serve no useful purpose for me to dwell specifically upon that aspect of counsel's arguments dealing with the question of arbitration and the expression 'invoice price.' If so desired, however, I shall do so.

"The agreement was terminated and in the result the action is dismissed with costs."

Statement

Plaintiff appealed, and the appeal was argued at Vancouver on the 5th of December, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Ritchie, K.C., for appellant: We complied with the provisions of the Bills of Sale Act. We were prepared to deliver the goods; produced all the invoices in our possession, and as to those goods of which we had no invoice, we gave what we believed and had marked as cost prices. If those prices were wrong, the defendants could have objected and given the price they considered was the correct one. There has been a distinct breach of contract, and we are entitled to damages.

J. A. Russell, for respondents (defendants): We say that the contract was not carried out either as to time or terms by the plaintiff; and there is the strong finding of the trial judge that defendants had not acted *bona fide* with plaintiff.

Ritchie, in reply.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This action arose out of the sale of a stock of gents' furnishing goods under a written agreement whereby the defendants agreed to pay $1.10 on the dollar "invoice price," which was afterwards increased by three cents. When the parties came to take an inventory of the stock, disputes arose with respect to the price of certain articles, and in many cases the plaintiff was unable to produce invoices. I do not find it necessary to decide whether or not the defendants were at liberty to withdraw from the contract if and when invoices were not forthcoming. They did not withdraw, but

attempted to adjust their differences at the time. I think the evidence is convincing that these differences were adjusted before the prices were put in the inventory, and that when the stock-taking was completed, no complaint or declaration was made by the defendants that they would re-open the matter for further proof of invoice prices. As this is an appeal on the facts, and as the learned trial judge has accepted the evidence of Mr. French, who was agent for, and whose firm was backing the defendants financially in this matter, it becomes necessary to examine how far Mr. French's evidence is in conflict, if at all, with the evidence given on behalf of the plaintiff. I may say at the outset that the evidence of Miss Periard and A. J. Periard, and the other witnesses called on plaintiff's behalf, impresses me favourably. They gave a fair and lucid statement of the manner in which the stock was taken and the inventory made up and completed. On the other hand, I am not impressed with the evidence or conduct of either of the defendants. The defendant Bergeron was employed as a salesman in the business for a month. This was in accordance with the agreement and prior to the taking of the stock. In this way he became familiar with the cost marks on the goods, but he was discharged from his position because he was surreptitiously disposing of goods for less than the prices at which he was instructed to sell, and at less than the defendants had agreed to pay when they should take over the stock. He endeavoured dishonestly to reduce the stock for his own and partners' benefit and to plaintiff's detriment. But, as I have said, the learned trial judge accepts as truthful the evidence of Mr. French, and if I were able to find that his evidence was substantially repugnant to the conclusion to which I have come, I should hesitate about it; but I do not find that his evidence is to any material extent opposed to that given on behalf of the plaintiff. As disputes arose as to prices they were settled between the parties at the time, and before the disputed articles were entered in the inventory, and on several occasions Mr. French was sent for to decide disputes. He says that he thinks his prices were not accepted by the plaintiff, but when pressed, admits that he may be mistaken about this, and could not contradict the evi-

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dence to the contrary. The evidence to the contrary is that his prices were accepted, the matter was settled, and the articles entered in the inventory. It is undisputed that the parties went on with the stock-taking, which lasted a day and a half, and ended about noon on Friday, and that when the inventory was complete there was no objection and no declaration made to the plaintiff or to anyone on her behalf, that the prices were not to be considered as settled. Mr. French's evidence upon this point does not contradict that of the plaintiff, and does not help the defendants, and the evidence of Erisman strongly supports this conclusion. I think, therefore, that the production of the invoices was waived. It was not until the Monday after the conclusion of the stock-taking that defendants, through Mr. French, stated that they would not go on with the transaction, but I do not think that the repudiation was even then distinctly based upon the non-production of the invoices. I infer that the total value of the stock was considerably in excess of what defendants and Mr. French anticipated. Mr. French was

MACDONALD, C.J.A.

agent for two Montreal firms who were to assist the defendants in financing the purchase, and I think that when it was found that the purchase price was larger than anticipated, it was then decided that the undertaking was beyond the means of defendants, and the non-production of the invoices was seized upon as a ready excuse. Defendants must have felt that they had not acted fairly when they offered to compensate the plaintiff for loss occasioned by the closing of her store at the time of the stock-taking.

There is another matter calling for some comment in this case. In the statement of defence, the plaintiff is charged with having made representations knowingly false. There is not, from beginning to end of the case, the slightest foundation for such a charge; it was wholly gratuitous, and one which reflects discredit upon those who made it.

I would allow the appeal, and remit the case to the Court below to assess the plaintiff's damages.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal. The plain meaning of the words "invoice price" in the contract was the amount

which Periard had been charged when he bought the goods. The contract contemplated that these invoices should be produced, so that after stock had been taken the total price payable could be ascertained. This conclusion, I think, can be reached without the assistance of any evidence. We are entitled to take into consideration well known mercantile practices in reading a commercial agreement. The non-production of these invoices in the circumstances supports, in my opinion, the conclusion of the learned trial judge that the plaintiff was not acting honestly.

GALLIHER, J.A.: I am unable to say that the learned trial judge came to a wrong conclusion, and would dismiss the appeal.

Appeal dismissed, Macdonald, C.J.A. dissenting.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *Russell, Russell & Hannington.*

SAVAGE v. SHAW.

Company law—Dividend—Shareholder leaving balance of dividend uncollected—Afterwards selling out his shares—Company subsequently assigning—Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 182 (g)—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13.

A shareholder in a company having left a portion of his dividend uncollected, subsequently sold out his shares. The Company thereafter assigned, and the shareholder claimed the balance due him on his dividend. The assignee pleaded section 182 (*g*) of the Companies Act as a bar to his payment of the claim.

Held, that, inasmuch as the Company was not in process of being wound up, plaintiff was entitled to recover.

ACTION by the assignee of a Company for directions as to payment of moneys due by the Company on a dividend declared to a shareholder, but not wholly drawn out by him before the

Statement

GREGORY, J.

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Sept. 30.

SAVAGE v. SHAW

Statement

Company assigned. Tried by GREGORY, J. at Victoria on the 27th of September, 1912.

Plaintiff was a shareholder in the Red Fir Lumber Company, Limited, which some years before action brought declared a dividend of some $5,000 in respect of his shares. All the shareholders, except five, took their dividends in cash. Savage took $1,250 on account of his dividend, and allowed the balance to remain to his credit with the Company. Subsequently he purchased some lumber from the Company, and this was allowed to go against his credit as part payment. In 1910 he ceased to be a shareholder, and the balance owing to him at that time was something over $2,000. In 1911 he pressed the Company for payment, and was given a promissory note. The Company later assigned for the benefit of their creditors, under the Creditors' Trust Deeds Act. The assignee admitted the facts above set out, but submitted that section 182 (*g*) of the Companies Act applied, which provides that no member of a company being wound up shall be entitled to payment of a dividend in competition with the claim of an ordinary creditor.

Harold Robertson, for plaintiff.

J. H. Lawson, for defendant.

30th September, 1912.

Judgment

GREGORY, J.: This case rests entirely on section 182 of the Companies Act. Without this Act, creditors are entitled to the benefit of their diligence. The section does not seem to me to apply to the present case, as the Company is not being wound up, and the section in terms applies only to a company in such position. It begins: "In the event of the company being wound up," etc. In the circumstances of this case, until the Red Fir Company is brought under the provisions governing companies being wound up, the provisions of the Assignment for the Benefit of Creditors Act must govern. On the question submitted, the plaintiff is entitled to judgment, with costs, which are to be paid out of the estate, as the assignee was quite justified in obtaining the opinion of the Court before recognizing the claim.

Judgment accordingly.

CORPORATION OF THE CITY OF VICTORIA v. HEALY *ET AL.*

MURPHY, J.

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Aug. 29.

VICTORIA v. HEALY

Municipal law—Expropriation of land for waterworks—Notice—Compensation—Arbitration—Action—Interim injunction—Res judicata.

Upon an application for the appointment of an arbitrator to assess compensation for lands of H. expropriated for waterworks by a city corporation, it had been held by GREGORY, J., that the corporation must take all the land in respect of which they had given notice, and he had appointed an arbitrator. In this action H. asked for a declaration that the corporation were entitled only to a portion of the land.

Held, that an application by the corporation to restrain the arbitrators from proceeding with the arbitration, until the determination of the action, should be refused.

APPLICATION by the Corporation of the City of Victoria for an *interim* injunction to restrain the defendant and the arbitrators appointed for the purposes of assessing compensation payable under the Victoria Waterworks Acts from proceeding with the arbitration, an action having been commenced for a declaration that the Corporation were entitled only to a portion of the land in respect of which the water commissioner had given notice of appropriation to the owner. Heard by MURPHY, J. at Victoria on the 29th of August, 1912.

Statement

McDiarmid, for the Corporation: At the beginning of the year 1911, a by-law was passed authorizing the carrying out of the necessary work for the purpose of bringing water from Sooke lake to supply the City; and the scheme evolved in pursuance of the by-law included the expropriation of certain property of the area of about 30 square miles around Sooke lake, from mountain top to mountain top. On the 10th of June, 1911, the water commissioner gave notice to the defendant and to every person whose land bordered on the lake; and in the defendant's case the notice referred to three lots, containing about 340 acres, in respect of which he claims compensation

Argument

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amounting to $166,000. It was discovered in March last that less land was required than had been stated in the notice given to the defendant, and it is insisted on behalf of the defendant that the Corporation have expropriated all the property mentioned in the notice. GREGORY, J., on an application for the appointment of an arbitrator, held that the Corporation must take all the land referred to, and appointed an arbitrator. On the question being taken to the Court of Appeal, that Court held that it had no jurisdiction to review the decision of GREGORY, J., as he was *persona designata.* The arbitrators met; this action was begun; and this is an application for an *interim* injunction to restrain them from proceeding with the arbitration. A settlement has been discussed between the parties, but the Council refused to accept the terms proposed. The arbitrators propose to proceed with the arbitration to-morrow. This is not *res judicata,* as, upon an application for the appointment of an arbitrator, any question as to the legality of the subject-matter could not be inquired into. The land required by the Corporation consists of 96 acres, in addition to two acres at the foot of the lake, and this is the area limited to the Corporation for the purposes for which it is required; and the Corporation have no power to expropriate more. The Corporation ask for an injunction until the question can be tried. It will be a waste of money, time and energy, to proceed with the arbitration. The applicants undertake to go to trial immediately, and to pay any damages which the defendant may be held to have suffered.

Argument

Davie, for the defendant and the arbitrators, submitted that the question was *res judicata.*

MURPHY, J.: There is a decision of one of my brother judges that the matter should go to arbitration. I do not think I should interfere. In any event, to justify my doing so, the Corporation must shew that they are likely to suffer damage. They have not done so. The application is dismissed, with costs to the respondents in any event.

Judgment

Application dismissed.

DUNN v. ALEXANDER.

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Vendor and purchaser—Contract for sale of land—Refusal of vendor to complete on terms agreed on—Misrepresentation by vendor's agent—Return of purchase money paid.

In an action for the return of money paid on a contract for the purchase of land, on the ground, *inter alia*, of misrepresentation by the agent of the vendor:—

Held, in the circumstances, that plaintiff was entitled to be refunded his money.

Held, further, *per* MACDONALD, C.J.A. and IRVING, J.A., that defendant having insisted on a variation of the terms of an agreement made by correspondence, he had lost his right to retain the money paid him.

Judgment of GRANT, Co. J., reversed.

APPEAL by plaintiff from the judgment of GRANT, Co. J. in an action tried by him at Vancouver on the 17th of October, 1911, for a refund of certain money paid on account of the purchase price of land.

Statement

R. M. Macdonald, for plaintiff.

S. Alexander, and *Sears,* for defendant.

26th October, 1911.

GRANT, Co. J.: In this action the plaintiff seeks to recover from the defendant the sum of $237.50, on account of the purchase price of certain land, according to an agreement of sale dated the 24th of April, 1911, on the grounds, firstly: that the said sale was brought about by the false and fraudulent representations of the defendant, leading the plaintiff to believe the property in question was being sold for the Canadian Northern Railway Company; and secondly, that the defendant had no title to the property.

GRANT, CO. J.

At the close of the trial I stated that, as to the first ground of objection, the plaintiff had absolutely failed, as there was not before the Court any evidence of fraud or misrepresentation —nothing whatever to lead any person to believe that the lands in question were being sold by the Canadian Northern Railway

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Company. As to the second ground, I asked counsel to favour me with a written argument on it, which they have done. Most of the evidence before me was documentary, but what was oral presents very little, if any, conflict. The facts are briefly these:

The registered owner of the said lands is Georges Barbey, of Paris, France. He, on the 24th of October, 1910, sold the said lands to the defendant, and one Selkirk, under an agreement of sale which has been duly registered, by which agreement the purchase price of $250,000 was made payable by instalments, the last of which fell due on the 24th of April, 1914, the vendor being further secured in the payment of the purchase price by an assignment to him by the purchasers of each and every agreement for sale of any of the said lands entered into by the purchasers with their respective buyers, so that 50 per cent. of the purchase money paid by said respective buyers should at once be credited by the said Georges Barbey on the next instalment of the purchase price, and the remaining 50 per cent. paid by him to his purchasers, Alexander & Selkirk.

By the said agreement, Barbey covenanted with his purchasers and their assigns to suffer and permit them to occupy the premises until default in the payment of the purchase money or interest, and in the event of default, Barbey should be at liberty to give to his purchasers the notice in writing in said agreement for sale stipulated, and if said default continued till the expiry of the period of said notice, the agreement for sale should absolutely cease and determine, and all moneys paid thereunder should be absolutely forfeited, and all claims arising out of said agreement or the said lands, should be absolutely relinquished, and in the event of Barbey exercising his said right of cancellation, it was further stipulated by him that he would convey his title in any lots sold by the said Alexander and his associate to the purchasers thereof in exchange for the payment of the balance of the purchase price due under the respective agreements.

GRANT, CO. J.

It does not appear that the defendant—who has since bought out the interest of his associate Selkirk—has at any time been in arrears in payment of his instalments, but rather is some $40,000 in advance; nor does it appear that the plaintiff cannot

get an absolutely good title at any time upon payment of the balance of the purchase price; but, on the contrary, he has been told that he can, and it is conceded that he can get the conveyance in fee whenever the balance is paid. That being so, it becomes of no importance whether the defendant's last payment or instalment to his vendor matures before or after the time of the payment of the last instalment by the plaintiff to the defendant. This seems to be nothing more nor less than the case of a purchaser regretting his purchase, repudiating his contract, and endeavouring to recover moneys paid under it on the unwarranted claim that the defendant cannot give title, and I adopt the language of Nelson, J. in *Hansbrough* v. *Peck* (1866), 5 Wall. 497 at pp. 506-7, in answer to such a contention:

"No rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party then being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

While the above case is not an authority binding upon this Court, it enunciates what I believe to be good law, and I accordingly follow it.

In this case the defendant has the whole equity in the land (not taking the plaintiff into consideration) and so controls the legal estate that, even if defendant forfeited his estate to his vendor, said vendor is, under his covenant with defendant and his assigns, compelled to convey to the plaintiff the lands purchased by him from the defendant upon the payment of the balance due thereon. As I understand the law, this is such a title as the Court, under the authority of *Craddock* v. *Piper* (1844), 14 Sim. 310, would compel the purchaser to accept. In *Esdaile* v. *Stephenson* (1822), 6 Madd. 366, Leach, V.C., after consultation with Lord Eldon, laid down the rule

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"That where a necessary party to the title was neither in law nor equity under the control of the vendor, but had an independent interest, unless there was produced to the master a legal or equitable obligation on the part of the stranger to join in the sale, the master ought to report against the title, otherwise, where a necessary party to the title was under the legal or equitable control of the vendor, ... there the master

GRANT, CO. J. might well report, that upon payment . . . . a good title could be made."

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In this case the necessary party to the title—Barbey—is, by virtue of his covenant with the defendant, and the plaintiff as his assignee of his interest in part of the said lands, under obligation to convey to the plaintiff in the event of the defendant not being able to complete his purchase and the plaintiff paying up his instalments. If further authority is needed upon this point it is found in the case of *Hartt* v. *Wishard Langan Co., Ltd.* (1908), 18 Man. L.R. 376 at p. 388, and especially in the dissenting judgment of Perdue, J. at p. 540, 9 W.L.R. 519:

"The result of the authorities appears to me to be that the Court will not force a purchaser to take an equitable estate except where the vendor has the *whole* equity in the land, and controls the legal estate in such a way that he can readily procure it."

GRANT, CO. J.

The above exception fits into this case exactly, and I think, therefore, the defendant had and has, or can readily procure, such a title as the plaintiff could be compelled to accept upon his payment of the remaining instalments on the lands in question, and that the plaintiff is not entitled to a return of the moneys paid by him. The action is dismissed, with costs.

The appeal was argued at Victoria on the 18th and 19th of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

R. M. Macdonald, for appellant.
S. Alexander (*Hyam,* with him), for respondent.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In the view I take of this case, it is unnecessary to consider whether or not the defendant had a good merchantable title to the lot in question. To my mind it is quite evident that the plaintiff was misled into paying his money, which he seeks in this action to recover back, by the representations made to him in circulars by defendant's agents, the Canadian Northern Securities Company, Limited. It is not necessary to rely on the letter heads of this company of letters written to the plaintiff after the purchase, though these,

together with the circulars, shew the versatility of this company in the arts of deception. The two circulars are unique even in real estate transactions. Apart altogether from the similarity in name of this company and the Canadian Northern Railway Company, the contents of the circulars are well calculated to lead any ordinary person to the conclusion to which, as he swears, the plaintiff was led, that is to say, that the lots offered for sale were in the townsite which was owned by Mackenzie & Mann, the president and vice-president respectively of the Canadian Northern Railway Company. Exhibit 7 consists largely of extracts from Vancouver daily newspapers, and interviews with or statements made by Mr. Mann, now Sir Donald Mann, and the land commissioners of the Canadian Northern Railway Company, and referring either directly or by implication to the Mackenzie & Mann townsite, or to the Canadian Northern Railway proposals and works. For instance, an extract from one of these articles, dated the 6th of August, 1910, describes "new plans of the Canadian Northern Railway in reference to Port Mann, its townsite opposite New Westminster, are being formulated and will soon be carried out." And again, in March, 1911, quoting from an interview with one McMillan, who speaks of statements made to him by Colonel Davidson and Mr. McRae, joint land commissioners of the railway company, and saying:

"The public sale of lots, however, will likely not take place until late in the summer, or early next fall, owing to the magnitude of the task of clearing and grading the townsite. From what I learn in London, I think the future sale will easily eclipse the phenomenal record made at the auction of Prince Rupert lots."

In another article Mr. McRae is quoted as saying: "All the flat land in proximity to the water front, embracing hundreds of acres, has been reserved for railway terminals." And again, "All the water frontage within the limits (Port Mann) has been reserved for docks." Under the heading, in large letters, "Port Mann's Future," an interview with Mr. Mann appears, in which he is quoted as saying, "Our idea in buying land on the south side of the Fraser opposite New Westminster is based on several considerations," etc.

Defendant's agents offered lots for sale in "Port Mann sub-

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division of section 9, range 1, west." They say "Inside property is always as good as money. This subdivision is the first offered for sale *within the townsite.*" The italics are mine. They also say, "Now note this, the remainder of the townsite lots will be put on the market and sold by auction about July next."

But why pursue the matter further? Deceit is stamped all over these circulars, and they are so skilfully prepared as to make it impossible to put one's finger on any actual misstatement, but the whole appears to have been designed and certainly is well calculated to mislead the public into the belief that it was lots in the townsite of Mackenzie & Mann, known as Port Mann, that were being offered for sale, and throughout these circulars there is no statement, no hint even, that what the defendant was offering was something different.

MACDONALD, C.J.A.

Now, unless with full knowledge of the true situation the plaintiff has waived his rights, and elected to confirm the sale, which, on the evidence, I find he has not, then he is entitled to the relief which he claims.

There is another matter which would entitle the plaintiff to the same relief. The agreement made by correspondence contains no restrictions upon the plaintiff's rights to have title shewn and made in the usual way by the vendor. The formal agreement which defendant sent to the plaintiff for signature, but which was never delivered, contains such restrictions, and the plaintiff was threatened with the law if he did not sign and return it to the defendant. While the plaintiff's letter of the 10th of May does not fully raise this objection to the formal agreement, still I think he has not waived it, and defendant's insistence on this variation of the agreement is in itself fatal to his right to retain the purchase money.

I would allow the appeal, and direct that judgment be entered for the plaintiff for the return of the money paid.

IRVING, J.A.

IRVING, J.A.: This is an action to recover the deposit made on entering into a contract for the purchase of land. It is a common law action, and has nothing to do with any of the equitable rules or doctrines in relation to specific performance.

On the 16th of April, 1911, the plaintiff, having seen an advertisement in some newspaper that the Canadian Northern Securities Company, Limited, were selling lots at Port Mann, wrote to that company asking for a map. Having received a map and one of the Canadian Northern Securities Co's forms, he applied on the 24th of April for a lot, and agreed to pay therefor (without saying how much in all) "$237.50 cash, and the balance in half-yearly instalments extending over two years," and, fearful lest he should not secure the good thing that was going, he telegraphed the money to the company. Price not being stated, I doubt if there was any binding offer. However, assuming that it was an offer, the company received the money, and the agent wrote (27th of April) that the company had reserved the lot for him. I doubt if this was an acceptance of the plaintiff's offer. The contract thus made was an open contract for the sale by the company of the lot in fee simple, free from encumbrances. The nature and incidents of such a deposit are discussed in *Howe* v. *Smith* (1884), 27 Ch. D. 89.

The contract—if contract there was—contemplated that the company would deliver to the purchaser a proper abstract of title to the property, and afford the purchaser an opportunity to examine the deeds, and then, if the title was accepted, and on payment of the purchase money, to convey the property free from encumbrances, by a proper deed, with the usual covenants, and to put the purchaser in possession. That would, in view of the stipulation, be in two years' time. Mr. *Macdonald* says that his client had a right to repudiate the contract with the company as soon as he discovered that the company were not the vendors. Granted that is so if the objection was made at once, but the plaintiff could not take that stand. I believe that the common law is this, if the vendor fails to shew a good title on the face of his abstract at the time of its delivery, he thereby commits such a breach of the contract as discharges the purchaser from the duty of performing his part of the agreement. The vendor's obligation is a condition precedent to the purchaser's. In this case there was no abstract delivered or demanded. The company, having obtained the plaintiff's name

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and description, sent to him a new agreement, practically a new proposal (*Larkin* v. *Gardiner* (1895), 27 Ont. 125), by which one Alexander, the defendant, agreed to sell to him the same lot for $950, payable $237.50 cash, and balance in four instalments, with interest at seven per cent., the plaintiff to be entitled to take possession at once, and stipulating that the vendor should not be bound to furnish any abstract or to afford to the purchaser the usual facilities for examining into the title. In short, the agreement Alexander to Dunn was wholly different to the contract (if contract there was) made between the company and Dunn. Immediately after the receipt by the defendant of the proposed agreement, it was open to him to repudiate the proposed contract at once, on many grounds, *e.g.*, that he had not contracted with Alexander but the company; that he had made a bargain under which he was entitled to have an abstract delivered to him, at the vendor's expense, and produce also, at his own expense, all proper evidence of all deeds, etc., mentioned therein.

But instead of repudiating, he wrote the letter of the 10th of May, 1911, complaining of the provision that he was to pay the cost of the conveyance Alexander to himself, something that the purchaser usually does pay. On the 15th of May the company wrote that he had misread the agreement, and asked him to execute the document and return it. On the 6th of June the

IRVING, J.A.

plaintiff wrote to the company that he would call on them next week with the agreement. All this correspondence shews that he recognized that the company were merely the agents of Alexander.

"Next week" he called on a solicitor in Vancouver, who searched the title and found that Alexander was not the owner in fee, but held an agreement for sale from one Barbey. This fact that Alexander was not the owner in fee was seized upon, and put forward as a ground for not proceeding further with the contract, although the time for making a good title had not arrived, and later on the plaintiff advanced a further reason, *viz.*: that the company, by using as part of their name the words "Canadian Northern," and exhibiting on their stationery a railway engine, had misled the plaintiff into believing they

were connected with—to follow the language of the statement of claim—or "had direct association and fiscal relationship" with the Canadian Northern Railway Company, and that it was only on account of this association with this great railway company the plaintiff was induced to buy the lot in question. This last ground can be disposed of in a few words. In my opinion it is not a *bona fide* defence, and was trumped up in July, long after the plaintiff knew that Alexander was his vendor. I agree with the learned trial judge that as there was no evidence that the plaintiff had been misled, there was nothing in the name of the company, nor in the embellishment on the company's stationery to lead anyone to believe that the land being offered for sale was the railway company's land.

I also agree with the learned Courty Court judge that Alexander's title has been shewn to be such that he can at the proper time give the plaintiff a good title in fee simple; but the time for so doing has not yet arrived.

IRVING, J.A.

The difficulty that I find in supporting the judgment appealed from is that the defendant admits that he has refused to complete with the plaintiff, save and except on the terms of the written agreement of the 24th of April. As I have already pointed out, that document does not contain the terms which by implication are to be read into the receipt, and as it was to secure the performance of the sale under the open contract or receipt, the deposit was made, the plaintiff is entitled to have his money back.

GALLIHER, J.A.

GALLIHER, J.A.: In my view it is only necessary to deal with one feature of this case. A perusal of the literature sent to the plaintiff before he purchased would, I venture to say, lead ninety-nine men out of a hundred, in reading it casually, to infer that they were being asked to purchase lands in the railway company's townsite.

In fact, on a careful analysis of the circulars, one is impelled to the belief that they were carefully and designedly prepared to create that impression without in explicit terms saying so. Such being my views, and the plaintiff swearing that he was so misled, there can be only one result.

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The appeal should be allowed, with costs, and judgment entered for the plaintiff, with costs.

Appeal allowed.

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Solicitors for appellant: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for respondent: *Alexander & Sears.*

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GOLDSTEIN v. VANCOUVER TIMBER AND TRADING CO.

GOLDSTEIN v. VANCOUVER TIMBER AND TRADING COMPANY.

Practice—Revivor, order of on devolution of interest—Rule 973—Ex parte order—Proceeding—Notice.

Where no proceedings have been taken in an action for more than one year, it is not necessary to give a month's notice of intention to proceed, under rule 973, before making an application to substitute as plaintiff, in lieu of the original plaintiff, a person upon whom the cause of action of the original plaintiff has devolved.

Statement

APPEAL from an order made by MURPHY, J. at chambers in Vancouver on the 4th of December, 1911, refusing to rescind an order obtained *ex parte* on the 14th of November, 1911, substituting M. J. Crehan as plaintiff, in place of the plaintiff Goldstein, and permitting action to be proceeded with by Crehan. The original plaintiff, Goldstein, was assignee for benefit of creditors of the North Arm Lumber Company, Limited, and brought this action to set aside, as fraudulent and preferential, a conveyance of lands made by the North Arm Lumber Company, Limited, to the defendants. After the commencement of the action, an order was made for the winding up of the North Arm Lumber Company, Limited, under the Dominion Winding Up Act. The plaintiff, Crehan, was appointed liquidator in the winding-up proceedings.

The defendants appealed and the appeal was argued at Vancouver on the 23rd of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

W. A. Macdonald, K.C., for appellants: There having been no proceedings taken in the action for or previous to the order complained of, the order substituting Crehan as plaintiff should not have been made without first giving the appellant one months' notice of intention to proceed with the action, under marginal rule 973. The order should not have been made *ex parte.* In any case, there should be a clause inserted in the order preserving the rights of the defendants to object on the trial that Crehan had no status to maintain the action begun by Goldstein.

Craig, for the respondent: The order substituting Crehan as plaintiff was properly made without giving a month's notice under rule 973. This order was not a step in the cause. Goldstein could not give notice of an application to be made by Crehan, and Crehan could not give notice of proceeding with the action until he was made a party, hence the giving of notice under rule 973 was an impossibility; and if such notice had to be given, the action could never have been proceeded with at all. The order was properly made *ex parte* under rule 973. There was no necessity of inserting any terms in the order as suggested. Crehan, on the trial, has to prove that he is entitled to maintain the action. If he fails to do so, his action will be dismissed.

Argument

Macdonald, in reply.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed.

IRVING, J.A.

IRVING, J.A.: In a note to Order LIV., p. 771, Yearly Supreme Court Practice, 1912, it is said that an application under Order XVII. may be made *ex parte* in the King's Bench Division. In a note to Order XVII., p. 206, the same thing is said, and a reference is given to Chitty's Forms, 515, where a form of affidavit is given. In the Chancery Division

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the order is usually obtained on a petition of course—an *ex parte* proceeding. Seton on Decrees, 6th Ed., Vol. 1, p. 113, gives the form of the order. This states the last material proceeding in the action, and the subsequent events causing the abatement and consequent devolution of interest.

I am of opinion that MURPHY, J. had jurisdiction to make *ex parte* the order for the carrying on of the proceedings by Crehan, and without the month's notice prescribed by rule 973. The amendment made to the style of cause could not be made *ex parte*. That was a proceeding within the rule 973 and required notice, but as MURPHY, J. corrected that mistake on the 4th of December—with costs to the successful party—I think the appellant has nothing to complain of.

IRVING, J.A.

I would dismiss the appeal.

The material before us does not shew whether the proper way to proceed is by use of the liquidator's name or the company's name: *Kent* v. *La Communaute des Sœurs de Charite de la Providence* (1903), A.C. 220 at p. 225.

MARTIN, J.A.

MARTIN, J.A.: At the conclusion of the argument I was of the opinion that the appeal should be dismissed, and, as I understand it, the rest of the Court shared that view, the only question reserved being the application to have some sort of special clause put in the order in favour of the unsuccessful appellant, having regard to future proceedings. This was strongly objected to by the respondent's counsel, and I do not think that it is necessary or desirable to make any other order than to dismiss the appeal, with costs.

GALLIHER, J.A.

GALLIHER, J.A. concurred in dismissing the appeal.

Appeal dismissed.

Solicitors for appellants: *Taylor, Hulme & Innes.*
Solicitors for respondent: *Ellis & Brown.*

BINGHAM *ET AL.* v. SHUMATE *ET AL.*

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April 15.

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BINGHAM v. SHUMATE

Trustees—Trust agreement—Action for cancellation of—Fraud—Misrepresentation—Removal of trustee.

In an agreement respecting certain timber licences, defendant S. was empowered to dispose of the licences, pursuant to the terms of the agreement, without reference to his associates and *cestui qui trustent*. MORRISON, J., at the trial, dismissed plaintiffs' action for cancellation of the agreement on the ground that the fraud and misrepresentation alleged had not been proved.

Held, on appeal, that the action was rightly dismissed.

S. counterclaimed for a direction to plaintiffs to execute the requisite documents to carry out a sale made by S. under the agreement.

Held, that such execution was unnecessary, and that the counterclaim should have been dismissed.

Held, further (IRVING, J.A. dissenting on this point), that on the evidence, no case had been made out for the removal of S. from his position as trustee, and, further, that the point was not raised in the pleadings in the Court below, or in the notice of appeal.

[An appeal and cross-appeal to the Supreme Court of Canada herein was dismissed, 29th October, 1912.]

APPEAL from the judgment of MORRISON, J. in an action tried by him at Victoria on the 28th, 29th and 30th of March, 1911, as to the ownership of 22 timber claims in the Copper River district. Defendant Shumate acquired seven of these limits from two prospectors named McCulloch and Dockerell in 1907; the remaining 15 he caused to be staked. The plaintiffs were induced to join a syndicate to handle these properties, he being paid $2,500 in respect of the seven limits and one-quarter of the expenses of staking. An arrangement was entered into whereby Shumate was empowered to sell the limits. The action was brought for a declaration as to the interests of the plaintiffs in the limits, for an accounting of defendant Shumate's dealings with them, and for the appointment of a receiver to administer the interests of all concerned. Shumate counterclaimed for a direction to the plaintiffs to execute the necessary documents to effectuate a sale, which was pending.

Statement

MORRISON, J. came to the conclusion that the plaintiffs had wholly failed to prove the allegation of fraud set up in their

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pleadings, that they must be held to the bargain into which he found they had deliberately entered, dismissed the action and gave judgment for the defendant Shumate on his counterclaim, with costs. Plaintiffs appealed.

Maclean, K.C., for plaintiffs.

Bodwell, K.C., for defendants.

15th April, 1911.

MORRISON, J.: The dealings material to the issues in this suit culminated in the agreement of the 24th of October, 1907. The plaintiffs seek to annul that agreement and have invoked the aid of the Courts for that purpose, charging the defendants in unmistakable terms with fraud. Fraud is the gravamen of their pleadings.

"A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified": Lord Watson in *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at p. 35.

It looks to me like an appeal to credulity to urge that a man with the physique and admitted ability of Ex-senator Bingham, or that attorneys of the status of the plaintiffs Edmunson and Travis should have been induced to put their hands to the document in question by any artifice or coercion of the defendants, who, with deference, did not strike me as being either physically or mentally equipped to cope with them in a transaction of the nature in dispute.

MORRISON, J.

It appears sometimes to be overlooked that in this country fraud is dealt with as fraud when one is confronted with it in the Courts of justice, and not as a mere word to be indiscriminately put upon the pleadings and records. When charged it must be clearly proven, and when proven an effective remedy is applied.

In this case the evidence is conflicting, and a critical review of it would serve no good purpose. The plaintiffs must be held to their bargain, into which I find they deliberately entered.

The action is therefore dismissed, with costs. There will be judgment for the defendants on the counterclaim, with costs in terms of sub-paragraph (a) of their claim.

The appeal was argued at Victoria on the 19th, 22nd and 23rd of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Maclean, K.C., for appellants.
Bodwell, K.C. (*Mayers*, with him), for respondents.

Cur. adv. vult.

1st April, 1912.

MACDONALD, C.J.A.: The trial judge has negatived the fraud or misrepresentation charged by the plaintiffs against the defendants in connection with the trust agreement. In this I think he was right, but I think he was in error in finding in defendant Shumate's favour on his counterclaim.

By the contract of the 24th of October, 1907, which declared the rights and interests of the parties in the subject-matter of this action, it was agreed that defendant Shumate should have the right and privilege of selling the timber licences mentioned in the pleadings without reference to his associates and *cestui qui trustent*, provided he did so on the terms specified in the agreement. By his counterclaim, alleging that he had made a sale to Messrs. Fields in accordance with said power, defendant Shumate asked that the plaintiffs be ordered to execute the documents of sale. The licences being vested in himself as trustee, he had no need of the plaintiffs' concurrence, nor of their signatures to the documents, provided the sale was within the power. If the sale were not within the power, then the plaintiffs should not have been ordered to concur. The order, therefore, that the plaintiffs should execute these documents was, in my opinion, unnecessary, and the judgment on the counterclaim should be reversed.

It would not be necessary, in my view of the case, to say more, were it not for the contention before us that defendant Shumate should be removed from his trusteeship. That question was not properly before us at all, although it was referred to and argued to a certain extent by Mr. *Maclean* for the plaintiffs. Mr. *Bodwell* took some objection, but Mr. *Maclean* was not stopped. It was not called to our attention that no claim of

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this kind was made in the pleadings, nor was the question raised in the notice of appeal. That being so, we ought not to make the order asked for. It is quite apparent that no evidence was directed to it. The evidence that was relied upon in what little argument there was, was directed to an entirely different issue. Shortly, Mr. *Maclean's* argument was that because defendant Shumate entered into an agreement of sale with Messrs. Fields, which was not strictly in compliance with his power of sale, we ought to hold that he was not a fit and proper person to remain a trustee. What Shumate did was to sell, or attempt to sell, the licences for the price mentioned in his power, but instead of requiring the whole 50 per cent. in cash, the purchasers were to pay sufficient to give the plaintiffs half of their interest in cash and the balance in a year, Shumate's interest to be otherwise arranged. There is no evidence that in such an arrangement Shumate was to get any more advantageous terms than the plaintiffs; in fact, for aught the evidence shews, they may have been much less advantageous. That question was not sifted down, because it was not in issue.

MACDONALD, C.J.A.

I do not understand the law to be that whenever a trustee makes a mistake as to the extent of his powers he ought to be removed from his trusteeship. Now, had the issue been raised and Shumate charged with dishonesty in connection with the alleged sale to the Fields, evidence might have been forthcoming to shew that he acted as he believed honestly and in the interest of the partnership, and without seeking any peculiar advantage for himself. To allow this issue to be raised now would be most unjust to said defendant.

I think, therefore, the judgment dismissing the action should be sustained, but that part of it based on the counterclaim should be reversed.

A question of account was referred to in argument, but as I remember, counsel for the plaintiffs did not press that.

IRVING, J.A.

IRVING, J.A.: The learned trial judge dismissed the plaintiffs' action, and on the counterclaim directed that the defendants should execute all documents necessary to enable

the defendant Shumate to carry out a sale to Messrs. Fields. This portion of the judgment is easily dealt with.

The evidence at the trial shews that Shumate has not sold the property to Fields, and there is no contract between Shumate and Fields. At the most, Fields was prepared to buy the plaintiffs' interest.

Then as to the appeal on the original action. The notice of appeal is that the judge below only considered one branch of the plaintiffs' claim for relief—that is, the application to set aside and cancel the deed of the 23rd of October, 1907, on the ground of fraud. The other ground is for an order for accounts, and the removal of Shumate from his office as trustee. The notice, I feel, ought to have been more explicit, and the only doubt I have about the order that should be made is the vagueness of the notice of appeal.

Shumate, in his letter of 16th November, 1910, did not disclose the true facts of the case, and, in my opinion, he is unfitted to be a trustee. Had he been honest, he would have written Bingham: "I can get you $10 an acre for your share; will you take it?"

The removal of a trustee—as a rule—is a delicate matter. The main principle for the Court to proceed upon in exercising its jurisdiction, is the welfare of the beneficiaries. The matter of the exercise of this power was discussed in *Letterstedt* v. *Broers* (1884), 9 App. Cas. 371, by Lord Blackburn. IRVING, J.A.

In *Forster* v. *Davies* (1861), 4 De G.F. & J. 133, it was laid down by Turner, L.J. that the mere fact of there being dissension between one of the several *cestui qui trustent* and the trustee was not a sufficient ground for the trustee's removal. But the letter, in my opinion, is sufficient to shew that Shumate should be removed from his position as trustee, and a receiver appointed.

As to the objection that the removal of a trustee was not specifically asked for, in my opinion the prayer in the original claim for a receiver was sufficient. In view of the fact that the action asked to set aside the trust deed; that it is merely a technical objection, and as the merits are all against Shumate,

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and as there has been no surprise or disadvantage to Shumate by the formal omission, I would not give effect to it: *Gorman* v. *Dixon* (1896), 26 S.C.R. 87. In *In re Wrightson* (1908), 1 Ch. 789 (where Warrington, J. refused to remove a trustee), the learned judge said that there was power to remove although not prayed for.

I would discharge the order made by MORRISON, J. and dismiss the action so far as false representations are concerned, but remove Shumate from the trusteeship, and order him to account. Divide the costs of the action below; direct Shumate to pay costs of the counterclaim, and of this appeal.

GALLIHER, J.A. concurred in the conclusions of MACDONALD, C.J.A.

Appeal dismissed.

Solicitors for appellants: *Elliott, Maclean & Shandley.*
Solicitor for respondents: *C. K. Courtney.*

MURPHY, J. (At Chambers)
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Sept. 3.
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PARSHLEY v. HANSON.

Practice—Writ of summons—Application to set aside service—Transitory action—Jurisdiction—Supreme Court Act, R.S.B.C. 1911, Cap. 58, Sec. 9.

Where the defendant was personally served with the writ of summons whilst within British Columbia, and the cause of action was transitory, an application to set the service aside was refused.

Statement

APPLICATION heard by MURPHY, J. at chambers, in Vancouver, on the 28th of August, 1912, to set aside service of a writ of summons.

Walsh, for plaintiff.
Mellish, for defendant.

3rd September, 1912.

MURPHY, J.: The law as applicable to the facts of this case is thus laid down in *Jackson* v. *Spittall* (1870), L.R. 5 C.P. 542 at p. 549:

"Though every fact arose abroad, and the dispute was between foreigners, yet the Courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him where present in England."

Transitory actions were those in which the venue might be laid in any country (Wharton's Law Lexicon), that is, those in which the facts involved might have occurred anywhere, as opposed to local actions, *viz.*, those, the facts of which necessarily involved the idea of a certain place or part of the soil (Foote's International Law, 3rd Ed., 343). The alleged cause of action here is clearly transitory; the defendant was personally served in British Columbia, and consequently the Court has jurisdiction.

As to the objection that the matter does not fall within section 9 of the Supreme Court Act, the reply is that it does. That section gives the Court jurisdiction in all cases, civil as well as criminal, arising within the Province.

Judgment

British Columbia, by statute, adopted the laws of England as the same existed on the 19th of November, 1858, unless locally inapplicable.

By the law of England as above set out, a case arises over which the Courts have jurisdiction when a person liable to a transitory action is actually served with a writ whilst within the territorial jurisdiction of such Courts.

The application is dismissed, with costs to the plaintiff in any event.

Application dismissed.

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Mortgage—Covenant by married woman—Responsibility of mortgagee for fraud of agent—Husband participating in fraud.

In an action upon a mortgage of land purported to have been given by a married woman, it developed that the land in question had been conveyed to her by an agent of the plaintiff Company, the mortgagees, but without her knowledge. The mortgage deed she was led to believe was a document relating to the transfer of shares which she held in the Company. On the same understanding she executed an authority to the agent to receive the mortgage moneys. He did receive such moneys, but did not pay them to her, although he made payments to the Company on account of the mortgage.

GREGORY, J., at the trial, held, that the agent's knowledge was that of the Company, who enabled him to occasion the loss which they must suffer, their negligence in appointing a dishonest agent being the proximate and effective cause of the fraud. The trial judge therefore directed that the Company were not entitled to recover on the covenant, but that the defendant married woman should transfer to the Company her registered title to the mortgaged property, and dismissed the action as against her husband.

On appeal, the judgment at the trial as to the defendant married woman was affirmed, but reversed as to her husband, who, on the evidence, was held to have joined in the fraud practised on the Company.

Statement

APPEAL by plaintiff Company from the judgment of GREGORY, J. at the trial at Vancouver on the 22nd, 23rd and 24th of February, 1912. The facts appear fully in the reasons for judgment at the trial and on appeal.

W. A. Macdonald, K.C., and *C. F. Campbell,* for plaintiff Company.

King, for defendants.

3rd December, 1910.

GREGORY, J.

GREGORY, J.: This action has already been dismissed as against Thomas C. Morgan, and the only question remaining is: Is the wife liable on her covenant in the mortgage to the plaintiff Company? The case reeks with fraud, but happily

not the fraud of any party to these proceedings. Although at the conclusion of the trial I made certain findings of fact, it will be convenient to briefly set out the circumstances of the case. The plaintiff Company is a loan company having its head office in Toronto, but having a local board in the city of Nanaimo. It had as its agent in Nanaimo one Leighton, through whom all applications for loans or shares in the Company were made. Leighton is now dead, and Williams is an absentee from the country. From the evidence before me, the inference is irresistible that both Leighton and Williams, acting together, were practising frauds upon the Company, and apparently they conceived the idea of using Mrs. Morgan's name for one of their schemes, she being the owner of certain shares in the plaintiff Company. She agreed, through her husband, to sell the shares to Leighton for $200, payable in monthly instalments of $10 each. These payments were not made regularly, but dragged over a long period. She was a woman of some education but no business experience, and in obedience to her husband's directions, went to Mr. Yarwood's office to sign the necessary transfer, and did sign, without reading certain documents which she believed, on Leighton's representations, to be the papers necessary to effect such transfer. Mr. Yarwood was the personal solicitor of Mr. Leighton, and also acted as solicitor for the plaintiff Company in Nanaimo. I attach no importance to his statement that he was not the solicitor for the plaintiff Company but simply acted for the plaintiff Company's chief solicitors at Toronto.

GREGORY, J.

I do not propose to refer at length to all the documents executed, but I am not satisfied from Mr. Yarwood's evidence that in taking the acknowledgments of Mrs. Morgan he took them as required by law. He appears to have been, to say the least, exceedingly careless, and to have practically assumed that his affixing his name to an acknowledgment was a mere matter of form.

The mortgage upon which the plaintiff sues, was brought about through an application, purporting to be made by Mrs. Morgan, for a loan, which application is dated the 9th of

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August, 1894, and a further application for shares, dated the 4th of August, 1894, "and made subject to loan being approved." (Apparently borrowers from the Company are required to purchase shares.) These documents are the inception of the relations between the plaintiff and defendant, but I have no hesitation in saying that Mrs. Morgan never signed either of them. She positively says she did not, and at the trial I shewed her practically all the documents in the case bearing, or purporting to bear, her signature, but excluded from her view every portion of them except the signature. There was no way in which she could tell which signature was attached to these applications and which attached to some other documents referred to later on, but she immediately and unhesitatingly picked out these two as not hers, and I am satisfied in my own mind that they are forgeries. At the time of the date of these applications, the property upon which the loan was to be made stood in the land registry office books in the name of one David Roberts, but Leighton had a conveyance of the same in his own name, dated the 27th of June, 1894, in his possession. He therefore knew that the property was his. On the 8th of January, 1895, Leighton executed a conveyance to his clerk, Williams, and ten days later (18th January), Williams executed a conveyance to Mrs. Morgan. Both of these last-named

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documents, as well as the mortgage sued on, purport to have been acknowledged before Mr. Yarwood on the 28th of March, 1895, being the day of the date of the mortgage, and it is significant that Mr. Leighton witnessed the conveyance to Mrs. Morgan, and it was his acknowledgment as witness that Yarwood took. All three conveyances were registered in the land registry office on the 6th of April, 1895. Mrs. Morgan, apparently, according to the documents, was the owner of the property in question, but she swears she had no knowledge of it, that she never bought it, and never knew that any conveyance of the same had ever been executed, and I have no hesitation in believing her statement. The property was assessed in her husband's name, but he also knew nothing about it, and although the ownership of that property would have given him

a vote in municipal affairs, he never, during his residence in Nanaimo, appears to have voted, or to have known that the property was assessed in his name. The taxes were regularly paid by Leighton, who also effected insurance upon a building purporting to be erected upon this property, but, as a matter of fact, there was no building upon it, and he must have known it. Mrs. Morgan apparently signed a number of documents, but I have no hesitation in believing her statement that when she signed them she was informed by Leighton that they were in connection with the transfer of shares in the plaintiff Company originally owned by her, and that she was in complete ignorance of the nature of the documents, and that her signature thereto was brought about by the fraud and misstatements of Leighton, and that she had no knowledge that they in any way related to the property in question, or even that they related to any real property, or at the time that she was the owner of any real property in the city of Nanaimo. Among the documents apparently executed by Mrs. Morgan was the mortgage sued on, and an authority to Leighton to receive from the Company the money to be advanced by it on the mortgage. Both of these documents are dated the 28th of March, 1894; this is admittedly an error. Mr. Yarwood, in his evidence, says the date should be 1895.

The plaintiff Company claims that it has been misled by the acts of Mrs. Morgan, and that her execution of the mortgage, whether by fraud of Leighton or otherwise, is no concern of theirs, for she also executed an authority to Leighton to receive the money. In answer to this I have only to say that it seems to me that the knowledge of Leighton is constructively the knowledge of the plaintiff Company, and that they must be taken to know all about the transaction. It appears to have been a practice of the Company to require an application for a loan to authorize its local attorney to receive money advanced by it as a loan. The authority in this instance is upon one of the Company's printed forms, and was originally made out to its local attorneys, Messrs. Yarwood & Young, but was changed to Mr. Leighton, its local agent, who actually did receive it, having

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made a draft on the Company for the amount, which was paid by a cheque payable to its solicitors at Toronto and indorsed by them in blank.

In the fall of 1897 Mr. Albert E. Planta entered the office of Leighton as a clerk. He swears that it was probably about two years after that before he ever heard of the Morgan loan, and that so far as he knew Leighton himself made all the payments to the Company on account of this loan. Morgan swears that the first he ever knew about this matter was comparatively recently, seven or eight years after he had left Nanaimo and moved to Vancouver, when the Company's inspector, Mr. Andrews, called upon him at Vancouver and drew it to his attention, and he says he told Mr. Andrews at the time that that was the first he had ever heard of it. Mr. Andrews was present in the Court during the entire trial but was not called as a witness. I cannot draw any other conclusion than that if he had been able to contradict Morgan he would have appeared as a witness on behalf of the plaintiff.

Although both the plaintiff and the defendant are innocent of any wrongdoing, it is the plaintiff who has enabled its own agent, Leighton, to occasion the loss, and it must therefore suffer it. If a company is negligent in the appointment of its agents, and appoints a rascal, it must be responsible for his rascality in his dealings with the company's affairs. Its negligence is the proximate and effective cause of the fraud.

GREGORY, J.

Counsel for the plaintiff, in the argument, referred me to the cases of *Hunter* v. *Walters* (1871), 7 Chy. App. 75; *King* v. *Smith* (1900), 2 Ch. 425; and *Howatson* v. *Webb* (1907), 1 Ch. 537, and on appeal (1908), 1 Ch. 1. In each of these cases the person sought to be charged was induced to execute the documents sued upon by the fraud and misrepresentation of another who was in no way connected with the plaintiffs in the action, and in each case the person executed the documents knowing that it dealt in some way with the property he owned, and which in fact it did deal with, and the misrepresentation was only as to the particular character of the instrument.

In the case at bar we have no such condition. The mis-

representation was made by the plaintiff's agent, and Mrs. Morgan had no knowledge that it dealt with any real property owned by her or otherwise, or, in fact, that she did own any real property, and this distinction seems to have been present in the mind of the Court in each of the above mentioned cases. In *Hunter* v. *Walters, supra,* Sir George Mellish, L.J., says at p. 88:

"When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed."

In *King* v. *Smith, supra,* Mr. Justice Farwell refers to this language with approval at p. 430; and in *Howatson* v. *Webb, supra,* the distinction is more clearly still brought out. This case was decided by Warrington, J., and the Court of Appeal appears to have adopted his reasons without question except as hereinafter stated. Warrington, J. refers at length to *Hunter* v. *Walters* and other cases of like nature, and it is not necessary for me to do so. I referred to the case of *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, where he refers (p. 548) to the judgment of Cotton, L.J., and quotes his language as follows:

"Now the rule of law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void . . . . . It is doubtful how far they understood the nature of the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses:"

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And in referring generally to that judgment he says, p. 549:

"It seems to me that the Court of Appeal came to the conclusion that, although a man might be misled as to the nature of the deed, yet if he knew it related to his property, he cannot succeed upon a plea of *non est factum.*"

And referring to the case before him at the same page he says:

"He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question

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of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed."

In *Bagot* v. *Chapman* (1907), 2 Ch. 222, Swinfen Eady, J. lays down the same distinction, and comes to the same conclusion as I have in the present case, and although this case is referred to by the Master of the Rolls in *Howatson* v. *Webb* (1908), 1 Ch. 1, he does not in any way refuse to accept that judge's decision, although he says at p. 3 that he at present is not prepared to assent to all that he had said upon the question of severability, but with that we have nothing to do in this case.

There will therefore be judgment for the defendant Mrs. Morgan, with costs, but she must transfer to the plaintiff all her registered title in the mortgaged property.

The appeal was argued at Vancouver on the 16th and 17th of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Owen Ritchie, for appellant.
Livingston, for respondent.

Cur. adv. vult.

28th June, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred in the reasons for judgment of GALLIHER, J.A.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal.

It is plain that the application for shares, and the representations as to value, were signed by the husband, Thomas C. Morgan, and it is equally plain that Mrs. Morgan executed the mortgage, but in my view of the evidence the defendants were mere dupes of Leighton and Williams. I am unable to see that either of them was guilty of fraud.

The exception laid down in *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, 32 L.J., Ex. 273, to the rule that a man who executes a deed without inquiring into its character will be bound by it, relieves the defendants in this case.

In that case it was held that Swan's negligence was not the

proximate cause of the removal of his name from the list of shareholders. There was something further necessary to complete the fraud. The broker in that case, Swan's agent, had to steal the share certificates to complete the transaction. In this case, Leighton, the Company's agent, and Williams, his clerk, had to transfer the title of the property into the name of Caroline Morgan, and get a false valuation of the property from the Company's local appraiser, Mr. Forman, as well as a recommendation from the local board, and then forward all these false documents to the plaintiff Company.

The proximate cause of the Company's loss was the fraudulent conduct of their own agent, who, if he is regarded as the agent of the defendants, also was in this fraud acting for himself. I would, therefore, uphold the judgment.

IRVING, J.A.

MARTIN, J.A.: Though not after some hesitation, I find myself unable, after careful consideration of the matter, to dissent from the view that Thomas B. Morgan signed his wife's name to exhibits 1 and 2, because not only is there strong evidence in his own handwriting to support this conclusion, but inferences may fairly be drawn from surrounding circumstances which tend to discredit his testimony and point to him as the author of the disputed signatures. I may say that if it were not for the writings, I should have affirmed the finding of the learned trial judge in his favour. I agree that the appeal should be allowed as against Thomas B. Morgan.

MARTIN, J.A.

GALLIHER, J.A.: This case reeks with fraud, carelessness and incompetence.

Shortly stated, an application was made in the name of Caroline Morgan for 15 shares in the plaintiff Company, and a loan of $1,500 on such shares, secured by a mortgage on Lots 1 and 4, Block 1, of Newcastle suburban lots, addition to the City of Nanaimo, B.C. The shares were issued and the application for loan duly passed upon by the head office at Toronto, and referred to the local board at Nanaimo to be passed upon by them. This was done, and the mortgage and necessary papers were duly signed and forwarded to the head office, and

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the money advanced. In the application for loan, certain buildings were described and valued which never existed upon the premises. Payments upon the mortgage were made more or less regularly for a time through the local agent, a Mr. Leighton (since deceased), but the payments having fallen greatly in arrears, in June, 1898, an extension agreement was entered into between the Company and Mrs. Morgan.

The matter ran on until 1903, when, the payments not having been made in accordance with the extension agreement, the Company were threatening proceedings, and as Mr. Planta, a witness, says, in order to avoid a disclosure of the fraud that had been practised upon the Company, the Company's agent Leighton (who was a party to the fraud throughout) procured his nephew, Walter Thompson, to enter into an agreement to purchase the property from the Company, which he did, November 16th, 1903, and that Walter Thompson was a fiction so far as any *bona-fide* sale was concerned, all the payments that were made under the agreement being made by Leighton. Finally, the Company ascertained the true state of affairs, and this action was brought.

GALLIHER, J.A.

First, with regard to Caroline Morgan, she denies signing exhibit 1, application for loan; and exhibit 2, application for shares. I think it is clear that she did not sign these. I am satisfied, however, that she did sign exhibit 3, mortgage; exhibit 4, statutory declaration; exhibit 5, assignment of shares for loan purposes; exhibit 7, authority to Leighton to receive the money, and exhibit 13, extension agreement. Her explanation of the fact that her signature appears to these papers is that her husband informed her that he was buying shares in the Company, and that she was to go down to the office of Yarwood & Young, solicitors, and sign certain papers in connection with same; that she went down and signed certain papers, but did not read them; that they were not explained to her; and she knew nothing of their contents, simply accepting her husband's word that it was in connection with the application for shares; and that when she signed exhibit 13, she understood it was merely a transfer of these shares to Leighton, who was buying them from her.

When one looks at these documents, it seems hard to realize that a woman, who is by no means illiterate, could have had no idea of their contents. Yarwood's evidence is unsatisfactory; for instance, speaking of exhibit 4, which purports to have been acknowledged before him, and which is a statutory declaration purporting to have been made by Caroline Morgan, he said: "I would not say that she ever came in and acknowledged it," and it must be that the trial judge to a great extent discarded his evidence. Were it not for this, and the credence given to Caroline Morgan's testimony by the learned trial judge, I should have the gravest doubts as to the genuineness of her defence, but considering that, I am, with considerable misgivings, impelled to give her the benefit of the doubt, and to hold that proof of deceit fails, and that as against her this appeal should be dismissed, but under all the circumstances, without costs.

As to the husband, Thomas C. Morgan, I entertain no doubt whatever that he signed the name "Caroline Morgan" to exhibit 1, application for loan; and exhibit 2, application for shares; and that he was from the beginning a party to the fraud practised against the Company. Considering that he swears that he never saw any of these papers until years afterwards, I place no credence whatever in his testimony. Looking at exhibit 1, application for loan, we find some twenty questions answered, including value of buildings, description of buildings, amount due on same, rental value, etc.—buildings which never existed on the premises. One would indeed need to be credulous to assume that he signed this document and knew nothing of its contents. It is as deliberate and brazen a piece of fraud as could be perpetrated, and I find the evidence fully connects Thomas C. Morgan with it.

The appeal will be allowed as against him, with costs.

I desire to call attention to the manner in which the appraiser performed his duties. Mr. Forman, the appraiser, and a director of the local board, in his report, taking the form of a statutory declaration, fixes the value of the property, including the buildings, states that he has a knowledge of the property described in the application, and when it is pointed out to him

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on examination that there were no buildings on this particular property, excuses himself by saying that the property that was pointed out to him had buildings as described, but although supposed to make a declaration having the solemnity of an oath, he does not take the trouble to verify the lots in question as being the ones on which the buildings are situate.

Further, he says that he generally made a memorandum, filled in the forms, and handed them into Mr. Leighton's office without making a declaration; in other words, the paid appraiser for the Company purports to furnish the Company with a sworn statement without swearing to it.

Judgment accordingly.

Solicitor for appellant: *G. H. Cowan.*

Solicitors for respondents: *Livingston, Garrett, King & O'Dell.*

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IN RE FALSE CREEK FLATS ARBITRATION

IN RE FALSE CREEK FLATS ARBITRATION (No. 2).

Practice—Arbitration—Costs of—Principle upon which they should be taxed.

On the principle that where land is compulsorily taken, the costs should be taxed on a larger scale than in ordinary litigation, they should be taxed on a solicitor and client basis.

Therefore, everything that has been necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him on taxation. The tariff of costs prescribed for ordinary litigation may be accepted as a general guide, but the taxing officer is not bound by it, and should not follow it in all circumstances.

Statement

APPEAL from the ruling of the taxing officer, heard by MURPHY, J. at Chambers in Vancouver on the 12th of September, 1912.

Reid, K.C., for appellant.
A. H. MacNeill, K.C., for respondent.

MURPHY, J.: The principles under which taxation of costs should be carried out are laid down by Mathers, J. in *Re Canadian Northern Railway and Robinson* (1908), 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, and are, first: That the taxation should be on a solicitor and client basis; second: That where land is taken compulsorily, the costs should be taxed on a larger scale than in ordinary litigation. Everything that was necessarily or reasonably done and every expense that was necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him on taxation. Third: The tariff of costs prescribed for ordinary litigation may be accepted as a general guide, but the taxing officer is not bound by it and should not follow it in all circumstances.

Applying these principles to the disputed items, I hold that the cost of obtaining transcripts of evidence, as was done here, is a reasonable expense which a prudent man would incur, and I direct that the registrar proceed to tax such disputed costs, but in so doing, I in no way hamper his discretion in deciding whether any particular item is chargeable as one which was necessary.

Judgment

I allow the $6 paid for the motor car, as I hold that it is an expense reasonably incurred. As to the third set of disputed items, I hold that the registrar is not bound to refuse to tax them merely because they do not fall within the words of any particular item of the Supreme Court tariff. I hold, also, that he is not precluded from taxing them by reason of subsection (3) of section 201 of the Railway Act. I further hold that they are only recoverable as reasonable expenses actually incurred and that, therefore, before they can be taxed, an affidavit of increase must be filed. If such affidavit is filed, the registrar is to proceed to tax them, but in so doing he is not bound to allow the amounts actually paid, but only such amounts, if any, as he in his discretion deems fair in view of

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all the circumstances, and then only if he, in his discretion, deems that such amounts were reasonable and necessary expenses demanded by a proper presentation of the appellant's case. He is not to allow any amounts under this head which he deems to result from unnecessary work or from over-caution. With these directions, the matter is referred back to the registrar.

Order accordingly.

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BANK OF OTTAWA v. ALDER

BANK OF OTTAWA v. ALDER.

Practice—Order XIV.—Application for judgment under—Promissory note Bona-fide holder for value—Fraud—Unconditional leave to defend.

Plaintiffs, being *bona-fide* holders for value of a promissory note, sued for recovery of the amount due thereon. The defence was that it was obtained by fraud.

On an application for judgment under Order XIV.:—

Held, that the defendant was entitled to unconditional leave to defend.

Statement

APPLICATION for judgment under Order XIV., heard by MURPHY, J. at chambers in Vancouver on the 11th of September, 1912.

Macrae, for plaintiff.

W. A. Macdonald, K.C., for defendant.

12th September, 1912.

MURPHY, J.: Plaintiffs sue as *bona-fide* holders for value of a promissory note, and now move for judgment under Order XIV.

Defendant, the maker of the note, swears it was obtained from him by fraud. These being the facts, I am bound by authority to hold that defendant is entitled to unconditional leave to defend: *Fuller & Company* v. *Alexander Brothers* (1882), 52 L.J., Q.B. 103; *Millard* v. *Baddeley* (1884), W.N. 96; *Flour City Bank* v. *Connery* (1898), 12 Man. L.R. 305.

Judgment

Application dismissed; costs to be costs in the cause to the party successful in the action.

Application dismissed.

POWELL v. THE CORPORATION OF THE CITY OF VANCOUVER.

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POWELL v. CITY OF VANCOUVER

Deed—Absolute gift—Land given to municipality for public purposes—Substantial performance of conditions—Change in circumstances rendering location unsuitable.

In an action for a declaration that certain lots conveyed to a Municipality for the purposes of a city hall site had reverted to the plaintiff on account of the Municipality having ceased to occupy the property for the purposes for which it was given, it was in evidence that the defendants had erected buildings and used them as a city hall on the property for about eleven years, but owing to the general progress the building and locality became unsuitable for the original purpose. The deed of conveyance, except for a reference to an agreement to give the property, was an absolute gift.

Held (affirming the judgment of CLEMENT, J. at the trial), that there was no condition subsequent to be deduced from the language of the conveyance, and that there was nothing in the evidence on the trial to warrant reforming the deed by inserting a clause. There was to a substantial degree a performance of the agreement, the expressed consideration for the grant, and there was no ground for suggesting an illusory performance to secure the property so as to give jurisdiction to declare a resulting trust on the ground of fraudulent acquisition of the legal estate.

APPEAL by plaintiff from the judgment of CLEMENT, J. in an action tried by him at Victoria on the 4th of March, 1912, for a declaration that certain real property conveyed to the municipality of Vancouver had reverted to the plaintiff on account of alleged failure to carry out the conditions on which the conveyance was made. Statement

Bodwell, K.C. (*Mayers,* with him), for plaintiff.

W. A. Macdonald, K.C. (*E. J. F. Jones,* with him), for defendant Municipality.

18th March, 1912.

CLEMENT, J.: By indenture bearing date the 31st day of July, 1886, the plaintiff conveyed the lands in question in this action to the defendant Corporation *habendum* "unto the said CLEMENT, J.

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purchasers and their successors to the use of the said purchasers and their successors forever." There is no indication in the operative part of the deed of the use to which the lands were to be put, but there are introductory recitals in these words:

"And whereas the said Corporation have agreed to build the city hall and offices and maintain the same for City purposes on the lots hereinafter by this indenture granted on condition that the said Israel Wood Powell should grant the said lots to the Corporation free of expense.

"And whereas the said Israel Wood Powell has consented to grant the said lots to the said Corporation in consideration of the foregoing agreement."

The defendant Corporation duly erected the contemplated buildings, and used and maintained the same as a city hall and offices for some eleven years, that is, until 1897, when, acting upon reasons and motives that are in no way attacked as insufficient or improper, the defendant Corporation built a new city hall on other property. During the years from 1897 to the present, the buildings on the lands in question in this action have been allowed to fall into a state of some dilapidation, and the premises have been utilized as a storage and supply yard for the City. Now the plaintiff brings this action claiming, in effect, to have the property reconveyed to him, the purpose for which it was originally given—or, perhaps I should say, conveyed—having failed or been abandoned by the defendant Corporation.

CLEMENT, J.

In my opinion, there is no condition subsequent to be deduced from the language of the conveyance; and there is nothing in evidence before the Court to warrant me in "reforming" the deed by inserting such a clause. In the judgment of Patterson, J.A. in *Jessup* v. *Grand Trunk R.W. Co.* (1882), 7 A.R. 128, there is a quotation from Preston's edition of Sheppard's Touchstone, p. 123, to the effect that in the King's grant and in wills, and in other special cases, words indicating intention, purpose, etc., may import a condition, "but these words regularly do not make a condition when they are used in deeds." And, in my opinion, the law is accurately stated in Dillon on Municipal Corporations, 5th Ed., Vol. 3, par. 979, both on the question of construction and on the exact point which arises here:

"A grantor, in conveying real property to a municipal corporation for a specific public purpose, may, by the use of apt terms, subject the title to liability to *forfeiture for breach of a condition* expressed in the deed; and upon the failure of the municipality to comply with the condition, the title will revert to the grantor, as in the case of a similar grant to an individual. The question whether a *deed is to be construed as containing a condition subsequent* in the case of grants to a city or other municipality, is to be determined upon the same principles as in the case of other grants. If the deed merely specifies the use or purpose for which the land is granted to the city, *e.g.*, 'for a public street' or 'for the erection thereon of a city hall' or 'for school purposes,' *the purpose expressed does not qualify the estate taken*, but simply regulates and defines the use for which the land granted shall be held. The specification of the purpose is not construed as a condition subsequent, and the property does not revert to the grantor or his heirs upon a discontinuance of the use."

In the deed before me the consideration moving from the defendant Corporation to the plaintiff is plainly—and I venture to think truly and fully—expressed, *viz.*: the agreement of the defendant Corporation to build and maintain a city hall and offices on the land in question; and I was strongly inclined at the trial to the view that the plaintiff's remedy, if any, could only be by action for damages for the City's failure, if failure there be, to "maintain" the city hall and offices upon the land in question, within the proper meaning of the word "maintain," as to which I express no opinion.

I reserved my judgment in this case chiefly on account of the views expressed by Hagarty, C.J. and Patterson, J.A. in the *Jessup* case, above referred to. Though those views were clearly *obiter*, they so impressed me that I invited a full discussion of the question of a possible resulting trust in favour of the plaintiff either as upon a failure of consideration, or as upon an abandonment of the purpose for which, at the date of the conveyance, the lands in question were avowedly granted. After careful consideration, I am of opinion that no such question arises here, and that the law is correctly laid down in the passage from Dillon which I have above extracted. The dearth of English and Canadian authority upon the precise point is curious, the diligence of counsel having unearthed nothing beyond the *obiter dicta*, above referred to, in the *Jessup* case. And, upon examination, it will be seen that the views there expressed, particularly those of Patterson, J.A., were upon an

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executory agreement couched in a few words and intended to be followed by a formal conveyance later; and the question discussed was as to the shape the formal conveyance should take in order to effectuate the real intention of the parties as indicated by the actual existing document. The view expressed was, I think, not more than this: that the vendor would be entitled to insert in the formal conveyance a clause in the nature of a true condition subsequent. But, however that may be, I cannot, on the formal deed before me, spell out a case of resulting trust. Under this deed, the defendant Corporation were not, except in the loosest colloquial sense, trustees. They were the beneficiaries, having, it is true, as a corporation, and a municipal corporation at that, a restricted *ambit* of possible user. There was to a substantial degree a performance of the agreement, the expressed consideration for the grant. And there is no ground for suggesting an illusory performance, or a trick to secure the property, so as to give jurisdiction to declare a resulting trust on the ground of fraudulent acquisition of the legal estate. The action is dismissed, with costs.

CLEMENT, J.

The appeal was argued at Victoria on the 25th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Bodwell, K.C., and *Mayers,* for appellant: We submit that the property was given for a specific purpose, and while the Corporation could not be compelled to keep the city hall in that location for ever, yet if its situation is changed, the property reverts to the donor. There is a resulting trust here. They cited and referred to: *Hayes* v. *Kingdome* (1681), 1 Vern. 33; *Sculthorp* v. *Burgess* (1790), 1 Ves. 91; *Johnson* v. *Ball* (1851), 5 De G. & Sm. 85; *Edwards* v. *Pike* (1759), 1 Eden 267; *Wallgrave* v. *Tebbs* (1855), 2 K. & J. 313; *Hutchins* v. *Lee* (1737), 1 Atk. 447; *Young* v. *Peachy* (1741), 2 Atk. 254; *Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196; *Haigh* v. *Kaye* (1872), 7 Chy. App. 469; *In re Duke of Marlborough* (1894), 2 Ch. 133; *Briggs* v. *Newswander* (1902), 32 S.C.R. 405; *Allen* v. *M'Pherson* (1845), 1 H.L. Cas. 191; *Barnesly* v. *Powell* (1749), 1 Ves. Sen. 283 at p.

287; *Jessup* v. *Grand Trunk R.W. Co.* (1882), 7 A.R. 128. Here the donees were not only to place the building on the site granted, but also to maintain it there.

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W. A. Macdonald, K.C., and *E. J. F. Jones,* for respondent Corporation: The undertaking to maintain the city hall on the site granted must be construed reasonably; it cannot be taken to have been intended to apply to all time. We have made a substantial compliance with the terms, or rather, understanding, on which the gift was made. There has been consideration for the gift. The cases on resulting trust do not apply to a municipal corporation. We rely on the findings of the trial judge. Further, there has been delay on the part of the plaintiff in taking action. The change in the location of the city hall took place in 1897, and action was not commenced by him until 1910.

Bodwell, in reply: We protested, but it was not until after various arrangements suggested by us had been declined that it was finally intimated to us that nothing would be done by the Corporation to carry out our understanding of the bargain. Laches must be coupled with acquiescence, actual or inferential. The deed contains evidence of a trust; when the trust could not be continued, then there was an end of it. There cannot be part performance; the property was given, not for general municipal purposes, but for a specific purpose, and that having failed, the consideration is gone.

Argument

Cur. adv. vult.

5th November, 1912.

MACDONALD, C.J.A.: I would dismiss the appeal. I agree entirely with the trial judge.

MACDONALD, C.J.A.

IRVING, J.A.: I would dismiss this appeal. Mr. *Bodwell* does not claim that there can be deduced from the language of the conveyance any condition subsequent. He rests his case on the doctrine of resulting trusts, and failure of consideration, and argues that the trust is created by the failure of the intention manifested by the language of the deed.

IRVING, J.A.

I am unable to see anything in this deed except a conveyance in fee to the Corporation in consideration of something to be done by the Corporation; that something, in my opinion, has

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been done. If it was intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument: *Smith* v. *Cooke* (1891), A.C. 297 at p. 299. The deed does not contain apt words to the effect that "maintain" shall mean "maintain for all time to come." The words actually used lead me to believe that the vendor might very well have considered it improbable that a new city hall would be required for many years, and that if a city hall were once established upon the lots granted by him, it would remain there a sufficient length of time to give an increased value to his property in that locality. The omission of the words "for all time," etc., in my opinion, are sufficient to rebut the presumption that there should be a resulting trust.

IRVING, J.A.

It must be remembered that the fixing of a site for a city hall is a matter to be determined by the ratepayers, and not by the council. The knowledge of this fact must have been present to the mind of the grantor's advisers. The promise to maintain the city hall on the lots in question must therefore be read "subject to removal at the will of the people." The vendor might well have recognized, and yet, speculating on the probabilities of the case, trusted that the people would not alter the character of the building for many years.

MARTIN, J.A.: I agree that the plaintiff cannot obtain any relief from this Court, in the present form of action at least. It is difficult to distinguish this case in principle from the decision of Mr. Justice Brewer in the United States Circuit Court in *Berkley* v. *Union Pacific Ry. Co.* (1888), 33 Fed. 794.

MARTIN, J.A.

It is from one point of view important to bear in mind the uncontradicted evidence of the causes that led to the change in site. They are given by the city comptroller as follows:

> "Now then, when was there any suggestion of moving from that place and what were the circumstances that created that, do you know? Well, they made several additions to the building, but some years after—ten years or so—the place did not suit; it was unsatisfactory for all offices; there was not room, and they decided to move to another place."

I mention this because, during the argument, it was suggested on behalf of the defendant, erroneously, I think, that the mere fact that the civic authorities had decided to make a change

would support the inference that it was a justifiable one. But a perusal of the evidence generally shews that the business area of the town had been extending very fast, and with the increase of general business there would be a corresponding increase of civic business, and the above citation shews that the old location had become too small, and that the cause of the change was a genuine one in the best interests of the community at large. It is not easy to say, in the face of such facts, and the other circumstances of this case, that the object of the donor has not been substantially attained, unless it can be said that that object was a fixed location in perpetuity, which, apart from the strict construction of the deed itself, cannot, I think, be successfully contended, on the evidence and correspondence before us; it certainly was not so contemplated by the defendant.

GALLIHER, J.A. agreed in dismissing the appeal.

Appeal dismissed.

Solicitors for appellant: *Bodwell & Lawson.*
Solicitor for respondents: *J. G. Hay.*

IN RE LEY, DECEASED.

Will—Construction of—Alternative executory gifts—Equitable estates for life and in remainder—Repugnant clauses—Gift of income carrying corpus by implication.

Upon the construction of the devise set out below:—

Held (1) That the life estate in the land given to the husband of the testatrix was an equitable one, as was also the limitation to his heirs.

(2) That a *cestui que trust* may be made one of the trustees of the land devised without thereby merging his equitable estate in the legal estate held *qua* trustee: there is not a union of two estates in the same person in the same right.

(3) That the word "heirs" used in the devise indicated the heirs general of the husband.

(4) That, under the first uses declared in the will, the husband took a

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life estate in the "$6,000 interest" and the fee simple in the remaining interest; and the daughter took an estate tail expectant on the death of her father in the $6,000 interest.

(5) That these estates were subject to be divested by one of two alternative executory gifts, arising (*a*) in case of the sale of the property before the death of the husband and daughter, and (*b*) in case the property should remain unsold at the death of the husband and daughter.

(6) That two clauses in the will being repugnant, the later governed.

(7) That an absolute gift of the income, in the circumstances of the case, was by implication a gift of the *corpus*.

Statement

APPEAL from the judgment of MURPHY, J. in a case submitted for the opinion of the Court as to the administration of the estate of Matilda Ley, deceased, heard by him on the 16th of November, 1911, at Vancouver. The facts are fully stated in the reasons for judgment of the learned judge.

Killam, for the executors and Mrs. Cook.
Armour, for Mrs. Crowston.
The Official Guardian, in person.

29th December, 1911.

MURPHY, J.: The testatrix, Matilda Ley, died on the 26th of November, 1909. She left a will bearing date the 16th of November, 1909. At the date of the will she had a husband, John H. Ley, and an only daughter, Mrs. Annie Crowston, living, and they survived her. Mrs. Annie Crowston had three children living at the time the will was made.

The will is as follows:

"This is the last will and testament of me, Matilda Ley, wife of John H. Ley, of the City of Vancouver, in the Province of British Columbia.

"I hereby revoke all former wills and testamentary dispositions by me at any time heretofore made, and declare this only to be and contain my last will and testament.

MURPHY, J.

"I appoint my husband, John H. Ley, and Frank Jolliffe, of the City of Vancouver, British Columbia, painter, hereinafter called 'my trustees,' to be the executors and trustees of this my will.

"I devise all that certain land and premises occupied by me as a residence in the City of Vancouver, and being lot numbered nineteen (19), in block numbered thirty (30), in the subdivision of district lot five hundred and forty-one (541), group one (1), Vancouver District, to my trustees, and direct that my trustees preserve the same to the use of my husband during his life, and thereafter to the use of my daughter Annie Crowston, wife of Alexander Crowston, in a six thousand ($6,000) dollar interest; the

property to be valuated and the interest ascertained by my said trustee during her life, remainder to the heirs of her body, and the balance of remaining interest in said property, to the use of the heirs of the said John H. Ley, until such time as my trustees, or the survivor of them, shall sell the said property, which they shall be at liberty to do at any time as they think advisable, and in the event of such sale, I direct that my trustees shall invest the proceeds thereof in any investments which they shall deem reasonably secure and likely to return a fair annual income, not being limited to investments expressly authorized by law, and to withdraw any of such investments and reinvest the proceeds of the same, or any part thereof, in any other security, the proceeds of any such investment to be paid or held by the said John H. Ley, or the said Annie Crowston, or the heirs of her body, or the heirs of the said John H. Ley, as their interests may be ascertained, by my said trustees; and I exonerate my trustees from any responsibility from any loss or damage which may be occasioned by reason of investments made by them in good faith.

"I direct that thereupon my trustees shall pay the proceeds of such investments to my said husband John H. Ley, during his life, and after his death, to pay such proceeds to my said daughter, Annie Crowston, during her lifetime, and that at her death, to pay the proceeds thereof equally divided to the children of the said Annie Crowston, share and share alike.

"Should the said lands and premises be retained by my trustees, as aforesaid, at the death of my husband and my said daughter, then I direct that my surviving trustee shall forthwith sell the said property and convert the same into money, and to invest the same and pay the income therefrom to my said daughter's children until the youngest of such children comes of age, thereupon, I direct that my trustees shall realize upon the said investments, and divide the proceeds thereof, share and share alike, among the children of my said daughter, Annie Crowston.

"I devise and bequeath all interest in mineral claims which I own to my said husband, John H. Ley, in trust, with full power to mortgage, sell or otherwise dispose of the same whenever and as he thinks advisable so to do, and to divide the said proceeds and profits arising thereout to pay the same, one quarter to my said daughter Annie Crowston, one quarter to my niece Mildred N. Cook, and the children of my deceased sister Dorothy Hatfield, share and share alike, and the remaining one-half to be retained for himself, the said John H. Ley.

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"I devise and bequeath all the residue of my property real and personal, to my husband, John H. Ley."

Her husband, John H. Ley, died some time subsequent to making his will, which is dated the 15th of June, 1911. By this will he made, *inter alia,* the following devise:

"I devise and bequeath unto Millicent Matilda Cook, all my right, title and interest in lot 19, block 30, district lot 541, in the City of Vancouver aforesaid, after deducting from the proceeds of the sale thereof, the sum of $6,000, which was bequeathed unto Annie Crowston, under the last will of Matilda Ley, deceased, also lots 21, 30, 35, 44, in subdivision 28, of district lot 799, North Vancouver; also lot 40, block 4648, district lot 2022;

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also block 62, district lot 2169, subdivision 6, block east ½ of lot 4, district lot 787, also the amount of insurance policy (Aetna), amounting to about $425; also all my personal property and private effects."

Said lot 19, so dealt with by both wills has not yet been sold, though counsel for the surviving trustee under Matilda Ley's will (Frank Jolliffe), states that such trustee is desirous of selling same. The surviving trustee asks for an interpretation of the clauses of Matilda Ley's will, which deal with said lot 19. The first question arising is, does the rule in *Shelley's Case* (1579-81), 1 Co. Rep. 227, apply? If it does, John H. Ley took an estate in fee simple in the whole of lot 19, except a $6,000 interest therein, and under the general residuary clause, he also took the reversion expectant on the falling in of the estate tail in this $6,000 interest given to Annie Crowston, subject to the possibility of its being barred by the taking of the proper steps by the tenant in tail. That it should apply two conditions must be fulfilled, *viz.*: there must be an estate of freehold in the ancestor (*Glendenning* v. *Dickinson* (1910), 15 B.C. 354 at p. 358), and the estate taken by the person to whom the lands are devised for a particular estate of freehold and the estate limited to the heirs of that person must be of the same quality—must be both legal or both equitable: *Van Grutten* v. *Foxwell* (1897), A.C. 658.

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Dealing with the requisites in order, I think John H. Ley took a life estate, which is an estate of freehold. As he is one of the trustees under the will, it is no objection to the construction that he takes a life estate to point to the power of sale given to the trustees to be exercised at their discretion, for his consent in his capacity of trustee during his lifetime is essential to the exercise of such power. Further, the provisions in case of a sale shew that he would have a life interest in the proceeds thereof. I therefore conclude that the first essential is complied with. But I do not think so with regard to the second. To my mind this life estate so taken by him is a legal estate, whereas the estate limited to his heirs is equitable. I consider him to hold the legal life estate because he takes by virtue of the devise to him as trustee, with which the will opens, the legal estate as joint tenant with Jolliffe, his co-trustee. The subse-

quent provisions as to the discretionary power of sale by the trustee, or the survivor of them, and as to disposing of the property after the deaths of John and Matilda Ley, by the surviving trustee in case of failure to exercise such discretionary power antecedent to said events shew, were such indications necessary —though I am of opinion they are not—that the ordinary rule, that a devise to two or more persons as trustees is a devise in joint tenancy, applies to this will. As one of the incidents of joint tenancy is unity of title, it follows that the whole legal estate in this lot was vested in John H. Ley, as fully as it was and is in his co-trustee. That being so, his beneficial estate in the same property for life, must be legal life estate, as distinguished from an equitable life estate. But the estate limited to his heirs is equitable on the principles laid down by Lord Herschell in *Van Grutten* v. *Foxwell, supra,* at p. 662, 66 L.J., Q.B. 745 at p. 748, citing *Harton* v. *Harton* (1798), 7 Term Rep. 652, for this will clearly in its provisions as to discretionary powers of sale and of changing of investments (which may be investments in land), subsequent to the exercise of such power, and particularly in its final mandatory trust, certain conditions being given, to sell and divide the property amongst the children of Annie Crowston, requires the legal estate to be in the trustees. If, then, the ancestor's estate is legal, and the estate limited to the heirs is equitable, the rule in *Shelley's Case* has no application. Should, however, I be in error as to this, I still think the rule inapplicable, for, though it is an inflexible rule of law—

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> "Yet if words are added to the devise or any provisions be found in the will shewing that the expression 'heirs' was not intended to be used in the ordinary legal sense, but to designate some particular person, or particular class of persons, then effect may be given to the intention of the testator thus expressed":

Per MACDONALD, C.J.A., in *Glendenning* v. *Dickinson, ubi supra,* citing *Van Grutten* v. *Foxwell.*

Now, if this rule does apply, then all the provisions of this will dealing with this particular property, subsequent to the limitation to the heirs of John H. Ley, in the first devise, except the general residuary clause, which might, under certain conditions, operate on the reversion of the $6,000 interest expec-

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tant on the extinction of the tenancy in tail, fail, for there is nothing for them to operate upon. They are clearly inapplicable to the said reversion which, *ex hypothesi,* is the only estate remaining in the testatrix. They cannot operate on the fee simple and estate tail given to John H. Ley and Matilda Ley, respectively, for there would be attempts to fasten conditions that are repugnant to such estates, and would therefore be absolutely void: Jarman on Wills, 6th Ed., Vol. 2, p. 1,466. Again, the words "heirs," and "heirs of the body" appear in the will when the proceeds of investments in case the discretionary power of sale is exercised is being dealt with. If the ordinary legal sense is to be given, then the provisions in which they are used are illegal as transgressing the rule against perpetuities. But I take it to be the law that if one meaning will render a testamentary disposition void whilst another will allow it to be operative, the latter is to be preferred and adopted.

However the matter is viewed, it seems to me the rule in *Shelley's Case* is not to be invoked in construing this will, with reference to the gift to John Ley. The reasoning adopted to exclude the rule from operation in favour of John Ley, applied equally in the case of the daughter, except that portion thereof which is based on his estate being legal and that limited to his heirs being equitable. It seems clear that if there is an estate of freehold limited to her, the estate to the heirs of her body must be of the same quality. I am inclined to believe that she takes no estate in the land at all, but merely a right enforceable in equity to have the proceeds of a $6,000 interest therein paid to her so long as the property remains unsold, limited, however, to the term of her natural life. This view, coupled with the reasons adduced in John Ley's case, insofar as they are applicable, lead me to reject the rule in the daughter's case also. The provisions of the will are such, however, as to make its interpretation a matter of extreme difficulty when this view is adopted. I have given the question much consideration, and have come to the conclusions hereinafter set forth, as being those best calculated to reconcile the conflicting provisions of the document and carry out the intentions of the testatrix as thereby expressed, but they are put forward with hesitation and

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should, I think, in the interest of all parties, come under the review of the Court of Appeal.

The one clearly intelligible provision as to the disposition of this lot is that which directs, in case it shall be retained unsold until the death of both father and daughter, that it is forthwith realized upon and the income devoted to the maintenance of the daughter's children, until the youngest of them becomes of age, when the *corpus* is to be divided equally amongst them. This provision operates only if the land remains unsold, and the limitations set out in the first devise apply also only so long as no sale takes place. This last clause then may be used to throw light on the first, and I deduce from a consideration of them jointly, that the word "heirs," as used in the first clause, means the daughter's children, and I am forced also to say that "heirs of the body," mean the same thing. I confess this on its face looks improbable, but it is not nonsensical or impossible, and in no other way can I reconcile the two clauses. To say that "heirs" means "children of the testatrix," is to say that it means Annie Crowston, she being the only daughter. In order not to entirely defeat the last clause, and the discretionary power of sale, so far as they deal with the excess of the property over $6,000, it would then be necessary to hold that section 25 of chapter 193, R.S.B.C. 1897, [R.S.B.C. 1911, chapter 241, section 25], which does away with the necessity of adding words of limitation to a devise, does not apply, for, otherwise, Annie Crowston would, as to this, take an estate in fee simple. It is true that this is possible if it is held that a contrary intention appears by the will. But such necessity is, I think, an argument *prima facie* against such a construction. A stronger, and to my mind a convincing one, is the express provision in this first devise clearly limiting the daughter to a $6,000 interest. This must be supported, if possible, and hence "heirs" must be given any alternative meaning that will do so, and will at the same time allow the last devise and the discretionary power of sale to stand in their entirety. If both "heirs" and "heirs of her body" are interpreted to mean "my daughter's children," this is accomplished. So long as the discretionary power of sale is not exercised, the

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father being dead, the mother takes the income of the estate in a $6,000 interest and her children take the balance of such income. The phrase "heirs of her body" does not come into operation until the death of the mother. On that occurring, the children take the whole income. But it then becomes incumbent on the trustee to sell the property, and pay the income to the children until the youngest attains twenty-one, when they get the *corpus*. It will be observed this compulsory sale does not interfere with the children's right to the whole income which, under the construction adopted, accrues to them at the moment of their mother's death. The testatrix has simply declared that the estate shall then be turned from real into personal estate. The gift of the *corpus* is only the rounding out of the scheme, and completes the disposition of the property.

But the difficulties are not yet at an end. The surviving trustee may exercise his power of sale during the life of Annie Crowston. If he does, both clauses hitherto dealt with cease to have any operation, and new provisions are made which certainly seem less advantageous to the daughter's children, and yet to which effect must be given, if possible. It may seem a peculiar power to place in the hands of, presumably a stranger, yet it is undoubtedly one that a testator can confer if he so

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desires, as is evidenced by the common example of powers to appoint to one or more children, as the donee of the power may, in his absolute discretion, decide. There seems to have been a clear intention in this will to devise the beneficial interest in this property in different ways, according as the trustees, or the survivor of them, should or should not exercise the discretionary power of sale. That, in any event, is the conclusion to which I have come. If, therefore, the trustee does exercise this power, who are the parties beneficially entitled? Two clauses of the will purport to deal with this phrase, but I am unable to altogether reconcile them, or, in fact, to account for two having been inserted at all, as I can only interpret the second as being, with a single inconsistency, a repetition of the first. It is to be observed that each of these clauses deals with proceeds of the investments to be made with the moneys pro-

duced by the sale, and not with the investments themselves. In other words, the income only is bequeathed and the capital left undisposed of. Under the general residuary clause of the will, therefore, it becomes part of the father's estate, as he is the sole residuary beneficiary and would, I think, pass under his will, but, of course, its distribution thereunder would be postponed until the trusts as to income have been carried out. What are these trusts? Dealing with the first clause and adopting the same interpretation of the words used, Annie Crowston would take the income on $6,000 for life, and during that period her children would take the remaining income. After her death her children would take the income in equal shares, and after the death of the last survivor of such children the capital would pass, under the will of John H. Ley, to Millicent Matilda Cook, or her legatees or next of kin.

The second clause, as stated, merely repeats these provisions as to income, except that it enlarges the daughter's interest by giving her the whole income for life. As this is the later provision in the will, and as I cannot reconcile it with the provisions of the previous clause, I am forced to hold that such previous clause is modified *pro tanto,* and that in the event of a sale by the trustee during the lifetime of the daughter, the beneficial interest of her children is postponed until her death, and she, in the meantime, takes the whole income.

To sum up: (a) So long as the property remains unsold and the daughter lives, the trustee must account to her for the income from said lot 19 up to a $6,000 interest therein, and he must account to her children, or to their legal guardian, if not of age, for the balance of such income. He must value the property to arrive at the proper proportions. If he allows the daughter the use of said lot, he must collect from her an amount equal to the proportionate amount of the income so ascertained by him to which the children would be entitled were the property rented to a stranger, and collect said amount from her, and account for same to the children, or to their legal guardian if not of age; (b) If the trustee sells the property, which he had full power to do, at discretion, he must account to the daughter

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for all the income derived from investments he makes of the money arising from the sale. Such investments must be made by him as soon as they reasonably can be, consistent with proper prudence as to risk of loss. After the daughter's death he must account to her children in equal shares for such income, and after the last survivor of such children has died, he must hand over the capital to Millicent Matilda Cook, or her legal representatives.

The appeal was argued at Vancouver on the 22nd of April, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Killam, in support of the appeal, cited *Harton* v. *Harton* (1798), 7 Term Rep. 652; *Van Grutten* v. *Foxwell* (1897), A.C. 658, 66 L.J., Q.B. 745. *Glendenning* v. *Dickinson* (1910), 15 B.C. 354, is distinguishable from this case. We say there was a freehold estate in J. H. Ley during his lifetime. The rule in *Shelley's Case* applies here. The last clauses in the will, being repugnant to the first, should be excluded.

Argument

Macdonell, for Mrs. Cook: We say the rule in *Shelley's Case* applies.

Armour, for Mrs. Crowston: The whole scheme of the will was to give Annie Crowston this property, and a correct interpretation of the will can be obtained by limiting the meaning of the words of devise in that way. No violence will thereby be done to the will. The devise of all the interests to a class carries the *corpus.*

Abbott, for the Official Guardian, supported the submission of *Armour.*

Cur. adv. vult.

On the 28th of June, 1912, the judgment of the Court was delivered by

MACDONALD, C.J.A.: This is an appeal from a judgment of MURPHY, J. on an application before him for the opinion of the Court upon the construction of the will of Matilda Ley, deceased. By her said will she devised lot No. 19

Judgment

"to my trustees, and direct that my trustees preserve the same to the use of my husband (John H. Ley) during his life and thereafter to the

use of my daughter, Annie Crowston, wife of Alexander Crowston, in a $6,000 interest, the property to be valuated and the interest ascertained by my said trustees during her life, remainder to the heirs of her body and the balance of remaining interest in said property to the use of the heirs of the said John H. Ley until such time as my trustees or the survivor of them shall sell the said property which they shall be at liberty to do at any time as they think advisable. I direct that my trustees shall invest the proceeds ..... The proceeds of any such investment to be paid or held by the said John H. Ley or the said Annie Crowston or the heirs of her body or the heirs of the said John H. Ley as such may be ascertained by my said trustees.

"I direct that *thereupon* my trustees shall pay the proceeds of such investments to my said husband John H. Ley, during his life, and after his death to pay such proceeds to my said daughter Annie Crowston during her lifetime, and at her death to pay the proceeds thereof equally divided to the children of the said Annie Crowston share and share alike.

"Should the said lands and premises be retained by my trustees as aforesaid at the death of my husband and my said daughter, then I direct that my surviving trustee shall forthwith sell the said property and convert the same into money, and to invest the same and pay the income thereof to my said daughter's children until the youngest of such children comes of age, thereupon I direct that my trustees shall realize upon such investments and divide the proceeds thereof share and share alike among the children of my said daughter Annie Crowston."

The learned judge was of opinion that the rule in *Shelley's Case* does not apply to the gift to the husband. He thought that because the husband is one of the trustees to whom the legal estate is devised, his life estate therefore must be a legal one, while that limited to his heirs is an equitable one. It is not without hesitation that I have come to the conclusion that the life estate of the husband is an equitable one. That hesitation is not because of the devise of the legal estate to the husband as one of the trustees, as I think a *cestui qui trust* may be made one of the trustees without thereby merging his equitable estate in the legal estate held *qua* trustee. There was not a union of two estates in the same person in the same right: Lewin on Trusts, 12th Ed., 936. My doubt was rather as to whether the devise being for the use of the husband, that use was not immediately executed in him upon the death of the testatrix so as to make his life estate a legal one wholly without reference to his being one of the trustees. Had there been no powers and duties vested in the trustees which would make it convenient, if not necessary, that they should continue to hold the legal estate, the

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use could properly be considered as executed in J. H. Ley, but having regard to the power of sale and the directions respecting the investment of the proceeds and disposition of the income which might, in the discretion of the trustees, be exercised in the husband's lifetime, as well as after his death, coupled with the trusts in favour of the daughter and her children, which trusts, to be properly executed, require that the legal estate should be vested in the trustees, and there being no redevise or redevises to the trustees in the will, I think the intention was that the legal estate should continue in them: *Richardson* v. *Harrison* (1885), 16 Q.B.D. 85; and in this view it follows that the life estate of the husband was an equitable one, as was also the limitation to his heirs.

But apart from this rule, the learned judge held that the word "heirs" was used in this will, not in its strict legal sense, but as denoting a particular person or class of persons. I cannot find anything in the will to support this view. To my mind there is nothing to indicate any particular person or class as distinguished from the heirs general of the husband. In this view of the case it follows that under the first uses declared in the will, the husband took a life estate in the "$6,000 interest" and the fee simple in the balance, and that Annie Crowston took an estate tail expectant on the death of her father in the $6,000 interest.

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But these estates were subject to be divested by one of two alternative executory gifts. The first, in case of the sale of the property before the death of the husband and daughter, in which event, as I read the will, the husband's estate would be cut down to one for life in the whole property, Annie Crowston would take the whole for life, after the death of her father, with remainder to her children as purchasers. To arrive at this result, two repugnant clauses in the will must be considered, and the true intention of the testatrix arrived at.

The first directs that upon such a sale and investment

"The proceeds of such investments (are) to be paid or held by the said John H. Ley or the said Annie Crowston or the heirs of her body, or the heirs of the said John H. Ley, as their interest may be ascertained by my said trustees."

If this stood alone, I should have no hesitation in considering it as continuing the previous estates, but it is followed by a clear and imperative direction which alters the previous gifts, and being posterior to the clause quoted above which conflicts with it, must be held to modify the earlier directions, in the manner above stated. In Jarman on Wills, 6th Ed., Vol. 1, at p. 565, it is said that

"'It has become an established rule in the construction of wills, that where two clauses or gifts are irreconcilable so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention.

"'For instance, if a testator in one part of his will gives to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shews that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly.'"

See also *Constable* v. *Bull* (1849), 3 De G. & S. 411, and other authorities cited in support of that statement.

The testatrix directs payment of the "proceeds" of the investments to the life tenants when it is obvious that she used that word in the sense of income, and used the same word in the grant to the children, but it does not matter whether she used it in the latter case in its proper sense or as meaning income, because an absolute gift of the income in circumstances like the present is by implication a gift of the *corpus,* whether the income be derived from land or personalty: Jarman, pp. 1,185 and 1,297.

Judgment

The other alternative executory devises arise only in case the property should remain unsold at the death of the husband and daughter, and he being dead, it now means at the daughter's death. In that event no difficulty arises. Up to that time the husband's heirs or devisees retained their interest in fee, and Annie Crowston her estate tail. Thereafter those interests are divested by the devises which then take effect in favour of the children of Annie Crowston.

Judgment accordingly.

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CASKIE v. MINISTER OF LANDS.

CASKIE v. MINISTER OF LANDS

Statute, construction of—Land Act—Appeal to Supreme Court under from decision of Minister—Section 163—Time.

The time for taking an appeal, under section 163 of the Land Act, to the Supreme Court, is to be computed from the date of the decision of the Minister.

Thus, where a district, or local commissioner advised an applicant to purchase land that the Minister had given instructions not to accept any applications for certain land until further advised, and on a later date returned the application and deposit of purchase money, with the information that a record of the land had been issued to another person:—

Held, that the second, or later act, was the one from which an appeal lay, and such appeal not having been taken within one calendar month from such date, it was out of time.

Where a party appealing from a decision of the Commissioner files his petition at different dates in two registries, that on which he proceeds to hearing must be taken as the petition on which he relies.

Statement

APPEAL by Angus Caskie from the decision of the Minister of Lands, refusing his application to purchase Lot 9293, Kootenay District, and also refusing to cancel a new record of pre-emption issued to A. G. Watson for the same land, the original pre-emption record having been cancelled by the assistant, or local commissioner for the district, on the ground of non-compliance with the requirements of the Land Act, on the application of the said Andrew Caskie, whose chief complaint was that the pre-emptor, Watson, had not "resided" on the land pre-empted. There was ample evidence before the assistant commissioner that the man had done a great deal of work on the land in the way of clearing and cultivation, and had also erected a dwelling and stable thereon, but he for some considerable period of the time slept in the house of his brother, on the adjoining pre-emption, about a quarter to half a mile from his line. The reason submitted for this was that his father was very advanced in years and his brother was a hopeless, bedridden cripple, and to both of them the pre-emptor was the only

attendant and nurse. On the cancellation of the pre-emption record, the petitioner herein applied to the Minister of Lands for permission to purchase the land in question, but the Minister, having under consideration the application of the pre-emptor for a review of the proceedings before the assistant commissioner, telegraphed and wrote to the assistant commissioner on the 9th of July, 1912, not to accept any applications for the land until further advised, and on the 26th of July definitely refused the application of the petitioner, on which date the assistant commissioner returned the application and money of the petitioner. On the 22nd of August, Caskie filed his petition from this decision in the Nelson registry of the Supreme Court. He did not serve either the Minister or the assistant commissioner with a copy of this petition. On the 3rd of September, the agents of the petitioner's solicitor filed a petition in the Victoria registry of the Supreme Court, and the Minister was duly served with a copy thereof. Section 163 of the Land Act, R.S.B.C. 1911, chapter 129, provides that "any person affected by any decision of the Minister . . . . may, within one calendar month after such decision, but not afterwards, appeal to the Supreme Court in a summary manner . ."

Statement

The hearing took place at Victoria before GREGORY, J. on the 18th of November, 1912.

Maclean, K.C., for the petitioner.
Bass, and *Bullock-Webster,* for the Minister.

21st November, 1912.

GREGORY, J.: Mr. *Bass,* in opposing the petition, raises five grounds, *viz.*: (1) The petitioner is not a person affected by the commissioner's decision (section 49); (2) he has not complied with the provisions of section 34 of the Land Act; (3) he should shew that he is not disqualified from purchasing under section 49 of the Land Act; (4) the appeal is on a point of fact and not of law (section 163); (5) the appeal is out of time (section 163).

Judgment

His last point is the only one which I think is sound, because it does appear to me that the appeal is out of order. This, of

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course, depends upon the date of the commissioner's decision and the date on which the appeal is taken. Mr. *Bass* thinks that the decision appealed from is contained in the letter of the 9th of July from the district commissioner, advising the petitioner's solicitor that he had received instructions from the department not to accept applications for the land in question until further advised. He, however, retained the application and cheque accompanying it until the 26th of July, when he wrote returning both, and advising the solicitor that the department had sanctioned the issue of a new record to Watson. This is, I think, the appealable act, and the one which the petitioner has appealed from. It is dated the 26th of July.

The evidence before me is that the petition was filed in the registry office at Victoria on the 3rd of September, 1912, and served upon the commissioner (Minister) on the same day, thus more than one month after the rendering of the decision, and so too late.

Judgment

Mr. *Maclean,* for the petitioner, stated that the petition was filed in Nelson on the 22nd of August, 1912. That may or may not have been a different petition. Evidently the petition served upon the Minister of Lands was the petition filed at Victoria, and the one which I think must govern.

The prayer of the petition will, therefore, have to be refused, with costs.

Judgment accordingly.

DICKINSON v. THE WORLD PRINTING & PUBLISHING COMPANY, LIMITED, AND L. D. TAYLOR.

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June 4.

DICKINSON v. THE WORLD PRINTING & PUBLISHING CO.

Libel—Newspaper report of police court trial—Mistake of reporter—Apology—Payment into Court of five dollars and repetition of apology—Counsel, in address to jury, referring to amount of payment—Order XXII., r. 22—New trial—Damages—Excessive.

In an action for damages arising out of a newspaper libel, the defendants pleaded a mistake of their reporter, published an apology, and paid into Court $5, as sufficient to satisfy the plaintiff's claim. A special jury awarded the plaintiff $5,000 damages.

Held (IRVING, J.A. dissenting), that there should be a new trial, because the plaintiff's counsel, in addressing the jury, had referred to the fact that money had been paid into Court and mentioned the amount, contrary to Order XXII., rule 22, and might thereby have influenced the jury.

Held, further, that the rule is applicable in an action for libel.

Per IRVING, J.A.: The rule was applicable and was violated; but a new trial should not be ordered, because the defendants' counsel did not ask to have the jury discharged, which he should have done if he thought the defendants were prejudiced.

Sornberger v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263 at p. 272, referred to.

Per MARTIN, J.A.: The objection to the violation of the rule should have been given effect to by the trial judge, who should have discharged the jury of his own motion, and given directions for a rehearing.

The alleged libel purported to be a report of a police court trial, in which it was stated that the magistrate had reserved sentence, whereas, in fact, he had reserved judgment. He afterwards dismissed the charge. The plaintiff, in his statement of claim, limited his complaint to the libellous statement that he had been convicted; he made no complaint concerning the report of the evidence given at the trial.

Held, per MACDONALD, C.J.A. and IRVING, J.A., that the trial judge properly refused to permit the defendants' counsel to cross-examine the plaintiff to elicit what had been said about the plaintiff by witnesses in the police court. The proper mode of proving the police court proceedings, where admissible, is by putting in the depositions: *Rex* v. *Prasiloski* (1910), 15 B.C. 29; and the rejected evidence was irrelevant, having regard to the frame of the pleadings.

Per IRVING, J.A.: The ruling of the trial judge was acquiesced in by counsel for the defendants, and he did not press the questions. Also,

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the amount of the damages was not so excessive as to justify interference by the Court of Appeal.

APPEAL by defendants from the judgment of CLEMENT, J. and the verdict of a jury granting the plaintiff $5,000 damages in an action for libel tried at Vancouver on the 29th of February, 1912. The action arose out of the report in the World newspaper of a police court proceeding against the plaintiff on a charge of obtaining money by threats. The report in question represented that plaintiff had been convicted of the charge, and that sentence had been reserved, whereas, in fact, at the hearing of the charge the magistrate had stated that he reserved his decision. The defence was that the newspaper reporter had misunderstood the magistrate to say that he reserved sentence. An apology was published directly the mistake was discovered, but plaintiff brought action, and the sum of $5 was paid into Court by the defendants, who repeated their apology. Plaintiff sued for $10,000 damages, was awarded $5,000, and defendants appealed on the ground that the damages were excessive.

Statement

The appeal was argued at Vancouver on the 16th of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Macdonell, for appellants: There was no malice; the publication of the article complained of was an honest error or mistake, and an effort was made to amend the error by publishing a complete apology immediately the matter was brought to our notice. He referred to *Smith* v. *Scott* (1847), 2 Car. & K. 580; Odgers on Libel and Slander, 5th Ed., 400.

Argument

Ritchie, K. C., for respondent.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This action is for libel contained in a report in the defendants' newspaper of a police court trial, in which it was stated that the plaintiff had been "found guilty of blackmail." The plaintiff was charged in the police court with having obtained money by threats, with intent to steal the same, and at the close of the case, the magistrate announced that he

would reserve judgment. Defendants plead that the reporter who was present at the trial and wrote the report had misunderstood what the magistrate said, and honestly believed that he had said he would reserve sentence, and that under this honest misapprehension, the article was written in which the statement complained of was made. The magistrate subsequently dismissed the charge. The defendants, upon discovering their mistake, published an apology in their newspaper, setting out the alleged mistake of the reporter.

The plaintiff, in his statement of claim, limits his complaint to the libellous statement that he had been convicted. He makes no complaint concerning the report of evidence given at the police court trial. Defendants pleaded mistake, and the apology, and paid a sum of money into Court which they alleged was sufficient to satisfy the plaintiff's claim. A special jury awarded the plaintiff $5,000.

Two grounds of appeal were strongly urged upon us on the argument. First, the refusal of the trial judge to permit defendants' counsel to cross-examine the plaintiff to elicit what had been said about plaintiff by witnesses in the police court; and secondly, that the plaintiff's counsel mentioned to the jury the amount paid into Court. The cross-examination in question was directed to what was said by witnesses against the plaintiff in the police court. Apart from the objection that the police court record must be produced as being the best evidence of what took place there, I am unable to see the relevancy of the rejected evidence, having regard to the frame of the pleadings. If it were intended to shew the jury that the plaintiff had, according to the evidence of witnesses in the police court, been guilty of the offence with which he had been charged, and hence had no character to lose, the evidence is clearly not admissible. It was open to defendants' counsel to cross-examine plaintiff as to credit, but that was not what was attempted in this case. The questions overruled were not as to his own conduct and character, but as to what witnesses in the police court had said about him. The proper mode of proving the police court proceedings—where admissible—was defined by this Court in *Rex* v. *Prasiloski* (1910), 15 B.C. 29.

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Then as to the other ground: It appears that the plaintiff's counsel, when addressing the jury, referred to the said payment into Court. Order XXII., rule 22 of the Supreme Court Rules, 1906, reads as follows:

"Where a cause or matter is tried by a judge with a jury no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into Court, or of the amount paid in. The jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into Court."

Upon objection being taken at the time, Mr. *Ritchie,* again addressing the jury, said:

"I would like to say to you gentlemen in regard to what I said as to the amount being paid into Court. I find I am mistaken about that. In mentioning that I find that I made a mistake, my learned friend suggests it is like making the mistake of taking away a man's character; I do not think it is from the way they are treating the case. They seem to imply that some very trifling amount is all that is necessary. I do not know if I said there was anything paid into Court or not, but I find I was mistaken about their being willing to pay $5. I do not know anything about any money paid into Court, or if any money has been paid into Court. I want you to disregard what I said about this newspaper having offered to pay $5. Mr. *Macdonell* will tell you how much they are willing to pay; I will tell you how much we claim, and Mr. *Macdonell* will tell you how much they are willing to pay. I was mistaken in saying they were only willing to pay $5, as I do not know how much they are willing to pay."

And again, after recess, Mr. *Ritchie,* clearly referring to the same matter, said:

MACDONALD, C.J.A.

"In regard to that matter this morning, my Lord, I notice, according to English decisions, that rule does not apply to libel suits.

"The Court: I have been looking it up."

I think the rule does apply to libel suits. In an unreported case referred to in the Annual Practice, 1912, p. 38, Lord Russell refused to apply this rule to a libel case, and in another case he characterized the rule as foolish and inconvenient, and refused to be bound by it; but in *Veale* v. *Reid* (1904), 117 L.T. Jo. 292, an action for libel, Ridley, J. said:

"The fact that money had been paid into Court must not be mentioned to the jury."

Our rule is a statutory one, and I do not think we can take the liberty of refusing to be bound by it. The money could have been paid in either under the Libel and Slander Act, R.S.B.C. 1911, chapter 139, section 7, or under rule 1 of Order

XXII. aforesaid. Rule 1 applies to two sets of circumstances: (1) where the defendant pays under admitted liability. There, there is no restriction of the class of action in which it may be paid in. The money here was paid under admitted liability. The other branch of the rule applies to actions other than libel and slander, where liability is not admitted. The case, therefore, stands thus: the defendants had the right, both under the rule and under the section of the statute above referred to, to pay in a sum of money in satisfaction of the plaintiff's demand. They had also the right to the protection of said rule 22, which prohibited any mention to the jury of the fact of payment in, or of the amount paid in. In the face of this statutory rule, counsel for the plaintiff told the jury that $5 had been paid into Court by the defendants. What he first said does not appear in the record, but what he said in explanation or by way of withdrawal quoted above indicates the nature of it. This sentence: "They seem to imply that some very trifling sum is all that is necessary," emphasizes what the rule is intended to guard against, using the fact and the amount of payment as a weapon to influence the jury. The case is analogous to those which have arisen under the section of the Canada Evidence Act prohibiting comment on a prisoner's failure to testify: see *Reg.* v. *Coleman* (1898), 2 C.C.C. 523. There an attempt was made to correct the error by directing the jury to disregard the comment, but it was held that the wrong had been done and could not be undone. In this case, no attempt was made to correct the wrong; what was done rather tended to aggravate it. As the case was not tried according to law, and as the prohibited comment was calculated to, and may well have had some influence with the jury in determining the amount of damages, the judgment and verdict ought to be set aside and a new trial ordered.

MACDONALD, C.J.A.

IRVING, J.A.: The notice of appeal sets forth six grounds of appeal. Three of these, *viz.*: 2, 3 and 6, were argued before us. As to the second, the amount does not seem to me to be so excessive as would justify our interference. Where there is nothing objectionable in the charge, it is difficult for a Court

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of Appeal to interfere with the amount: see *Higgins* v. *Walkem* (1889), 17 S.C.R. 225 at p. 233; even if the Court of Appeal would not approve of so large an award.

As to the third, I agree with the plaintiff's counsel that the questions were not sufficiently pressed at the trial, and I also am of opinion that his objection that the notice of appeal does not sufficiently raise the points the appellant wishes us to deal with was well taken.

The cross-examination was conducted in a very loose and indefinite manner, and I find difficulty in coming to any conclusion but this, *viz.*: the counsel for the defendants acquiesced in the ruling of the trial judge, and, in deference to his ruling, did not press the question.

The defence was that the defendants' police court reporter had misunderstood the magistrate when he, the magistrate, stated that he would reserve his decision; the reporter thought, it is said, that he said he would reserve sentence. It seems to me that on the pleadings the burthen of supporting the *bona fides* of the defence rested mainly on the evidence of the reporter who had made the blunder. It was admitted that it was a blunder.

IRVING, J.A.

Counsel for the defendant put certain questions to the plaintiff on cross-examination, and to these Mr. *Ritchie* objected that if the intention was to bring out by these questions what had been said in the police court by the witnesses, the proper method of proof was to produce the notes of evidence taken down by the official stenographer. That, undoubtedly, would be the best evidence of what the sworn testimony was; but other evidence of what was said would be admissible. But the depositions, as a rule, should first of all be put in, as in *Rex* v. *Prasiloski* (1910), 15 B.C. 29. So far as I can see, all the questions actually asked might very well have been answered without infringing any rule of evidence, but the objection by Mr. *Ritchie,* and the ruling by the learned trial judge took a wider range. It seems to me, as I have said, that the defendants' counsel acquiesced in the ruling and allowed the matter to drop; afterwards he returned to it, but the learned trial judge

refused to allow any cross-examination as to what had taken place in the police court. I think the questions asked were not in themselves objectionable, unless on grounds of irrelevancy, and should have been answered. The ruling of the judge that the proper way to prove what took place in the police court was by the production of the depositions, is correct enough, but the questions hardly went that far. The appellant, in my opinion, is endeavouring to make a point of something which has no importance, as it was admitted that their reporter had made a blunder.

As to the 6th ground. It appears, from Odgers's work on Libel, that rule 275a applies to libel actions; but in the absence of authority I should have been of opinion that the plaintiff's counsel in a libel action had a right to call the jury's attention to the insignificant sum paid into Court by the defendants "as satisfaction of the plaintiff's claim" as an aggravation of the libel.

The rule being applicable, and having been violated, should we order a new trial? I think not, as the defendants' counsel did not ask to have the jury discharged. Defendants' counsel drew attention to the violation of the rule, by saying that he did not waive any right by reason of counsel drawing the attention of the jury to page 4 of the statement of defence. Mr. *Ritchie* apologized and withdrew the statement. The matter was then allowed to drop. I think the defendants' counsel should have applied to the judge to discharge the jury if he thought he was prejudiced. See the remarks of Boyd, C. in *Sornberger* v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263 at p. 272.

IRVING, J.A.

The appeal, in my opinion, is altogether frivolous, and should be dismissed, with costs.

MARTIN, J.A.: We should first deal with the objection taken at the beginning of the trial that the plaintiff's counsel, in opening the case to the jury, communicated to them both the facts prohibited by rule 275a, *viz.*: (1) that money had been paid into Court, and (2) the amount paid in. The rule further directs that "the jury shall be required to find the amount of

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the debt or damages, as the case may be, without reference to any payment into Court." Fortunately, we have the view of the Court of Appeal on the rule in the case of *Williams* v. *Goose* (1897), 66 L.J., Q.B. 345, wherein the scope of it was considered on the 25th and 26th of February, 1897, and it was held that it provided "in terms" that the issues should be put before the jury in a particular way, and the judge could not depart therefrom by submitting other issues to them. Lord Justice Lopes said, p. 347:

"I am strongly of opinion that it is a most wholesome rule."

And the Master of the Rolls thus referred to an assertion respecting a ruling of the Lord Chief Justice, p. 346:

"It was asserted that the Lord Chief Justice had declared the rule to be *ultra vires*, but I do not think that he ever did so. There was, it seems, a case before him which he did not think came within the rule, and if that case comes before us on appeal, we shall have to say what view we take of the matter, but at present nothing has been brought to our notice of which we can take cognizance."

In *Klamborowski* v. *Cooke* (1897), 14 T.L.R. 88, a libel action which came before Lord Chief Justice Russell on the 1st of December in the same year, the plaintiff's counsel, in opening the pleadings, told the jury that money had been paid into Court, and on this being objected to as being contrary to the rule, the learned Lord Chief Justice held it was so, saying:

MARTIN, J.A.

"That is so, but in my opinion the rule is a very foolish one and works out very inconveniently. I think it would be much better that the jury should know when money has been paid into Court. As, however, the learned counsel has now informed the jury, we may as well 'go the whole hog' and tell them the amount,"

which was done. This decision is, of course, when carefully read, really in favour of the defendants' objection at bar, and a later authority directly in support of it, also in a libel action, is *Veale* v. *Reid* (1904), 117 L.T. Jo. 292, wherein Mr. Justice Ridley held that "the fact that money had been paid in must not be mentioned to the jury." See also *Jaques* v. *South Essex Waterworks Company,* decided on the 3rd of June, 1904, 20 T.L.R. 563, wherein Lord Chief Justice Alverstone adopted the same course in an action for personal injuries, where payment in was accompanied by an admission of liability.

In my opinion, it is clear on these authorities that the objec-

tion, which I may say I consider a very substantial one, should have been given effect to by the learned trial judge, and the jury discharged of his own motion, and directions given for a rehearing pursuant to the practice set out in the Annual Practice, 1912, p. 387. The remarks of the plaintiff's counsel to the jury could not cure his mistake or avoid its consequences. It is, therefore, unnecessary to consider the other point raised.

The appeal should be allowed, with costs, and there must be a new trial. The costs of the former trial should, in the circumstances, be given to the defendants in any event of the cause.

MARTIN, J.A.

GALLIHER, J.A. agreed that there should be a new trial, and concurred with MARTIN, J.A. as to costs.

GALLIHER, J.A.

Solicitor for appellants: *B. P. Wintemute.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

New trial ordered, Irving, J.A. dissenting.

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April 2. *Contract—Verbal—Consideration—Promise—New trial.*

WATTSBURG LUMBER CO. v. W. E. COOKE LUMBER CO.

On an appeal taken from the judgment of MORRISON, J. in this case, reported (1911), 16 B.C. 154, it was

Held, per MACDONALD, C.J.A. and GALLIHER, J.A. that the appeal should be allowed and the action dismissed.

Per IRVING, J.A.: That there should be a new trial.

Statement

APPEAL by defendant Company from the judgment of MORRISON, J. reported (1911), 16 B.C. 154. The appeal was argued at Vancouver on the 10th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. A. Macdonald, K.C., for appellant.

S. S. Taylor, K.C., and *M. A. Macdonald,* for respondent.

Cur. adv. vult.

2nd April, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think that the fundamental error in the reasons for judgment below is to be found in the assumption that the defendant entered into the ordinary contract of towage with the plaintiffs; that the contractor was bound to use a tug of sufficient strength and equipment to safely do the work and was to assume the risk of weather conditions. In my view of the case, what was in the contemplation of both parties was that that tug, with its then equipment, and on the morning in question, and under at least the partial direction, and with the assistance of the plaintiffs' servants, was to move the boom in question. The defendants wished to borrow some boom sticks from the plaintiffs and the plaintiffs asked the defendants to move the boom around to his jack ladder. It was a friendly arrangement altogether outside the scope of the business of towage, in which defendants were not engaged. While I agree that Yates had authority and did make this arrangement, I do

not think that either party had any notion that it was other that the lending of assistance by the defendants to the plaintiffs for the mutual benefit of both, and with the appliances that they had at hand. The learned judge below seemed to think that the defendants would be responsible for anything which happened to the boom between the time they attached their line to it and its safe arrival at the jack ladder; that the defendants' servants had sole control and were responsible if they ventured out with it when the weather conditions were not favourable. I am unable to take this view of the transaction. I think the defendants could only be held responsible for negligence or unskilfulness in the handling of the tug where such negligence or unskilfulness caused the loss of the boom.

Now, it cannot be suggested that there was any negligence or unskilfulness up to the time when the plaintiffs' yard foreman, Williams, and his other employee, Sewell, who were assisting in the moving of the boom, tied it up to what is known as the first dolphin, and called to Captain Johnston, of the tug, to let go his line. If there was any negligence up to this point, it was the negligence of Williams in not fastening the boom to the dolphin with a stronger rope or steel cable. On this point the evidence of West is of importance. But however that may be, there is no question that up to this point there was no negligence or unskilfulness on the part of those handling the tug. When Williams called to the captain to let go his line, and back away, Williams says they were finished with the tug; after that they proposed to guide the boom down with the rope in the current to its place of destination. The crucial point of the case, as I view it, turns on whether or not, as Williams and Sewell say, the captain of the tug ran his boat over this line, which fastened the boom to the dolphin, and broke it. I do not think the defendants can be held responsible for anything that happened after the breaking of the line, because what the persons in charge of the tug did was done at the direction of Williams and on account of signals made by the plaintiff himself. Taking the view I have above expressed, the plaintiffs can only succeed if they have satisfied the Court that the rope was broken in the manner Williams and Sewell say it was.

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MACDONALD, C.J.A.

Now, unfortunately, as I think, the learned judge makes no finding on this point. His judgment is based upon entirely different grounds, and such as, with respect, I am unable to adopt. There is a direct conflict between Williams and Sewell on the one side and Johnston and E. J. Cooke on the other as to whether or not the tug did, as Williams and Sewell say, run over this line and break it. The only other witness who throws any light on this crucial point in dispute is C. H. Houle, who was at the time in plaintiffs' employ, and was in the neighbourhood of the jack ladder, where he could see the position of the boom and the tug at the time in question. His evidence, as far as it goes, corroborates that of Johnston and Cooke. As I have already said, Williams and Sewell say that the tug ran over the line instead of backing out and away from the line. Captain Johnston, who was at the wheel, and Cooke, who was handling the tow rope, say that they were never at any time nearer than about 70 feet to this line. They attribute the breaking of the line to its insufficiency for the purpose, having regard to a gale of wind which sprang up shortly before, blowing off shore, and which put such a strain upon the rope that it broke and allowed the boom to escape. I think the evidence sufficiently establishes that there was such a gale; in fact, the learned judge, inferentially at least, finds so when he considers that the defendants' servants in charge of the tug were reckless and ignorant in going out with the boom in such weather. I do not agree that they were reckless in doing this, but I advert to this finding as shewing that we may take it as proved that there was a gale about the time the boom reached the first dolphin and was tied up with the rope by Williams. Houle's evidence also is that the tug was never at any time near the rope in question, and while the learned judge criticizes this witness, when giving his evidence, a perusal of the evidence itself shews that the learned judge was under an unfortunate misapprehension which brought about this criticism. In view of the conflict of evidence it will be useful to look at the circumstances, and endeavour to judge of the probabilities of the two stories. Williams and Sewell say that the tug was using its bow line and had no stern line; at all events, none that they could see. The import-

ance of this, as I view it, is that if the tug were using its bow line, it would be heading towards the rope in question, and if it kept on going ahead, would come against the rope, and thus lend colour to the story of these two witnesses. On the other hand, the captain and Cooke, who was in charge of the line with which the work was being done, say that they were using the stern or tow line, and heading the other way. The evidence on this point is not very definite on either side; we should have been much assisted had the evidence clearly shewn in which direction the tug "was rolling" the boom; there is some evidence, but it is vague. However, it is not probable, in fact it is highly improbable, that those in charge of the boat, knowing that the boom was fastened to the dolphin by the line in question, and the importance of that, and that the line was some distance above the water, plainly in view, should run the tug over it. It is much more likely that the story of Johnston, Cooke and Houle is correct.

I have already adverted to West's evidence. West says that the line used to fasten the boom to the dolphin should have been a steel cable. He was an experienced man, not only on the lake, but at this very place, and says he never used a rope alone, but always a cable, or both. It is also to be noted that both Williams and Sewell attempt to minimize the fact that a strong wind was blowing. The impression they try to create is that there was no wind of any consequence at all. In the absence therefore of a finding by the learned judge, and it appearing that he had not directed his mind to this phase of the question, and the onus which was upon the plaintiff, if my view of the arrangements under which the boom was to be moved is right, to prove negligence or unskilfulness, I think the plaintiffs have not made out their case.

MACDONALD, C.J.A.

It was objected by the appellant that a sketch of the locality purporting to shew the boom at different points in its course, and the position of the tug, and the relation of the boom to the dolphin, and other matters of that kind, ought not to have been admitted; and *Beamon* v. *Ellice* (1831), 4 Car. & P. 585, was cited to us as authority against its admission. I agree that the

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sketch was inadmissible, but in view of the conclusion to which I have come, this ceases to be of importance.

I would allow the appeal, and dismiss the action.

IRVING, J.A.: The point in dispute is: Were the defendants negligent in breaking the plaintiffs' rope, or was the rope broken owing to the wind, or other causes? There were four witnesses who were in a position to testify as to the proximity of the boat to the rope, namely: Williams, the defendants' foreman, and Sewell, his assistant, for the plaintiffs; and Johnston, the master of the tug, and Cooke. The learned judge took the view that Johnston was reckless or incompetent, and, basing his opinion on Johnston's condition at the trial, suggested that possibly Johnston was drunk at the time of the accident. Now, there was no suggestion to or by any of the witnesses that Johnston on that day had been drinking, or had exhibited any recklessness. The result was that, having discounted Johnston's evidence in this way, the learned judge found in favour of the plaintiffs' contention.

IRVING, J.A.

Now, in connection with the weight to be attached to the cause of the breaking of the rope, must be considered the evidence of Houle, but the learned judge misunderstood what Houle had said and, labouring under that mistake, he rejected his testimony. The total result, in my opinion, brought about a mistrial. I would order a new trial.

GALLIHER, J.A.: Whether the finding of the learned trial judge that the moving of the logs was the consideration for the loan of the boom sticks and chains is borne out by the evidence may be doubtful; in any event, the defendants undertook to move them, and would be required to use such care and skill in so doing as a man would use in carrying on the operation in his own business.

GALLIHER, J.A.

Be that as it may, the whole case, in my opinion, narrows down to the manner in which the rope was broken which allowed the logs to drift away from the dolphin to which they were moored. Williams, the plaintiffs' witness, says when the tug brought the boom of logs round and he fastened them with the

rope to the dolphin, they were finished with the tug, and he gave orders to the captain to throw off his line and back away. If, as Williams and Sewell swear on behalf of the plaintiffs, the tug, instead of backing out, steamed forward over the rope and broke it, then the defendants would be liable, but if on the other hand, as Cooke and Johnston, on behalf of the defendants, assert, the tug did not steam towards, but away from the rope, and was at no time near it, and it was the force of a high wind which had arisen, and the current bringing such a severe strain upon the rope that it broke, then the defendants could not be held liable, on the plaintiffs' own admission that their work was done when the logs were moored to the dolphin. I have read the learned trial judge's judgment carefully to see if he had made any finding on this point, but I am unable to find that he directed his mind to it. Had he done so, I should have felt the greatest hesitation in interfering with that finding, but as he has not, it devolves upon us to consider and weigh that evidence without the advantage of seeing the witnesses in the box.

I think the preponderance of evidence is that there was a considerable squall at that point at the time in question. I attach a good deal of importance to the evidence of young West. He was born and raised on the lake, and has been working on boats on it ever since he left school, and knows the locality thoroughly, and the conditions attaching to winds there. That is a feature to be taken into consideration in determining the probability as to which story is true. Two other features seem to me to weaken the probability of the truth of the plaintiffs' version. One is that it seems unaccountable that the captain of a boat would deliberately steam up against or upon a taut rope, which was the only thing holding the logs in place, when the course was clear for him to pull out without going near the rope; and the other is, how he would get the tug over this taut rope. He might break it by running against it, but both of plaintiffs' witnesses swear he ran over it.

GALLIHER, J.A.

The trial judge makes reference to the condition of Captain Johnston at the trial, but there is no suggestion by the plaintiffs of anything of that nature on the day in question.

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It is not an easy task to decide, where there is a conflict of evidence such as here, without an opportunity of seeing the witnesses, but I do not think any useful purpose would be served by sending the case back for a new trial. Considering the evidence in all its aspects, and the conditions as they existed at the time, my conclusion is that the plaintiffs' version of the breaking of the rope is not the reasonable one. As to what took place afterwards in trying to shove the boom across to the bay after it had broken loose, I do not consider it, for what was done was, I think, at the instance of, and upon the directions of the plaintiffs, and against what the captain of the boat considered the best methods to pursue.

GALLIHER, J.A.

Mr. *Macdonald,* counsel for the defendants, raised a point as to the admissibility of a plan or sketch, and I quite agree with his contention that it should not have been admitted.

I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Hall & Thomson.*

Solicitors for respondents: *Harvey, McCarter & Macdonald.*

PEARLMAN v. GREAT WEST LIFE INSURANCE COMPANY.

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PEARLMAN v. GREAT WEST LIFE INSURANCE CO.

Company law—Foreign company "carrying on business"—Company registered in British Columbia—Cause of action arising outside of British Columbia.

Where a company, operating under a Dominion charter, but having its head office in Manitoba, although registered to carry on business in British Columbia, and having a local office in the latter Province, pursuant to the British Columbia Companies Act, was sued in British Columbia for a cause of action arising in Manitoba:—

Held, reversing the opinion of McINNES, Co. J., that the Company did not come within the provisions of section 67 of the County Courts Act providing that a defendant may be sued in the County in which he dwells or carries on business, and that, the cause of action having its origin in another Province, the registration by the company in British Columbia did not benefit the plaintiff.

APPEAL from the judgment of McINNES, Co. J. at Vancouver on the 4th of April, 1912, answering in the negative a question submitted for the opinion of a judge of the County Court. Plaintiff is an insurance agent carrying on business in Vancouver. The defendant Company is registered in British Columbia, but its head office and place of business is in Manitoba. The cause of action arose, admittedly, wholly in the city of Winnipeg. The question for the opinion of the judge was: Did the defendant Company dwell or carry on business within the territorial limits of the County Court of Vancouver as required by section 67 of the County Courts Act and rules—or in other words, has the County Court of Vancouver any jurisdiction to try the action? McINNES, Co. J. came to the conclusion that, in view of the fact that the head office of the defendant Company in this Province is in the City of Vancouver, and it had appointed one George H. Halse, of the city of Vancouver, its attorney, to sue and be sued in any Court on its behalf, in compliance with subsection (*d*) of section 153 of the Companies Act, R.S.B.C. 1911, chapter 39, he must hold that

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the defendant Company carried on business in the County of Vancouver, and that the Court accordingly had jurisdiction to try the action. Plaintiff appealed.

The appeal was argued at Vancouver on the 23rd of April, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

W. B. A. Ritchie, K.C. (*Woodworth,* with him), for appellant.

J. A. Clark, for respondents.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from the judgment of MCINNES, Co. J. on a stated case. The defendant is a life insurance company incorporated by Dominion charter, and having its head office and principal place of business in the city of Winnipeg, where its directors and officers reside, and where its general business is carried on. It is registered in this Province under the Companies Act, and has its registered office for this Province and a local office where insurance business is solicited at Vancouver. The plaintiff now resides at Vancouver, but it does not appear whether or not he resided in this Province when the cause of action arose or contract sued on was made; it is merely stated that the cause of action arose wholly in the city of Winnipeg. The plaintiff brought action in the County Court of Vancouver, claiming to do so by virtue of the County Courts Act, R.S.B.C. 1911, chapter 53, section 67, which provides that a defendant may be sued at the place where he "dwells or carries on his business." The learned judge held that because of registration in this Province, with a registered office and place of business at Vancouver, the defendant falls within the words quoted. I am unable to agree with that view of the law. There are a number of authorities bearing upon the subject, but I shall content myself with referring to the following: *Corbett* v. *General Steam Navigation Co.* (1859), 4 H. & N. 482; *In re Brown* v. *London and North Western Railway Co.* (1863), 4 B. & S. 326; *Adams* v. *Great Western*

Railway Co. (1861), 6 H. & N. 404; *Shiels* v. *Great Northern Railway Company* (1861), 30 L.J., Q.B. 331; *Le Tailleur* v. *South Eastern Railway Co.* (1877), 3 C.P.D. 18; *Jones* v. *Scottish Accident Insurance Co.* (1886), 17 Q.B.D. 421.

There are other more recent cases which turn on the construction of the Income Tax Acts in England, such as *De Beer's Consolidated Mines, Limited* v. *Howe* (1906), A.C. 455, which in my opinion support the appellant's contention. The only case the other way, to which we have been referred, is *Weatherley* v. *Calder & Co.* (1889), 61 L.T.N.S. 508, which seems to me to be at variance with the decisions both before and since that date.

It was contended by the respondent's counsel that his case is strengthened by virtue of the British Columbia Companies Act, under which this Company was registered. I am unable to accede to that view for this reason: While it might be contended (though I do not hold that opinion), that a company registered under the Act should, for all business done in this Province, be considered, for the purpose of section 67 of the County Courts Act, to be carrying on business here, yet such an argument is not applicable to a case like the present one, where the cause of action arose in another Province.

MACDONALD, C.J.A.

I think the appeal should be allowed.

IRVING, J.A.

IRVING, J.A.: When, in 1885, the Legislature reduced into one statute (the County Court Jurisdiction Act, 1885) the many provisions—English and colonial—governing County Court practice, it was provided by section 52 that:

(1) The plaint might be entered in the County Court within the district in which the defendant dwelt or carried on his business, (*a*) at the time of bringing the action, or (*b*) by leave within six months next before the time of action or suit brought; or (2) In the County Court in the district in which the cause of action wholly or in part arose.

The action having arisen wholly in Manitoba, we need not trouble ourselves with the last limb of the section.

As to the first, the expression "dwell or carry on business" has been considered many times by English Courts. It has

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been held that a railway company dwells at the principal office, and not at every station on the line. So, too, a *quasi* corporation, under 7 & 8 Vict. (Imp.), chapter 110, was deemed to carry on its business where its principal office was situate: *Adams* v. *Great Western Railway Co.* (1861), 30 L.J., Ex. 124, 6 H. & N. 404; *Taylor* v. *Crowland Gas and Coke Co.* (1855), 24 L.J., Ex. 233, 11 Ex. 1.

Again, it was held in *Corbett* v. *General Steam Navigation Co.* (1859), 4 H. & N. 482, 28 L.J., Ex. 214, that a public company (carrying on business in London), which employed in a country town a general commission agent who transacted the company's business in such town, in an office for which the company paid him rent, did not "carry on business" in that town, within the meaning of the County Courts Act.

The defendants rely on these cases as shewing that the County Court of Vancouver has not jurisdiction to deal with this case. The plaintiff points to the general words of the Companies Act and claims that as the attorney is to accept process, the Vancouver County Court has jurisdiction.

The general rule which lies at the root of all international and most domestic jurisprudence on this matter is that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit. All jurisdiction is territorial.

IRVING, J.A.

Territorial jurisdiction attaches, with special exceptions, upon all persons either permanently or temporarily resident within the territory while they are in it. It exists always as to land within the territory, and may be exercised over moveables within the territory. And in questions of status and succession governed by domicile, it may exist as to persons domiciled, or who, when living, were domiciled within the territory. In a personal action, to which none of these causes of jurisdiction apply, a judgment is not recognized by international law (unless, of course, the defendant has submitted himself to the jurisdiction of the Court making such judgment).

In those cases in which the Courts of one country recognize the judgments of another country, the principle proceeded on is this: that as the judgment of a (foreign) Court of compe-

tent jurisdiction imposes a duty or obligation on the defendant to pay the sum for which judgment is given, the (home) Court will enforce it.

The question we have to determine is whether the compliance with the provisions of the Companies Act, British Columbia statutes 1910, chapter 7, so as to enable the defendants—a Dominion incorporated company, having its head office in Manitoba—to carry on business in this Province, makes the Company a resident of this Province, so as to give the Courts of this Province jurisdiction over the Company in respect of a cause of action not relating to land or moveables within the Province, nor connected with domicile.

Having regard to the authorities as to the meaning of the words "dwells or carries on business" in the County Courts Act, chapter 14, 1905, this answer must depend on the provisions of the Companies Act, chapter 7, 1910.

I can find nothing in that Act shewing it was the intention to confer any extraordinary jurisdiction on the Courts, or to make the Company liable to process except in respect of their British Columbia business. The aim and object of the statute of 1910 was to provide by a system of licensing for the protection of creditors of the Company in this Province, and to enable the Company to sue and be sued in respect of business transacted in this Province.

IRVING, J.A.

If it were the intention to give the Company power to be sued in respect of any matters wholly unconnected with their British Columbia business, say a mortgage held by the Company on land in Manitoba by a resident of Manitoba, one would expect, having regard to the rules relating to enforcement of foreign judgments, which I have already referred to, a very clear declaration to that effect.

I would allow the appeal.

MARTIN, J.A.: I agree with the judgment just delivered by the learned Chief Justice, and only desire to add that where an extra Provincial company has taken out a licence "authorizing it to carry on business within this Province" . . . . (under sections 153-6 of the Companies Act, chapter 7, 1910), it is too

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late for it to contend that as a fact it is not "carrying on business" here, and a wide interpretation should be given to that expression. But that does not touch the real point in the present case, which, in a nutshell, is that when the defendant, then (we were informed), living in Winnipeg, and having a cause of action, which arose wholly in Winnipeg against the Company where its head office was, packed up his effects to come to this Province, he sought to pack up his cause of action (if I may use that simile), with them, which is something he clearly could not do.

GALLIHER, J.A.

GALLIHER, J.A. concurred in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Woodworth & Creagh.*
Solicitors for respondent: *Lennie & Clark.*

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McCORMICK v. KELLIHER LUMBER CO.

McCORMICK AND McCORMICK v. KELLIHER LUMBER COMPANY.

Master and servant—Judgment recovered at trial—Reversed on appeal—Application to Court of Appeal for direction to assess damages under Workmen's Compensation Act, 1902, B.C. Stats., Cap. 74—Powers of Court of Appeal.

Plaintiffs at the trial recovered damages for the death of their son, killed while in defendant Company's employment. The Court of Appeal reversed the trial judgment. Thereafter plaintiffs applied to the Court of Appeal for a direction to assess damages under the Workmen's Compensation Act, 1902, section 6, subsection 4.

Held, that the Court of Appeal could not assess the damages or make any order directing an assessment.

Statement

APPLICATION by plaintiffs (respondents) for a direction as to awarding compensation under the Workmen's Compensation Act, 1902, the judgment at the trial having been reversed

on appeal and the action dismissed. Heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A. at Vancouver on the 9th of April, 1912.

A. E. McPhillips, K.C., for the application.
E. A. Lucas, contra.

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.: The plaintiffs, at the trial, recovered damages for the death of their son, who was killed while in the defendants' employ. On appeal, this Court reversed the judgment below and dismissed the action on the ground that no negligence causing the death had been proven against the defendants. Counsel for the plaintiffs afterwards applied to us to assess compensation under the provisions of section 6, subsection 4 of the Workmen's Compensation Act, 1902. We were referred to *Greenwood* v. *Greenwood* (1907), 97 L.T.N.S. 771, in which case a similar application was made to a Divisional Court under circumstances identical with the present. In that case the Court thought that the trial Court was the proper tribunal to assess the compensation. I think it is plain on the reading of the statute that the tribunal designated to discharge the duties which are ordinarily discharged by an arbitrator is the trial Court. Where the plaintiff's action is dismissed at the trial no difficulty arises. If the plaintiff desires to claim the benefit of said section, he may do so, and the trial judge proceeds to deal with the matter there and then. But where, as here, the plaintiff succeeds at the trial but fails on the appeal, the question arises as to whether or not this Court can discharge the functions in this behalf of the trial judge; and if not, can it make any order in the premises? As I have already said, I think this Court cannot assess the compensation, but I see no reason why an application to the trial Court should not be made. I express no opinion as to how that Court should deal with it. It follows that this application must be refused, but as the question has come up for the first time, and is one of general importance, there should be no costs.

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IRVING, J.A.: The action brought under Lord Campbell's Act was for damages at common law, and also under the Employers' Liability Act, and was dealt with under the common law and judgment was given for the plaintiffs.

The judgment was reversed by this Court on the ground that the employer was not liable in that action. Mr. *McPhillips* now asks this Court for an order directing the Court in which the action was tried to assess the compensation payable under the Workmen's Compensation Act, 1902, in the same way that the Court in which the action was tried would assess the damages, acting under section 2, subsection (4) of the Workmen's Compensation Act, 1902.

The case of *Greenwood* v. *Greenwood* (1907), 24 T.L.R. 24, was relied upon by counsel for the applicants. There the plaintiff's action was successful in the County Court; but that judgment was reversed by the Divisional Court. Upon an application to the Divisional Court to assess the compensation, the opinion was expressed that the County Court was the proper tribunal to make the assessment, but the Court declined to insert in the order any direction to the County Court. The report in 97 L.T.N.S. 771 agrees with that in 24 T.L.R.

The chief objection taken by Mr. *Lucas* is that the plaintiffs are not at liberty to proceed at common law, and then when that remedy has failed, to go to the Workmen's Compensation Act. When we turn to the Act itself, we find that to provide a remedy for accidents attributable to the negligence of fellow workmen, to the man's own carelessness, or to causes beyond his explanation, the Legislature thought fit to declare that the employer should regard as one of the costs of production a sum or sums necessary to compensate the workman during his disablement—or after his death, his actual dependants.

IRVING, J.A.

To the end that this compensation should be obtained in an easy and informal way, it was provided that the tribunal to determine whether compensation was or was not payable, and the amount thereof (if any) should be settled, not by the Courts, but by arbitration. But the Legislature, in granting this new remedy, and providing a suitable tribunal for its administra-

tion, had also to deal with those cases where an employee might think he was entitled to damages in consequence of the injuries sustained by him being caused by the personal negligence or wilful act of his employer, or of some person for whose act or default the employer was responsible.

In such cases the civil liability of the employer remained, by section 2, subsection (2*b*), unaffected, but, *nemo bis vexari debet,* the Act provided that it was optional with the workman injured to say whether he would proceed under the new Act or take his chances in an action at law. The employer was not liable to pay compensation both independently of the Act and also under the Act. That means, according to a number of cases decided in England, *e.g., Cribb* v. *Kynoch, Limited (No. 2)* (1908), 2 K.B. 551, that he was not only not to pay compensation, but he was not to be harrassed with unnecessary litigation; but an exception in favour of the injured man was made in the event of his suing for damages, if the suit was commenced within six months. In such a contingency it was provided that if it were determined in the action that the injury was one for which the employer was not liable for damages, but that it was a proper case for compensation, the action should be dismissed, but the Court, instead of putting the plaintiff to the expense of going to arbitration, should, if the plaintiff then and there made a request to that effect, proceed to assess the compensation, just as an arbitrator would, and as if no action had been brought. Subject to this, the Court was to be at liberty to deduct from the compensation all the costs which in its judgment had been caused by the plaintiff bringing the action, instead of proceeding under the Act, as he ought to have done.

IRVING, J.A.

There are authorities, *e.g., Edwards* v. *Godfrey* (1899), 2 Q.B. 333 at p. 337, that to entitle the plaintiff to this exceptional privilege, he must make his application "then and there," that is to say, before the action is disposed of. Unless the application is made then and there, the Court can have no power to set off the costs against the compensation.

Now in this case, as the plaintiff succeeded before the trial judge in obtaining damages, it would have been unreasonable

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for him in such case to apply then and there for an assessment. But, unfortunately for him, we have disagreed with the judge who found in his favour, and the question we have to deal with is: Can this Court under these circumstances, by virtue of (a) section 8 of the Court of Appeal Act, 1907, chapter 10 (R.S.B.C. 1911, chapter 51, section 8); or (b) Rule 868 of the Supreme Court Rules, 1906, assess the compensation, or make an order directing the Supreme Court to determine whether the employer is liable, under the circumstances of this case, to pay compensation, and if so, to make the assessment.

In my opinion this Court has the power, if the order of this Court has not been taken out. If the order has been taken out, the action has been dismissed and is at an end.

IRVING, J.A.

Having regard to the fact that this action was brought within the six months, this Court, in my opinion, would have the power to make the order asked for, *i.e.*, remitting it to the Supreme Court, in order that the Court might "determine in the action" whether or not the injury was one for which the employer was liable, if the application had been made to this Court before the judgment allowing the appeal and dismissing the action is perfected.

GALLIHER, J.A.

GALLIHER, J.A. concurred in the conclusions of MACDONALD, C.J.A.

Application dismissed.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY, JAMES ISLAY MUTTER, AND KENNETH FORREST DUNCAN.

GREGORY, J.

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ATTORNEY-GENERAL v. ESQUIMALT AND NANAIMO RY. CO. *et al.*

Statute, construction of—School reserves—Alienation—Land held by the Crown in trust—B.C. Statutes, 1884, Cap. 14; 1882, Cap. 17.

The reservation of Crown lands for school purposes is an "alienation" within the meaning of section 6 of The Island Railway Act (B.C. statutes, 1884, chapter 14).

APPEAL from the judgment of GREGORY, J. in an action tried by him at Victoria on the 5th of December, 1911, for a declaration that two specified half-sections of land in Comiaken District did not pass under the statutory grant by the Crown in right of the Province to the Crown in right of the Dominion effected by the Island Railway Act, 1884. The land in suit was, by notice in the British Columbia Gazette of the 31st of August, 1872, reserved for school purposes. The reserve was effected by virtue of the Land Ordinance, 1870, section 42. The Public School Act Amendment Act of 1882, provided:

"But no public school reserve shall be alienated without the consent of the trustees of the school district in which such reserve is situated."

Statement

In this state of circumstances the Island Railway Act, 1884, was passed, granting to the Dominion a certain area of land, within the boundaries of which the land in question was situate. There was, however, excepted out of the grant, by section 6 of the Act, "any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown," and also Indian, naval and military reserves. The land so granted to the Dominion was granted over to the defendant Railway, who purported to sell the land in suit to the other defendants, and this action was brought, claiming a declaration as set out above

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and also an injunction to prevent the defendants dealing with the land.

Bodwell, K.C., and *Mayers*, for the Attorney-General, contended that the effect of the proclamation of the 31st of August, 1872, coupled with the Public School Act Amendment Act, 1882, was to constitute the Crown a trustee of the lands for the school trustees; that a declaration of trust was strictly analagous to an "agreement for sale" in section 6 of the Island Railway Act, 1882, inasmuch as in both cases only the legal title remained in the Crown, and that, therefore, the reservation fell within the class of "other alienation" specified in the section; that the land could only be freed from the trust by Act of the Legislature; and that the Island Railway Act, 1884, had not that effect on the principle of *specialibus generalia non derogant*. They cited *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, *per* Turner, L.J. at p. 274; *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11, *per* Jessel, M.R. at p. 14; *Williams* v. *Pritchard* (1790), 4 Term. Rep. 2; *Eddington* v. *Borman, ib.* 4; *The London & Blackwall Railway Co.* v. *The Limehouse District Board of Works* (1856), 3 K. & J. 123; *Fitzgerald* v. *Champneys* (1861), 2 J. & H. 31, *per* Wood, V.C. at p. 54.

Argument

Maclean, K.C., for the defendants, contended that a reservation was the antithesis of an alienation.

22nd December, 1911.

GREGORY, J.

GREGORY, J.: This is an action involving the title to the western halves of sections 8 and 9, range one, Comiaken District, Vancouver Island. The defendants claim through a grant from the Dominion Government, which depends for its validity on the provisions of the Island Railway Act, being chapter 14 of the statutes of British Columbia, 1884; while the plaintiff contends that the lands in question had been alienated before the passage of that Act, and so falls within the exception set out in section 6. It is, therefore, necessary to consider first the dealings of the Provincial Government with that land prior to the passage of the statute of 1884.

In 1872 the land was Provincial Crown land, and governed by the provisions of the laws then in force. The Land Ordin-

ance, 1870, being No. 144 of the Revised Laws of British Columbia, 1871, by section 42, authorized the Governor, "for such purposes as he may deem advisable," by notice published in the Gazette, to reserve any lands not sold or legally pre-empted; this would include the lands in dispute. The Public School Act, 1872, being No. 16 of the British Columbia statutes of 1872, by section 6, subsection 2, authorized the Lieutenant-Governor in council "from time to time to set apart in every school district such a quantity of the waste lands of the Crown as in his opinion may be necessary for school purposes in such district." There does not appear to be any provision in either of these Acts for the cancellation or removal of a reserve once it is established.

On the 19th of June, 1872, the school trustees for the North Cowichan District made application for the reservation of these lands for school purposes. The application was reported on by the then chief commissioner of lands and works on the 27th of June, 1872; and on the 4th of July, 1872, considered by the committee of council, which found that the district was a district within the meaning of The Public Schools Act, 1872; that the land was vacant and unreserved, and advised the granting of the application; and on the 5th of July, 1872, it was approved by the Lieutenant-Governor and notice thereof published in the Provincial Gazette on the 13th of July, 1872. This reservation is the alienation relied on by the plaintiff to bring the lands within the exception set out in section 6 of the statutes of 1884.

GREGORY, J.

The Land Act, 1875, No. 5, repealed all previous Land Acts and Ordinances, but the repeal was not to prejudice or affect any rights then acquired under any of the repealed Acts. Section 60 of this Act gave the Lieutenant-Governor in council power to reserve lands to be conveyed to the Dominion Government in trust for the Indians or for railway purposes, under the Terms of Union; and section 75 empowered the Lieutenant-Governor in council "to set apart in each school district . . a piece of land, not exceeding 160 acres, for school purposes." There appears to be no provision in this Act for the cancellation of reserves of land so set apart for school purposes.

The Land Act, 1875, was amended in 1879 by chapter 21,

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and, although by section 9 of this amending Act, particular sections of land in each township were set apart for the purposes of education, section 75 of the Act of 1875 was left unaffected.

In 1876, by Act No. 2, the Public Schools Act, 1872, and its amending Acts were repealed, and it in turn, with its amendments, was repealed by the Public School Act, 1879, being chapter 30 of the statutes of 1879. Neither of these two Acts of 1876 nor 1879 makes any reference to school reservations (leaving the matter to be dealt with under section 75 of the Land Act, 1875, and section 9 of the Lands Amendment Act, 1879), but section 41 of 1879, chapter 30, gives the control of "school lands" to the lands and works department.

The Public School Act, 1879, was amended by chapter 17 of the statutes of 1882 by adding to section 41 the following words:

"But no public school reserve shall be alienated without the consent of the trustees of the school district in which such reserve is situated."

The position of affairs, therefore, as to the law and the facts when the Island Railway Act, British Columbia statutes, 1884, chapter 14, under which the defendants claim, was passed, was as follows: The lands in question had been validly reserved for school purposes, there was no statutory authority for the cancellation of a school reserve once it was made (such a cancellation would, it would seem, have to be done by the Legislature itself by legislation in the usual way), and school lands could not be alienated without the consent of the school trustees; there is no evidence that the school trustees ever assented to any transfer.

GREGORY, J.

Although the Land Act, 1875, and its amending Acts, were repealed in 1884 by chapter 16 of the statutes of that year, and section 57 of that Act provided a means for the cancellation of reserves, it has no bearing upon the present case, even if it were proved that this reserve was duly cancelled under its provisions, for that statute did not become law until the 18th of February, 1884, while the Island Railway Act became law on the 19th of December, 1883, the Legislature on that occasion having been in session from the 3rd of December, 1883, until

the 18th of February, 1884; and his Honour the Lieutenant-Governor visited the Legislature on the 19th of December, 1883, and assented to the Island Railway Act and the Municipality Act Amendment Act, chapter 22; while the other Acts of that session were not assented to until the 18th of February, 1884, as appears by an inspection of the statutes themselves. It is unnecessary to refer to any of the later Land Acts, but an examination of them will shew that the policy of the Government in dealing with school reservations has not changed, *e.g.*, chapter 66 of the statutes of 1888 provides, by section 38, for setting apart lands for school purposes, and sections 86 to 90 for the creation of other reserves, the cancellation of reserves "made for temporary purposes," the leasing of school reserves with the consent of the school trustees, etc.

Each side has referred to certain returns brought down to the House in 1891 in connection with these lands, but it seems to me that unless they were made the basis of some legislative action they are of no value in the present discussion, as they were not made until seven years after the legislation relied on was enacted, and can at best only express the personal opinion of the clerk or officer who compiled them; and the defence cannot use those they rely upon as admissions made by the Government, nor do they create an estoppel in the absence of evidence that the defendants knew of them, and that they were induced to alter their position in the belief that the statements therein made are true, even if the Crown is subject to the doctrine of estoppel.

GREGORY, J.

At the time of the passage of the Island Railway Act, the Legislature must be presumed to have had in mind all previous legislation, and probably all information previously returned to it. On the 14th of January, 1873, the chief commissioner of lands and works formally made a return to the Legislative Assembly, in answer to an address of that body "for a return of Government reserves," in which he shewed the lands in question as a school reserve of 100 acres established on the 8th of July, 1872, and as "unlimited"; this word being placed in the column headed "withdrawn," would appear to me to indicate that the land department looked upon this reserve as incap-

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able of being withdrawn. A number of maps were also introduced by both parties, presumably as admissions, but in the absence of evidence explaining the authority of their making, and the information they should contain, their mere production does not assist me.

It is a recognized principle in the interpretation of statutes that the Crown is not reached except by express words or necessary implication, in any case where it would be ousted of an existing prerogative: Maxwell on Statutes, 4th Ed., p. 202. Also that the Legislature having already given its attention to a particular subject (here the creation of school reserves) is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifest in explicit language, or there be something which shews that the attention of the Legislature has been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one: Maxwell, p. 264. And see the remarks of Wood, V.C. in *Fitzgerald* v. *Champneys* (1861), 2 J. & H. 31 at p. 54. See also *The London & Blackwall Railway Co.* v. *The Limehouse District Board of Works* (1856), 3 K. & J. 123, which was a case of two special Acts, and the second was held not to defeat the rights conferred by the first.

GREGORY, J.

In the case at bar we have a general Land Act dealing specially with the subject of school reserves, and a subsequent public Act passed to implement a previous Act creating a private railway company, and granting aid thereto, the construction of such railway having become a matter of negotiation between the Dominion and the Provincial Governments. In case of any apparent conflict between these two Acts, it seems to me that the principles of interpretation above stated must be applied. As already stated, the root of the defendants' title, if any, is the Island Railway Act, which came into force on the 19th of December, 1883. Section 3 of that Act granted to the Dominion Government, in trust, save as thereinafter excepted, the lands situate as therein described. The area described includes the lands in dispute. Section 4 specifically

excepted a certain described area. Section 5 provides that the Dominion Government shall

"Be entitled out of such excepted tract to lands equal in extent to those *alienated* up to the date of this Act by Crown grant, pre-emption, or *otherwise,* within the limits of the grant mentioned in section 3 of this Act."

Section 6 is as follows:

"The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or *other alienation* by the Crown, nor shall it include Indian reserves or settlements, nor naval or military reserves."

It is to be noted that section 5 makes no allowance to the Dominion for Indian or military reserves included within the granted area, and the reason is plain, *viz.*: because the Province had no present beneficial interest or control over them, but lands within that granted area over which it had control and beneficial interest, but which it had parted with, it had to make good to the Dominion. To have included the lands in dispute in section 6 as a school reserve would appear to take it out of the provisions of section 5, and render it unnecessary to make any allowance therefor, for which there was no good reason, and it would not be accurate, for, although such lands are spoken of generally as "school reserves," the Act of 1872, under which they were selected, speaks of them as lands "set apart for school purposes," and the report of the executive council uses this identical language. It seems to me that these lands were, therefore, intended by the Legislature to be included in the general words "or other alienation"; general words would have to be used unless time was to be taken to make a critical examination of all lands that had been dealt with in any manner whatever, and then enlarge the language of the section so as to fully describe each, which would be impracticable.

The defendants contend that alienation means a transfer of the title. That is probably true when speaking in general terms; but it must here be interpreted in the sense in which it is used in the statute. The words of the statute are "or other alienation," following the words "now *held* under Crown grant, lease, agreement for sale," clearly indicating that both leases and agreements were looked upon as alienation. Some effect must be given to the words "or other alienation," and so we must look for lands *held* in some other way.

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Mr. *Maclean* referred to *The Queen* v. *Victoria Lumber Co.* (1897), 5 B.C. 288, where the Court interpreted the word "alienated" in section 22 of the same statute. But it does not seem to me to assist him. MCCREIGHT, J. at p. 301, draws attention to the duty of construing words in the same sense throughout an Act; and at pp. 299 and 300 says that the Legislature has repeatedly shewn in this Act that the word "alienate" is to have a very comprehensive signification, and "was meant to include a great deal more than a mere conveyance of the fee" etc., and WALKEM, J. at p. 304, says that alienation means a parting with control over the lands.

On the publication of the order in council the lands immediately, and without power of revocation, passed out of the general control of the Crown, and were thereafter *held* by the lands and works department for school purposes; and neither the Crown nor the department could sell or lease them without the consent of the school trustees. The Legislature alone could thereafter change the conditions of this holding, it having, by the School Act, 1872, delegated certain powers to the Lieutenant-Governor in council which, once exercised, became exhausted, and the Legislature alone could undo what had been done. This would have to be done in language leaving no doubt of its meaning, and it does not seem to me that such language is to be found in the Island Railway Act.

GREGORY, J.

The case appears to me to be in the same position as if the Legislature had passed an Act setting apart the disputed lands for school purposes, which would be the equivalent to a declaration of trust, and had subsequently passed the Island Railway Act without making any special reference to the previous legislation, and that in such a case the principles of interpretation already referred to would apply and that the subsequent legislation would not be held to repeal the previous Act.

Although I have some misgivings as to the soundness of my conclusions, but must give effect to them, there will be judgment therefore for the plaintiff. The costs will be governed by the Crown Costs Act.

Defendants appealed, and the appeal was argued at Vancou-

ver on the 2nd and 3rd of April, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

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Maclean, K.C., for appellants: It must be shewn that the land was alienated, that is, it had passed out of the possession of the Crown in right of the Province, or that it had been constituted a naval or military reserve, before the conveyance to us can be attacked. We say that this land passed over to the Railway Company in the land grant, and this is the more apparent when it is seen that in respect of these particular sections, there was no provision made for lieu lands.

Bodwell, K.C., for respondent: There was no compensation allowed to the Railway Company, in lieu lands, for naval, military, or other reserves. The Crown gave to the Railway Company only such lands as were not alienated. Our submission is that as soon as this tract was made a school reserve it was impressed with a trust—there was a declaration of trust for school purposes. The school trustees could bring an action to prevent the transfer of this land to the Railway Company or to anyone else. As to the submission that this tract was not considered in the settlement of lieu lands, it is not perhaps too late now to make the claim for rectification of any oversight which may have occurred.

Maclean, in reply: The statute supplies the whole answer to the question of alienation. There has been no relation of trustee and *cestui que trust* established between the Government and the school trustees; the latter in this instance are new partners of the government machinery. There has been nothing done more than an indication that this land should be held for school purposes, and that land being left out of the settlement for lieu lands would indicate that the intention had been abandoned and that the lands had been thrown into the land grant to the Railway Company.

Argument

Cur. adv. vult.

4th June, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant's right to the parcels of land in question in this appeal depends upon the true construction of the grant to their predecessors in title, the Dominion

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of Canada, contained in chapter 14 of the statutes of British Columbia, 1884.

By section 3 of the said Act a block of land, the boundaries of which are roughly defined, was granted to the Dominion, within which boundaries it is admitted the parcels in question here lie. Section 6 provides:

"The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian reserves, or settlements, nor naval or military reserves."

Section 5 of the same Act provides for lieu lands

"Equal in extent to those alienated up to the date of this Act by Crown grant, pre-emption, or otherwise, within the limits of the grant mentioned in section 3 of this Act."

The parcels in question, being parts of lots 9 and 10, range 1, Comiaken District, North Cowichan, were, on the application of the board of school trustees for the North Cowichan School District, by order in council, dated the 4th of July, 1872, "set apart for school purposes," and the order was duly gazetted on the 13th of July of the same year. The order in council was made pursuant to power given to the Lieutenant-Governor in council by The Public School Act, 1872, British Columbia statutes, No. 16, section 6, subsection 2,

"To set apart in every school district such a quantity of the waste lands of the Crown as in his opinion may be necessary for school purposes in such district."

By the said School Act, school trustees were created bodies corporate, and certain powers and duties were given to, and imposed upon them. It was declared, by section 30, that

"The trustees shall take possession and have the custody of and safe-keeping of all public school property, which has been acquired or given for public school purposes in such district, and shall have power to acquire and hold as a corporation, by any title whatsoever."

In 1882, by chapter 17, the School Act was amended to declare that

"No public school reserve shall be alienated without the consent of the trustees of the school district in which such reserve is situate."

It does not appear in the evidence that there was a school building on these lands at a date earlier than 1885. Since then there appears to have been such a building on the lands in question in use for public school purposes.

The appellants appear not to have attempted to take possession of or deal with these lands until 1905, and their claim to do so was then denied by the respondent.

In the light of these acts and circumstances, do the lands in question fall within the exceptions mentioned in said section 6 already quoted? Not without some hesitation I have come to the conclusion that the setting apart of these lands on the application of the school board for purposes of this school section, followed by the legislative declaration that they should not be alienated without the consent of the trustees, constituted a declaration of trust by the Crown in favour of the school section, represented by the trustees thereof, and that such declaration of trust falls within the meaning and intent of the words "other alienations" in said section 6. It is true that the trust is a voluntary one, but it was created in favour of a corporation competent to take the benefit thereof, and at the date of the grant to the Government of Canada, remained unrevoked, unless it was revoked by that grant itself, which does not either in express terms or by necessary implication derogate from what was recognized by the Legislature as an interest created for the benefit of the trustee corporation. Reading the word "alienation" *ejusdem generis* with the preceding words does not, I think, weaken the conclusion at which I have arrived. If I am right, in thinking that what took place amounted to the creation of a trust, then the trustees held an equitable interest in these lands, just as a person or corporation having an agreement of purchase from the Crown holds an equitable interest. Again, the interest held by the pre-emptor is not a legal one; by obtaining his pre-emption record he becomes entitled only to an inchoate right in the land, which may or may not finally ripen into a title in fee simple. What the Province intended to convey to the Dominion by the grant in question were, I think, lands, the equitable as well as the legal interest in which was in the Crown.

Some argument was directed to the alleged fact that a couple of townsite reserves in existence at the date of the grant passed, or were assumed to have passed to the appellants, although not specifically mentioned in the grant. Even if that had been

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properly proved, I do not see that it affects the question involved in this appeal, because in townsite reserves no one other than the Crown has any interest. Such reserves were not set apart for the benefit of any person or corporation, but remained wholly the property of the Crown.

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IRVING, J.A.: I would dismiss this appeal.

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The scheme of the Island Railway Act was to grant to the Dominion Government all lands within the limits mentioned, which were then within the disposing power of the Provincial Parliament.

The question is whether the setting apart, or reserving, of the lots for school purposes by the order in council did amount to an "alienation" by the Crown. "Alienation" is a word of circumstance. If possession of the land had been taken by the school trustees, that possession, following the order in council, would undoubtedly amount to an alienation; but does the mere "reserving the property for school purposes" constitute an alienation?

When we look at The Public School Act, 1872 (No. 16, section 6, subsection 2), we see that the power conferred in the Lieutenant-Governor in council is

IRVING, J.A.

"To set apart in every school district such a quantity of the waste lands of the Crown as in his opinion may be necessary for school purposes *in such district.*"

The order in council does not follow the wording of the statute, but I think it must be read as if it expressed the intention that it was reserved for "school purposes of the Comiaken District."

Turning to The Public School Act, 1872, we find (section 30) that it was the duty of the

"Trustees to take possession . . . . of all public school property, which has been acquired or given for public school purposes in such district, . . . and to do whatever they shall judge expedient with regard to the . . . . keeping in order . . . . school lands . . . . held by them."

Now, these being the provisions of The Public School Act, 1872, and present to the mind of the executive council at the time the order in council was passed, what action was necessary

to create a trust, other than the passage of the order in council and the enactment of the statute of 1882?

The argument put forward by the Railway Company is that by the Act of 1882 the Crown alone has the power of alienation; the school trustees have merely a status to object. It is true that in ordinary cases between individuals, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement was necessary to be done, in order to transfer the property and render the settlement binding on him.

It is not easy to apply the ordinary law of trusts to cases where the relationship is brought about (if brought about at all) by statute, because Parliament has at all times a power of repealing. The relationship is not voluntary; we are not dealing with a gift; the statute in question was passed in order that "provision might be made for the establishment, maintenance and management of public schools throughout the Province."

What the order in council did was to alter the interest or right which the Crown had in the land dealt with. From being "waste lands of the Crown," it was changed to "lands set apart for the school purposes of Comiaken District." There was something more here than a mere change of administration. It is a fundamental principle of law that rights and duties, considered with reference to their duration, continue to exist until some special circumstance arises which causes them to cease.

In my opinion, the order in council in effect was an absolute unqualified and unconditional dedication to school purposes of Comiaken District. It appears that after the order in council was passed, a schoolhouse was erected on the lot. Undoubtedly it would be contrary to principles of equity to allow a private landowner to make over to a third person land so built upon or occupied. I would therefore hold that this land had been "alienated."

GALLIHER, J.A. concurred in dismissing the appeal.

Appeal dismissed.

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LOFFMARK v. THE ADAMS RIVER LUMBER COMPANY, LIMITED.

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LOFFMARK v. THE ADAMS RIVER LUMBER CO.

Master and servant—Workman killed in course of his employment—Cause of death—Case withdrawn from jury.

Where the evidence is equally consistent with the existence or non-existence of negligence, it is not competent for the judge to leave the case to the jury.

The Canadian Coloured Cotton Mills Co. v. *Kervin* (1899), 29 S.C.R. 478, followed.

APPEAL by plaintiff from the decision of HUNTER, C.J.B.C., at the trial of the action on the 24th of January, 1912, withdrawing the case from the jury at the close of the plaintiff's case and dismissing the action. The plaintiff is the mother of a young man, aged 20, an apprentice to the chief engineer, and who was killed in the fly wheel bed of the engine room of the defendants' mill. The fly wheel had a diameter of 18 feet, and a width at the rim of 52 inches. It travelled at the rate of 4,500 feet per minute. Deceased was an apprentice to the chief engineer. The wheel bed had a concrete floor, and one of the concrete piers on one side of the building which supported the main driving axle of the wheel, came close to the rim of the wheel. The other large pier on the other side, which supported the driving axle of the wheel and constituted the bed of the engine, was a distance of three feet from the rim of the wheel. The space thus created was about 12 by three feet. It was necessary, on account of the rising of the water at flood time, to connect these two piers by two small concrete walls, so that when the water came in at the basement it would not flood the belt of the fly wheel. This space in the bed was not lighted by electricity or otherwise, and the fly wheel had no guard upon it. The deceased went down there for the purpose of putting into place the two board frames into which would be poured the concrete for the small walls being constructed. These small walls came

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under the bow of the fly wheel on each side, that is, the fly wheel, in its circumference, extended some five feet beyond the well and over it and on the other side some three feet.

After deceased had been working there for some time, he was required, and not responding to a call, search was made for him. His body was found in the well. Blood and hair were found on one of the truss bars of the fly wheel, at a distance of seven inches from the rim.

Plaintiff contended that, this being true, the fly wheel coming within 17 inches of the floor, with the distance of seven inches from the rim, made a distance of 24 inches, vertical, from the floor, and the deceased, having been struck by the truss bar on the head, his height being five feet eleven and one-half inches, must have been standing outside the fly wheel, and the blow knocked him over and into the prohibited space; that the Company were responsible, inasmuch as the foreman engineer should not have allowed or instructed an inexperienced boy to work near the fly wheel in motion; that the wheel should have been guarded pursuant to the Factories Act, and that the basement should have been lighted.

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The Company submitted that the boy must have been in the prohibited space, when struck, as his body was found there, and in any event plaintiff's evidence did not shew exactly the cause of the accident.

At the conclusion of the plaintiff's case, the learned Chief Justice withdrew the case from the jury. From this judgment the plaintiff appealed, asking for a new trial on the ground that there was sufficient evidence for the jury to consider.

The appeal was argued at Victoria on the 7th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellant: We had a right to have the jury pass on the evidence. He referred to *The Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S.C.R. 595.

Argument

Armour, for respondent: The Chief Justice was quite within his rights in the circumstances here in withdrawing the case from the jury.

Cur. adv. vult.

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MACDONALD, C.J.A.: I am unable to see any distinction between this case and that of *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (1899), 29 S.C.R. 478. It would be hard to find two cases in which the essential facts are more alike.

It follows that I am bound to dismiss this appeal.

IRVING, J.A.: I would dismiss this appeal. Where the evidence is equally consistent with either view, that is, of the existence or non-existence of negligence, it is not competent for the judge to leave the case to the jury. It was argued that the balance of probability is in favour of the plaintiff's case, but it is well to remember, as the Lord Chancellor pointed out in *Swansea Vale (Owners)* v. *Rice* (1912), A.C. 238 at p. 239, that before you can weigh probabilities you must have some foothold or ground in comparing and balancing probabilities at their respective values, and as Meredith, J. pointed out in *Graham* v. *Grand Trunk R. W. Co.* (1912), 25 O.L.R. 429, jurors are not at liberty to draw on their imagination.

MARTIN, J.A.

MARTIN, J.A.: After a careful consideration of the facts in this case as compared with those in *Kervin* v. *The Canadian Coloured Cot'on Mills Co.* (1896), 28 Ont. 73, (1898), 25 A.R. 36, (1899), 29 S.C.R. 478, I find myself unable to put the case for the plaintiff at bar upon a stronger ground, seeing that in the *Kervin* case the jury had negatived the contention that the deceased had disobediently or negligently crossed the trench on two planks, thereby making it impossible for me to distinguish the principle upon which that case was decided from the present one.

It follows that the appeal must be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: This case seems on all fours with *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (1899), 29 S.C.R. 478, and although the views expressed in the later case of *Grand Trunk Railway Co.* v. *Griffith* (1911), 45 S.C.R. 380, seem to be somewhat at variance with the judgment in the *Kervin* case, it may be distinguishable on the facts.

The facts and circumstances here are almost identical with

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the *Kervin* case, and as that case was not cited or referred to in *Grand Trunk Railway Co.* v. *Griffith, supra,* nor so far as I am aware its authority questioned, I feel myself bound by that decision. The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Taylor, Harvey, Baird, Grant & Stockton.*

Solicitors for respondents: *Harvey, McCarter & Pinkham.*

BERGKLINT v. CANADA WESTERN POWER COMPANY, LIMITED.

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Master and servant—Alleged defective system—Personal injuries—Volenti non fit injuria—Jury, findings by—Unreasonable.

Plaintiff was sent, with some fellow workmen, to clear an incline of stones and other natural debris preparatory to the commencement of certain operations in connection with the defendant Company's undertaking. A considerable quantity of such debris had been cleared when plaintiff proceeded to operate a drilling machine upon a rocky ledge. He was struck and injured by a stone which rolled from the incline. A jury found that if the incline had not been sufficiently cleared, it was due to the negligence of plaintiff and his fellow workmen, but that defendant Company was also negligent in not protecting the incline with barriers to stop loose material from coming down. It was admitted by plaintiff that it was customary to clear off such inclines, or to use barriers, but not to do both; and there was some evidence that in this case barriers were unnecessary and dangerous.

Held, on appeal (MARTIN, J.A. dissenting), that there was no evidence justifying the jury in finding defendant Company guilty of negligence, and that any negligence shewn was that of the plaintiff's fellow servants.

APPEAL by defendant Company from the judgment of CLEMENT, J. and the verdict of a jury at Vancouver, on the Statement

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26th of March, 1912, giving plaintiff $5,500 damages for injuries sustained by him while in the defendant Company's employ. Plaintiff, a native of Sweden, had been some six months in the country and had worked for the Company for two months before the accident. The Company at the time were engaged in excavating on the side of a mountain at Stave River for the purpose of erecting a power house. He was sent to assist a drillman and his helper, who were operating a steam drill on a ledge about 35 to 40 feet from the bottom of the ravine and about 15 or 20 feet from the natural brow or brink of the hill. Three men had been sent up to remove any loose material from the brow of the hill and along the side. Water was running out of the side of the hill and at the place where the men would place their drill. Whilst working clearing the ledge for the drill, some loose stones and dirt came down from above, and one of these stones struck him on the head, knocking him off the ledge, and causing him to fall some 25 or 30 feet, striking projecting rocks on his way, breaking both legs in his fall and sustaining other injuries. He was in consequence confined to the hospital for some nine months and after some 18 or 20 months he was still considered to be some four or five months from recovery. He underwent several operations and must undergo another, the evidence states, for the removal of some diseased bones from the leg.

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His complaint was that the hill should have been cleared six or eight feet back from the brow, and in addition, as water was running from the hill, there should have been a protection in the shape of logs or planks tied together with ropes, which would catch the rolling stones and dirt; and that the absence of these logs or planks constituted a defective system. The jury brought in a verdict finding that these matters constituted a defective system.

The defendant Company contended that the work was carried on under a competent foreman and engineers, and they, being fellow workmen, the Company was not liable if negligence did occur; and as to the erection of logs or planks, it was claimed that such a scheme would not be feasible, because if the stones gave way, such a work would be a source of considerable danger.

Defendant Company appealed, and the appeal was argued at Victoria on the 6th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Sir C. H. Tupper, K.C., and *A. E. McPhillips, K.C.,* for appellants: We asked and pressed for questions to be submitted to the jury, but the judge refused to give them, and the case went to the jury wholly on the common law aspect. As to the finding of the jury that we were negligent in not preparing the face of the incline, we say that that was actually the work which the plaintiff was sent to do. There was no proximate cause given for the accident. There was no system for the work in operation; it was in course of preparation when the accident occurred. We are entitled to have a finding as to the definite cause of the accident: *Lovegrove* v. *London, Brighton, and South Coast Railway Co.* (1864), 16 C.B.N.S. 669 at p. 692; *Jamieson* v. *Harris* (1905), 35 S.C.R. 625 at pp. 631-2. There was no case to go to the jury. On the evidence the jury could not properly find any defects in the operations or the work of clearing the face of the incline. They also referred to *Allen* v. *New Gas Company* (1876), 1 Ex. D. 251; *Wood* v. *Canadian Pacific Railway Company* (1899), 6 B.C. 561, 30 S.C.R. 110; *Canadian Asbestos Co.* v. *Girard* (1905), 36 S.C.R. 13; *Fakkema* v. *Brooks Scanlan O'Brien Company, Limited* (1910), 15 B.C. 461, (1911), 44 S.C.R. 412.

Argument

S. S. Taylor, K.C., for respondent: There was no time to get a system in operation.

Tupper, in reply.

Cur. adv. vult.

5th November, 1912.

MACDONALD, C.J.A.: The bulk of the evidence in this case was directed to proving the negligent system of operating aerial trams, but this has been disposed of against the plaintiff by the verdict of the jury. The only question remaining is: Was there evidence to support the jury's finding that defendants were negligent "in not sufficiently clearing the face of the incline and by not placing barriers to prevent rolling stones and other debris from causing injury to employees."

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Now, it is common ground that the plaintiff and two other workmen were detailed by the foreman to clear away the loose or dangerous rocks and debris above the ledge upon which they were to work, and on which the plaintiff was working when the accident happened. These men worked at such clearing for at least four or five hours. I will quote from the plaintiff:

"My question is, did you think at the time when you were clearing it that you had not cleared it sufficiently? I do not think so."

And again:

"Your idea, Mr. Bergklint, is in short that the accident was due to this insufficient clearing at the edge of the hill? Yes.

"You have told us that you and Maclean and McKinnon did the clearing? Yes."

And again:

"Let me put it to you again, Mr. Bergklint, is it not a fact that you cleared off these loose rocks in order to prevent them tumbling on you when you went to work? Yes, sir.

"So far as you could see, you cleared off all loose rock? Yes, sir."

The only qualification of this is where he states that:

"At the edge we cleared off as many stones as we saw, but there were stones higher up the mountain.

"There were stones higher up the mountain; and did you tell anyone, or suggest to anyone, that there was any danger higher up the mountain? No."

The plaintiff further says that he had had experience in Sweden in similar work.

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"Was it not always your custom in working on that class of work, either in Sweden or at the works, to go up above the ledge and clear off the loose stones before you went down on the ledge to work? Yes.

"The Interpreter: His answer is that when it was not too much work they cleared off the rock, but if it was too much work they put protection."

Now, in this case the jury have found that the face of the incline was not sufficiently cleared; if this be so, that was the fault of the plaintiff and his fellow workmen. The jury further say that there was negligence in not placing a barrier; that is the kind of "protection" the plaintiff apparently meant in the answer above quoted. So that the system (if we can use that much abused term in connection with the work in question) usually adopted under circumstances similar to those in question here was to clear the rocks off above unless that involved too much work or expense. It was only in case that method of clearing was not practicable on account of the amount of work

involved that the placing of other protection, such as a barrier was resorted to. In the face of this evidence, to say nothing of the evidence of witnesses who say that a barrier in this case would be unnecessary and dangerous, I cannot see how the jury could reasonably find the verdict they did. Some stress was laid upon the fact that the plaintiff did not speak or understand English very well. This, undoubtedly, would render him less capable of expressing himself both at the trial and when the work of clearing was being done, but, on the other hand, there is no suggestion that he was under any misapprehension at all with regard to the duties of himself and his fellow workmen in clearing the incline and making it safe. His own admitted knowledge of such work enables one to safely conclude that he was quite satisfied that the place had been made safe.

It seems to me that this was one of those unfortunate accidents which occur without fault on either side, the risk of which is incidental to an employment which at best is hazardous.

It follows that the appeal should be allowed and the action dismissed.

IRVING, J.A.: I think this appeal should be allowed.

The plaintiff received his injury from a stone which fell from above and hit him as he was standing on a ledge or shelf of rock which was being cleared in order that a steam drill might be placed thereon. The plaintiff was working under the immediate orders of one Maclean. He, the plaintiff, and another man, McKinnon, were helpers to Maclean, and it was Maclean's machine they were about to set up on the shelf or ledge. This ledge projected a few feet from the side of the hill, which rose above them some 40 or 50 feet. Below them some 30 feet or so was the bottom of the pit.

As a safeguard, Maclean, McKinnon and the plaintiff had been sent up the hill some hours before the accident took place to clear off the loose stones and debris, so as to make the ledge a safe place for them to work the drill. The three men went up and removed a quantity of stuff from the brow of the hill, and Maclean said: "That's enough; we can now go down to the ledge." The plaintiff did not think enough of the loose

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material had been removed but did not say so, apparently because he did not expect that he himself would be required to work on the ledge for any length of time, the usual practice being for Maclean and McKinnon to run the drill together after it was once set up. After they had descended to the ledge Maclean thought more stones should be removed from the face of the hill, and he sent McKinnon up to do this.

The three, Maclean, the plaintiff and McKinnon—possibly McKinnon had not returned—but certainly Maclean and the plaintiff, then began clearing the ledge, when a stone and some dirt came down the hill and struck the plaintiff on the head. He fell back into the pit below and was injured.

In my opinion this evidence, which I have taken from his own testimony, disentitles the plaintiff to go to the jury. In the first place, Maclean was a fellow workman, and in the absence of any evidence that the defendants had knowingly entrusted the duty of supervising to an incompetent man, the plaintiff cannot expect to recover. I do not suggest that Maclean was guilty of negligence, but it was he who said sufficient has been cleared away. The principle was settled in *Priestley* v. *Fowler* (1837), 3 M. & W. 1, where Lord Abinger, at pp. 6 and 7, said:

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"The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."

The latter portion of the quotation is peculiarly applicable to the present case, and this is the second ground for dismissing the action, because the plaintiff was himself a party to the negligent clearing away—if negligent it was. The plaintiff, however, relies on what has been called a negligent system. In *McDonald* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 386, I refer to a number of cases on the question of system. Too often the jury get the idea that because there is an accident there is a right to damages. If that were so, the Workmen's Compensation Act was unnecessary. But, with that idea in their head, they listen to evidence as to how the accident could be prevented. The question here was not, I think, put as fully before them by the learned trial judge as it ought to have been. What he should have asked them, having regard to the admitted circumstances of the case, was this: "In your opinion was the clearing off of the debris above the place where the men were about to work—if it had been well and carefully done—a reasonable and proper measure of protection to the men?" There is no doubt that it was, and the judge seems to have thought so, because he ruled there was no case to go to the jury on that point. With deference to the learned trial judge, that seems to me to be the only question in the case, because the want of care in respect of which the defendants are liable is in connection with that particular piece of work. In this connection the jury's answer shews that they have fixed the Company with responsibility for neglecting to sufficiently clear the face of the incline, *and,* not *or,* for not erecting overhead barriers to protect the men.

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The jury concede in effect that if the face of the incline had been properly cleared, on which being properly done no barriers would be necessary, the accident could not have occurred. I think this establishes what I have already suggested—that the defendants escape under the doctrine of common employment.

In *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326 at p. 346, in discussing the charge there, Lord Colonsay pointed out that the question involved was not one of a defect in the general arrangement or system, for which in certain views the defenders might be regarded as liable, but was one as to the construction of a temporary structure erected by order of Neish, a fore-

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man, for certain working operations then about to be undertaken. This, Lord Colonsay points out, raised a totally different question for the jury, and that was in reference to the liability of the defenders for the fault of Neish, the foreman. If it was simple misdirection, that would mean a new trial; but I think there was no case to go to the jury, on the principle that the negligence, if any, there was that of Maclean.

The doctrine of *volens* was much pressed on behalf of the defendants. *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 338, was referred to. In that case, wherein a great many matters are dealt with, there was really only one point, and that was, according to Lord Halsbury (p. 335), whether the plaintiff should have been non-suited by the County Court judge because he had admitted in his own evidence that he knew of the danger, or according to Lord Watson (p. 354), whether, in view of the plaintiff's admission, the jury were warranted in finding as they did, that plaintiff was not *volens*.

The House determined the question in favour of the workman on the facts of that case. It was argued for the defendants, who admitted a defective system, that the mere fact of a workman continuing to work with a knowledge that there was danger would, in every case, necessarily imply his acceptance of the risk, and justify the judge in dismissing the case. Lord Watson declined to accede to that suggestion, and said (p. 355),

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"whether it would or would not have that effect depended upon the nature of the risk and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case."

Now, we know what (a) the nature of the risk in this case was; it was danger from stones falling on the men as they worked on the ledge—not unlike the risk in the *Smith* v. *Baker & Sons* case. But when we come to consider (b) the workman's connection with it, we find no parallel in the *Smith* v. *Baker & Sons* case, nor have we (as there was in that case, pp. 336-349), an admission of negligence on the part of the defendants. In the circumstances of that case Lord Watson (p. 357) said the question was one of fact. Lord Herschell, at p. 360, said:

"It was of course open to the respondents to contend that, after the

admission of the plaintiff as to his knowledge of the dangerous character of the work, the case ought to have been withdrawn from the jury."

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Having regard to plaintiff's answers, I think that the case should have been withdrawn from the jury, and the jury's finding—if they found the plaintiff was not *volens*—was against the weight of evidence.

MARTIN, J.A.: I am unfortunate in finding myself unable to take the same view of this case as my learned brothers.

To clear the ground, I shall first say that in view of the evidence of McKinnon, a witness for the defendant Company, and the learned judge's charge on that point, it is hopeless, in my opinion, for the defendants to seek to rely upon the defence of *volens;* nor can I see any escape from the finding of no contributory negligence which in view of the charge, must be inferred to have been found in the general verdict in favour of the plaintiff. And I am equally satisfied that the damages awarded are not so large that we should be justified in interfering with them.

Then as to the negligence of the defendant Company. It is found by the jury to consist in "not sufficiently clearing the face of the incline and putting in place barriers to prevent rolling stones and other debris from causing injury to the employees." This is not a finding of two distinct acts of negligence having, it may be, different legal consequences, but the essence of the meaning is, when the circumstances are properly understood, that the jury considered the only safe way to protect the workmen was to clear away rock, dirt, etc., a reasonable distance back from the brink of the excavation (*i.e.,* "face of the incline"), thereby creating a berm, and then place a barrier of planks or logs at the brink so as to omit no reasonable safeguards in a situation which was admittedly dangerous. There is nothing in such a verdict, having regard to the evidence and charge of CLEMENT, J., that is ambiguous, and as the work was on a large scale and of a long continued nature, the permanent (using the word in a relative sense) or continuous protection of its workmen must, in my opinion, necessarily form part of the system requisite to be established by the Company for the safe conduct of such operations. That there was abundant evidence

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to go to the jury on which they might reasonably reach such a conclusion is not, in my opinion, open to serious controversy.

But while I see no reason for disturbing the verdict, I think it desirable to add that the application twice made to the learned trial judge by the defendants' counsel to put questions to the jury should have been acceded to, and I repeat what I said in *Eves* v. *Linton* (not reported) on June 10th last, and in *Guthrie* v. *W. F. Huntting Lumber Co.* (1910), 15 B.C. 471, on the authorities there cited, as to the duty of the trial judge to do so in negligence cases. If that proper course had been followed in the present case it is altogether probable that the parties would have been saved the expense of this appeal, and assuredly this Court would have been spared much additional labour in trying to reach a just conclusion.

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GALLIHER, J.A.: I would allow the appeal.

The jury have found the accident was due to the negligence of the defendants in not sufficiently clearing the rocks and debris from the face of the incline, and in not placing protecting barriers. I think they might reasonably find from the evidence that the accident was due to a stone or other debris coming from above where the plaintiff was working on the ledge and knocking him down, but the question still remains: whose negligence was that? If it was the negligence of the plaintiff, he cannot succeed. If not due to a defective system, and caused by the negligence of fellow workmen, he cannot succeed, there being no question of the competeney of the foreman.

GALLIHER, J.A.

The facts are that the plaintiff and two other men were sent up on the incline to clear off loose stones, rocks and rubbish above a ledge on which they were to set a drilling outfit. The foreman went up and inquired if everything was cleared off all right before they started, barring the loose rocks off the ledge to prepare a level foundation for the drilling machine.

One of the men, in the presence of the plaintiff, answered yes, and the plaintiff made no comment. It appears this precaution was always taken, but the plaintiff contends that in addition barriers, such as planks or logs, should have been suspended by ropes above to prevent anything coming down

on the workmen, and in not providing these, the Company's system was defective.

In the first place, I think it is a misuse of the word "system." It is not a system at all, as I understand the application of that word in connection with the operation of works. For their own protection, when a drill was to be moved from ledge to ledge, men were sent up to clear away any loose stuff that might be above, and which might accidentally roll down and injure them. If this cannot be properly classed as a system, and in my opinion it cannot, the failure to erect the logs or barrier is not a defective system, and there is no negligence on the part of the Company.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *McPhillips & Wood.*
Solicitors for respondent: *Taylor, Harvey, Baird & Grant.*

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KOMNICK BRICK COMPANY v. BRITISH COLUMBIA PRESSED BRICK COMPANY.

Statute, construction of—Companies Act, 1897, R.S.B.C. 1897, Cap. 44—Companies Act, B.C. Stats. 1910, Cap. 7, Sec. 166—Foreign company—Doing business—Company obtaining a Provincial licence after contract entered into, but before commencement of action.

A foreign, unregistered corporation entered into a contract to install a plant in British Columbia, but before commencing action on the contract, became licensed. In the meantime there had been an amendment to the Companies Act, by which, upon the granting of a licence, any action, suit or other proceeding might be maintained as if such licence had been granted before the institution of any such action, suit or other proceedings.

Held, on appeal (MACDONALD, C.J.A. dissenting), that the provisions of section 123 of the Companies Act, 1897, governed in the circumstances here, and that the amendment of 1910 did not apply.

Northwestern Construction Co. v. *Young* (1908), 13 B.C. 297, followed.

Statement

APPEAL by plaintiffs from the judgment of CLEMENT, J. on the trial of an action, at Vancouver, on the 22nd of March, 1911, for damages for breach of contract. The facts are shortly stated in the reasons for judgment of MACDONALD, C.J.A.

The appeal was argued at Victoria on the 5th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

A. H. MacNeill, K.C., for appellants: The contract having been made in Ontario, and the goods shipped from there, the property ownership vested in Ontario: see *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297; and *Charles H. Lilly Co.* v. *Johnston Fisheries Co.* (1909), 14 B.C. 174 is in our favour as shewing that the Courts are not closed to foreign corporations coming here to sue on a debt; nor are we barred by the decision in *Waterous Engine Works Company* v. *Okanagan Lumber Company* (1908), 14 B.C. 238. Plaintiffs obtained a licence in British Columbia before commencing the action in September, 1909, and the amendment, which we say is a remedial enactment, took place in 1910.

Armour, for respondent: On the facts, we submit that the plant never had any proper test, nor was any notice given of a test to be held. The contract was to instal the plant in British Columbia, and that was part of their business. The obtaining of a licence before the commencement of the action, but after the contract had been entered into, did not put the plaintiffs in any better position. There is no evidence of this licence having been obtained. It seems clear that the plaintiffs were doing business in this Province within the meaning of the statute.

MacNeill, in reply: The 1910 amendment is a remedial section and is applicable to our case.

Cur. adv. vult.

5th November, 1912.

MACDONALD, C.J.A.: The plaintiffs (appellants) entered into contracts with the defendants (respondents) for the sale by the plaintiffs (an Ontario corporation) to defendants of a brick-making plant to be erected and installed in British Columbia by the plaintiffs and to be there tested and demonstrated to be of a specified capacity. At the time the contracts were entered into, and until the 13th of September, 1909, after the work of erection had been completed, as the plaintiffs claim, they were unlicensed to do business in this Province. On that day they complied with the provisions of the Companies Act, Revised Statutes of British Columbia, 1897, chapter 44, section 123, and on the 24th of the same month commenced this action for the recovery of the unpaid balance of the purchase price.

MACDONALD, C.J.A.

I come without hesitation to the conclusion that the contracts and business in question were made and carried out in contravention of the prohibition contained in said section 123, and in this respect this case cannot be distinguished from *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297, wherein it was decided by the Full Court that an action cannot be maintained by an unlicensed or unregistered extra-provincial company in respect of business done by it in this Province.

Since that decision, however, the law has been changed, and the right of the plaintiffs to maintain this action will depend on the construction to be placed upon section 166 of the Companies Act, 1910, and the fact that the plaintiffs became licensed before

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they brought this action, though after the prohibited business had been done. I do not think the contracts in question were utterly void because of the plaintiffs' non-compliance with the statute. The rights of the defendants were not affected by plaintiffs' failure to comply with the law: see Part VII. of the Companies Act.

If the contracts were not void, but merely unenforceable at suit of the offending party, then, did the licence subsequently obtained place the plaintiffs in good standing in respect of past transactions? If the Act of 1897 stood alone I should doubt this; but considered in the light of the Companies Act, 1910, and the same Act as revised in the Revised Statutes of British Columbia, 1911, chapter 39, I think I ought to hold this action maintainable. Said section 166 reads:

"If any extra-provincial company shall, without being licensed or registered pursuant to this Part, carry on in the Province of British Columbia any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business, and so long as it remains unlicensed or unregistered under this Act it shall not be capable of maintaining any action, suit or other proceeding in any Court in British Columbia in respect of any contract made in whole or in part within this Province in the course of or in connection with its business, contrary to the requirements of this Part:

"Provided, however, that upon the granting or restoration of the licence or the issuance or restoration of the certificate of registration or the removal of any suspension of either the licence or the certificate, any action, suit or other proceeding may be maintained as if such licence or certificate had been granted or restored or such suspension removed before the institution of any such action, suit or other proceedings."

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In the revision of this section contained in the Revised Statutes of British Columbia, 1911, there was inserted between the word "this" in the 6th line thereof, and "act" in the same line, the words "or some former," so that the section, after such revision, would, in effect, read insofar as it is applicable to this case:

"So long as . . . . a company remains unlicensed . . . . under this or some former Act [Act of 1897] it shall not be capable of maintaining an action."

It appears to me that the necessary inference from this and the proviso above quoted is that having obtained a licence under the Act of 1897, as this Company did, they became, on the coming into force of the Act of 1910, entitled to maintain an action,

and that, too, in respect of business transacted before the license was obtained, or, in other words that such a company was entitled to the same rights and remedies as a company licensed under the Act of 1910. But the revised Act of 1911 was not in force at the time of the trial of this action. The law then was as contained in said section 166. But section 166 must be read along with section 139 of the same Act, which required registration under this "or some former Act," and so read, I think the added words do not change the law, but appear to have been inserted to make plain what these sections read together meant on a proper interpretation thereof. The commissioners who inserted the words above referred to had authority by section 5, chapter 41, of the statutes of British Columbia, 1909, to "make such minor amendments as are necessary to bring out more clearly what they deem to have been the intention of the Legislature," and by chapter 41, section 3 (1) of the statutes of 1912:

"The said Revised Statutes shall not be held to operate as new laws, but . . . . as a revision and consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted."

This is to some extent qualified by subsection (2), but in my opinion the subsection ought not to be applied where it would be consonant with reason and justice to read the change as intended "to bring out more clearly" what the Legislature meant.

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I have referred to this difference in language because the revision of 1911 had not become law until after the trial of the action. Had it been in force before trial, the action could undoubtedly have been maintained. If the change is declaratory, as I think it is, the plaintiffs can even now invoke the later Act. But apart from this, I think that section 166 being plainly a remedial section having a well-defined object, the letter, if necessary, must give way to the reason where such a construction is not repugnant to the clearly expressed meaning of the words themselves. To impose on companies in the situation of the plaintiffs a penalty out of all proportion to the offence might well have been regarded by the Legislature as a scandal, and it was to correct this scandal that the law was amended. While the general rule is that statutes are to be construed as prospective unless a contrary intention is clearly made to appear, yet

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that rule must not be taken to mean that such contrary intention may not be inferred from the general scope and purview of the Act: see *Pardo* v. *Bingham* (1869), 4 Chy. App. 735. Lord Eldon, in *Johnes* v. *Johnes* (1814), 3 Dow 1 at p. 15, observes:

"It had been properly said that this was a remedial statute, and that, in advancement of the remedy, all was to be done that could be done in a way consistent with any construction of it. This shewed how anxious the Courts were to extend a remedy to cases where it was wanted."

And in *Caledonian Railway Co.* v. *North British Railway Co.* (1881), 6 App. Cas. 114 at p. 122, Lord Selborne said:

"The more literal construction ought not to prevail, if (as the Court below has thought) it is opposed to the intentions of the Legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

Now, said section 139 places companies licensed under the Act of 1897 on the same plane as those licensed under the Act of 1910, that is to say, the licence under the former Act is treated as equivalent to a licence under the latter one. It retains its status on the repeal of the former Act in virtue of the latter one. The reason of section 166 is abundantly plain. It is to enable companies which offended to purge their offences by compliance with the law. In some respects it is clearly retrospective. For instance, if the plaintiffs had commenced this action without having obtained the licence under the Act of 1897, and had waited until the Act of 1910 came into force, and had thereupon obtained it, the action would have been maintainable in respect of the very business in question in this action. To my mind it is inconceivable, having regard to the reason for the remedial section, that a company complying earlier with the law should have been intended to be placed in a worse position than if it had continued longer to offend. Whether the recent amendments of the law be considered as retrospective, or as legislative interpretations of the consequences which were intended to follow contravention of the provisions of the earlier Act, the result is the same, the action is maintainable.

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It has been suggested that section 166 has no application because the action is not brought in respect of a contract made in whole or in part in this Province. The contract of the 5th

of October was made in this Province, and the one of the 10th of February, which incorporates it, and assigns it, was negotiated and drawn up in this Province though signed in Toronto. In my opinion the case does in this respect come within the section.

On the merits, I think the plaintiffs are entitled to succeed. The learned trial judge made no specific finding of fact, but has simply declared: "I have not the slightest hesitation in saying that you [plaintiffs] have not demonstrated the contract; that means, of course, that the action is dismissed." What I conceive was meant by the learned judge was that the plaintiffs had not, to use the words of the contracts, "demonstrated (the plant) to be of a capacity of 17,000 good merchantable bricks in 10 hours, or 34,000 good merchantable bricks in a day of 20 working hours for three consecutive days." Tests were made to demonstrate this capacity, and in respect of these the defendants have set up a curious objection. The presses have to be worked six or seven hours to produce the necessary quantity of unbaked bricks to fill the retort in which they are to be hardened by the use of steam. When, therefore, the plant is started in operation on the first day, the hardening section of it must remain idle for six or seven hours, but after the first day's operation both sections synchronize and work continuously, because the presses will have then the required quantity of brick ahead to keep the retort supplied. The defendants, however, say that because the plant will not press and bake the specified number in ten consecutive hours, or in three consecutive days, making no allowance for the initial time required to meet the situation above outlined, it is not to be deemed of the specified capacity. I find myself unable to accede to that construction of the contract. Capacity must mean normal working capacity.

As the only questions argued before us were the capacity and quality of the plant, and had it been sufficiently demonstrated, and the legal question of the plaintiffs' right to maintain the action, I need only add that I think, having regard to the plaintiffs' consent to make a further test in December, though the capacity had been demonstrated theretofore, the 20th of December, 1908, is to be taken as the date of completion and

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demonstration. The parties may speak to the question of how the amount for which judgment shall be directed to be entered shall be ascertained, whether by remitting the case back or by reference.

IRVING, J.A.: I think the plaintiffs cannot maintain this action: see *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297.

Mr. *MacNeill* relies on the amendment of 1910, or, I should say, the addition made to the statute in 1910, chapter 7, section 166. His argument requires us to consider whether that addition is a declaratory law, and therefore retrospective; or introductory of only a new state of law, and in the latter event, whether it governs cases which were pending before and when it was passed, or whether they are to be decided by the law as it stood when they were brought.

This is not a statute relating to procedure merely. The general rule (see *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672, *per* Jessel, M.R. at p. 674, and Bowen, L.J. at p. 677), is that a statute does not affect pending proceedings, but that rule is only a guide where the intention of the Legislature is obscure. It does not modify the clear words of the statute. See, too, *Reid* v. *Reid* (1886), 31 Ch.D. 402, *per* Bowen, L.J. at pp. 408-9; and *per* Lindley, L.J. in *Lauri* v. *Renad* (1892), 3 Ch. 402 at p. 420. *West* v. *Gwynne* (1911), 2 Ch. 1, seems to be the latest case on the subject. In the argument of Hughes, K.C., in that case, a number of authorities bearing on the point are cited.

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The statute is by no means clear that it was intended to apply to a case where the action had been commenced when there was a cause of action, and where the licence acquired before the Act of 1910 was passed. The fact that the Act was not to come into force until the 1st of July, 1910 (section 308), in my opinion is against the plaintiffs. It is difficult to imagine that the Legislature contemplated that the plaintiffs, who were on grounds of public policy without a cause of action, should remain so until the 1st of July, 1910, and then that the licence obtained by them in September, 1909, which, according to the

law then in force, had no restorative powers, should on the 1st of July, 1910, confer new rights by an Act passed in March, 1910. Then again, section 166 speaks of the disability so long as the company remains unlicensed "under the Act." The plaintiffs seek to be relieved against the disability created under the old Act.

On the whole, the legislation seems so obscure that I think the general rule should be held applicable and the appeal and action dismissed.

MARTIN, J.A.: We have first to decide the question of the contracts arising under sections 123-4 and 143 of the Companies Act, chapter 44, Revised Statutes of British Columbia, 1897; and section 166 of chapter 7 of the Companies Act, 1910. Though the contracts were made in Ontario for the sale of certain machinery and plant, which were to be "shipped to Steveston, British Columbia," yet there was more than that; the plaintiff Company undertook not only to "erect the plant and machinery" upon arrival at its agreed destination in this Province, but to "demonstrate" the capacity by a specified three-days' test of the same. This to my mind is clearly "carrying on business" within this Province, and the case is brought within the decision of the late Full Court in *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297.

But the plaintiffs seek to escape from the consequences of that ruling by invoking section 166 of the Act of 1910, on the ground that though it did not take out a licence till after the beginning of this action, yet the effect of that section is to cure all antecedent objections to the want of a licence; and that after the Company has paid the penalty its new status reverts back so as to give it a *nunc pro tunc* one.

MARTIN, J.A.

Now, while this section 166 is remedial and due effect should be given to it, yet, on the other hand, the interests of those who have acquired vested rights, such as a good defence to an action, before it was passed, must be considered, and as Baron Alderson said in *Moon* v. *Durden* (1848), 2 Ex. 22 at p. 40:

"Unless the words imperatively require it, we ought not to make their prohibition retrospective; for it is contrary to the first principles of justice to punish those who have offended against no law; and surely to

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take away existing rights without compensation is in the nature of punishment."

And in *Knight* v. *Lee* (1892), 67 L.T.N.S. 688, Bruce, J. said, in the Queen's Bench Division, *coram* Mathew and Bruce, JJ., that "the Courts are always reluctant to construe statutes retrospectively," and that where a construction could be given to a statute "consistent with the words without their being held to be retrospective," it should be adopted. There is nothing to prevent this construction being applied to the section in question, and its being read prospectively. The words "shall not be capable of maintaining any action," etc., are beyond question used in the main and prohibitive part of the section in the sense of "bringing," and the remarks of Baron Alderson in *Moon* v. *Durden, supra,* at p. 41, taking a contrary view to that expressed in the dissenting judgment of Baron Platt, are singularly in point covering the very case he postulates, as follows:

MARTIN, J.A.

"If it had been stated 'that no action shall be brought,' or only, 'that no action shall be maintained,' it seems to me clear that we should have considered the words 'brought' and 'maintained' as synonymous, and as prohibiting the success of future suits alone."

This view was also taken by Baron Parke, p. 43, who thus speaks of legislation affecting pending actions, the converse of which applies to the defendants at bar:

"It is a still stronger thing to hold, that, if he has already commenced an action with an undoubted right to recover his debt and costs, he should not only forfeit both, but also be liable, as he would in the ordinary course of a suit, to pay the costs of his adversary, by being obliged to discontinue, or be nonprossed, or have his judgment arrested. These considerations afford a strong reason for limiting the operation of the words of this section, and holding that they apply to future contracts, and actions on such future contracts only—at all events, to future actions only, if any distinction can be made in the degrees of apparent injustice."

In view of this meaning, which must be given to the word "maintain" in the principal part of the section, it would be impossible, legally, to give it a different one in the proviso thereto; both words must be held to mean "brought," which satisfies the remedial intention without encroaching upon the principle of retrospective construction.

GALLIHER, J.A.

GALLIHER, J.A.: In this case the appellants have to meet two contentions; first, that upon the evidence the plaintiffs did not comply with the terms of their contract; and second, that

in any case they cannot succeed as they were carrying on business in British Columbia in contravention of the requirements of the Companies Act, Revised Statutes of British Columbia, 1897, chapter 14, section 123.

The learned trial judge dismissed the action on the first ground.

After reading and weighing the evidence with great care, I cannot, I say it with respect, agree with his finding. A great deal of evidence was directed to the question as to whether the plaintiffs had demonstrated by test the capacity of the plant, as guaranteed in their contract. Mr. *Armour* practically conceded that this had been done with this exception, that in a three-day run the bricks were not cooked and completed within the specified time, and when the evidence on this point is examined closely it transpires that the cooking process takes some seven hours after the pressed brick is put in the retorts or kettles, so that in starting up for a run of three days (the time limit fixed in the contract for the test), the bricks would not be cooked until seven hours afterwards, but if that plant is run continuously for a month or a year, or longer, there would only be the one period of seven hours during all that time in which the plant would not be turning out the full complement of bricks fully completed.

Mr. Allen, in his evidence, states that in the trade, when you speak of the capacity of a plant for turning out bricks, the cooking is not included, but, even if we disregard that, in the light of what I have just stated, to hold that the contract had not been demonstrated, in my opinion, would be to depart from the true spirit and intent of the contract.

It was also objected that no formal notice was given as to when these tests were to be made, but the fact is that nearly all of the directors and shareholders of the Company in British Columbia were present at these tests. Complaint was also made as to the inefficiency of the machinery by reason of breakages. The breakage to the valves was purely accidental, caused by the iron key of a bolt dropping out, and when new parts were obtained from the east the machinery ran satisfactorily. There were also some breakages in springs in the press, but when these were adjusted and fixed, no more difficulty was encountered. In

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a new plant starting up, it not infrequently happens that breakages take place, and to condemn a plant on that ground, which, after minor defects are remedied, works satisfactorily, would be unjust.

Mr. *Armour* further contended that while the plant might be capable of turning out the number of bricks specified, it had to be speeded up to such a point as would in a very short time wreck the machinery. I have looked carefully for any evidence that might substantiate this, but fail to find it. Holding this view of the evidence, it becomes necessary to consider the second ground.

The case of *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297, is on all fours with the present case with these exceptions: that the plaintiffs in the case at bar had taken out a licence (September 13th, 1909) before bringing action, and that section 166 of the Companies Act, 1910, upon which the plaintiffs rely, was not in existence. Unless the Act of 1910 assists the plaintiffs, and if *Northwestern Construction Co.* v. *Young, supra,* was rightly decided, they must fail. I think the decision in that case is fully justified by the authorities there cited, and we have then only to deal with section 166 of 1910.

GALLIHER, J.A.

At the time the plaintiffs took out their licence, and commenced their action, the statute law of 1897 was in force. The trial took place after the coming into force of the Act of 1910. Section 123 of 1897 prohibits carrying on business in British Columbia by an extra-provincial company until certain formalities are complied with, and imposes a penalty for infraction thereof, but is silent as to the rights of parties to maintain an action. This was the law as it stood when the plaintiffs brought their action.

Has the Act of 1910 made any difference as between the parties hereto? Unless it is retroactive, or is deemed to be an interpretation of the intention of the Legislature as to what the rights as between parties to such a contract as the present then were, it is not applicable. I do not see how the canons of construction can be applied here to make it retroactive, and when we consider that the Act of 1897 is silent as to the rights as between parties, what is provided for by the Act of 1910 cannot,

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as I view it, be regarded as expressing any intention of the Legislature in 1897, but is a dealing with the matter for the first time as a provision for the granting of a remedy as between parties on complying with certain conditions, and speaks only from the time of the coming into force of the Act.

I am, if I may say so with regret, forced to the conclusion that this appeal must be dismissed.

Appeal dismissed, Macdonald, C.J.A. dissenting.

Solicitor for appellants: *J. E. Bird.*
Solicitor for respondents: *D. G. Marshall.*

MERCER v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

MURPHY, J.
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Oct. 14.

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Nov. 19.

MERCER v. B. C. ELECTRIC RY. CO.

Practice—Amendment of statement of claim—Alternative claim—General indorsement—Founding damage action under common law and Employers' Liability Act.

A plaintiff claiming damages under a generally indorsed writ, applied, some seven months after writ issued, to amend his indorsement by adding an alternative claim particularly pleading the Employers' Liability Act.

Held, on appeal, that as his claim as originally framed, could be supported either under the common law or the Employers' Liability Act, the six months' limitation under the latter could not be held to apply.

APPEAL from an order of MURPHY, J., at chambers, on the 14th of October, 1912, dismissing in part the application of the plaintiff for leave to amend his statement of claim. The action was brought for personal injuries received by the plaintiff while in the employment of the defendant Company. The accident in question occurred on the 4th of November, 1911, and the writ was issued on the 13th of February, 1912. On the 20th of

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September the application for the order complained of was heard. One of the amendments asked was that the statement of claim be amended by adding the following:

"4. Alternatively the defendant is liable to the plaintiff for damages suffered by the plaintiff by reason of the said personal injuries under the provisions of the Employers' Liability Act, the particulars of which are as follows:

"(a) The said freight train was on the said 4th day of November, 1911, in charge of and under the superintendence of one Frederick Cooper, now deceased, the conductor of the said train in the service of the defendant Company, to whose order the plaintiff at the time of the injuries was bound to conform and did conform.

"(b) The said Cooper negligently ordered and directed the plaintiff to haul five loaded cars on the defendants' line of railway from Vancouver to New Westminster and particularly down the hill in the vicinity of Eighth avenue, where the accident in question happened, the hill in question being too steep to take five loaded cars down with safety on the day in question.

Statement

"(c) The plaintiff obeyed the order and direction of the said Cooper so given, and as a consequence the said freight train escaped from control and ran away on the said hill and thereby caused the said personal injuries so suffered by the plaintiff as aforesaid."

Armour, for the application.
L. G. McPhillips, K.C., contra.

MURPHY, J.: The pleadings herein are closed and the action was set down for trial on the 3rd of September, 1912, and has been adjourned to the 8th of November, 1912. Plaintiff now applies to amend his statement of claim by substituting the word "train" for "motor car." This amendment is granted. Apparently it is of small consequence, but if defendants are in any way prejudiced as to going to trial on the day fixed, the matter may be spoken to again.

MURPHY, J.

The plaintiff, however, also wishes to amend his statement of claim by raising an alternative claim under the Employers' Liability Act. It is, I understand, common ground that the

statutory period of six months within which such action must be brought has elapsed. Defendants, therefore, object that to grant such amendment would be unfair and in fact illegal, citing *Weldon* v. *Neal* (1887), 19 Q.B.D. 394. This case is followed in *Morris* v. *Carnarvon County Council* (1910), 1 K.B. 159. I find that this very matter was before the Scotch Court of Session in Appeal and that such amendment was refused: see Minton-Senhouse on Accidents to Workmen, 2nd Ed., 50. The only distinction was that the trial had actually taken place, but the ground of the decision was the one raised here by defendants' counsel. It was held by the Full Court in *Hosking* v. *Le Roi* (1903), 9 B.C. 551, that a litigant is bound by the manner in which he prosecutes his case, and though this decision was reversed in the Supreme Court of Canada, 34 S.C.R. 244, such reversal was on other grounds. It is argued that the writ as indorsed would justify a statement of claim based on the Employers' Liability Act, which is quite true, but the answer is that the statement of claim does not raise such a case, or if it does (which is suggested), then there is no need for the amendment asked. This branch of the application is refused. The matter of costs may be spoken to again.

Statement

Plaintiff appealed, and the appeal was argued at Vancouver on the 19th of November, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Armour, for appellant: We have already given particulars in our statement of claim sufficient to found an action under the Employers' Liability Act, and we are merely asking to be allowed to amend those particulars. The indorsement on the writ is a general indorsement, and under that we could clearly develop an action under the common law and the Employers' Liability Act. No injustice can be done to defendants by allowing the amendment. The cases cited in the reasons for judgment of MURPHY, J., dismissing the application, *viz.*: *Weldon* v. *Neal* (1887), 19 Q.B.D. 394, *Morris* v. *Carnarvon County Council* (1910), 1 K.B. 159, and *Hosking* v. *Le Roi* (1903), 9 B.C. 551, are distinguishable.

Argument

L. G. McPhillips, K.C., for respondents, referred to *Steward*

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v. *Metropolitan Tramways Company* (1885), 16 Q.B.D. 178. We deny that this is merely developing the cause of action. It certainly is not giving us particulars, because we have not demanded particulars, and it is rather peculiar that a plaintiff of his own motion should wish to amplify his particulars. He claims $5,000 damages, which is more than he can recover under the Employers' Liability Act, therefore we took it as a common law action pure and simple, and so pleaded in answer. We have been misled. The onus was on the plaintiff to shew his line of action before the six months expired. We did not move to strike out his plea as embarrassing, because we did not consider it so. A statement of claim, to come under the Employers' Liability Act, should state so; it should not be brought within the statute by an ambiguous clause.

Argument

Armour, in reply: Defendants had a remedy which was not pursued, and there is no wrong done.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: I think the appeal should be allowed and the amendment made. It is very unfortunate if, as Mr. *McPhillips* says, motions to strike out pleadings on the ground that they are embarrassing, are discouraged in the Courts below, because it is very useful and very necessary practice. In this case it seems to me that subsection (j) of paragraph 2 of the statement of claim was intended to raise the rights of the plaintiff under the Act (Employers' Liability Act). It did not do it artistically and the amendment now sought is to put that claim which is contained in (j) in the form that it ought to be in when it comes before the Court at trial. I do not think any injustice will be done to the defendants by permitting the amendment.

Judgment

Appeal allowed.

MURRAY v. THE COAST STEAMSHIP COMPANY.
LINDEN v. THE COAST STEAMSHIP COMPANY.

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Master and servant—Shipping—Seamen—Sunday work—"Emergency"—Lord's Day Act—Lawful commands of ship's officers.

In dealing with cases of labour on board ships, the word "emergency," as applied in the Lord's Day Act, must be given a liberal, elastic meaning, as such labour is dependent on wind, weather and tide.

In this case, plaintiff having expressly undertaken employment which necessitated work on Sunday, he could not come to the Court for relief when he had deliberately disobeyed the lawful commands of the ship's officers.

Judgment of McINNES, Co. J. affirmed.

MURRAY v. THE COAST STEAMSHIP CO.

LINDEN v. THE COAST STEAMSHIP CO.

APPEALS by plaintiffs from judgments of McINNES, Co. J. The two plaintiffs were employed on the defendant Company's steamer as able seamen. They were, according to the evidence, willing to do all work in connection with the steamer as seamen on all days of the week, but objected to discharging and loading cargo on Sundays. The Company hired longshoremen on some occasions to do this work, and deducted a *pro rata* amount therefrom from plaintiffs' wages. Plaintiffs claimed the benefit of section 6 of the Lord's Day Act, submitting that such work was not a work of emergency or necessity.

In the Murray case, plaintiff was regularly signed on the articles, and it was a question whether he had refused to obey the lawful commands of the ship's officers. Statement

In the Linden case, plaintiff, who sued for wrongful dismissal, was not on the ship's articles, and was given his option of going ashore at one of the way ports or travelling home on the vessel, paying for his meals *en route*.

The appeals were argued at Victoria on the 18th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

McCrossan, for appellants: We have no objection to doing the Argument

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ordinary work of the vessel on Sunday as any other day, but this was loading and unloading cargo, and it was not a work of necessity or emergency within section 6 of the Lord's Day Act. The learned trial judge was wrong in holding that "lawful commands" mean "any" commands. If we work on Sunday we must, within the following six days, have 24 hours' rest.

[MARTIN, J.A.: Why is it not to be construed that unless he goes and asks for it, he waives it?]

The moving obligation is on the party requiring the work.

[MARTIN, J.A.: Where is the evidence of any refusal of their 24 hours?]

We admit that we must do our ordinary work, but we require our day of rest.

[IRVING, J.A.: He undertook employment which he knew necessitated working on Sunday.]

Argument

H. B. Robinson, for respondent: The question is one of contract. As to the plaintiff Linden, he signed on the ship's articles and knew what the work was. When he refused to work on Sunday, and after six o'clock, he broke his contract and also disobeyed the lawful commands of the ship's officers. The custom of the coasting business shews that it was a lawful command which was disobeyed. As to the provisions of the Lord's Day Act, we submit that as the ship was *in transit* the statute does not apply here. As to the plaintiff Linden, he was justifiably dismissed.

McCrossan, in reply: The Linden case is one of direct, wrongful dismissal. On the whole, seamen are more or less wards of the Court, and in cases of this kind, where their morals as well as their legal rights are concerned, the Courts will construe their rights liberally.

Judgment

Per curiam: In the Linden case the appeal must be dismissed. Plaintiff was told at the time he was employed the kind of work he was required to do. He should then have objected to working on Sunday. There was a breach of contract, and he cannot bring an action for wrongful dismissal. His appeal should be dismissed.

In the Murray case the Court reserved judgment.

5th November, 1912.

MACDONALD, C.J.A.: I would dismiss this appeal.

IRVING, J.A.: The plaintiff sues for the balance due him for wages. He shipped on the 26th of August with the defendants as an able-bodied seaman at $45 a month and board, to serve on the defendants' steamship British Columbia.

The amount sued for is the difference between 25 days' wages at $1.50, less $12.20, that being the amount deducted by the master on discharging the plaintiff on 19th September, for moneys paid to longshoremen hired by the master to perform the plaintiff's work on three separate occasions when the plaintiff refused to work. The occasions and charges are: 9th September (Saturday) 6 hours at 50 cents—$3; 10th September (Sunday); 17th September (Sunday). On the 9th of September plaintiff says he refused to work after 6 p.m.; he was tired; that he thought as he had been employed all day he had done enough. On the 10th—Sunday—when the ship arrived at Sechart at 3 p.m., he refused to assist in discharging cargo because it was Sunday. On the 17th—Sunday—when the ship arrived at Victoria at 10 or 11 a.m., he again refused to assist in discharging cargo because it was Sunday.

This vessel was in the coasting trade. Its home port appears to be Vancouver, B.C. According to the evidence for the defence, which seems to have been accepted by the learned trial judge, the plaintiff had been notified when he signed the articles as an able-bodied seaman, that his duties would be those of a deck-hand, handling cargo when required. It was night and day work, and Sunday work.

The plaintiff seems to have accepted this view of his duties at first, but afterwards to vindicate a principle, *viz.*: that he was not required to work on Sundays or after six o'clock, declined to work. The Lord's Day Act, chapter 153 of the Revised Statutes of Canada, 1906, was relied upon as justifying the plaintiff's refusal to work on Sunday. The 6th section seems to contemplate the employment of men on Sundays on any work "in connection with transportation," and provision is made for making up to the employee so working a holiday dur-

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ing the week. This section does not seem to have been considered by the plaintiff until after he left the defendants' service, because we have no suggestion that he would work on Sunday if the defendants promised him the statute-given holiday. He undertook to refuse to work on Sundays regardless of the interests of his employer. He arrogated to himself the right to say whether it was necessary for him to work. I do not think the law of master and servant, or The Lord's Day Act ever contemplated such a step. It is the duty of the employee to obey the master of the ship. It may be that masters may make themselves liable to the penalties of the Act if they do not give the statutory holiday, but I can see nothing to justify the action of the able-bodied seaman or deck-hand in refusing to work at cargo in order to vindicate a principle. The learned County Court judge thought the defendants were justified in deducting from the plaintiff's wages the sums they had paid to others who did the work he had undertaken to do, and that in paying him for his actual time they had done all that they were required to do.

IRVING, J.A.

It is, I think, well to point out that the law of master and servant does not contemplate any such liberal settlement with a servant who has been guilty of disobedience of such a character as to justify his discharge. In my opinion, the plaintiff's conduct amounted to that. The refusal to work was the result of a conspiracy. Where a person employed is guilty of disobedience, such as to justify his discharge, he cannot recover by action for the time of his actual service. Every contract of service contains an implied condition that if faithful service is not rendered, the master may elect to determine the contract. If that right is properly exercised by the master during the currency of the servant's salary, the servant has no remedy, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on the condition that he had fulfilled his duty as a faithful servant down to that later date.

MARTIN, J.A.

MARTIN, J.A.: The plaintiff shipped at Vancouver as a deck-

hand on the steamship British Columbia on a coasting voyage from Vancouver to Victoria, West Coast of Vancouver Island, Prince Rupert and way ports, back to Victoria, so we are informed, though it is not exactly shewn on the evidence. The learned trial judge has found, on evidence which supports his finding, that the contract was that plaintiff agreed "to handle cargo on Sundays, and after 6 p.m. if required," but that he broke his contract for no valid reason, and therefore the defendant Company was entitled to make a deduction from his wages.

It is clear that the plaintiff cannot succeed in any event as regards his refusal to work on week days after 6 p.m., but as regards Sundays he relies on section 6 of the Lord's Day Act, and contends that as the cases in question were not ones "of emergency," he should have been allowed "during the next six days of such week 24 consecutive hours without labour."

I remark first, as to the word "emergency," that in the case of ships it obviously will have to be given an elastic and varying meaning according to the circumstances, especially in the case of vessels engaged in the coasting trade in dangerous waters where conditions of wind, tide, and weather must be carefully considered beforehand and duly provided for by the master, so as to insure, as far as possible, the safety of the vessel and those on board.

The evidence herein has been so confusedly and insufficiently brought out on behalf of the plaintiff that it is difficult to form an exact and satisfactory opinion of its legal consequences, but in one of the instances complained of I should be inclined to think that there was an "emergency" on his own shewing; and clearly with respect to another of them, the exception (*h*) in section 12 as to a vessel already "in transit when (*i.e.*, on or before) the Lord's Day begins" applies.

MARTIN, J.A.

But even if the whole matter were within section 6, the position the plaintiff finds himself in is that though he had agreed to work on Sunday, yet he comes to this Court and asks for this relief under said section, *viz.*: that the Court will invoke it to direct his employer to return him money properly deducted under his contract. In my opinion it is clear he cannot do so, and the Court will no more assist him in such circumstances than it

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would the defendants if they brought an action to recover an amount which they claimed against him under a prohibited contract. If he wished to rely upon the section, the proper course for him to have taken, in a case not of emergency, was to have made a request for the 24 hours substituted holiday. But he did nothing of the kind, and simply relied upon his deliberate intention to break his contract without, as he erroneously thought, any consequences to himself. It has been overlooked, I think, that the true effect of section 6 is to recognize that it is "lawful" for the employer to require the employee to work if the substituted holiday is subsequently "allowed." Unless and until that holiday is refused, the prohibition does not arise. Beyond doubt the employee may waive his right to this "allowance." I am unable to discover any merits, legal or equitable, to support this action.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A., concurred in dismissing the appeal.

Appeal dismissed.

Solicitors for appellants: *McCrossan & Harper.*
Solicitor for respondent: *H. B. Robinson.*

SWIFT CANADIAN COMPANY, LIMITED v. THE ISLAND CREAMERY ASSOCIATION, LIMITED. CANADIAN PACIFIC RAILWAY COMPANY, GARNISHEE.

GREGORY, J.
1912
Sept. 20.

SWIFT CANADIAN CO. v. THE ISLAND CREAMERY ASSOCIATION

Company law—Winding up—Agricultural Associations Act, R.S.B.C. 1911, Cap. 6—Incorporation under—Title of Association—Action against Association—Mode of intituling—Amendment nunc pro tunc.

The plaintiff in an action to recover a debt from an association incorporated under the Agricultural Associations Act, in course of winding up under the control of the Court, applied for payment out of Court of garnisheed moneys to the plaintiff, in preference to the liquidator, on the ground that the winding-up proceedings were intituled with the wrong title of the association.

Held, that the moneys should be paid to the liquidator, and on a subsequent motion on behalf of the liquidator, a *nunc pro tunc* order was made.

APPLICATION by plaintiff Company for payment out of Court of the amount due to the Canadian Pacific Railway Company, garnishee, to the defendant, The Island Creamery Association, Limited. Heard by GREGORY, J. at Chambers, in Victoria, on the 20th of September, 1912. Statement

McDiarmid, and *Copeman,* for the liquidator of The Island Creamery Association, stated that the defendant Association was now in liquidation, being wound up by the Court, and submitted that the amount due should be paid through the liquidator, and that the plaintiff should prove in the liquidation for the debt. Argument

Langley, for the plaintiff, contended that the defendant in this action was The Island Creamery Association, Limited, that the Association that was now in liquidation was The Island Creameries Association, Limited, and that there was no such association registered pursuant to the Agricultural Associations Act, under the name of The Island Creameries Association, Limited, but there was an association registered under the

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name of The Island Creamery Association. He therefore claimed that the plaintiff was entitled to the full amount.

An affidavit of the liquidator was read, wherein it was stated that the Association was an agricultural association, incorporated under the Agricultural Associations Act, and that a certificate had been granted to the members of such Association whereby the same was entitled The Island Creamery Association. The Association carried on business in Fort street and in Broad street, in the City of Victoria, and there was inscribed on the window of the Association's place of business the words The Island Creameries Association, Limited. Part of the stationery used by the Association was headed The Island Creamery Association, Limited, and as to part The Island Creameries Association, Limited. The corporate seal of the Association was stamped with the words Island Creameries Association, Limited. The bank pass book was inscribed with the words Island Creameries Association, Limited. The Association had also entered into a lease of the premises on Fort street under the name of The Island Creamery Association, Limited, and leased the same premises under the name of The Island Creameries Association, Limited. In the minute book the said Association was repeatedly referred to as Island Creameries Association, Limited, and the stamp used by the Association in the course of its business was impressed with the words The Island Creameries Association, Limited.

McDiarmid, submitted that the action commenced by the plaintiff was an action against the Association by whatever name it was called, and that The Island Creamery Association as registered, was in fact the association against which the plaintiff made its claim, and that being the case, the amount should be paid out of Court to the liquidator.

GREGORY, J.

GREGORY, J. ordered that the amount be paid out of Court to the liquidator.

McDiarmid thereupon applied for an order that the petition and the winding-up order and all affidavits, orders, directions and other proceedings on the files of the Court be amended by

striking out the words Island Creameries Association, Limited, and inserting in lieu thereof the words Island Creamery Association, and that all directions, orders, applications, recognizances and other proceedings stand as if validly made on the dates on which the same were respectively made, which was granted.

Order accordingly.

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COOK v. THE CORPORATION OF THE CITY OF VANCOUVER.

MURPHY, J.
1912
March 6.
COURT OF APPEAL
Nov. 5.
COOK v. CITY OF VANCOUVER

Water and watercourses—Riparian rights—Diversion of course of stream—Record obtained by municipality for public purposes—Water Clauses Consolidation Act, 1897, R.S.B.C. 1897, Cap. 190.

In the circumstances here, a water record empowering the defendant Corporation to divert a creek for municipal purposes was held to be in derogation of the rights of riparian owners on such creek.

APPEAL by plaintiff from the judgment of MURPHY, J. in an action tried by him at Vancouver on the 10th of November, 1911, for an injunction to restrain the defendant Corporation from diverting the course of Seymour creek, and for damages.

Statement

J. A. Russell, for plaintiff.
Hay, for defendant Corporation.

6th March, 1912.

MURPHY, J. In this action the constitutionality of the Water Clauses Consolidation Act, 1897, under which the defendants hold their water records cannot be attacked, since notice of the proceedings has not been given to the Attorney-General for British Columbia, as required by subsection 1 of section 9 of chapter 45, Revised Statutes of British Columbia, 1911.

MURPHY, J.

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In my view this disposes of this action. The statute, by its clear language and by the interpretation put thereon by the Courts in the various cases that have come up under it, makes such riparian rights as exist in British Columbia subject to rights acquired by record pursuant to its provisions, whether such riparian rights were in existence at the time it became law or came into existence after its passage. The defendants have such records, and they prevail over any riparian rights the plaintiff may have. The action is dismissed, with costs.

The appeal was argued at Victoria on the 13th of June, 1912, before IRVING, MARTIN and GALLIHER, JJ.A.

Argument

J. A. Russell, for the appellant: We did not attack the constitutionality of the statute in the Court below, but rather the judge's interpretation of certain clauses of it, but see section 291, which is an answer to the point taken by the judge. We submit that the Water Act cannot take away our riparian rights: *In re Milsted* (1908), 13 B.C. 364. Also see section 4 of the Water Clauses Consolidation Act, 1897, which saves the rights of riparian owners, and section 5 as to permanent or prescriptive rights. At certain periods of the year, and that without any of the other records being used, plaintiff has no supply. The record to the Corporation absorbs all the water, and our domestic and stock supply is disregarded. The common law having given us some rights there, the Legislature cannot deprive us of them without some reparation. We are entitled to the natural flow of the water. The Crown grant to us is silent as to reservation of riparian rights. This water is not taken for mining or agricultural purposes. The inference is that the Legislature did not intend that riparian rights should be interfered with. Further, the point of diversion should be exactly stated in the notice; it states ten miles; the grant gives eleven miles. They are not using the water for municipal purposes, which really are domestic purposes, but are using it for power purposes and watering streets. Therefore, they have exceeded their powers.

Hay, for respondent Corporation: The Corporation obtained the water for a waterworks system; that includes all the purposes for which water is required in a municipality. As to

interference with plaintiff's riparian rights, there is no evidence that he has not all the water he requires for his purposes. Plaintiff did not bring his action until 1910; the grant in question was made in 1906, therefore he was not diligent in protecting whatever rights he claims.

Russell, in reply.

Cur. adv. vult.

5th November, 1912.

IRVING, J.A.: The plaintiff, who on the 9th of December, 1892, obtained a Crown grant of 190 acres on Seymour creek, brought an action against the City of Vancouver to restrain the defendants from obstructing or diverting the waters of Seymour creek from flowing past his said lands.

The plaintiff complains of the invasion of the proprietary rights incident to the ownership of his property.

The defendants, who are not riparian proprietors, have done that "which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire watershed of the country, and in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north." This is, to continue to quote from the elaborate exposition of riparian rights set out by Lord Cairns in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Co.* (1875), L.R. 7 H.L. 697 at p. 705, "a confiscation of the rights of the . . . . owner."

IRVING, J.A.

The defendants justify their action under a grant of water rights, dated the 28th of September, 1906, issued to them by the Provincial Government under the Water Clauses Consolidation Act, 1897, and amending Acts, and they also rely on the statutory limitation of six months conferred by section 145 of the Vancouver Incorporation Act, 1900, and amending Acts.

This last point was not argued before us.

Mr. *Russell,* for the plaintiff, objects that the conditions prescribed by section 40 and section 9 (*c*) of the Act of 1897, were not complied with, in that the point of diversion was not specified with sufficient exactness. "About 10 miles from Burrard inlet," it must be admitted, is not very definite, but in a rough country it is not so very vague. A notice seems to have been

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posted at the very spot and also on the plaintiff's lands. These notices brought the matter of the application to his attention and he attended and objected. After all, so far as he is concerned, the knowledge of the exact point of diversion is not so much of importance to him as the knowledge that the diversion was to be made at a point above his land.

Mr. Justice McCREIGHT, who for many years resided in Cariboo, and had there great experience in dealing with water questions under the Mining Acts, said in *Carson* v. *Martley* (1886), 1 B.C. (Pt. 2) 281, that if these conditions went to the jurisdiction, proceedings should have been taken by prohibition or *certiorari,* and in the Supreme Court of Canada, (1889), 20 S.C.R. 634, Gwynne, J. seemed to think that as the granting of the record was in the discretion of the commissioner, these clauses were only directory.

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It seems impossible to suppose that the Legislature in 1897, when it, after reciting the provisions of the Act of 1892, passed the provisions it did, relating to the acquiring of water and the making of water power available to the fullest possible extent in aid of industrial development as well as of the agricultural and mineral resources of the Province, did not intend to break in upon the rights which at common law would belong to the plaintiff.

The title of the Acts speaks of "making adequate provision for municipal water supply," and it seems to me that the idea was that the Board should do what Parliament had formerly done—grant, on conditions to be specified, the power to take the water.

I think the learned judge was right in his conclusion, and I would dismiss the appeal.

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MARTIN, J.A.: Under a grant from the Crown, dated the 9th of December, 1902, the plaintiff became the owner of lot 851, group 1, New Westminster District, which admittedly carried with it riparian rights to that portion of Seymour creek which, for about half a mile, formed the eastern boundary of said lot. No buildings have been erected on it and no one has ever used it in any way except clearing a little of it and cutting about 300

cords of shingle bolts. The Crown grant contains the following proviso, which I shall notice later:

"Provided, also, that it shall be lawful for any person duly authorized in that behalf by us, our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation to the aforesaid David Cook, his heirs and assigns."

The defendant Corporation, on the 28th of September, 1906, obtained a record of 1,400 inches of water out of said creek, and similar records were granted to four other municipalities for 1,600 inches, amounting in all to 3,000 inches. The intake, and point of diversion, for the water so recorded is about five miles above the plaintiff's boundary, and it is admitted that if the whole 3,000 inches were diverted at the intake there would be no surplus water immediately below it, and the plaintiff would get only the surface water and the water of certain tributary streams below the intake. At present the whole amount granted by the records, 3,000 inches, which are equivalent to a flow of 84 cubic feet a second, is not being taken, but it is admitted that the flow of water past the plaintiff's land has been materially diminished by about 16½ cubic feet a second by the defendants' pipe, though there is still, at present, at lowest known water, a flow of about 29 cubic feet a second past the plaintiff's land. The plaintiff had due notice of and did attend upon the hearing of the defendants' application for record before the water commissioner, and objected to the application on the ground that, as owner, he had riparian rights, but made no application for a record on his own behalf and did not appeal from the decision of the commissioner. The position he takes before this Court is simply that as part of his riparian rights, he is entitled to the natural and undiminished flow of the stream (as to which *Kensit* v. *Great Eastern Railway Co.* (1883), 52 L.J., Ch. 608; and *Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110, may be considered), and asks for an injunction to prevent further obstruction and diversion.

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He further, under section 291 of the Water Act, Revised Statutes of British Columbia, 1911, chapter 239, attacks the

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validity of the defendants' record for non-compliance with statutory provisions, which I shall consider later.

His contention, set up in his reply, that the Water Clauses Consolidation Act, 1897, and amending Acts, are *ultra vires,* was formally abandoned.

With respect to his riparian rights, I may, for the purposes of this case, adopt the general definition of their nature as given by Duff, J. in *Esquimalt Waterworks Company* v. *City of Victoria* (1907), 12 B.C. 302 at p. 322, 2 M.M.C. 480 at p. 496, as follows:

"The right of a riparian proprietor is not a mere privilege, but a right incident to his ownership of the land, 'parcel of the inheritance,' as it is commonly put by the text writers on the subject."

And speaking of one effect of the Water Clauses Consolidation Act of 1897, which is that which was in force when the defendants' record was obtained, he said, p. 323:

"As regards the Act of 1897, it cannot, I think, be maintained, that it does not, indirectly, interfere in a most substantial way with pre-existing riparian rights; but it is not, I think, necessary to conclude that that Act, any more than the Act of 1892, abrogates those rights. It makes provision by which persons complying with the conditions prescribed by it may acquire rights to divert water in circumstances under which such diversion, apart from the provisions of the Act, would be a wrongful invasion of the rights of riparian proprietors. But because to that extent the Act is retrospective in its operation, one is not bound to give—indeed, one is bound not to give—to it any further retrospective operation, unless that be necessary in order to give effect to its provisions. See *Reid* v. *Reid* (1886), 31 Ch.D. 402, *per* Bowen, L.J. at p. 408."

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There is nothing new in this view, as it was held by Gwynne, J. in *Martley* v. *Carson* (1889), 20 S.C.R. 634 at pp. 654-5; 658-9, [(1885-6), 1 B.C. (Pt. 2) 189, 281], that so far back as 1865 the Water Ordinance of that year had "qualified the common law right of riparian proprietors by substituting therefor those statutory rights which the conformation of the country made absolutely necessary to the beneficial use of the . . . . Province." It is desirable to note that later and better knowledge of this vast Province shews that the learned judge's descriptive remarks should be much restricted in their application. See also the remarks of Iddington and Duff, JJ. in *Vaughan* v. *Eastern Townships Bank* (1909), 41 S.C.R. 286 at pp. 295, and 321-3 [(1907), 13 B.C. 77, 2 M.M.C. 444].

Sections 4 and 5 of said Act of 1897 are as follows:

"4. The right to the use of the unrecorded water at any time in any river, lake, or stream, is hereby declared to be vested in the Crown in the right of the Province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, lake or stream vested in the Crown, and to which there is access by a public road or reserve.

"5. No right to the permanent diversion or to the exclusive use of the water in any river, lake, or stream shall be acquired by any riparian owner, or by any other person, by length of use or otherwise than as the same may be acquired or conferred under the provisions of this Act, or of some existing or future Act."

Section 4 is not very happily worded, but its meaning becomes plain, or plainer, when its construction is partly reframed so as to give what I am satisfied is its true meaning, thus:

". . . . vested in the Crown in the right of the Province, and no person shall divert or appropriate any water from any river . . . . etc. (save in the exercise of any legal right existing at the time of such diversion or appropriation), unless (except) he does so under the provisions of this or some other Act . . . ." etc.

Read thus, it is clear to me that since the right to the use of unrecorded water is formally "vested in the Crown" (wherein it must remain till it is as formally divested therefrom), a riparian owner must "exercise" any legal rights to divert or appropriate such water before a valid application for record of it is made by another, and if he does not so preserve his riparian rights, he is prevented from exercising them as regards the water covered by the record granted on such application during the duration of that record, as hereinafter noticed. To give an example: I have no doubt that a riparian owner who was duly "exercising" his existing legal right to use the water of a stream to run machinery to supply, say, electric light and power for his house and farm purposes, would retain that right as against an applicant for a record thereof. And such water would also be water which was "appropriated," "occupied," and "used for a beneficial purpose," within the meaning of the exception in the interpretation given to "unrecorded water" in section 2, thus:

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"'Unrecorded water' shall mean all water which for the time being is not held under and used in accordance with a record under this Act, or under the Acts repealed hereby, or under special grant by Public or Private Act, and shall include all water for the time being unappropriated or unoccupied, or not used for a beneficial purpose."

This section has been considered in some aspects by the Privy Council in the *Esquimalt Waterworks Company* v. *City of Victoria Corporation* (1907), A.C. 499 at pp. 528-9, and it is clear that the right to the use of all water which cannot be excluded from that definition, or which is not within the saving clause of exceptions contained in section 4, is "vested in the Crown" by that section. The expression "unrecorded water" obviously includes more than water not held by record. The contention made at bar that water, the right to which was merely claimed under the general right of riparian owners derived from the customary grant from the Crown, was "appropriated" to the grantee within the meaning of said section 2, cannot, I think, be supported for a moment in view of the context, which clearly contemplates activity and not mere passivity as the test. Essentially the same contention was unsuccessfully advanced in *Martley* v. *Carson, supra,* at pp. 661, 680-1, based upon the ground that the water became "occupied" because "by the common law of England every riparian proprietor is entitled to the flow of the waters of every stream running along or through his property in its natural course without interruption." The terms "occupied" and "unrecorded and unappropriated water" are of long legislative standing; they are considered in the last reference in relation to section 44 of the Land Ordinance of 1865, 1870 (section 30) and 1875 (sections 48 and 54), and *cf.* Duff, J. in *Vaughan* v. *Eastern Townships Bank, supra,* at pp. 322-3.

The same reasoning extends to section 4, as it is not the "legal right," but the "exercise" of it that is safeguarded.

In the *Esquimalt Waterworks Company* case, *supra,* their Lordships of the Privy Council drew attention to the acts done which led them to reach the conclusion that the water in controversy there had been "appropriated" (p. 527), and also that it was water held under a private Act and therefore not "unrecorded water" (pp. 528-9); see also the remarks of Duff, J. in

the Court below, p. 494. But, as the same learned judge pointed out, p. 322: "The fact that these [riparian] rights were subject to curtailment by reason of grants of water records under existing legislation did not, in the absence of such records, affect the validity or scope of the rights," and he goes on to point out that riparian owners have a "remedy . . . . against a wholly wrongful and unauthorized diversion of the stream."

In short, it comes to this, that though riparian rights may be curtailed or suspended, they are not abrogated. In the case at bar, for example, if there were a mean flow of 30 cubic inches past the plaintiff's property and a record of 15 cubic inches were granted to a third party, the plaintiff would, until an application for a record for the remaining 15 inches, preserve all his riparian rights therein, and if he chose to "exercise" them as above mentioned, he could forestall any applicant and preserve them intact. See what Duff, J. says at p. 323:

"No records have been granted in respect to any of the waters in question, and the rights to these waters incident to the ownership of the lands purchased by the Company remained in the owners of these lands, unimpaired, as acquired by virtue of the original grants from the Crown at the time these rights were appropriated by the Company. Does the Act of 1897, then, authorize any interference with these rights? To my mind, it does not."

And it might further be very plausibly argued, at the least, that, as it is only the "use" of the water that is vested in the Crown, in case of the lapse by time, or cancellation, of a record, the riparian owner's original rights in the water (which were never abrogated, but merely suspended, or held in abeyance by reason of the record permitting another to use it, and which I observe in *Martley* v. *Carson, supra,* at p. 641, were stated by Chief Justice Ritchie in his dissenting judgment to "include the right to use the water for irrigating purposes") were revived, and the water having once more become "unrecorded" was likewise once more subject to his "exercise of any legal right therein," just as if it had never been recorded. There may also be other respects in which riparian rights still have a valuable existence, but it is unnecessary to pursue the subject. The riparian owner may, of course, avail himself of all the benefits of the statute—*Martley* v. *Carson, supra,* p. 655—priority of a recorded grant "alone giving precedence to any one" over him.

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With respect to section 5 (which first appeared substantially in its present form in the Water Privileges Act, 1892, British Columbia statutes, 1892, chapter 47, section 3), I read it as a precautionary enactment providing that in no circumstances shall any one, whether a riparian owner or not, "acquire . . . . the right to the permanent diversion or the exclusive use of the water," etc., unless by the Act, the intention being, so far as riparian rights are concerned, not, for one thing, to allow the owner to acquire such rights by any combination of circumstances, *e.g.*, such as are pointed out by Duff, J. in the *Esquimalt Waterworks Company* case, *supra*. Even so early as 1870 he had been denied the "exclusive right to the use of . . . . water . . . . flowing naturally through or over his land, except such record shall have been made," by section 30 of the Land Ordinance of 1870, referred to in *Martley* v. *Carson, supra,* at p. 674.

So far I have been considering the plaintiff's rights under the Act of 1897, under which the records complained of were granted. I now turn to the existing Act of 1911, Revised Statutes of British Columbia, chapter 239. Section 4 is as follows:

"Saving the right of every riparian proprietor to the use of water for domestic purposes, the right to the use of the unrecorded water in any stream is hereby declared to be vested in the Crown in the right of the Province; and save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water except under the provisions of this or some former Act, or except in the exercise of the general right of all persons to use for domestic purposes water to which there is lawful public or private access."

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It will be noticed that this section has in one place a narrower, and in another a wider definition of water than the old section 4, *viz.*: in line 3 the expression is "water in any stream"—not water "in any river, lake, or stream," while in the sixth line it is "any water," without limitation. How this might affect the decision in *In re Milsted* (1908), 13 B.C. 364, it is unnecessary to consider. Otherwise, and beyond the fact that it specifically recognizes the right of "every riparian proprietor to the use of water for domestic purposes," the section has, for the purposes of this case, the same effect as old section 4; and save as regards the expressions "any water" and "by licence," the same remark applies to section 5.

It was not disputed that the plaintiff was entitled to water for domestic purposes (and therefore I have not been considering that phase of the matter at all), and it was pointed out that an abundant supply for that purpose is, as a matter of fact, flowing past his land, but that never was, and is not now, what the plaintiff claimed to get by this suit, as has already been noticed, and in my opinion he has failed to support his claim.

Then as to the attack upon the validity of the record, advanced under said section 291, as follows:

"Any riparian proprietor, and this shall include pre-emptors, homesteaders, and lessees from the Crown, whether in the right of the Province or the Dominion, may, without making the Crown a party, maintain an action and take any proceedings in any Court of competent jurisdiction to prevent any unlawful or wrongful diversion of water."

I assume, for the purposes of the argument, that this section entitled the plaintiff to question the validity of the defendants' record.

The irregularity complained of is that in the notice of application for record, the requirement of subsection 2 (*c*) of section 9, chapter 190, Revised Statutes of British Columbia, 1897, as to stating "the point of diversion" has not been complied with. The notice says:

"(b) The name of the lake, stream or source is Seymour creek running into Burrard inlet.

"(c) The point of diversion or intended ditch head is about 10 miles from Burrard inlet."

It is urged that a definite spot should have been given, and that as a matter of fact the distance was correctly given in the record which was issued upon the application, thus:

". . . . at a point eleven miles or thereabouts from Burrard inlet."

In my opinion the point of diversion is given sufficiently to put any one interested upon further inquiry, which is really what the Act contemplates; there is no suggestion that as a matter of fact the plaintiff was misled by it or that it was not sufficient for the purpose. It is, moreover, difficult to give distances correctly in a hilly, not to say mountainous, district such as that in question. I note as a matter of precaution that the technical answer put forward by defendants' counsel to this contention is untenable—*viz.*: that section 2 (*c*) only requires the

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point of diversion to be stated when the water is intended to be used for power purposes. It is obvious from a close perusal of the section that there should be a semicolon before the word "where" in the first line, as there is in the fifth line. It is clear that the intention is to require the point of diversion or ditch head to be given in all cases, and additional specified particulars "shall also be stated" where the water is to be used for power and mining purposes.

I have reached this conclusion apart from the opinion expressed in *Martley* v. *Carson, supra,* pp. 656, 663, 677-8, as to requirements of this nature being merely directory, and as to the limitation of attacks upon water records, also noticed in *Vaughan* v. *Eastern Townships Bank, supra,* at pp. 295, 306-7-8; and (1907), 13 B.C. 77 at p. 79, 2 M.M.C. 444 at p. 445, where the question of status to attack is also raised but not decided. It should be noted that leave to appeal to the Privy Council was given on the 9th of July, 1911, in that case, but it was settled before the hearing.

MARTIN, J.A.

I notice section 8, which was cited to us, only to shew that I have not overlooked the same; it obviously does not relate to riparian rights.

Finally, and with respect to certain water privileges and rights mentioned in the proviso in the Crown grant set out in the beginning of this judgment, it is only necessary to say that on the present statutes it obviously affords no assistance to the plaintiff nor to this Court in the study of the questions raised, because it is the long established and customary provision relating to the use and carrying of water across the land for mining and agricultural purposes on other lands in the vicinity, which, save its extension to agriculture, may be found in Crown grants so early as 1864, at the least: *Martley* v. *Carson, supra,* pp. 641, 651. No inference respecting riparian rights can be extracted from it since the Water Privileges Act of 1892, whatever view might be taken of it in relation to water records granted before that statute was passed, in regard to which some observations are made by Duff, J. in the *Esquimalt Waterworks Company* case, *supra,* at pp. 320, 321.

It follows that, in my opinion, the appeal should be dismissed, with costs.

GALLIHER, J.A. concurred with MARTIN, J.A.

Appeal dismissed.

Solicitors for appellant: *Russell, Russell & Hancox.*
Solicitor for respondents: *J. G. Hay.*

RAT PORTAGE LUMBER COMPANY, LIMITED v. WATSON AND ROGERS.

Mechanic's lien—Notice by material man of intention to claim lien—Delivery, what constitutes—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Sec. 6.

The term "delivery" in section 6 of the Mechanics' Lien Act, means actual, physical delivery.

Where, therefore, a material man, who had contracted to furnish all the materials for a building, and after some of the material had been delivered, gave notice of intention to claim a lien in respect of more material than had been delivered:—

Held, affirming the judgment of MCINNES, Co. J., that the notice was bad as to the material not delivered.

APPEAL by plaintiff Company from the judgment of MCINNES, Co. J. in an action to enforce a mechanic's lien on a contract to build a church. Appellants entered into a contract with Watson and Rogers to build a church of specified material for a lump sum. After some of the material had been furnished, appellants served a notice of claim for lien, and as to some of the material covered by the notice, it was furnished more than ten days before service of the notice. The trial judge held that the word "delivery" in section 6 of the Mechanics' Statement

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Lien Act means actual, physical delivery, and that no lien could attach to material actually and physically delivered prior to ten days before the giving of the notice.

The appeal was argued at Vancouver on the 19th of November, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

A. H. MacNeill, K.C., for appellants: We say there was a contract for an entire delivery. The appellants having contracted to deliver certain material, there was no delivery until all the material was in fact delivered. He referred to *Day* v. *Crown Grain Co.* (1907), 39 S.C.R. 258; *Morris* v. *Tharle* (1893), 24 Ont. 159; Jones on Liens, 2nd Ed., Vol. 2, paragraph 1,431; *Kemp* v. *Falk* (1882), 7 App. Cas. 573 at p. 586.

MacGill, for respondent, was not called upon.

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MACDONALD, C.J.A.: I think the appeal must be dismissed. If any effect at all is to be given to the section which was obviously intended to protect the owner of the building from claims which he could protect himself against by retaining purchase money, we must give it the construction the learned judge below has given it.

IRVING, J.A.

IRVING, J.A.: I am of the same opinion.

MARTIN, J.A.

MARTIN, J.A.: I am also of the same opinion.

GALLIHER, J.A.

GALLIHER, J.A.: I am not so clear on the point as my learned brothers, but I do not feel strongly enough to dissent and delay proceedings by hearing the other side.

Appeal dismissed.

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Master and servant—Injury to workman in the course of his employment—Defective machine—Finding by jury—Reasonable evidence—Balance of probabilities.

Plaintiff was injured by a cutting machine "tripping," or coming down a second time through, as he submitted, a defect in the mechanism. He operated the machine by working a lever with his foot, and if he kept his foot on such lever it would cause the knife to continue cutting or descending. There was some evidence that the machine had "tripped" a second time without the operator's foot being on the lever. The jury gave a general verdict of $500.

Held, on appeal, sustaining the verdict, that on the evidence, it was open to the jury to find the verdict which they did.

APPEAL by defendants from the judgment of CLEMENT, J. and the verdict of a jury in an action for personal injuries. Tried at Vancouver on the 23rd and 24th of January, 1912. Plaintiff was a workman employed in the steel structural works of J. Coughlan & Sons, Limited, Vancouver. He was injured by getting the tips of his fingers squeezed off between the 24-inch steel coping and the head of a large cutting machine in the defendants' works. The head of the machine, or knife, has a clearance of three-eighths of an inch when it comes down to its furthermost point in the operation of cutting heavy steel. The machine stands eleven feet high, is of enormous proportions, self-contained, and all its working parts clearly visible, and inspection of same is made continuously. The machine was equipped with a lever which engaged a clutch, and when the clutch is so engaged the machine would not ascend or descend in the cutting operations. If the operator of the machine kept his foot on this lever two seconds too long the knife would descend a second time, and, in fact, would continue ascending and descending as long as the foot remained on the lever. The plaintiff contended that the head to which the knife was attached in this particular instance ascended a second time without his foot being on the lever. None of the witnesses for the plaintiff could swear that

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there was any defect in the machine, or explain the cause of the knife descending a second time, but all agreed that if the operator kept his foot on the lever a few seconds too long it would cause a second descent. Plaintiff denied that he had his foot on the lever to cause a second descent of the knife when he was injured.

Defendants' witnesses alleged that the machine was mechanically perfect, and that it was impossible for the machine to descend or ascend without the operation of the lever. CLEMENT, J. told the jury that the doctrine of *res ipsa loquitur* applied, and that the jury had only to find that the knife did descend a second time without the foot being on the lever, and that it need not be proved by plaintiff that there was any defect in the machine otherwise than by giving the evidence referred to, *viz.*: that the knife did descend a second time without his foot being on the lever. The jury brought in a verdict of $500, against which the Company appealed, claiming, among other things, that it is the duty of the plaintiff to prove affirmatively that there was a defect in the machine which caused the accident, and, having failed to do so, he cannot succeed; also claiming that the accident was caused by the plaintiff keeping his foot too long on the lever, thus making him the author of his own injury. Further, defendants submitted that in any event plaintiff had no business to keep his fingers on the cap, and that he had, only a few minutes before, warned his co-labourer against such a risk.

Statement

The appeal was argued at Victoria on the 7th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellants: We say that plaintiff was careless in operating the machine. There was no defect in the machine, but the cause of the accident was his keeping his foot for too long a period on the lever. He did not release it promptly. At most it is a case of remuneration under the Workmen's Compensation Act, 1902. There was clearly contributory negligence, and also *volens*, as he had just warned a fellow workman of the risk which he himself took. He cited and referred to *Walsh* v. *Whiteley* (1888), 21 Q.B.D. 376;

Argument

Morgan v. *Hutchins* (1890), 59 L.J., Q.B. 197; *Williams* v. *Birmingham Battery and Metal Co.* (1899), 68 L.J., Q.B. 918; *Kiddle* v. *Lovett* (1885), 16 Q.B.D. 605; *Moore* v. *Gimson* (1889), 58 L.J., Q.B. 169; *Black* v. *Ontario Wheel Co.* (1890), 19 Ont. 578; *Milne* v. *Townsend,* 19 R. 830.

Armour, for respondent: There was a defective machine, the evidence shewing that it would at times, and had, tripped a second time without the action of the foot on the lever. The verdict is not unreasonable on the evidence.

Argument

Taylor, in reply: The doctrine of *res ipsa loquitur* cannot be invoked here.

Cur. adv. vult.

5th November, 1912.

MACDONALD, C.J.A.: I think this appeal should be dismissed. The jury found a general verdict, and awarded the plaintiff $500 damages for the loss of the ends of the fingers of one hand, which were cut off in a coping machine which he was operating. The machine in question was used for shearing iron and steel. The head to which the shears were attached moved vertically up and down. When the operator desired it to descend he pressed with his foot what is called a tripper. If he desired it to descend only once he took his foot off the tripper during the descent, otherwise it would, after rising, descend again.

MACDONALD, C.J.A.

It was claimed by the plaintiff that this machine would sometimes descend a second time when the tripper was properly released by the operator. It is conceded that if so, the machine was abnormal and defective. The evidence for the defence is that the machine was not defective, and that it was practically impossible that it should act thus unless the operator kept his foot too long on the tripper. The plaintiff's injury, he claims, was received by reason of the cutting head of the machine descending a second time when it should not have done so. He claims that at the time of his injury he was not aware of this defect in the machine. He brings home to the defendants notice of this defect by the witness Blaikie, who says that the machine acted in that way when he was operating it, and that he called

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the fact to the attention of the defendants' foreman. Another witness, who operated the machine very frequently and for a considerable time, says that it acted in this way with him many times. While I have a very strong belief that the plaintiff's accident arose from his inadvertently keeping his foot too long on the tripper, yet, in face of the evidence above referred to, I think it was open to the jury to find the verdict they did. The jury were entitled to believe Blaikie and the other witnesses, and if so, they were entitled to come to the conclusion that the machine was defective, and that that fact was brought to the knowledge of the defendants. I do not think the plaintiff need point to the particular defect in the mechanism which produced this peculiar action of the machine, and the jury were entitled to discard, if they chose, the evidence of the witnesses for the defence, who say it was in perfect condition.

MACDONALD, C.J.A.

IRVING, J.A.: I would dismiss the appeal.

IRVING, J.A.

As there was no misdirection, I do not think we would be justified in setting the verdict aside: *Toronto Railway* v. *King* (1908), A.C. 260. In saying this I do not wish to be taken as approving or disapproving of the finding.

MARTIN, J.A.: This case, the more it is examined, is shewn to turn on a very simple question which, if answered affirmatively, establishes the plaintiff's right to recover, and removes any objection to the charge. And the question is: Is there reasonable evidence to go to the jury in support of the contention that the machine "tripped" a second time voluntarily, without the agency of the plaintiff? The testimony of Blaikie is clear that not only had it done so on two occasions when he was in charge of it, but that he had reported this dangerous defect to the defendants' foreman, Lilly. This supports the plaintiff's own account of what happened, otherwise the cause of the accident would be inexplicable. The suggested cause of this second "tripping," an unstable foundation, given by Blaikie, does not sound unreasonable, and moreover the defendant John Coughlan's evidence on discovery shews the machine was a second-hand

MARTIN, J.A.

one when he bought it, though "in good condition," as he believed.

The appeal should, in my opinion, be dismissed.

GALLIHER, J.A.: I would dismiss this appeal. I think the case was properly left to the jury: see *Grand Trunk Railway Co.* v. *Griffith* (1911), 45 S.C.R. 380.

At the close of the plaintiff's case Mr. *Taylor* moved for dismissal of the action on the ground that there was no evidence of negligence on the part of the plaintiff, citing, among other cases, *Walsh* v. *Whiteley* (1888), 57 L.J., Q.B. 586; and *Morgan* v. *Hutchins* (1890), 59 L.J., Q.B. 197. If the evidence of Blaikie is to be believed, then there is the very evidence which was lacking in *Walsh* v. *Whiteley, supra,* as decided by a majority of the Court, Lindley and Lopes, L.JJ. and which brings it within *Morgan* v. *Hutchins, supra.*

In speaking of this machine tripping with him on several occasions when his foot had been taken off the lever, Blaikie says:

"Did you say anything about this dangerous condition? I did to Mr. Lilly.

"Who is Mr. Lilly? He is foreman of the shop.

"What did he say about it? He turned around and told me the same thing—to look out—she would trip."

Blaikie does not appear to have been cross-examined upon this. Then the plaintiff says he was never warned by anyone that the machine would trip a second time. This was all evidence to go to a jury as to the negligence of the defendants' foreman. If the machine tripped a second time without the agency of the person operating it, it argues a defect—in fact, the defendants' case is that it could not.

GALLIHER, J.A.

There is, then, before the jury the evidence of both parties, and, whether rightly or wrongly, they have found in plaintiff's favour.

No cause can be assigned by either party why it should trip a second time without human agency, so in determining the question, the jury no doubt took into consideration the balance of probabilities (which they would be entitled to do), and as these are dependent on pure questions of fact upon which the

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evidence is contradictory, we would not be justified in setting aside the verdict.

I would not interfere with the scale of costs awarded by the learned trial judge.

Appeal dismissed.

Solicitors for appellants: *Taylor, Harvey, Baird, Grant & Stockton.*

Solicitors for respondent: *Davis, Marshall, Macneill & Pugh.*

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BARNUM v. BECKWITH

BARNUM v. BECKWITH.

Practice—Execution, stay of—Application for pending appeal—Motion after execution satisfied and sheriff withdrawn—Material on application—Sufficiency of.

An application for stay of execution pending appeal to the Court of Appeal will not be granted where the defendant has paid the sheriff and secured his withdrawal from possession of the goods held in execution.

In any event the applicant must come prepared with all necessary material, and an adjournment will not be granted merely for the purpose of procuring affidavits.

Statement

MOTION for stay of execution pending appeal to the Court of Appeal. Heard by GREGORY, J. at Victoria on the 15th of November, 1912.

McDiarmid, and *Copeman,* for the motion.
Aikman, contra.

11th December, 1912.

Judgment

GREGORY, J.: This is an application to stay execution pending an appeal to the Court of Appeal.

On the hearing I expressed the opinion that no sufficient

ground had been shewn for granting the application, and only delayed dismissing the same because of Mr. *McDiarmid's* suggestion that I was prejudiced against his client, until I had an opportunity of consulting some of my brother judges. I have now had that opportunity, and see no reason for changing the view I then expressed.

The affidavit does not even state that it is intended to appeal, but simply that the solicitor has received instructions to appeal. There has been ample opportunity to make this application since the sheriff went into possession, but the defendant, though repeatedly notified of the plaintiff's intention to proceed and enforce his rights, takes no steps, and actually pays the sheriff and secures his withdrawal from the goods seized.

It seems to me there is nothing left for me to stay—the execution is satisfied.

If the execution could still be stayed, the defendant could come into Court with all necessary affidavits to establish his position: an adjournment will not be granted to enable him to procure affidavits: *Barker* v. *Lavery* (1885), 14 Q.B.D. 769. The execution creditor must shew special grounds for seeking a stay: *The Annot Lyle* (1886), 11 P.D. 114; *Atkins* v. *The Great Western Railway Company* (1886), 2 T.L.R. 400; *Webber* v. *London, Brighton, &c., Railway Co.* (1881), 51 L.J., Q.B. 154; *Reynolds* v. *McPhail* (1907), 13 B.C. 159. No special grounds have been shewn here. Mr. *McDiarmid's* second affidavit and Mr. Barnum's in reply, I do not consider. I only agree to allow defendant to supplement his original affidavit if he could produce authority that the practice allowed it. No such authority has been shewn me, and *Barker* v. *Lavery*, above referred to, being a decision of the Court of Appeal, seems to me conclusive against it.

Judgment

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DAYNES v. B. C. ELECTRIC RY. CO.

DAYNES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED LIABILITY.

Master and servant—Railways—Rules governing traffic—Disregard of rule by motorman—Damage.

Evidence—Admissibility—Refreshing memory from notes of event—New trial.

One of the rules of the defendant Company was that cars running in the same direction should be kept five minutes apart, except when approaching stations, when the motorman was to so manage his car that it could be stopped within the range of vision. Plaintiff, a motorman, ran his car into the rear end of another car standing at a station, and sustained injuries for which he claimed damages, alleging a defective system. The jury found defendants guilty of negligence and gave damages in $2,500.

Held, on appeal, reversing the verdict, that the accident was caused by plaintiff's disregard of the rules.

One of the witnesses at the trial endeavoured to refresh his memory from an extended note of the accident made at the time. The trial judge refused to permit this.

Held, *per* IRVING and MARTIN, JJ.A., that there had been an improper rejection of evidence, and that the defendants were in any event entitled to a new trial.

Statement

APPEAL by defendant Company from the judgment of HUNTER, C.J.B.C., entered upon the verdict of a jury in favour of plaintiff. The action was for damages on account of injuries sustained by the plaintiff while in the employment of defendant Company, and was tried at Vancouver on the 12th of January, 1912.

The appeal was argued at Victoria on the 10th and 11th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

L. G. McPhillips, K.C., for appellant Company: We submit that the plaintiff should have observed the rule requiring him to wait for five minutes in the circumstances here. The rules by which plaintiff was governed are standard rules, framed on the block system of operating railway traffic. But even if the

rules are defective, the Company is not to blame, because they were framed by the manager, who is not shewn to be an incompetent official.

S. S. Taylor, K.C., for respondent.

5th November, 1912.

MACDONALD, C.J.A.: The plaintiff admits that he was familiar with rule 91 of the standard rules, which, insofar as need be recited here, reads:

"Unless some form of block signals is used, trains in the same direction must keep at least five minutes apart except in closing up at stations. When the view is obscured by curves, fog, storms, or other causes, they must be kept under such control that they may be stopped within the range of vision."

I do not intend to enter into a discussion as to whether or not the system of despatching and operating cars on this inter-urban tramway was a defective one. Under any practical system, something must be left to the intelligence and care of those in charge of the trains or cars. If the above rule requiring the rear car to keep five minutes behind the leading one was not observed by defendants' motormen to the knowledge of the defendants, as the plaintiff swears, and if, as he also swears, the customary rule was to keep a distance of about 700 feet behind, he was bound, and the duty was more insistent, because of the near proximity of the car ahead, and the fog, to observe scrupulously the latter part of the rule.

The facts upon which my decision depends are not in dispute. The plaintiff was following the car Cloverdale, approaching Strathcona station in a dense fog. He knew by certain land marks that he was approaching the station, the horseshoe curve and arc light enabling him to tell exactly where he was. He admits he knew that the Cloverdale would probably stop at that station to let off passengers; he intended to stop his own car there also. The Cloverdale was standing at the station when the plaintiff arrived, with its rear at the far end of the platform, yet the plaintiff came to the station at such speed that he was unable to stop his car though all brakes were in order, before the front of it had reached the far end of the platform and crashed into the rear of the Cloverdale with such force as to telescope the vestibule of his own car and to do considerable

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damage to the Cloverdale. I think the plaintiff is responsible for what happened, and that the jury could not reasonably, upon the facts in evidence, assuming a negligent system, acquit him of contributory negligence.

I would, therefore, allow the appeal and dismiss the action.

IRVING, J.A.: The defendants, in my opinion, are at least entitled to a new trial on the ground of non-reception of evidence. The mistake into which the learned judge fell, I think, was in forgetting the purpose to which the extended notes was to be applied. The practice of refreshing one's memory is an everyday affair, whether for the purpose of giving evidence in Court or merely for the recalling of one's engagements. One looks at the note of the incident and then is able to act or speak with certainty. The note is not the evidence. The testimony of the witness is that, having refreshed his memory by looking at the note, he is now able to make a statement.

In *Burton* v. *Plummer* (1834), 4 L.J., K.B. 53, a clerk to a tradesman entered transactions as they occurred into a waste book from his own knowledge. These entries were afterwards copied into a ledger by the master and the clerk checked them off. It was held that the clerk could look at these ledger entries for the purpose of having the facts brought to his mind. In this case the waste book had been destroyed. Erle's argument, which prevailed, was to the effect that the ledger entries were in the nature of an original memorandum made by himself though not with his own hand.

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The extended notes, in my opinion, may be regarded as duplicates or *quasi* originals of the memorandum taken the day before. The rule is that the memorandum proposed to be looked at must have been made by the witness, or adopted as a correct account by him, at or about the time when it was made.

On the merits of the case I think the verdict for the plaintiff cannot stand. He was the author of his own misfortune. The rules plainly call for a five-minute interval between cars. Mr. *Taylor* seeks to invoke the rule of statutory construction that the headings govern the rules which are ranged immediately under it. It may well be that headings are inserted for conveni-

ence of reference and are not intended to control the interpretation of the clauses which follow: see *Union Steamship Company of New Zealand* v. *Melbourne Harbour Trust Commission* (1884), 9 App. Cas. 365 at p. 369. It does not appear to me that rule 91 applies to trams run by time tables only. In my opinion rules 83, 94 and 91 can very well be read together.

I would set aside the verdict and dismiss the action.

MARTIN, J.A.: It is, from the view I take of the case, necessary to first consider the application for a new trial, based upon the alleged improper rejection of the evidence of McCutcheon. Assuming that evidence to be material, I have no doubt, after examining all the authorities cited to us, and also *The King* v. *The Inhabitants of St. Martin's, Leicester* (1834), 2 A. & E. 210, and 13 Halsbury's Laws of England, 595-6, on Evidence, that it should have been admitted; the loss of the original notes was proved, also the transcript thereof on the following day, and the accuracy thereof, and the memory of the witness had been exhausted on the subject; the right to refresh his memory by reference to the "exact copy" had, in my opinion, been established.

It cannot, I think, be successfully contended that the evidence was immaterial. The question asked as to the statement made by the plaintiff respecting the position of the car Cloverdale indicates, to my mind, the general object of the evidence which would, for one thing, be adduced to support the contention that the plaintiff was guilty of contributory negligence; or by shewing that he had made conflicting statements, to discredit him in the minds of the jury. What happened was, in the circumstances, really tantamount to the total rejection of the witness before counsel for the defendant had reached a stage where he could be called upon to do more, and in such circumstances his remark that "I do not think I can ask the witness anything more that would be useful," was quite understandable and appropriate.

MARTIN, J.A.

There must, I think, be a new trial; the costs of the former one to abide the result of the second; the appellant should have his costs of this appeal.

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GALLIHER, J.A. concurred in allowing the appeal and dismissing the action.

Appeal allowed.

Solicitors for appellants: *McPhillips & Wood.*

Solicitors for respondent: *Taylor, Harvey, Baird, Grant & Stockton.*

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KING LUMBER CO. v. CANADIAN PACIFIC RY. CO.

KING LUMBER COMPANY, LIMITED v. CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Forest fires—Damage by—Different fires uniting. Jury—Misdirection—Refusal of judge to submit to jury additional questions proposed by counsel.

In an action for damages caused by forest fires, alleged to have been caused by the negligence of defendant Company's servants, there was some evidence of other fires which had been burning previously having united through a change in the wind. Counsel for defendant Company requested that the jury be asked to find if any such fires caused the damage complained of, and if so, which. The trial judge declined, and instructed the jury to find which fire was the preponderating cause of the damage. The jury returned a verdict against defendant Company.

Held (MARTIN, J.A. dissenting), that the refusal of the trial judge to put the questions suggested did not, viewing the whole of the judge's charge, prejudice the defendant Company, and that there was therefore no misdirection.

APPEAL by defendant Company from the judgment of CLEMENT, J. and the verdict of a jury in an action for damages caused by fire alleged to have been started by defendant Company's servants.

Statement

Plaintiffs' case was that a fire started on the right of way of Yahk, and notice was given to the Company the day after, but that they failed to extinguish it. Plaintiffs alleged that it burned and smouldered until the 30th of July, when it sprang

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up and burnt plaintiffs' limits. Defendant Company's case was that another fire, which they did not start, beginning over two miles away, worked up to the point of the old fire, which they say was extinguished, swept over that burnt area and did the damage. Alternatively, that at least this fire, known as the Curzon fire, contributed to the loss. The sole question on the appeal arose out of the judge's charge. Defendant Company asked for a new trial on the ground that the judge should have submitted two further questions, with a view of having them pass on the point whether or not the Curzon fire contributed to the loss.

Plaintiffs claimed that the judge's charge made it clear that if the jury believed the Curzon fire had anything to do with the loss, they should find for the defendant Company, and that the jury's answers shewed that they attributed the fire solely to the one originating on the defendant Company's right of way at Yahk.

Statement

The appeal was argued at Victoria on the 11th, 12th and 13th of June, 1912, before IRVING, MARTIN and GALLIHER, JJ.A.

Davis, K.C., and *McMullen*, for appellants.

S. S. Taylor, K.C., and *M. A. Macdonald*, for respondents.

Cur. adv. vult.

5th November, 1912.

IRVING, J.A.: I would dismiss this appeal.

There was, in my opinion, evidence sufficient to justify the jury in coming to the conclusion that the fire which caused damage to the plaintiffs was either wholly or in part the combined fire which, according to the evidence of the bridge gang, Sam McDonald and the two de Wolfes, travelled from the north-west corner of lot 45,026, or the hillside fire, which broke out to the east of the pump house on the 29th or 30th of June, and I agree that the questions submitted by the defendants' counsel might very properly have been left to the jury; but, having regard to the whole charge of the learned judge, I am of opinion that the case was properly left to the jury, and that we would not be justified in disturbing the verdict.

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A question was raised during the argument as to the practice of cross-examining a witness from the depositions taken on discovery. I think that it is not permissible to conduct the proceedings so as to give to the jury a false impression of the evidence given by a witness on discovery. Where that is attempted, the trial judge, in his discretion, may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression.

MARTIN, J.A.: After a reconsideration of the charge and the evidence relative thereto, I can find no escape from the conclusion that there must be a new trial for misdirection.

The objection clearly raised by counsel involved an important question which should have been placed before the jury, because, quite apart from the point raised as to the "Curzon" fire, there was unquestionably evidence to go to them with respect to the fire on the hillside, which was admittedly burning for some hours before it was enveloped in the big fire, nevertheless the question as to how far that fire contributed to the damage, if at all, was definitely withheld from the jury. It may possibly be that the jury might have taken the view that it (the "hillside" fire) was caused by sparks from the big fire and therefore must be deemed to be a part of it, but that is a matter they have never passed upon, though it is essential to determine it before damages can be properly assessed and the responsibility therefor placed upon the proper shoulders. The direction to the jury that the question was one of a "preponderating fire" is, with all respect, one that cannot be supported, and must inevitably have led the jury to a wrong conclusion. It is not a question of preponderance of size, but distribution of liability, and if there were three or more fires contributing to the damage, the "preponderating" one is no more the "real cause" of the damage than the lesser ones. Each is the "real cause" of the damage it creates, and the principle is not altered by any difficulty in its application. If my land is damaged by the discharge upon it of combined streams of refuse from two different factories, each of the factories is liable for the damage caused by its own stream, though one of them may greatly "preponderate" in

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volume over the other; and though the cause of the damage to me may be "concurrent" because the two streams have intermingled before discharging upon my land in one flow, yet that does not relieve the authors of the original two streams from their several responsibility for such share of the damage as may be apportioned between them according to the quantum of the refuse discharged.

It may be, in the case at bar, that even if the "hillside" fire were found to be an independent one, the damage occasioned thereby would be very small, but that does not alter the principle; indeed, it would only increase my regret that a matter which might so easily have been placed before the jury and disposed of was not so dealt with, thereby avoiding the heavy expenses of this appeal and of the lengthy new trial which must be, in my opinion, ordered. The costs of the former one should abide the result of the new, and the respondent will have the costs of this appeal.

MARTIN, J.A.

GALLIHER, J.A.: The question of liability only has been tried. On the evidence I do not think we would be justified in interfering with the finding of the jury. There remains only the question as to whether there should be a new trial by reason of the fact that the learned trial judge refused to put certain questions to the jury, and also by reason of misdirection. A series of questions were put to the jury and Mr. *Davis,* counsel for the defendants, requested that the following questions also be submitted:

"What, if any, other fires than that fought on July 10th were burning in the vicinity of Yahk or Curzon on or prior to July 30th, 1910?

"What one or more of such fires occasioned or contributed to the burning of the plaintiffs' property?"

GALLIHER, J.A.

This the trial judge refused to do, and instead charged the jury as follows:

"Now just a word with reference to the point raised by Mr. *Davis.* In these cases you have to arrive at what has been called the real cause of the loss. If you find that there was a junction of any of these fires and the evidence does not satisfy you that one or the other was the preponderating fire so to speak, then you have to answer the first question, either 'it began down the valley,' 'it began at Yahk,' or 'we do not know where it began,' that is the fire that did the damage, the real cause, the real cause of the catastrophe. For instance, supposing the fire that began on

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Yahk townsite, or near Yahk townsite, smouldered there and got in this draw in the hills, if that fire would have died out had it not been for the other overwhelming fire coming from lower down the valley, then you would say that the real cause of the plaintiffs' loss was the fire that came from down the valley.

"If there was a concurrent cause and you are not able to say which was the preponderating cause, you simply have to say 'we cannot definitely determine what was the origin of the fire that did the damage.' It is a difficult point, I quite see. If there were two fires which came together, one of which they are responsible for and the other they are not responsible for, and you are unable to say which was the preponderating fire which caused this loss, then you will simply say you cannot say, and if you cannot say, the defendants, of course, win, because the burden is on the plaintiffs to lead you to such a state of conviction that you find ultimately in their favour."

GALLIHER, J.A.

This charge really deals with the questions which Mr. *Davis* asked to be submitted so that, unless there is misdirection in the manner in which the jury were so charged, the defendants are not entitled to a new trial. Reading the whole of that part of the charge complained of, I do not think it is unfavourable to the defendants. Portions of it, if they stood alone, might be so construed, but we should read it all together, and so read, in my opinion (and after a perusal of the authorities cited), it does not amount to misdirection.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

FARRELL AND FARRELL v. FITCH AND HAZLEWOOD AND THE BRITISH COLUMBIA SOUTHERN RAILWAY COMPANY.

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Mining law—Trespass—Location of discovery posts—"Side line locations"—Railway Aid Act, 1890, Cap. 40, Sec. 10—Mineral claims not excepted therefrom.

Statute, construction of—Repealed section—Railway Aid Act, 1890—Mineral Act, R.S.B.C. 1897, Cap. 135.

The property in question had been located as the Bridge Creek mineral claim on the 28th of July, 1898, and all assessment work was done upon the ground up to July, 1903, when the holder was entitled to a certificate of improvement. He did nothing further until August, 1907, when he re-located this and adjoining ground as the Victoria group and the Victor group. On the 30th of October, 1901, the defendant railway Company obtained a Crown grant of certain lands by way of subsidy. In May and June, 1911, defendants Fitch and Hazlewood, contractors for the construction of the railway, entered the property in question and cut a number of railway ties. CLEMENT, J. at the trial came to the conclusion that on the evidence the location of claims was bad, and dismissed the actions.

Held, on appeal, that the re-location was upon occupied land, not open to location as mineral claims.

APPEAL by plaintiffs from the judgment of CLEMENT, J., dismissing the actions (consolidated) for an injunction restraining the defendants from trespassing upon certain mineral claims and cutting and carrying away timber therefrom, and for damages. The actions were tried at Cranbrook on the 24th to the 27th of October, 1911. Statement

Thompson, for plaintiffs.
Hamilton, K.C., for defendant Railway Company.
Gurd, for defendants Fitch and Hazlewood.

21st November, 1911.

CLEMENT, J.: In these three cases which, by consent, were tried together, the various plaintiffs, claiming to be the holders of certain mineral claims, seek for an injunction restraining the defendants from trespassing upon the ground covered by the claims, and from cutting and carrying away timber thereon and therefrom; and for damages. CLEMENT, J.

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By section 26 of the Mineral Act (Revised Statutes of British Columbia, 1897, chapter 135), "the lawful holder by record of a claim" is declared entitled to certain surface rights and no others, *viz.*:

"The right to the use and possession of the surface of such claim, including the use of all the timber thereon, for the purpose of winning and getting from and out of such claim the minerals contained therein."

At the date of the acts complained of as trespasses, the ground covered by the defendants' operations was unoccupied, that is to say, there was no actual possession thereof by the plaintiffs or by any one on their behalf on which reliance could be placed as throwing upon the defendants the onus of justifying their entry. The only possession which the plaintiffs could set up would be that constructive possession which follows and depends upon proof of title. In either view, therefore, whether upon the language of section 26 or upon the facts, the onus is upon the plaintiffs to shew title or, in other words, to prove that they were the lawful holders by record of the claims in question. They so allege in their statement of claim, not in terms but in effect, and the allegations along this line are categorically denied in the statements of defence.

CLEMENT, J.

Two groups of claims come into question: the Victoria group, consisting of eight claims called Victoria No. 1, Victoria No. 2, and so on to Victoria No. 8, and the Victor group, called Victor No. 1 and so on to Victor No. 4. The eight claims of the Victoria group cover what is, roughly speaking, a rectangular parallelogram over a mile in length and over half a mile in breadth. The location lines of the eight claims form one continuous and nearly straight line through the centre of this parallelogram, four of the claims lying on the north side of this centre line and four on the south. There are thus, it will be seen, only four location lines for the eight claims, Nos. 1 and 2 having a common location line and so on to 3 and 4, 5 and 6, and 7 and 8. The claims were located by the plaintiff Chas. C. Farrell as agent for the plaintiff Mamie Farrell as to Nos. 1 and 2, as agent for the plaintiff Octavia Farrell as to Nos. 3 and 4, acting for himself as to Nos. 5 and 6, and as agent for the plaintiff Timothy Farrell as to Nos. 7 and 8. Each plaintiff, therefore, it will be seen, claims to be the holder of

two mineral claims lying on the opposite sides of a common location line. A discovery of rock in place, the basis and condition precedent of the right to proceed to location, is alleged by Chas. C. Farrell to have been made by him upon each of these eight claims; in the case of Nos. 1, 3, 5 and 7, at points some distance to the south of the location line, and in the case of Nos. 2, 4, 6 and 8 at points to the north of that line; one discovery for and upon each claim. The various discovery posts bear no relation whatever, either in fact or intention, to the location lines; or, to express it conversely, the location line of each of these claims was fixed by Chas. C. Farrell entirely without reference to the vein or ledge or deposit of mineral in place evidenced or indicated at the various "discovery" posts. These "discovery" posts are in no instance upon the location line or near enough thereto to indicate any relationship between them. There is no mineral in place discernible anywhere along the location lines.

A clearer disregard of both the letter and spirit of the Mineral Act it would be hard to imagine. As I read that Act, the first essential step in the acquisition of a mineral claim is a discovery of "rock in place." It is with a view to winning the mineral from the vein, or lode or deposit indicated or evidenced by the rock in place at "discovery" that the free miner proceeds to locate a mineral claim. This is "the vein or ledge" referred to in section 16, which provides that posts Nos. 1 and 2, marking the two ends of the location line, shall be "placed as near as possible on the line of the vein or ledge." This view is emphatically supported by the examples given in the Act "of various modes of laying out claims." In each of the three examples the discovery post is on the location line. I do not say that it must be exactly on the line. A vein or ledge, properly so called, may not follow a straight line, and the straight line required between posts Nos. 1 and 2 may often leave discovery posts to one side. But the three posts must, I think, be on one and the same vein or ledge or other deposit. As a matter of fact, there is nothing in the evidence to give the slightest support to the idea that posts Nos. 1 and 2 are as near as possible on the line of any vein or ledge or other deposit of mineral in

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place, or to justify Chas. C. Farrell in even conjecturing that such was the case; much less to justify a conjecture that such vein or ledge or other deposit, if it existed, was the same vein or ledge or other deposit evidenced or indicated at "discovery."

As I have said, there is no "rock in place" on any of the location lines of these claims; but if, notwithstanding this fact, it is to be assumed that the location lines do follow a vein or ledge or deposit of which the locator had no knowledge other than a general knowledge that in that particular district mineral veins, ledges or deposits usually ran in an easterly and westerly direction, and if we assume further, that the locator was justified upon such general knowledge, in concluding that his various discoveries indicated or evidenced the existence of the "vein or ledge" on which he placed posts Nos. 1 and 2 of his location line, then he was guilty of a clear violation of section 29 in locating for each plaintiff, including himself, two claims upon the same vein or lode. And there is no evidence upon which I can find the order of location so as to say, *e.g.*, that Victoria No. 1 is a good location (so far as this particular point is concerned) and No. 2 invalid. There is, however, in my opinion, no warrant for any such assumption as I have suggested, and therefore, the ground taken in the preceding paragraph is, to my mind, sufficient to dispose of these cases.

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Mr. *Hamilton* further urged that "side line location," as he called it, is illegal. By "side line location" is meant the taking of the entire 1,500 feet of a claim on one side of the location line. In British Columbia statutes, 1892 (chapter 32, section 5), this mode of location was prescribed, but in the following year it was abandoned and the method now prescribed adopted: British Columbia statutes, 1893, chapter 29, section 3. It may be that it was not contemplated that a miner would or should run the risk which he would incur by a side line location, of losing his mineral by an alteration underground in the dip of the vein or ledge.

However that may be, I should hesitate to hold a side line location invalid under the present Act. The argument is based largely upon the examples given in the Act of various modes of laying out claims; and it is arguable that the text of section

16 is literally complied with by stating that no feet lie to the right and 1,500 feet to the left. But I need not labour the point, as a decision upon it is not in my view necessary to the disposition of these cases, and I very much dislike to pen *obiters*. For the same reason I express no opinion upon the many other questions argued before me at the trial. I always feel a distrust of the thoroughness of my consideration of points which I am not driven to decide.

The ground upon which I hold the claims of the Victoria group invalid applies with equal force to the claims of the Victor group. The location lines adopted were the side lines of other claims and were so adopted quite without reference to any vein or ledge or deposit indicated or evidenced by the locator's various discoveries, or by any other rock in place. The discovery posts are all hundreds of feet away from the location lines and have no reference that I can appreciate to any vein or ledge or deposit upon which posts Nos. 1 and 2 of the location lines might be supposed to be placed. There is no "rock in place" discernible anywhere along the location lines. As to both groups of claims, Chas. C. Farrell frankly admitted that he chose his lines so as to occupy all the ground and leave no fractions. He certainly did not, in my opinion, place, nor did he try to place, the posts of his location lines on the line of any vein or ledge or deposit indicated or evidenced by his various discoveries or by any other rock in place. That being so, the plaintiffs never became the lawful holders of these claims, and they have no status to question the act of the defendants.

CLEMENT, J.

The actions must be dismissed, with costs.

The appeal was argued at Victoria on the 4th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Wilson, K.C., for appellants: We were lawfully in possession, because at the time of the issue of the Crown grant to the defendant railway Company, the Bridge Creek claim was a valid and subsisting mineral claim. He cited and referred to: *Lord Advocate* v. *Young* (1887), 12 App. Cas. 544 at p. 556; *Victor* v. *Butler* (1901), 8 B.C. 100; 1 M.M.C. 438; *Asher*

Argument

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v. *Whitlock* (1865), L.R. 1 Q.B. 1 at p. 5; *Hogg* v. *Farrell* (1895), 6 B.C. 387; 1 M.M.C. 79; *Aldous* v. *Hall Mines* (1897), *ib.* 394, 213; *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396; 1 M.M.C. 161.

McMullen, for respondent railway Company: The grant to the railway included minerals. He referred to *Alexander* v. *Heath* (1899), 8 B.C. 95.

Wilson, in reply: We have that which is equivalent to a lease.

Cur. adv. vult.

5th November, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff claims damages for trespass to mineral claims which were located after the grant of a land subsidy by the Province to the defendants, or their predecessors in title, pursuant to the Railway Aid Act, 1890, British Columbia statutes, chapter 40, and amending Acts. The plaintiff contends that the ground covered by her said mineral claims was at the time of the grant aforesaid under location, and held of record as mineral claims, and that these expired after the said grant was made, and thereupon the land reverted to the Crown and again became waste lands open to location as mineral claims, and were relocated thereafter, and are held now by her as mineral claims located upon waste lands of the Crown. She bases this contention upon section 10 of said Railway Aid Act, which excepts from the grant "any lands held by grant, lease, agreement for sale, or other alienation by the Crown, Indian reserves or settlements, military or naval reserves, or lakes or lands in which any person other than the Crown shall have a vested interest." That section does not specifically mention mineral claims, although at that time mining was one of the principal industries of the Province. If section 10 stood alone, it might be proper to infer that mineral claims fell within the exceptions. The interest of a free miner in his mineral claim was defined by the Mineral Act then in force, and practically the same definition has been continued ever since, as being a chattel interest equivalent to a lease. At that time it carried with it a right, on the performance of certain conditions, subsequent to a grant in fee of the land as well as of the min-

erals. As section 10 is, in my opinion, to be interpreted by the aid of section 13 of the same Act, I do not feel called upon to express an opinion as to whether or not, had section 10 stood alone, it would be proper to hold that mineral claims fell within it. I am of opinion that said section 13 clearly enough indicates that mineral claims were intentionally omitted from section 10. Section 13 provides that the Lieutenant-Governor in council may grant to the Railway Company the right for a period of 25 years to exact a percentage not exceeding 5 per cent. of the gold and silver extracted from ores which may be found *upon any of the lands granted.* So far the section does not cast any light upon section 10, but what follows, in my opinion, does. I quote:

"But such percentage shall not apply to mines [in any of the lands granted] which may have been acquired before and are held by mining companies or individuals at the time of the filing by the railroad company of its map or plan under the Railway Act, ... nor shall such percentage apply so long as such mines [in any of the lands granted] are held by such mining companies or individuals or their lawful successors in title."

This section was repealed the following year, but the repeal does not, I think, affect the significance of the section as shewing the intention of the Legislature at the time section 10 was passed. To my mind it shews that lands in the blocks granted, upon which were located mineral claims, included in the broader term "mines," were intended to pass to the Railway Company subject to the rights of the holders of such mines, which were expressly reserved by the Act. The words inserted in brackets in the above quotation from section 13 are mine. They do not add to, but simply repeat the antecedent words in the first part of the section which are, in my opinion, clearly to be inferred. The inference which I draw from the last part of the section recited is that on the expiry of the title of those holding such mines at the time of filing the railway plan, the Railway Company might be authorized to exact a percentage in the same way as it might be authorized to exact a percentage from ores extracted from the lands mentioned in the first part of section 13. I think the Legislature has clearly indicated that it intended that the interest of the Crown in lands covered by mineral claims,

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or mines, should pass to the Railway Company, subject to existing and future rights of free miners.

Having come to this conclusion, it is unnecessary for me to consider any other phase of the case. No matter what the status of the original claims was, whether they were in existence before the filing of the map or plan or not, as to which there is no evidence in the case, they expired after the grant which was made in October, 1901, and the title which the plaintiff now claims is a title to mineral claims which, if I am correct in my view, were located upon occupied lands, namely, upon the lands of the Railway Company. If that be so, she is not entitled to succeed in this action. The relief she claims in this action is not founded upon the ownership of mineral claims so located; she does not pretend that she has complied with the provisions of the Mineral Act in respect of such locations.

It follows that the appeal should be dismissed.

IRVING, J.A.: I think this appeal must be dismissed.

Mr. *Wilson* relies on his certificates of work, and argues that on the pleadings in this case it is not open to the defendants to attack the plaintiffs' title. The statement of defence contains (1) a denial of the plaintiffs' property in the land; and (2) a claim that the land is the property of the Railway Company.

IRVING, J.A.

The first of these defences disputes the plaintiffs' possession and their title. The second disputes the plaintiffs' title by asserting a title in the defendants under Crown grant of the 3rd of October, 1901, and by implication asserts a right of possession in the defendants as owners.

It is admitted that the lands in question are contained within the limits of the grant to the Railway Company. The defendant Railway Company has a status by virtue of its grant under chapter 40, British Columbia statutes, 1890, to attack the plaintiffs' title. The grant from the Crown is entirely different from the miner's right mentioned in *Osborne* v. *Morgan* (1888), 13 App. Cas. 227. Having regard to that difference, the pleadings, in my opinion, are sufficient to enable the defendants to shew the location was faulty under section 29. *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396, was

relied on as an authority for the proposition that the defendants had no status to attack the plaintiffs' location. With all respect, I cannot find that laid down in the judgment of the Court of Appeal in that case, nor, in my opinion, can the grant to the plaintiffs be construed by reference to the decisions in the *Nelson and Fort Sheppard Railway* case. The plaintiffs there, the railway company, made their selections on the 23rd of March, 1893, their Crown grant issued on the 8th of March, 1895, and there was excepted therefrom all lands alienated, or held as mineral claims, prior to the date of selection. The defendants located the Paris Belle on the 24th of December, 1894, and the location was illegal and void, but the defence was this: The Paris Belle covered a previous good location on the Zenith, located the 15th of June, 1892, and certain additional land. As to the Zenith, it was set up that as it was a good location, made prior to the 23rd of March, 1892, and never abandoned, it did not fall within the terms of the company's Crown grant. This defence as to the Zenith, *viz.*: that it had not been abandoned, succeeded, and it was also pointed out that on the authority of *The Queen* v. *Demers* (1893), 22 S.C.R. 482, had it been abandoned after the 23rd of March, 1893, it would not have become the company's property, but would have reverted to the Crown. In dealing with the Zenith ground it was not suggested that the plaintiffs had no status to attack the defendants' title. As to the additional area, *i.e.*, outside of the Zenith boundaries, the defence was that under the Railway Subsidy Act and the terms of the plaintiffs' Crown grant, the land was open to free miners, and that the defendants had lawfully located their claim on the 24th of December, 1894. The reply was the location was bad because (1) no rock in place had been discovered; and (2) no compensation had been made to the company. The rejoinder of the defendants set up that the plaintiffs were estopped from attacking the defendants' title because they (the defendants) had, on the 8th of November, 1895, obtained a certificate of improvements. The Full Court held that although the location was illegal and void, the failure of the plaintiffs to protest on the 8th of November, 1895 (after writ issued), estopped the

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company from questioning the defendants' title, on the principle laid down by Channel, B. in *Staffordshire Banking Co., Limited* v. *Emmot* (1867), L.R. 2 Ex. 208. MCCREIGHT, J., in giving judgment, at p. 433, says expressly:

"Both the railway company and the licensees of the Crown have rights under the Act and Crown grant. The free miner can enter, locate, record and in due course obtain a certificate of improvements, etc., and the railway company must have a right to see these privileges are not abused by the miner to their detriment."

The plaintiffs in the case at bar have not obtained a certificate. The Nelson and Fort Sheppard Railway Subsidy Act, 1892, British Columbia statutes, chapter 38, section 5, confined the Company to "unoccupied Crown land," and especially excepts "lands held as mineral claims." The Railway Aid Act, 1890, chapter 40, section 10, does not except lands from the grant simply because they are occupied. The Act of 1892 uses wider words of exemption than does the Act of 1890. Again, as was to be expected from the different terms in the two Acts, the language of the exceptions in the Crown grant in this case is different from that used in the other case—the exception there expressly included "all lands alienated by the Crown *or held as mineral claims,*" but here these words are not used.

IRVING, J.A.

How can it be said that lands improperly located are "alienated" by the Crown, particularly in view of section 18, which protects the free miner's rights, subject to compliance with the Mineral Acts? The word "alienated" indicates a recognition by the Crown of the rights of the locators of the claims. There is no such recognition in this case. It is to be noted that the contention that the Zenith had not been properly located was not established in *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al., supra;* Order XIX., rules 13 and 14.

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MARTIN and GALLIHER, JJ.A. concurred with MACDONALD, C.J.A.

Appeal dismissed.

Solicitor for appellants: *P. E. Wilson.*
Solicitors for respondents: *W. F. Gurd* and *J. E. McMullen.*

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Contract—Insurance—Application form filled in by company's agent.

In an action on a policy of fire insurance, the company resisted the claim on the ground of misrepresentation as to the class of building and the value of the goods insured. The insured, a foreigner, left to the Company's agent the task of filling in the particulars in the application on which the policy was issued. It was stated that the premises were a store and dwelling, whereas they were a store and lodging, or rooming, house; and that the value of the goods was $3,000. The jury found that the description of the premises and the value of the goods were given and made by the agent of the Company, and that there was no misrepresentation by the plaintiff. The trial judge set aside the findings and verdict of the jury, and entered a nonsuit, on the grounds that the agent had exceeded his authority and that any waiver of the conditions of the policy should have been authorized in writing.

Held, on appeal (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that the Company were not prevented by anything the agent did, from setting up the misrepresentation alleged, and that plaintiff was liable for the misrepresentation as to the value of the merchandise.

[The Court being evenly divided, the appeal was dismissed.]

APPEAL by plaintiff from the judgment of MURPHY, J. dismissing the action after a verdict by a jury in plaintiff's favour at the trial. The facts are set out in the reasons for judgment of MACDONALD, C.J.A. Statement

C. W. Craig, and *D. A. McDonald*, for plaintiff.

J. A. Russell, and *M. A. Macdonald*, for defendant Company.

3rd May, 1912.

MURPHY, J.: In this case I am forced to conclude that the nonsuit must be granted on the ground that condition 20 limits the scope of the agent's authority so that any waiver of the conditions must be in writing. MURPHY, J.

It can hardly be disputed that plaintiff here caused the goods insured to be described otherwise than as they really were in

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breach of condition 1. A crowded lodging house, such as were the premises when the fire occurred, cannot in reason be regarded as a "dwelling and store," which is the description of the building set out in the policy as containing the insured goods. Again, admittedly there was an over-valuation of the stock of merchandise. On the policy as it is written then, the plaintiff must fail. She endeavours to overcome this by setting up the fact that the agent had full knowledge of the conditions. His knowledge in itself amounts to nothing. The plaintiff must go further and say that such knowledge is the Company's knowledge. Why? Because the contention then is that the Company, knowing all the facts, agreed to change its contract—in other words, to waive its printed contract and substitute another.

It is, I take it, open to the Company to do so, since condition 1 is a condition in its favour. But the Company has expressly stipulated what the agent may do. He may indeed waive a condition of the policy, but he must do so in writing. But for this he, having full knowledge of the facts, might, possibly, be held to have waived the policy conditions and to have substituted therefor another contract, and in so doing to have been acting within the scope of his authority, as was the case in *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company* (1892), 2 Q.B. 534. That case clearly turned on the authority of the agent. As Kay, L.J. says, referring to the agent: "What was he agent for?" On the evidence there it was held his agency was wide enough to authorize him to negotiate a contract other than the one the application conditions called for. But here condition 20 shews clearly the authority of the agent. He has not acted within it even if all the facts alleged by plaintiff be taken as true. If plaintiff had read her policy when received, she would have seen first that it required a proper description of the risk. With the knowledge she must be held to have had, she would then know that the agreement made with her by the agent—assuming everything in her favour—was in contravention of this provision. Condition 20 would further inform her that if she wished any such agreement to be binding on the Company, she must have the alteration in

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writing, signed by the agent. If, in the face of this, she chose to rely on the possibility of the Company not repudiating the alleged act of its agent instead of refusing to accept the policy as not being the one she contracted for, she must, I think, take the consequences when, as here, the Company does make such repudiation.

It is to be observed also that the application for insurance contains a covenant on the part of plaintiff that it is to be the basis of the insurance policy and a warranty by plaintiff of the truth of its contents, whether signed by the Company's agent or any other person on her behalf. This, in itself, would, I think, indicate that it was not within the scope of the agent's authority to bind the Company to a contract of insurance based upon a misrepresentation material to the risk. At any rate, it ought to put the plaintiff on sufficient enquiry as to the extent of the agent's authority to require her to read the policy before accepting it. The nonsuit is granted.

MURPHY, J.

The appeal was argued at Victoria on the 17th and 18th of June, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

C. W. Craig, for appellant: We made no representations whatever; the agent took the application and himself filled in all the particulars. Questions were submitted to the jury, but were not answered, nor were the jury asked if they had answered the questions. The jury were simply asked, on returning to the Court, if they had agreed on their verdict, and they answered:

"We have. We find in favour of the plaintiff.
"The Court: For how much, gentlemen?
"Foreman: $940.05."

Argument

Afterwards the questions and answers were found on the table in the jury room.

[MACDONALD, C.J.A.: It is astonishing that greater care was not taken to see whether the questions had been answered. In this case no one seems, after the questions were handed to the jury, to have taken any further interest in what became of them; to see whether they were answered, or whether the jury could answer them.]

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J. A. Russell, for respondent: There was no reasonable evidence for the jury to go on that the insured premises were used as a lodging house to the knowledge of the Company. Plaintiff did not make the fact known, or offer any information to that effect. The agent was simply a medium to bring the parties together, and the Company is not bound by his acts.

[MACDONALD, C.J.A.: If the policy is signed in blank and sent to the agent to fill in, is not the Company bound?]

The agent filled in the policy in accordance with the application of the assured. If he waives a condition otherwise than in writing, he has done an unauthorized act, and the Company is not bound. If he was authorized to enter into a contract of insurance for a store and dwelling, and he insured a store and lodging house, he exceeded his authority. The application and policy are a warranty to the Company. The Company can, as a body corporate, act only through its agent, and to support the contention that we have waived or abandoned any condition, the written authority must be shewn.

Argument

[MACDONALD, C.J.A.: This is not a question of waiving any condition in the policy, but merely one of alleged wrong description, and the plaintiff says if you set up a wrong description, you are responsible for it.]

As to over-valuation: there is no evidence that the whole insured property was worth $3,000.

[MARTIN, J.A.: Where is your objection to the charge to the jury on that point?]

There is no direct objection. Further, there was no particular account of the loss furnished to the Company, and no notice in writing forthwith after the loss.

Cur. adv. vult.

5th November, 1912.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendants' head office is at Calgary, in the Province of Alberta. They appointed L. B. Freeze their general agent for British Columbia, and supplied him with blank forms of their policy, signed by the president and manager. He solicited insurance from the plaintiff's husband, who was acting on her behalf. The husband told Freeze

that she would take insurance to the extent of $1,800 on her stock of merchandise, furniture and fixtures, and $300 on the contents of a stable, and suggested to Freeze that he should inspect the goods and effects and ascertain whether he would insure them for these amounts. Freeze made the inspection, and filled up a form of proposal—the form supplied by the defendants—in which he described the merchandise and household effects as being contained in a one-story dwelling house and store. He stated the value of all the goods, including the contents of the stable to be $3,000, and apportioned the insurance as follows: to stock of merchandise and meats, $1,300, to store fixtures and furniture, $200, to household furniture, $300, and to contents of stable, $300. He admits that the proposal was not read over by him to the plaintiff or her husband when they signed it. They are Italians, and it is apparent that they left the matter entirely in the hands of Freeze, as the insurer. On the day on which the proposal was signed, Freeze issued the policy. Some months afterwards a fire occurred and the goods were partially destroyed and damaged. The defendants' appraiser fixed the loss at $940.05. This action was brought for that sum. The defendants resisted on the following grounds: that in the signed proposal the building was erroneously described as a one-story building, whereas part of it was two storys in height; that it was erroneously described as a store and dwelling, whereas it was a store and lodging house; that the value of the goods was over-stated, and that a chattel mortgage was not disclosed. There were also set up as defences that the action was not commenced within six months next after the loss or damage occurred, and that the proofs of loss were insufficient. I do not think there is any substance in the last mentioned defence. Nor is the action out of time. While it was not brought within the six months specified in Variation No. 29, it was brought within the year specified by the statutory condition. The variation of the statutory conditions in this policy are not set forth in accordance with the provisions of the British Columbia Fire Insurance Act, but purport to be in accordance with an Ontario Act. They are, therefore, to be disregarded, and as far as this policy is concerned, the rights of

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the parties depend upon the statutory conditions only: *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 119; *Green* v. *Manitoba Assurance Co.* (1901), 13 Man. L.R. 395. The verdict effectually disposed of the chattel mortgage.

The only question left, the substantial one in this appeal, is: are defendants estopped by reason of the acts and knowledge of Freeze from setting up the alleged misrepresentations, and over-valuation (if any) contained in the proposal? So far as the facts are concerned, the jury, upon sufficient evidence, have found them in favour of the plaintiff. It may be doubted that the stock of meats and groceries, to which $1,300 was apportioned, were ever of that value, though there is no positive evidence of this, but it is certain that the store fixtures and household furniture were of much greater value than the sums apportioned to them. No question arises as to the contents of the stable, so that that item may be eliminated from the case. In answer to the question, what was the value of the property proposed to be insured on the date of the application for insurance, the jury answered that they could not accurately state it. They, however, found that the value was placed on it by Freeze, and that the apportionment was made by him, that from his inspection of the property he knew, or ought to have known, that it was a store and lodging house, and that neither the plaintiff nor her husband misrepresented the value of the property. The learned trial judge nonsuited the plaintiff, basing his judgment largely on No. 20 of the statutory conditions, which provides that no condition of the policy should be deemed to be waived except in writing signed by an agent of the Company. With respect, I am unable to see the applicability of this condition to the facts of this case. The first condition is the one relied upon by defendants, and they contend that that cannot be waived except in writing. That condition provides that false description or misrepresentation shall void the policy. But this is not a condition subsequent. There was in my view of the case, no attempt to waive condition No. 1. The situation and value of the goods, and the character of the house were known to and described by Freeze. He described and insured

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goods which he himself saw, contained in a house which he himself saw, at a valuation which he himself made, and the question is not whether there was a waiver of any condition of the policy, but whether the Company is now estopped from contending that the facts are otherwise than as known to and stated by Freeze. The question is not a new one, but it is undoubtedly a very important one. By their mode of doing business, insurance companies are forced to rely very largely on the statements made in proposals for insurance as a protection against the carelessness and dishonesty of their agents. On the other hand, applicants for insurance, who in a great many cases, as we know, are not accustomed to business of this nature, look to the agent to put the proposal and all matters connected with it in proper form. They sign documents which are submitted to them, relying upon the superior knowledge and judgment and good faith of the insurance company as represented by their agents. This is particularly so in the case of persons of the plaintiff's class, calling in life, and foreign birth and language.

It was urged upon us, relying upon *Biggar* v. *Rock Life Assurance Company* (1902), 1 K.B. 516, that the plaintiff was bound to know what she signed. Wright, J., in that case, approved in a general way of *New York Life Assurance Company* v. *Fletcher* (1896), 117 U.S. 519, where that doctrine was asserted. But it is apparent from the reasons given in each of these cases that the Courts did not intend to lay down a doctrine applicable to all cases, but only to the facts and circumstances of the cases before them. Unquestionably no such doctrine has been adopted in any Court in respect of ordinary contracts. Circumstances of education, station in life, ignorance of the kind of business in hand, confidence in the other party, absence of advice, and many others may be considered. And I am confident that there is no difference in this respect between such contracts and contracts of insurance; and no conditions contained in the proposal or in the policy can affect the question if, under the circumstances of the particular case, the party was not bound to know what he signed. If he were not so bound, how could anything contained in the document, call them con-

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ditions, warranties or representations, affect the matter, for *ex hypothesi* he knows nothing of them. That the applicant for insurance is not in all cases bound to know what he signs was decided in the case of *Bawden* v. *London, Edinburgh and Glasgow Assurance Company* (1892), 2 Q.B. 534, and in several other cases referred to in argument.

Reverting to the case of *New York Life Insurance Co.* v. *Fletcher, supra,* it is apparent that there is no conflict between that and the *Bawden* case. In the former, reference is made with approval to *Insurance Company* v. *Wilkinson* (1871), 13 Wall. 222, where the same Court adopted a statement of the law contained in American Leading Cases, 5th Ed., Vol. 2. p. 917, as follows:

> " 'By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.' "

And in the reasons for judgment it was further stated that the reason for this (estoppel of the company) is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto.

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To the like effect is the judgment of the same Court in *Insurance Company* v. *Mahone* (1874), 21 Wall. 152.

The case at bar appears to me to be a stronger one in favour of the plaintiff than either of these. The agent Freeze, the scope of whose authority was at least as wide as that of any of the agents in the cases referred to, considered, and I have no doubt quite honestly, that this building could be properly described as a one-story building. He considered that it could be properly described as a store and dwelling; and his evidence is that the rate would be the same for a store and dwelling as for a store and lodging house. He chose to employ his own language to describe both.

With regard to the alleged over-valuation, there is no evidence of it, and the onus was upon the defendant. The jury found that they could not state the value at the time of insurance. It has, therefore, not been proven that there was an over-valuation of the whole of the goods and effects in question. The apportionment of the insurance to the different classes of goods was the act of the agent, and to my mind it makes no difference whether Freeze did it himself or had it done by one of his employees. The plaintiff asked for an insurance upon the whole without making any segregation save as to the contents of the stable, and the jury have found that no misrepresentation was made by either the plaintiff or her husband.

Under these circumstances I have no hesitation in coming to the conclusion that the learned trial judge was wrong in non-suiting the plaintiff; and would therefore allow the appeal and direct that judgment be entered for the plaintiff for the amount claimed, namely, $940.05.

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IRVING, J.: I would affirm the judgment and dismiss the action on the ground that there was over-valuation of the merchandise, which was valued at $1,300. The other matters were rated as follows: Frame building, $200, other goods, $300, and stable, $300, in all, $3,000. The plaintiff admits that she asked for $3,000, but contends that as she did not herself fix the sum of $1,300 for the merchandise, she is not responsible for the merchandise being over-valued.

In *Biggar* v. *Rock Life Assurance Company* (1902), 1 K.B. 516, it was held that if a person in the position of the plaintiff chooses to sign without reading it a proposal form which somebody (say the Company's agent) has filled in, and if he acquiesces in that form being sent as signed by him, he must be treated as having adopted it. Business could not be carried on if that were not the law.

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The learned trial judge left to the jury these questions:

"Did Freeze apportion the insurance to be carried on the different classes of property?

"Did Freeze place the value set out in the application on the property?"

To both these questions the jury answered yes. With every deference, these questions should not have been left to the jury

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at all. There was no evidence upon which the jury could find any but one answer to both questions, and that was "no." The witnesses to the facts upon which these two answers are based were Freeze, the plaintiff and her husband. These are all the plaintiff's witnesses. Freeze says:

"I took part of the application for insurance from Mahomed himself He told me what he wanted—$2,000, or $2,100. I wrote the application out in the street and then I took it to the office. Afterwards I sent Howden to Mahomed's store to get it signed, and the amounts apportioned, *i.e.*, the amounts to go on the stock and on the furniture and on the house, etc. It (the application) was brought back signed by the plaintiff and Mahomed and was lying on my desk when I saw it. The total value was then written on it. Also the other amounts to be insured, *viz.*: groceries $1,300, office furniture $200, house furniture $300, and stable $300. I went down there just before the policy was issued. He had not got his stuff in there at all. He had some meat and other things downstairs. I do not think the upstairs had anything at all."

Mahomed says:

"Freeze was not at my store when the application was signed—just the once, *i.e.*, just the one (Howden), the other agent again."

Mrs. Mahomed says:

"I signed the application in my store. Nobody was there except my husband and the agent. Just the agent."

This must mean Howden, it cannot mean Freeze. She continues, in answer to the question:

"Did you read it at the time you signed it? No, I did not read it at all.

"Did you hear any talk about how much insurance there should be; did you hear your husband talk with the agent about that, as to how much insurance there should be? Yes.

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"What was said? He asked me how much and my husband told him to look it all over and to judge how much he thought it was to make the insurance.

"Look it all over and see how much he thought it was worth and put that much in? Yes.

"What happened after that? Did they talk about these insurance matters? He fixed the insurance and I signed my name to it, and he went to the office and after he went to the office and the next day he brought the policy," etc.

Mahomed makes a statement that gives the impression that it was to Freeze he said you make the opportionment, etc., but when we read the testimony of the plaintiff herself and Freeze, when she had called, we see that he speaks inaccurately. He said: "Freeze was there again and got everything, and made the rates to me," and he said: "I will send my man down" (*i.e.*,

Howden, without doubt) and he (*i.e.*, Howden) said: "How do you want to get the insurance put down?" etc. Mahomed could not have asked Freeze to make the valuation (1) because, according to Freeze, the stock was not there, and Mahomed's statement agrees with this—"He came there again and we had a little groceries." (2) Because, according to Mrs. Mahomed, this conversation took place between her husband and Howden, in her presence, at the time of signing the application. (3) Again, Mahomed says, in answer to the question "Did you tell Mr. Freeze what any of the groceries or things were worth? he (Freeze) said, "You had better figure the cost what you think all the effects would cost."

No witnesses were called for the defence, and nothing can be clearer on the plaintiff's testimony than this, that the apportionment was made at the interview between Mr. and Mrs. Mahomed and Howden, at the time of the signing the application, and that Freeze was not present on that occasion. There was no evidence to justify the finding of the jury that Freeze either apportioned the insurance to the several items, or that he placed the total valuation at $3,000. In fact, it was not suggested. We are, therefore, not troubled with the finding of the jury that Freeze had a knowledge of the true facts, or that he misled the plaintiff.

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Howden, it seems, from the plaintiff's own testimony, did exactly what he was instructed to do. He asked her how much the insurance should be, and she, instead of figuring up the cost of the different things, said "Examine for yourself." Assuming that nothing more was said and that Howden made the examination and came to the conclusion that the merchandise would stand being insured at $1,300, and the true amount was about one half that sum, would it not be the duty of the assured to say, "You have made a mistake"? Would not the assured infringe the first statutory condition? In my opinion, she would.

If she, after asking Howden for his opinion, or for a suggestion, chooses to sign the application without looking at it, she adopts him as her agent, and is bound by his misrepresentations. For these reasons, I think the principles laid down in *Biggar* v. *Rock Life Assurance Company, supra,* apply.

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Is the Company bound by Howden's knowledge, assuming that he had knowledge? I should think not, as he was an agent only to get the proposal signed and the amounts apportioned. The apportionment was to be made by the plaintiff. Her application was to be the basis of the contract. She had the only means of truly stating what the value was. The case differs from *Bawden* v. *The London, Edinburgh and Glasgow Assurance Company* (1892), 2 Q.B. 534, because Howden was sent up for a certain limited purpose.

The jury's verdict was against the evidence. The plaintiff, in my opinion, is entitled to a new trial.

MARTIN, J.A.

MARTIN, J.A.: With every respect for the view taken of this case by the learned trial judge, the judgment he directed to be entered cannot stand, certainly not for the reason he bases it on, *viz.*: condition 20, relating to waiver, as to which it is only necessary to say that during the argument we unanimously ruled that it was not a question of waiver, and that waiver had nothing to do with misrepresentation. Were it not for this opinion of the learned trial judge, he considers that the case would have been brought within the principle of the decision of the Court of Appeal in *Bawden* v. *London, Edinburgh and Glasgow Assurance Company* (1892), 2 Q.B. 534. I think on the finding of the jury on the various points clearly explained to them in the charge, on every one of which there was ample evidence for them to find either way, that this case must be governed by the *Bawden* case, and the other authorities in Canada to the same effect which were cited to us.

We were referred by defendants' counsel to a decision of Mr. Justice Wright delivered on the 27th of November, 1901, in *Biggar* v. *Rock Life Assurance Company* (1902), 1 K.B. 516, but the learned judge distinguishes the case before him from the *Bawden* case because the agent "invented the answers to the question" and therefore he could not be considered the agent of the Company. The learned judge relies upon an American authority, in regard to which all I need say is that he himself on p. 525 expresses a doubt as to its "doctrines" being "applied to their full extent." Moreover, in the following year, 29th

January, 1902, the same learned judge decided, *Hough* v. *Guardian Fire and Life Assurance Company,* 18 T.L.R. 273, which is in harmony with the *Bawden* case.

With respect to the objection taken to the incompleteness of the proofs of loss, I am clearly of the opinion that in view of the correspondence between the Company and the plaintiff's solicitors, the Company is not entitled to press that defence.

Finally, as to the lack of notice under condition 13a, that is a matter which can and should in the circumstances be cured under the remedial provisions of section 2 of the Fire Insurance Policy Act as interpreted by *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Company* (1910), 44 S.C.R. 40.

The appeal should, in my opinion, be allowed.

GALLIHER, J.A.: In my view of the case, there is only one point I need consider, *viz.*: the over-valuation of the stock in trade as apportioned in the insurance. Were the jury justified in finding that Freeze made the valuation and the apportionment?

A perusal of the evidence discloses the following facts: Freeze, who was called as a witness for the plaintiff, says he did not make the apportionment; that he sent a man named Howden from his office to the plaintiff's premises to make the apportionment and have the application signed, and when the application was presented to him for signature, the figures were filled in and it was signed by the plaintiff and her husband. Mahomed says:

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"Before I leave that, Mr. Mahomed, at the time these two men were there, Freeze and the agent, and went over the premises like you have been telling, was that before that paper was signed or after? Before that paper was signed. One time he came himself and got everything.

"Who? Freeze. He was there again and got everything and made the rates to me and he said: 'I will send my man down to you,' and he said: 'How do you want the insurance put down.' And I asked him: 'You had better look yourself,' and he said: 'Will $1,800 be enough for the stock and the rooming house and the dining room and the kitchen?' And I said: 'That is all right, I think that is enough.'"

There may be some confusion as to who is meant by "he" as it appears in connection with the words "he said how do you want the insurance put down," etc., but I think it is made clear from the evidence which precedes it when, in reply to Mr.

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Craig, Mahomed says that the application was signed at a time when Freeze was not there, but the other one, meaning Howden, and in view of this, I think it must also be concluded that the person spoken of as the "agent" by the plaintiff, in her evidence, is Howden.

If I am correct in this view, there is no evidence upon which the jury could find that Freeze made the apportionment personally; in fact, quite the contrary.

In this view, then, we have the fact that Freeze sent Howden down for two purposes—to make the apportionment, and have the application signed, and we find both the plaintiff and her husband discussing with him the very question which Freeze says he, Howden, was sent to settle.

Now, both the plaintiff and her husband say that they did not make the apportionment, and the jury are entitled to believe that, but they did not say directly that Freeze did, nor in my opinion is there evidence upon which a jury could reasonably so find; so that the strongest light in which the plaintiff's case can be put is that it was made by Howden. Howden appears to have worked this one day in the office with which Freeze was connected; however, he was sent down by Freeze to make the apportionment, and we will assume that he filled in the figures after consultation with the plaintiff and her husband, as they describe it in their evidence. The plaintiff and her husband then signed the application, a part of which was a declaration that the values, etc., set out in the application were just and true. This was then taken to the agent Freeze, and by him forwarded to the Company, and Freeze, for the Company, issued a policy, which he had power to do, without reference to the Company.

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Admittedly the stock in trade was insured for twice its value, so that the policy is vitiated under clause 1 of the conditions, unless the Company are estopped by the act of their agent.

A number of cases have been cited to us in support of this contention, but to hold the Company estopped under the circumstances of this case would, to my mind, be going further than has yet been done. It is not reasonable to suppose that Howden was sent there to merely fill in the figures on his own

responsibility. If that were so, Freeze, who, according to the evidence for the plaintiff, had inspected the premises and their contents, would have filled them in himself, and Howden would simply have had to obtain the signatures; but supposing Howden did fill in the figures after the conversation above set out, and without insisting on plaintiff's naming the values herself, can the plaintiff by saying: You go on and make the valuations, and then warranting their truth to the Company, as well as the general agent who issued the policy, successfully urge that she did not adopt Howden's valuation as hers? It seems to me to hold so, under the circumstances of this case, would be to open the door wide for the practice of fraud.

I would dismiss the appeal.

Appeal dismissed, Court evenly divided.

Solicitors for appellant: *Craig, Bourne & McDonald.*
Solicitors for respondent: *Russell, Russell & Hancox.*

GEORGE v. MITCHELL.
GEORGE v. HUMPHREY BROTHERS.

Water and watercourses—Riparian rights—Water records—Origin of—Lands in Railway Belt.

Plaintiff alleged damage by wrongful diversion and obstruction of water claimed by her under several water records granted under Provincial statutes on lands within the railway belt. The records themselves did not shew under what statutes they were obtained, nor that they were granted in connection with plaintiff's lands, which had been acquired by pre-emption and purchase from the Crown as far back as 1876. GREGORY, J., at the trial, held that the presumption was that the water records were obtained under the provisions of the laws in force at the time they were granted, *viz.*: 1875 and 1884; and on the evidence, that plaintiff had not proved any damage by reason of the use made by defendants of the water claimed by her; that her alleged riparian

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rights had not been established by the evidence; that if she had any such rights, the defendants had similar, and probably superior rights, and that she was not in a position to prove that her rights had been interfered with.

An appeal from this judgment was allowed.

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APPEAL from the judgment of GREGORY, J. reported in (1911), 16 B.C. 510.

Statement

The appeal was argued at Victoria on the 20th and 21st of January, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Maclean, K.C., for appellant: The learned judge below was in error in holding that water records issued by the Provincial Government between 1871 and 1884, or rather, between the date of the union of the Province with the Dominion and the date of the transfer of the railway belt to the Dominion, were not valid. We say that those records, having been granted, were valid and remained valid. Even supposing that they were not, then we have riparian rights as land owners. But in any event, the Province had a right to deal with lands in the railway belt until the line was located, which was not until 1883; see the facts in *The Queen* v. *Farwell* (1887), 14 S.C.R. 392; *The Queen* v. *Demers* (1894), 22 S.C.R. 482. The decision in *Burrard Power Company, Limited* v. *The King* (1911), A.C. 87, shews that the water went with and as part of the land. As to riparian rights: Mitchell absorbed all the water. The rights of the riparian owner are restricted to the use of the water for the purposes of his live stock, and his domestic needs, and taking into consideration the requirements of adjoining owners. Our right has been invaded by the complete absorption of the water, and our property is injured. Even if we do not use the water, its diversion *simpliciter* injures us. We were entitled to the uninterrupted flow from Jacko lake.

Argument

Craig, for respondent: We also have riparian rights, and possess the stronger claim in that we are further up the stream and therefore, of necessity, entitled first. Our taking of the water was reasonable. The right given to take water from one creek does not prevent the acquirement of a right to water from

another creek running into that on which the right was first given. Appellant did not reside on the land from which the water came.

[The appeal in *George* v. *Humphrey* was argued at the same time.]

Cur. adv. vult.

5th November, 1912.

MACDONALD, C.J.A.: This action was brought for an injunction to restrain the defendant from abstracting water for irrigating land from a stream sometimes in the case called Peterson creek and sometimes Jacko. I shall call it Peterson creek, because it appears to me to make no difference in the result by which name the stream or any part of it is called. The plaintiff claims damages resulting from said abstraction in the years from 1906 to 1910 inclusive.

The plaintiff's lands, which are agricultural lands, were pre-empted under the Provincial land laws by her predecessors in title, Jones and Mellors, in 1876, with the exception of one lot which was purchased from the Province in 1878. The pre-empted lots are numbered 453 and 454, and the purchased lot 410, all in group 1, Kamloops Division of Yale District. Lot 410 was patented in 1879, and the others on the 20th of October, 1884. Authority pursuant to British Columbia statute, 1875, chapter 5, section 48, to divert 400 inches of water from Peterson creek for purposes of irrigation was recorded by the proper executive officer of the Province in favour of Mellors on the 12th of February, 1877, he then being the pre-emptor of said lot 454; 500 inches from the same stream in favour of Jones for farming purposes was recorded on the 27th of August, 1877, he then being the pre-emptor of said lot 453; and 500 inches from Jacko lake, an expansion of Peterson creek, in favour of Jones and Mellors was recorded on the 25th of June, 1883. In the argument before us no attack was made upon the validity of these transactions, commonly called water records, save that the stream being within what is now the railway belt, the Province could not, because of the Terms of Union (an agreement entered into between the Province and Dominion in 1871),

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legally make these grants of water. There were other water records made in favour of the plaintiff's predecessors, but they are subsequent to the 19th of April, 1884, and for reasons which will hereafter appear are, I think, invalid, though the status of the defendant to question them, or the ones above mentioned, may be doubted. As to this I express no opinion, as the point was not argued.

The question of the validity of the three records mentioned, being exhibits 1, 2 and 4, depends upon the answer to the question: When did the Province cease to have jurisdiction to alienate water to settlers for irrigating purposes within what is now the railway belt? Was it when the Terms of Union were entered into, or was it when the railway belt was, by subsequent statute or statutes, transferred to the Dominion?

These Terms and statutes have been judicially noticed and construed as to some of their consequences in *The Queen* v. *Farwell* (1887), 14 S.C.R. 392, in which the Court appears to have thought that it was not until the 19th of April, 1884, or at earliest, the 19th of December, 1883, that the Legislature of the Province had put it out of its power to deal with the lands agreed by the Terms of Union to be conveyed to the Dominion. Ritchie, C.J. at p. 420-1, said:

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"Therefore, so soon as the Act of the Dominion [47 Vict., chapter 6, 19th April, 1884] adopting and confirming the legislation of the Province [B.C. statutes, 1883, chapter 14, 19th December, 1883] was passed, the line of the Canadian Pacific Railway thus selected by the Dominion Government and adopted by British Columbia passed out of the control of the executive Government of British Columbia, and was held by the Crown as represented by the Governor-General of Canada."

And Lord Watson, in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295 at p. 301, speaking with reference to the Terms of Union and to the said Provincial statute, said:

"The obligation [by the Terms of Union] is to 'convey' the lands, and the Act [B.C. statutes, 1883, 19th December, 1883] purports to 'grant' them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been and still is, vested in the Crown; but the right to administer and dispose of those lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union. Leaving the precious

metals out of view for the present, it seems clear that the only 'conveyance' contemplated was a transfer to the Dominion of the Provincial right to manage and settle the lands, and to appropriate their revenues."

I infer from this that until the actual transfer of the railway lands by the statute of 1883, confirmed by the Dominion in 1884, the Province had not by the Terms of Union parted with its right to manage and settle its public lands, including those which should afterwards be ascertained by the location of the line of railway to be those to be conveyed to the Dominion, but that such right would cease only when the transfer should have taken place and with respect to those lands only. But if I am wrong in supposing that such inference may be drawn from the language above referred to, and right in thinking that no opposite inference may be drawn affecting this case, I am still of the opinion that the Province had not parted with its right to settle its public lands, including those afterwards defined as the railway belt, until after the transfer effected by the statutes aforesaid. I have not overlooked the Provincial Act of 1880, chapter 11, but, assuming that Act to have been of any effect before its terms were assented to by the Dominion, there is no evidence in this case that the waters in question here are within the belt there defined, which is different, from Kamloops easterly, from that finally selected. The statute would, in any event, only affect the record of the 25th of June, 1883.

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The respondent's contention, and that apparently adopted by the Court below, was that by the 11th Article of the Terms of Union, which provides

"That until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him,"

the Province had surrendered its powers of disposition over its lands, including waters, except to alienate by such right of pre-emption, and that while the settler might acquire land by right of pre-emption under Provincial laws, yet the Province could not grant him water privileges under the same laws, although, without such, the lands would be useless for agricultural purposes—the purposes for which it was intended he should acquire

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them. It was so notorious that I think I may take judicial notice of the fact that a wide belt through which the railway would pass was a dry territory commonly called the dry belt, which fact must have been known to the parties to the Articles of Union; and as a settler's right of pre-emption in this territory without the right to obtain water for irrigating the lands pre-empted would be valueless, I cannot think that a construction of the 11th Article, which would bring about that result, is the correct one. The line to be followed by the railway was not defined. The Articles of Union would, therefore, apply alike to all the public lands of the Province, and not to a defined, or even roughly defined area. If the water records now under consideration are invalid, so are all water records made in the Province between 1871 and 1884, whether within the limits of what was afterwards defined and transferred to the Dominion or not. I think the intention, made sufficiently manifest by the Terms of Union, and the course of conduct of the parties afterwards, was that the Province should retain its jurisdiction over its public lands except as expressly limited in the Articles, and should be permitted to settle those lands in the honest sense of that term, which could not be done if the settlers were to be deprived of the appurtenances to their holdings which the Land Act authorized them to acquire, and which were essential to a profitable cultivation of the soil. I can find nothing in the language of the Articles of Union to justify the conclusion that an interregnum in the administration of the public lands was to be created between their date and the final transfer of the railway lands to the Dominion. Until their transfer, the Dominion could exercise no jurisdiction over them. That the settlement of the lands should go on, on the part of one or the other party to the articles, is plainly indicated in the Articles themselves, and in the final terms arrived at at the time of the transfer, and embodied in the Dominion Act of 1884, chapter 6.

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It follows that in my opinion, the three records, exhibits 1, 2 and 4, are valid.

It is unnecessary to say anything about the defendant's records save that they are invalid, as they were made by the

Province long after the railway belt was transferred to the Dominion: *Burrard Power Company, Limited* v. *The King* (1911), A.C. 87. The learned trial judge thought the last-mentioned case was authority for holding that the records which I have held to be valid were not so. Their Lordships had not there to consider the status of records made before the transfer of the railway belt, but only those made thereafter, and the language relied upon by the learned judge, I think, must be confined to the facts of that case.

On the merits I have come to the conclusion, after reading the evidence, that the plaintiff is entitled only to nominal damages. It is beyond question that the defendant interfered with and diverted water for several years prior to 1910, which plaintiff was entitled, had she insisted on it, to have flow down Peterson creek into Jacko lake, and thence through the continuation of Peterson creek to the plaintiff's lands, but until the year 1910 the parties were not at arms' length. Some protests were made by or on behalf of the plaintiff, but after various discussions between the parties, there was up to the end of 1909 such condonation on plaintiff's part of defendant's trespass as to estop her from claiming damages. There was, however, no such estoppel in respect of what was done in 1910, but there is no satisfactory evidence of actual damage in that year. The evidence is that that was an exceptionally dry year from the very beginning, and having regard to the lack of convincing proof that defendant's interference in that year with the water in Peterson creek resulted in damage to the plaintiff, and the finding of the learned judge who, after a view, held that even if the water had not been interfered with by the defendant, it would, owing to the exceptional dryness of the season and consequent scanty flow of water in the creek, have been absorbed by the soil before reaching the plaintiff, I cannot say that a case of actual damage was made out.

MACDONALD C.J.A.

I would allow the appeal, direct that judgment be entered for the plaintiff for a perpetual injunction, and one dollar damages, with costs here and below.

IRVING, J.A.: I would allow this appeal. The plaintiff's

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property was pre-empted in 1876, and immediately applications to record water were made. In point of time they were the first to record water on the creek. The defendants, without doubt, used the water, disregarding the rights obtained by the plaintiffs under their records.

The learned trial judge based his judgment on the decision given by the Judicial Committee in *Burrard Power Company, Limited* v. *The King* (1911), A.C. 87, which, in his opinion, declares, in effect, that the Provincial Parliament had no authority subsequent to the 21st of July, 1871, to legislate with respect to waters and water rights within the railway belt. I do not think there is anything in the report of the Judicial Committee's decision that is inconsistent with what has been generally regarded as the rule, *viz.*: that the 11th Article did not come into effect so as to deprive the Province of its right to legislate in respect of water until the 19th of December, 1883, or possibly until the Province and the Dominion had agreed upon and defined the lands to be granted, that is, until the 19th of April, 1884, when the Dominion Parliament passed the Act of 1884, chapter 6, ratifying the settlement entered into by the Provincial and Dominion Governments.

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In *The Queen* v. *Farwell* (1887), 14 S.C.R. 392, when the title to the site of the present City of Revelstoke was in dispute, it was held that a grant made to Farwell by the Provincial Government in 1885 was of no effect. Strong, J. took the view that the Provincial statute, chapter 14, passed on the 19th of December, 1883, was self-executing and operated immediately and conclusively so soon as the event on which it was limited was to take effect, that is, as soon as the line of railway was finally located. This date, he said, could be fixed by evidence. Ritchie, C.J., who assumed, but without so deciding, that legislation by the Dominion was necessary to transfer the proprietory interests, fixed the 19th of April, 1884, as the true date. In *Farwell* v. *The Queen* (1894), 22 S.C.R. 553, King, J. said the railway belt was transferred by the Provincial Act of 1883, chapter 14, that is, on the 19th of December, 1883, and in *The Queen* v. *Demers*, *ib.* 482, Gwynne, J., in whose judgment all the other members of the Court concurred, seems to take the

view that it was to the joint action of the two Parliaments, and not the 11th Article that the title of the Dominion to the railway belt should be attributed. That case would therefore fix the 19th of April, 1884. In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295 at p. 300, Lord Watson says:

"The lands forming the railway belt were granted by an Act of the Legislature of British Columbia, 47 Vict. c. 14, s. 2 [19th December, 1883]."

The Act of 1880 was passed to aid the Dominion Government in constructing the Canadian Pacific Railway between Burrard inlet and Yellowhead pass, and at the end of the first section are these words:

"The grant of the said land shall be subject otherwise to the conditions contained in the said 11th section of the Terms of Union."

What these words include is difficult to say, because the term of two years within which work was to commence had long since expired, and the term of ten years was fast running out. Possibly it was intended to reserve to the Province—notwithstanding the wide words "and there is hereby granted"—the right to continue to dispose of the lands under the pre-emption laws.

The line from Burrard inlet to Yellowhead pass was never proceeded with, and on the 12th of May, 1883, an Act was passed by the Province in settlement of all claims by the Province against the Dominion in respect of delays in construction of the Canadian Pacific Railway. The Act of 1880 was amended by eliminating all reference to the Yellowhead pass, and a new grant was made with reference to the line "wherever it may be finally located." This Act in turn was repealed on the 19th of December, 1883, by chapter 14, which substituted a new agreement, which, however, was not to be binding until ratified by the Dominion Parliament.

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In determining the exact date when the administration of the railway belt passed to the Dominion so as to put an end to the power of the Provincial Government to make grants of water therein, regard must be had to the fact that here we are construing "statutory compacts"—to use Lord Watson's expression—between two governments. Until acceptance there was no compact, and having regard to the express provision for ratifi-

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cation by the Dominion Government set out in the preamble to the Act of 1883, chapter 14, I would say that the date of the assent to the Dominion statute of the 19th of April, 1884, was the true date, and that all records obtained by the plaintiff prior to that date were good and valid. At any rate, if that view is not correct, the date referred to by Strong, J. would be the true date of the transfer.

I do not think it is necessary to refer to any of the Land Acts prior to the Land Act, 1875. The Land Act of 1874 had been disallowed in March, 1875, by the Dominion Government on the ground that no reservation had been made in respect of the railway belt or for the Indians. By the Act of 1875, section 48, provision was made for the diverting of unrecorded and unappropriated water, on giving one month's notice, a record was made by the proper officer and thereupon the applicant became entitled to divert the stream.

In *Carson* v. *Martley* (1885-6), 1 B.C. (Pt. 2), 189, 281, (1889), 20 S.C.R. 634, much discussion took place as to the necessity for proving compliance with the terms of the Act and as to the omission of details in the application and in the records, but the majority of the Supreme Court of Canada held that the provisions as to notices, etc., were merely directory, and that records imperfect in form should be upheld.

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It would appear then that between the pre-emption of the plaintiff's property and the 19th of December, 1883, the plaintiff's predecessors in title had obtained some five records, covering some 1,900 inches of water from the creek in question, and before the 8th of May, 1880, the date of the Royal assent to the first Act of the Province, two records of 200 and 500 inches respectively. With reference to these two records, it seems to me the plaintiff's case is absolutely unassailable, and, on these two records alone, that judgment ought to have been entered for the plaintiff. But the plaintiff, in my opinion, is entitled to more. All of her records obtained prior to the 19th of April, 1884, are good and valid, and a declaration to that effect should be made and an injunction granted to restrain the defendants from interfering with her rights. The plaintiff is also entitled to damages; there may be difficulties in the way

of proving the amount of damages, but there is abundant proof that she suffered damages year by year by reason of the defendants' interference with her water rights.

I think the questions settled by this lawsuit might very well have been determined by raising the point of law for decision, and then, if necessary, the question of damages could be settled later.

MARTIN, J.A.: I agree that the appeal should be allowed.

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MACDONALD, C.J.A.: The principal question of law involved in this case is the same as that in *George* v. *Mitchell,* in which I have just read my conclusions and the reasons therefor. It is, therefore, only necessary to consider those phases of the case which differ from the one above mentioned. The only water records upon which the plaintiff can rely as being prior to the transfer of the railway belt to the Dominion are exhibits 3 and 5, recorded on the 8th of August, 1882, and 9th of November, 1883, respectively, and they relate to the waters of Jones lake and Anderson creek only. The defendants' records having been obtained long after the transfer of the Railway Belt to the Dominion cannot, in any view of the case, avail them. As in the *Mitchell* case, the only objection urged against the plaintiff's said records was that the waters in question being within the said railway belt, the Province had no jurisdiction over them after the agreement of the Union in 1871.

In both cases the question of riparian rights was discussed, but it is clear to my mind that in this case neither party had riparian rights in Jones lake nor Anderson creek. The lands of neither party touched these waters. Jones creek, the outlet of Jones lake, was an artificial channel, and the ownership of lands abutting on it as defendants' lands did, gave no riparian rights in respect of it. The defendants, therefore, have no rights, riparian or otherwise, in the waters of Jones lake, and Anderson creek, which are the waters in dispute, and which the defendants admit they diverted before they reached Peterson

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creek through the channel called Jones creek. It follows, therefore that the plaintiff's rights under her said records have been infringed by defendants, and that she is entitled to a perpetual injunction and damages. In this, unlike the *Mitchell* case, there is evidence that the plaintiff objected to defendants' user of the water in 1909 as well as in 1910, and that she suffered injury through defendants' interference in those years. The learned judge having decided against the validity of her water records, made no finding on the question of damages. I would therefore remit the case back to the Court below to have such damages assessed.

I would allow the appeal, with costs here and below.

IRVING, J.A.: I would allow this appeal. In my opinion the Provincial Government were administering the lands included in the railway belt till the 19th of April, 1884. In the case of *George* v. *Mitchell* I have set out my reasons for fixing that date as the correct date of the transfer of the railway belt to the Dominion. The plaintiff is entitled to a declaration of the validity of her records of water obtained before the 19th of April, 1884, an injunction, and an inquiry as to damages.

IRVING, J.A. The learned judge took a view of the premises and found a number of facts on the strength of his investigations. The conclusions derived from an inspection in the autumn would be of little value as to what the conditions were in June or July, but, with deference to the learned trial judge, I think the true object of taking a view was forgotten. A view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence: see *London General Omnibus Company, Limited* v. *Lavell* (1901), 1 Ch. 135 at p. 139.

MARTIN, J.A. MARTIN, J.A.: I agree that the appeal should be allowed.

Appeal allowed.

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Company law—Extra-Provincial unlicensed company—Dominion incorporation—"Carrying on business" in British Columbia—Right to bring action on promissory notes—Companies Act, R.S.B.C. 1911, Cap. 39, Secs. 139, 168.

Plaintiff Company (a Dominion corporation, but not licensed in British Columbia) and defendant entered into an agreement in Winnipeg, Manitoba, for the exclusive purchase and sale of some of the Company's machines within a certain area of British Columbia. An order for shipment was executed by delivery f.o.b. Calgary, Alberta, the goods thereafter to be at the expense and risk of the purchaser. Defendant gave promissory notes in payment, which notes were dated at Winnipeg, the headquarters of plaintiff Company, and made payable at Elko, British Columbia.

Held, that the Company were carrying on business in British Columbia within the meaning of section 168 of the Companies Act.

[An appeal was taken, *per saltum*, to the Supreme Court of Canada, when this finding was reversed on the facts, 7th April, 1913.]

Reversed by S.C. of Can.

ACTION tried by MURPHY, J. at Vancouver, on the 11th of September, 1912. The facts are shortly set out in the head-note. Statement

Sir C. H. Tupper, K.C., for plaintiff Company.
Jamieson, for defendant.

1st October, 1912.

MURPHY, J.: As to the question that the sections of the Companies Act applicable here are *ultra vires* because they seek to impose conditions on a Company incorporated by the Dominion and authorized to do business throughout Canada, this has already been passed upon in *Waterous Engine Works Company* v. *Okanagan Lumber Company* (1908), 14 B.C. 238, adversely to plaintiffs' contention. As the decision still stands, I adopt it *pro forma* and hold the legislation complained of to be *intra vires*. Judgment

On the second branch of the case, that what was done here does not fall within the disabling sections, putting the plaintiffs' case on its strongest ground, it must be conceded that if section

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139 has been violated, section 168 becomes operative, and this action fails. Now, section 139, *inter alia,* states:

"No company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the Province until such extra-provincial company shall have been licensed or registered as aforesaid."

Does the contract in question here provide that defendant, "as representative or agent of or acting in any other capacity," shall carry on any of the business of plaintiffs? I think it does. The defendant need not be an agent; he need not even be a representative as required by the Alberta Act. It is sufficient if he acts in any capacity. The contract requires him to ensure the goods shipped in the Company's name; to sell according to a fixed price list; on demand, to take notes in the Company's name from purchasers and forward same to the Company; to hold in trust for the Company proceeds of sales until payment of all obligations and to do a variety of other things on behalf of the Company. It is argued that all these provisions are merely the giving of security for payment of the indebtedness and not a carrying on of any of the business of the Company. But the defendant has to act within the Province in providing such security. He must insure here; the contracts of sale are evidently intended to be made here, and therefore, if the demand to take notes in plaintiffs' name is made, the defendant must act here in obtaining such notes, and so on with many other provisions of the contract. To put the matter in a nutshell, in my opinion, granting for the sake of argument the plaintiffs' contention, the taking of security for indebtedness is a part of plaintiffs' business as it would be of any merchant, and the defendant is in some capacity—it matters not what under the wording of the section—bound to do various things in this Province to obtain such security for plaintiffs. This is a violation of section 139, and the present action cannot be maintained. The questions are answered accordingly.

Judgment

NOTE:—The following are the findings of the Supreme Court of Canada, on appeal:

Fitzpatrick, C.J.C.: I am of the opinion that this appeal should be allowed, with costs.

Both of the questions submitted for the opinion of the Court assume that

the appellant Company, in the circumstances of the transaction in question, carried on in British Columbia "a part of its business," within the meaning of the statutory prohibition relied upon—section 156 of the Provincial Companies Act—or that the notes sued on were contracts made by that Company in the Province in the course of or in connection with its business. I do not pause to inquire whether the statute was intended to penalize contracts made in the Province in connection with the business carried on there by an unlicensed or unregistered extra-provincial company, or whether all contracts made in the Province by such companies are unenforceable. The distinction is not material, in view of the conclusion I have reached.

As stated in the special case, the facts are as follows: An agreement was entered into between the appellants and the respondent, at Winnipeg, in the Province of Manitoba, under which the respondent was given the exclusive right to buy and sell certain of the appellants' machines within a defined area of the Province of British Columbia. Under this agreement the respondent ordered a shipment of goods, which was executed by delivering them f.o.b. at Calgary, in the Province of Alberta; the goods to be thereafter at the expense and risk of the purchaser. The consignment was to be paid for by promissory notes, and the notes sued on herein were made in execution of that undertaking. All of the notes are dated at Winnipeg, where the head office of the Company, the appellants, is situate, and made payable at Elko, in British Columbia, where two of them were actually signed.

I cannot see how, assuming that the respondent was the agent of the appellants, under the agreement made in Winnipeg, it can be said, on these facts, that the Company, appellants, carried on "any part of its business" in British Columbia. The most that can be said is, that the appellants sold and delivered goods to the respondent in the Province of Alberta, to be afterwards resold, possibly, by the latter, within the Province of British Columbia. The statute is not intended to reach those who trade *with* the Province, but those who carry on business *within* the Province, and no act was done by the appellants within the Province. If we had to deal with the sale of goods by the respondent to a customer, then the question of carrying on business through an agent in the Province might arise.

Can it be said that the promissory notes, made in the Province and payable there, but sent to Winnipeg in payment of a debt under a purchase made at the latter place, is a contract made in the Province in the course of or in connection with the business of the Company? A note executed, made payable, and delivered to the payee, in the Province, may be a contract made there by the maker of the note, but is not a contract made by the appellants, who assumed no obligation with respect to it. The notes must be considered in connection with the contract of sale and delivery, which is the consideration for which they were given. That contract was complete by the delivery of the goods beyond the limits of the Province, and the notes made by the respondent in British Columbia were made only in performance of his obligation to pay the amounts specified in those notes under that contract.

As to whether a promissory note is a contract, see Pothier, "Lettre de

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Change," Bugnet Ed., pp. 473 and 474: "La lettre de change appartient a l'execution du contrat de change; elle est le moyen par lequel ce contrat s'execute elle le suppose ou l'etablit; mais elle n'est pas le contrat."

Judgment will be entered for $3,315.85, the amount demanded, together with interest from the date of the issue of the writ, at five per cent., and for costs.

Davies, J.: I am of opinion that this appeal should be allowed.

Under the facts stated in the case submitted to us, the plaintiffs were not doing or "carrying on business" in the Province of British Columbia. I think myself bound by the principle of the judgment of this Court in *City of Halifax* v. *McLaughlin Carriage Co.* (1907), 39 S.C.R. 174, and *Kirkwood* v. *Gadd* (1910), A.C. 422. Applying the test stated in those cases to the facts in this case, it is impossible to hold, on the facts as stated that the John Deere Plow Company could be considered as "carrying on business" in British Columbia, within the meaning of that phrase as used in the statute.

In this view, it is unnecessary for me categorically to answer the questions submitted, as the answers I would give are evident from what I have said above.

Idington, J.: The judgment against which this appeal is taken is upon a stated case so framed as to raise questions that are not necessarily involved in determining the right of the appellants to recover upon the promissory notes upon which they sue.

Counsel for the appellants, in answer to a question I put as to whether or not this was the result of a design to obtain the opinion of the Court upon legal questions not arising out of the facts stated, but of importance to the parties concerned herein, assured me that such was not the case. Counsel for the respondent did not dissent from this assurance. The learned trial judge must be taken also to have so viewed the action, or he would not have heard it. I think we must, therefore, treat the case as if, on the facts stated, the submission had been whether or not the provisions of the Companies Act of British Columbia as it stood in the earlier half of the year 1911, or as revised later, when applied thereto, constitute a defence in whole or in part to the appellants' claim to recover on the promissory notes in question. The revision which took place in 1911 altered the numbering of sections and modified the language used in many parts. The action began in 1912; and the part prohibiting certain actions must be looked at as it stood in 1912. The pamphlet copy of this revision was used in argument, and hence, I refer to sections as numbered therein.

The Act is badly drawn. In the sections, 139, 152, 153 and 168, which we have specially to consider, the object designated by the phrase "every extra-provincial company" is expressly or impliedly referred to as subject thereto.

The interpretation clause defines the term as follows: " 'Extra-provincial company' means any duly incorporated company other than a company incorporated under the laws of the Province or the former colonies of British Columbia and Vancouver Island."

By close examination we find later that it does not mean what is thus

interpreted, but means it only subject to the awkwardly expressed limitation which the language of section 152 gives.

That section, which I take as the key of this Part VI. of the Act, is as follows:

"152. Any extra-provincial company duly incorporated under the laws of:

"(*a.*) The United Kingdom;

"(*b.*) The Dominion;

"(*c.*) The former Province of Canada;

"(*d.*) Any of the Provinces of the Dominion; and

"(*e.*) Any insurance company to which this Act applies "duly authorised by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Legislature extends, may obtain a licence from the registrar authorising it to carry on business within the Province, on compliance with the provisions of this Act, and on payment to the registrar, in respect of the several matters mentioned in the Table B. in the First Schedule hereto, the several fees therein specified, and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the licence, thereupon have the same powers and privileges in the Province as if incorporated under this Act."

What does this phrase "any of the purposes or objects to which the legislative authority of the Legislature of British Columbia extends" mean? Let it be noted that it is what "the charter and regulations" of the foreign legislative or creative power, or both, have authorised to be done by the supposed corporate body that is to become the purpose or object to which the legislative authority of the Provincial Legislature has been thus directed.

The puzzles of the section do not end with these lines in the beginning of it, but are continued by the lines "and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the licence, thereupon have the same powers and privileges in the Province as if incorporated under this Act."

It is quite possible for a company, by virtue of the limitations of its creation, to be prohibited from carrying on business in British Columbia, and yet be able to make, as the appellants did in the case in hand, a contract outside of that Province, and, in respect of some breach thereof, be under the need of suing in British Columbia, and be entitled to sue therefor in the Courts of that Province.

I know not whether the appellant Company has "by its charter and regulations" the right to apply for a licence to do business in British Columbia or not. *Prima facie* the patent creating it enables it to apply anywhere to do its business. This suggestion of its regulations limiting its capacity starts the inquiry I have just mentioned as possible. In the light of what section 139 provides, it becomes a pertinent inquiry whether or not the scope of this Part VI. of the Act is such that a company may, by virtue of its Dominion charter, be entitled to enter into such a contract as I have suggested, yet be disabled from following its debtor in the Courts of that Province, without taking out a licence, which its self-restrictive regulations may render useless for any other purpose than such litigation.

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The language of section 139 seems to have been held by the learned trial judge to have some such effect. True, he relies upon other incidents, such as the insurance of property that the appellants permitted another to carry into the Province and deal with therein. Can the appellants not ship their goods through British Columbia, say to Seattle, and in doing so employ men in British Columbia to take care of them, and, if need be, insure them there? And for breach of duty on the part of those bound by or concerned in such obligations, can it not bring an action in the Courts of that Province?

I am not concerned with solving all these problems. I am only raising them here to illustrate the curious things that may happen if this section and some others are to be applied literally.

We are concerned here with section 166 as it stood in 1911, and section 168, of which the first part is as follows: "168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the Province, in respect of any contract made, in whole or in part, within the Province, in the course of or in connection with its business, contrary to the requirements of this Part of this Act."

This provision, it is said, bars this action. If the methods of interpretation and construction I have adverted to are correct, the defence herein may be well founded.

Section 152, quoted above, does, not, however, seem to me to have been so framed as to warrant that mode of treatment. These other sections, including 168 just quoted, must be read as operative within its terms or not at all. It is the one which provides for a licence. The subject throughout Part VI. is licence, and the meaning declared by section 152 must be held as limiting the operative effect of all these other penalizing and puzzling sections aimed at the consequence of not obtaining a licence.

I must, therefore, revert to the consideration of the meaning to be extracted from section 152 to give the other sections validity or force.

It seems inconceivable that a charter of another power can have had in view the carrying out or effecting of "any of the purposes or objects to which the legislative authority of the Legislature of British Columbia extends." Yet such creations are those that the literal meaning of this clause deals with.

Passing that for the moment, what we are concerned with here is the recovery upon a number of promissory notes, of which some were given in and some outside of the Province.

Now, it is as plainly written in the enumerated subjects of section 91, over which exclusive power is given the Dominion, as anything can well be, that bills of exchange and promissory notes are not within either "the purposes or objects to which the legislative authority of the Legislature of British Columbia extends."

Hence, it seems to me that the kind of contract involved herein is one over which the Legislature enacting the disabling section 168, which is relied on, has no more authority than it has over the other corporations, and contracts founded on any of the subjects, enumerated in section 91, over which Parliament has exclusive legislative authority.

It is possible that Parliament has not yet, in this regard, covered all the ground thus open to it to take in aid of its corporate creations, which must rest only upon its residual power over "peace, order and good government," as distinguished from those other corporate creations I refer to above and hereinafter.

But the language of this section 152, which I have called particular attention to, lends itself peculiarly to the application of the principle that the Legislature cannot deal with promissory notes. Indeed it seems as if intended, however awkwardly, to exclude the field of legislation beyond its powers from the range of anything contemplated by this legislation.

The Legislatures of the Provinces, having assigned to them exclusive legislative authority over property and civil rights, beyond that part thereof primarily assigned exclusively to Parliament by said enumeration in section 91, and possibly by implication in a few other sections of the Act, which do not concern us here, may, no matter how much inconvenience may possibly, by reckless or improper legislation, arise, so enact as to contracts as to render them in certain cases null.

This power clearly cannot be so used as to affect the validity of promissory notes, which Parliament has declared shall not be thereby invalidated.

Parliament, in the Bills of Exchange Act, has not expressly dealt with this aspect of the matter and gone so far as it may have a right to go. But, it may be asked, must we not hold that Parliament, by providing for the creation of such companies as the appellants, with the evident purpose of making the franchises so granted as effective as Parliament, acting within its powers, can make them for the execution of their respective purposes, has, so far as necessary therefor, by implication, given such effect as it can in relation to promissory notes? I express no opinion.

Such is the problem which I conceive may arise upon this Act in relation to the rights of the Dominion corporate creations resting upon the residual power of Parliament alone and on the law as it stands at present.

Of course, other extra-provincial companies may not stand in the same position.

It seems to me that in this case, and in view of the phraseology used in section 152, to which I have adverted, the Legislature has refrained from questioning the power of Parliament, and so advisedly used the word "contract" in section 168 as to avoid any question of conflict.

I admit that the word "contract" might include promissory notes; but, when we read it in the light of all these considerations I have referred to, I conclude that it does not.

For that reason alone, section 168 does not apply as a bar to this action.

There are many other considerations leading to the same result.

The whole meaning of the section must turn upon the effect given to the words "carry on business within the Province." That is what the licence is provided for. The fees exacted indicate that it must be something thus substantial, and not the mere incident, for example, of bringing an action.

I admit that the language used in other sections does seem at times to strike at isolated acts. I cannot think that they alter the scope and purpose of the whole of this part of the Act; they must be controlled or read in light of what seems to me the obvious purpose of section 152 as a licensing Act.

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I assume for argument's sake that such a power of licensing exists, but by no means express an opinion in regard thereto.

Then, it has been urged, it is a taxing Act within the power to impose direct taxation within the Province; and the authority of *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, is invoked.

It seems as clear as can be that banks and railways and other subjects falling within the enumerated subjects of section 91 of the British North America Act may be taxable by a Province. But I do not think that involves the liability to comply with such regulations as these sections of the Companies Act in question require compliance with. And I should say that none of the conceivable creations which may be the product of the exclusive powers over the said enumerated subjects of section 91 fall within the sweeping language of these sections now in question, unless restricted within the necessarily incidental powers for executing the taxing power. Destroying their right of contracting or suing does not seem to fall within that. And, so far as the mere taxing power goes, this should hold good, also, relative to other companies. These respective spheres of legislative authority of Dominion and Provinces may well be viewed as if appertaining to two independent States in their relation to each other. Each may help the other, but can go no further. It never, however, was intended that either should try to destroy the other.

It seems to me that there is also much to be said relative to the quality of the taxation. If it is imposed purely to enable a company to do what the appellants have done, then I submit that such methods of taxation would be indirect taxation, and not within Provincial powers.

I am not to be taken as suggesting that promissory notes are, as a matter of course, to be held free from taints of illegality and consequences thereof. The causes of illegality founded on mere revenue laws, however, may, in regard to promissory notes, be found such as Parliament alone may declare. I express no opinion here in regard thereto, and only desire to avoid unwarranted inferences from what I have said.

I conclude that there is nothing in the facts submitted that entitles a Province to deprive a company of its ordinary rights of contract and suing in the Province.

I think the appeal should be allowed, with costs.

Duff, J.: I think the British Columbia Companies Act, R.S.B.C. 1911, chapter 39, does not, on its true construction, disable the appellant Company from maintaining this action.

The relevant provisions of the Act are sections 139, 167, 168. These are in these words:

"139. Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the Province until such extra-provincial company shall have been licensed or registered as aforesaid.

"This section shall apply to an extra-provincial company notwithstanding

that it was heretofore registered as a foreign company under the provisions of any Act, but shall not apply to an extra-provincial investment and loan society duly licensed under the Extra-provincial Investment and Loan Societies Act.

"167. If any extra-provincial company, other than an insurance company, shall, without being licensed or registered pursuant to this or some former Act, carry on in the Province any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business.

"168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the Province, in respect of any contract made, in whole or in part within the Province in the course of or in connection with its business, contrary to the requirements of this Part of this Act.

"Provided, however, that upon the granting or restoration of the licence or the issuance or restoration of the certificate of registration or the removal or any suspension of either the licence or the certificate, any action, suit, or other proceeding may be maintained as if such licence or certificate had been granted or restored or such suspension removed before the institution of any such action, suit, or other proceedings."

I think it is quite clear that the disability to sue imposed by section 168 affects the Company only in respect of rights of action alleged to arise out of some contract "in the course of or in connection with its business, contrary to the requirements of this Part of this Act." These words refer, it seems to me, to sections 139 and 167, which require that an extra-provincial company shall be licensed or registered under the Act before it can become entitled "to carry on in the Province any part of its business." The contracts, therefore, in respect of which an extra-provincial company, which is not licensed or registered under the Act, is disabled from enforcing in the Courts of British Columbia, by virtue of the provisions of section 168, are contracts made "in the course of or in connection with" the same business which the company, in whole or in part, "carries on" in that Province

The learned trial judge held that the appellants were carrying on business by the respondent as their agent, and that the contracts in question were made in connection with that business. In support of this conclusion, the respondent relies upon the provisions of an agreement set out in the special case between the parties to the action. Th appellants are manufacturers of ploughs, and their principal place of business is at Winnipeg; the respondent is a general merchant at Elko, B.C. The promissory notes sued on were given for goods shipped at Calgary by the appellants to the respondent, at Elko, under the terms of the agreement already mentioned. Some of these goods were ordered by the defendant in person at Winnipeg and others by letter from Elko. The agreement in question binds the respondent to accept all goods shipped under it, and to "settle by cash and notes" for all such goods according to the prices set forth in the price list on the first of the month following each shipment. All goods affected by the agreement are to be at the risk of the

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respondent until paid for; the respondent is to insure them for the protection of the appellants. In the event of the death of the respondent, or his insolvency, or of an action being brought against him, all moneys owing are to become immediately payable. In default of payment of any obligation given to the appellants for any goods shipped under the agreement, all moneys owing by the respondent become payable, and the appellants are authorised to sell all goods to which the agreement relates, and credit the proceeds to the respondent, who is to remain liable for any deficiency. In the meantime, pending the payment of all obligations in full, the title to all goods shipped remains, until they are sold by the respondent, in the appellants, and all notes taken on the sale of any of them by the respondent from purchasers are to be taken in the name of the appellants. The sales made by the respondent are to be according to a price-list furnished by the appellants. This agreement constituted—the learned trial judge holds—the respondent the agent of the appellants for the sale of goods to which it relates. I cannot agree with this. It is, in my judgment, an agreement for sale embodying elaborate provisions for the protection of the sellers. Until the sellers have been paid in full, the property remains vested in them, and all moneys received on sales by the respondent are to be treated as theirs; but the rights thus reserved to them are only for securing the payment of the purchase-money; and, on payment, they would disappear at once. Subject to the rights so held by the sellers as security, the purchaser is the beneficial owner of the goods. True, there is a covenant that he will not sell except at the prices specified in the agreement. I doubt very much whether this provision was intended to bind the purchaser with respect to goods that have been fully paid for. If it was intended to apply to goods that have become fully vested in the purchaser, its validity is doubtful; but, in any case, it could only operate as a personal covenant by the respondent, affecting the conduct of his own business.

I see nothing in these provisions requiring, or indeed justifying, the inference that the respondent, in carrying out the agreement, was acting as the agent or representative of the appellants in carrying on the appellants' business. What was contemplated was, that in the conduct of his own business he should observe the provisions of this contract that he had made with the appellants. The second part of the first question, "whether the plaintiff Company is precluded from carrying on business in British Columbia or from maintaining actions in respect of any of the claims or notes aforesaid," ought to be answered in the negative. The other questions are not raised by the facts, and it would, therefore, be improper to answer them.

I may add, although it is not strictly necessary to the decision, that section 167, which subjects extra-provincial companies to penalties for carrying on in the Province any part of their business without licence or registration, appears to indicate that the Legislature, by the phrase "carrying on business," contemplated such conduct on the part of the company as would, according to the general principles of law, amount to a submission to the jurisdiction of the British Columbia Courts. According to that view, no company would come within the penalties or disabilities

imposed by the enactments quoted above, unless it had not a fixed place of business at which it carried on some part of its own business within the Province.

Anglin, J.: In my opinion, the notes sued on were not given or taken by the plaintiffs in the course of carrying on their business within British Columbia. The burden was on the defendant to prove this. The evidence in the record does not establish that the plaintiffs carried on any part of their business in that Province. On that short ground, this appeal should, in my opinion, be allowed.

Brodeur, J.: The main question to be decided in this case is, whether the appellants are carrying on business in the Province of British Columbia.

By the Companies Act of that Province, it is provided that every extra-provincial company having gain for its purpose is required to take out a licence, and it is also provided, by the same Act, that " no . . . . person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on the business of an extra-provincial company . . . . until such extra-provincial company shall have been licensed," (section 139). And, "if any extra-provincial company shall carry on any of its business in the Province, it shall not be capable of maintaining any action in any Court of British Columbia in respect to any contract made, in whole or in part, within that Province in connection with its business" (sections 167, 168).

It appears by the stated case that the head office of the Company is at Winnipeg; that the respondent, Agnew, is residing in British Columbia, and carrying on there the business of a general merchant. In February, 1911, Agnew, in Winnipeg, made a contract with the appellants, under which the appellants agreed not to sell, in a certain territory in British Columbia, the classes of goods which the respondent would order. In execution of that contract, the respondent, at different dates, ordered from the appellants certain goods to be shipped to him in Calgary, in Alberta, and he gave his promissory notes for those goods. Some of those notes were made and signed in Manitoba. The other notes, though dated in Winnipeg, were in fact signed by the respondent at his place of business.

The Company was not registered in British Columbia.

The trial judge found that the appellants should be considered, on the above facts, as carrying on business in the Province of British Columbia; and, as the Company was not registered there, that it could not take any action to enforce the contract with the respondent.

I am not able, for my part, to come to such a conclusion. It cannot be said that the appellants were carrying on any business in the Province of British Columbia. Some of the goods were being sold, it is true, by the respondent, defendant, but he was not their representative or agent, and did not act in any such like capacity for the appellants, but he was doing with these goods the same as he would do with any other goods which, in his ordinary business, he would bring from any other part of the country.

Having come to that conclusion, I do not think it is necessary then to examine the other question which has been submitted by the plaintiffs, namely, whether or not they, being a company incorporated by the

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Dominion Parliament, could be subjected to the requirements of the Act above mentioned.

I think that the appeal is well founded, and it should be allowed, with costs.

Appeal allowed.

APPENDIX

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

JOHN DEERE PLOW COMPANY v. AGNEW (p. 543).—Reversed by Supreme Court of Canada, 7th April, 1913. See 24 W.L.R. 221.

LANGAN, RYAN AND SIMPSON v. NEWBERRY (p. 88).—Affirmed by Supreme Court of Canada, 29th October, 1912. See 47 S.C.R. 114.

BRITISH COLUMBIA ORCHARD LANDS, LIMITED v. KILMER (p. 230).—Reversed by the Judicial Committee of the Privy Council, 26th February, 1913. See (1913), A.C. 319; 82 L.J., P.C. 77.

Cases reported in 15 B.C., and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

DYNES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 429).—Affirmed by Supreme Court of Canada, 21st November, 1910. See 47 S.C.R. 395.

MCKENZIE v. CORPORATION OF CHILLIWHACK (p. 256).—Affirmed by the Judicial Committee of the Privy Council, 30th October, 1912. See (1912), A.C. 888; 82 L.J., P.C. 22.

CUMMINGS v. THE CORPORATION OF THE CITY OF VANCOUVER (p. 494).—Affirmed by the Supreme Court of Canada, 21st March, 1912. See 46 S.C.R. 457.

Cases reported in 16 B.C., and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

NAISMITH v. BENTLEY AND WEAR (p. 308).—Reversed by Supreme Court of Canada, 21st March, 1912. See 46 S.C.R. 477.

ROWLANDS v. LANGLEY (p. 72).—Affirmed by Supreme Court of Canada, 6th November, 1912. See 46 S.C.R. 626.

KRZUS v. CROW'S NEST PASS COAL COMPANY, LIMITED (p. 120).—Reversed by the Judicial Committee of the Privy Council, 18th June, 1912. See (1912), A.C. 590; 81 L.J., P.C. 227.

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ADMIRALTY LAW—*Practice—Affidavit leading to warrant—Discretion of registrar—Rule 39.*] Where the registrar has thought fit, under Rule 39, to dispense with some particulars in an affidavit to lead to warrant, the Court will not reveiw the exercise of his discretion. LETSON v. THE TULADI. - - - - - - - - **170**

2.——*Practice—Amendment of preliminary act—Application for on evidence discovered after filing of preliminary act.*] It is a settled rule not to allow an application for an amendment of the preliminary act at the instance of the party who filed it. PALLEN v. THE IROQUOIS. - - - **156**

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2.——*Responsibility of mortgagee for fraud of.* - - - - - - - - **366**
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AGREEMENT — *Construction of — Forfeiture—Neglect—Specific performance.*] An agreement for the sale of land was not signed by the plaintiff, but defendants accepted the first payment under it. When the second payment became due, plaintiff was absent in England, but it was alleged on his behalf that he left the money with his partner. Defendants telephoned his office where he was, and were told he was in England. Defendants then had two notices typewritten, giving him the 30 days' option of paying up, or suffering forfeiture. One of these notices was posted to his address in England, and the other to his office in Vancouver. The two documents were enclosed in square envelopes, such as would be used in private correspondence and, in addition to being addressed in a lady's handwriting, that sent to his Vancouver office was marked "private." His partner would not open the letter, and it

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remained. On behalf of the defendants it was alleged that the enclosing of the notices in such envelopes, being addressed in a lady's handwriting, and one of them marked private, was a mere unauthorized act of a stenographer, and that the marking one envelope "private" was due to a question by her whether the notice sent to Vancouver was to be sent to the firm, and she was instructed that that was a private or personal matter, apart from plaintiff's firm's business. Plaintiff alleged that the notice sent to England missed him there and followed him home. The notice mailed to the plaintiff required payment within 30 days after the date of the notice, which was dated 22nd February, 1909. The notice was not mailed until the 25th of February, 1909. The appellant contended that the notice was not a good notice under the agreement, as it demanded payment within 30 days after the 22nd of February instead of 30 days after the 25th of February, when the notice was mailed. Five days after the expiration of the 30 days given in the notice, his partner tendered the money, which was refused, and defendants proceeded to exercise their power of forfeiture. MURPHY, J. was of the opinion that as the agreement of sale was never signed by Mills, it was a unilateral contract, and that, therefore, time was of the essence that the plaintiff was admittedly in default for over five weeks, and while the agreement provided for termination in case of default by giving 30 days' notice, and that they purported to proceed under that clause, yet they did so in the belief that plaintiff had executed the contract, and that such action did not prejudice them. In reply to the argument that because of the inclusion of the forfeiture clause, the agreement could be terminated only by action in accordance therewith, the learned trial judge was of opinion that such a clause in an agreement clearly contemplated execution of the agreement by both parties, and was inoperative where

AGREEMENT—*Continued.*

such mutual execution had not taken place. The case, therefore, in his opinion, fell under the ordinary law as to time being of the essence in unilateral contracts, which are in reality simply options, only one party being bound. On appeal, the notice of forfeiture was set aside, and specific performance decreed, IRVING, J.A. dissenting. MILLS v. MARRIOTT & FELLOWS AND BOYD. - - - - - - - - - - **171**

2.——*Forfeiture—Assignment of agreement—Assignee continuing payments to assignor's agent—Default of agent.*] Defendant Williams entered into an agreement to purchase the land in question from plaintiff. He assigned the agreement to defendant Schank, who continued the payments to one Moss, agent of Williams, according to the allegation of Schank. Williams denied the agency of Moss, who failed to account for the moneys received. GRANT, Co. J. gave judgment against Williams for $750 and costs, dismissed the action for foreclosure, and also dismissed the action against Schank, with costs. *Held*, on appeal, that the judgment should be vacated; that the contract between plaintiff and defendant Williams should be rescinded unless all payments in arrear be made within a time certain. In the alternative, in the event of defendant Schank making such payments, he, Schank, should have judgment against defendant Williams, with costs and interest. SOUTHWELL v. WILLIAMS AND SCHANK. **209**

3.——*Notice — Cancellation—Forfeiture—Necessity for strict compliance with requirements of deed—Tender before action.*] It is incumbent on a person seeking cancellation of an agreement for sale of land to shew that the cancellation notice relied upon is in strict accord with what the agreement requires it should be. Therefore, a notice of cancellation of an agreement, dated the 23rd of December, delivered on the 21st of January, calling for payment "within thirty days from this date," and demanding compound interest, was held to be bad. Where a purchaser had shewn a continuous intention to fulfil his bargain, to the knowledge of the vendor (almost half the purchase money being paid on the first instalment) and a readiness and ability to pay the overdue instalment within two or three days after the expiration of the limit in the cancellation notice, and vendor had indicated the futility of attempting to pay, a tender before action was not necessary. BROWN v. ROBERTS. - - - - - - - - - **16**

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ARBITRATION AND AWARD—*Expropriation by municipality—Award of arbitrators—Abandonment of award by municipality—Expropriation of smaller area—Victoria Water Works Act, 1873.*] Defendant municipality, under powers conferred upon it by the Victoria Waterworks Act, 1873, and amendments, appropriated certain land for waterworks purposes. The compensation for said land having been settled by arbitration, the municipality sought to abandon the award of the arbitrators and to expropriate a smaller area. *Held*, that the land having been appropriated, the defendant municipality could not withdraw. The option given by the statute to the land owner to resume possession in default of payment of the compensation awarded within the time limited is an additional safeguard to the land owner as a means of compelling prompt payment. [An appeal from the above was dismissed on the 2nd of April, 1912.] DAVIE v. THE CORPORATION OF THE CITY OF VICTORIA. - - - **102**

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2.——*Expropriation — Compensation — Interest upon amount allowed — Wrong principle—Duties of arbitrators.*] On an application to set aside an award of arbitrators upon a question of compensation payable in respect of the expropriation of certain land by a municipal corporation under its statutory powers, GREGORY, J. altered the rate of interest allowed under the award, but refused to set the same aside. *Held*, on appeal, that interest was not payable, that the award could not be altered by the judge and must be set aside. *Per* IRVING, J.A.: That the arbitrators had exceeded their authority; that the award should be set aside and the matter remitted to the arbitrators for reconsideration. HUMPHREYS v. THE CORPORATION OF THE CITY OF VICTORIA. - - - - - - - - **258**

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COMPANY LAW—*Conversion of public company into private company—Restrictions imposed on disposition of shares.*] A public company with a view to changing itself into a private company by special resolution, duly passed, imposed certain restrictions on the disposal of shares by shareholders *Held*, that such restrictions were not void as being opposed to absolute ownership. *Borland's Trustee* v. *Steel Brothers & Co., Limited* (1901), 1 Ch. 279, followed. *Semble*, a public company may, although there is no express provision in the Companies Act for doing so, resolve itself into a private company. LEISER v. POPHAM BROTHERS, LIMITED. - - - - - **187**

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2.——*Directors — Powers of — Appointment of managing director—Authority of directors to dismiss him—Meetings of directors—Necessity for notice of meeting to all directors.*] Plaintiff Company is an English company incorporated under the English Companies Act, 1908, with its head office in London. The Company is capitalized at £20,000, in shares of £1 each, of which about £13,000 have been issued. There are six directors of the Company. Early in the year 1911 the defendant was appointed managing director of the business of the Company, which was carried on in British Columbia; in fact, the Company was incorporated for the purpose of taking over a cannery business on the Fraser river. Defendant then came out to British Columbia and entered on his duties. Some months after his arrival in British Columbia, dissatisfaction arose in connection with his management, and another of the directors was sent out, so that matters stood: of six directors, four were in London and two in British Columbia, one being the managing director in British Columbia, and the other having been sent out to represent the English shareholders. In the latter part of 1911 the four directors in London had a meeting at which they appointed a Mr. Sherman managing director. The point was (1) Was it necessary, in order to have a legal meeting of the board of directors in London, to give a notice to the two directors in British Columbia? (2) Whether the directors had power to dismiss the managing director? The trial judge held that there was no power to dismiss, and also that it was necessary to send notice of any meetings to the directors in British Columbia, and that anything done at a meeting held without such notice was irregular and void. *Held*, on appeal (varying the judgment of MURPHY, J.), that there was no necessity to send notices of meetings to absent directors, but *Held*, also (IRVING, J.A. dissenting), that the directors had no authority in the circumstances to dismiss plaintiff as managing director. C. S. WINDSOR, LIMITED v. J. W. WINDSOR. - - - - - - - - **105**

3.——*Dividend—Shareholder leaving balance of dividend uncollected—Afterwards selling out his shares—Company subsequently assigning—Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 182 (g)—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13.*] A shareholder in a company having left a portion of his dividend uncollected, subsequently

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construction of the scows, or for loss of profit of an expectation of obtaining a particular contract. The damages which he thought proper to allow were ordered to be assessed by the registrar, not the damages specifically claimed, but general damages which he based on the net earning power of the dredge per day for 39 working days. From this judgment the defendants appealed. *Held*, on appeal (affirming the judgment of MURPHY, J.), that the course followed by the trial judge in arriving at the basis of damages was a proper one, and the principle having been determined, it was within his right and discretion to direct the reference for assessment. *Held*, further, that the opinion of a witness as to what was likely to happen, or would have happened, but for the delay complained of in completing the contract, was not admissible. BROWN *et al.* v. HOPE *et al.* - - - - - - - - **220**

2.——*Failure of contractor—Work taken over from contractor—Cost of execution of work in such circumstances to be ascertained by architect — Whether Surety Company entitled to particulars of architect's finding —Practice—Particulars.*] A contract for the execution of a certain work was guaranteed by the bond of a surety company conditioned to indemnify the plaintiff Company against loss or damage by reason of failure of the Construction Company to perform its contract. The contract provided that in certain circumstances the work might be taken out of the hands of the Construction Company, and executed by the plaintiff Company, the cost and charges thereof to be ascertained by the architect and paid for by the Construction Company. *Held*, on appeal (GALLIHER, J.A. dissenting), that the Surety Company was not bound by the decision of the architect as to the cost of executing the work by the plaintiff Company, and therefore the Surety Company was entitled to particulars of the plaintiff Company's loss and damages in executing the work taken over from the Construction Company. POWELL RIVER PAPER COMPANY, LIMITED v. WELLS CONSTRUCTION COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK. - **37**

3.——*Guarantee—Statute of Frauds—Sufficiency of memorandum.*] A memorandum of a contract of guarantee required under the Statute of Frauds is not necessarily insufficient by reason merely that a blank space left therein for inserting the name of the party whose account is guaranteed has not been filled in, if it appears from the whole document that a person of ordinary capacity must have been able to infer whose account it was intended to guarantee. KELLY, DOUGLAS & CO. v. LOCKLIN. - - **331**

4.——*Insurance—Application form filled in by company's agent.*] In an action on a policy of fire insurance, the company resisted the claim on the ground of misrepresentation as to the class of building and the value of the goods insured. The insured, a foreigner, left to the Company's agent the task of filling in the particulars in the application on which the policy was issued. It was stated that the premises were a store and dwelling, whereas they were a store and lodging, or rooming, house; and that the value of the goods was $3,000. The jury found that the description of the premises and the value of the goods were given and made by the agent of the Company, and that there was no misrepresentation by the plaintiff. The trial judge set aside the findings and verdict of the jury, and entered a nonsuit, on the grounds that the agent had exceeded his authority and that any waiver of the conditions of the policy should have been authorized in writing. *Held*, on appeal (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that the Company were not prevented by anything the agent did, from setting up the misrepresentation alleged, and that plaintiff was liable for the misrepresentation as to the value of the merchandise. [The Court being evenly divided, the appeal was dismissed.] MAHOMED v. ANCHOR FIRE AND MARINE INSURANCE COMPANY. - **517**

5.——*Sale of goods—Contract based on invoice prices—Invoices not produced—Breach—Waiver.*] In a contract for the sale of a stock of merchandise, the purchase price was fixed at an advance of ten cents on the dollar on the invoice price. The invoices were not produced in several instances where disputes arose as to the price. *Held*, on appeal, affirming the judgment of MORRISON, J. (MACDONALD, C.J.A. dissenting), that the failure to produce the invoices relieved the defendants from being held to the contract. PERIARD v. BERGERON AND RICKSON. - - - - - - **339**

6.——*Sale of land—Specific performance —Cancellation of agreement by vendor on fraud of vendee—Notification of cancellation to vendee—Assignment of agreement to third party before notice of cancellation*

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received by vendee.] An agreement for the sale of certain real property was entered into between defendant and one Franks on the 31st of December, 1910, in respect of which a first payment of $50 was to have been made. This payment was made partly by cash and a post-dated cheque for $24. The cheque, which was dated the 11th of March, 1911, was dishonoured, whereupon defendant notified Franks of the cancellation by him (defendant) of the agreement. Franks, prior to the receipt by him of this notification, assigned all his rights under the agreement to plaintiff on the 13th of March, 1911. Plaintiff tendered to defendant the balance considered by him to be due under the agreement, *viz.*: $200, and $10 for interest and cost of conveyance, and claimed specific performance. *Held*, on appeal, that if the plaintiff relied on his position as an innocent purchaser, and as such claimed an equitable right, apart altogether from the assignment, he should have supported his claim with evidence. Judgment of GRANT, Co. J. confirmed on different grounds. MCKENZIE v. GODDARD. - **126**

7.——*Verbal—Consideration—Promise—Loss through carelessness and incompetence—New trial.*] In carrying out a verbal arrangement to move a boom of logs in exchange for the loan of certain boom sticks, plaintiffs lost control of the boom, which was carried away in a gale. It was not shewn that it was necessary to move the boom at the particular time, or that plaintiffs had made any time a condition for the lending of the boom sticks. There was evidence of negligence and incompetence in the operation. *Held*, that the defendants not being under any obligation to move the logs at the time they did, and having selected an inopportune time and used inadequate and deficient equipment, were guilty of negligence and must be held liable for the loss. *Held*, on appeal, *per* MACDONALD, C.J.A., and GALLIHER, J.A., that the appeal should be allowed and the action dismissed. *Per* IRVING, J.A.: That there should be a new trial. WATTSBURG LUMBER COMPANY v. W. E. COOKE LUMBER COMPANY. - **410**

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CRIMINAL LAW—*Evidence—Statement by accused—Admissibility of.*] Any statement made by an accused person, if voluntary, is admissible. Here, moreover, the statement was made in open Court, and after a caution by the magistrate. REX v. JAMES. - - - - - - - - - **165**

2.——*Extradition — Habeas corpus — Appeal — Right of — Jurisdiction.*] The Court of Appeal has no jurisdiction to entertain an appeal in *habeas corpus* proceedings. *In re* TIDERINGTON. - - **81**

3.——*Libel — Private prosecutor not bound to appear at trial—Request to presiding judge to authorize preferment of indictment—Criminal Code, section 873.*] It is no part of the duty of a judge to initiate a criminal prosecution. REX v. DANIEL. **150**

4.——*Procuration—Definition of—Charge to jury—Prejudice of juror—Statement of during trial—Duty of jurors to live up to their oaths.*] On a prosecution for procuring a female to leave her home for the purpose of embarking her in a life of prostitution, the judge, after defining the crime of procuring, said: "You have to go further and find that she was in a brothel in Vancouver when he procured her to leave here in order to justify the prisoner." There was some doubt upon the evidence as to whether the female in question had any regular place of abode. *Held*, on appeal, *per* IRVING and GALLIHER, JJ.A., that the judge had properly defined the crime to the jury. *Per* MACDONALD, C.J.A.: That as the onus was upon the prosecution to prove that the woman had a usual place of abode, and as such onus had not been discharged, there should be a new trial. On the morning of the second day of the trial of an accused person on a charge of procuration, the foreman of the jury informed the judge that one of the jurymen had stated that he was prejudiced, and asked the advice of the judge on the point The judge refused to take any action further than directing that the trial proceed. *Held*, that the course adopted was right; that a juryman ought not to volunteer a statement of that kind. Jurors, after they are sworn, are expected to live up to their oaths. REX v. MAH HUNG. - **56**

5.——*Procuring — Evidence — Accused found with clothing of complainant—Charge*

COMPANY LAW—*Continued.*

sold out his shares. The Company thereafter assigned, and the shareholder claimed the balance due him on his dividend. The assignee pleaded section 182 (*g*) of the Companies Act as a bar to his payment of the claim. *Held*, that, inasmuch as the Company was not in process of being wound up, plaintiff was entitled to recover. SAVAGE v. SHAW. - - - - - - - - **343**

4.——*Extra-Provincial unlicensed company—Dominion incorporation—"Carrying on business" in British Columbia—Right to bring action on promissory notes—Companies Act, R.S.B.C. 1911, Cap. 39, Secs. 139, 168.*] Plaintiff Company (a Dominion corporation, but not licensed in British Columbia) and defendant entered into an agreement in Winnipeg, Manitoba, for the exclusive purchase and sale of some of the Company's machines within a certain area of British Columbia. An order for shipment was executed by delivery f.o.b. Calgary, Alberta, the goods thereafter to be at the expense and risk of the purchaser. Defendant gave promissory notes in payment, which notes were dated at Winnipeg, the headquarters of plaintiff Company, and made payable at Elko, British Columbia. *Held*, that the Company were carrying on business in British Columbia within the meaning of section 168 of the Companies Act. [An appeal was taken, *per saltum*, to the Supreme Court of Canada, when this finding was reversed on the facts, 7th April, 1913.] JOHN DEERE PLOW COMPANY v. AGNEW. **543**

5.——*Foreign company "carrying on business"—Company registered in British Columbia—Cause of action arising outside of British Columbia.*] Where a company, operating under a Dominion charter, but having its head office in Manitoba, although registered to carry on business in British Columbia, and having a local office in the latter Province, pursuant to the British Columbia Companies Act, was sued in British Columbia for a cause of action arising in Manitoba:—*Held*, reversing the opinion of MCINNES, Co. J., that the Company did not come within the provisions of section 67 of the County Courts Act providing that a defendant may be sued in the County in which he dwells or carries on business, and that, the cause of action having its origin in another Province, the registration by the Company in British Columbia did not benefit the plaintiff. PEARLMAN v. GREAT WEST LIFE INSURANCE COMPANY. - - **417**

COMPANY LAW—*Continued.*

6.——*Winding up—Agricultural Associations Act, R.S.B.C. 1911, Cap. 6—Incorporation under—Title of Association—Action against Association—Mode of intituling—Amendment nunc pro tunc.*] The plaintiff in an action to recover a debt from an association incorporated under the Agricultural Associations Act, in course of winding up under the control of the Court, applied for payment out of Court of garnisheed moneys to the plaintiff, in preference to the liquidator, on the ground that the winding-up proceedings were intituled with the wrong title of the association. *Held*, that the moneys should be paid to the liquidator, and on a subsequent motion on behalf of the liquidator, a *nunc pro tunc* order was made. SWIFT CANADIAN COMPANY, LIMITED v. THE ISLAND CREAMERY ASSOCIATION, LIMITED. CANADIAN PACIFIC RAILWAY COMPANY, GARNISHEE. - - - - - - - - **475**

COMPENSATION - - - - **258**
See ARBITRATION AND AWARD. 2.

CONSPIRACY—Rejection of candidate by College Board—Undermarking of papers. - - - - - - **114**
See FRAUD. 2.

CONTRACT—*Breach of—Damages, general, special—Reference to registrar for assessment—Discretion of judge in directing reference—Evidence—Opinion of witness as to probable event—Admissibility of.*] By a contract dated the 21st of February, 1910, the plaintiffs agreed to ship to the defendants on or before the 28th of April, 1910, a dredge. The price was $8,080, of which $1,000 was paid in cash. The dredge was not shipped until the 6th of June. The plaintiff then brought an action for the price, and recovered judgment for $7,614. The defendants counterclaimed for damages and specifically claimed (*a*) $5,000, loss of profit on a dredging contract which they expected to obtain when they ordered the dredge; and (*b*) $2,500, loss on scows; this sum being the amount thrown away, or needlessly incurred, in consequence of the plaintiff's delay in making delivery of the dredge. The learned trial judge thought the case was governed, so far as the delay in delivery of the dredge was concerned, by *Elbinger Actien-Gesellschafft* v. *Armstrong* (1874), L.R. 9 Q.B. 473, and that the defendants were entitled to damages; but he refused to allow any damages in respect of the contract for the bonus paid for hurried

CRIMINAL LAW—*Continued.*

to jury—"Substantial wrong" within section 1,019 of the Code.] The prisoner was found with the clothing of prosecutrix in his valise, but he denied any knowledge of how it came to be there, and the jury discredited his story. The evidence of the prosecutrix was that she had gone to Prince Rupert from Vancouver with the accused and lived there with him; that when she decided to return to Vancouver her clothing, including her boots, were missing, and were found in the prisoner's bag when he was arrested on the dock waiting for his steamer. The defence suggested that the girl herself had placed the clothing in the bag, but she denied this. The trial judge, in his charge to the jury, said: "It is suggested on the part of the Crown, or, if it is not suggested, your common sense would suggest to you, that there would be a motive, we can readily understand, on the Chinaman's part, for the taking of those clothes. There is sufficient evidence here, if you find that the intention of taking the girl to Prince Rupert was to embark her in the business of prostitution, and it is a matter of common knowledge that one of the most usual ways of forcing them to embark in the business of prostitution by men who intend to profit by their becoming prostitutes, is by taking away their clothes." There was no objection to this charge on behalf of the prisoner at the time. *Held* (GALLIHER, J.A. dissenting), that no substantial wrong had been done to the prisoner sufficient to justify the Court exercising its powers under section 1,019 of the Criminal Code, to direct a new trial. REX v. LEW. - **77**

6.——*Speedy trial — Procedure — New trial—Right of accused to re-elect—Evidence given by accused at first trial—Use of by prosecution on second trial—Evidence sufficient to convict—Refusal of judge to reserve a point upon.*] An accused appealing from a conviction in a County Court Judge's Criminal Court, and securing a new trial, is sent back to that Court, and has not any right to re-elect whether he shall be tried speedily or go before a jury. Where an accused submits himself to give evidence and be cross-examined upon such first trial, the evidence so given is admissible in the second trial. In this case the trial judge refused to reserve a point that there was no evidence warranting the finding of guilty arrived at, and the Court of Appeal refused to disturb the ruling. REX v. DEAKIN. - - - - - - - - **13**

CRIMINAL LAW—*Continued.*

7.——*Warrant of commitment—Appeal—Whether warrant vacated by appeal—Habeas corpus — Conviction for keeping bawdy house—Release of accused pending appeal—Further arrest under original warrant—Criminal Code, Sec. 751.*] A warrant of commitment to prison after conviction on a criminal charge is not vacated by the lodging of an appeal and granting of bail. REX v. ESTELLE DURLIN *alias* STELLA CARROLL. - - - - - - - - **207**

DAMAGES—Excessive. - - - **401**
See LIBEL.

2.——*General, special — Discretion of judge in directing reference to registrar for assessment.* - - - - - - - **220**
See CONTRACT.

DEED—*Absolute gift — Land given to municipality for public purposes—Substantial performance of conditions—Change in circumstances rendering location unsuitable.*] In an action for a declaration that certain lots conveyed to a Municipality for the purposes of a city hall site had reverted to the plaintiff on account of the Municipality having ceased to occupy the property for the purposes for which it was given, it was in evidence that the defendants had erected buildings and used them as a city hall on the property for about eleven years, but owing to the general progress the building and locality became unsuitable for the original purpose. The deed of conveyance, except for a reference to an agreement to give the property, was an absolute gift. *Held* (affirming the judgment of CLEMENT, J. at the trial), that there was no condition subsequent to be deduced from the language of the conveyance, and that there was nothing in the evidence on the trial to warrant reforming the deed by inserting a clause. There was to a substantial degree a performance of the agreement, the expressed consideration for the grant, and there was no ground for suggesting an illusory performance to secure the property so as to give jurisdiction to declare a resulting trust on the ground of fraudulent acquisition of the legal estate. POWELL v. THE CORPORATION OF THE CITY OF VANCOUVER. - - - - - - - - - **397**

DEFECTIVE SIDEWALK—Non-repair—Negligence—Liability of corporation. - - - - - - - **264**
See MUNICIPAL LAW.

DIVIDEND—Shareholder leaving balance of dividend uncollected — Afterwards selling out his shares—Company subsequently assigning. **343**
See COMPANY LAW. 3.

DIVORCE—*Evidence — Corroboration — Cruelty—Adultery.*] On a petition for divorce, the respondent is entitled to know clearly the charges he is called upon to meet. Thus, the cruelty alleged should be such as to cause danger to life, limb or health, bodily or mental, or a reasonable apprehension of it; and where there is an admission of adultery, corroboration will be required unless the admission is entirely free from suspicion. Remarks on the necessity of strict compliance with the rules and practice. EDMONDS v. EDMONDS. - **28**

2.——*Practice — Interrogatories—Harsh—Oppressive—Objectionable.*] In divorce, as in ordinary actions, where interrogatories are put, they must not be harsh, oppressive or objectionable. M——. v. M——. - - - - - - - - - **336**

EVIDENCE—Accused found with clothing of complainant—Charge to jury—"Substantial wrong" within section 1,019 of the Code. - - **77**
See CRIMINAL LAW. 5.

2.——*Admissibility—Refreshing memory from notes of event—New trial.* - **498**
See MASTER AND SERVANT. 10.

3.——*Given by accused at first trial—Use of by prosecution on second trial—Evidence sufficient to convict.* - - **13**
See CRIMINAL LAW. 6.

4.——*Corroboration.* - - - **28**
See DIVORCE.

5.——*Opinion of witness as to probable event—Admissibility of.* - - - **220**
See CONTRACT.

6.——*Statement by accused — Admissibility of—Criminal law.*] Any statement made by an accused person, if voluntary, is admissible. Here, moreover, the statement was made in open Court, and after a caution by the magistrate. REX v. JAMES. - **165**

7.——*Sufficiency of—Allegations made on affidavit—Warrant containing more than one charge—Extraditable offences—Extradition.*] A commissioner acting under the powers vested in him by the Extradition

EVIDENCE—*Continued.*

Act, is justified in proceeding upon the complaint laid before him without taking any evidence in support of such complaint. Evidence in support of the charge may be submitted by affidavit. When the commissioner has decided that there is evidence justifying an order for extradition, his decision cannot be reviewed if the judge to whom the application is made is of the opinion, from the record, that there was such evidence. *In re* O'NEILL. - - **123**

EXECUTION—*Stay of—Application for pending appeal—Motion after execution satisfied and sheriff withdrawn—Material on application—Sufficiency of—Practice.*] An application for stay of execution pending appeal to the Court of Appeal will not be granted where the defendant has paid the sheriff and secured his withdrawal from possession of the goods held in execution. In any event the applicant must come prepared with all necessary material, and an adjournment will not be granted merely for the purpose of procuring affidavits. BARNUM v. BECKWITH. - - - **496**

2.——*Stay of pending appeal to Court of Appeal.* - - - - - - - - **334**
See PRACTICE. 21.

EXPROPRIATION - - - **258**
See ARBITRATION AND AWARD. 2.

EXTRADITION - - - - - **81**
See CRIMINAL LAW. 2.

2.——*Evidence — Sufficiency of — Allegations made on affidavit—Warrant containing more than one charge—Extraditable offences.*] A commissioner acting under the powers vested in him by the Extradition Act, is justified in proceeding upon the complaint laid before him without taking any evidence in support of such complaint. Evidence in support of the charge may be submitted by affidavit. When the commissioner has decided that there is evidence justifying an order for extradition, his decision cannot be reviewed if the judge to whom the application is made is of the opinion, from the record, that there was such evidence. *In re* O'NEILL. - **123**

FOREIGN COMPANY—"Carrying on business"—Company registered in British Columbia—Cause of action arising outside of British Columbia. - - - - - - - **417**
See COMPANY LAW. 5.

FOREIGN COMPANY—*Continued.*

2.——*Doing business—Company obtaining a Provincial licence after contract entered into, but before commencement of action.* - - - - - - - - - **454**
See STATUTE, CONSTRUCTION OF. 2.

FOREIGN VESSEL—Seizure of within three-mile limit. - - - **50**
See SHIPPING.

FOREST FIRES—Damage by—Different fires uniting. - - - - **502**
See JURY.

FORFEITURE - - - **16, 230**
See AGREEMENT. 3.
VENDOR AND PURCHASER. 5.

FRAUD - - - - - - - - **378**
See PRACTICE. 14.

2.——*Conspiracy—Rejection of candidate by College board—Undermarking of papers—Destruction of papers of other candidates at same examination—Discretion of Board—Withdrawal of case from the jury.*] Plaintiff tendered himself as a candidate for examination to be admitted to the practice of dentistry, and after examination was informed that he had not passed. He brought an action against the College, the registrar and the examiners for conspiracy in refusing to allow him the full number of marks obtained and thereby excluding him from the practice of his profession. There was some evidence that his papers were undermarked, and it also developed that after the commencement of the action, and up to discovery, the papers of other candidates at the same examination had been kept, but were destroyed during proceedings on discovery, but before a demand had been made for them. It was not shewn that they had been tortiously destroyed, although disposed of before the time limited by the rules of the College. Nor was it shewn that the defendants had acted in any way in concert. *Held*, on appeal, that the trial judge was right in nonsuiting the plaintiff in the absence of evidence of conspiracy. *Per* GALLIHER, J.A.: That, on the evidence, the applicant was entitled to be enrolled, and had the statute given authority, the Court should have ordered his enrolment. *Semble*: That, in the circumstances, there should be no costs. *Semble*, per MACDONALD, C.J.A.: That on a proper marking of the papers the plaintiff would have been entitled to admission. RICHARDS

FRAUD—*Continued.*

v. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA, VERRINDER, SMITH, MCLAREN, SPENCER AND MINOGUE. - **114**

3.——*Husband participating in.* - **366**
See MORTGAGE.

GOODS—Damage of in transit. - **226**
See RAILWAYS. 3.

HABEAS CORPUS - - - - **81**
See CRIMINAL LAW. 2.

INSURANCE—Fire insurance—Application form filled in by company's agent. - - - - - - - **517**
See CONTRACT. 4.

INTERIM INJUNCTION - - **345**
See MUNICIPAL LAW. 2.

INTERROGATORIES— Harsh—Oppressive—Objectionable. - - **336**
See DIVORCE. 2.
PRACTICE. 9.

JUROR—*Prejudice of—Statement of during trial——Duty of jurors to live up to their oaths.*] On the morning of the second day of the trial of an accused person on a charge of procuration, the foreman of the jury informed the judge that one of the jurymen had stated that he was prejudiced, and asked the advice of the judge on the point. The judge refused to take any action further than directing that the trial proceed. *Held*, that the course adopted was right; that a juryman ought not to volunteer a statement of that kind. Jurors, after they are sworn, are expected to live up to their oaths. REX v. MAH HUNG. **56**

JURY—*Misdirection—Refusal of judge to submit to jury additional questions proposed by counsel. Railways—Forest fires—Damage by—Different fires uniting.*] In an action for damages caused by forest fires, alleged to have been caused by the negligence of defendant Company's servants, there was some evidence of other fires which had been burning previously having united through a change in the wind. Counsel for defendant Company requested that the jury be asked to find if any such fires caused the damage complained of, and if so, which. The trial judge declined, and instructed the jury to find which fire was the preponderating cause of the damage. The jury returned a verdict against defendant Company. *Held* (MARTIN, J.A. dissenting), that the refusal of the

JURY—*Continued.*

trial judge to put the questions suggested did not, viewing the whole of the judge's charge, prejudice the defendant Company, and that there was therefore no misdirection. KING LUMBER COMPANY, LIMITED v. CANADIAN PACIFIC RAILWAY COMPANY. - **502**

2.——*Notice of trial by—Extension of time for filing.* - - - - - - **338**
See PRACTICE. 13.

3.——*Questions to—Necessity for submitting questions to the jury in damage actions.* - - - - - - - - - **211**
See MASTER AND SERVANT. 6.

LANDLORD AND TENANT—*Lease—Renewal — Surrender — Consideration for—Notice unsigned—Estoppel.*] Under a lease for a term of five years, commencing from the 22nd of September, 1902, the lessee had an option for a further term of five years, provided he gave six months' notice of his intention to exercise such option. He continued in occupancy after the termination of the first five years, but on the 8th of February, 1908, he wrote to one of the owners who had purchased from the original landlord, agreeing to "take off" two years from his lease. GREGORY, J., at the trial, held that the lessee had surrendered his lease and gave judgment for plaintiff. Defendant appealed. *Held*, that the judgment should be sustained. GREENWOOD v. BANCROFT. - - - - - - - - - **151**

LEASE— Renewal—Surrender—Consideration for — Notice unsigned — Estoppel. - - - - - - **151**
See LANDLORD AND TENANT.

LIBEL—*Newspaper report of police court trial—Mistake of reporter—Apology—Payment into Court of five dollars and repetition of apology—Counsel, in address to jury, referring to amount of payment—Order XXII., r. 22—New trial—Damages—Excessive.*] In an action for damages arising out of a newspaper libel, the defendants pleaded a mistake of their reporter, published an apology, and paid into Court $5, as sufficient to satisfy the plaintiff's claim. A special jury awarded the plaintiff $5,000 damages. *Held* (IRVING, J.A. dissenting), that there should be a new trial, because the plaintiff's counsel, in addressing the jury, had referred to the fact that money had been paid into Court and mentioned the amount, contrary to Order XXII., rule 22, and might thereby have influenced the jury. *Held*, further, that the rule is applicable to an action for libel. *Per* IRVING, J.A.: The rule was applicable and was violated; but a new trial should not be ordered, because the defendants' counsel did not ask to have the jury discharged, which he should have done if he thought the defendants were prejudiced. *Sornberger* v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263 at p. 272, referred to. *Per* MARTIN, J.A.: The objection to the violation of the rule should have been given effect to by the trial judge, who should have discharged the jury of his own motion, and given directions for a rehearing. The alleged libel purported to be a report of a police court trial, in which it was alleged that the magistrate had reserved sentence, whereas, in fact, he had reserved judgment. He afterwards dismissed the charge. The plaintiff, in his statement of claim, limited his complaint to the libellous statement that he had been convicted; he made no complaint concerning the report of the evidence given at the trial. *Held, per* MACDONALD, C.J.A. and IRVING, J.A., that the trial judge properly refused to permit the defendants' counsel to cross-examine the plaintiff to elicit what had been said about the plaintiff by witnesses in the police court. The proper mode of proving the police court proceedings, where admissible, is by putting in the depositions: *Rex* v. *Prasiloski* (1910), 15 B.C. 29; and the rejected evidence was irrelevant, having regard to the frame of the pleadings. *Per* IRVING, J.A.: The ruling of the trial judge was acquiesced in by counsel for the defendants, and he did not press the questions. Also, the amount of the damages was not so excessive as to justify interference by the Court of Appeal. DICKINSON v. THE WORLD PRINTING & PUBLISHING COMPANY, LIMITED, AND L. D. TAYLOR. - **401**

LORD'S DAY ACT - - **469**
See MASTER AND SERVANT. 11.
SHIPPING. 2.

LOST PROPERTY—*Purse left in public office of bank and taken possession of by clerk of bank—"Lost," what constitutes—"Laid down and forgotten," distinction between and "lost"—Clerk acting as careful employee—Making claim as finder.*] An article laid down and forgotten is not lost property in the sense that the person picking up such article acquires title thereto against any person but the true owner. Thus, where a clerk in a bank, while attend-

LOST PROPERTY—*Continued.*

ing to his duties behind the counter, noticed lying on a desk used by patrons of the bank in the public portion of the premises, a wallet containing money, and picked it up and handed it over to the manager for the rightful owner, who never was discovered or appeared to claim it: *Held*, affirming the judgment of GRANT, Co. J. at the trial, that the money could not be considered lost within the proper meaning of the term. HEDDLE v. BANK OF HAMILTON. - **306**

MASTER AND SERVANT — *Alleged defective system—Personal injuries—Volenti non fit injuria—Jury, findings by—Unreasonable.*] Plaintiff was sent, with some fellow workmen, to clear an incline of stones and other natural debris preparatory to the commencement of certain operations in connection with the defendant Company's undertaking. A considerable quantity of such debris had been cleared when plaintiff proceeded to operate a drilling machine upon a rocky ledge. He was struck and injured by a stone which rolled from the incline. A jury found that if the incline had not been sufficiently cleared, it was due to the negligence of plaintiff and his fellow workmen, but that defendant Company was also negligent in not protecting the incline with barriers to stop loose material from coming down. It was admitted by plaintiff that it was customary to clear off such inclines, or to use barriers, but not to do both; and there was some evidence that in this case barriers were unnecessary and dangerous. *Held*, on appeal (MARTIN, J.A. dissenting), that there was no evidence justifying the jury in finding defendant Company guilty of negligence, and that any negligence shewn was that of the plaintiff's fellow servants. BERGKLINT v. CANADA WESTERN POWER COMPANY, LIMITED. **443**

2.——*Hiring at will—Remuneration "at the rate of $600 per annum of the fees collected"—Dismissal before end of year—Disposition of fees collected in year before date of dismissal—Time for accounting—Harbour Masters' Act.*] Where a harbour master was appointed, to be paid "at the rate of $600 per annum of the fees collected by him from vessels entering the port," and he was dismissed at the end of the first month of the year: *Held*, on appeal, affirming the judgment of MURPHY, J., that the appointment was a hiring at will, terminable at the pleasure of the Crown, that the appointee was entitled to be paid only for the month

MASTER AND SERVANT—*Continued.*

served "at the rate of $600 per annum," and that the fees collected during that period belonged to the Crown (MARTIN, J.A. dissenting). THE KING v. MCLEOD. - **189**

3.——*Injury to workman in the course of his employment—Defective machine—Finding by jury—Reasonable evidence—Balance of probabilities.*] Plaintiff was injured by a cutting machine "tripping," or coming down a second time through, as he submitted, a defect in the mechanism. He operated the machine by working a lever with his foot, and if he kept his foot on such lever it would cause the knife to continue cutting or descending. There was some evidence that the machine had "tripped" a second time without the operator's foot being on the lever. The jury gave a general verdict of $500. *Held*, on appeal, sustaining the verdict, that on the evidence, it was open to the jury to find the verdict which they did. MCMULLEN v. COUGHLAN & SONS. - - - - - - - - - **491**

4.——*Injury incidental to employment—Workmen's Compensation Act, 1902—Finding by arbitrator—Question of fact.*] Where there is conflicting evidence, the finding by an arbitrator under the Workmen's Compensation Act, 1902, that the applicant was not engaged on his employers' business at the time of the accident, is a conclusive finding of fact on that point. An accident occurring to a workman while doing something purely for his personal convenience, and foreign to his duty, is not an accident arising out of and in the course of his employment. SCALZO v. COLUMBIA MACCARONI FACTORY. - - - - - - **201**

5.——*Judgment recovered at trial—Reversed on appeal—Application to Court of Appeal for direction to assess damages under Workmen's Compensation Act, 1902, B.C. Stats., Cap. 74—Powers of Court of Appeal.*] Plaintiffs at the trial recovered damages for the death of their son, killed while in defendant Company's employment. The Court of Appeal reversed the trial judgment. Thereafter plaintiffs applied to the Court of Appeal for a direction to assess damages under the Workmen's Compansation Act, 1902, section 6, subsection 4. *Held*, that the Court of Appeal could not assess the damages or make any order directing an assessment. MCCORMICK AND MCCORMICK v. KELLIHER LUMBER COMPANY. - **422**

MASTER AND SERVANT—*Continued.*

6.—— *Negligence — Contributory negligence—Damages—Findings of jury—Questions to jury—Remarks as to necessity for.*] Plaintiff sustained injuries while in defendant Company's employment as an engineer, owing, as alleged by him, to his having obeyed a peremptory but negligent order of the foreman. The jury awarded him $3,000 damages. *Held*, on appeal (*per* IRVING, J.A.), that the plaintiff not having made out a case sufficient to go to the jury, he should have been nonsuited. *Per* GALLIHER, J.A.: That there was evidence of contributory negligence on the part of the plaintiff, and the jury ought to have found contributory negligence. *Per* MACDONALD, C.J.A. (dissenting): That as there was evidence of negligence on the part of defendant Company, and an absence of contributory negligence on the part of the plaintiff, as found by the jury, the verdict should stand. In the result the verdict was set aside and the action dismissed. Remarks as to the necessity for submitting questions to the jury in damage actions. LATHAM v. HEAPS TIMBER COMPANY, LIMITED. - - - - - **211**

7.—— *Negligence — Inspection — Fellow servant—Nonsuit.*] Plaintiff was injured by striking his pick in some dynamite in a tunnel of the defendant Company. There was no evidence of how the dynamite happened to be there beyond the inference that it was from a previous blast, and plaintiff did not shew that there had been no inspection after the blast. The jury gave a verdict for plaintiff on the ground that as the defendant Company had not proved such inspection was made, they were therefore guilty of negligence. The trial judge set aside the verdict as a finding tantamount to negativing negligence, and as wrong in that it was an attempt to throw upon the defendant Company the burden of disproving negligence in the first place. *Held*, on appeal, that the trial judge's view should be sustained. *Per* MACDONALD, C.J.A. and GALLIHER, J.A.: That the case was properly one under the Workmen's Compensation Act, 1902. ROOT v. VANCOUVER POWER COMPANY, LIMITED. - - - - - - **203**

8. —— *"Plant," what constitutes — Machine, being manufactured, attached, for testing, to motive power of factory—Factories Act, R.S.B.C. 1911, Cap. 81, Sec. 32.*] Section 32 of the Factories Act, R.S.B.C. 1911, chapter 81, which requires dangerous machinery in a factory to be, as far as practicable, securely guarded, applies only to machinery which is part of the plant used in the manufacture of the product of the factory, and does not include a machine which is in course of construction in the factory, although such machine for the purpose of being tested, is connected with the motive power of the factory, and is being operated as a machine for the purpose of testing. The plaintiff, having received personal injuries while testing a machine, by reason of the machine being unguarded, the trial judge charged the jury that if they considered the machine to be dangerous, the defendants were liable at common law for breach of duty imposed by the Factories Act, and further charged the jury that under such circumstances, it was no defence that the plaintiff voluntarily assumed the risk. The trial judge also charged the jury that the defendants might be liable under the Employers' Liability Act for the negligence of their foreman in telling the plaintiff to work the machine without a guard. The jury found a verdict for the plaintiff for damages at common law. *Held*, on appeal, that the Factories Act did not apply, and the action at common law must be dismissed. *Held, further*, that the jury, under the judge's charge, did not consider whether the plaintiff had voluntarily assumed the risk, and therefore damages could not be assessed under the Employers' Liability Act. A new trial was ordered as to the liability under the Employers' Liability Act. EVERETT v. SCHAAKE MACHINE WORKS, LIMITED. **271**

9.——*Railway — Brakeman on freight train injured by water standpipe alongside track—Pipe of standard approved by Board of Railway Commisioners—Statutory protection—General and special orders of Board —Publication of orders—Effect of.*] The Board of Railway Commissioners, by an order dated the 2nd of February, 1910, approved of the defendant Company's plan of water standpipes, to be placed not less than seven feet six inches from the centre of the track. By a general order, dated the 9th of November following, the Board directed that "water standpipes shall not be nearer than two feet six inches from the widest engine cab." Plaintiff was injured by being knocked off the side ladder of a freight car by coming in contact with a water standpipe which was only sixteen and a half inches from the cab of the engine pulling the train in question. In an action for damages, the jury found in favour of the plaintiff, but the trial judge set aside the verdict. *Held*, on appeal, that as the first

MASTER AND SERVANT—*Continued.*

order was a special one, and was not overruled or displaced by the second one, and moreover had the effect of a statute, the defendants could not be held guilty of negligence. CLARK v. CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - **314**

10.——*Railways—Rules governing traffic—Disregard of rule by motorman—Damage — Evidence — Admissibility — Refreshing memory from notes of event.*] One of the rules of the defendant Company was that cars running in the same direction should be kept five minutes apart, except when approaching stations, when the motorman was to so manage his car that it could be stopped within the range of vision. Plaintiff, a motorman, ran his car into the rear end of another car standing at a station, and sustained injuries for which he claimed damages, alleging a defective system. The jury found defendants guilty of negligence and gave damages in $2,500. *Held*, on appeal, reversing the verdict, that the accident was caused by plaintiff's disregard of the rules. One of the witnesses at the trial endeavoured to refresh his memory from an extended note of the accident made at the time. The trial judge refused to permit this. *Held, per* IRVING and MARTIN, JJ.A., that there had been an improper rejection of evidence, and that the defendants were in any event entitled to a new trial. DAYNES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED LIABILITY. - - - - - **498**

11.——*Shipping—Seamen—Sunday work—"Emergency"—Lord's Day Act—Lawful commands of ship's officers.*] In dealing with cases of labour on board ships, the word "emergency," as applied in the Lord's Day Act, must be given a liberal, elastic meaning, as such labour is dependent on wind, weather and tide. In this case, plaintiff having expressly undertaken employment which necessitated work on Sunday, he could not come to the Court for relief when he deliberately disobeyed the lawful commands of the ship's officers. Judgment of MCINNES, Co. J. affirmed. MURRAY v. THE COAST STEAMSHIP COMPANY. LINDEN v. THE COAST STEAMSHIP COMPANY. - - - - - - - - **469**

12.——*Workman killed in course of his employment—Cause of death—Case withdrawn from jury.*] Where the evidence is equally consistent with the existence or non-existence of negligence, it is not competent

MASTER AND SERVANT—*Continued.*

for the judge to leave the case to the jury. *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (1899), 29 S.C.R. 478, followed. LOFFMARK v. THE ADAMS RIVER LUMBER COMPANY, LIMITED. - - - - - **440**

MALICIOUS PROSECUTION — *Reasonable and probable cause—Honest belief—Advice of counsel—Motion for nonsuit—Findings by jury—Order XIX., r. 13*] Plaintiff, who was in the employ of defendants, was discharged. Subsequently one of the defendants obtained a search warrant and had the plaintiff's rooms searched for certain tracing paper, etc., alleged to have been taken by plaintiff from their place of business. The detectives who made the search arrested the plaintiff and he was prosecuted in the police court for stealing a lamp shade, a show case reflector and $4. The magistrate dismissed the charge, and plaintiff brought action, claiming $3,000 damages. The claim for wrongful dismissal was abandoned on the opening of the trial. The defendants, as to the charge of malicious prosecution, did not deny the falsity of the charge, but submitted that they had reasonable and probable cause and did not proceed with malice. *Held*, that this plea amounted to an admission of plaintiff's innocence, under Order XIX., r. 13, and this being supported by the depositions in the magistrate's court, upon which the charge against him was dismissed, the plaintiff had proved his innocence. *Held*, on the facts, that there was want of reasonable and probable cause. That whilst the taking of counsel's advice was evidence in defendants' favour, it was not a complete answer. Therefore, a motion for nonsuit was refused. HARRIS v. HICKEY & Co. - - - **21**

MECHANIC'S LIEN — *Architect — Assignment by—Right of assignee—Posting payrolls—Substantial performance of contract—Pleading—Evidence—County Court.*] Where the assignee of an architect superintended for the defendant the work of constructing a building, brought action to recover the money due for the architect's services, and to enforce payment thereof by filing a lien for the sale of the land and building, it was *Held*, that the defendant should have raised in the pleadings the objection that the architect had not posted upon the building or delivered to the owner a receipted pay roll pursuant to section 15 of the Mechanics' Lien Act, or led evidence upon that point. Therefore, that defence

MECHANIC'S LIEN—*Continued.*

was not open. *Held*, also, that, the lien being assignable, every remedy for its enforcement went with it. *Held*, further, upon the facts, that there was a sufficiently substantial performance of the contract to entitle the architect or his assignee to a lien, notwithstanding that some portion of the material contracted for had not been supplied by one of the contractors at the time he received his final certificate from the architect. SICKLER v. SPENCER. - **41**

2.——*Notice by material man of intention to claim lien—Delivery, what constitutes—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Sec. 6.*] The term "delivery" in section 6 of the Mechanics' Lien Act, means actual, physical delivery. Where, therefore, a material man, who had contracted to furnish all the materials for a building, and after some of the material had been delivered, gave notice of intention to claim a lien in respect of more material than had been delivered: *Held*, affirming the judgment of MCINNES, Co. J., that the notice was bad as to the material not delivered. RAT PORTAGE LUMBER COMPANY, LIMITED v. WATSON AND ROGERS. - - - - - **489**

MINING LAW—*Trespass—Location of discovery posts—"Side line locations"—Railway Aid Act, 1890, Cap. 40, Sec. 10—Mineral claims not excepted therefrom. Statute, construction of—Repealed section—Railway Aid Act, 1890—Mineral Act, R.S.B.C. 1897, Cap. 135.*] The property in question had been located as the Bridge Creek mineral claim on the 28th of July, 1898, and all assessment work was done upon the ground up to July, 1903, when the holder was entitled to a certificate of improvement. He did nothing further until August, 1907, when he re-located this and adjoining ground as the Victoria group and the Victor group. On the 30th of October, 1901, the defendant railway Company obtained a Crown grant of certain lands by way of subsidy. In May and June, 1911, defendants Fitch and Hazlewood, contractors for the construction of the railway, entered the property in question and cut a number of railway ties. CLEMENT, J. at the trial came to the conclusion that on the evidence the location of claims was bad, and dismissed the actions. *Held*, on appeal, that the re-location was upon occupied land, not open to location as mineral claims. FARRELL AND FARRELL v. FITCH AND HAZLEWOOD AND THE BRITISH COLUMBIA SOUTHERN RAILWAY COMPANY. - - - - - **507**

MISDIRECTION — Jury — Refusal of judge to submit questions to jury —Additional questions proposed by counsel. - - - - - - **502**
See JURY.

MORTGAGE — *Covenant by married woman—Responsibility of mortgagee for fraud of agent—Husband participating in fraud.*] In an action upon a mortgage of land purported to have been given by a married woman, it developed that the land in question has been conveyed to her by an agent of the plaintiff Company, the mortgagees, but without her knowledge. The mortgage deed she was led to believe was a document relating to the transfer of shares which she held in the Company. On the same understanding she executed an authority to the agent to receive the mortgage moneys. He did receive such moneys, but did not pay them to her, although he made payments to the Company on account of the mortgage. GREGORY, J., at the trial, held, that the agent's knowledge was that of the Company, who enabled him to occasion the loss which they must suffer, their negligence in appointing a dishonest agent being the proximate and effective cause of the fraud. The trial judge therefore directed that the Company were not entitled to recover on the covenant, but that the defendant married woman should transfer to the Company her registered title to the mortgaged property, and dismissed the action as against her husband. On appeal, the judgment at the trial as to the defendant married woman was affirmed, but reversed as to her husband, who, on the evidence, was held to have joined in the fraud practised on the Company. DOMINION PERMANENT LOAN COMPANY v. MORGAN AND MORGAN. - - - - - - - - **366**

MORTGAGES—Computation of fees for registration of. - - - - **329**
See STATUTE, CONSTRUCTION OF. 5.

MUNICIPAL LAW—*Defective sidewalk—Non-repair—Negligence—Liability of Corporation — Notice — Third party — Remedy over against—Vancouver Incorporation Act, 1900, Cap. 54, Secs. 149, 219.*] A municipal corporation, charged with the maintenance and repair of streets and sidewalks, took up a wooden sidewalk and replaced it with a permanent one. In doing so, they replaced a wooden grating in an area opening, which had been made in the old sidewalk by a former owner of the abutting private property without permission from the corporation. The private owner at the

MUNICIPAL LAW—*Continued.*

time of replacing the old sidewalk was not consulted by the corporation. The trial judge, in an action for damages for personal injuries sustained by plaintiff in falling through the wooden grating, gave damages, $3,000, against the corporation, with a remedy over against the third party. An appeal was taken by the municipality, and the third party also appealed against the main judgment and against the order that she indemnify the City, but on the argument she confined her appeal to the latter. *Held*, on appeal, that the corporation was liable, and that the appeal of the third party should be allowed. MACPHERSON v. THE CORPORATION OF THE CITY OF VANCOUVER (STIRLING, THIRD PARTY). **264**

2.——*Expropriation of land for waterworks—Notice—Compensation—Arbitration—Action—Interim injunction—Res judicata.*] Upon an application for the appointment of an arbitrator to assess compensation for lands of H. expropriated for waterworks by a city corporation, it had been held by GREGORY, J., that the corporation must take all the land in respect of which they had given notice, and he had oppointed an arbitrator. In this action H. asked for a declaration that the corporation were entitled only to a portion of the land. *Held*, that an application by the corporation to restrain the arbitrators from proceeding with the arbitration, until the determination of the action, should be refused. CORPORATION OF THE CITY OF VICTORIA v. HEALY *et al.* - - - - - - - **345**

NEGLIGENCE - - - **203, 211**
See MASTER AND SERVANT. 6, 7.

2.——*Action for.* - - - - **338**
See PRACTICE. 13.

NEW TRIAL - - - - **13, 401**
See CRIMINAL LAW. 6.
LIBEL.

2.——*Evidence—Admissibility—Refreshing memory from notes of event.* - **498**
See MASTER AND SERVANT. 10.

NUISANCE—Abatement of. - - **19**
See TRESPASS.

ORDER XIV.—Application for judgment under. - - - **218, 378**
See PRACTICE. 14, 15.

PRACTICE—*Affidavit leading to warrant—Discretion of registrar—Rule 39—Admiralty law.*] Where the registrar has thought fit, under Rule 39, to dispense with some particulars in an affidavit to lead to warrant, the Court will not review the exercise of his discretion. LETSON v. THE TULADI. - - - - - - - - **170**

2.——*Amendment of preliminary act—Application for on evidence discovered after filing of preliminary act—Admiralty law.*] It is a settled rule not to allow an application for an amendment of the preliminary act at the instance of the party who filed it. PALLEN v. THE IROQUOIS. - **156**

3.——*Amendment of statement of claim—Alternative claim—General indorsement—Founding damage action under common law and Employers' Liability Act.*] A plaintiff claiming damages under a generally indorsed writ, applied, some seven months after writ issued, to amend his indorsement by adding an alternative claim particularly pleading the Employers' Liability Act. *Held*, on appeal, that as his claim as originally framed could be supported either under the common law or the Employers' Liability Act, the six months' limitation under the latter could not be held to apply. MERCER v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - **465**

4.——*Arbitration—Costs of—Principle upon which they should be taxed.*] On the principle that where land is compulsorily taken, the costs should be taxed upon a larger scale than in ordinary litigation, they should be taxed on a solicitor and client basis. Therefore, everything that has been necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him on taxation. The tariff of costs prescribed for ordinary litigation may be accepted as a general guide, but the taxing officer is not bound by it, and should not follow it in all circumstances. *In re* FALSE CREEK FLATS ARBITRATION (No. 2). - - - - **376**

5.——*Costs—Taxation—Affidavit of disbursements—Cross-examination on—Taxing officer, jurisdiction of to order.*] It is within the jurisdiction of the taxing master to order the cross-examination of a party on his affidavit of disbursements. JOHNSON v. MOORE. - - - - - - - - - **219**

6.——*County Court judgment in default of appearance at trial—Application to set aside — Omission by solicitor — Rules of*

PRACTICE—*Continued.*

Court—Discretion—Exercise of—Imposition of terms—Severity of.] Where the judge has absolute discretion, and it is not or cannot be shewn that he has exercised it improperly, the Court of Appeal will not readily interfere. Where, therefore, through a slip in the solicitor's office, counsel was notified in time to appear at the trial, and judgment was entered on default of appearance, and, as a term of being allowed in to defend, defendant was required to pay all costs and also pay into Court the amount of the judgment: *Held*, that it would be inadvisable for the Court of Appeal to interfere with the ruling, but *Semble*: In this case the term imposed appeared to be severe. ROYAL BANK OF CANADA v. FULLERTON LUMBER AND SHINGLE COMPANY, LIMITED. - - - - - - - - **11**

7.——*Discovery—Examination of officer of railway company—Past officer—Rule 370c.*] A person in the employ of a railway company, in the capacity of a fire warden, with other persons under him to make reports to him of fires in the district over which his jurisdiction extends, is an officer of the company within the meaning of rule 370c, examinable for discovery. MACDONALD, C.J.A. *dubitante*. KING LUMBER MILLS, LIMITED v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - **26**

8.——*Discovery—Further and better affidavit of documents—Contentious affidavit.*] Two orders for further and better affidavits of documents were made in an action on an agreement for the leasing of a certain property and the erection of a building thereon. By one of the orders the plaintiffs were required to make a further and better affidavit of documents. The order was based upon the affidavit of defendant's solicitor that a mortgage and lease, not referred to in the pleadings, or in any admissions of the plaintiffs, appeared in the records of the land registry office as affecting the property in question in the action. *Held*, following *Jones* v. *Monte Video Gas Co.* (1880), 5 Q.B.D. 556, that this order was erroneous, because "it cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient," but *Semble*, in this case the defendant might be entitled to an order such as that made in *Ormerod, Grierson & Co.* v. *St. George's Ironworks, Limited* (1906), 95 L.T.N.S. 694, or *Hall* v. *Truman, Hanbury & Co.* (1885), 29 Ch. D. 307. An order for particulars of the expenditure of

PRACTICE—*Continued.*

$67,000 was affirmed with some variation. Remarks as to the impropriety of multiplying appeals. IRWIN AND PURVIS v. JUNG. **69**

9.——*Divorce — Interrogatories—Harsh—Oppressive—Objectionable.*] In divorce, as in ordinary actions, where interrogatories are put, they must not be harsh, oppressive or objectionable. M——. v. M——. - - - - - - - - **336**

10.——*Divorce and matrimonial causes—Necessity of strict compliance with the rules and practice.* - - - - - **28**
See DIVORCE.

11.——*Execution, stay of—Application for pending appeal—Motion after execution satisfied and sheriff withdrawn—Material on application—Sufficiency of.*] An application for stay of execution pending appeal to the Court of Appeal will not be granted where the defendant has paid the sheriff and secured his withdrawal from possession of the goods held in execution. In any event the applicant must come prepared with all necessary material, and an adjournment will not be granted merely for the purpose of procuring affidavits. BARNUM v. BECKWITH. - - - - - - - - **496**

12.——*Joint defendants — Election by plaintiff—Action in tort.*] In an action against the supposed owner of a building for injuries caused by the falling of a portion of a coping wall, it was, after issue of writ, discovered that defendant's wife was the registered owner, and she was joined as party defendant. After delivery of the statement of claim, an application to have plaintiff elect which defendant should be proceeded against was dismissed, following *Bullock* v. *London General Omnibus Company* (1907), 1 K.B. 264. NORTH v. ROGERS AND ROGERS. - - - - - - - - **87**

13.——*Jury—Notice of trial by—Extension of time for filing—Negligence action—Discretion—Rules 430, 967.*] A judge has power, under rule 430, to extend the time for filing a notice of trial by jury. Here, the action being one for negligence, and peculiarly fitted for a jury, the discretion should be exercised. WILLIAMS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - - - **338**

14.——*Order XIV.— Application for judgment under—Promissory note—Bona-*

PRACTICE—*Continued.*

fide holder for value—Fraud—Unconditional leave to defend.] Plaintiffs, being *bona-fide* holders for value of a promissory note, sued for recovery of the amount due thereon. The defence was that it was obtained by fraud. On an application for judgment under Order XIV.: *Held*, that the defendant was entitled to unconditional leave to defend. BANK OF OTTAWA v. ALDER. - - **378**

15.——*Order XIV.—Judgment under.*] In order to obtain judgment under Order XIV., the indorsement on the writ must shew beyond question that the claim is for liquidated damages. Where, therefore, in a suit claiming $25 per day for default in a building contract, and no commencement was made on the building contracted for: *Held*, that the claim for damages could not be said to be for liquidated damages, entitling plaintiff to sign judgment under Order XIV. LEMBKE v. CHIN WING. **218**

16.——*Particulars.* - - - - **37**
See CONTRACT. 2.

17.——*Pleading—Evidence.* - - **41**
See MECHANIC'S LIEN.

18.——*Pleading—Statement of defence—Alleging title in third party.*] A person having actual possession of Crown land, with the concurrence of the Crown, can maintain an action for trespass against a wrong-doer. Therefore, when a defendant pleaded that the land in question was vested in the Crown, it was *Held*, that the plea was embarrassing. Order of HUNTER, C.J.B.C. affirmed with a variation, IRVING, J.A. dissenting as to the variation. BROWN AND BAYLEY v. MOTHER LODE SHEEP CREEK MINING COMPANY, LIMITED. - - **248**

19.——*Preliminary hearing of question of law raised on pleadings—Refusal to adjudicate upon when facts in issue in controversy—Rule 286.*] A question of law raised on the pleadings will not be adjudicated upon where the facts on which the question is based are in controversy. CROSBIE v. PRESCOTT. - - - - **199**

20.——*Revivor, order of on devolution of interest—Rule 973—Ex parte order—Proceeding—Notice.*] Where no proceedings have been taken in an action for more than one year, it is not necessary to give a month's notice of intention to proceed, under rule 973, before making an application to substitute as plaintiff, in lieu of the original plaintiff, a person upon whom the cause of action of the original plaintiff has devolved. GOLDSTEIN v. VANCOUVER TIMBER AND TRADING COMPANY. - - - **356**

21.——*Stay of execution pending appeal to Court of Appeal—Order LVIII., r. 16—Discretion—Grounds for exercising same—Insufficiency of affidavit.*] Unless special circumstances are shewn, stay of execution or adjournment will not be granted. Leave will not be granted to file further material on such application. WILLIAMSON v. GRIGOR. - - - - - - - - - **334**

22.——*Trial by jury—Local investigation—Destruction of timber by fire—Valuation of—Extent of—Expert evidence—Order XXXVI., r. 5—Discretion.*] Order refusing a jury in which the principal issue was the amount of damage caused by fire to standing timber, which would have to be found by a large number of expert witnesses, upheld as coming within the authority conferred by Order XXXVI., rule 5. CLARKSON *et al.* v. NELSON AND FORT SHEPPARD RAILWAY COMPANY. - - - - - - - - **24**

23.——*Trial by jury—Refusal of order for—Discretion—Interference by Court of Appeal.*] While, on the facts here, the judge at Chambers was right in refusing a jury, yet, in any event, having exercised his discretion, the Court of Appeal will decline to interfere. MCARTHUR v. ROGERS. - **48**

24.——*Writ of summons—Application to set aside service—Transitory action—Jurisdiction—Supreme Court Act, R.S.B.C. 1911, Cap. 58, Sec. 9.*] Where the defendant was personally served with the writ of summons whilst within British Columbia, and the cause of action was transitory, an application to set the service aside was refused. PARSHLEY v. HANSON. - - - - **364**

PRINCIPAL AND AGENT—*Agreement—Forfeiture—Assignment of agreement—Assignee continuing payments to assignor's agent—Default of agent.*] Defendant Williams entered into an agreement to purchase the land in question from plaintiff. He assigned the agreement to defendant Schank, who continued the payments to one Moss, agent of Williams, according to the allegation of Schank. Williams denied the agency of Moss, who failed to account for the moneys received. GRANT, Co. J. gave judgment against Williams for $750 and costs,

PRINCIPAL AND AGENT—*Continued.*

dismissed the action for foreclosure, and also dismissed the action against Schank, with costs. *Held*, on appeal, that the judgment should be vacated; that the contract between plaintiff and defendant Williams should be rescinded unless all payments in arrear be made within a time certain. In the alternative, in the event of defendant Schank making such payments, he, Schank, should have judgment against defendant Williams, with costs and interest. SOUTHWELL v. WILLIAMS AND SCHANK. - **209**

2.——*Auctioneer—Liability of—Disclosure of principal—Credit given by auctioneer to purchaser on cash sale—Right to recover—Post-dated cheque given by purchaser.*] An auctioneer knocked down two horses to a bidder, who, before the sale, stated that he had not sufficient money in the bank at the time, but would have in two days from then and would give his cheque so dated. The auctioneer gave the owners of the animals a cheque for the purchase price, less the commission. The purchaser took possession of the animals, but on the following day, on discovering that another person had a lien on the horses, stopped payment of his cheque. *Held*, affirming the finding of GRANT, Co. J. at the trial (IRVING, J.A. dissenting), that the auctioneer was entitled to recover the amount paid. *Per* MARTIN and GALLIHER, JJ.A.: That the defendant, by notifying the auctioneer of the stoppage of payment of the cheque, had waived presentment. *Per* IRVING, J.A.: That on the evidence, the auctioneer had not disclosed the principals. T. J. TRAPP & CO., LIMITED v. W. S. PRESCOTT. - - - - - **298**

3.——*Authority of agent—Money paid for and on account of principal—Condition attached to payment—Duty of agent, before acceptance, to obtain principal's consent to waiver of condition.*] Where an agent, vested with limited authority, receives a payment which does not fulfil the conditions on which he is authorized to receive payments, he should place the money in *medio* until further instructed by his principal. MCPHERSON v. FIDELITY TRUST AND SAVINGS COMPANY, LIMITED, AND MOSES GIBSON. **182**

4.——*Sale of land—Agent purchasing from principal—Fiduciary relationship—Setting aside deed—Estoppel.*] Plaintiff purchased, through defendants, for the purpose of investment, a piece of property in Victoria, and left with the defendants the duty of collecting the rents and acting as

PRINCIPAL AND AGENT—*Continued.*

agents in that respect. After a big fire which swept away a great portion of business property, it was rumoured that View street, on which was situated the lot in question, would be opened out to Government street, and defendants asked for, and obtained, on the 2nd of November, 1910, from the plaintiff an option on the property for $8,000 as the purchase price. They then advertised it, and on November 19th sold it for $15,500. This purchase from plaintiff gave him a profit of $500 on his investment. In the time between agreeing to give the option and completing it, plaintiff became aware of the rumour as to the probability of the street being extended, but did not make any objection then to carrying out the transaction. GREGORY, J. came to the conclusion that in the circumstances the defendants occupied towards the plaintiff a fiduciary relationship, which cast upon them the duty of disclosing all facts and circumstances affecting or likely to affect the property or its value, and gave judgment accordingly for the plaintiff. Defendants appealed. *Held*, affirming the judgment of GREGORY, J. at the trial, setting aside a sale and conveyance of land to defendants, that there was a relationship between the latter and the plaintiff, which demanded the fullest disclosure to him by them before they purchased the property, and that they had not made such disclosure. LAYCOCK v. LEE & FRASER. - - - - - - - - - **73**

5.——*Sale of real estate—Fraud of agent—Collusion with purchaser—Knowledge by principal of fraud.*] Where a real estate agent directly or indirectly colludes with a purchaser, and so acts in opposition to the interests of his principal, he thereby disentitles himself to any commission, and the principal is bound to refund to the party with whom his agent has contracted on his behalf, the money he has received through the fraud of his agent, whether the principal authorized the fraud or not. CANADIAN FINANCIERS, LIMITED v. HONG WO. - **8**

6.——*Warranty of authority—Liability of agent.*] C. had property for sale which was listed with the defendant Exchange for some months. Plaintiffs, having inquired from the Exchange whether the property was still for sale, received the information that it had not been withdrawn, and thereupon entered into negotiations for its sale to one of their customers, accepting a deposit on the purchase price and paying same to the Exchange, from which an order

PRINCIPAL AND AGENT—*Continued.*

was given on C. for the commission. It transpired that C. had previously sold the property. *Held*, on appeal (affirming the judgment of GRANT, Co. J. at the trial), that plaintiffs' damages were what they would have gained by the contract which the defendant Exchange warranted should be made, *viz.*: the full amount of the commission involved. AUSTIN & COMPANY v. THE REAL ESTATE LISTING EXCHANGE AND CASHER. - - - - - - - - - **177**

PROCURING - - - - - - **77**
See CRIMINAL LAW. 5.

PROMISSORY NOTE—Bona-fide holder for value of. - - - - - **378**
See PRACTICE. 14.

PURCHASE MONEY—Return of. - **347**
See VENDOR AND PURCHASER. 2.

RAILWAYS — *Arbitration — Lands not taken but "injuriously affected"—Increased value—Set off—Misconduct of arbitrators—Claimants misled by course of proceedings—Railway Act, R.S.C. 1906, Cap. 37, Sec. 198.*] In constructing their line of railway on a tidal flat conveyed to them by a municipality, the Railway Company cut off the access of abutting owners to the water. In an arbitration to ascertain the amount of damage done such owners, the Company submitted that the increased value which the land of the abutting owners acquired by reason of the construction of the railway should be set off against any damage suffered: section 198 of the Railway Act. To this submission the owners replied that that provision of the Railway Act did not apply, as the Railway Company had not taken, or "passed through or over" their lands. The arbitrators, after having taken evidence, promised to set out in their award the respective amounts found as damages and increased value. In the result this was not done, as the arbitrators failed to agree on the point, although they were agreed that the increased value more than offset the damage, and, on the request of the Company, made an award of one dollar damages. On an application to GREGORY, J. to set aside the award, he was of opinion that the owners had been misled by the promise of the arbitrators to make alternative awards, and, although unintentional, the failure to make the award as indicated constituted misconduct sufficient to justify the setting aside of the award. On appeal, the Court was evenly divided. *In re* FALSE CREEK FLATS ARBITRATION. **282**

RAILWAYS—*Continued.*

2.——*Brakeman on freight train injured by water standpipe alongside track—Pipe of standard approved by Board of Railway Commissioners—Statutory protection—General and special orders of Board—Publication of orders—Effect of.* - - - **314**
See MASTER AND SERVANT. 9.

3.——*Common carriers—Damage of goods in transit—Delay—Liability, inference of—Evidence.*] A shipment of fruit from Italy to Fernie, in British Columbia, was delivered to the Great Northern Railway Company at St. Paul, Minnesota, on the 24th of December, 1909, to be forwarded to destination, which was not reached until the 19th of January, 1910, when the fruit was found to be frozen. *Held*, in the absence of evidence by the Great Northern Railway Company as to what care they took of the shipment while in their possession, that the damage occurred while the fruit was in their care, and that they were liable. Judgment of WILSON, Co. J. reversed. ALBO v. GREAT NORTHERN RAILWAY COMPANY AND CROW'S NEST SOUTHERN RAILWAY COMPANY. - **226**

4.——*Forest fires—Damage by—Different fires uniting.* - - - - - - - **502**
See JURY.

5.——*Rules governing traffic—Disregard of rule by motorman.* - - - - **498**
See MASTER AND SERVANT. 10.

6.——*Shunting—"Train moving reversly"—What constitutes a train—Coupling cars—When cars become part of train—Duty of Company to have man on rear car—British Columbia Railway Act, R.S.B.C. 1897, Cap. 163, Sec. 100.*] Plaintiff, on the occasion in question, had driven across the tracks after having been delayed by a train, and on returning found four dead, or unattached, cars in his way. He diverted from the regular crossing in order to pass behind the cars. As he did so, a train backed down on and coupled with these cars, moving them so that they struck the plaintiff's vehicle, threw him out, and caused injuries which may prevent his being able to walk. The jury found in favour of the defendant Company in a general verdict, and plaintiff appealed. *Held*, granting a new trial, that the trial judge should have drawn the attention of the jury to the provisions of section 100 of the Railway Act, R.S.B.C. 1897, chapter 163, which imposes upon the Company the duty of stationing a man on the rear car of any train moving in a reverse direction in

RAILWAYS—*Continued.*

any city, town or village, to warn persons standing on or crossing the track; and also that the jury should have been given a definition of what constitutes a "train." HELSON v. MORRISSEY, FERNIE AND MICHEL RAILWAY COMPANY. - - - - - **65**

REASONABLE AND PROBABLE CAUSE - - - - - - - - - **21**
See MALICIOUS PROSECUTION.

RIPARIAN RIGHTS - - **477, 531**
See WATER AND WATERCOURSES. 1, 2.

SALE OF GOODS—Contract for based on invoice prices—Invoices not produced—Breach—Waiver. - **339**
See CONTRACT. 5.

SALE OF LAND - - - **73, 230**
See PRINCIPAL AND AGENT. 4.
VENDOR AND PURCHASER. 5.

2.——*Contract for—Refusal of vendor to complete on terms agreed on.* - - **347**
See VENDOR AND PURCHASER. 2.

3.——*Specific performance—Cancellation of agreement by vendor on fraud of vendee—Notification of cancellation to vendee—Assignment of agreement to third party before notice of cancellation received by vendee.*] An agreement for the sale of certain real property was entered into between defendant and one Franks on the 31st of December, 1910, in respect of which a first payment of $50 was to have been made. This payment was made partly by cash and a post-dated cheque for $24. The cheque, which was dated the 11th of March, 1911, was dishonoured, whereupon defendant notified Franks of the cancellation by him (defendant) of the agreement. Franks, prior to the receipt by him of this notification, assigned all his rights under the agreement to plaintiff on the 13th of March, 1911. Plaintiff tendered to defendant the balance considered by him to be due under the agreement, *viz.*: $200, and $10 for interest and cost of conveyance, and claimed specific performance. *Held*, on appeal, that if the plaintiff relied on his position as an innocent purchaser, and as such claimed an equitable right, apart altogether from the assignment, he should have supported his claim with evidence. Judgment of GRANT, Co. J. confirmed on different grounds. MCKENZIE v. GODDARD. - - - - **126**

4.——*Option.* - - - - - - **250**
See VENDOR AND PURCHASER. 3.

SALE OF LAND—*Continued.*

5.—*Purchaser dealing with vendor as agent—Agent becoming principal by purchasing property himself after accepting deposit—Rescission—Offer to return money—Vendor and purchaser.*] Plaintiff, in the belief that defendant was a real estate agent, explained to the latter what he desired. Defendant recommended a certain lot at $2,500, and plaintiff, at a second interview on the same day, said he would take the lot if defendant could get it for him, paying at the same time a deposit of $50 on account of the purchase price, one-third of which was to be paid within a few days. Defendant, on his own account, then procured the lot from the owner for $2,000, less $100 commission. Shortly after the payment of the one-third, plaintiff complained to defendant that he (defendant) had sold his own property, when plaintiff had understood that he was merely an agent. Defendant offered to refund the money paid, which was refused. Plaintiff, some two days after this, having learned what defendant had actually done, wrote defendant, accepting the offer to refund. Defendant refused. Plaintiff sued to recover the profit made by defendant, or, in the alternative, a rescission of the agreement and a return of the moneys paid. GREGORY, J., at the trial, was of opinion that plaintiff had ratified the transaction, and dismissed his claim. Plaintiff appealed. *Held*, reversing the finding of GREGORY, J. (MACDONALD, C.J.A. dissenting), that plaintiff was entitled to a rescission of the contract and a return of the money paid by him. STEVENSON v. SANDERS. - - - - - - - - **158**

SCHOOL RESERVES — Alienation — Land held by Crown in trust. **427**
See STATUTE, CONSTRUCTION OF. 8.

SHAREHOLDER—Leaving balance of dividend uncollected — Afterwards selling out his shares. - - **343**
See COMPANY LAW. 3.

SHIPPING—*Foreign vessel—Seizure of within three-mile limit—Customs and Fisheries Protection Act, R.S.C. 1906, Cap. 47, Secs. 10 and 21—Burden of proof on defendant ship.*] In an action brought in the Supreme Court of British Columbia by His Majesty, on the information of the Attorney-General for Canada, for the forfeiture of the Edrie for contravention of the Customs and Fisheries Protection Act, the statement of claim alleged that the Edrie, being a foreign vessel, was, on the 21st of February, 1911,

SHIPPING—*Continued.*

found fishing within three marine miles off the coast of Canada, namely, within three marine miles of the shore of Cox Island, British Columbia, and that such ship was legally seized by an officer authorized by the Customs and Fisheries Protection Act, and claimed the forfeiture of the Edrie. The statement of defence denied those facts and alleged that the Edrie was lawfully on the high seas, and was illegally seized by the Canadian cruiser Rainbow. Section 10 of the Customs and Fisheries Protection Act, R.S.C. 1906, chapter 47, enacts that: "Every ship, vessel or boat which is foreign, or not navigated according to the laws of the United Kingdom, or of Canada, which (a) has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the limits specified and described in the first article of the aforesaid convention, or in or upon the inland waters of Canada, without a licence then in force granted under this Act; or (b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force; shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited"; and section 21: "The burden of proving the illegality of any seizure, made for alleged violation of any of the provisions of this Act, or that the officer or person seizing was not by this Act authorized to seize, shall lie upon the owner or claimant." The judgment on the trial determined that the defendant did not discharge the burden of proof resting upon defendant, and adjudged that the Edrie be condemned as forfeited to His Majesty and be sold by public auction. *Held*, on appeal, that the trial judge was right. THE KING v. CHLOPECK FISH COMPANY. - - - - - - - - - - **50**

2.——*Shipping—Seamen—Sunday work—"Emergency"—Lord's Day Act—Lawful commands of ship's officers—Master and servant.*] In dealing with cases of labour on board ships, the word "emergency," as applied in the Lord's Day Act, must be given a liberal, elastic meaning, as such labour is dependent on wind, weather and tide. In this case, plaintiff having expressly undertaken employment which necessitated work on Sunday, he could not come to the Court for relief when he had deliberately disobeyed the lawful commands of the ship's officers. Judgment of MCINNES, Co. J. affirmed. MURRAY v. THE COAST STEAMSHIP COMPANY. LINDEN v. THE COAST STEAMSHIP COMPANY. - - - - **469**

SHIPPING—*Continued.*

SPECIFIC PERFORMANCE **88, 126, 171, 230**
See AGREEMENT.
SALE OF LAND. 3.
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SPEEDY TRIAL - - - - - **13**
See CRIMINAL LAW. 6.

STATUTE—B.C. Stat. 1873, Cap. 20. **102**
See ARBITRATION AND AWARD.

B.C. Stat. 1882, Cap. 17. - - - **427**
See STATUTE, CONSTRUCTION OF. 8.

B.C. Stat. 1884, Cap. 14. - - - **427**
See STATUTE, CONSTRUCTION OF. 8.

B.C. Stat. 1890, Cap. 40, Sec. 10. - **507**
See MINING LAW.

B.C. Stat. 1898, Cap. 40, Sec. 5. - **166**
See STATUTE, CONSTRUCTION OF. 9.

B.C. Stat. 1900, Cap. 54, Secs. 149, 219. **264**
See MUNICIPAL LAW.

B.C. Stat. 1902, Cap. 74. **201, 203, 422**
See MASTER AND SERVANT. 4, 5, 7.

B.C. Stat. 1903-4, Cap. 17. - - **31**
See STATUTE, CONSTRUCTION OF.

B.C. Stat. 1908, Cap. 14. - - - **31**
See STATUTE, CONSTRUCTION OF.

B.C. Stat. 1910, Cap. 7, Sec. 166. - **454**
See STATUTE, CONSTRUCTION OF. 2.

B.C. Stat. 1910, Cap. 31, Sec. 15. - **41**
See MECHANIC'S LIEN.

Criminal Code, Sec. 751. - - - **207**
See CRIMINAL LAW. 7.

Criminal Code, Sec. 873. - - - **150**
See CRIMINAL LAW. 3.

Criminal Code, Sec. 1,019. - - - **77**
See CRIMINAL LAW. 5.

R.S.B.C. 1897, Cap. 1, Sec. 10, Subsecs. 13 and 14. - - - - - - - - - **1**
See STATUTE, CONSTRUCTION OF. 6.

R.S.B.C. 1897, Cap. 6. - - - - - **475**
See COMPANY LAW. 6.

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R.S.B.C. 1897, Cap. 24, Sec. 37, Subsec. 3 (*b.*), 4 (*b.*) - - - - - - - - **1**
See STATUTE, CONSTRUCTION OF. 6.

R.S.B.C. 1897, Cap. 44. - - - - - **454**
See STATUTE, CONSTRUCTION OF. 2.

R.S.B.C. 1897, Cap. 97, Sec. 22. - - **166**
See STATUTE, CONSTRUCTION OF. 9.

R.S.B.C. 1897, Cap. 135. - - - **507**
See MINING LAW.

R.S.B.C. 1897, Cap. 163, Sec. 100. - **65**
See RAILWAYS. 6.

R.S.B.C. 1897, Cap. 190. - - - **477**
See WATER AND WATERCOURSES.

R.S.B.C. 1911, Cap. 13. - - - **343**
See COMPANY LAW. 3.

R.S.B.C. 1911, Cap. 39, Secs. 139, 168. **543**
See COMPANY LAW. 4.

R.S.B.C. 1911, Cap. 39, Sec. 182 (*g*). **343**
See COMPANY LAW. 3.

R.S.B.C. 1911, Cap. 51, Sec. 6. - **276**
See STATUTE, CONSTRUCTION OF. 3.

R.S.B.C. 1911, Cap. 58, Sec. 9. - **364**
See PRACTICE. 24.

R.S.B.C. 1911, Cap. 81, Sec. 32. - **271**
See MASTER AND SERVANT. 8.

R.S.B.C. 1911, Cap. 127, Secs. 175, 176. **329**
See STATUTE, CONSTRUCTION OF. 5.

R.S.B.C. 1911, Cap. 129, Sec. 163. - **398**
See STATUTE, CONSTRUCTION OF. 4.

R.S.B.C. 1911, Cap. 154, Sec. 6. - **489**
See MECHANIC'S LIEN. 2.

R.S.C. 1906, Cap. 37, Sec. 198. - - **282**
See RAILWAYS.

R.S.C. 1906, Cap. 47, Secs. 10 and 21. **50**
See SHIPPING.

R.S.C. 1906, Cap. 113, Part XII. - **189**
See MASTER AND SERVANT. 2.

R.S.C. 1906, Cap. 153. - - - - **469**
See MASTER AND SERVANT. 11.
SHIPPING. 2.

STATUTE, CONSTRUCTION OF—*Commissioners for taking affidavits—Limitation of powers to specific acts—Provincial Elections Act, B.C. Stats. 1903-04, Cap. 17—Municipal Elections Act, B.C. Stats. 1908, Cap. 14.*] A commissioner appointed under the provisions of the Provincial Elections Act "for the purpose of acting under (the) Act in the electoral district in which he resides" is restricted in the scope of his duties to taking affidavits and declarations of persons claiming to vote under the Provincial Elections Act only. Where, therefore, certain persons, otherwise qualified, claiming to vote at a municipal election, but who made their declarations before such a commissioner, and whose names were rejected by a court of revision, it was *Held*, that the names were properly struck off the list. *In re* MUNICIPAL ELECTIONS ACT. **31**

2.——*Companies Act, 1897, R.S.B.C. 1897, Cap. 44—Companies Act, B.C. Stats. 1910, Cap. 7, Sec. 166—Foreign company—Doing business—Company obtaining a Provincial licence after contract entered into, but before commencement of action.*] A foreign, unregistered corporation entered into a contract to install a plant in British Columbia, but before commencing action on the contract, became licensed. In the meantime there had been an amendment to the Companies Act, by which, upon the granting of a licence, any action, suit or other proceeding might be maintained as if such licence had been granted before the institution of any such action, suit or other proceedings. *Held*, on appeal (MACDONALD, C.J.A. dissenting), that the provisions of section 123 of the Companies Act, 1897, governed in the circumstances here, and that the amendment of 1910 did not apply. *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297, followed. KOMNICK BRICK COMPANY v. BRITISH COLUMBIA PRESSED BRICK COMPANY. - - - **454**

3.——*Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 6—Habeas corpus—Appeal—Right of where accused discharged from custody.*] No appeal lies to the Court of Appeal from an order discharging an accused person on a writ of *habeas corpus*. *Per* IRVING, J.A.: In this case the person discharged had not come within the operation of the Immigration Act (Dominion) so as to be considered as a person "lawfully landed." *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454, not followed, IRVING, J.A. dissenting. *In re* RAHIM. - - - - - - - **276**

4.——*Land Act—Appeal to Supreme Court under from decision of Minister—Section 163—Time.*] The time for taking

STATUTE, CONSTRUCTION OF—*Continued.*

an appeal, under section 163 of the Land Act, to the Supreme Court, is to be computed from the date of the decision of the Minister. Thus, where a district, or local commissioner advised an applicant to purchase land that the Minister had given instructions not to accept any applications for certain land until further advised, and on a later date returned the application and deposit of purchase money, with the information that a record of the land had been issued to another person: *Held*, that the second, or later act, was the one from which an appeal lay, and such appeal not having been taken within one calendar month from such date, it was out of time. Where a party appealing from a decision of the Commissioner files his petition at different dates in two registries, that on which he proceeds to hearing must be taken as the petition on which he relies. CASKIE v. MINISTER OF LANDS. - - - - - **398**

5.——*Land Registry Act, R.S.B.C. 1911, Cap. 127, Secs. 175, 176—Computation of fees for registration of mortgages—Principle of.*] On an application under section 176 of the Land Registry Act to register a mortgage, the mortgage shall be valued at its true value as provided by section 175, dealing with applications for the registration of a fee. If, therefore, the registrar be not satisfied as to the correctness of the value affirmed, he may require production of other evidence, or of a certificate under the hand of a valuator. There not having been any such course adopted in this case, but the inspector of legal offices having ruled that the value of a mortgage for registration purposes is necessarily the full amount of money for which it is given as security: *Held*, that there is no provision authorizing the registrar to make such a ruling, but that the procedure set out in sections 175 and 176 must be adhered to, unless the registrar, "for sufficient cause shewn," directs otherwise. *Semble*, that the registrar may vary the methods for adducing such further proofs as he may require, on the applicant for registration shewing him sufficient cause why the provisions of section 176 are impracticable or inconvenient. *In re* THE ROYAL TRUST COMPANY, LIMITED. - **329**

6.——*Legal Professions Act, R.S.B.C. 1897, Cap. 24, Sec. 37, Sub-sec. 3 (b), 4 (b), —Interpretation Act, R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-secs. 13 and 14—Right of women to admission to Legal Profession.*] The Legislature, when framing the Legal Professions Act, had not in mind the probability of women seeking to enter the profession; therefore any remedy for the omission lies with the Legislature and not with the benchers of the Law Society. Judgment of MORRISON, J. affirmed. *In re* MABEL PENERY FRENCH. - - - - - **1**

7.——*Repealed section — Railway Aid Act, 1890 — Mineral Act, 1897, Cap. 135.* - - - - - - - - - - **507**

See MINING LAW.

8.——*School Reserves—Alienation—Land held by the Crown in trust—B.C. Statutes, 1884, Cap. 14; 1882, Cap. 17.*] The reservation of Crown lands for school purposes is an "alienation" within the meaning of section 6 of The Island Railway Act (B.C. statutes, 1884, chapter 14). THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY, JAMES ISLAY MUTTER, AND KENNETH FORREST DUNCAN. - **427**

9.——*Tenancy by the curtesy—R.S.B.C. 1897, Cap. 97, Sec. 22—B.C. Stats. 1898, Cap. 40, Sec. 5.*] By proclamation, the Revised Statutes of British Columbia, 1897, were declared in force on and after the 21st of February, 1898. Section 22 of the Inheritance Act, being chapter 97 of the said Revised Statutes, provided: "Nothing in this Act contained shall be held to impair or affect the right of the widow of an intestate to her dower out of her deceased husband's lands, nor the right of a husband to his curtesy out of his deceased wife's lands." By chapter 40 of the statutes of 1898, being The Statutes Revision Act, 1898, it was enacted that the following subsection should be added to section 5 of said chapter 97: "(5) If the intestate shall leave a widow or husband him or her surviving, such widow or husband, as the case may be, shall be entitled, in case the intestate has left no lawful descendants, to one-half of such real estate absolutely, and in case the estestate has left lawful descendants him or her surviving, then to one-third of such real estate for life." *Held*, on appeal (affirming the judgment of MURPHY, J.), that section 22 of chapter 97 was repealed by said chapter 40. Therefore, in the circumstances here, where a husband, entitled upon the death of his wife to a tenancy by the curtesy in her lands, and the lands were put up for

STATUTE, CONSTRUCTION OF—*Continued.*

sale for taxes and bought in by him and subsequently sold to third parties, it was *Held*, that such parties acquired only the one-third interest for his life to which he was entitled. Judgment of MURPHY, J. affirmed. ROMANG v. TAMBURRI. - **166**

STATUTE OF FRAUDS—Sufficiency of memorandum of a contract of guarantee required under. - - **331**
See CONTRACT. 3.

TAXING OFFICER—Cross-examination on affidavit of disbursements—Jurisdiction of to order. - **219**
See PRACTICE. 5.

TENDER BEFORE ACTION - - **16**
See AGREEMENT. 3.

THIRD PARTY—Remedy over against. - - - - - - - - - - **264**
See MUNICIPAL LAW.

TRESPASS—*Enclosure of part of road—Possession—Invasion of—Taking down fences—Abatement of nuisance—Injunction—Damages.*] The plaintiff's fences enclosed part of the highway abutting on his land. The defendant tore down the fences, although his right of passage along the highway was not really interfered with: *Held*, that the plaintiff was in possession, and could maintain trespass and the defendant, as a private individual, had no right to abate the nuisance caused by the obstruction of the highway. Injunction and damages awarded. WADDELL v. RICHARDSON. - - - **19**

TRUST AND TRUSTEES—*Trust agreement—Action for cancellation of—Fraud—Misrepresentation—Removal of trustee.*] In an agreement respecting certain timber licences, defendant S. was empowered to dispose of the licences, pursuant to the terms of the agreement, without reference to his associates and *cestui qui trustent*. MORRISON, J., at the trial, dismissed plaintiffs' action for cancellation of the agreement on the ground that the fraud and misrepresentation alleged had not been proved. *Held*, on appeal, that the action was rightly dismissed. S. counterclaimed for a direction to plaintiffs to execute the requisite documents to carry out a sale made by S. under the agreement. *Held*, that such execution was unnecessary, and that the counterclaim should have been dismissed. *Held*, further

TRUST AND TRUSTEES—*Continued.*

(IRVING, J.A. dissenting on this point), that on the evidence, no case had been made out for the removal of S. from his position as trustee, and, further, that the point was not raised in the pleadings in the Court below, or in the notice of appeal. [An appeal and cross-appeal to the Supreme Court of Canada herein was dismissed, 29th October, 1912.] BINGHAM *et al.* v. SHUMATE *et al.* - - - - - - - - - - **359**

TRUSTEE—Removal of. - - **359**
See TRUST AND TRUSTEES.

VENDOR AND PURCHASER—*Agreement—Specific performance—Sale of land—Default—Cancellation by vendor—Demand by vendee of abstract of title—Non-delivery of, ground for refusal to complete payment.*] The holder of an agreement for sale of land is entitled to time to investigate the title, and where he makes a demand for a solicitor's abstract of title, he is not bound to complete his payments until such proof of title as may be required, has been shewn. *Per* IRVING, J.A.: According to the law of conveyancing, it is the vendor's duty, in the absence of express stipulations to the contrary, to (1) shew a good title by delivering a proper abstract, and, later, verifying the same; (2) if the title is accepted, to convey free from encumbrances, and give possession. The vendee's duties are (1) to examine the title deeds, and, when a good title is shewn, to accept it; (2) to tender a deed for execution, and the whole amount due. *Semble, per* MACDONALD, C.J.A.: The English practice of delivering a solicitor's abstract of title was imported into British Columbia with the common law, and has always been in force here, although more honoured in the breach than the observance. LANGAN, RYAN AND SIMPSON v. NEWBERRY. - - - - - - - - - - **88**

2.——*Contract for sale of land—Refusal of vendor to complete on terms agreed on—Misrepresentation by vendor's agent—Return of purchase money paid.*] In an action for the return of money paid on a contract for the purchase of land, on the ground, *inter alia*, of misrepresentation by the agent of the vendor: *Held*, in the circumstances, that plaintiff was entitled to be refunded his money. *Held*, further, *per* MACDONALD, C.J.A. and IRVING, J.A., that defendant having insisted on a variation of the terms of an agreement made by correspondence, he had lost his right to retain the

VENDOR AND PURCHASER—*Continued.*

money paid him. Judgment of GRANT, Co. J. reversed. DUNN v. ALEXANDER. - **347**

3.——*Contract—Sale of land—Option—"Exercising" or "acceptance" of—Time of the essence.*] In an option to purchase land, it was provided that 25% of the purchase money was to be paid at the time of "exercising the option." The purchasers had until a certain time to "accept the option," but did not tender or pay the 25% with the letter of "acceptance." *Held*, on appeal, sustaining the judgment of GREGORY, J. (IRVING, J.A. dissenting), that the 25% became due and payable at the time of exercising the option, *i.e.*, with the letter of acceptance. LAWRANCE, SWIFT AND REAR v. PRINGLE. - - - - - - - - **250**

4.——*Sale of land—Purchaser dealing with vendor as agent—Agent becoming principal by purchasing property himself after accepting deposit — Rescission — Offer to return money.*] Plaintiff, in the belief that defendant was a real estate agent, explained to the latter what he desired. Defendant recommended a certain lot at $2,500, and plaintiff, at a second interview on the same day, said he would take the lot if defendant could get it for him, paying at the same time a deposit of $50 on account of the purchase price, one-third of which was to be paid within a few days. Defendant, on his own account, then procured the lot from the owner for $2,000, less $100 commission. Shortly after the payment of the one-third, plaintiff complained to defendant that he (defendant) had sold his own property, when plaintiff had understood that he was merely an agent. Defendant offered to refund the money paid, which was refused. Plaintiff, some two days after this, having learned what defendant had actually done, wrote defendant, accepting the offer to refund. Defendant refused. Plaintiff sued to recover the profit made by defendant, or, in the alternative, a rescission of the agreement and a return of the moneys paid. GREGORY, J., at the trial, was of opinion that plaintiff had ratified the transaction and dismissed the claim. Plaintiff appealed. *Held*, reversing the finding of GREGORY, J. (MACDONALD, C.J.A. dissenting), that plaintiff was entitled to a rescission of the contract and a return of the money paid by him. *Held*, affirming the finding of GREGORY, J. (MACDONALD, C.J.A. dissenting), that defendant had failed to establish a relationship of principal and agent between himself and defendant. A man, as here, may undertake to sell property not his own, but if he secures title before the purchaser rescinds his offer, the latter cannot complain. *Per* MACDONALD, C.J.A.: That plaintiff was entitled to a rescission of the contract, and a return of the money paid. STEVENSON v. SANDERS. **158**

5.——*Sale of land—Specific performance—Default in payment of instalment of purchase money — Forfeiture — Time of the essence.*] Defendant purchased from plaintiff Company certain lands for the sum of $75,000, of which $2,000 was paid on execution of the agreement, and of the further instalments, the first was to be $5,000, and interest, on the 14th of June, 1910. Time was of the essence of the agreement, and it was provided that on default in payments, forfeiture should ensue. In addition to the land, defendant also purchased certain personal property on the premises, and, before the first instalment of $5,000 was due, expended some $3,000 in improvements. Defendant, when the instalment fell due, requested grace, and was granted until the 7th of July. He did not then pay, but asked that forfeiture proceedings be suspended until he had had time to have an interview with the Company. On the 9th of July the plaintiff Company declared the contract terminated, and three days later sold at an advance of $25,000. *Held*, on appeal (GALLIHER, J.A. dissenting), reversing the finding of GREGORY, J. at the trial, that the transaction being one of a speculative character, plaintiff having defaulted, and been granted an extension of time after default, he was not entitled to either relief against forfeiture, or to specific performance. [Reversed by the Judicial Committee of the Privy Council: see (1913), A.C. 319.] THE BRITISH COLUMBIA ORCHARD LANDS, LIMITED v. KILMER. - - - - - - - - **230**

WAIVER - - - - - - - - **339**
See CONTRACT. 5.

WARRANT OF COMMITMENT - **207**
See CRIMINAL LAW. 7.

WATER AND WATERCOURSES—*Riparian rights—Diversion of course of stream—Record obtained by municipality for public purposes—Water Clauses Consolidation Act, 1897, R.S.B.C. 1897, Cap. 190.*] In the circumstances here, a water record

WATER AND WATERCOURSES—*Continued.*

empowering the defendant Corporation to divert a creek for municipal purposes was held to be in derogation of the rights of riparian owners on such creek. COOK v. THE CORPORATION OF THE CITY OF VANCOUVER. - - - - - - - - - - **477**

2.——*Riparian rights—Water records—Origin of—Lands in Railway Belt.*] Plaintiff alleged damage by wrongful diversion and obstruction of water claimed by her under several water records granted under Provincial statutes on lands within the railway belt. The records themselves did not shew under what statutes they were obtained, nor that they were granted in connection with plaintiff's lands, which had been acquired by pre-emption and purchase from the Crown as far back at 1876. GREGORY, J., at the trial, held that the presumption was that the water records were obtained under the provisions of the laws in force at the time they were granted, *viz.*: 1875 and 1884; and on the evidence, that plaintiff had not proved any damage by reason of the use made by defendants of the water claimed by her; that her alleged riparian rights had not been established by the evidence; that if she had any such rights, the defendants had similar, and probably superior rights, and that she was not in a position to prove that her rights had been interfered with. An appeal from this judgment was allowed. GEORGE v. MITCHELL. GEORGE v. HUMPHREY BROTHERS. - - - - - **531**

WILL—*Construction of—Action to establish—Capacity of testator—Duty of Plaintiff to give all his evidence in opening—Evidence in reply.*] On the evidence in this case it was *Held*, on appeal, reversing the finding of CLEMENT, J. at the trial, that at the time of making the will in question the testator was mentally competent. *Per* CLEMENT, J., at the trial: Where the plaintiff, propounding the will, has not in his opening given all the evidence he had in support of the will, he should be confined in reply to evidence strictly in rebuttal. FORMAN AND HEISTERMAN v. RYAN *et al.* - - - - - **130**

2.——*Construction of—Alternative executory gifts—Equitable estate for life and in remainder—Repugnant clauses—Gift of income carrying corpus by implication.*] Upon the construction of the devise set out below: *Held* (1) That the life estate in the land given to the husband of the testatrix

WILL—*Continued.*

was an equitable one, as was also the limitation to his heirs. (2) That a *cestui que trust* may be made one of the trustees of the land devised without thereby merging his equitable estate in the legal estate held *qua* trustee; there is not a union of two estates in the same person in the same right. (3) That the word "heirs" used in the devise indicated the heirs general of the husband. (4) That, under the first uses declared in the will, the husband took a life estate in the "$6,000 interest" and the fee simple in the remaining interest; and the daughter took an estate tail expectant on the death of her father in the $6,000 interest. (5) That these estates were subject to be divested by one of two alternative executory gifts, arising (*a*) in case of the sale of the property before the death of the husband and daughter, and (*b*) in case the property should remain unsold at the death of the husband and daughter. (6) That two clauses in the will being repugnant, the later governed. (7) That an absolute gift of the income, in the circumstances of the case, was by implication a gift of the *corpus*. *In re* LEY, DECEASED. - - - - - **385**

WINDING UP - - - - - - **475**
See COMPANY LAW. 6.

WORDS AND PHRASES—"Carrying on business" in British Columbia. - - - - - - - - - - **543**
See COMPANY LAW. 4

2.——*Delivery, what constitutes.* - **489**
See MECHANIC'S LIEN. 2.

3.——*"Emergency."* - - - - **469**
See MASTER AND SERVANT. 11.
SHIPPING. 2.

4.——*"Exercising" or "acceptance" of option.* - - - - - - - - - **250**
See VENDOR AND PURCHASER. 3.

5.——*"Laid down and forgotten," distinction between and "lost."* - - **306**
See LOST PROPERTY.

6.——*"Lost," what constitutes.* - **306**
See LOST PROPERTY.

7.——*"Plant," what constitutes.* - **271**
See MASTER AND SERVANT. 8.

8.——*Procuration—Definition of.* - **56**
See CRIMINAL LAW. 4.

WORDS AND PHRASES—*Continued.*

9.——*"Side line locations."* - - **507**
See MINING LAW.

10.——*"Substantial wrong" within section 1,019 of the Criminal Code.* - **77**
See CRIMINAL LAW. 5.

WORDS AND PHRASES—*Continued.*

11.——*"Train moving reversly"—What constitutes a train.* - - - - - - **65**
See RAILWAYS. 6.

WRIT OF SUMMONS—Application to set aside service. - - **364**
See PRACTICE. 24.