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.

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA,

BY

OSCAR CHAPMAN BASS, - - - BARRISTER-AT-LAW.

VOLUME XVI.

176

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited
1912.

Entered according to Act of the Parliament of Canada in the year one thousand nine hundred and twelve, by the Law Society of British Columbia.

JUDGES

OF THE

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

During the period of this Volume.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

THE HON. PAULUS ÆMILIUS IRVING.
THE HON. ARCHER MARTIN.
THE HON. WILLIAM ALFRED GALLIHER.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. GORDON HUNTER.

PUISNE JUDGES:

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THE HON. WILLIAM HENRY POPE CLEMENT.
THE HON. DENIS MURPHY.
THE HON. FRANCIS BROOKE GREGORY.

LOCAL JUDGE IN ADMIRALTY:

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COUNTY COURT JUDGES:

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HIS HON. GEORGE HERBERT THOMPSON,	East Kootenay

ATTORNEY-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K. C.

MEMORANDA.

On the 29th of January, 1912, George Herbert Thompson, Barrister-at-Law, was appointed Judge of the County Court of East Kootenay, in the room and stead of His Honour Peter Edmund Wilson, resigned.

On the 7th of February, 1912, His Honour George Herbert Thompson, Judge of the County Court of East Kootenay, was appointed a Local Judge of the Supreme Court of British Columbia.

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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.

MELLOR v. MELLOR.

GREGORY, J.

1910

Dec. 23.

MELLOR v. MELLOR

Alimony—Application for cancellation of judgment—Material necessary in support of—Order LXX., Supreme Court Rules, 1906.

Where a defendant in an alimony action, in default in his payments, applies for an order cancelling the judgment against him, he must make a full and frank disclosure of his affairs since the obtaining of the judgment, together with the reasons for his default.

APPLICATION, by petition, on behalf of defendant in an alimony action, for the cancellation of a judgment against him for permanent alimony. Defendant had never paid anything under the judgment, and the only ground alleged in support of his prayer for relief was that his income had been materially reduced. The application was heard by GREGORY, J. at Victoria on the 23rd of December, 1910. Statement

A. E. McPhillips, K.C., for plaintiff.
W. J. Taylor, K.C., for defendant.

GREGORY, J.: This is an application by petition for an order to cancel and annul an order of MARTIN, J. for permanent Judgment

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1910
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v.
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alimony, made in an alimony action in the Supreme Court, and to cancel the registration of the same against the lands of the defendant.

The defendant is in default in not having complied with the terms of the order; he has, in fact, never paid a single cent under it, and now asks to be relieved of its burden because, as he alleges, his annual income has been materially reduced.

Order LXX. of the Supreme Court Rules, under which this action was brought, makes no provision for the annulment or cancellation of a judgment for alimony, and the judgment itself apparently only provides for possible relief in the case of future payments. Order LXX. provides for the cancellation of the registration of such a judgment, but before defendant can ask for such an indulgence, it seems to me he must make out a strong case, fully account for his default, and make a full and frank disclosure of his accounts since the signing of the judgment.

Assuming that the practice under the Matrimonial Causes Act, 1857, applies to these proceedings, the defendant has not furnished me with sufficient material to enable me to form any judgment as to whether the monthly amount of alimony should be reduced or cancelled altogether. He should account in detail for moneys received and expended. His general allegation that his only means of livelihood "*at present* is derivable from his property in Greenwood, etc., which amount on the average to $43 a month," is too indefinite. From all that appears, it may have been much greater a few months ago, and may again in the near future be much larger; the reduction in income may be of the most temporary character, which would not entitle him to the relief he now seeks.

Judgment

Defendant's counsel appeared to overlook entirely the facts that the plaintiff has to support and educate defendant's three minor children, and that the defendant is no longer required, for business purposes or otherwise, to keep up any establishment—two considerations which enter largely into the question of determining the proportion of income allowable for permanent alimony.

The application will be dismissed with costs, without prejudice to the defendant's right to renew it before me or any other judge.

Application dismissed.

GREGORY, J.
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CARTY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

COURT OF APPEAL
1911
Jan. 10.
CARTY v. B. C. ELECTRIC RY. CO.

New trial—Costs of—Damages—Excessive—Costs of first trial to be paid by plaintiff—Rule 869A.

In an action for damages for injuries sustained in a railway accident, the negligence was admitted and the case tried only on the question of amount of damages. The sum of $15,000, the amount sued for, was awarded, and defendants appealed.

A new trial was ordered, but it was directed that, in the circumstances, the plaintiff should pay the costs of the first trial, IRVING, J.A. dissenting.

APPEAL from the judgment of CLEMENT, J. and the verdict of a jury in an action for damages for injuries sustained in an accident on defendant Company's railway.

Statement

The appeal was argued at Vancouver on the 5th and 6th of December, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A. A new trial was ordered, *Davis, K.C.*, for the appellant, being stopped in his opening argument and not called upon in reply.

Argument

Davis, as to costs: We are entitled to the costs thrown away by the trial. It was solely by virtue of the jury following the request of plaintiff's counsel to give the amount of damages sued for that plaintiff recovered that amount.

Macdonell, for respondent: We sued for that amount, and counsel is quite within his rights in pointing it out to the jury

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and asking them to give a verdict. It surely is not wrong to ask a jury to give what you have demanded in your pleadings.

Cur. adv. vult.

10th January, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal was based solely on the ground that the verdict was excessive. We allowed it on this ground and directed a new trial, but reserved the question of the costs of the abortive trial. Mr. *Davis,* for the defendants, contended that we should not follow the usual rule and make these costs abide the result of the new trial, because defendants, in their pleadings and at the trial, admitted the liability, and only contested the action on the question of the amount of damages. I think the costs of the first trial should be paid by the plaintiff. This case is an exceptional one. In the ordinary course, where a new trial is directed, each party has a chance to get the costs where they are to abide the result. There is no such mutuality in this case. To direct that the costs of the first trial should abide the event is tantamount to saying now that the defendants shall pay them, and this, too, in the face of the plaintiff's insistence upon damages which we have found to be excessive. If we order defendants to pay the costs of the first trial we should, in effect, say that while the defendants were right and the plaintiff wrong, yet the defendants shall pay two sets of costs.

IRVING, J.A.

IRVING, J.A.: In this case we have allowed a new trial on the ground that the damages are excessive. The jury assessed the damages at $15,000. Suppose another jury comes to the same conclusion—as it is possible they may—would we be justified in ordering a new trial? I am inclined to think not: see *Swinnerton* v. *Marquis of Stafford* (1810), 3 Taunt. 232. That is an old case, but in a comparatively modern case the principle is restated by the Court of Appeal in *Ex parte Morgan* (1876), 2 Ch.D. 72 at p. 98, where Brett, J. asserted that where several juries find in the same way, the Courts have never persisted in setting aside consecutive verdicts.

In actions for damages, particularly where the negligence is not disputed, the Court is extremely reluctant to interfere: see

Britton v. *The South Wales Railway Company* (1858), 27 L.J., Ex. 355. The estimate of future damages—necessarily of a speculative character—which the jury would be bound to give (*Lambkin* v. *South Eastern Railway Co.* (1880), 5 App. Cas. 352 at p. 359) if they believed the plaintiff's evidence, is something so uncertain that I, for one, would feel great hesitation, in the event of a second jury finding the same verdict, in saying it was unreasonable.

I put forward these points because I think they meet the suggestion that, as the plaintiff is bound to fail in holding a verdict for this amount in the long run, he should be compelled to pay the costs of the first trial as costs unnecessarily incurred, and therefore thrown away.

IRVING, J.A.

Furthermore, between now and the next trial there may be developments which will establish beyond peradventure that the view taken by the plaintiff's doctor was the correct view, and that the rough estimate allowed for future damages was insufficient.

MARTIN, J.A.: I concur with what has been said by the learned Chief Justice, and add that a similar course was recently adopted by us in *Swift* v. *David* (1910), 15 B.C. 70, where costs were thrown away by the action of a litigant.

MARTIN, J.A.

Since under our British Columbia Rule 869A, we have the power (which the Court of Appeal in England has not) to reduce damages, there is no hope whatever that the plaintiff will be able to hold his present verdict as the result of a new trial. It was not even suggested to us during the argument that there was any probability of the evidence being strengthened in the plaintiff's favour; indeed, according to the record now before us, the inference is to the contrary.

GALLIHER, J.A.

GALLIHER, J.A. concurred with MACDONALD, C.J.A.

Judgment accordingly.

Solicitors for appellant: *McPhillips & Tiffin.*
Solicitors for respondent: *Macdonell, Killam & Farris.*

COURT OF APPEAL

1911

Jan. 24.

REX v. BAXTER AND JOHNSON.

Statute, construction of—Post Office Act—Right of Postmaster-General as to transmission of mail matter—"Sending" letters—What constitutes.

REX v. BAXTER AND JOHNSON

The defendants contracted with an association to transmit to every voter in British Columbia a certain circular of a political nature. They made up a number of parcels for various city centres and sent them by express, consigned to the express company's agents in the respective places, with instructions to mail them in the local post offices. The local or drop letter postal rate of one cent on each letter was affixed.

Held, setting aside the finding of the magistrate, that this procedure of reaching the addressees was an infringement of the rights of the Postmaster-General under the Post Office Act.

APPEAL, by way of case stated, from the decision of the acting police magistrate at the City of Victoria, in the following circumstances:

Statement

The accused, during the latter part of September, 1909, undertook a contract for the Licensed Vintner's Association of British Columbia to print, address, seal, stamp and despatch a two page circular to every voter in the Province of British Columbia. Each circular was put in a separate envelope, sealed, addressed to a different person and stamped with a one cent stamp. On or about the 8th of November, 1909, at the City of Victoria, the accused packed the letters addressed to all persons in each city and town of British Columbia (with the exception of the City of Victoria) in separate boxes, and forwarded such boxes by the Dominion Express Company to an agent in each city, with instructions to open the box and post the letters therein contained. The letters were packed in such a manner that without opening the boxes no one could tell what they contained. The boxes were addressed and consigned to the respective agents as aforesaid, and on arrival were opened by them, and all letters therein contained were mailed in the post office of the city or town in which the agents respectively resided. At Vancouver the post office authorities became aware of the means by which the letters had been sent to the agent there, the letters were intercepted and it was required that the additional one cent postage for each letter be paid, there being some 25,400 letters.

In his reasons for the decision, the magistrate stated:

"As the facts are not in dispute, all I am called upon to decide is whether, upon these facts, the defendants are guilty of the offence charged. This depends on what is the meaning of the word 'sends' in conjunction with the words 'otherwise than in conformity with the Act' (Post Office Act). Although the meaning of a number of words used in the Act is defined by section 2 of the Act, no definition of the word 'sends' is given consequently the intention of the Act, as well as the section in which it appears, must be looked at. In my opinion the intention of the Act, as regards section 136, is that no letter (save the excepted letters especially mentioned in section 66, but which section has no application to the case before me) shall be sent to the person to whom it is addressed, *i.e.*, its ultimate and intended destination, except through the medium of the post office; in other words, that the services of the post office cannot be dispensed with in the ultimate carriage and delivery of such letters to the addressee. I consider the word 'sends' in section 136 refers to the sending by some medium (other than by post) of a letter, with the intention that it shall be carried and delivered to the addressee by such medium without the intervention of the postal service. For instance, if the defendants had given the letters in question to the Dominion Express Company with instructions to carry and deliver each letter to the person to whom it was addressed, and the Company had delivered each letter, there would be no question that an offence would have been committed by both the defendant and the Company under section 136. But, in this case, every letter the subject of the charge against the defendants was, in fact, mailed in a post office in Canada and was delivered by the postal authorities to the person to whom it was addressed. All that can be said is that instead of mailing the letters in Victoria, the defendants mailed them in Vancouver and the other places to which they were sent. I can find nothing in the Post Office Act, neither was it contended by the prosecution, that the Act requires a person to post a letter in any particular post office. In my opinion, if a letter is posted in some post office in Canada and is carried and delivered to the addressee by the postal

Statement

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authorities, it is sent in conformity with the Post Office Act, and therefore section 136 does not apply.

"Suppose the universal two cent postage rate, which obtained at the time of the passing of the Post Office Act, had been in force to-day, and the letters which the defendants forwarded by the Dominion Express Company to another city for posting had all been stamped with two cents instead of one, I am strongly inclined to think that the postal authorities would not have taken any notice of the case, and indeed, would not have considered any offence had been committed under section 136. All the Act requires is that a letter shall be posted, that is, it shall be carried and delivered to the addressee by the postal authorities. A person is not debarred by the provisions of the Post Office Act from posting his letter in any post office in Canada that he chooses and so, now, avail himself of the one cent local rate.

"The fact that the Postmaster-General may lose revenue by the course which the defendants adopted in this case does not, in my opinion, constitute or create any offence under section 136, as charged in the information. This kind of loss of revenue can only arise since the inauguration of the one cent local rate, and therefore such a contingency was not in contemplation at the time of the passing of the Post Office Act."

Statement

He therefore found the accused not guilty, but reserved, on the application of the Post Office Department, the following question for the opinion of the Court of Appeal:

"Whether upon the facts I was right in holding that the said Charles Stuart Baxter and Halcrow Peter Johnson, in forwarding the letters by the Dominion Express Company in the manner proved, did not send them 'otherwise than in conformity with the Post Office Act'; in other words, whether I rightly applied the provisions of the said Act (having regard particularly to section 65 and section 136, sub-section 2) to the facts."

The appeal was argued at Victoria on the 24th of January, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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Langley, for the Post Office Department, submitted that the facts shewed a plain infringement of the law, and the magistrate's decision, if allowed, meant that the most unwarranted interference with the department in handling the mails would be permissible.

Aikman, for the respondents: The statute has not been infringed, as the accused did not adopt this means of sending the letters in question with a view to defeat the law, or evade the payment of revenue to the Crown. The actual sending of the letters, within the meaning of the Post Office Act, did not commence until they were taken from the express office in Vancouver to be deposited in the post office.

Argument

Per curiam: We think the finding of the acting police magistrate was wrong, and that the matter should be sent back for the recording of a conviction and the imposition of the proper penalty.

Judgment

Per MARTIN and GALLIHER, JJ.A.: The expression "send" means that the letter has been started on its destination.

Judgment accordingly.

REX v. ALLEN.

COURT OF APPEAL
1911
Jan. 26.
REX v. ALLEN

Criminal law—Evidence—Accused testifying on his own behalf—Witness at preliminary hearing not present at trial nor absence accounted for—Accused in his evidence referring to such witness—Right of Crown to cross-examine thereon—New trial—No substantial wrong under Sec. 1,019 of the Code.

On a trial for murder, the defence set up was temporary insanity caused by over-indulgence in alcohol. This defence broke down, and the prisoner was found guilty. The killing was actually proved. A witness at the preliminary hearing, who testified to certain threats by the prisoner against the deceased, was not produced at the trial, nor his absence accounted for. Prisoner entered the box and was sworn on his own behalf. In his evidence, he endeavoured to cast suspicion upon the witness referred to, and in cross-examination, counsel for the Crown asked prisoner certain questions as to his recollection of the absent witness's evidence at the preliminary hear-

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ing. This was objected to and ruled out. There was other evidence of threats by accused against deceased, independently of that objected to.

Held (IRVING, J.A. dissenting), that there had been no substantial wrong done the prisoner within the meaning of section 1,019 of the Code, and that he was not entitled to a new trial.

CRIMINAL appeal, by way of case stated by HUNTER, C.J.B.C., for the opinion of the Court of Appeal on an application for a new trial on the ground that certain evidence was improperly admitted. The indictment was one for murder, and a plea of not guilty was entered. As stated in the reserved case, the fact of the killing was proved, and the defence set up of temporary insanity caused by over-indulgence in alcohol, not having been established to the satisfaction of the jury, the prisoner was found guilty and sentenced to be hanged. The evidence complained of was a statement by a witness named Corrigan at the preliminary hearing as to the prisoner having threatened the deceased, and the prisoner saying, *inter alia,* that he had a bullet for the deceased. Corrigan had disappeared before the trial, and counsel for the Crown, without duly accounting for not having produced Corrigan, brought this evidence up. It was objected to and ruled out, but the jury was not, in the charge at the close of the trial. warned to discard this evidence. There was other evidence of threats by accused against the deceased, independently of that in question.

Statement

The appeal was argued at Victoria on the 23rd of January, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Davie, for the accused: It is submitted that the omission to warn the jury against the evidence complained of did the accused substantial injury, and he is entitled to a new trial. This is a stronger case than *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100. There was no attempt made by the Crown to have the witness Corrigan present at the trial, and no explanation whatever of his absence. The jury should, therefore, have been warned against considering the evidence, notwithstanding the fact that it had been ruled out. It is also submitted that the other general evidence is not sufficient

Argument

to shew conclusively that the accused's remarks or threats pointed to the deceased; it is quite capable of a construction pointing to some one else altogether.

Aikman, for the Crown: Apart from the evidence objected to, there is ample testimony in the case to convict the accused, and that, too, even on his own admissions and remarks after the shooting. The defence of insanity, the onus of which was on the accused, broke down completely. In this connection, see *Rex* v. *Harding* (1908), 1 Cr. App. R. 219; *Rex* v. *Jones* (1910), 4 Cr. App. R. 207; *Rex* v. *Atherley* (1909), 3 Cr. App. R. 165. The case of *Reg.* v. *Sonyer* (1898), 2 C.C.C. 501, is distinguishable, because here absolutely no defence has has been made out.

Argument

Cur. adv. vult.

26th January, 1911.

MACDONALD, C.J.A.: The question submitted to this Court is whether or not the condemned man is entitled to a new trial on the ground that improper evidence was admitted at his trial. It appears that one Corrigan was a witness, and gave evidence at the preliminary investigation before the police magistrate. Corrigan was not called at the trial, nor did the Crown comply with the conditions precedent to its right to use Corrigan's said evidence. Nevertheless, counsel for the Crown asked the accused man, who went into the witness box on his own behalf, whether Corrigan had not, in his evidence in the police court, made a statement that he (Allen) had made threats of a very serious nature against Captain Elliston. It was sought in this way to get before the jury damaging statements made by Corrigan in the police court. This evidence ought not to have been permitted to reach the jury. The course pursued is not in accord with the best practice of officers of the Crown charged with the administration of justice. The argument advanced before us that counsel was entitled in this way to test the credibility of Allen cannot, in my opinion, be accepted.

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In considering, however, whether we should grant a new trial in this case, we have to bear in mind the provisions of section 1,019 of the Criminal Code, which reads as follows:

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"No conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

I have carefully read the evidence from beginning to end. It was admitted before us, in argument, that the shooting was done by the condemned man. His defence was that he was at that time temporarily insane, and not responsible for his act. There is no other defence, and unless there is evidence upon which a jury could reasonably find that that defence had been made out, they could do nothing other than convict. The contention before us was that the evidence improperly admitted was introduced by the Crown for the purpose of weakening the defence of insanity; that only a sane man would be likely to make threats of the kind mentioned in Corrigan's evidence, and hence that the jury may have been influenced by this evidence when considering the question of the alleged insanity I have examined the evidence, and I find none upon which reasonable men could come to the conclusion that the prisoner was insane or irresponsible at the time of the shooting, or in fact at any time. This being so, the objectionable evidence has, in this case, done no substantial wrong. If there was no evidence of insanity upon which a jury could properly act, then the evidence of the Crown rebutting insanity was of no importance either way. We must, I think, give effect to section 1,019 and dismiss the appeal.

MACDONALD, C.J.A.

IRVING, J.A.: The frame of the second and third questions set out in the cross-examination is objectionable, in that there is brought before the jury an incriminating statement on oath of a person not called at the trial. The jury would naturally assume that no such questions would be put by the Crown counsel unless there was foundation for them. The inference they would draw was that the prisoner had threatened to kill Captain Elliston by shooting, and that a witness had so testified in the police court. It seems to me that as soon as the first of these two questions was propounded, it was the duty of the judge to interpose, even without any objection on the part of

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the prisoner's counsel. I cannot see how the line of cross-examination could be adopted with a view to test the prisoner's veracity or his memory, but whatever the object of the Crown counsel was, the questions were framed in such a way as to put before the jury a statement by a person not then present to be cross-examined. Would the knowledge that the prisoner had made use of these threats be material? Would it prejudice the prisoner's defence? The defence was that the accused was suffering from the effects of drink, and was more or less unbalanced in his mind when he fired at the deceased. Rebutting that defence to a very great degree would be the question, "Do not the numerous threats of revenge made by the prisoner for supposed wrongs, show a fixed determination on his part to injure the deceased?—and does not this fixed determination tend to dispel the idea of his insanity? At any rate, would not the fact that these threats had been made cause a jury to regard with greater suspicion than they otherwise would, a defence of the kind raised?" These questions are not mere surmises on my part as to how a jury might look at it. They were actually put to the jury (but with reference to threats testified to by the witness Bryan) in the following words:

"Then you have also to consider the evidence shewing malice, shewing that he harboured a grudge against this officer. There is the plain, straightforward evidence of Bryan to the effect that this man said on one occasion, shortly before the happening of the event, that he would do for that fellow yet. And upon being asked his reason for that, he simply muttered—did not give any reason. Now, if you believe the evidence of Bryan, then you have to seriously consider for yourselves whether it is evidence of an insane mind, or whether it is evidence of an evil-minded man who has been corrected by a superior officer, and who is harbouring notions of revenge."

The remark made by the learned Chief Justice in upholding the objection to the line of cross-examination, that he did not think the counsel was justified in putting the question, in my opinion did not go far enough. I think there was cast on the judge a duty of, at least, warning the jury that they should not be influenced by testimony given in the police court, and to dismiss from their minds any suggestion created by reason of the inferences they would draw from the questions put.

In my opinion, it was the duty of the prisoner's counsel to

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have asked the presiding judge to warn the jury against considering the portions read to them as evidence of the fact that prisoner had ever made such a threat. The fact that the prisoner's counsel did not, at the time, ask for such an instruction, has caused me to doubt if the whole matter is not within the curative provisions of section 1,019.

That section is one which places a great responsibility on the Court of Appeal. It, or a very similar section, was considered in *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57. It was also under consideration by this Court in *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100. There a statement was made to the jury by counsel for the Crown of what he proposed to establish in evidence by means of a certain witness. Afterwards, when that witness was called, it was objected that she was not competent to give evidence in the case. This, of course, took place in the presence of the jury, so they saw how it was that the proposed subject of testimony was dropped from the Crown's case.

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I thought that as there had been no protest from the accused, and that as the jury had seen the witness dismissed from the witness box as incompetent, no further reference to the matter was necessary. In other words, as the effect of the statement had been removed before the jury came to consider their verdict, no substantial wrong had been done the prisoner.

In the present case, however, nothing was said or done to remove from the minds of the jurors the effect of the improper statement made to them by the Crown counsel. I have not been able to satisfy myself that no substantial wrong was done to the prisoner within the meaning of section 1,019. Therefore, it is my duty to determine the matter in the prisoner's favour.

MARTIN, J.A.: In my opinion, in the circumstances of this case at least, the evidence objected to was admissible. In any event, as a matter of strict procedure upon cross-examination, it was admissible to test the memory and credibility of the accused, who had gone into the witness box and given a long, rambling and unsatisfactory account of himself and his actions,

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in the course of which he attempted to shield himself from damaging admissions by alleging loss or absence of memory and failure to concentrate his mind. Now, in such circumstances, it was not only the right but the duty of the Crown counsel to test the witness's credibility in any lawful manner, and why he should have been prevented from asking questions about Corrigan in particular, I fail, with all respect, to understand, seeing that the witness himself had introduced the subject of Corrigan in his examination-in-chief, and made an attack upon his evidence in the police court as follows:

"You might tell the jury what you know of this affair. Well, I am afraid I shall be able to tell them very little, because I am of opinion that the man who left here, that is Corrigan—Corrigan came here the same as Trimbly, with a manufactured statement, he was not prepared at the time, apparently, and he came along here with a rambling statement at the preliminary investigation; and I am of the opinion that Corrigan deserted as a consequence of afraid to stand the cross-examination that he might have been subjected to.

"What I want to get at—As a consequence of that, sir,—because he stated, you see, sir, in his evidence, that he had a bottle of whisky that morning.

"Before you come to that now, tell the jury what you know of this affair; you are charged with having, on the first of August—I can remember an explosion taking place by my bed, in that vicinity.

"You remember an explosion? An explosion, a noise.

"In that vicinity? Yes, sir, and that is all . . . . "

And he twice later brings similar charges against Corrigan at the close of his examination-in-chief, whereupon the Crown counsel very naturally opened his cross-examination with the subject of the preliminary investigation that the witness had voluntarily spoken of. The witness had also denied to his counsel that he had any grudge against the deceased, and the matter was specially important, as regards Corrigan, because the witness suggested that Corrigan was implicated in the crime, saying:

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"I have a very strong suspicion that the man Corrigan knows more about this, sir, than anybody else, and that is the reason he deserted, something tells me, sir, that that man Corrigan acted crooked on that morning."

Such being the case, why was it not permissible to ask the witness if he remembered exactly what Corrigan had said in his evidence in his presence, and, to make sure of it, to read from a question put to Corrigan? And if the witness admitted that

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he did remember Corrigan saying that he, witness, made a threat against the deceased, could he not have been asked if Corrigan spoke the truth? And if he admitted that Corrigan had told the truth, could that admission thus obtained by the Crown from the accused's own mouth have been struck out of the record and kept from the jury? Assuredly not. An accused who offers himself for examination to help his cause, must also accept, like other witnesses, the results of cross-examination should he happen to break down under it (which I have not infrequently known to occur in my experience as a trial judge) or be forced to make damaging admissions: if he denied that he had made threats to Corrigan, he was entitled to have that denial recorded in his favour; likewise, if he admitted the threats, the Crown was entitled to have the admission recorded against him. There would be no difference in principle between asking the witness about his recollection of Corrigan's statements made in the police court, or before or after that time, so long as they were made in his presence. The fact that they were made under oath would only affect the weight of credibility in a question of degree; and an illustration, indeed. of my view is to be found in this very case, where the accused was asked, later on in cross-examination, if he had not stated to one of the prisoners named Henderson that he "would cheat the hangman yet if (he) possibly could?" The accused answered "No," and as he was not contradicted, the point was thereby closed in his favour. No objection was taken to the question, and who shall say that it was not a proper one? And in what respect would the principle be altered if Henderson had given evidence at the police court respecting what had passed between him and the accused? Of course, I do not wish it to be understood that if it clearly appeared that counsel, under the guise of testing credibility, was really attempting to get evidence before the jury which should be excluded, it would not be the duty of the Court to interfere at once and protect the accused from such an improper and unfair proceeding, but such is not, in my opinion, the case at bar; the whole evidence must be looked at, and a clear case of impropriety established before the strict rights of a cross-examining counsel can be curtailed.

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But, further, in this case I am of the opinion that, in any event, the accused was not prejudiced by what happened, even if the questions were not admissible. The accused not only flatly denied having made use of the suggested language to Corrigan, stigmatizing the suggestion as "nonsensical," but later, on being re-examined, he returned to the subject and stated that Corrigan's evidence in that respect was a "false accusation." I note here that the learned trial judge is in error in stating in the case, after giving the extract at page 100, that "No further allusion was made to this matter by either of the counsel or myself," because the evidence he referred us to contains the further important evidence I have quoted. This repeated denial, coupled with the fact that the judge stopped the cross-examination, saying that the counsel had no right to mention the statements, and that "you must test him (the witness) by standard methods," would have, in the circumstances, the effect of removing any harmful impression from the minds of the jury. Hence there is no similarity between this case in this respect and *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, wherein certain very damaging statements of the Crown counsel went to the jury without any contradiction by evidence or comment by the Court.

MARTIN, J.A.

On the whole case, I find myself unable to hold that there should be a new trial, because section 1,019 clearly declares that we ought not to set aside the verdict and judgment unless we can affirmatively reach the "opinion" that "some substantial wrong or miscarriage was . . . . occasioned on the trial." That opinion I cannot reach, therefore the proceedings below should stand.

GALLIHER, J.A.

GALLIHER, J.A. concurred in refusing a new trial.

New trial refused, Irving, J.A. dissenting.

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Oct. 29.

GIDNEY v. MORGAN

GIDNEY v. MORGAN AND MORGAN.

County Court—Mechanic's lien—Contractor furnishing labour and materials for fixed sum—Work done under profit-sharing arrangement between contractor and his sons—Posting of receipted pay rolls—Wage earners—Material men—Mechanics' Lien Act, Secs. 6, 15.

A contractor, building a house under a profit-sharing arrangement with his helpers, on completion of the work, not having any wages to pay, is not subject to section 15 of the Mechanics' Lien Act providing for the posting of a receipted pay roll.

Further, where the contractor also supplies the materials, and no notice of claim is filed by any material man within the statutory period, the conditions of section 6, as to notice, do not apply to the contractor.

Statement

ACTION to enforce a mechanic's lien under a building contract, tried by GRANT, Co. J. at Vancouver on the 19th and 20th of October, 1910.

Creagh, for plaintiff.
Price, for defendants.

Judgment

GRANT, Co. J.: This is an action to recover the sum of $1,500 under the terms of a contract entered into between the plaintiff and the defendant Edward Morgan, who, it is alleged, was really acting as agent for the defendant Mathilda Morgan, the undisclosed principal. By this contract, the plaintiff undertook to erect for the defendant, on lands of the defendant Mathilda Morgan, a two storey dwelling house, according to plans provided by the defendant (save and except the painting, plumbing, wiring and heating, which were to be done by the defendants), for the sum of $2,000. Of this sum, $1,000 was to be paid when the roof was on, and the balance on or before the 1st of October, 1910.

The plaintiff also asks for an order that in default of payment forthwith, the lands and premises upon which the said dwelling was, and is being erected, may be sold, pursuant to the provisions of the Mechanics' Lien Act.

At the opening of the trial, it was admitted by counsel for

the defendants: (1) That Mathilda Morgan was, at the time of the commencement of the work, and has ever since remained the owner of the property in question; (2) That the affidavit of lien, as appears in the pleadings, was filed in this Court on the date it bears, the 26th of August, 1910; (3) The lien was duly entered in the Land Registry Office, and is undischarged.

The plaintiff is a builder and contractor. On the 22nd of June, 1910, he entered into a contract with the defendant Edward Morgan, who, it is admitted, was at the time acting for and on behalf of his wife, in accordance with the terms hereinbefore referred to. At this time it does appear that the plaintiff was not aware that the lands in question belonged to the female defendant, and he did not know that Edward Morgan was acting only as agent for his wife. The defendant Edward Morgan, having entered into the contract with the plaintiff as the owner or proprietor, cannot now be heard to say that he was acting solely as agent for his wife: see *Calder* v. *Dobell* (1871), 2 Camp. R.C. 457.

Beyond question, the female defendant was, and is, the owner of the lands in question; that the sketch or plan of the contemplated house was prepared by her; that the very imperfect contract was presented to the defendants for perusal and was afterwards signed by the defendant Edward Morgan; that the defendant Edward Morgan went to Alberta for some months, and the female defendant, who lived in a shack on the rear of the lots in question, was present most of the time as the work progressed, and was the only person to approve or disapprove of the work as it was being done; that the roof was on the building by the 1st of August, and under the contract $1,000 was then payable; that up to this point there does not appear to have been any objection made to either work or material. Everything seems to have been satisfactory.

The plaintiff had as his helpers on the house his two sons, who were not under wages, but who were to receive as their compensation for their work a share of the profits on the job, and besides his two sons, he had no other persons engaged in the building in any capacity.

The materials called for in the contract that the plaintiff

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had to supply were "all nails, glass, locks, hinges and all lumber, laths and plastering," with an indirect reference to paper for the outside of the house, while "all painting, plumbing, wiring and heating" were to be done by the proprietor. By the evidence, the last of the materials supplied on the premises by the plaintiff was about the middle of July.

Notwithstanding the first instalment of the contract price fell due and payable about August 1st—that being the time the roof was on the building—no receipted pay roll was posted on the works. Mr. *Creagh,* for the plaintiff, argues that, inasmuch as there were no wage-earners on the building, section 15 of the Mechanics' Lien Act does not apply. This contention I hold to be sustainable as far as it relates to the help, who certainly had no claim for anything in the way of profits until the house was completed or abandoned, and their proportion ascertained, but the same cannot be said of those who had supplied materials, until such time, at least, as the time for filing their liens had expired, which would be some time about the last week in July in the absence of notice of intention to claim such lien.

It does not appear, from the evidence, that any material man had given any notice to the owner or her husband, as her agent, of an intention to claim a lien for materials, and as the defendant Mathilda Morgan, was about the house so being constructed very frequently, and was living on the same lots all the time, it is not a very violent inference that she was cognizant of the time when the various materials ordered by the plaintiff were supplied.

Judgment

In the view I take of section 15 of the Act, under the facts proved, as to there being no men engaged upon the buildings as wage-earners—they being, at most, silent partners who had no pay day until the contract was finished, and the time having lapsed for filing a lien for materials used in the first part of the contract—there was no pay roll to be made up and receipted and posted, and whenever the time for filing or giving notice of the lien for materials expired, the provisions of the section ceased to form a barrier to the payment of the first instalment, and the same became due and payable forthwith. This, I hold,

was not later than August 1st. At this time, the first instalment was certainly due.

The defendants allege that the work was done in such a defective, negligent and improper manner as to be of no value to the defendants. I have had the witnesses before me and observed their demeanour on the stand, and after looking into the evidence very closely and considering it to the best of my ability, I do not think there exists any good cause for complaint as to the manner in which the work was done and as to the materials. I was not favourably impressed with the evidence of either Bayley or Pinder, called on behalf of the defendants; they impressed me as being exceedingly prejudiced, in fact, to such an extent as to be wholly unsafe to follow. On the other hand, Hintz, Graham and Gray, called for the plaintiff, seemed to be exceedingly careful and only desired to tell the truth. Having had all the witnesses before me, I consider the evidence of the plaintiff and his witnesses is entitled to much greater weight than that of the defendant Mathilda Morgan and her two witnesses named.

From the evidence before me, I find the work was done in a thorough, workmanlike manner, and the materials used were of good quality. [The learned judge dealt with the work and materials.]

Judgment

On the 17th of August, 1910, the plaintiff notified the defendants that he was unable to complete his contract because of the plumbing not being done, and demanded a payment of the first instalment. To this letter no reply was made, the plumbing and wiring were not, and have not been done, and the first instalment of $1,000 had not been paid, though then long overdue. The plaintiff, in my judgment, was justified, in view of the notices he had received from the defendant Mathilda Morgan and her solicitors, and the non-performance by the defendants of the work called for in the contract to be performed by them in the construction of the house and without which the plaintiff could not complete his work, and also of the non-payment of the first instalment, to treat the defendants as having repudiated the contract, and on his part to put an end to it and take the necessary steps to recover for what he had done under it: see *Cort*

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v. *Ambergate, &c., Railway Co.* (1851), 17 Q.B. 127; *Lodder* v. *Slowey* (1904), A.C. 442, 73 L.J., P.C. 82, Wallace on Mechanics' Liens, 64, and cases there cited.

Under the evidence given, the value of the work done under the contract is $1,500, and $500 will finish the house in accordance therewith, that is, as far as the plaintiff's contract is concerned. I therefore find the plaintiff is entitled to recover from the defendants the sum of $1,500 for the work and labour done and the materials provided under the contract, and hold that in this case there was no statutory condition precedent in the way of posting receipted pay rolls of wages to be performed, as there were no wages payable, nor as to materials, as more than ten days had elapsed from the last delivery, and it does not appear any notice of intention to claim a lien therefor had been given. In the absence of a right to claim for wages and materials by labourers and material men, as distinguished from the original contract, the posting of the receipted pay roll is not a condition precedent to bringing the action.

There is no question but that the work done and materials furnished, were done and furnished at the request and with the knowledge and consent of the owner, Mathilda Morgan, and under the said contract.

Judgment

It now becomes a question whether or not the contractor can claim a lien upon the property under the contract, without having given a notice of intention to claim as required by section 6 of the Act. In other words, is he the material man contemplated in section 6, for, if so, such notice must be given. I do not think the original contractor is the material man contemplated in said section. This, I think, is plain from the form of notice given in Schedule A of the Act, in which notice of the amount due for materials delivered to date of notice must be stated.

That is possibly only where the materials are supplied other than under the contract for a lump sum for work and materials. In the contract in question, there was no stated price for either materials or labour. As between the contractor and the man who furnished him with the materials there would be a stated price for the materials supplied, and the material man could

give such a notice as in Schedule A, and must do so if he wishes to claim a lien, but it would not be possible for the original contractor to give such notice, as the contract was for a lump sum. Besides that, the reasons for a notice from a material man to the owner do not exist where the claim is made by the contractor as such.

The owner knows from the start that the contractor has a right of lien, and that indirectly he will furnish the materials, though directly through another, called a material man. Who this other is, the owner does not necessarily know, but he knows that, whoever he is, he has a claim for lien, but in order to keep that claim intact he must, either before or within ten days after furnishing the materials, give the owner notice in writing of his intention to claim such lien. In the absence of such notice from the material man proper, the owner, after the expiry of said ten days after delivery, knows he only has his contractor to deal with as to said materials, and all other claims for lien are extinguished.

The contractor then becomes the only material man the owner has to deal with, and that not for material alone, but for materials and labour combined in such a way as not to be divisable. In the view I take of the law, the provision of section 6 relating to notice from material men, does not apply to the original contractor under the facts as found in this case (see *Duncan* v. *Brunelle* (1909), 10 Q.P.R. 268, cited in Annual Digest, Canadian Case Law (1909), 428), and the plaintiff is entitled to a lien upon the lands and premises hereinbefore described.

Judgment

There will be judgment against the defendants, for $1,500, payable forthwith, and costs, and in default of such payment, all the estate of the defendant, Mathilda Morgan, in the said lands and premises may be sold, and the proceeds applied in and towards the payment of the plaintiff's claim and the costs of this action, pursuant to the Mechanics' Lien Act.

Judgment for plaintiff.

HOWAY, CO. J.

1909

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Nov. 1.

TAYLOR v. PALMER

TAYLOR AND SMITH v. PALMER.

Mining law—House erected in connection with mining operations—Land taken up as pre-emption—Lapse of rights under, and cancellation of pre-emption record—Land subsequently pre-empted by and Crown granted to another person—House as chattel under mining law or improvement on land under Land Act.

In 1888, one Patterson erected a house on a portion of a pre-emption taken up by him in 1886. A small portion of the house, as shewn by a survey made in 1903, was upon adjoining property, at the time of action held by plaintiffs under lease from the Crown. The house was built in connection with a mining venture of Patterson's, which did not prove successful, and before his death in 1891, he became indebted to William Palmer, defendant's testator, to whom the house and mining property were transferred as security. In 1894, one Morton, plaintiffs' testator, obtained a pre-emption record to the same land, and a Crown grant in 1908. Various acts of ownership of the building were exercised by Palmer in the interval, but in April, 1908, defendant went upon the land and tore down and removed the building. It was given in evidence that Patterson had defaulted in his payments under the pre-emption record, and it had been cancelled, but when, or on whose application, was not shewn. By such cancellation, lands and improvements thereon become forfeited to the Crown under the Land Act.

Held, on appeal (IRVING, J.A. dissenting), that the house was a chattel in connection with the mining property, that it did not pass to the plaintiffs' testator under his pre-emption record as improvements on the land, and that, on the evidence, defendant or her husband could not be said to have abandoned the house, although its removal was not undertaken until 1908.

Judgment of HOWAY, Co. J. reversed.

Statement

APPEAL from the judgment of HOWAY, Co. J. in an action tried by him at Kamloops on the 26th of October, 1909. The facts are stated in his reasons for judgment.

D. Murphy, for plaintiffs.
Macintyre, for defendant.

HOWAY, CO. J.

HOWAY, Co. J.: This is an action of trespass to land. The facts are quite clear, although unusual. In July, 1886, one W. D. Patterson obtained a pre-emption record for the fraction of

west half of section 4, township 100, Upper Nicola, and in January, 1889, a certificate of improvements was issued to him therefor. In 1888, the house in question was built. It was not entirely on the pre-emption, a small portion at the rear being upon the adjoining property, which is now held by the plaintiffs under lease from the Crown. Patterson was then interested in a mine in the vicinity, but the venture was not successful, and in 1888 it was closed down, leaving Patterson and his associates heavily indebted to Wm. Palmer, the defendant's testator. Patterson died in 1891. In November, 1894, Alfred Morton, the plaintiffs' testator, obtained a pre-emption record for the same land, therein described as the fractional west one-half of section 4, township 100. The Crown grant therefor was issued to Alfred Morton on the 25th of June, 1908. Prior to the issuance of the Crown grant, *i.e.,* about the 1st of April, 1908, the defendant entered upon the land in question and tore down and removed the house above referred to. The defendant justifies this removal under an alleged leave and licence of Patterson granted to her husband, whose legatee and devisee she is. The defendant also pleaded that the pre-emption record issued to Morton in November, 1894, which is the root of the plaintiffs' Crown grant, was obtained by fraud and misrepresentation, as the land was not then unoccupied Crown land within the meaning of the Land Act, and argued that although she could not attack the Crown grant, yet, as at the date of the removal of the house no grant had been issued, but only the pre-emption record, she could shew that the land at the time Morton obtained it was not open to pre-emption owing to the existence of the earlier pre-emption record of Patterson. At the trial, I did not think the defendant could raise this defence. I retain this opinion: *Hand* v. *Warren* (1899), 7 B.C. 42; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227. In an action of trespass, possession is sufficient, and the defendant is not here entitled to set up a *jus tertii.* The plaintiff offered in evidence in rebuttal a copy of Patterson's pre-emption record duly certified, which shewed it to have been cancelled. The defendant's counsel objected to its admission, but I overruled the objection. No evidence was adduced to shew when or how this cancellation was made.

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Section 24 of the Consolidated Acts, 1888, chapter 66, was in force at the time material to this matter, *viz.*, from 1888 to 1895, remaining without amendment till 1895, chapter 27. This section provides that pre-emptors should pay $1 per acre for the land in four equal instalments, and then proceeded:

"If default be made in payment of any of the instalments according to the terms hereof, the record made of the said land may be cancelled by the Chief Commissioner of Lands and Works, and the land with the improvements (if any) thereon, together with any instalment paid thereon, shall be absolutely forfeited to the Crown."

The first instalment was due by Patterson in July, 1888; the second in July, 1889; the third in July, 1890, and the fourth in July, 1891, or after survey. So that prior to the pre-emption record being granted to Morton in November, 1894, three instalments at least were long overdue, and rendered the record liable to cancellation. Again, Patterson died in 1891, and under section 27 of chapter 66, in the event of his heir or devisee making no application for a Crown grant within one year thereafter, "the Chief Commissioner of Lands and Works may cancel the said record, and all improvements made on the said land and all moneys paid in respect thereof shall be forfeited." Under this section, also, the rights of Patterson were liable to cancellation after 1892.

This was the state of facts when in November, 1894, the pre-emption record was granted to Alfred Morton. Was the land in question unoccupied and unreserved Crown land at that time? If it was not, then Morton was guilty of a fraud, or of an offence which Duff, J. in *In re Bessette* (1906), 12 B.C. 228 at p. 234, calls essentially a perjury, in making the declaration, form two, and the commissioner acted illegally in granting him the pre-emption record. There is no presumption that the commissioner acted dishonestly: IRVING, J. in *Victor* v. *Butler* (1901), 8 B.C. 100 at p. 104; *Earl Derby* v. *Bury Improvement Commissioners* (1869), L.R. 4 Ex. 222 at p. 226:

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"In the absence of any proof to the contrary, credit ought to be given to public officers, who have acted *prima facie* within the limits of their authority, for having done so with honesty and discretion."

So in regard to the conduct of Morton:

"I take it there is no proposition better established than that fraud must be distinctly and clearly proved, that the law will presume in favour of honesty and against fraud":

Ritchie, C.J. in *Beatty* v. *Neelon* (1886), 13 S.C.R. 1 at p. 5. See, too, Parke, B. in *Shaw* v. *Beck* (1853), 8 Ex. 392 at p. 400; *Doe dem Tatum* v. *Catomore* (1851), 16 Q.B. 715.

I must therefore hold that Patterson's pre-emption was cancelled prior to November, 1894, and that Morton's pre-emption was a good and valid one. Patterson's pre-emption being cancelled, any leave and licence which he may have given to the defendant's testator fell therewith. In any event, no leave and licence to tear down and remove the building was proved. Nothing less was of any avail. See cases cited in Addison on Torts (1887), p. 384.

The house in question was about 34 feet by 32 feet, one storey and attic. It was built in connection with the mining business, but in the usual way in the district, *i.e.*, a shelf was cut out of the hillside for it, the rear rested on sills set on stones placed in the ground, the remainder was on posts similarly set, and the earth from the rear was banked up around the base to cover a part of the lower boards. It was used as a dwelling house and assay office.

Without going into all the decisions, I take the liberty of adopting as my own the words of HUNTER, C.J. in *Bing Kee* v. *Yick Chong* (1909), 10 W.L.R. 110 at p. 111: [Reversed on appeal 19th January, 1910.]

"In my opinion, it is a fixture, as it was evidently put there for the purpose of better enjoying the use of the freehold, and the fact that it could, no doubt, be removed without materially injuring the freehold is immaterial. If that were so, a large number of dwelling houses and shops in the Province, which are mostly constructed of wood and built on wooden posts, could be treated as chattels."

The house was one of the improvements to the land, which on the cancellation of Patterson's record passed to the Crown and thence to the plaintiffs' testator on his obtaining the pre-emption record in 1894. The plaintiffs' right to recover here is given by section 101 of chapter 66, which is now section 93 of chapter 113, R.S.B.C. 1897. This section declares that a person lawfully occupying a claim by pre-emption, or under lease, may obtain redress in an action of trespass to the same extent as if he were seized of the legal estate therein.

The only question now remaining is the amount of damages.

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As there was in this case a *bona fide* dispute, a dispute, on the evidence, of long standing, I do not think I should award anything but the absolute pecuniary damage the plaintiffs have sustained, *i.e.*, the amount by which the value of the property is diminished. The evidence on this point is conflicting, but after some consideration I think the sum of $400 is the proper amount of the damages the plaintiffs have suffered. There will, therefore, be judgment for the plaintiffs for $400 and costs.

The appeal was argued at Victoria on the 16th of June, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Macintyre, for appellant (defendant).
Fulton, K.C., for respondents (plaintiffs).

Cur. adv. vult.

1st November, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: That the house in question was built for use in connection with a mine or mineral claim by the owners thereof is not, in my opinion, open to the slightest doubt. Active mining operations ceased in 1888 or 1889; the owners of the mine had become indebted to William Palmer, deceased, the husband of the defendant, and had transferred the house in question, with other mining property, to Palmer to secure the said indebtedness. Afterwards the keys of the house in question, and other buildings, were delivered to Palmer. This seems to have been about the year 1891. At that time, the plaintiffs' testator was living in a cabin situate on land of which he is now the owner, but which at that time was held by one Henderson as a pre-emption, said Henderson being one of the owners or operators of the mine. Mines in this Province are held under title acquired independently of the land laws, so that Henderson and his partner's mining rights were held under a different title to that under which Henderson held the land. In 1894, the plaintiffs' testator obtained a pre-emption record for the land upon which the house in question had been partly built. Said testator and the plaintiff, Letitia Morton, his wife, were aware that these mine buildings were claimed by Palmer. Palmer exercised acts of ownership to the knowledge of the

plaintiffs' testator and his wife, at least up to the date of Morton's pre-emption. Mrs. Morton borrowed from Mrs. Palmer the key of one of the houses, not the one in question, but one in the same situation, either in 1893 or 1894, and promised to return it; Morton suggested to Mrs. Palmer, a year after her husband's death, that the doors should be nailed up to keep cattle out, thus recognizing her interest in the house. It also appears that the defendant was asserting her rights as late as 1897 or 1900. The evidence upon this point is rather indefinite, but it does appear that a letter was written by her to Mr. J. H. Turner, then a member of the Government of British Columbia, asking the permission of the Government to remove the improvements, which would include these houses which were upon the expired mineral claim. It also appears that Morton and his wife, long after he had obtained his pre-emption record, recognized Palmer's ownership of the buildings. It is stated that Morton slept occasionally in the house because he "wanted to hold it." I take that to mean that he was endeavouring to acquire some sort of possessory right to it as against Palmer, but there is no evidence that Palmer or Mrs. Palmer was aware of this. It appears, also, that as late as 1900, Mrs. Palmer and others engaged an engineer to pump the water out of the mine, and that the engineer and his men slept in the house in question. These men boarded with the Mortons, and the plaintiffs set this up as evidence of their use of the house. I would draw a different inference from its occupancy by persons working in the mine at that date.

I think it is also reasonably clear, even from evidence offered on behalf of the plaintiffs, that this house was resting upon the ground and was not attached to the soil so as to make it a fixture. The learned trial judge seems to have thought that this house was built for the better enjoyment of the freehold of the pre-emption. I think the facts are all the other way. The house was built for the working of the mine, and was never intended to be used in farming operations in connection with the pre-emption. The conclusion I have come to is that Palmer was the owner of, or had such an interest in the house as gave him the right to remove it; that it did not pass to Morton when

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he obtained his pre-emption record as part of the improvements on the land, because it never was part of the freehold, and the only question that has given me much trouble is whether or not Palmer, and after his death Mrs. Palmer, can be said to have abandoned this house. Upon the evidence, I cannot say that mere delay in removing it, considering that even as late as 1900 there was a project on foot to continue mining operations there, and that neither Morton nor the plaintiffs appear to have objected to it remaining there, amount to an abandonment. It is also important to note that Morton's pre-emption was not surveyed until 1903, shewing this house partly on his land, a circumstance of which the defendant does not appear to have become aware until 1908.

I would allow the appeal and dismiss the action, both without costs.

IRVING, J.A.: In my opinion, the learned County Court judge was wrong in holding that the house in question was a fixture. The intention (manifested by the builders giving a bill of sale by way of mortgage to Palmer) was that it should be regarded as a chattel. In the interest of mining, I think we should, in a doubtful case, lean to the view that a miner's house is a chattel rather than a fixture.

IRVING, J.A.

I agree in the conclusion that the production of the record with the word "cancelled" was evidence which should be acted upon, and that the proper date of cancellation was fixed as the 7th of November, 1884, *i.e.*, just before Morton pre-empted the land.

The point at issue reduces itself to this: Did Morton, by pre-empting the land upon which this house was situate in 1894, become the owner thereof so as to maintain an action in respect of the demolition of the building, which was admittedly undertaken by the defendant in April, 1908?

The statutes relating to cancellation of Patterson's claim, declare (by section 24) that in default of the payment of instalments, "the land with the improvements, if any, thereon shall be absolutely forfeited." By section 27, that in the event of the death of a pre-emptor, and no person representing him making

any application for the land, the Chief Commissioner may cancel the record, and "thereupon all improvements made upon the said land . . . . shall be forfeited."

It is manifest that these provisions relating to the forfeiture of all improvements on the land were made with a view to the settlement of the country, so that when there had been a cancellation duly made, and a new pre-emptor had entered upon the land, the new occupant would not be involved in disputes with some persons as to compensation for improvements which were on the land when he (the new pre-emptor) took possession, whether placed there by the old pre-emptor or others. The object of the absolute forfeiture was to discourage and put an end to demands of those claiming through or under the old pre-emptor, and to permit the new man to take advantage of what had been declared to have been abandoned.

I think this house, whether it was a fixture or moveable, was "an improvement on the land" within the meaning of the Act, and that when Patterson's pre-emption was cancelled the house was also forfeited, and thereafter no one could claim through or under him.

That it was an improvement on the pre-emption and would be supported by an application for a certificate of improvements by the pre-emptor, seems to have been the idea of Messrs. Henderson, Patterson and Palmer. This is evidenced by the fact that when Palmer objected to lending money on the security of the house, Henderson replied, "Oh, that is all right; Patterson has got his certificate of improvement."

In my opinion, the chattel mortgage given to Palmer does not benefit the defendant. Had she intended to assert any ownership in respect of the building, she ought to have put forward her claim before Morton staked the land. When he put in his posts, he gave notice to the public that he intended to take all within the boundaries of his proposed pre-emption.

The borrowing and returning the key of the adjacent building, which was not situate on the pre-emption, can have no bearing on the ownership or abandonment of the house which was on the pre-emption.

It was suggested that the building, being a chattel, there

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was no more necessity for her to claim it when Morton staked the land than there would have been to claim a horse if it happened to be roaming on the proposed pre-emption. There seems to be a wide difference between the two. No one could possibly suggest that a horse was an improvement, and therefore liable to be forfeited under section 24. It was on account of its being an improvement to the land upon which it rested that it became forfeited.

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On the one hand, I recognize that the Palmers have advanced money on the security of this building, and that the Mortons got it for nothing; but I think the policy of the statute, passed for the benefit of the speedy settlement of lands and designed to prevent any disputes of this kind, ought to prevail.

For these reasons I would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the conclusion that the building in question was a chattel. The only question, then, is as to whether there was an abandonment by Mrs. Palmer. I do not think there was any statutory abandonment. Was there an actual abandonment? From the evidence, we find Mrs. Palmer exercising acts of ownership, such as removing windows and doors from the building in 1892; giving key of bunk house to Mrs. Morton, who promised to return it, and five years later writing to the premier for leave to remove building in question.

A point was raised that the writing of this letter to Mr. Turner indicated that Mrs. Palmer did not think she had the right to remove, but I do not draw that inference. On the other hand, I think it was only an act of precaution on her part so as to avoid any possible dispute with the Government.

Abandonment is a question of intention, either directly expressed or to be gathered from the acts of the party, and on the whole I am of opinion that no intention to abandon has been shewn here. I would therefore allow the appeal with costs.

Appeal allowed, Irving, J. A. dissenting.

Solicitor for appellant: *J. M. Scott.*
Solicitor for respondents: *F. J. Fulton.*

MORRISON, THOMPSON HARDWARE COMPANY, LIMITED v. WESTBANK TRADING COMPANY, LIMITED, *ET AL.*

HUNTER, C.J.B.C.

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Jan. 31.

MORRISON, THOMPSON HARDWARE CO. v. WESTBANK TRADING CO.

Company law—Chattel mortgage by company—Registration of in County Court instead of with Registrar of Joint Stock Companies—Rectification of error—Ex parte order—Party aggrieved thereby—Procedure to set aside such order.

Where a bank, in the ordinary course of business, obtained a chattel mortgage from a company indebted to it, but without the knowledge of other creditors, and there was no evidence of concealment, and registered such mortgage in the County Court instead of with the registrar of joint stock companies, the bank was granted an extension of time within which to register. In an action to set aside the mortgage, it was

Held, that, there being no evidence of *mala fides* or dissimulation on the part of the bank, the transaction should not be set aside.

Semble, if a party aggrieved by an order made *ex parte*, becomes possessed of facts against the making of the order, he should at once apply to the judge who made it to set it aside, and not call upon another judge to investigate the circumstances under which it was made.

ACTION tried by HUNTER, C.J.B.C. at Vancouver on the 31st of January, 1911.

In April, 1910, the Westbank Trading Company was in financial difficulties. Its creditors, however, were not pressing and were inclined to be lenient and give the Company time to extricate itself out of its difficulty. The Royal Bank brought pressure to bear on the Company, and obtained a chattel mortgage from the Company covering all its assets other than book debts. The rest of the creditors did not know of this, and continued to extend credit to the Company. The bank, through an error, omitted to register its mortgage with the registrar of Joint Stock Companies and, instead, registered it with the County Court registrar as in the case of a mortgage from a private party instead of an incorporated company. About July, the other creditors discovered its existence and ceased furnishing goods. Meetings of the creditors were called on sundry occasions to consider the Company's position, and it became

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apparent that nothing could be done. In these circumstances, in the month of October the bank applied, *ex parte,* to MURPHY, J. for an order extending the time for registering the chattel mortgage with the registrar of joint stock companies, as provided in the Companies Act. No disclosure was made to the judge of the insolvent condition of the Company, the only ground of the application being that registration had been omitted through an accidental error. The creditors immediately commenced action to set aside the order made by MURPHY, J. and the registration effected thereunder.

R. M. Macdonald, for plaintiffs.
Griffin, for defendant Bank.

HUNTER, C.J.B.C. [oral]: I do not think I need to hear you, Mr. *Griffin.* In the first place, I should think it would be very difficult to hold that satisfactory proof has been given here that there was any credit at the time of the execution of the mortgage. Mr. Wheeler distinctly states that the arrangement by which the Westbank Trading Company was taken over as the new debtor was not come to until after the execution of the mortgage. But assuming that the proof is sufficient to shew that the plaintiff Company was a creditor at the time of the execution of the mortgage, I can find no evidence whatever of *mala fides* on the part of the bank in connection with the obtaining of the mortgage. On the contrary, it was, as the witness himself described it, a case of obtaining it under pressure, and so far as I can see, the pressure exerted was *bona fide.*

Judgment

It might, of course, have been different if Mr. *Macdonald* had been able to shew to the satisfaction of the Court that this Company was openly and notoriously insolvent to such a degree that the right inference would have been that the insolvency was known to the defendant bank, and that the pressure, so called, was merely an act of dissimulation on the part of the bank. Then it might very well have been that the Court should have set aside the transaction. But the only conclusion I can come to on the evidence tendered here is that the bank,

in the usual course of business, finding itself a creditor to a large extent of a small concern, adopted the practice that is usual with banks in such circumstances, of demanding and obtaining security. I, therefore, am unable to hold that the chattel mortgage was improperly obtained.

Now, with respect to the delay in the registration of this mortgage, I must assume that Mr. Justice MURPHY was correct in making the order on the material that was before him. It would be improper for me, I think, to speculate on what was passing in his mind, and as to what induced him to make the order. It may be that there were facts undisclosed on that application which should have been disclosed. As to that, all I can say is, even assuming he is rightly described as *persona designata,* I can see nothing to prevent him, or any other judge in similar circumstances, from setting aside an order obtained *ex parte* on the ground of concealment of material facts. It is trite learning that *ex parte* orders are taken *cum periculo;* that there must be *bona fides* shewn on the application leading to such an order, and if orders are obtained by concealing material facts, then those orders may be vacated, as far as I know, at any time by the judge who made the order, and it is manifestly appropriate that any party aggrieved by the making of such an order should apply at once, as soon as he comes in possession of facts that would enable him to make an application to the judge that made the order, to set it aside, and not call on another judge of the Court to speculate as to what was passing in the other judge's mind at the time he made the order, or investigate the circumstances under which it was made.

Judgment

The action will be dismissed with costs, without prejudice, however, to any application that the plaintiffs may see fit to make to Mr. Justice MURPHY.

Action dismissed.

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New trial—Assault—Legal wrong—Charge to jury—Damages—Mitigation or aggravation of—Point taken in pleadings and abandoned at trial, but put to jury.

In a clear case of assault of an aggravated character, as here, the jury should be directed that such assault is a legal wrong, and that as a matter of law, the plaintiff is entitled to redress. They should also be directed to consider circumstances in mitigation of damages, and, conversely, questions in aggravation of damages.

Per IRVING, J.A.: Where a point taken in the pleadings has been abandoned at the trial by the party taking such point, the judge in charging the jury should eliminate all reference to the point so abandoned; and where it is nevertheless put to the jury, who may have based their finding in favour of the party on such point, that would be reason for a new trial.

APPEAL from the judgment of HUNTER, C.J.B.C. and the verdict of a jury in an action for damages tried by him at Nelson. The action was brought by the father of a boy who was horsewhipped by the defendant in the following circumstances: The defendant was informed by a hired man that the boy was following, or paying attention to his (defendant's) daughter, aged about 13 years, and, to a companion, had used an expression about her which had been variously interpreted as scurrilous, according to the understanding of different persons. On these facts the defendant, who is a justice of the peace, proceeded to gather evidence, called the boy into his presence, charged him with the alleged offence, and gave him the choice of a criminal prosecution or a horsewhipping. The boy chose the latter, and was ordered in the presence of witnesses to take off his coat, place his hands upon a flagstaff and submit to the whipping by defendant. The boy's parents were ignorant of these proceedings until afterwards. The jury returned a verdict "for the defendant, each party to pay their own costs," and plaintiff appealed on the grounds of misdirection, that the verdict was a compromise one, and of non-direction, in that it was not pointed out to the jury that defendant had assumed to act and use his influence as a magistrate.

Statement

The portions of the charge objected to are set out in the reasons for judgment on appeal.

The appeal was argued at Vancouver on the 10th of November, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

McTaggart, for appellant.

M. A. Macdonald, for respondent.

Cur. adv. vult.

10th January, 1911.

MACDONALD, C.J.A.:

THE ANCIENT WHIPPING POST.

A. E. Watts, J.P., of Wattsburg, spent the whole day taking evidence *in camera,* charging a great, strapping young man with attempting to entice a young girl of tender years, and afterwards boasting of what he could do. The culprit confessed when confronted with the evidence. Mr. Watts gave him his choice of the lash or prison, and for the sake of sparing his parents the disgrace, he chose the lash.

At Wattsburg is a great flagstaff. The culprit was not tied, but commanded to take off coat and vest, and place his hands on the post. Mr. Watts personally applied the lash, each stripe calling forth yells for mercy.

This is the defendant's account of the occurrence in question in this action, given by him to a newspaper reporter a short time after it took place. At this time the plaintiff, a boy between 17 and 18 years of age, was working with his father, building a greenhouse for the defendant at his place, some considerable distance from the town of Cranbrook. The father and son had their own horse and trap to drive out from Cranbrook to defendant's place and back on Saturdays or Sundays. The plaintiff fed and cared for this horse, which was kept in a stable near which was another stable in which the defendant kept a colt a few months old, which was a pet of defendant's daughter, Eva Watts, a girl between 13 and 14 years of age, and two younger children, a daughter and grandchild. These children were in the habit of going to the stable to pet the colt, and the plaintiff, boy-like, gravitated to the same place. The defendant does not suggest that the plaintiff ever said anything to or in the presence of these young girls of an improper or indelicate nature, or ever touched them in any way. The evidence upon which the defendant administered the

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whipping was principally that of one Nelson, a gardener, who told him that the plaintiff on several occasions had been at the stable where the colt was kept at the time Eva Watts and the other children had been there petting the colt, and that on one occasion, when Eva Watts was in the stable playing with the colt, the plaintiff, who was passing by carrying his harness, put the harness down and went into the colt's stable, as it is called, and that the door was closed after him; that shortly afterwards, Mrs. Watts and her married daughter came, calling to Eva; that Eva came out of the stable door in the usual way, but that the plaintiff got out through a back window so as not to be seen by Mrs. Watts. The plaintiff does not deny this, but says that one of the other little girls was either in the stable or at the door, and that when Eva heard her mother call, she told him to get out the back way, as she feared her mother would be annoyed. This is the plaintiff's explanation of the stable incident. The other reason which was insisted upon by the defendant as an excuse for his conduct towards the boy was also told him by Nelson, who says he overheard the plaintiff and another young man named Walker, when they were at work in the greenhouse, talking and laughing. What they are alleged to have said, I will give in Nelson's own words. Examined in chief, he said:

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"Now, did you hear any talking between them? I heard them laughing and looking over to Mr. Watts's house.

"Did you see anyone there? Miss Eva Watts was up on the balcony, and he was waving, moving his hand to her.

"Who was? Slater.

"Did you hear any conversation between them? Well, they were both bent down under this table to mix some putty, put their heads down, stooping down, and they were laughing, and I heard the remark that she was a bit of alright.

"By whom? By Slater."

On cross-examination, Nelson said:

"You thought they were talking about Miss Eva Watts, did you? Yes.

"They did not mention her name, though, did they? They did not mention her name.

"You took it for granted they were talking about her? I expect they were."

On hearing Nelson's story, the defendant, to use the words quoted above, "spent the whole day taking evidence *in camera.*"

He does not claim that he did this in his capacity of justice of the peace, but rather as a father, who felt himself aggrieved on account of what he had been told. Several persons were called in and examined, but the principal evidence is that of Nelson, the effect of which I have already stated. There were some further statements about the boy having been in the neighbourhood of a certain duck house where Eva Watts kept ducks, but no great importance appears to have been attached to this, as it did not appear that the boy even saw her on that occasion. Neither the boy nor his father, who was at the defendant's place at the time, knew anything about this *"in camera"* proceeding until it was over. Having concluded it, the defendant sent his son for the plaintiff, but even then the father was not called in, nor was Eva asked if the boy had been in any way disrespectful towards her. Defendant says plaintiff admitted the whole thing. The stable incident, the boy admits he told defendant, was true, but says he denied the use of the words "bit of alright," and told defendant that he had never heard the expression before. Amongst the witnesses whom the defendant had examined was the young man Walker, in whose presence this expression is said to have been used, and defendant admits that after a long examination to get him to admit that the expression had been used, Walker denied it. The boy was given, to use the defendant's own words, "his choice of the lash or prison." The only persons present were the plaintiff and defendant, and the defendant's two grown sons. The whip was procured. The little party marched out to the place of execution. "The culprit was not tied, but commanded to take off his coat and vest and place his hands on the post. Mr. Watts personally applied the lash, each stripe calling forth yells for mercy." That the whipping was severe, was further evidenced by the defendant's own testimony, where he says:

"Do you recollect how many times you struck him? Oh, about a dozen or so. After the first two cuts he turned and said, 'I can't stand it and I won't stand it.' I said, 'put up your hands or I will give you an extra dose? He put them up again.

"Did you strike him hard? Just about as hard as I could.

"About hard enough, I should think. Did the boy cry? Oh, yes."

The instrument used was a buggy whip, broken off at the

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small end, and the boy claims to have been struck at least once on the ear, drawing blood from it. The case was tried at Nelson before Chief Justice HUNTER and a special jury.

The following portions of the learned judge's charge to the jury are complained of:

"There is, however, a defence which has been called justification in the argument presented by the learned counsel; I do not think that is quite the right term to use. I do not think that, technically or strictly, there should be such a thing as justification of this assault, but there is a defence of excusable provocation, it seems to me. Suppose, for instance, a man steps up to you on the street and, without any cause, calls you a liar in the presence of other persons, I take it there would be excusable provocation on your part for knocking him down if you are able to do it, and *I do not think any ordinary, common-sense jury, would feel it incumbent on* them or would be required to give the person so assaulted damages. That, at all events, is my view of the law. If that view is wrong, the plaintiff or the party aggrieved has his remedy in the Court of Appeal. For instance, in the case of libel, although a man may write a gross libel about another man, still he may be excused. Juries do often excuse such on the ground of extreme provocation; for instance, that he was libelled before he wrote the libel of which he is accused. So that it does not follow that, because a technical breach of the law has been committed, or because a tort, as it is called, has been committed, it is always incumbent on a jury to give damages. They may look at the circumstances surrounding the case, and if it appears to them that there has been extreme provocation, which would induce the ordinary man, acting reasonably and prudently, to act in the way he did, I do not think it is incumbent on them to award damages. So with respect to this so-called justification."

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And again:

"However, it seems to me that what you have to decide is, in a nutshell, this: Whether, having regard to all the circumstances, this man was so provoked, was so naturally and reasonably provoked, that what he did is to be excused. If you conclude that what he did is excusable on the ground of extreme provocation, then, as I say, I do not think it is incumbent upon you to give damages."

Following this charge is the reporter's note:

"The jury then retired (11.50 a.m.). At 5.40 p.m. they handed out the following question:

"Are we to consider further than whether the defendant had sufficient provocation in his action in thrashing the plaintiff?"

After an adjournment to consider the law on the subject, the direction being objected to by plaintiff's counsel, the Chief Justice again directed the jury in answer to their question. He said:

"Now, there are instances, as it seems to me, where, notwithstanding that the plaintiff can shew a tort—that is a technical word for a civil

wrong—it does not necessarily follow that it is incumbent on a jury to award him damages. Such a condition exists, I am satisfied, in the case of libel. If a man publishes a gross libel on another man, being provoked thereto by a prior libel having been published about himself, then I think the law is clear that a jury may, in their discretion, refuse to award any damages to either of those parties. Similarly, as I said this morning, where a man is deliberately insulted on the street, or his wife insulted in his presence, and under the spur of that provocation he proceeds to knock the man down, in such circumstances, if the assault is at all commensurate with the provocation, I do not think it is incumbent to award any damages."

And again:

"While saying that I do not wish you to understand that it is necessary that you come to the conclusion that this boy was in reality guilty of misconduct, it is sufficient for the purpose of this case, in my opinion, if you come to the conclusion that the defendant was led reasonably to believe that he was guilty of this misconduct, though, as a matter of fact, he may not have been. The real position is that this young man compromised himself by his acts. He was in much the same position as a man who thrusts a lighted match into a can of gun powder, and then idly complains that the powder exploded in a northerly instead of a southerly direction, and if that is the real view of the matter, he has procured his own injury and ought not to get any damages."

And again:

"Ask yourselves what you would do in the circumstances. I do not think any two of you would exactly agree as to what you would do. One man might have taken him by the neck and kicked him off the place, another man, under the same conditions, might put him in irons, and another might have done exactly what the defendant here did. So, from that point of view, I do not think too much stress should be laid on the alleged publicity of this castigation, because it all comes down to this: Did the man act under this extreme provocation?—because, if he did not, if he had time to cool down, to get his bearings, then the other question arises, and just so far as his act exceeded the provocation, just so far will you award damages."

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At the conclusion of this charge, the plaintiff's counsel took exception to it, and during the discussion, and in the presence of the jury, the Court further said:

"Some men may act on very slight grounds. The jury have to consider the circumstances and judge of the reasonableness of his belief, and whether he acted as an ordinary, normal, average man would have acted."

And as to publication in the newspaper, the learned judge said in answer to this question of the foreman:

"I am asked to ask whether the question of publication should be considered.

"COURT: As to that, I have already remarked that the defendant is not sued for publication. Of course, there is no doubt that a highly coloured

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account was published, and possibly it would have been much better to have made a bald statement to the effect that the girl had not been interfered with, and let it rest at that. But after all, the whole thing may be considered as one transaction; if Watts brooded over the fact that rumors were going about that his daughter had been injured, the provocation was virtually continued. It seems to me these matters should not be pressed too heavily."

The jury then retired and rendered the following verdict:

"We find for the defendant. Each party to pay their own costs."

Then a discussion took place between counsel and the judge, in the presence of the jury, as to the effect of this verdict and how it should be dealt with, in view of the fact that the jury had no jurisdiction over costs. Counsel for defendant said:

"I object to any further reference to the jury; their verdict has been rendered."

"COURT: I suppose you mean by your verdict that you do not consider the plaintiff entitled to any damages.

"Foreman: I think we would have to go out to consider that matter, if we are not in a position to decide the costs; the verdict has been reached on those lines.

"Mr. *McTaggart* (counsel for plaintiff): The verdict has been given under a wrong belief as to the rights of the jury. If the verdict stands, it should stand as a whole. If it is a proper verdict, it should stand. If it is not, we should have them give a proper one."

After some further discussion:

"COURT: I think if the jury wish to reconsider, they should be allowed to do so.

"Mr. *Macdonald* (counsel for defendant): We forego costs, but I do not wish to waive my rights.

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"COURT: Then in view of Mr. *Macdonald's* statement, the jury have nothing further to consider.

"Mr. *Macdonald*: I agree to carry out their view."

And after some further discussion:

"Mr. *McTaggart*: We want the judgment of the Court on the merits of the case.

"COURT (to the jury): I gather that, in view of what Mr. *Macdonald* has said, you have no wish to reconsider it.

"Mr. *Macdonald*: That is what we undertake—to carry out the recommendation of the jury; we are willing to abide by their recommendation that each party pays his own costs.

"Jury: That would be satisfactory to us."

That the directions to the jury complained of are erroneous, admits of no doubt. It is idle for counsel to suggest that the assault, admittedly committed, was of a trifling character, or that this case is in any way analogous to one of libel. A man may repel physical force by physical force in his own

protection or in that of his wife, parent or child, but even in such case, he must not go beyond the force reasonably necessary to such protection. Even when assaulted, he may not follow up his assailant and strike him after the danger to himself is past. The very limitations placed by law upon the right to repel force by force, shew the absurdity of the arguments advanced in support of the defendant's alleged right to take the law into his own hands, and escape liability therefor on the plea of provocation, either fancied or real, great or little, in circumstances such as are disclosed in this case.

Circumstances of provocation may be given in evidence, and the jury can and ought to consider them in arriving at the measure of damages. But where, as here, there is a clear case of assault, and that, too, of an aggravated character, the jury should be directed that such assault is a legal wrong, and that, as a matter of law, the plaintiff is entitled to redress.

The jury ought to consider, and ought to be directed to consider, all circumstances in mitigation of damages, circumstances which may tend to shew that the defendant did not act as he did out of mere wanton cruelty. Conversely, they ought to consider, and ought to be directed to consider, all questions in aggravation of damages, such, for instance, as the publication of the occurrence in the newspapers, and all acts of the defendant which the jury might consider ought to be visited with punitive damages.

In some other respects, I think, the charge and the manner of conducting the trial are open to grave objection, but I prefer to deal chiefly with the above, because the proposition of law propounded to the jury is so startling and so subversive of even the most elementary principles of English law, that its acceptance by juries would be disastrous.

The verdict could not, in my opinion, stand for another reason. It is clearly against, not only the weight, but against all the evidence, and from this, and from what took place after the verdict was rendered, it is apparent that the verdict was a compromise, and that the jury had not fulfilled its function of deciding upon the merits of the case.

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The appeal should be allowed with costs, and a new trial directed, the costs of the abortive trial to abide the result.

IRVING, J.A.: The defendant resides with his family, consisting of wife and two grown-up sons and two young daughters, at Wattsburg, B. C., where he has a farm and a saw mill, and where he employs a large number of hands, sometimes as many as two hundred, sometimes only thirty or forty, some of whom have their meals in a mess house, which adjoins the defendant's private residence.

Among those employed by Watts in the spring of 1909 was the infant plaintiff, John Ross Slater, who, on the 3rd of April, was nearly 18 years of age. The father of John Ross Slater was also employed by the defendant. He had a horse which, during the daytime, he kept in one of the defendant's barns, and the boy had the duty of looking after this horse. In another barn, the daughter of the plaintiff, then about 14 years of age, kept a colt which she looked after. In that way, the young man became acquainted with the young girl, and to that acquaintance, so formed, this action is traced.

The defendant, on returning home on the 2nd of April, was informed of various things that had been said and done by the boy, and as a result of that information, after making inquiries from the men who were working on the place, he, on the 3rd of April, gave the boy a whipping, and this action for assault followed.

IRVING, J.A.

The jury found a verdict for the defendant, and added a rider to the effect that each party should bear his own costs. The defendant's counsel accepted this proposal, and the judge, HUNTER, C.J.B.C., entered judgment for the defendant, without costs. The plaintiff now appeals. The first ground of appeal is that the verdict is against the weight of evidence.

The rule on this point was laid down in *Metropolitan* v. *Wright* (1886), 11 App. Cas. 152 at p. 153, by the Earl of Selborne, L.C., sitting in the Court of Appeal, in the following terms:

"In many cases, the principles on which new trials should be granted on the ground of difference of opinion which may exist as to the effect of the evidence, have been considered, both in the House of Lords and in the

lower Courts, and I have always understood that it is not enough that the judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the judges in the Court where the new trial is moved for, might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the judge, should return such a verdict."

That principle has been laid down again and again.

As there may be a new trial in this case, I shall not attempt to analyze the evidence with any great minuteness, or express any opinion upon the effect of the evidence further than that which is implied in this judgment.

It appears that the boy had been in the habit of going to the shed where the colt was kept, and there was evidence from which the jury might infer that he had no business to go there; that on one occasion, after he had gone in there when the girl was there, the door closed behind him, and that when the mother of the girl came towards the shed, he, to avoid meeting her or being seen by her, crawled out through a small opening and landed on his hands on the manure that was accumulating under this opening; that one evening he was seen making his way stealthily towards a duck house where the girl was in the habit of going, and that when detected, he stood up erect and moved away towards the dam; that he had been seen waving signals to her, and he had spoken of her to his fellow workman, using an expression with regard to her which some of the witnesses swore carried an imputation of unchastity with it. If the verdict can be upheld on the ground that the defendant was justified in doing as he did, I think there is plenty of evidence to enable the jury to reach the conclusion they did, that is, if their verdict is grounded on the young man's behaviour towards the girl.

The second ground is: That the learned trial judge misdirected the jury, in that he stated that a waiver of a defence of compromise between the defendant and plaintiffs should *not* be taken into account by the jury.

The 7th paragraph of the statement of defence stated that the defendant, immediately after thrashing the boy, notified his father (who now sues as the boy's next friend), and that he,

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the father, then "expressed his full approval of the course taken by the defendant and his concurrence therein, ratifying thereby the act of the defendant," and it was thereupon arranged that the plaintiffs, father and son, should continue in the employment of Watts, and they did remain for some three weeks, when Mrs. Slater, having heard of the whipping, had an interview with Watts. They then left.

In the cross-examination of the defendant, reference was made to the fact that the boy and his father had remained at Wattsburg in the defendant's employ for some three weeks after the thrashing had been inflicted, and the defendant, when in the box, was asked if he wished to elude any responsibility for his assault by taking the ground that Slater, by his conduct, had foregone his right of action, to which the defendant replied:

"I say that, because of the boy's gross misconduct, I was fully justified in thrashing him."

And in answer to the question:

"You do not suggest that Slater, senior, by reason of any bargain he made with you, or anything of that sort, took away any rights the young man may have had?"

The defendant said

"I say there was no bargain, and I would not stoop to make a bargain of that kind. . . . If I have done wrong, I take the consequences. I am either guilty or I am not guilty, and the jury are the judges."

On this point the Chief Justice charged as follows:

IRVING, J.A.

"If you are not satisfied that the claim is *mala fides*, then you have to consider next whether the action is of a trumpery nature, because it is not every cause of action which would justify a jury in giving damages, although there had been a technical breach of the law. For instance, if someone jostles me off the sidewalk, I do not suffer any physical damage or any humiliation in the ordinary sense, and while that person has been guilty of a technical breach of the law—a technical assault—it would not follow that it would be incumbent on a jury to give me damages, for the reason that the law does not care about trifles, and the common-sense view would be that I had no business bringing a matter of that trifling sort before a court and jury. So if, for any reason, you consider the action is of a trumpery character, you will, I think, have the right to take into consideration the delay that ensued in bringing the action, and the fact that the father and son both, or, at all events the father, seemed to think that the castigation was deserved. If it is your view that the boy suffered no permanent corporal injury, but only a certain amount of humiliation which was coming to him in the circumstances, it would be quite proper for you to treat the action as a trumpery action. If, how-

ever, you think the boy was subjected to unnecessary humiliation or an unduly severe thrashing, then you have to go on and consider the case further."

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Having regard to the very explicit stand taken by the defendant, I do not agree with the learned Chief Justice that there was any necessity for him to refer to the matter again. In my view, a judge, in charging a jury, should eliminate all reference to matters abandoned during the trial, and endeavour to get to the real, living issues. The defendant said, in effect, that the question of waiver or compromise was not an issue. Nevertheless, it was put to the jury, and I am not able to say that the jury did not base their finding for the defendant on this very point. If they did—I do not think they were at liberty to do so—that ground has been abandoned.

IRVING, J.A.

This alone would, in my opinion, entitle the plaintiff to a new trial, as the defendant, having abandoned that issue, the plaintiff was entitled to get a finding based on the other issues.

Having reached the conclusion that the plaintiff is entitled, on this ground, to a new trial, I have not looked into the other matters.

GALLIHER, J.A.

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

New trial ordered.

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IN RE HARRY HOWARD, DECEASED.

Settled Estates—Property registered in name of widow under deed from deceased—Cross deed from wife to husband not registered—Order confirming sale by widow as administratrix—Appeal by guardian of infant interested—Jurisdiction.

Deceased, who left a widow and one child, was at the time of his death the owner of some four acres of land. The child was taken in charge by a Children's Aid Society. Letters of administration were issued to his widow. She subsequently obtained registration of the property in her own name, based upon a conveyance to her from her late husband, and on the title so obtained entered into an agreement for sale of the property, receiving a payment of $500 on account of the purchase price. It afterwards developed that there had been cross deeds between the husband and wife, but that that from the wife to the husband had never been registered. She then applied to MORRISON, J. for, and obtained authority to carry out the sale as administratrix. The Children's Aid Society appealed on behalf of the infant.

Held, on appeal, that the learned judge had not jurisdiction to make the order confirming the sale.

Statement

APPEAL from an order made by MORRISON, J. at Chambers in Vancouver on the 2nd of November, 1910, in circumstances briefly set out in the headnote.

The appeal was argued at Vancouver on the 2nd of November, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

L. G. McPhillips, K.C., for appellants: We say that this was an application to ratify and confirm a sale by a person who admittedly had no title. The only person entitled to apply for authority to sell the land under the Settled Estates Act would be the guardian of the infant. Deceased left no debts which would call for or justify the sale of the land, and a sale is not necessary for the support of the child, for it is being cared for by the appellant Society. In any event, the child's future should not be deprived of the benefit of the increase in value of this land which time will bring.

Davis, K.C., and *Bond*, for respondent: The property was

registered in the name of Mary Howard. She, not as administratrix of the estate of Harry Howard, deceased, but as Mary Howard, entered into an agreement for sale. *Inter partes* interests are not applicable to third parties who have had no notice. The fact that the interests of the infant and widow are involved is a matter for the Court, but as to the purchaser, he has a right, in view of the records in the land registry office, to insist on his contract being performed.

Argument

McPhillips, in reply: It is the purchaser who is really making the application here, and his only right in the circumstances is to recover his money. He had notice and took a risk in selling again.

Cur. adv. vult.

10th January, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Harry Howard died on the 28th of March, 1906, leaving him surviving one child, a daughter, and his widow, Mary Jane Howard. Letters of administration were granted to the widow on the 14th of June, 1906. In 1907, the stipendiary magistrate for the County of Vancouver, on the application of the Children's Aid Society, made an order, directing that the said Society should have the custody of the child. Harry Howard, at the time of his death, was the owner of about four acres of the northerly part of the east half, block 6, district lot 50, group 1, New Westminster District. The widow, now Mary Jane Sheard, on the 31st of May, 1909, presented a petition in the Supreme Court of British Columbia, in which she recited that, after the granting of letters of administration to her, she applied to the district registrar of titles at Vancouver to register the title to the said four acres; that subsequently she received from him a certificate of title in her own name for the same; that not being a business woman, she applied to a friend of hers for information with regard to the title, and that this friend, after a search in the land registry office, advised her that the property was registered in her name. That on the 1st of June, 1908, being of opinion that she could deal with the property, entered into an agreement of sale with one William Miller for $4,000, and received a first payment of $500; and afterwards

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she became aware of some doubt as to her title to the property, and consulted her solicitors, who advised her that the property belonged to the estate of her late husband and that she was only entitled to deal with the same as administratrix of the estate. She therefore prayed that the Court should direct that she be at liberty to carry out, as administratrix, the said sale to Miller and execute a conveyance thereof, paying the purchase money into Court pending any further order concerning the disposition of the same. The petition is headed, "In the Matter of the Settled Estates Act." The matter came before MORRISON, J. who, on the 26th of August, 1909, made an order which is headed, "In the Matter of the Trustees and Executors Act; In the Matter of the Administration Act, and In the Matter of the Settled Estates Act," in which he confirmed the sale to William Miller, and ordered that the property vest in the administratrix for the purpose of executing the necessary conveyance, and authorizing her to execute such a conveyance. There was no evidence before the learned judge of the value of the property except her statement in the petition, that the price obtained for the property sold under the agreement with Miller is good value for the same, as the petitioner is advised and believes.

MACDONALD, C.J.A.

The Children's Aid Society, the appellants herein, are the guardians of the little girl, duly appointed, and the Society claims to have the said order set aside. On the argument, Mr. *Davis,* for the respondent, Mrs. Sheard, admitted that the matter could fall only within the Settled Estates Act, and relied upon section 27, and strongly urged upon us that a certificate of title having been issued to the respondent, and Miller, not being shewn to have had notice that she was not what the certificate declared her to be, the actual owner, was entitled to enforce his agreement, notwithstanding that it afterwards appeared that the vendor was not in reality the owner. If Miller has any such right, it is open to him to pursue his remedy. It seems to me that what is attempted here is, by a side wind, to relieve Miller from the necessity of shewing that he is a *bona fide* purchaser without notice. The application here is being made, not in the interest of the petitioner, but in the interest of Miller, he keeping in the background. Assuming that the Court

in a proper case has power under the Settled Estates Act to sanction the sale of the property, which belongs to the infant represented by her guardian, subject to the life interest of the petitioner in one-third thereof, the application should be made by the proper party, and I do not think the petitioner is the proper party; at all events, she is only one of the proper parties that ought to have been before the Court. Then, too, the Court would only sanction a sale upon being satisfied that it was in the interests of the infant or of all parties concerned, and upon satisfactory evidence that the price offered was such as ought to be accepted. We have no evidence in this case that it was in the interests of the infant, or of the infant and the petitioner, that the property should be sold, nor have we any evidence that the price at which it was sold to Miller was the best price obtainable, or was a price which ought to have been accepted. The only evidence on the latter point is that above recited, which, to my mind, is wholly insufficient.

MACDONALD, C.J.A.

I have referred to the style of cause in the order merely to point out that when an application is made under a statute, the case should not be complicated by dragging in by the ears other statutes which have nothing to do with it.

I think the appeal should be allowed, and the order of MORRISON, J. set aside with costs here and below.

IRVING, J.A.: The application was to confirm a sale made "out of Court" by the administratrix. I think the order should be set aside. As the Imperial statute of 1877, from which our statute was copied, with the exception of a few sections, was in force in England for only four years; we can get but little help from the English reports as to its working. But there are a few cases which bear on the present case. In 1878, Malins, V.C. made an order for sale of the property out of Court by public auction or private contract, it having been stated by counsel for the petitioner that a beneficial order had been made for the purchase of part of the land. It is worth noting that the registrar of the Court, before the order was drawn up, requested the matter to be mentioned again to the judge.

IRVING, J.A.

In 1882, a petition was presented to Hall, V.C. in *In re*

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Harvey's Settled Estate (1882), 21 Ch. D. 123, for the sale of a settled estate, praying that, subject to a reserve price which had been fixed by a surveyor, the trustees might be authorised to sell the property out of Court by public auction or private contract. The petition was filed by the beneficiaries, and the trustees were respondents.

"There was evidence to shew that an immediate sale would be beneficial, and it appeared that a sale out of Court was desired in order to avoid the delay which would take place in settling the particulars and conditions, and advising on the title by the conveyancing counsel to the Court."

Hall, V.C. said, p. 127:

"I have already, in *In re Simpson's Settled Estates* [unreported, February, 1879] declined to follow *In re Adams' Settled Estates* [(1878), 9 Ch. D. 116]. The 16th section of the Settled Estates Act, 1877, provides that every sale 'shall be conducted and confirmed' in the same manner as sales of land sold under a decree of the Court, and the conclusion to which I came in the case I have referred to was that a sale out of Court was not within the terms of the statute."

In my opinion, the conclusion of Hall, V.C. is correct, and the learned judge had no jurisdiction under this statute in making the order appealed from, nor can I find authority for the order under any other statute.

There are other reasons for holding the judge had no jurisdiction to deal with this property under the Settled Estates Act. The land was not "settled estate" unless it fell within section 2. If it fell within section 2 the widow or administratrix could make the application: see section 27.

IRVING, J.A.

Then it was argued by Mr. *Davis,* who appeared for the purchaser as well as the administratrix, that as the property was registered in her name, he, the purchaser, had a right to insist on the sale going through. I express no opinion on the point, but the duty of the Court below (if it had jurisdiction) was to consider the interests of the infant, and in that connection it may be well to observe that the old Chancery practice required a guardian to be appointed for the purpose of representing the infant on the application, the consent of the testamentary guardian not being sufficient.

As to impeaching a sale of this nature after the sanction of the Court has been obtained, it is of the greatest importance that sales made with the sanction of the Court should not be lightly

set aside. Many instances can be found of irregularities which have not been allowed to prevail—why should they, if all persons interested are before the Court?—but in this case the widow has been wrong throughout, and as the purchaser has endeavoured here and below to support her action, I think we should make him liable with her for the costs of this appeal, and also the costs of the application below.

MARTIN, J.A.

MARTIN, J.A.: I concur in the view that the order appealed from cannot stand because, first, in the circumstances, there was no jurisdiction to make it; and, second, in any event no proper foundation was laid to support it.

GALLIHER, J.A.

GALLIHER, J.A.: Section 3 of chapter 171 R.S.B.C. 1897 (Settled Estates Act), declares lands of infants to be settled estate under the Act. By section 20 of the same Act, the Court may authorise a sale of the whole part of any settled estate, and section 27 of the Act defines the persons who may, by petition, apply to the Court to exercise the powers conferred by the Act. Harry Howard died in March, 1906, leaving him surviving his widow, Mary Jane Howard, and an infant daughter. It appears that prior to his death, Harry Howard had conveyed to his wife a certain piece of land in the district of New Westminster, and that she had reconveyed to him during his lifetime, but neither of these conveyances was registered. Mary Jane Howard was appointed administratrix of the estate of her deceased husband, and subsequently thereto applied to register the said lands in her own name (either overlooking or withholding the reconveyance from herself to her husband), and obtained a certificate of title thereto in her own name on the 19th of February, 1908. Afterwards, in June, 1908, she sold the property to one William Miller under an agreement of sale. On the 31st of May, 1909, Mary Jane Howard applied to the Court, by petition, for confirmation of the sale to Miller, and on the 26th of August, 1909, MORRISON, J. made an order, confirming the sale and vesting the property in the said Mary Jane Howard, as administratrix, for the purpose of executing a conveyance to Miller. From this order the Children's Aid

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Society of the Church of Our Lady of the Holy Rosary, as guardians of the infant daughter, and the said infant daughter, appealed.

It appears to me the order should not have been made. The material upon which it was granted is, in my opinion, insufficient, and while it may very well be that Mary Jane Howard could join with the other party interested in a petition under section 27 of the Act (being entitled to a one-third interest), I do not think that she can alone, without the consent and in direct opposition to the wishes of the other interested parties, maintain this order. The property belonged to the estate, and she had no right or authority to dispose of it. I do not think Miller has any status in this proceeding, and cannot here apply the provisions of the Land Registry Act. I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *McPhillips, Tiffin & Laursen.*
Solicitors for respondent: *Wilson, Senkler & Bloomfield.*

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Practice—Discovery—Company—Examination of officer—Order XXXIA.

A witness, an officer of a company, being examined under Order XXXIA., may not be ordered off the witness stand to inform himself of the knowledge of his fellow servants or agents touching matters in question in an action.

IRVING, J.A. dissenting.

Statement

APPEAL from an order made by CLEMENT, J. at Chambers in Vancouver on the 20th of September, 1910. The manager of the defendant Company attended for examination before the registrar. There were two questions asked which he could not answer from personal knowledge, and the examination was concluded without objection or reservation on that point by plaintiff. An order was then obtained, directing him to attend and answer the questions, but plaintiff's counsel did not attend. A second appointment was made under this order, but the witness did not attend, and plaintiff then applied for an order striking out the defence or, in the alternative, that the witness be attached. CLEMENT, J. made an order, directing the witness to attend for further examination, costs of the last application to be defendant's costs in any event. Defendants appealed.

The appeal was argued at Vancouver on the 15th and 16th of November, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Davis, K.C., and *Pugh,* for appellants (defendants): We say that the questions asked were such that the manager of the defendant Company should not be required to answer in any event; he had, in fact, answered them to the best of his knowledge and belief, and no objection had been made to his answers. Further, having attended pursuant to a second order, and plaintiff's counsel having failed to attend, there should not have been any order made directing him to attend a third time.

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Woods, for respondent (plaintiff): The order made was never exhausted, and at all events, we submit it was the duty of the Company to produce an officer who could give the desired information.

Davis, in reply: The system here is that the examination is to be the same as at a trial, therefore the witness could not be compelled to give hearsay evidence.

Cur. adv. vult.

10th January, 1911.

MACDONALD, C.J.A.: This is an appeal on a point of practice. Walter N. Nichol, the defendant Company's manager, was examined for discovery under Supreme Court Order XXXIA., which is copied from the Ontario rules. This provides for the oral examination of an officer of a corporation. The rule provides that the officer "may be compelled to attend and testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness." Mr. Nichol was asked to answer questions with respect to which he had no personal knowledge, but which probably were within the knowledge of other servants or agents of the defendants. The examination was closed without any objection to the want of knowledge of the deponent, but subsequently an order was obtained from a judge of the Supreme Court requiring Nichol to attend and make better answers to those questions. From that order defendants appeal.

MACDONALD, C.J.A.

Our rules provide two distinct modes of obtaining this kind of discovery, the one by means of written interrogatories, following the practice in England, our rule 347 being a copy of the English rule; the other under said Order XXXIA.

The practice in England is well settled that the officer selected to answer the interrogatories must inform himself, if necessary, by inquiries of the other servants or agents of the corporation, of facts of which, in the course of their employment, they had obtained a knowledge. This, of course, is confined to relevant matters. This practice is based upon the general principles of equity as applied to discovery. The rule is laid down in Bray's Digest of Discovery, p. 5, article 18. There is no rule in England allowing oral examination such as obtains here

and in Ontario, and on the other hand, there is no rule in Ontario permitting the delivery of written interrogatories, such as obtains here and in England. Nevertheless, in Ontario, the English practice requiring the deponent to inform himself, has been adopted and applied under the rule of which our order XXXIA. is a copy; see *Clarkson* v. *Bank of Hamilton* (1904), 9 O.L.R. 317; and *Harris* v. *Toronto Electric Light Co.* (1899), 18 Pr. 285, which is a judgment of Meredith, C.J. at Chambers.

We are now called upon to declare the practice which ought to prevail in this Province. I have no doubt that the English practice should prevail here, where discovery is sought by means of interrogatories under our rule in that behalf. On the other hand, I do not think that that practice is applicable on the point here involved, where discovery is sought by oral examination under Order XXXIA. Even if we had not the English rule of practice in addition to that in the above mentioned order, I should hesitate to follow the Ontario practice. The oral examination is expressly declared to be subject to the rules of examination applied to a witness, and I do not think that a witness may be ordered off the witness stand to inform himself concerning the knowledge of his fellow servants or agents, so that he may return and give evidence based on the information so obtained.

But apart from the strict interpretation to be placed upon these words, I am of opinion that we ought not to lay down a practice which is obviously expensive and inconvenient, unless, indeed, there are very cogent reasons why we should do so. There is no difficulty in the way of the English practice as applied to interrogatories. The deponent has before him specific questions (approved beforehand by a judge), and time to acquire the obtainable information which will enable him to answer the questions. The case is different, it seems to me, where the examination is oral. Questions may be asked which the witness could not reasonably have anticipated. The result of the introduction of such a practice would be that the examination would have to be adjourned, perhaps more than once, and serious delay and expense incurred. But in any case, in this

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Province parties have their choice, and may pursue a mode of discovery best suited to the nature of the case and character of the parties from whom discovery is sought. There is no reason why we should strain the rules to meet conditions which are fully provided for by our dual practice.

I do not deal with the other point raised on the appeal, namely, whether in the circumstances of this case, the order requiring Nichol to attend for further examination should not have been made, or if the first order should have been made, whether the second should. In view of my opinion on the main question, it is unnecessary to express any opinion upon this.

MACDONALD, C.J.A.

I think the appeal should be allowed and the order complained of discharged. There should be no costs here or below, as the order complained of appears to have been made in pursuance of what was understood in Vancouver to have been the practice.

IRVING, J.A.: Rule 370c requires the person to be examined to testify upon the same terms and subject to the same rules as a witness. Rule 370k. prescribes a penalty if the person to be examined refuses to answer "any lawful question put to him." Rule 370q. provides that the examiner shall, if need be, make a special report to the Court touching the examination and the conduct of the witness, and thereupon the Court may deal with the matter.

IRVING, J.A.

The main question in this appeal is: Is the manager of a corporation, being examined under Order XXXIA., bound to inquire from his subordinate officers information relating to the matters in question, in the same way and to the same extent that a party being interrogated under the provisions of Order XXXI. is required to do, according to the practice laid down by the Court of Appeal in *Bolckow* v. *Fisher* (1882), 10 Q.B.D. 161.

The Ontario practice requires that the officer being examined shall prepare himself by obtaining full knowledge of all relevant facts, so that the examining party may get the information. That seems to me a reasonable and convenient rule, and one which should be adopted, if possible.

The difficulty is raised by the use of the expression in Rule

370c. (1) "He shall testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness"—and it is said that a witness is not required to go away and ascertain a lot of facts of which he knows nothing—but I think that full effect may be given to those words by regarding them as laying down directions for the conduct of the examination itself, and not to the preparation for it, nor as to the principle which should govern the scope of it.

We do not find in the rule relating to discovery by means of interrogatories, any direction that the party to be examined must seek the information from his officers or agents. Why, then, should we look for such a direction in discovery by means of *viva voce* examination?

Looking at Rule 11 of Order XXXI., we see that in England they resort, if necessary, to oral examinations. On such examination, there is no doubt but that the party examined under that order would not be at liberty to shelter himself from answering the question by saying he himself did not know, but his agents would. He, on such *viva voce* examination, would be required to answer according to the rule laid down in the *Bolckow* case. The reason is simple. The system laid down by the Rules of Court in England—our Rule XXX.—was to afford the litigants the same information as they were able to obtain under the old Chancery practice: see *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. 644 at p. 657. Under the old Chancery practice, they were entitled to a discovery upon oath to the best of the knowledge, information and belief of the defendant of the facts upon which he relied to establish his case.

Our Rule XXXI., copied from Ontario, is an alternative system for obtaining discovery, and, I think, entitles a litigant to the same information as fully as the English rule.

There may be some difficulties and inconveniences in working out the rule I would follow, but these arise under the English practice. These difficulties will be few and far between if the examining party will remember that his examination should not be oppressive, nor should it exceed the legitimate requirements of the occasion, and the party to be examined will bear

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in mind that he must be prepared to answer everything which can be fairly said to be material, to enable the other side to maintain his own case or destroy the case of his adversary.

I think, on the general principles I have referred to, that it was Mr. Nichol's duty either to have informed himself before going to the examination, so that he could definitely answer the two questions, or have offered to furnish the information at a subsequent examination, or have given an undertaking to furnish an admission on the point. One of the main objects of the rules for discovery is to narrow the issues as much as possible before the trial is reached.

Coming, now, to the particular case, the two questions were put to Mr. Nichol on the 26th of May, 1910. No objection was then taken to the insufficiency of the answers, nor was he pressed under Rule 370m. 3, or Rule 370q. The examination passed off. On the 23rd of June, an order was obtained on summons, directing Mr. Nicol to attend at his own expense and answer the questions. Under that order, an appointment was taken out for the 6th of September, 1910, and served on Mr. Nichol, who, in obedience thereto, attended at the time and place, but no one appeared on behalf of the plaintiff.

A second appointment was then obtained for the 12th of September, and served, but Mr. Nichol did not attend, although he had been tendered and accepted the usual witness fee when served with the appointment and a subpœna.

IRVING, J.A.

The plaintiff then applied at Chambers to strike out the defendants' statement of defence, because of the non-attendance of Mr. Nichol on the 12th of September, or in the alternative, that Mr. Nichol be attached, or in the further alternative, that a further order for examination of Mr. Nichol be made. The learned judge made an order for further examination, but not at Mr. Nichol's cost, and made the costs of the application the defendants' costs in any event.

I think that the order was right, with the exception, possibly, that the defendants were entitled to receive any costs occasioned to them by the plaintiff not attending on the 6th of September, in addition to the costs of the application.

The failure on the part of the plaintiff may have been a slip;

I infer from the disposition of the summons that the judge so thought. The judge in Chambers has a wide discretion in matters of this kind, and it seems to me it was a case in which the defendants could be compensated by payment of costs. The statement of Bramwell, L.J. in *Collins* v. *Vestry of Paddington* (1880), 5 Q.B.D. 368 at p. 379, as to the principle upon which he proceeded when sitting in Chambers and dealing with applications which became necessary by reason of mistake, error or carelessness, is instructive.

In my opinion the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. concurred with MACDONALD, C.J.A. in allowing the appeal.

Appeal allowed, Irving, J.A. dissenting.

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

Solicitors for respondent: *Brydone-Jack, Ross, Price & Woods.*

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SEMISCH v. KEITH

SEMISCH v. KEITH AND KEITH.

Practice—Evidence—Lost deed—Secondary evidence of—When admissible—Order XXXIA., Marginal Rule 370r.

In an action for redemption brought by the representative of a deceased mortgagor (one of two co-mortgagors) against the assignee of the original mortgagee, said assignee being also the wife of the still living co-mortgagor, who was also a party defendant, the latter was examined for discovery. On such examination he deposed to a settlement of accounts between himself and his co-mortgagor in 1892, under which he assumed the payment of the mortgage in question. He also deposed that as part of such settlement he received a deed of the property in question, which deed he had lost. At the trial the plaintiff put in evidence the first part of the above deposition.

Held, that the second part should also go in under Order XXXIA. Marginal Rule 370r.

Held, further, that on this evidence, corroborated by a letter written by the deceased co-mortgagor to the tax collector (as set out below), the action was rightly dismissed at the close of the plaintiff's case.

Judgment of CLEMENT, J. affirmed.

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 10th of January, 1910. About the year 1890, the defendant, James Cooper Keith, and the late Otto Semisch were jointly interested in a number of properties in North Vancouver. Some of the properties stood in the name of Keith and others in the name of Semisch. In addition to this, both of them had certain other properties absolutely. On the 1st of December, 1891, a mortgage was given by Keith and Semisch to the late J. D. Pemberton to secure $12,000 and interest; 480 acres were included in the mortgage, 400 acres belonging to Keith and 80 acres being the north 80 acres of district lot 471, group 1, New Westminster District, belonging to Semisch. These 80 acres had been bought by the late Semisch from one Forbes, and he (Semisch) was the registered owner. In 1892, a settlement of accounts between Semisch and Keith appears to have been made, and Semisch gave ten quitclaim deeds to Keith for a number of properties, not, however, including the 80 acres above mentioned, which stood in

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the name of Semisch up to the time of the action. Semisch died in 1905, and his widow, the plaintiff in the action, was appointed administratrix in 1909. On the 16th of May, 1906, the executors of the late J. D. Pemberton assigned the mortgage to the defendant Keith. After her appointment as administratrix, the plaintiff asked for an account of the moneys, if any, due under the mortgage, and no account being forthcoming, the present action was brought by her for redemption, Mrs. Keith being made defendant as assignee of the mortgage in question, and Mr. Keith being made a defendant as a necessary party, being one of the joint mortgagors. The action was in the usual form of a redemption action. The defendant pleaded that the late Semisch had on or about the 22nd of November, 1902, abandoned his interest in the said 80 acres in question to the defendant Keith, and that Keith had since paid the taxes on the property. At the trial, the plaintiff called a witness to prove the indentity of the plaintiff as the wife of the late Otto Semisch, and on cross-examination of said witness, the defendant's counsel produced a letter from the late Otto Semisch to the then tax collector of North Vancouver, dated the 10th of July, 1896, in which he referred to tax accounts of a number of properties, including the 80 acres in question, and stated that he had no longer any interest in these properties, having abandoned the same in favour of J. C. Keith, and that Mr. Keith would pay the taxes in the future. At the end of the letter, he stated that all the above properties were registered in the name of Keith. The plaintiff then put in the certificate of title, shewing Semisch as the registered owner of the property, the mortgage to Pemberton and the assignment to Mrs. Keith, and then read part of the evidence of the defendant Keith on discovery, shewing that in the settlement Keith had assumed the payment of the mortgage in question, and that he had obtained a release from Mrs. Keith, and the release of the mortgage had been filed since by him as attorney for Mrs. Keith, which it was admitted he was.

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The defendant's counsel then asked to put in part of Keith's evidence, in which he claimed that he had obtained a quit-claim deed of the 80 acres in question, but that it

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was lost. This was objected to, but admitted by the trial judge as, in his opinion, it was so connected with the part put in by plaintiff that such last mentioned part ought not to be used without the qualification of it contained in the passages in question. See Order XXXIA. Marginal Rule 370r. At the close of the plaintiff's case, the trial judge dismissed the action, basing his judgment on the letter addressed to the tax collector, Keith's statement that there was a lost deed, and what he called the staleness of the claim. From this judgment the plaintiff appealed.

Statement

The appeal was argued at Victoria on the 16th of June, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

A. D. Taylor, K.C., for the appellant: The trial judge was wrong in admitting the defendant's evidence on discovery on his own behalf, and particularly the statement as to there having been a lost deed. The preliminary requirements to admit secondary evidence of a lost deed had not been complied with. The trial judge was also wrong in his view of the letter of July 10th, 1896, and in view of Semisch's death, the letter must be interpreted strictly, and if taken as a whole, the statement as to the registration of the properties at the end qualified the reference to them at the beginning of the letter. This evidence, even if the letter were admitted, could not take the place of a conveyance or oust the certificate of title. Further, the judge was wrong in his view of there being laches and the claim being a stale one.

Argument

On the point that the statement of the defendant Keith's examination for discovery should not have been admitted, the following authorities were cited: *Lyell* v. *Kennedy* (1884), 27 Ch. D. 1 at pp. 15 and 29; Holmested & Langton, 3rd Ed., pp. 668 and 669; *Prince* v. *Samo* (1838), 7 A. & E. 627.

As to the requirements before secondary evidence of a lost deed can be given, the following authorities were cited: Phipson on Evidence, 4th Ed., pp. 110, 174 and 506; *Ansley* v. *Breo* (1864), 14 U.C.C.P. 371; *Nesbitt* v. *Rice, ib.* 409; *Soules* v. *Donovan, ib.* 510; *Covert* v. *Robinson* (1865), 24 U.C.Q.B. 282.

As to the effect of the letter of July 10th, 1896, the following authorities were cited: Section 52 of the British Columbia Evidence Act; *Blandy-Jenkins* v. *Earl of Dunraven* (1899), 2 Ch. 121; *Taylor* v. *Witham* (1876), 3 Ch. D. 605, and especially the remarks of Jessel, M. R. at p. 607.

As to the effect of the certificate of title being in Semisch's name, see section 74 of the Land Registry Act; *Kirk* v. *Kirkland* (1899), 7 B.C. 12; *Whitlow* v. *Stimson* (1909), 14 B.C. 321.

Argument

J. A. Russell, for respondent, was not called upon.

The Court dismissed the appeal, considering that the trial judge was right in his view of the letter of July 10th, 1896, and that the statements of the defendant on discovery as to the lost deed were rightly admitted.

Judgment

Appeal dismissed.

Solicitor for appellant: *S. Lucas Hunt.*
Solicitors for respondent: *Russell, Russell & Hannington.*

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HOLMES v. LEE HO AND LOU POY.

Principal and agent—Listing—Net price—Commission—Change in terms—Revocation of agency.

Plaintiff and one of the defendants, after a conversation, arranged on the selling price of a piece of real estate at $6,000. There was a conflict in the evidence as to whether that was to be a net price, but this difficulty was got over by the fact that on the occasion the parties next met, a few days later, the defendant in question said "property is gone up now, and I shall want $6,000 net." Plaintiff, on the same day, but before the change in price (the second occasion) brought the property to the notice of a purchaser, and told the defendant about him. Plaintiff also changed his advertisement to read $6,500, as the selling price. The purchaser refused to pay more than the $6,000, and eventually bought direct from the owners at that price.

Held, that plaintiff was not, in these circumstances, entitled to a commission.

Statement

APPEAL by plaintiff from the judgment of LAMPMAN, Co. J. in an action tried by him at Victoria on the 18th of April, 1910, claiming $300 commission on the sale of certain real estate, in circumstances set out shortly in the headnote.

Tait, for plaintiff.

A. D. Crease, for defendant.

12th September, 1910.

LAMPMAN, Co. J.: The plaintiff, who is a real estate agent, claims $300 commission on the sale of a lot for the defendants. The defendants deny the plaintiff's agency and say that the price which they gave plaintiff was a net one.

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On Saturday, the 8th of January, plaintiff and Lou Poy had a conversation about the property, and Lou Poy told plaintiff his price was $6,000. Lou Poy says he stated expressly that it was a net price, but plaintiff says it was understood that Lou Poy was to pay a commission, and in this I think plaintiff is correct, as the next time he saw Lou Poy (on the 12th) the latter said to him "property is gone up now and I shall want

$6,000 net." I am not at all impressed with Lou Poy's ability to tell the truth, and where he and plaintiff contradict each other, I have no hesitation in believing the plaintiff.

That same day plaintiff had brought the property to the attention of one Calwell, and had told Lou Poy of him, but as soon as Lou Poy said he wanted $6,000 net, the plaintiff changed his advertisement in the newspaper so as to make the price read $6,500 instead of $6,000, as it was in the first insertion, and he tried to get Calwell to pay $6,300, but he refused, and eventually bought for $6,000 direct from the owners.

I think that what took place between plaintiff and Lou Poy on the Saturday amounted to a listing of the defendants' property at $6,000, but it was open to Lou Poy to revoke the agency, and this he did before the plaintiff had put himself in a position to claim a commission, for at the time Lou Poy changed his price, Calwell had not seen the property and had not decided to purchase.

In the circumstances of this case I do not think that the revocation of plaintiff's authority to sell at $6,000 was wrongful; it is true that the change in price was made very soon after the listing, but Lou Poy gave as his reason that property was going up—certainly an excellent reason—and Calwell, the purchaser, stated in evidence that the prices of several different properties visited by him had increased between his first interview with the agent and his return to the agent's office after seeing the property. The action is dismissed with costs.

The appeal was argued at Victoria on the 24th of January, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Tait, for appellant (plaintiff): We say that there was no revocation, but simply that plaintiff was instructed to get a different price; not that his agency was terminated. It is not competent for the owner, after an agent has introduced a probable purchaser, to terminate the agency, take up negotiations with the purchaser and sell the property at the original listing

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price. To constitute a contract of this kind, there must be an agent, an introduction of a purchaser, and then a sale, and it is submitted that all three elements are present here.

A. D. Crease, for respondents (defendants): The evidence is that plaintiff did not fulfil his contract to produce a purchaser able, ready and willing to pay a price of $6,000 net to the vendors. When the price was raised to $6,000 net, a new contract was made; *ergo* he never earned his commission: *Bridgman* v. *Hepburn* (1908), 13 B.C. 389, 42 S.C.R. 228 is similar.

Tait, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: In this action there was no agency in the proper sense of that term. The defendants in effect said to the plaintiff our price is $6,000 net to us. If you can get a purchaser to pay more than that sum we will give you the excess as your remuneration or profit. The purchaser procured by the plaintiff, though repeatedly urged by defendants to pay a higher price than $6,000, refused to do so, and the sale was made at that figure. There is no suggestion of collusion between the purchaser and defendants to deprive the plaintiff of his anticipated profit. In these circumstances I think the plaintiff failed to make out his claim, and that the learned County Court judge was right in dismissing the action.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: In my opinion the learned County Court judge decided this case properly on the ground that the offer of a reward for selling the property at $6,000 was withdrawn before the plaintiff had found a purchaser. But Mr. *Tait* asks, is it competent for the vendor after introduction by the agent of a prospective purchaser, to alter the original price, and later on to sell behind the agent's back at the original price, and so deprive the agent of his commission.

I would answer, that depends on a number of circumstances, but that is not the question raised by the evidence in this case.

The employment of a real estate agent is like any other con-

tract, everything depends upon how it is brought about and upon its terms. It is a popular mistake to imagine there is one rule governing the earning of a commission by a real estate agent. The contract may be brought about, as in this case, by an offer of a promise on one side and acceptance by an act on the other. We all know that until the offer is accepted there is no contract, and that the terms finally accepted constitute the contract. Here the offer held out was a promise by the defendants to pay a commission on a sale at a fixed sum. The act of the plaintiff was to be the finding of a purchaser at $6,000. Until there was compliance with this there was no contract. On the one hand the plaintiff incurred no liability, he could be as diligent or not as he pleased. On the other, the vendors were not bound. He had merely held out an offer which might never be accepted. If the agent finds a purchaser at the terms specified—if terms are specified—then he thereby performs the act, and that act constitutes an acceptance of the offer, and he would be entitled to his reward; but if before he finds a purchaser able and willing to buy, and the demand for the class of property in question improves, may not the owner advance the price? Common sense says of course he can. It may be that where there has been an increase in the price or other alterations in the conditions of sale, the agent may be entitled, in certain cases, to remuneration for what he has done, for work now rendered useless by the change. That would depend on the terms expressly agreed upon, or upon the terms which the law would imply: see the judgment of Jervis, C.J. in *Campanari* v. *Woodburn* (1854), 15 C.B. 400 at p. 407, and of Crowder, J. at p. 409, but when the first offer is withdrawn without fraud —or before introduction or without any claim being advanced for remuneration, and a new and distinct offer is made, so that the employment is for a commission, if a purchaser is found at a higher figure, the agent's reward depends upon his finding a purchaser at the increased price, I am not dealing with the case of a general or continuous employment for a sale at any price.

The plaintiff sues in this case for a reward on the first

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promise, *i.e.*, for a purchaser at $6,000 gross. The learned judge came to the conclusion that before the purchaser was found at that figure, or at all, the defendants had withdrawn the offer to pay a commission for a sale at that price—or to sell at that price. That finding seems to me to be sufficient to dispose of this appeal. But Mr. *Tait* cites certain cases upon which I should like to say a few words. In *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139, the agent was to be paid in any event. The contract was one of mutual promises. The question there discussed was (other than the question of the admissibility of a certain question): was there evidence from which the jury might infer that the purchase was brought about by his intervention? The premium in that case was not a fixed sum as in this case, and as in *Bridgman* v. *Hepburn* (1908), 13 B.C. 389, 42 S.C.R. 228.

In *Wilkinson* v. *Martin* (1837), 8 Car. & P. 1 at p. 5, Tindal, C.J., in charging a jury, made use of the following words upon which Mr. *Tait* places much reliance:

> "If the plaintiffs were the agents up to a certain time, the parties cannot afterwards deprive them of their right, *i.e.*, just remuneration."

Those words must be read having regard to the case. The contest was whether the plaintiffs were the brokers of the defendant, and as such had really brought about the sale. Martin, the defendant, was trying to shew that the sale had really been brought about by another broker called Ashcroft. It was admitted that the plaintiffs had brought about the introduction of the purchaser to Martin, but it was said that was all he had done. Tindal, C.J. said with reference to this:

IRVING, J.A.

> "A dry introduction of one man to another will not be enough. . . . But if the introduction is the foundation on which the negotiation proceeds, and without which it would not have proceeded, then the parties cannot by their agreement deprive the brokers of their just remuneration."

He then makes use of the words as above set out, and left it to the jury to determine whether the plaintiffs were the real agents acting for the defendants who had brought about the sale. The issue was altogether different from that raised in this case.

Green v. *Bartlett* (1863), 14 C.B.N.S. 681, turned upon the construction of the written agreement between the parties by which the plaintiff was to recover a two and a half per cent. com-

mission if the property was sold by him or through his agency. In *Elvin* v. *Clough* (1908), 8 W.L.R. 590, the Manitoba Court of Appeal expressed the opinion that the decision went against Bartlett because he was acting in bad faith. In *Aikins* v. *Allan* (1904), 14 Man. L.R. 549, the promise (an implied promise) to Pepler was that if he brought a purchaser—not naming any figure—he would be paid a commission: note the finding of the County Court judge that it was an employment to sell the house, p. 551, that is there was a general or continuing employment. I prefer the dissenting judgment of Perdue, J., who at p. 565 puts this exact case as I would put it.

In *Toulmin* v. *Millar* (1887), 12 App. Cas. 746; 57 L.J., Q.B. 301, and 3 T.L.R. 836, 58 L.T.N.S. 96, the employment —one of mutual promises—was a continuing, or to use Lord Watson's expression, a general employment (see *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614), where the agent's contract is of that nature, then the agent is entitled to a commission at the stipulated rate, although the price paid should be less than, or different from the price named to him as a limit. Whether the employment is a continuing employment, or only if a certain figure is obtained is a question of fact in each case.

IRVING, J.A.

Elvin v. *Clough, supra,* decided by the Court of Appeal in Manitoba, is an interesting case. There was a contract to pay commission on any sale effected directly or indirectly by the plaintiff, and approved by the defendant. The purchaser was sent to the vendor by the agent, and a sale was made, but as the defendant was not aware, nor had he any reason to believe, that the plaintiff was instrumental in bringing the introduction about, and had acted in good faith, it was held that the plaintiff could not succeed.

MARTIN, J.A.

MARTIN, J.A.: It is, in my view, impossible to distinguish this case in principle from the decision of the Full Court in *Bridgman* v. *Hepburn* (1908), 13 B.C. 389; affirmed in 42 S.C.R. 228, though I must say that otherwise I should have felt disposed to follow the Manitoba case of *Aikins* v. *Allan* (1904), 14 Man. L.R. 549, which is strongly in favour of the appellant. I

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am, however, in this respect, unable to reconcile it, after careful consideration, with *Bridgman* v. *Hepburn,* which being now a decision of the Supreme Court, must be followed.

The appeal therefore should be dismissed.

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

Appeal dismissed.

Solicitors for appellant: *Tait & Brandon.*
Solicitors for respondents: *Crease & Crease.*

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Principal and agent—Sale of land—Commission—Procuring purchaser—Net price.

Plaintiff at one time obtained an option on defendant's ranch, with the idea of promoting a syndicate to purchase it. In this he was unsuccessful, and then undertook the sale of the ranch on a commission basis, $100,000 being the purchase price, and his commission or profit to be made by adding $5,000 thereto. He endeavoured to effect a sale in various quarters and ultimately introduced H. to the defendant, telling the former that the price was $105,000, and asking the latter to protect him at that price. H. stayed for some days on the ranch inspecting it, and, having concluded to purchase, asked defendant his price and was told $100,000, which he paid.

Held, on appeal, affirming the verdict of the jury at the trial (GALLIHER, J.A. dissenting), that plaintiff was entitled to recover his commission of $5,000 from the defendant (vendor).

Statement

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action tried by him at Vancouver on the 28th of November, 1910, to recover commission on the sale of a ranch at Ashcroft. The facts appear in the headnote and reasons for judgment.

The appeal was argued at Victoria on the 17th of January,

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

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S. S. Taylor, K.C., for appellant (defendant): Plaintiff has not made out a case for commission; he never had the property listed with him for sale, although the action is based on a listing. There was no commission agreement; Rowlands simply asked that Langley maintain the price at $105,000, and the proper course would have been to sue for a breach of contract to maintain the price at one greater than that wanted for the ranch. The jury should have been instructed on breach of contract. We submit that there was no valid contract, because the arrangement was based on a falsehood in telling Hammond that the price was $105,000, without any authority, when the price was really only $100,000, and it is therefore against public policy. There was no consideration for such a contract. They are suing for part of our $100,000; the jury have found on a basis of agency.

Argument

Davis, K.C., for respondent (plaintiff): The effect of a general finding by a jury is shewn in *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41, and means, when in favour of the plaintiff, that every fact in his favour, and every inference that is necessary to be drawn in order to support the plaintiff's contention has been drawn by the jury. Rowlands, we submit, had the property for sale on commission.

Cur. adv. vult.

10th April 1911.

MACDONALD, C.J.A.: There is evidence that the defendant was offering his ranch for sale; that the plaintiff first took an option for the purpose of promoting a syndicate to purchase it; that when he failed, he proposed that the defendant should allow him to go to Victoria to endeavour to sell the ranch on a commission basis, that is to say, he was to make his commission or profit by adding $5,000 to the defendant's net price of $100,000.

MACDONALD, C.J.A.

Now, although he failed to make a sale to his Victoria customers, yet I think the jury could look at these transactions as

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shedding some light on the conduct of the parties in connection with the sale to Hammond. Within a week or ten days after his failure to make a sale in Victoria, the plaintiff met Hammond in Ashcroft and took him to the defendant's place, introduced him as a prospective purchaser, and told the defendant that he had quoted the price at $105,000. I think the jury could fairly draw the inference that the defendant, in treating this visit and the quotation of the price as a matter of course, accepted the plaintiff's activity as referable to the previous arrangement, and in effect admitted the continuance of it so as to include the new customer. Following this up, the plaintiff returned with Hammond on the 6th of April, when he distinctly broached the question of commission in this way:

"I told Mr. Langley that Mr. Hammond was willing to pay $105,000, and I would look to him to protect me for the $5,000 commission."

The defendant answered:

"Certainly I will. I am very glad for your sake and for Mrs. Rowlands' sake that you have made this sale. You have been put to lots of expense and lots of trouble over it."

The defendant denies this, but we must take it that the jury has accepted the plaintiff's story. Hammond remained, and after a thorough examination of the property asked the defendant the price. The defendant said his price was $100,000, and at that price the sale was completed without any communication with regard to its terms with the plaintiff. There is no doubt that it was through the plaintiff's intervention that Hammond was procured as the purchaser. It is also clear that the plaintiff told Hammond that the price would be $105,000. Hammond has sworn that he was willing to pay and would have paid $105,000 had it been demanded by the defendant.

MACDONALD, C.J.A.

Now, in these circumstances, I am unable to say that the jury could not reasonably have come to the conclusion that the plaintiff was entitled to a commission. From a perusal of the evidence, I am convinced that the defendant acted quite honestly, and was probably under the impression that the plaintiff would be paid the commission by Hammond. I think he did not quite appreciate his responsibilities in respect of the plaintiff. The jury might well apply their own knowledge to

the case, and conclude that the defendant must have known that if the purchaser was to be made aware that a commission of $5,000 should be paid by him, there was no object in fixing the price at $105,000, and that as an intelligent man, the defendant must be taken to have understood the transaction as one involving the payment of a commission by him out of the purchase price agreed upon between himself and the plaintiff in the event of the plaintiff bringing a purchaser ready and willing to pay that price. This is the only way that the defendant could protect the plaintiff as he had promised to do.

In short, the contention of the plaintiff amounts to this: He proposed to act as a selling agent; the defendant's net price was $100,000; it was agreed, or at all events tacitly arranged, that the asking price should be $105,000 in order that the plaintiff should obtain his commission; the plaintiff procured in Hammond a purchaser at that price, and the defendant, by his own act or mistake, or misapprehension of a plain business transaction, prevented the sale at that price.

I do not think I should, on the evidence, have come to the conclusion reached by the jury, but I cannot for that reason interfere with the verdict.

I think the appeal should be dismissed.

IRVING, J.A.: I would dismiss this appeal. The plaintiff, in my opinion, was employed to find a purchaser at $100,000 net to the owner, and the owner permitted him to add another $5,000 to the price so as to cover his commission.

I extract certain portions of the evidence. Langley said before Rowlands had seen the purchaser:

"Rowlands said on 19th of March he hoped I would give him a show to make a deal. I said I would. I said the price was net to me $100,000, and anything he made over it was to come out of the purchaser.

"Did he say he would have to ask $5,000 to get his commission? I think it is very likely he did. I always told him my price was $100,000, and if he wanted to make any commission it must be out of the purchaser."

Later, after the property had been inspected by the purchaser, Langley said:

"Mr. Rowlands took me aside, and said he would like to speak to me, and we went outside of the house, and Mr. Rowlands said that he had

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arranged with Mr. Hammond at the price of $105,000, and that he wished me to sell it to Mr. Hammond at that price.

"Well, what did you say as a matter of fact to him? I told him that my price was $100,000, and if he wished to make any profit out of the transaction he would have to make it out of the buyer."

Rowlands said:

"As near as I can recollect I said to Mr. Langley, "you will protect me on the matter of this commission; I have taken the place to Mr. Hammond at $105,000.' He said 'I will protect you certainly. I am very pleased you have made this sale, both for your own sake and for Mrs. Rowlands' sake, as you have been put to a lot of expense and trouble in this matter.' I said 'thank you' and shook hands with him and left him."

The jury have accepted Rowlands' version of the case, but Mr. *Taylor* contends that no case has been made out. He argues that this "protection" was the only agreement to pay a commission, and that as it was based upon a past consideration, it is *nudum pactum.*

IRVING, J.A.

The view I take is that the first conversation I have set out, which took place on the 19th of March, constituted the offer by Langley; and although Rowlands at that time was not in touch with Hammond, the offer remained open until it was recalled; and that when Rowlands introduced the purchaser, he thereby, by that act, accepted Langley's offer. It is another instance of offer by promise and acceptance by act. The conversation between Rowlands and Langley above set out, sheets the contract home to Langley. It was a recognition by him of the fact that the commission was $5,000, and that it had been earned.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I do not think the plaintiff was what we would really call in the real estate business. At one time he had an option on the property in question, and endeavoured to float a syndicate to purchase it, of which he was to be one of the number. This fell through, and later he got a stated price of $100,000 net from the defendant, he (plaintiff) to have what he could get over and above that as his commission or remuneration if he made a sale. The plaintiff went to Victoria, but failed to make a sale, and the matter dropped.

I think it pertinent to remark here that, in my opinion, at this stage any arrangements between the parties ceased. It is true the plaintiff kept this property among others noted on a list for sale, but I think that any remuneration he could claim for a sale made subsequently to his unsuccessful venture at Victoria must depend on a new arrangement. We have then to search for that new arrangement and consider its effect. The jury have found in favour of the plaintiff, and we should not disturb that finding unless we hold that they could not reasonably have come to that conclusion on the evidence, or that—granted a new arrangement made—it does not in law entitle the plaintiff to succeed.

Shortly after the plaintiff's return from Victoria, he fell in with a Mr. Hammond at Ashcroft, where the plaintiff resides, and in the course of conversation, Hammond inquired as to whether there were fruit lands in the neighbourhood for sale, and the ranch in question was discussed, the price $105,000 named, and they drove out to see the property on April 3rd, 1910.

The plaintiff introduced Hammond to the defendant as a prospective purchaser, and some conversation took place between plaintiff and defendant as to who Hammond was, in the course of which the plaintiff stated he had quoted $105,000 to Hammond as the price of the ranch, to which the defendant made no reply.

After casually looking over the ranch, Hammond and the plaintiff drove back to Ashcroft.

They went out to the ranch again on April 6th, when the plaintiff says the following conversation took place between the defendant and himself:

"At that time did you tell him anything about what the man was willing to pay? Oh, yes.

"What did you tell him about that? I told Mr. Langley that Mr. Hammond was willing to pay $105,000, and I would look to him to protect me for the $5,000 commission.

"Yes, what did he say to that? He said, 'Certainly I will, and I am very glad for your sake and for Mrs. Rowlands' sake that you have made this sale. You have been put to lots of expense and lots of trouble over it,' and I shook hands with him and left him."

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And again on cross-examination:

"But what you said to him was that you would ask Hammond $105,000? I told him that I had asked Hammond $105,000, and I wanted him to protect me for $5,000 commission.

"In other words you wanted him to ask Mr. Hammond $105,000 and make the sale to Hammond at $105,000? Yes.

"And what you complain of now is that Langley did not make the sale at $105,000 with Hammond, after agreeing with you that he would do that? That is correct.

"He agreed to put his price up to $105,000 and pay you the difference? He certainly did.

"You are sure of that? Quite.

"Now, was there anything more said? He replied to me upon my asking him, he replied, 'Certainly, I will protect you.'

"That is, certainly I will put the price up to $105,000? Certainly I will protect you. That is what he said. Of course that was the inference."

This conversation is denied by the defendant, but in view of the verdict I must assume that the jury found in favour of the plaintiff, believing, as they had the right to believe, the plaintiff as against the defendant, and their finding should not be interfered with.

This, then, I take it, was the new agreement between the parties, and in my view of the case on this agreement, the plaintiff's verdict must stand or fall.

GALLIHER, J.A.

Let us consider first what the agreement really means, and then its effect in law. Referring again to the evidence which is set out above, we find the plaintiff stating that Hammond would pay $105,000 for the ranch, and the defendant promising to protect the plaintiff for $5,000 commission. The words "protect me for the $5,000 commission" have no significance unless applied in the sense that the defendant was not to sell below $105,000, in which case he would get $100,000 net, the balance to go to the plaintiff.

There was no other way in which he could be protected, as it was not a case of money passing from but to the defendant.

I would so interpret it even in the absence of the evidence in cross-examination which I have quoted above, and in which the plaintiff himself makes it quite clear. We have then an agreement by which the defendant agreed to increase his price to $105,000 in order that the plaintiff might receive $5,000 out of the transaction. This he did not do, but sold to Ham-

mond for $100,000, and refuses to pay the plaintiff anything. Is he in law liable on such an agreement? I think not, on the short ground that it is *nudum pactum.*

The sale of the ranch might be an advantage to the defendant, but the sale at $105,000 instead of $100,000 would be no advantage to the defendant, and this is the contract sought to be enforced.

I would allow the appeal.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitor for appellant: *J. A. Harvey.*
Solicitor for respondent: *D. G. Marshall.*

TURNER v. MUNICIPALITY OF SURREY.

Practice—Particulars—Facts of which the burden of proof is on the applicant—Form of order.

In an action by plaintiff, claiming that the tax sale proceedings on which her property had been sold were invalid, it was alleged in the statement of claim (par. 7) that the plaintiff had made various demands for statements of the taxes due, and (par. 8) that the provisions of the Municipal Clauses Act had not been followed in carrying out the tax sale proceedings. On a summons for particulars of these two paragraphs, plaintiff was ordered to deliver an amended statement of claim giving such particulars.

Held, that particulars should not have been ordered, but, in any event, the form of the order, directing the delivery of a new statement of claim, instead of particulars simply, was objectionable.

APPEAL from an order made by MURPHY, J. at Chambers in Vancouver on the 18th of November, 1910, ordering the delivery of a new statement of claim with particulars. The plaintiff brought an action against the defendants, claiming that the tax sale proceedings on which her property had been

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sold and bought in by the Municipality were invalid. The statement of claim alleged that the plaintiff is the registered owner of the property in question, and that the defendants had taken proceedings to sell and had ultimately bought in the property themselves and applied to register their deed. Paragraph 7 of the statement of claim set out that the plaintiff had at various dates made demand for statements of the taxes due, and paragraph 8 set out that in the tax sale proceedings the Municipality had not complied with the formalities required by the Municipal Clauses Act. A demand was made for particulars of these two paragraphs, and an order was made by MURPHY, J. that the plaintiff should deliver an amended statement of claim containing particulars of the two paragraphs in question.

The appeal was argued at Victoria on the 25th of January, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

A. D. Taylor, K.C., for appellant (plaintiff): So far as paragraph 7 is concerned, the judge was right in ordering particulars, for the allegations in it were affirmative allegations of demands made by the plaintiff for accounts of taxes. The plaintiff would have to prove such demands and the defendants were therefore entitled to particulars.

[MACDONALD, C.J.A.: Is not the form of the order wrong in any case? It should have merely ordered particulars of the paragraphs in question and not a new statement of claim.]

The practice is merely to order particulars, and the order entails useless costs. As to paragraph 8, it is submitted that the order was clearly wrong for two reasons; firstly, that particulars will only be ordered of an affirmative allegation: see Odgers on Pleading, 6th Ed., 182. Secondly, that particulars should not be ordered of allegations, the burden of proof of which lies on the applicant. On this point, see *James* v. *Radnor County Council* (1890), 6 T.L.R. 240, and *Roberts* v. *Owen, ib.* 172. On the point that it would be incumbent on the plaintiff at the trial to prove in the affirmative that the requirements of the Municipal Clauses Act had been complied with, see *Kirk* v. *Kirkland* (1899), 7 B.C. 12.

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A. D. Crease, for the respondent (defendant), referred to marginal rule 202, which requires sufficient particulars to be included in the pleading as authority for the form of the order appealed from. If paragraph 8 was, as appellant claimed, immaterial, it should be struck out as asked for in the summons in the alternative. If it was material, it could not be pleaded to without particulars, as it was too vague. There were no dates at all in the statement of claim, not even the year of tax sale. The defendants are entitled to know in what respect they have not complied with the law according to the view of the plaintiff, who may prove to be under an entire misapprehension when she has fairly disclosed her case. See also Annual Practice, 1910, p. 276.

Argument

MACDONALD, C.J.A.: The burden of proof that all the formalities required by the Municipal Clauses Act had been complied with was upon the defendant, and whether they had or had not was peculiarly within the knowledge of the defendants themselves. It is true that the plaintiff, in the pleadings, gratuitously alleged that these formalities had not been complied with, and perhaps in this way invited a demand for particulars on this head, but that is no reason why particulars should have been ordered. The form of the order appealed from is objectionable, as it orders the delivery of a new statement of claim, which involves needless expense. The usual order is that particulars should be delivered. Upon delivery, they become, as a matter of law, just as binding upon the party as if embodied in the statement of claim.

MACDONALD, C.J.A.

I think the appeal should be allowed.

IRVING, J.A.
GALLIHER, J.A.

IRVING and GALLIHER, JJ.A. concurred.

Solicitors for appellant: *Wade, Whealler, McQuarrie & Martin.*

Solicitors for respondent Municipality: *Kappele & Dockerill.*

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WILSON v. McCLURE *ET AL.*

Action—Survival of cause of—Death of plaintiff—Injury to personal estate—Property in timber licences applied for—Fraudulent procurement of timber licences—Revival.

In an action for a declaration that defendants were trustees for the plaintiff in certain timber licences, or in the alternative for $250,000 damages, it was alleged that the plaintiff had done all things necessary under the Land Act to obtain special timber licences; that before he made his formal application for such licences, the defendants applied and falsely represented to the commissioner that they had performed all the statutory requirements to entitle them to licences for the same limits; that the plaintiff had filed a protest against defendants' application; that before the determination of such protest, or of its having been heard, the defendants fraudulently represented to the commissioner that plaintiff had not complied with the Land Act as to staking or advertising, etc., and that he had withdrawn his protest and was willing that licences should be granted to defendants. Plaintiff died after action brought, and his executrix applied to be substituted as plaintiff.

Held, on appeal, reversing the order of GREGORY, J. (MARTIN, J.A. dissenting), that the cause of action did not survive to the executrix.

Per MACDONALD, C.J.A.: The right given to an individual by the Land Act to apply for a licence to cut timber on Crown lands, though all conditions precedent to the actual grant of the licence have been fulfilled, does not confer upon the applicant any legal or equitable interest in the subject-matter applied for.

Statement

APPEAL from an order made by GREGORY, J. at Chambers in Victoria on the 26th of April, 1910, permitting Gunda M. Wilson, executrix of W. E. Wilson, deceased, the plaintiff, to continue the action as plaintiff.

W. J. Taylor, K.C., for plaintiff.
H. W. R. Moore, for defendants.

6th October, 1910.

GREGORY, J.

GREGORY, J.: This is an application on the part of the executrix of the plaintiff's last will and testament to be substituted as plaintiff, and it is resisted by the defendants on the ground that the right of action is a personal one and came to an

end with the plaintiff's death, upon the principle of *actio personalis moritur cum persona.*

At this stage of the proceedings the allegations in the statement of claim must be taken as true. Shortly, they are:

"(1.) That plaintiff did all things necessary to entitle him to apply for and obtain special timber licences under the Land Act (Cap. 30, B.C. Stats. 1908).

"(2.) That before making his formal application to the chief commissioner, the defendants made application and falsely represented that they had done all things necessary to entitle them to obtain licences for the same limits.

"(3.) That plaintiff filed a protest against the defendants' application.

"(4.) That defendants, before the determination of plaintiff's protest and without its ever having been heard, conspired together and knowingly, falsely and fraudulently represented to the chief commissioner that plaintiff had never properly staked or advertised, etc. (as required by the Land Act); that he had withdrawn his protest and was willing that licences should be issued to the defendants; by reason of all which the defendants, in fraud of plaintiff, obtained licences which they would not otherwise have obtained.

"The plaintiff's claim is for a declaration that defendants are trustees for the plaintiff, or, in the alternative, $250,000 damages."

In these circumstances, does the action survive to the executrix? There is no doubt that at common law the action would not have survived, but the common law rule has been considerably modified by statute, particularly 4 Edw. III., Cap. 7, and it being a remedial law, has always been largely expounded; and by an equitable construction, an executor now has the same action for an injury done to the personal estate of the testator in his lifetime whereby it becomes less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be: *Wheatley* v. *Lane* (1668), 1 Saund. 216, n. 1; and Williams on Executors, 606 and 607, and cases there cited. See also Encyclopædia of the Laws of England, Vol. 1, p. 105, where it is stated that

"Although an action for a mere tort, such as an assault or slander, dies with the wrongdoer, where, besides commission of the wrong, property is acquired which benefits the deceased, an action for the value of the property survives against the representative."

So far as I can learn from the modern cases, there is no distinction made between a plaintiff executor and a defendant executor.

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In *Twycross* v. *Grant* (1878), 4 C.P.D. 40, Bramwell, L.J., speaking of the statute 4 Edw. III., Cap. 7 at p. 45, says:

"This statute being remedial in its nature, and also those amending it, have been construed very liberally; they have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature."

And in the same case, Brett, L.J., at p. 46, says:

"Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shewn upon the face of the proceedings that an injury has accrued to the personal estate.

In view of the authoritative statement of the law, it only seems necessary to ascertain whether the plaintiff's personal estate has been injured by the defendants.

A timber licence in this Province is unquestionably a valuable property, and it is also personal property.

Before a person can make application for or obtain such a licence, the Land Act requires him to do certain things, and upon the doing of those things and making the application, the granting of the licence seems to follow as a natural consequence. The statement of claim distinctly alleges that the plaintiff had done all that the Act required, and that plaintiff was entitled to apply for and obtain licences. That was surely a right of property or an asset which he could take into the open market and sell, and if so, it was a part of his personal estate which on his death would pass to his executrix, and would have to be included in any statement made for probate or succession duty purposes. True it is not a chattel, but the law does not require that the injury be to a chattel.

GREGORY, J.

In the present case, the plaintiff has not only been deprived of his right by the defendants' fraud (according to the allegations in the statement of claim), but we find the defendants in possession of licences over the identical lands to which the plaintiff's right attached and to plaintiff's exclusion, thereby increasing their personal estate by the same amount as the plaintiff's has been diminished.

The case of *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, cited by Mr. *Moore,* is one of injury to real property which is governed by different principles and a different statute, as the

executor in no way represents the deceased's real property, and the Court there maintained the action, so far as it related to personal property. The remarks of Bowen, L.J., in delivering his own and Lord Justice Cotton's judgments, are fairly applicable to the present case. He says, p. 454:

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those *in which property, or the proceeds or value of property, belonging to* another, have been appropriated by the deceased person and added to his own estate or moneys."

And at p. 455:

"Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of the wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby."

In the case of *In re Duncan, Terry* v. *Sweeting* (1899), 1 Ch. 387, also referred to by Mr. *Moore,* Romer, J. rested his decision largely upon the remarks of Lord Justice Bowen, last above quoted, and the plaintiff, while retaining the shares purchased, and while not in a position to insist upon repudiation of his contract, undertook to sue for the purchase money at law as remaining his own property by reason of defendant's fraud which induced the contract, this seems to me to distinguish it from *Twycross* v. *Grant, supra,* which was not referred to by Romer, J. or by counsel.

In *Davoren* v. *Wootton* (1900), 1 I.R. 273, the Irish Court of Appeal referred with approval to the judgment of Romer, J., but although *Twycross* v. *Grant* was cited by counsel, it was not referred to by the Court. I find some difficulty in reconciling these three decisions, all of which related to misrepresentation on the sale of company shares, but it is clear that it was neither alleged nor proved that the defendant's estate had been benefited by defendant's deceit, and Lord Justice Fitz Gibbon, at p. 282, says:

"Without attempting to give any exhaustive definition . . . . . it may be suggested, if the assets of a deceased person have been specifically diminished by the cause of action, his personal representatives may, after his death, institute or continue an action to recoup them."

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Since, on the death of a plaintiff, the action is at an end until revived, the question of its survival must be dealt with before any other application can be heard. The summons before me is limited to the question of survival. I feel bound at this stage to assume that the plaintiff, if still alive, would have an action against the defendants, and therefore express no opinion whether he has or not. That question can be easily settled in a subsequent application, without the expense of a trial, when the very strong authorities cited by Mr. *Moore* can be considered. The order asked for will be made. Costs in the cause.

The appeal was argued at Victoria on the 23rd and 24th of January, 1911, before MACDONALD, C.J.A., IRVING, MARTIN, and GALLIHER, JJ.A.

Argument

Harold Robertson, for appellants (defendants): We submit that the cause of action abated with the death of the plaintiff, because plaintiff acquired no property right by the mere filing with the commissioner an application for timber licences; in other words, the power in the commissioner to grant the licences being permissive, the person who stakes under the Land Act for the purpose of making an application for timber licences, does not thereby acquire a legal right. Notwithstanding the fact that he may have complied with every provision of the Land Act, yet the granting of the licence is in the discretion of the commissioner. The plaintiff may claim a hearing under chapter 30, section 7, of the 1903-04 amendment, where there are conflicting claims over the same land, but that again is permissive. This alleged wrong took place in February, 1907; chapter 26, section 16, of 1907 was not then in force, but even then the amendment of 1907 shews that the Legislature was of opinion that no right attached previously.

He referred to *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140; *Hall* v. *The Queen* (1900), 7 B.C. 89; *Hartley* v. *Matson* (1902), 32 S.C.R. 644; *Smith* v. *The King* (1908), 40 S.C.R. 258; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227. It must be shewn that the plaintiff's personal estate has been diminished before a right of action will descend: *Phillips* v. *Homfray* (1883), 24 Ch. D. 439.

W. J. Taylor, K.C., for respondent (plaintiff): We had a status which amounted to a legal right, and whether the Crown (or the commissioner) considered our claim favourably or otherwise was immaterial. It was a property right of a personal nature; we were deprived of that right, and therefore our estate affected, diminished, to that extent. We have not to shew that ours was a freehold right, but merely that it was a right of some kind and that we were deprived of it.

Robertson, in reply: Plaintiff had no right to a hearing before the commissioner.

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.: The plaintiff, since deceased, alleged that he had applied to the chief commissioner of lands for certain timber licences; that the defendants also applied for licences over the same lands; that the plaintiff filed a protest against the defendants' application; and that the defendants falsely and fraudulently represented to the commissioner that the plaintiff was willing that the defendants should obtain their licences, and by reason of which fraudulent representations the plaintiff's protest was not heard and licences were issued to the defendants.

Before the trial the plaintiff died, and his personal representative applied to a judge of the Supreme Court for an order of revivor, which was granted, and from that order the defendants appeal. The statement of claim alleges as aforesaid, and prays for a declaration that defendants hold the said licences in trust for the plaintiff; in the alternative, $250,000 damages. The appellants contend that the statement of claim discloses no cause of action, and if it does disclose a cause of action, that cause of action did not survive to the personal representative. It was contended that timber licences are personal estate, and that the false representations complained of deprived the personal representative of the deceased of personal estate which would have been obtained by him but for the false representations.

I am of opinion that the order appealed from cannot stand,

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and I think it is only necessary to refer to *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140; *Hartley* v. *Matson* (1902), 32 S.C.R. 644; and *Smith* v. *The King* (1908), 40 S.C.R. 258. The right given to an individual by the Land Act to apply for a licence to cut timber on Crown Lands, though all conditions precedent to the actual grant of the licence have been fulfilled, does not confer upon the applicant any legal or equitable interest in the subject-matter applied for. I think the plaintiff had no *locus standi* to maintain this action, and that it should not be revived.

I think, therefore, the appeal should be allowed, but without costs.

IRVING, J.A.: The original plaintiff brought his action to have it declared that the plaintiff was liable to him in damages for inducing, by misrepresentations, the chief commissioner to refuse to issue to him certain timber licences, and to have it declared that the defendants, who had succeeded in getting licences over the property in dispute issued to them, were trustees for the plaintiff.

The original plaintiff died before the action came on for trial, and the question before us is: can his executrix continue the action? GREGORY, J. was of opinion that the action survived, and from that decision this appeal is taken.

IRVING, J.A.

The history and scope of the maxim *actio personalis* has been analyzed by Bowen, L.J. in *Finlay* v. *Chirney* (1888), 20 Q.B.D. 494 at p. 502, and quite recently its application to cases under the Workmen's Compensation Act, 1906, was considered by the Court of Appeal in Ireland in *In re O'Donovan & Cameron, Swan & Co.* (1901), 2 I. R. 633. By the statute *De Bonis Asportatis* (1330), 4 Edw. III., Cap. 7, actions for the recovery of goods and chattels of a deceased person carried away in his lifetime were given to the executors. This remedy was extended in 1350 by 25 Edw. III., Stat. 5, Cap. 5, to executors of executors, and by the equitable construction of these remedial statutes, it was held that administrators had the same right. The result is that to-day a personal representative can maintain an action for any damage done to the personal

estate in his lifetime, whereby it has become less beneficial to such representative. But the rule has never been extended to torts (a) relating to the testator's freehold; or (b) to those where the injury done is of a personal nature, "With these two exceptions, it is said that the executor may sue for all torts": *per* Bramwell, L.J., in *Twycross* v. *Grant* (1878), 4 C.P.D. 40 at p. 45, where an administratrix was held entitled to carry on an action for deceit. It is upon this statement of the law that the learned judge proceeded. The line seems to be finely drawn in *Hatchard* v. *Mege* (1887), 18 Q.B.D. 771, where it was held that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade mark survived, so far as the action was in the nature of a slander of title, but it was put an end to so far as it was a claim for libel on the deceased in relation to his trade, so that an executrix could not maintain the action because it charged the deceased with being a dishonest wine merchant, but she could if the statement was calculated to bring his trade mark into disrepute and so damage his property.

In *Finlay* v. *Chirney, supra,* it was held that an action for breach of promise of marriage did not survive against the personal representative of the promisor unless there was special damage affecting the property of the plaintiff, and in respect of which property there must have been another promise (*i.e.,* in addition to the promise to marry). There the Court of Appeal having, in mercy to both the suitors, given leave to the plaintiff to deliver to the Court, on affidavit, particulars of the property affected, it was argued that the buying of her trousseau and the giving up of a good situation and maintaining herself as a *feme sole* subsequent to the breach, brought her within the rule and constituted special damages so as to entitle her to continue the action.

In Pulling v. *Great Eastern Railway Co.* (1882), 9 Q.B.D. 110 at p. 112, Denman, J. (Pollock B. concurring) said:

Some of the expressions used by the judges in the case of *Twycross* v. *Grant* (1878), 4 C.P.D. 40, seem no doubt to go to considerable lengths, but those expressions must be construed with reference to the cause of action in that case. The cause of action there was not an injury to the person, but in respect of the pecuniary damage done to the intestate's estate by reason

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of the failure to perform the statutory obligation to disclose certain contracts.

The personal property in all these cases appears to have been actually vested in the deceased. In the present case, we are asked to regard a remotely potential right to acquire property as property, and in my opinion that would be going further than we are justified in doing.

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MARTIN, J.A.: The fact that the defendants, as the result of their alleged fraudulent representations, stood in the shoes of the deceased and thereby obtained for themselves in due course of departmental procedure, and without any difficulty, the timber licences in question is, in the circumstances, the best proof that in due course the deceased plaintiff, who had in all respects conformed to the statute, would, had it not been for such false representations, have, with like ease, become possessed of them, because no one else had, by the record, any claim thereto. In such case I find nothing in the language of section 7 of the Land Act Amendment Act, 1903 (chapter 30), section 3 of chapter 33 of the Land Act Amendment Act, 1905, or section 16 of chapter 25 of the Land Act Amendment Act, 1907, which could reasonably be taken to defeat the plaintiff's rights, and I find myself able to say that the personal estate (using the term in its broad sense) of the deceased has been "specifically diminished" by the injurious acts of the defendants. While it is difficult to define exactly what rights the deceased had acquired, yet he had undoubtedly an interest of commercial value which, as a very substantial business asset, could not have been ignored in the valuation of his estate had not the defendants supplanted him. I think the learned judge below reached, in substance, the right conclusion and the appeal therefore should be dismissed.

GALLIHER, J.A.

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

Appeal allowed, Martin, J.A., dissenting.

Solicitor for appellants: *Harold Robertson.*
Solicitors for respondent: *Eberts & Taylor.*

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PERRY v. MORLEY

Municipal law—Municipal voters—Qualification of—"Registered owner"—Holders of agreements to purchase—Municipal Elections Act, Cap. 14, B. C. Stats. 1908—Land Registry Act, 1906, Cap. 23, Sec. 74.

Holders of agreements for purchase of real property are not owners, within the meaning of the Municipal Elections Act, entitled to vote at municipal elections.

Where, therefore, a voters' list had been compiled in accordance with a practice followed of placing the names of holders of agreements for purchase of real property on the list as registered owners:—

Held, that such list was bad, and that an election had thereon should be set aside.

ACTION tried by GREGORY, J. at Victoria on the 17th and 20th of February, 1911, for an order declaring invalid the municipal election for mayor of the City of Victoria for 1911.

Statement

Maclean, K.C., for plaintiff.

W. J. Taylor, K.C., for defendant.

21st February, 1911.

GREGORY, J.: This is a petition to declare void the election of the respondent as mayor of the City of Victoria upon the ground that the voters' lists, upon which this election was held, were not compiled or revised according to law. The real ground of the complaint is that the names of holders of agreements for the purchase of real property have been placed upon the lists instead of the registered owners of the same. It is imperative that the matter should be disposed of without delay. I am therefore compelled to render my decision without having been able to give the question the consideration it deserves, but I have carefully examined the statutes and cases cited by counsel, all of which I shall refer to later.

Judgment

Section 6 of the Municipal Elections Act, Cap. 14, B. C. Statutes 1908, prescribes the qualification of a voter. The only qualification necessary to consider on this application is that

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a voter shall be the "owner" of real estate of the assessed value of $100. The respondent did not seriously contend that the holder of an unregistered agreement for purchase of land was the owner of it within the meaning of the Act; but it will not be amiss to examine the question. The interpretation clause, section 2, defines a "freeholder or owner" as "any person holding an *estate* for life or of inheritance (in possession) in lands within the corporate limits of any municipality." This would not appear to me to include the holder of an unregistered agreement, who has merely a contract with the registered owner of the fee, which may or may not be carried out, and even if carried to completion, will require a further instrument to transfer the estate to the purchaser. But section 74 of the Land Registry Act, B. C. Statutes 1906, Cap. 23, seems to put the question beyond all doubt, for that section provides that no instrument purporting to transfer, etc., "executed . . . . . shall pass any *estate* or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act"; and this has been the interpretation given by our own Courts whenever the matter has been dealt with: see *Re Kaslo Municipal Voters' List* (1907), 12 B.C. 362, a decision of Forin, Co.J.; and *Levy* v. *Gleason* (1907), 13 B.C. 357, a decision of HUNTER, C.J.

Judgment

Mr. *Taylor* drew attention to the fact that to put this interpretation upon the word "owner" would appear to result in requiring one list of owners for the election of mayor and councillors, and an entirely different list of owners for an election on a money by-law, as section 76 of the Municipal Clauses Act, 1906, in providing who may vote on money by-laws, speaks only of "assessed owners," etc., and assumes that the holders of agreements for purchase, who are assessed for the property referred to in the agreement, are assessed owners within the meaning of the Municipal Clauses Act. If that is so, I can only regret it, but it should not prevent me from truly interpreting the Elections Act as I see it. It is, however, to be noted that the Municipal Clauses Act, by the last clause of its interpretation section, namely, section 2, provides that any word not therein expressly defined shall receive the inter-

pretation given to it by the Municipal Elections Act, which is the Act we are considering, and the interpretation of the word "owner" is the same in it as it was in the Election Act in force at the time of the passing of the Municipal Clauses Act, 1906, in fact the interpretation clauses in the Municipal Elections Act and the Municipal Clauses Act are by both Acts made reciprocal; and it is quite possible therefore, if not probable, that the word "owner" would receive the same interpretation in the Municipal Clauses Act as required by the Municipal Elections Act.

Mr. *Taylor's* real contention is that a document, purporting to be the voters' list, having been compiled and revised by the Court of Revision by virtue of section 20 of the Elections Act, is final and cannot be disturbed except for fraud. Section 14 of the Elections Act provides that the voters' list shall be prepared by the clerk of the municipal council. It then provides for a revision of the list by the Court of Revision, consisting of the mayor and two aldermen. It shall then be certified correct by the mayor, and posted. Section 17 makes provision for corrections in the list as posted on application to a police magistrate or a judge of the Supreme or County Court. Mr. *Taylor* argues that as the statute provides the method of preparing and revising the list, that it is final, and it cannot be interfered with by the Courts. I cannot agree with that contention if it is clearly shewn that the provisions of the Act are absolutely ignored.

The provisions as to the appointment of the Court of Revision, its sitting, certificate by the mayor and posting, etc., I assume have all been complied with, for there has been no evidence to the contrary.

The city clerk gave evidence as to the method by which he prepared the list of owners. He simply copied it from the assessment roll. The work was actually done by Mr. Scowcroft under the clerk's supervision. Mr. Scowcroft is also the assistant to the city assessor, and he gave evidence as to the method of preparing the assessment roll. It appears beyond question that the assessor's office kept a book in which they entered a memorandum of any notices of sale of land within

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the city which they received, and in the course of the year they received hundreds of such notices from real estate agents and others, simply notifying them that a certain lot had been sold and giving the name of the purchaser. These properties appear to have been sold chiefly on an agreement for purchase on terms. The practice in the assessor's office was then to enter the name of the purchaser on the assessment roll, without regard to what amount had been paid on account of the purchase, or any other facts in connection therewith. Whether this is or is not a proper way of preparing the assessment roll I express no opinion, but I feel confident that the assessment roll cannot, after that, be treated as the list of owners required to be prepared for the purpose of an election for mayor and aldermen. This appears to have been the practice in the city for a considerable period, but the Courts are not supposed to perpetuate error. The city clerk evidently had misgivings as to the correctness of his method, and, prior to the sitting of the court of revision, wrote to the city solicitor for advice, and the very question here discussed was referred to the city solicitor, who replied that the word "owner" in the Elections Act must be interpreted as the "registered owner." This letter was laid before the court of revision at its sitting, and the matter was discussed by the court; but because it would cause a great upheaval in the list the court decided to adhere to the old method of preparing the list. It did, however, in one specific instance, at the request of a registered owner, restore his name to the list, but at the same time left upon the list the name of the purchaser.

Judgment

Sub-section (*c*) of section 14 provides that the "court of revision shall *correct and revise* the said voters' list," but I do not think it can be said, in this case, that the court of revision corrected or revised the voters' list as prepared by the city clerk, in fact, they declined to correct, and it is no answer to say, as suggested by counsel for the respondent, that no application had been made for that purpose, because the statute does not provide that any application shall be made. It is, however, provided that the court shall have the additional power of hearing and determining any application to strike off

the name of any person improperly placed thereon, or to place on said list the name of any person improperly omitted. This latter appears to have been done.

I do not think it was necessary for the petitioner to shew on the hearing that as many or more names had been improperly placed on the list than would equal the majority received by Mr. Morley. To do so would have occupied weeks, and the time of the Court is not to be taken up with unnecessary matter. It was proved on the hearing that the last memorandum received in the assessor's office of sales by agreement contained 47 names; and that, with the exception of 15 of them, the purchaser had no other property qualification, and one of them at least was an infant. The practice adopted with reference to this memorandum was the practice adopted generally, and I must draw the only reasonable inference, *viz.:* that the list as prepared by the clerk, revised and certified, contained the names of very many persons not entitled to be placed upon it; and it is not necessary, as I shall shew later, for the petitioner to prove that those persons actually voted at the election now contested.

The Queen ex rel, St. Louis v. *Reaume* (1895), 26 Ont. 460, referred to by Mr. *Maclean,* is of some assistance in discussing this question, although the actual point decided is not the question in issue here. But that case is decided on the Ontario Municipal Act, 1892, section 188, which sets out the grounds upon which an election may be contested, but it contains no provision such as section 91 of our Elections Act does, *viz.:* that it may be contested on the ground that the voters' list has not been "compiled or revised . . . . . in accordance with law." In the Province of Ontario the voters' lists are prepared under the provisions of the Voters' Lists Act, and the final list is certified by a County Court judge. It may be remarked, in passing, that the Ontario Municipal Act, by section 79, provides a qualification for voters on real property, quite similar to our own, as I have interpreted it.

Judgment

It only remains to deal with section 92 of the Elections Act, which is as follows:

"No election of a member of any municipal council shall be declared invalid by reason of a non-compliance with the rules contained in the

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Act, or any amendments thereto, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and in the by-law or resolution (if any) of the municipality in which such election was held relating to elections, and that such non-compliance, or mistake, or irregularity did not materially affect the result of the election."

This section is practically copied from section 175 of the Ontario Act, 1892, but it has omitted a material portion of the Ontario section, as shewn by the last phrase, for the words there "such non-compliance or mistake" refer to the rules as to the taking of the polls, counting the votes, or mistake in the use of forms in the Ontario Act, and which are omitted from our Act after the first word "Act" in section 92. But in any case, it provides that an election shall not be declared invalid "by reason of any irregularity if it appears to the tribunal . . . that the election was conducted in accordance with principles laid down in this Act . . . . and that such . . . . irregularity did not materially affect the result of the election." It is surely not necessary for the petitioner to furnish proof that might shew that he was not entitled to a decision. That duty is cast upon the respondent; it is for him to shew that the irregularity did not affect the election. I cannot believe that it did not, when I must infer that so many names have been improperly placed there, and as stated by Chancellor Boyd in the case above referred to, it is impossible to say what effect the presence of names improperly placed upon the list had upon the election. In addition, the election does not appear to me to have been conducted in accordance with the principles laid down in the Act; the list of owners was prepared on a principle in defiance of the requirements of the Act.

Judgment

Aside, however, from section 92, though I am satisfied that the matter complained of here is not an irregularity, but a matter of substance, section 91 expressly provides that a petitioner may complain of an election on the express grounds taken here. As to section 20 of the Act, if there is any conflict between it and section 91, the latter being a later section must govern; but it appears to me that both sections might well stand, and that section 20 may be interpreted to mean that

the lists as revised and used in an election shall thereafter be the lists for the remainder of the year if the election has not been protested. It would seem to be idle to suggest that in the first election a petitioner could not complain that the lists were invalid because they had been used, when of necessity they must have been used before he could launch his petition; and in any case, the lists, as I have already held, were not revised. Certain corrections were made on application, but that is not of itself a revision.

It occurs to me that the situation is not so embarrassing as has been suggested by counsel for the respondent and the city solicitor. Sub-section (*c*) of section 91 provides that "the order of the judge on the said petition may be appealed from, and the order of the judge or of the Court on appeal may contain all necessary directions for the holding of a new election or otherwise, as may be requisite." This appears to me to give ample authority to make the necessary provision for the preparation of new lists and the holding of a new election.

The election of Mr. Morley as mayor will be declared invalid, but I will hear any application with reference to the costs of this petition, and the directions for the holding of a new election.

Judgment

I omitted to refer to the suggestion that many of the names upon the list of owners might probably have been placed on the list of householders or licensees, but that is no answer to the petition; it is only speculative, and in any case, can only be done upon the application of the claimant to vote, upon complying with certain regulations, one of which is the payment of certain taxes. It does not appear that they could have made the necessary declaration at any time, and at the time of the so-called revision it was too late for them to do so.

Election quashed.

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HUSON v. HADDINGTON ISLAND QUARRY CO.

HUSON *ET AL.* v. HADDINGTON ISLAND QUARRY COMPANY, LIMITED.

Mortgage—Duty of mortgagee—Interest of mortgagor—Leave to redeem—Assignment of mortgage—Power of sale—Notice to purchasers—Setting aside sale as made at undervalue—Equities between parties to the mortgage.

In an instrument mortgaging certain land containing a stone quarry for $3,500, it was provided that on two months' default in payments the power of sale might be exercised without notice. Default occurred, but thereafter the mortgagee assigned the mortgage to the Chief Commissioner of Lands and Works, and it was then arranged between plaintiffs and the commissioner that a contractor was to take stone from the quarry for the erection of Government buildings, paying the Government a royalty which was to be applied on the mortgage for the benefit of the plaintiffs (mortgagors). The royalty paid under this arrangement reduced the mortgage to $1,150. The Chief Commissioner subsequently assigned this mortgage to defendant Company, who, presuming to act under the power of sale, sold the quarry to their co-defendants for $3,500. It was in evidence that the quarry was worth at least $20,000; that the sale was made without notice to anyone but the purchasers, and that the latter had sufficient knowledge of the value of the property to put them on their guard. Further, it was contended, for the plaintiffs, that the assignment of the mortgage by the commissioner did not vest the mortgage in the defendant Company, as there was no order in council of the Government authorising the assignment. In reply to this, it was submitted for defendants that to support such a contention the Attorney-General should have been made a party.

Held, that the power of sale had not been exercised with proper regard for the interests and rights of the mortgagors, and that a sale so made should be made as a reasonably prudent man would sell his own property, and therefore that, in the circumstances, the sale should be set aside and plaintiffs allowed to redeem.

Per GALLIHER, J.A.: That the Attorney-General was not a necessary party; also that there were no equities existing between the Government and the mortgagors (plaintiffs) which attached to the assignment from the commissioner to the defendant Company.

Statement

APPEAL from the judgment of MORRISON, J. dismissing the plaintiffs' claim on the ground that the Attorney-General

should have been made a party defendant. The facts are set out in the reasons for judgment on appeal.

The appeal was argued at Victoria on the 25th, 26th and 27th of October, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Higgins, for appellants (plaintiffs).

W. J. Taylor, K.C., and *Harold Robertson,* for respondents (defendants).

Cur. adv. vult.

10th January, 1911.

MACDONALD, C.J.A.: The plaintiffs, or those whom they represent, were the owners of the Haddington Island quarry, and mortgaged it to one Macaulay. The mortgage contained a clause that on two months' default the power of sale might be exercised without notice. After default, Macaulay assigned the mortgage to the Provincial Government, and arrangements were made between the Government and the mortgagors by which a contractor for the erection of the Parliament buildings should be permitted to take possession of the quarry and take stone therefrom, paying to the Government a royalty of five cents a cubic yard for the benefit of the mortgagors. Under this arrangement, stone was taken from the quarry and the royalty credited upon the mortgage in question, which was finally reduced, according to a statement of account made by the Government, to the sum of $1,150 or thereabouts. On the 11th of March, 1908, the Government assigned this mortgage to the defendant Company, and the defendant Company purporting to act in pursuance of the power of sale, made a sale of the quarry to its co-defendants for $3,500. The plaintiffs attack this sale, and amongst other things, claim that the assignment of the 11th of March did not vest the mortgage in the defendant Company, because there was no order in council authorizing the assignment. Objection was taken that to succeed on such a ground the Attorney-General should be a party defendant, and as he was not, the learned trial judge dismissed the action. There are a number

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of other grounds of attack upon the mortgage which I need not refer to in particular, except that the plaintiffs allege that the sale should be set aside on the ground that the same was improvident, and they, in the alternative, claim to redeem. As I have come to the conclusion that the sale was not made by the defendant Company with due regard to the interests of the mortgagors, it becomes unnecessary to consider the other questions raised in the pleadings. For the purpose of my decision it may be conceded that the assignment from the Government to the defendant Company was a good and valid assignment; that the mortgagors were in default for more than two months; and that the defendant Company had the right to exercise the power of sale contained in the mortgage. The question then is, have they exercised that power of sale in a proper manner? The defendants offered no evidence. The evidence given on behalf of the plaintiffs that the quarry was worth at least $20,000 is uncontradicted. How is it then, that the defendant Company sold a property worth at least $20,000 for $3,500? The sale was made, admittedly, without notice to the plaintiffs; without notice to the public; without notice to anyone, so far as the evidence shews, except to the purchasers, the other defendants. Those purchasers had seen the quarry, they knew its value. There is evidence that two members of the defendant firm were told by one of the plaintiffs that he feared that an attempt was being made to dispose of this property without due regard to the plaintiffs' interests. It is clear that the defendant firm was put on notice that the plaintiffs claimed that they were in fear of being unfairly dealt with, and desired to protect their interest in the property. If it be necessary to shew that the purchasers were aware that the property was being sold under power of sale at an undervalue, I think there is sufficient evidence to prove the knowledge, or some knowledge sufficient to put the purchasers on their guard. So far as the evidence shews, the defendant Company made no effort at all to obtain the best price obtainable for the property; all that we know is that $20,000 worth of property was sold by them for $3,500 without notice to anybody. The inference is obvious, and it is

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against the defendants. While the cases shew that the mortgagee or assignee of the mortgagee is not a trustee for the mortgagor, yet they shew that the power of sale ought to be exercised with due regard to the mortgagor's interests, and the sale ought to be made in the manner that it would be made by a reasonably prudent man selling his own property.

I think, therefore, the appeal should be allowed, the sale set aside, and that there should be the usual decree for redemption.

There should be a reference to the registrar to take the accounts, including the rents and profits received, or which should have been received, by the defendant Company as mortgagees in possession. Further directions and costs should be reserved to be disposed of by the Supreme Court, except the costs of this appeal, which should be paid by the defendants.

MACDONALD, C.J.A.

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

MARTIN, J.A.

GALLIHER, J.A.: In my opinion the Attorney-General is not a necessary party to this action for the purpose of giving to the plaintiffs the relief to which I think they are entitled.

The facts of the case are shortly these: On October 31st, 1893, the plaintiff Huson, one Henry Rudge and one Samuel Gray, being then the owners in fee, mortgaged to William James Macaulay a certain tract of land known as Haddington Island, and more particularly described in the mortgage, upon which was situate a stone quarry, for the sum of $3,500, which mortgage contained among others the following covenants:

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"Provided, that the said mortgagee, in default of payment for one month may, on one month's notice, enter on and lease or sell the said lands.

"And provided also, that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said powers of entering and leasing or selling, or any of them, may be acted upon without any notice."

On November 2nd, 1894, the mortgagors then being in default, the principal and interest being overdue and unpaid, the said Macaulay transferred and assigned the said mortgage to

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the then Chief Commissioner of Lands and Works. At this time stone was being taken from the quarry on this land and was being used in the construction of the Legislative buildings then being erected at Victoria.

The plaintiff Huson says, in his evidence, that he had a verbal arrangement with the then Attorney-General that the mortgage should be paid off out of the proceeds of the stone to be supplied from the quarry, and subsequent events shew that this was carried out to the extent of reducing the amount due under the mortgage on the 11th of March, 1908, to $1,150.87.

On the 1st of February, 1894, the mortgagors entered into an agreement with the then Chief Commissioner of Lands and Works, in which, after reciting that the mortgagors had undertaken to supply Frederick Adams, contractor for said Legislative buildings, with Haddington Island stone to be used in the construction of said buildings, and had furnished a bond to the satisfaction of the commissioner; the mortgagors hypothecated the said lands and quarry to the use of the Province, with a proviso that the agreement should be void in case they carried out their contract with Adams to supply stone, and providing that, should they fail to do so, the Chief Commissioner or his agent could enter into possession of the lands, and take stone therefrom, charging the expenses to the mortgagors.

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This was later superseded by an agreement dated the 12th of June, 1894, and made between Frederick Adams, the contractor, of the first part, the Hon. Forbes George Vernon of the second part, and the mortgagor of the third part, in which it was provided that the Chief Commissioner and the mortgagors should render quiet possession of the lands and quarry plant to the contractor, that the contractor should work same, and account to the Chief Commissioner at the rate of five cents per cubic yard royalty for all stone extracted from the quarry; these moneys to be held by the minister for the use and benefit of the mortgagors. The moneys so received, together with a sum received from the contractor for the Empress hotel, Victoria, for which stone was also taken from the quarry, were credited upon the mortgage.

No payments were made or credits given on account of principal or interest after June 15th, 1906, so that on March 11th, 1908, there was due on account of principal and interest on the said mortgage the sum of $1,150.87. On this latter date the Hon. F. J. Fulton, then Commissioner of Lands and Works, assigned the mortgage and the moneys due thereunder to the Haddington Island Quarry Company, Limited. This Company filed its memorandum of association dated 6th March, 1908, with the registrar of joint stock companies under the provisions of the Companies Act, 1897, their object, as stated therein, being to carry on the business of quarry masters and stone merchants. There is no evidence that they ever did so carry on business or do more than acquire this mortgage from the Chief Commissioner, and sell the property under the power of sale to the defendant Walker, who, it is admitted, was a trustee for the defendants McDonald, Wilson and Snider, it being stated that the deed was in his name, as he advanced the money to make the purchase. This sale was made on the 18th of May, 1908, and a conveyance executed by the Company on that date. The defendant Walker was not represented before us.

The case was tried before MORRISON, J. who dismissed the plaintiffs' action on the ground that the Attorney-General should have been made a party. From this judgment the plaintiffs appeal.

GALLIHER, J.A.

I do not think it is necessary to deal with more than two points raised in the appeal. Were there any equities existing between the Government and the mortgagors or their representatives, and if so, did such equities attach to the assignment from Hon. F. J. Fulton to the defendant Company? And secondly, was the property sold at such an under-valuation as to warrant this Court in setting aside the sale and allowing the mortgagors in to redeem?

On the first point I am against the appellants. Taking all the arrangements which culminated in the agreement of June 12th, 1894, and reading that agreement, it appears to me it goes no farther than to provide for an application of the royalty on such stone as should be supplied thereunder on the

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mortgage. This was done, and although we find a credit for stone supplied the Empress hotel, I treat that merely as a sum received and applied in due course on the mortgage. This was the last credit given, and is some two years before the mortgage was assigned to the defendant Company, so that even if that is treated as a payment under a special agreement, the mortgagors were for a long time subsequent thereto in default, and the Government could deal with the mortgage as they saw fit, due regard being had to the interest of the mortgagors. Their assigns could, of course, do likewise.

On the second ground, I am of opinion the plaintiffs should succeed. The evidence of the plaintiff Huson is that the quarry is worth $20,000, and there is nothing to contradict this. The onus is on the defendants to shew that there was a due exercise of the power of sale: *Bartlett* v. *Jull* (1880), 28 Gr. 140. The defendant Company do not attempt to give any evidence upon this. They simply say: we are the assignees of a mortgage. The mortgagors are in default. We are entitled to sell without notice. We have sold for $3,500.

Now let us examine the cases, and see how the Courts have dealt with this question.

In *Kennedy* v. *De Trafford* (1896), 1 Ch. 762, Lindley, L.J., at p. 772, expresses his view of the law thus:

GALLIHER, J.A.

"A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor; that is all."

And Maclennan, J.A., referring to this in *Aldrich* v. *Canada Permanent Loan Co.* (1897), 24 A.R. 193 at p. 195, says:

"Recklessly means carelessly, negligently, and if there be negligence and want of proper care and precaution, and if that is followed by a sacrifice of the interest of the mortgagor, then, according to all the authorities, the mortgagee is answerable for the loss and must make it good."

In *Warner* v. *Jacob* (1882), 51 L.J., Ch. 642 at p. 645, Mr. Justice Kay, after summing up the authorities, says:

"The result seems to me to be, that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale

be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud."

Then in *Latch* v. *Furlong* (1866), 12 Gr. 303 at p. 306, Vice Chancellor Mowat, in referring to the language of Lord Justice Turner in *Davey* v. *Durrant* (1857), 1 De G. & J. 535 at p. 558, says:

"Now I presume, that by a 'fraudulent undervalue' in this connection, is meant a gross undervalue, such as shews either actual and intentional fraud, or gross negligence, constituting in the view of equity, a fraud on the mortgagor; and I think that the undervalue which is established in the present case is, under the circumstances, abundantly sufficient for this purpose. Had the mortgagee used any exertions, or, in the absence of such exertions, had there been any contrariety in the evidence as to the fairness of the price, I might have found reason to hesitate before avoiding the purchase."

In that case the property was sold for $300, and the value was fixed at $600.

Now, what do we find in the case at bar? The defendant Company incorporated ostensibly for quarrying, working and dealing in stone, on March 6th, 1908, acquire the mortgage on March 11th, 1908, and sell to the defendants McDonald, Wilson and Snider on May 28th of the same year for $3,500. No notice is given to the mortgagors or their representatives, no advertisement in newspapers, no effort made to procure a fair price, and the property is sold under the power of sale for the grossly inadequate price of $3,500. It seems to me that this falls far short of the duty that devolved upon them in the due exercise of the power of sale.

The sale was made with no thought of the interests of the mortgagors, in fact the very reverse.

As illustrating what may be considered reasonable efforts in this behalf, the case of *Chatfield* v. *Cunningham* (1891), 23 Ont. 153, might be referred to. But the defendants McDonald, Wilson and Snider say: We are *bona fide* purchasers without notice, and as against us the sale should not be set aside. I think I need only refer to the evidence which shews, to my mind, that they were not only not purchasers without notice, but were parties to obtaining these lands with full knowledge of all the circumstances.

I would allow the appeal with costs.

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The sale should be set aside and the plaintiffs allowed in to redeem.

Appeal allowed.

Solicitor for appellant: *F. Higgins.*

Solicitors for respondents: *Eberts & Taylor* and *Harold Robertson.*

MURPHY, J.
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FRENCH v. MUNICIPALITY OF NORTH SAANICH

FRENCH v. MUNICIPALITY OF NORTH SAANICH.

Municipal law—By-law regulating trade—Power to regulate does not include power to prohibit—Reasonableness—Intention of council in passing by-law—Object aimed at in by-law.

A menagerie kept within the municipal area is not a nuisance *per se.*

Where, therefore, a municipal council passed a by-law purporting to regulate the maintenance of a menagerie within the municipal bounds, but imposed such conditions as to make such maintenance virtually prohibitive, the by-law was held bad and was quashed.

A by-law manifestly passed in pursuance of a particular section of the Municipal Clauses Act, and aimed at regulating or governing a specific matter, cannot be supported as applying to other matters.

Thus, where a by-law was framed under sub-section 27 (*a*) of section 50 for regulating the keeping of wild animals in captivity, such by-law could not be supported under other provisions of the same section dealing with public health and sanitation.

Statement

APPLICATION to quash a municipal by-law passed by the Municipality of North Saanich with a view to regulating the keeping of wild animals in captivity within the municipal area. Heard by MURPHY, J. at Victoria on the 27th of April, 1911.

A. E. McPhillips, K.C., in support of the application.

Aikman, for the municipality, *contra.*

18th May, 1911.

Judgment

MURPHY, J.: I am of the opinion that this by-law must be quashed. It is objected in the first place that, under section 89

of the Municipal Clauses Act, 1906, chapter 32, the Court has no jurisdiction to quash a by-law on an application such as this unless its illegality is apparent upon its face. I find, however, on comparing the language of section 89 of our Act with section 378 of the Ontario Act, that the words conferring jurisdiction upon the Courts are identical in each. It has been held in several cases in Ontario that the power to quash is not limited to cases where the illegality is apparent upon the face of the by-law, but extends to those where it is established by extraneous evidence. (See cases cited in Biggar's Municipal Manual, p. 377). I therefore hold that I have jurisdiction, and in the circumstances, I think it is a jurisdiction which I ought to exercise.

The by-law was passed apparently under sub-section 27 (*a*) of section 50 of the Municipal Clauses Act, which authorizes municipal councils to make by-laws for regulating the keeping of wild animals in captivity. It appears on the evidence, however, that the by-law, as passed by the Municipality of Saanich, absolutely prohibits the keeping of wild animals in captivity in any part of that Municipality, because the provisions in the by-law as to locality where such wild animals may be kept are such that no point in the Municipality can be found which will not contravene them. The case of *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A. C. 88, is authority for the proposition that a municipal council cannot, under the guise of regulation, absolutely prevent the carrying on of what is a legal occupation. In fact, during the argument, counsel for the Municipality practically admitted that the by-law in question could not be supported under sub-section 27 (*a*) of section 50. He endeavoured, however, to support it under another sub-section of the same section, giving power to the Municipality to pass by-laws in relation to public health and sanitation. In answer to this, in the first place, I do not think that either the preservation of public health or the question of sanitation was in the contemplation of the Council in passing this by-law, and I doubt that it is open to counsel to change his

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position and invoke sections as authorizing the by-law which were not relied upon when it was passed.

However that may be, counsel does not contend that even these sections give power to prohibit unless the council has reason to apprehend a nuisance arising from the business thus prohibited. In support of this contention he cites *Slattery* v. *Naylor* (1888), 13 App. Cas. 446. A consideration of that case, however, shews that the by-law in question there did not absolutely prohibit the burying of the dead within the limits of the municipality; its effect was to prohibit such burial in certain places, amongst others a cemetery which had long been established. The by-law before the Court, however, is absolutely prohibitive. Further, I do not think that a menagerie can be considered a nuisance *per se*. It is well known that such institutions exist in the largest cities in the world. Consequently I do not think the provisions as to health and sanitation, even if they can be invoked, are such as to authorize the Council to pass this by-law. It is therefore quashed, the applicant to have his costs against the Municipality.

Judgment

By-law quashed.

TAYLOR v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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1911

April 11.

TAYLOR v. B. C. ELECTRIC RY. CO.

Damages—Assessment of under separate heads—Excessive verdict—New trial.

Following *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, a jury should not be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independently of nervous shock.

Remarks *per* IRVING, J.A. as to cases in which the damages were so assessed.

In this case a new trial was ordered (IRVING, J.A. dissenting) on the ground that the damages awarded were excessive.

APPEAL from the judgment of CLEMENT, J. and the verdict of a jury awarding the plaintiff $15,000 damages for injuries received in a collision on the defendants' line of railway.

Statement

The appeal was argued at Vancouver on the 24th of November, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A. The points raised in the argument on the appeal are dealt with in the reasons for judgment.

L. G. McPhillips, K.C. for appellant (defendant) Company. *McCrossan,* and *Harper,* for respondent (plaintiff).

Cur. adv. vult.

11th April, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff, who is a blacksmith by trade, was injured while travelling as a passenger on appellants' tram line by reason of a collision between the car on which he was travelling and a freight car, which was under appellants' control. It was contended by appellants' counsel that the judge erred in not directing the jury that appellants were not liable in damages for injuries to the respondent caused by mental or nervous shock, and that the jury should have been directed to separately find the damages (1) in respect of personal injury resulting exclusively from mental shock; (2) in respect of shock

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caused by blows; and (3) in respect of bodily injuries independent of any shock; and he relied on the judgment of the Judicial Committee of the Privy Council in *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222. That case has given rise to much criticism from judges in England and Ireland, some of whom have declined to follow it. We, however, are not free to question it. We are just as much bound by it as we should be by a statute in identical language, and are therefore not entitled to give weight to any opinions other than those which tend to interpret the meaning of the decision. We have therefore to determine in this case what are the principles laid down there and apply them if the facts of the case fall within those principles. As I read their Lordships' decision it is expressly limited to the declaration that the damages arising from mere sudden terror unaccompanied by actual physical injury, but occasioning a mental or nervous shock, are too remote to be recovered.

In the case at bar there was serious physical injury both external and internal. There was no sudden terror or fright. The blow came unexpectedly and the respondent lost consciousness immediately and remained in that condition for several days. The nervous symptoms did not develop or at least manifest themselves until some weeks after the injury. It is clear that he is still suffering physically from the injury sustained, but it is said that he is suffering from traumatic neurasthenia, or nervous shock as well.

MACDONALD, C.J.A.

I think the jury were entitled to say on the evidence that the nervous condition described was the result of the bodily injuries occasioned to the respondent by the appellants' negligence, and not of sudden terror; that his condition is the natural and reasonable result of the defendants' act.

I do not see the propriety of asking a jury to assess separately, or at all, damages resulting exclusively from mental shock. Such damages are not recoverable, if I correctly understand the decision in the *Coultas* case. I would suggest that the proper course to pursue in cases where there is evidence of injuries occasioned by such shock is to direct the jury that they are not to give damages for such, that that element must be excluded

in arriving at the quantum of damages, nor do I see any reason why a jury should be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independent of shock. Juries ought not to be unnecessarily burdened with distinctions which are not easily appreciated and understood by laymen.

On the other ground of appeal, namely, that the damages awarded are excessive, I think there should be a new trial, the costs of the first trial to abide the result of the new trial.

IRVING, J.A.: The learned trial judge thought it would not be fair to the jury to ask them to assess the damages separately (1) in respect of personal injury resulting exclusively from mental shock; (2) in respect of shock caused by blows; (3) in respect of bodily injuries independent of any shock; and the jury fixed the damages at $15,000.

Having regard to the fact that the plaintiff received severe physical injuries crippling him in earning his livelihood, as well as causing him great pain, I do not see that the damages were so excessive as to call for a new trial, that is if the plaintiff is not barred from recovering damages in respect of the injuries he suffered from the mental shock.

As to the practice of dividing the damages into separate heads, as a consequence of the decision of the Judicial Committee in *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222; *Henderson* v. *Canada Atlantic R. W. Co.* (1898), 25 A.R. 437, confirmed, but not on this point, by the Supreme Court of Canada (1899), 29 S.C.R. 632, and *Geiger* v. *Grand Trunk R. W. Co.* (1905), 10 O.L.R. 511, are cases in which the damages were so assessed.

IRVING, J.A.

In *Toms* v. *Toronto R. W. Co.* (1910), 22 O.L.R. 204, the judge declined to put the matter to the jury in that shape, and he was upheld by the Court of Appeal on the ground that the plaintiff in the *Toms* case had suffered a physical impact and as a result a condition of traumatic neurasthenia developed, and that there was no physical impact in the *Coultas* case.

This difference as to the primary cause of the injury seems

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to me to be established in the evidence and I would therefore dismiss the appeal.

Raves v. *Blaenclydach Colliery Company, Limited* (1909), 2 K.B. 73, a workman's compensation case, decides that a man's compensation is not to cease as soon as the muscular mischief is at an end.

GALLIHER, J.A.

GALLIHER, J.A.: This case is clearly distinguishable from *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, as I understand the decision in that case. To my mind, the learned trial judge was right in not requiring the jury to find or attempt to find so much as damages from mental shock, and so much for bodily injury, as from the evidence in this case I think it would be setting them an impossible task. I am, however, clearly of opinion that the damages awarded are excessive, and that a new trial should be granted on that ground alone, and this having fully in view the principles laid down by eminent judges for the guidance of Courts of Appeal in ordering a new trial.

The appeal should be allowed, and a new trial ordered.

New trial ordered, Irving J.A. dissenting.

Solicitors for appellant Company: *McPhillips & Tiffin.*
Solicitors for respondent: *McCrossan & Harper.*

WILKINSON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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WILKINSON v. B. C. ELECTRIC RY. CO.

Negligence—Death ensuing from accident arising out of such negligence—Employee of railway travelling on a pass—Onus on Company to prove issue of pass—Fellow servant—Common employment.

Deceased, an employee of defendant Company, was killed in a collision between the car of the defendant Company on which he was travelling to his work, and a freight car which had been allowed to get loose and run down grade alone. There was no proof of how this car got away. Some evidence was given of a pass from the Company having been found on deceased, but not to shew that a pass had been issued to him over that portion of the line, nor was the pass produced.

Held, that the onus was on the defendant Company to shew that deceased was travelling on a pass, and that it was not shewn that he was being carried in such circumstances as to make him a fellow servant with those operating the line.

Per IRVING, J.A.: That the case had not been tried out, because the trial judge, after instructing the jury that defendant Company would not be liable if it was found that deceased was travelling on a pass by reason of the negligence of a fellow servant, asked the jury to find whether the accident was due to a defective system without explaining to them what constituted a defective system.

Statement

APPEAL from the judgment of CLEMENT, J. and the verdict of a jury in an action for damages arising out of a collision on the defendant Company's line, tried by him, with a jury, at Vancouver on the 29th of June, 1910, giving plaintiff a verdict for $11,000.

The appeal was argued at Vancouver on the 24th of November, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

L. G. McPhillips, K. C., for appellant (defendant) Company: We say that the deceased was a servant travelling on a pass, and under the terms of that pass we are not liable in damages. There was no evidence of a defective system; therefore the case should not have been sent to the jury on that ground.

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Macdonell, and *Wintemute,* for respondents (plaintiffs): There is no evidence that deceased travelled on a pass; it was not produced, if he had one. They referred to *O'Brien* v. *Michigan Central R. R. Co.* (1909), 19 O.L.R. 349; *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494.

McPhillips, in reply.

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.: The plaintiff's husband was killed in the collision referred to by me in the case of *Farmer* v. *B. C. Electric Railway Company,* reasons for judgment in which I have just handed down. There is in this case the same absence of proof of how the accident occurred, there is simply the fact of the collision. In this case, also, the deceased was an employee of the defendants, but it is not shewn to my satisfaction that he was a fellow servant of those operating the tramway. He was on his way to work at the time of the occurrence. The only evidence with regard to how he was travelling at the time is that obtained on cross-examination of the plaintiff, when she was asked:

"Did you receive any articles, things of that kind, that were taken from him (deceased) on the morning of the accident? Yes.

"Did you find a pass in there? There was a pass in his pocket book."

MACDONALD, C.J.A.

The defendants offered no evidence to shew that they had issued a pass to the deceased over this portion of their line; the alleged pass itself was not produced and put in evidence; whether it was current or whether it was not is not shewn; and I therefore do not think that the defendants have shewn that the deceased (Wilkinson) was at the time travelling upon a pass, or that he was being carried under such circumstances as to make him a fellow servant with those operating the tramway.

The onus of proof was on the defendants, and to shew how dangerous it would be to accept the above evidence as sufficient, I need only refer to statements made by counsel after the jury had retired, that the pass found in the pocket book was not a pass over this portion of the line at all. This, of course, was not before the jury, but as I have already said, the onus of proof was upon the defendants. For the reasons which I have given

in the *Farmer* case, with the doctrine of common employment eliminated, I think the jury were entitled to draw the inference from the unexplained fact of the collision that the death occurred by reason of defendants' negligence.

Another question was raised on the appeal before us, namely, that the damages awarded were excessive. While they were undoubtedly large, yet I do not think we can say that the jury might not reasonably have awarded them.

The appeal should be dismissed.

IRVING, J.A.: The evidence shews that a collision took place between a passenger car and an unattached freight car, running down grade. How, or in what way, the freight car was allowed to run wild is not shewn.

It is admitted that the deceased, who was in the passenger car, was in the employ of the defendants and was going to New Westminster, where he worked for the Company. There was no evidence that he was travelling on a pass, or that he was on the train by virtue of any term or condition of his contract of employment (as in the case of *Tunney* v. *Midland Railway Co.* (1866), L.R. 1 C.P. 291; or in *Coldrick* v. *Partridge Jones & Co., Limited* (1909), 1 K.B. 530, (1909), A.C. 77). He must be regarded then as an ordinary passenger, and in my opinion the doctrine of *res ipsa loquitur* would apply: *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.* 10 O.L.R. 419; but I do not think we can dispose of the case on that one ground. The case, in my opinion, was not fully tried out. The learned judge, after instructing the jury that the defendants would not be liable if he was travelling on a free pass, by reason of the negligence of a fellow servant, asked the jury whether the accident was due to a defective system on the part of the Company, without explaining what would constitute a defective system.

The charge seems to me to be objectionable because it assumes that the deceased was travelling on a pass—or at any rate was in the course of his employment. The learned judge told the jury that if they found the system was faulty, they could

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notwithstanding that the deceased was travelling on a pass, find a verdict for the plaintiffs, but he omitted to explain to the jury what they should consider when reaching a conclusion that the system was defective. I venture to think from the answer given that the jury did not understand what was meant by system.

In *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494, the question of system was discussed, but after evidence had been put in, the jury found that the system was defective. The trial judge (Meredith, C.J., 13 O.W.R. 463) and the Ontario Court of Appeal, thought there was no evidence to justify the jury in finding that the system was defective. In this conclusion they were supported by Davies, J., but the other judges in the Supreme Court of Canada took a different view; but that decision turned on evidence.

IRVING, J.A.

In my opinion there was in this case no evidence to justify the jury in coming to any conclusion as to the system one way or the other.

I think there should be a new trial.

MARTIN, J.A.

GALLIHER, J.A.

MARTIN and GALLIHER, JJ.A. concurred with MACDONALD, C.J.A., in dismissing the appeal.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant Company: *McPhillips & Tiffin.*

Solicitor for respondent: *B. P. Wintemute.*

REX v. JONES.

GREGORY, J.

1911

Jan. 21.

REX v. JONES

Criminal law—Practice—Crown Office Rules—Statute, construction of—Crown Costs Act, 1910—Effect of upon criminal cases—Unsuccessful application for certiorari.

Where an applicant for a writ of *certiorari* in a criminal proceeding was unsuccessful, the Crown asked for and was granted costs, it being *Held*, that the Crown Costs Act, 1910 (B.C. Stat., Cap. 12), which provides that no Court or judge shall have power, except under the provisions of a statute expressly authorizing it, to order that the Crown shall pay or receive costs in any cause, matter or proceeding, does not apply to criminal proceedings.

APPLICATION for a writ of *certiorari* in a criminal cause, heard by GREGORY, J. at Victoria on the 18th of January, 1911. The rule having been discharged, the Crown asked for costs, and it was submitted that the Crown Costs Act, 1910, which enacts that no Court or judge shall have power, except under the provisions of a statute expressly authorizing it, to order that the Crown shall pay or receive costs in any cause, matter or proceeding, operated against such a demand.

Statement

Harold Robertson, for the Crown.
Tait, for defendant.

21st January, 1911.

GREGORY, J.: The rule *nisi* for *certiorari* having been discharged, the Crown asked for costs, notwithstanding the Crown Costs Act, 1910, which provides that

"No Court or judge shall have power to adjudge, order or direct that the Crown or any officer, servant or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter or proceeding, except under the provisions of a statute which expressly authorizes the Court or judge to pronounce such judgment or to make such order or direction as to costs."

Judgment

The proceedings herein were purely criminal and the question to be decided is: Has the Crown Costs Act, 1910, any effect upon costs in such cases? Acting under the authority of sections

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533 and 892 of the Criminal Code, 1892 (continued by sections 576 and 1,126 of the Code of 1906) the judges of the Supreme Court made certain rules and by Rule 1, Crown Office Rules (Criminal), provided that the practice and procedure in relation to *certiorari*, etc., should be the same as that followed in civil proceedings.

Certiorari practice in civil proceedings is and was at that time governed by Crown Office Rules (Civil) numbered from 28 to 40, both inclusive. Under rule 36 the applicant for a writ of *certiorari* must enter into a recognizance in the sum of $100 to prosecute the same at his own cost and charges and pay the party in whose favour such judgment, order, etc., shall be given his full costs and charges, to be taxed, etc.

The applicant herein duly complied with this rule 36, but now says that since the passage of the Crown Costs Act, 1910, the giving of the recognizance is a mere matter of form and it cannot be enforced. His contention may be sound as to civil matters to which the Crown is a party, but cannot, I think, be accepted in purely criminal proceedings. That the Parliament of Canada has exclusive jurisdiction in criminal matters is unquestioned.

Judgment

In the matter of jurors' qualification, etc., it has delegated its authority to the provincial Legislature: see section 921 of the Criminal Code, 1906. In the matter of the practice and procedure in *certiorari* proceedings, it has delegated its jurisdiction to the judges of the Superior Courts: see sections above referred to.

It is a well recognized principle of law that a delegated authority cannot be re-delegated where the authority involves a trust or discretion in the agent for the exercise of which he is selected; nor can one clothed with judicial functions delegate the discharge of those functions to another unless there is express power enabling it to be done: Broom's Legal Maxims, 7th Ed., pp. 637-640. See also the cases referred to by CLEMENT, J. in *In re Behari Lal* (1908), 13 B.C. 415.

To hold that any change in the practice as to civil proceedings in *certiorari*, made by Provincial statute, would automatic-

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ally change the criminal practice, by reason of the wording of Rule 1, Crown Office Rules (Criminal), would be a manifest disregard of the legal principle above referred to. Rule 1 speaks only with reference to the civil practice prevailing when it was made and which the judges in the exercise of their judicial discretion then adopted for criminal matters; to hold otherwise would be equivalent to holding that the judges could make a rule saying that the criminal practice shall hereafter be the same as the civil practice as the same may be altered from time to time by the provincial Legislatures, which would be clearly bad, as it would be an attempt to transfer to the provincial Legislatures the discretion which the Code intended should be exercised by them. In the matter of jurors' qualification, the Code gives that discretion to the provincial Legislatures but not so here. Heretofore the practice has been to give the Crown costs in unsuccessful *habeas corpus* and *certiorari* proceedings: *Regina* v. *Little* (1898), 6 B.C. 321; *In re Narain Sing* (1908), 13 B.C. 477. In the Province of Ontario there is jurisdiction to award costs against an unsuccessful applicant in *certiorari* proceedings in purely criminal matters: *The King* v. *Bennet* (1902), 5 C.C.C. 456.

Judgment

The rule will therefore be discharged with costs.

Order accordingly.

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1911

April 28.

KRZUS v. CROW'S NEST PASS COAL COMPANY, LIMITED.

Statute, construction of—Workmen's Compensation Act, 1902—Alien dependants residing in a foreign country.

KRZUS v. CROW'S NEST PASS COAL CO.

The provisions of the Workmen's Compensation Act, 1902, awarding compensation to the dependants of a deceased workman in circumstances provided for in the Act, do not apply to alien dependants of such workman resident in a foreign country.

IRVING, J.A. dissenting.

APPEAL from the judgment of CLEMENT, J. upon a case stated submitted for his opinion by WILSON, Co. J. acting as an arbitrator under the Workmen's Compensation Act, 1902. The deceased, a workman employed by the respondent Company, was killed in an accident arising out of and in the course of his employment, and the applicant applied for compensation under the Workmen's Compensation Act, 1902, on behalf of the widow, who resided at the time of the accident, and since, in Austria. The widow was not a British subject, and never resided in British Columbia. WILSON, Co. J. submitted the following questions: (1) Can the applicant, who is the legal personal representative of the deceased workman, and who was a resident of the Province of British Columbia, obtain an award under the Workmen's Compensation Act, 1902, the dependant of the deceased being an alien, residing in a foreign country at the time of the accident out of which the claim for compensation arose, and at the time of the death of the deceased workman and ever since? (2) Can such legal personal representative in such circumstances enforce payment to him of compensation so awarded by an action on the award? (3) Can such legal personal representative in such circumstances enforce payment of the award, pursuant to section 8 of the Second Schedule of the Workmen's Compensation Act, 1902? CLEMENT, J. answered the first question in the affirmative and expressed

Statement

no opinion on the other two. The defendant Company appealed.

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

Davis, K.C., for appellant: The question is whether the statute applies to a foreign dependant residing out of the jurisdiction, and although the point came up in a sense in *Varesick* v. *B. C. Copper Co.* (1906), 12 B.C. 286, yet there is no reported decision that can be found of its actually having arisen before, either in Canada or England. Ruegg is silent on the point, but the amendment to the Act in England in 1909, permitting French dependants to come within the statute is suggestive that, in the opinion of Parliament, they did not come in before; it is a statutory declaration that before then they were not entitled. See *Adam* v. *British and Foreign Steamship Company* (1898), 2 Q.B. 430; *Davidsson* v. *Hill* (1901), 2 K.B. 606, 70 L.J., K.B. 788, both of which, however, were under the Employers' Liability Act. Also *Tomalin* v. *S. Pearson & Son, Limited* (1909), 2 K.B. 61 at p. 64; 78 L.J., K.B. 863 at p. 865, and *Colquhoun* v. *Heddon* (1890), 25 Q.B.D. 129 at p. 134. The right here is merely a statutory obligation imposed on the employer, and apart from the statute there is no right of action. The *Tomalin* v. *Pearson* case is exactly in point here; "Parliament does not extend its legislative enactments beyond the territorial limits of the United Kingdom." *Ergo*, unless the statute expressly gives the right, there is no other way of getting it, and the word dependant must mean a person within the jurisdiction. If the rights and liabilities governing employer and employee are confined to the jurisdiction, why should "dependant" be different? Sub-section 8 of Schedule 2 shews that it was not so intended; on the contrary, it is submitted that residence of the dependant is expressly intended.

Argument

S. S. Taylor, K.C., for respondent: Section 1 of the Act gives jurisdiction to award compensation in accordance with the First Schedule; the latter is therefore incorporated in the statute. See section 4 of the First Schedule. The only statutory limitation is that the persons seeking benefit must have been

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dependent upon the earnings of the deceased. We rely on *Davidsson* v. *Hill* (1901), 2 K.B. 606, 70 L.J., K.B. 788, which has not yet been overruled. Section 8 of the Second Schedule cannot be discussed because section 2 of the Act distinctly eliminates the Second Schedule. In case of death, the Act is intended to create a liability on the part of the defendant. The *Tomalin* case is not applicable here, because it decided that the Act did not apply where the accident occurred out of the jurisdiction; it did not deal with the question whether a foreign dependant can recover where the accident occurs within the jurisdiction. Section 8 does not apply until the award has been made; it merely provides a special remedy for the cheap enforcement of the award; it does not preclude any other remedy, but says that where a memorandum of the award is sent to the registrar of the Court where the party resides, then it will become a County Court judgment, enforceable as such. In this case there is a personal representative, the proceedings are in his name, and the dependants cannot interfere. There is nothing in either the statute or the First or Second Schedule shewing that the Legislature intended to exclude foreigners from the benefit of this legislation. If the widow here can sue under the Families' Compensation Act, it would be anomalous if she could not do so under the Workmen's Compensation Act.

Argument

Craig, on the same side: The principle that statutes have no extra-territorial effects does not mean that the statutory effect of something done shall not extend to persons beyond the jurisdiction, but means that as to some act occurring beyond the jurisdiction, which, if it had occurred within the jurisdiction would have given a cause of action, the remedy can extend beyond it. The same principle should be applied to statutes as is expounded in the common law. Beal's Cardinal Rules of Interpretation, 2nd Ed., p. 232; *Follis* v. *Schaake* (1908), 13 B.C. 471. As to the effect to be attached to section 8 of the Second Schedule, see *Lyson* v. *Andrew Knowles & Sons, Limited* (1901), A.C. 79 at p. 88. *Baird* v. *Birsztan* (1906), 8 F. 434 (Ct. of Sess.), 2 Butterworth's Digest, 724, does not apply.

Davis, in reply: The *Lyson* case does not apply, and in *Follis* v. *Schaake* the question did not arise. Here is special legislation, and the onus is on the party seeking the benefit of it, not for us, to shew that there was no limitation to "dependant." See also cases cited in *Davidsson* v. *Hill, supra.*

Cur. adv. vult.

28th April, 1911.

MACDONALD, C.J.A.: This is an appeal from the decision of CLEMENT, J. in respondent's favour, in answer to the following question submitted to him by an arbitrator under the Workmen's Compensation Act, 1902. That statute provides that:

"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

That schedule provides for compensation to the workman for injury where death does not result, and also provides that if the workman leaves any dependants solely or partially dependent upon his earnings at the time of his death, those dependants shall be entitled to compensation.

No reasons for judgment were given, but as the learned judge decided *Varesick* v. *B. C. Copper Co.* (1906), 12 B.C. 286, we may assume that he adhered to what were his reasons for judgment in that case. With the exception of the *Varesick* case we have been referred to no authority directly in point. Our attention was called, however, to the case of *Baird* v. *Birsztan* (1906), 8 F. 434 (Ct. of Sess.), 2 Butterworth's Digest, 724, from which it appears that an alien dependant residing abroad was awarded compensation. But it was pointed out, and it appears to be true, that the question we have to consider now was not raised in that case. Doubtless there may have been many cases of that sort, but they are of no assistance to us here. The question, therefore, I think must be decided on the construction of the statute, bearing in mind the rule laid down by Maxwell on the Interpretation of Statutes 213, and referred to with approval in *Tomalin* v. *S. Pearson & Son, Limited* (1909), 2 K.B. 61 at p. 64:

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"In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."

This seems to follow generally what was said in *Jefferys* v. *Boosey* (1854), 4 H. L. Cas. 815, where the principles which ought to be attended to in ascertaining the scope of Acts of Parliament were very fully considered by the House of Lords, which decided that case after submitting questions to the judges. Parke, B., one of the judges at p. 926 stated the rule thus:

"The Legislature . . . . . when legislating for the benefit of persons, must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect."

And Jervis, C.J., in the same case, at p. 946 said:

"No duty can be imposed upon aliens resident abroad and with them the Legislature of this country has no concern, either to protect their interests or to control their rights."

After hearing the opinions of the judges, the House of Lords gave judgment in that case unanimously in favour of excluding from the operation of the statute there in question (the Copyright Act, 8 Anne) aliens resident abroad for reasons practically identical with those cited above. Cranworth, L.C., at p. 97, said:

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"The object of giving that privilege (copyright) must be taken to have been a national object, and the privileged class to be confined to a portion of the community for the general advantage of which the enactment was made."

On the other hand, *Davidsson* v. *Hill* (1901), 70 L.J., K.B. 788, a decision under the Fatal Accidents Act, was relied upon by the respondent's counsel as authority for their contention that the benefit of an Act, such as the Workmen's Compensation Act, ought to be held to extend to alien dependants resident abroad. I think a distinction must be drawn between the former Act and the Act now under consideration. The former was intended to remedy an injustice by enabling dependants to obtain compensation for a wrong done to the deceased, which by common law they were denied. Here the case is different. An obligation founded on no wrongful act is imposed upon the employer on what I venture to think are con-

siderations of public policy. The Workmen's Compensation Act is in its nature domestic or municipal, and it may be regarded as a shifting of what one might call (though strictly not one) a duty, namely, to provide for the destitute, from the state to the employer. This Province owes no such obligation to aliens abroad; these could not become a burden upon the state or upon private charity in the state, hence I think no intention ought to be inferred to impose obligations on employers beyond that essential to accomplish what would appear to be the Legislature's intention. Or, to put it in another way, that the general words used in the Act relied upon as including foreign dependants must be limited by reference to what the Legislature may fairly and reasonably be considered to have had in contemplation.

As against this view of the statute there is the one based upon the notion that the Act holds out to every workman who accepts employment within the Province, a promise that in case of his death in such employment by accident, the employer shall be compelled to compensate his dependants. This, I think, is based upon the idea that the dependants derive their rights from or through the deceased workman; but as pointed out in *Tomalin* v. *S. Pearson & Son, Limited, supra,* the benefit conferred by this statute is not founded upon contract at all, but arises out of the statutory duty imposed for the benefit of dependants. It is a benefit conferred directly upon dependants.

But all this brings us back again to the question: What was the intention of the Legislature? Suppose it had thought fit to provide state insurance for the benefit of workmen and their dependants in the broad terms employed in this Act, would not the fair inference be that it intended no more than to benefit those who were actually within its jurisdiction, those who owed a duty to its laws and to whom it is reasonable to suppose it might think it owed a duty to make provision for. The Act in substance does effect state insurance. To say as CLEMENT, J. said, on the authority of Lord Macnaghten in *Fenton* v. *Thorley* (1903), 72 L.J., K.B. 787, that the "basic idea of the Act is accident insurance for the workman," seems

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to me to strengthen the employer's case. I cannot, however, agree with what appears to be his view that we can apply in this case the principles applicable to insurance effected by contract. It was argued for the respondents, relying on *Davidsson* v. *Hill, supra,* that the accident having happened in this Province, had death not resulted, the workman could have claimed compensation, therefore the reasons for the decision in that case apply here. But as I read *Davidsson* v. *Hill* the considerations there relied upon do not enter into this case at all. Kennedy, J., p. 792, said:

> "The basis of the claim to which the Fatal Accidents Act gives statutory authority is negligence causing an injury, and that is a wrong which I believe the law of every civilized country treats as an actionable wrong."

And again:

> "Nevertheless, as I venture to think, it is true to say that in substance the purpose and effect of the legislation is to extend the area of reparation for a wrong which all civilized nations treat as an actionable wrong."

MACDONALD, C.J.A.

I am convinced that alien dependants resident abroad are not within the purview of the Workmen's Compensation Act. There is very little internal evidence of the Legislature's intention in this behalf to be found in the Act, but I think that section 8 of the Second Schedule furnishes some, although perhaps only slight evidence, that those who enacted this legislation never had in contemplation as a person entitled to be awarded compensation anyone other than a resident of the Province.

I would allow the appeal.

IRVING, J.A.

IRVING, J.A.: I have reached a different conclusion. During the period that Lord Collins sat in the Court of Appeal as Master of the Rolls (1901-1907), a number of decisions were given in which this Act was construed in the way most beneficial to the claimants for compensation: see *Darlington* v. *Roscoe & Sons* (1907), 1 K.B. 219 at p. 224. We find that the Legislature appears to have intended to simplify matters as much as possible so as to avoid considerations which might involve the claimants in the making of elaborate calculations; and that the right to the compensation money descends to the personal representative of a dependant, although the dependant

died without having made a claim: *United Collieries, Limited* v. *Simpson* (1909), A.C. 383. A posthumous illegitimate child has been held to be a dependant of an injured man within the meaning of the Act: *Schofield* v. *Orrell Colliery Company* (1909), 1 K.B. 178; affirmed by the House of Lords (1909), A.C. 433. *Hodgson* v. *West Stanley Colliery* (1910), A.C. 229. These decisions have been indorsed by the House of Lords as being sound: see *Hodgson* v. *West Stanley Colliery, supra,* 237, and from them it would seem that the spirit of the Act is a liberal and beneficial one; and see *Keeling* v. *New Moncton* (1911), 1 K.B. 250. Whether a person is or is not a dependant is a pure question of fact, irrespective of legal responsibility—the only prescribed limit is that of kinship. This the arbitrator decides as a question of fact. Compare *Conybeare* v. *London School Board* (1891), 1 Q.B. 118; *Reg.* v. *Zulueta* (1843), 1 Car. & K. 215; *Santos* v. *Illidge* (1859), 28 L.J., C.P. 317; 29 L.J., C.P. 348 at p. 352.

It is settled by authority (*Tomalin* v. *S. Pearson & Son, Limited, supra,* at p. 65), that the accident must be one happening within the jurisdiction, to one there who has the status of a workman to some employer who is made liable to the jurisdiction of this Act. The principle on which that decision is grounded is that the presumption that Parliament did not design its statute to operate beyond its territorial limits. That principle seems to be correct, beyond question, but it does not, to my mind, necessarily cover the case we have under consideration. So far as I can see the fact that the workman injured was an alien, or that the claimants—if residents—are aliens, does not touch the question.

IRVING, J.A.

An alien within the realm enjoys that general protection of the King which extends generally to all the King's loyal subjects.

Then the appeal must succeed, if it is to succeed at all, because the dependants are not residents of this Province. The result would be the same if the workman injured was himself a resident British subject, and his dependants living in Alberta.

The Act was passed for the benefit of the person injured: see the title of the Act, *Salmon* v. *Duncombe* (1886), 11 App. Cas.

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627 at p. 634; the compensation is to him for injuries received by him in the course of his employment. The employer is liable, as soon as the accident happens, and the dependants—a class created by and for the purposes of this Act only—only come in where death results from the injury.

The rights of the dependants are identified with the rights of the injured man. If he lives, they have none; the money is payable to him as compensation; if he dies, a status is given to them, irrespective of any will or intestacy. If those who are in fact dependent on him, whether legally or otherwise, are not recognized, will not his estate suffer? The compensation which he was earning or has earned by his injuries has vanished. It seems to me that if we regard the compensation as an asset of the injured man, we escape the extra-territorial argument, as Parliament has, in effect, taken the administration of that part of the injured man's estate out of the hands of the executor or administrator and committed it to a new tribunal to which it has given parental authority.

IRVING, J.A.

I am of the opinion that CLEMENT, J. has read the Act in the way it was intended to be read, and having regard to the fact that our Legislature must be aware that a large number of British subjects—as well as aliens—work in the mines, I feel that he has not unduly strained the Act in holding it confers on the non-resident dependants a status to demand that which the workman, if alive, would give him.

GALLIHER, J.A.

GALLIHER, J.A.: I have given this case very careful consideration, and as I agree entirely with the reasons given by the Chief Justice, it is unnecessary for me to do more than concur in allowing the appeal.

Appeal allowed, Irving, J.A. dissenting.

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

Solicitors for respondents: *Eckstein & McTaggart.*

COOK v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER.

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1911

June 6.

COOK v. NORTH VANCOUVER

Municipal law—Power to enter lands and take material for repair of highways—Right of action—Arbitration clauses of Municipal Clauses Act, B. C. Stats. 1906, Cap. 32; 1908, Cap. 36.

The onus is on a district municipal council entering on land and taking any timber, stones, gravel or other material for repair of roads, etc., to shew what is intended to be taken, and the extent of the operations to be carried on.

MACDONALD, C.J.A. dissenting.

APPEAL from an order made by MURPHY, J. at Chambers in Vancouver on the 8th of November, 1910, staying proceedings in the action pending the holding of an arbitration under the provisions of the Municipal Clauses Act. The defendant Corporation entered upon the lands of the plaintiff and cut down and carried away some timber for the purpose of effecting certain road repairs. They did not consult or ask plaintiff before entering, and plaintiff brought action for trespass and damages. Defendants took out a summons for an order staying proceedings in the action pending the holding of an arbitration under the Municipal Clauses Act, for the purpose of ascertaining what, if any, compensation was due to the plaintiff for the timber so taken. MURPHY, J. made the order and plaintiff appealed.

Statement

The appeal was argued at Vancouver on the 6th of April, 1911, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

R. W. Hannington, for appellant: We submit that the plaintiff should have been given an opportunity to dissent from or consent to the act complained of, but the defendants entered on the land, took the timber away and then spoke of compensation. We also say that until we are put in a position to consent or object, the arbitration clauses of the statute do not apply, so that our action is properly brought.

Argument

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Burns, for respondent: It is admitted that we had a right to enter the lands in question. This was an emergency case and came within our statutory powers. The proper procedure was followed in road repairing, and we at once asked plaintiff to make his claim.

Hannington, in reply.

Cur. adv. vult.

6th June, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendants were authorized by section 240 of the Municipal Clauses Act as amended in 1908 to take the timber in question, and in my opinion it was not the intention of the Act that they should contract or arbitrate in respect of the value of it before taking it. Sub-sections 4, 5 and 6 of section 251 of the said Act are not, in my opinion, applicable to this case. I think it is quite manifest that the Legislature never intended the last mentioned sub-sections to apply to the taking of timber, gravel and other material required for the construction and maintenance of roads and bridges. The intention was that such material should be taken from day to day by those in charge of the work as required. If anything further be necessary to distinguish this case from *Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110, it is to be found in sub-section 3 of said section 151, which requires the person whose materials have been taken to make his claim within one year from the date when the materials were taken, or from the time when the alleged damages were sustained or became known to the claimant. I think this is quite inconsistent with the contention that compensation must be made, or at all events that notice to treat must be given before the material is taken.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: By section 240 of the Municipal Clauses Act, 1906, it was enacted as follows:

"It shall be lawful for the council of any township or district municipality to enter upon any lands granted by the Crown and take from or upon any part thereof, without compensation, any gravel, stone, or timber, or other material which may be required in the construction, maintenance, or repair of any roads, bridges, or other public works."

This power was considered unfair to the landowner, and in 1908 we find that section was repealed, and the following substituted therefor:

"240. It shall be lawful for the council of any township or district municipality to enter upon any land and take therefrom all timber, stones, gravel, sand, clay or other material which may be required in the construction, maintenance or repair of any roads, bridges or other public works.

"240A. Compensation to be agreed on between the parties, or appraised and awarded as shall be determined by arbitration in the manner directed by section 251, and the sub-sections of the Municipal Clauses Act, [shall be paid] for such timber, stones or other material or for any damage thereto to the owner or occupier of such land or property, or to the persons suffering such damage aforesaid, and shall be paid within six months after the amount of such compensation has been agreed on or appraised and awarded."

The defendants entered upon the plaintiff's land without notice, and took 250 trees for Corporation purposes, and the plaintiff brought this action for damages. The defendants then applied to have the action stayed on the ground that the plaintiff's remedy was by arbitration under the provisions of the Municipal Clauses Act, and MURPHY, J. granted the stay.

IRVING, J.A.

I would allow the appeal because section 251 of the Act and its sub-sections (4), (5), and (6) in particular clearly point out that the duty of shewing what is intended to be taken from or done on the plaintiff's land is on the Municipal Council. Who else could know whether it was the intention to take a load of gravel for the filling in of a road—or to make on the land a gravel pit from which to take gravel for roads for other parts of the municipality? The amount of the material to be taken can be known only to those who have charge of the roads or public works for which the gravel or timber is required.

It was said, in argument, that the provisions of the Act were not intended to be called into effect by reason of the taking of a shovelful of gravel.

The fact that the damage is small is immaterial: see *Goodson* v. *Richardson* (1874), 2 Chy. App. 221, applied in *Marriott* v. *East Grinstead Gas and Water Company* (1909), 1 Ch. 70. We are dealing with the principle of the thing, and as I cannot look upon this case other than as a deliberate and unlawful

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invasion of the plaintiff's land I would permit the action to proceed.

MARTIN, J.A.: After a careful consideration of section 28 of the Municipal Clauses Act Amendment Act, 1908, chapter 36, and sections 50 (142) and 251 of the Municipal Clauses Act, 1906, chapter 32, in the light of the decision of the Judicial Committee in *Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110, I am unable to come to the conclusion that the principle laid down in that case should not apply to this, *viz.*: that "the arbitration clause only comes into operation on disagreement." The only escape from this would be to hold that section 28 is a complete code on the matters therein specified, the obvious consequences of which would be so very far-reaching that I should shrink from so doing unless the statute were clear on the point. I confess that for some time I felt inclined to hold that section 28 might be regarded, as was submitted, as intended to cover cases of emergency only, or minor matters, but the language used clearly extends to the undertaking of such great constructive works that I do not think it would be safe to give it such an interpretation. This case is an illustration of the difficulty Courts experience in trying to construe and reconcile statutes made up of provisions adopted from various enactments in various countries.

MARTIN, J.A.

Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitors for appellant: *Russell, Russell & Hannington.*
Solicitors for respondent: *Burns & Walkem.*

YOUNG HONG AND QUONG SANG HO v. MACDONALD.

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1910

Nov. 23.

YOUNG HONG v. MACDONALD

Practice—Costs—Scale of—Action in Supreme Court—Amount adjudged within County Court jurisdiction—Supreme Court Act, 1903-04, Cap. 54, Sec. 100—Marginal rule 976—Costs follow event—Discretion.

An appeal in this case, reported (1910), 15 B.C. 303, was allowed on the ground that the facts shewed that the learned judge below had not exercised his discretion, and the case was remitted to be dealt with on that basis.

Statement

APPEAL from the judgment of MURPHY, J. reported (1910), 15 B.C. 303.

The appeal was argued at Vancouver on the 23rd of November, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Reid, K.C., for appellant (defendant): Section 100 of chapter 15 of the statutes of 1903-04, which made costs follow the event, has been repealed by the rules of 1906 (Order 976), which have legislative sanction.

[MARTIN, J.A. referred to *Hird* v. *E. & N. Ry. Co.* (1909), 14 B.C. 382 and *Crewe* v. *Mottershaw* (1902), 9 B.C. 246.]

Argument

Where a plaintiff brings a case in the Supreme Court, and makes, as the trial judge remarks, a preposterous claim, that, it is submitted, is good cause. Here there are a number of events, and the costs should have been spread over a number of issues. The decision in *World P. & P. Co.* v. *Vancouver P. & P. Co.* (1907), 13 B.C. 220, was rendered when the rule was the same as at present. Making an extravagant claim is good cause for depriving a plaintiff of costs. He referred to: *Fox* v. *Peters* (1907), 5 W.L.R. 505; *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26; *Roberts* v. *Jones* (1891), 2 Q.B. 194; *Forster* v. *Farquhar* (1893), 1 Q.B. 564.

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W. S. Deacon, and *Ogilvie,* for respondents: The jurisdiction which previously existed to deprive a successful litigant of costs for "good cause" was swept away by the Legislature: Supreme Court Act, 1903-4, section 100; *Hopper* v. *Dunsmuir* (1906), 12 B.C. 18; *Russell* v. *Black* (1904), 10 B.C. 326. Section 108 of the same statute restricted the powers of the Lieutenant-Governor in Council to the making of rules "not inconsistent with the Act." Marginal Rule 976 is inconsistent with the Act and therefore *ultra vires.* Rules could be made only for "regulating any matters relating to the practice and procedure of the Court" and the depriving a successful litigant of costs had ceased to be such a matter. By the Supreme Court Rules, 1906, Act, the Legislature intended to deal only with the sanctioning of rules for regulating practice and procedure as to matters within the competence of the Court, and not to alter the rights of successful litigants or to confer additional jurisdiction: *Pellas* v. *Neptune Marine Insurance Company* (1879), 5 C.P.D. 34. There has been no amendment, repeal or alteration of section 100 of the Supreme Court Act, either expressly or by implication, that not being in contemplation nor within the purview of the Supreme Court Rules, 1906, Act: *Dobbs* v. *Grand Junction Waterworks Co.* (1882), 51 L.J., Q.B. 504; *Seward* v. *Owners of The Vera Cruz* (1884), 54 L.J., P. 9; *Gard* v. *Commissioners of Sewers* (1883), 49 L.T.N.S. 327; *Church Wardens &c. of West Ham* v. *Fourth City Mutual Building Society* (1892), 1 Q.B. 654.

Argument

The trial judge exercised his discretion and refused to deprive the plaintiff of costs. The ground of his discretion was that the Legislature had chosen to permit plaintiffs a choice as to which Court they would proceed in. The learned judge says: "How can I say that bringing the action in the Supreme Court is good cause why costs should not follow the event when the law expressly gives him that privilege." No appeal lies from this exercise of his discretion: *Moore* v. *Gill* (1888), 4 T.L.R. 738; Ann. Pr. 1909, p. 1,011. The plaintiff came to enforce a legal right and there was no misconduct in his selecting the Supreme rather than the County Court, and the Court

cannot take away his right to costs. There is an extra right of appeal in Supreme Court cases: *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *Upmann* v. *Forester* (1883), 52 L.J., Ch. 946; *Wittman* v. *Oppenheim* (1884), 54 L.J., Ch. 56. Mere smallness of damage is not "good cause." *Tipping* v. *Jepson* (1906), 22 T.L.R. 743.

Argument

Reid, in reply: As to "good cause," see *Jones* v. *Curling* (1884), 13 Q.B.D. 262. If the judge below had exercised his discretion there would be no appeal, but he has not, and therefore we have a right to come here for a direction to the judge below to exercise his discretion. The Court below misconceived the points of law.

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.: This is an appeal from MURPHY, J in an action in the Supreme Court where the amount claimed was upwards of $2,400, and the amount recovered $160. The learned judge was requested to make an order depriving the plaintiff of costs on the scale of the Supreme Court, and to grant them on the County Court scale only.

MACDONALD, C.J.A.

He could do this only for good cause, and while thinking that the claim made by the plaintiff was "absolutely preposterous," and the bringing of the action in the Supreme Court instead of in the County Court an injustice upon the defendant in the matter of costs, and while expressing his desire to deprive the plaintiff of costs on the Supreme Court scale if he had power to do so, yet he came to the conclusion that he had no jurisdiction to do this, because, under our practice the plaintiff may, if he choose, bring a petty action in the Supreme Court. The learned judge in effect says that in no case can the bringing of an action in the Supreme Court, however morally unjustifiable, when the honest course was to bring it in an inferior Court, be considered good cause for the simple reason that the law allows it to be so brought.

In order to understand the decisions of our own Courts it is necessary to refer to the statutes and rules governing costs.

Prior to the 10th of February, 1904, and back to May, 1901,

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which is as far as I need go, the costs of trials except in specified cases, of which this is not one, were to follow the event unless the judge, for good cause, ordered otherwise: section 88, R.S.B.C. 1897, chapter 56, repealed in 1899 and re-enacted in May, 1901. On the 10th of February, 1904, by section 100 of the Supreme Court Act, as revised and consolidated in that year, the power to deprive a successful plaintiff of costs for good cause was taken away from the judges, and the matter stood thus until the 1st of May, 1906, when the Supreme Court Rules of that year came into force, and being statutory, restored the power to deprive for good cause. The following authorities therefore are to be considered with reference to the facts above stated: *Richards* v. *Bank of B. N. A.* (1901), 8 B.C. 209; *Royal Bank of Canada* v. *Harris, ib.* 368; and *Crewe* v. *Mottershaw* (1902), 9 B.C. 246. These were decided during the period when the law with regard to judges' powers over costs was practically the same as it has been since the 1st of May, 1906. *Richards* v. *Bank of B. N. A., supra,* is a decision of the Full Court, and in that case while the Court held that the trial judge ought not to have deprived the plaintiff of all costs, yet considered that the action should have been brought in the County Court, and hence reduced the costs to the County Court scale. The next case is *Russell* v. *Black* (1904), 10 B.C. 326, decided by Duff, J., after the coming into force of section 100 mentioned above. He decided that he had no jurisdiction to deprive a successful plaintiff of costs, as indeed he was bound to do under that section. In *Hopper* v. *Dunsmuir* (1906), 12 B.C. 18, the Full Court gave a similar decision, and declared that section 100 took away all jurisdiction from the judges to deal with costs except as in that section mentioned. After the 1st of May, 1906, when power to the judges to deprive a plaintiff of costs for good cause was restored *Fox* v. *Peters* (1907), 5 W.L.R. 505, was decided by CLEMENT, J. who reduced the costs from the Supreme to the County Court scale, and in several unreported cases the same course has since been pursued. It therefore appears that except during the period from the 10th of February, 1904, to the 1st of May, 1906, our

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Courts have had and exercised jurisdiction and discretion in proper cases to deprive or reduce costs from the Supreme to the County Court scale, and that this was done under circumstances similar to those in the case at bar.

The respondent contends, relying upon *Moore* v. *Gill* (1888), 4 T.L.R. 676, and Rule 976 of our Supreme Court Rules, that an appeal does not lie from the refusal of a judge to deprive a successful party of costs. This is true if the learned judge has exercised his discretion in the matter. In this case, however, the learned judge did not exercise his discretion, under the erroneous belief that he had none. Section 89 of the Supreme Court Act deals with discretionary costs and is inapplicable where no discretion has been exercised. The moment the judge decides that there is "good cause" he becomes vested with a discretionary power over the costs, and may either deprive the plaintiff wholly of them, or make such other order, as for instance reducing them to a lower scale, as he may think meets the justice of the case.

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The principles upon which a Court or a judge acts in depriving a successful plaintiff of costs are clearly set forth in *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26, and the facts of that case are not unlike those now before us. I do not wish to be understood as holding that in every case where a plaintiff brings an action in the Supreme Court, which is within the competence of an inferior Court, he should be deprived of his costs, or have his costs reduced to the scale of the inferior Court. All the circumstances of the particular case have to be considered in arriving at a decision as to whether good cause does or does not exist.

The appeal must be allowed and the matter remitted to the trial judge to be dealt with.

IRVING, J.A.

IRVING, J.A. agreed that the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: Decisions in recent years of the Full Court and Supreme Court on the question of allowance of costs under the statutes and rules prior to the Supreme Court Rules of May 1st, 1906, are to be found reported in the cases of *Royal Bank*

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of Canada v. *Harris* (1901), 8 B.C. 368; *Richards* v. *Bank of B. N. A.* (1901), 8 B.C. 209; *Crewe* v. *Mottershaw* (1902), 9 B.C. 246; *Russell* v. *Black* (1904), 10 B.C. 326; *Pacific Towing Co.* v. *Morris* (1904), 11 B.C. 173 at p. 176; and *Hopper* v. *Dunsmuir* (1906), 12 B.C. 18, in which last it should be remembered section 110 of the Supreme Court Act was not up for consideration. These cases, particularly the decision of the Full Court in *Richards* v. *Bank of B. N. A., supra,* shew that it had been the established practice during the periods mentioned by the learned Chief Justice for the Courts to exercise jurisdiction regarding the allowance of costs when judgments had been recovered in the Supreme Court for amounts within the jurisdiction of the County Court. I also find a note in my book that at Nelson, in the case of *Johnson* v. *Yale Mining Co.* on June 30th, 1904, I only allowed costs on the County Court scale (higher) though $500 damages had been recovered in an action of negligence.

Since the Rules of 1906, restoring the jurisdiction to deprive the plaintiff of costs, there is the decision of Mr. Justice CLEMENT in *Fox* v. *Peters* (1907), 5 W.L.R. 505, allowing costs on the County Court scale only; the decision of the Full Court in *World P. & P. Co.* v. *Vancouver P. & P. Co.* (1907), 13 B.C. 220; and my own decision on the existing rule 976 in *Hird* v. *E. & N. Ry. Co.* (1909), 14 B.C. 382, wherein (pursuant to my view in *Jackson* v. *Drake Jackson & Helmcken* (1907), 13 B.C. 62) I treated that rule as being now the latest statutory guide to the question then and now at bar, instead of section 100 of the Supreme Court Act; but not of course referring to the matters specially provided for by section 110 of that Act (*re* verdicts under $100) or by Rule 868, respecting appeals. And for the purpose of exactly understanding the matter I note that during the course of the present argument, when the contention was advanced that said Rule 976 was *ultra cires* as going beyond said section 100, we were unanimously of the opinion that such was not the case, the learned Chief Justice saying, on behalf of the Court:

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"All the members of the Court are quite clear that the Supreme Court Rules Act, 1906, chapter 14, gives the Rules of 1906 the force of a statute: the Legislature may change its views from hour to hour."

In the light of the foregoing, it is clear that it was the duty of the learned judge below to consider and pass upon the facts before him and exercise his discretion thereon, as he was asked to do, to see if he could find that "good cause" existed under the rule for making the special direction to meet the circumstances that the rule empowered him to make, *i.e.*, to "otherwise order." From his judgment it is clear that he thought he had no jurisdiction at all in the matter, and that he was barred by statute, and by a general rule of law thereon embodied in the decision of the former rule that he cited or from even exercising his discretion. After stigmatizing the plaintiff's claim as "absolutely preposterous" he said "I can only express my regret that I have no discretion as to costs," and he follows this up in his later judgment by saying:

"If I thought I had any discretion I would award costs on the County Court scale, for I think injustice is being inflicted on defendant by saddling him with costs on the Supreme Court scale when a much less expensive form (of procedure) could have been, and in my opinion ought to have been invoked. But for reasons above stated I consider I have no power to so order, and costs must follow the event and are to be taxed on the Supreme Court scale."

Therefore the appeal does not come before us as one in which the judge has exercised his discretion upon a finding of "good cause," but as one in which he has not applied his mind to a relevant matter within his jurisdiction which it was the right of either party to have judicially determined by him. If he had found on "good cause," or not, and exercised his discretion, different considerations and principles would apply, and cases such as *Moore* v. *Gill* (1888), 4 T.L.R. 676, 738, would be of assistance, in which case Lord Justice Bowen (p. 739) after referring to the fact that Lord Chief Justice Coleridge had been "pursuing a somewhat singular course" pointed out that finally, when the matter came before him the second time, "he then exercised his discretion by depriving the plaintiff of costs, and so set the matter right." In *Leckhampton Quarries Company* v. *Ballinger and the Cheltenham Rural*

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District Council (1905), 21 T.L.R. 632, the Court of Appeal said that the "discretion must be a judicial discretion and must be exercised on strict principles."

The learned judge below makes it clear in his judgment that he could not escape from the conclusion that the bare fact that the plaintiff has recovered a sum in excess of that mentioned in section 110 deprived him of all "discretion" and "power" to even consider the question of "good cause" and therefore he did not entertain any of the facts and circumstances of the case even though he was of the opinion that "an injustice is being inflicted upon the defendant" thereby. I am glad to say that there is ample authority for our coming to his assistance and getting rid of such an anomalous situation, and there is nothing in Rule 976 (1) nor in section 89 of the Supreme Court Act (which is the same as section 49 of the Judicature Act, 1873) to prevent our doing so because the Court of Appeal in *Bew* v. *Bew* (1899), 2 Ch. 467, 68 L.J., Ch. 657, held that where a judge has acted on a mistaken application of a general rule, which if applicable would have excluded his discretion, he has not exercised his discretion at all, and, therefore, there was an appeal on the merits without leave. This case has recently been followed by the Court of Appeal in *Rotch* v. *Crosbie* (1909), 54 So.J. 30, wherein it is stated to be a "most authoritative decision."

MARTIN, J.A.

In the case at bar there were at least two weighty elements for the learned judge to consider in arriving at a finding on "good cause." Both are mentioned in his judgment; the first being the bringing of an action in a higher Court instead of in a lower, thereby increasing the burden of costs thrown upon the adverse litigant. See the House of Lords decision in *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26, wherein Lord Chancellor Halsbury said (p. 32):

"I cannot entertain a doubt that everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of his costs."

And Lord Watson further says at p. 34:

"The improper artifices to which the appellant resorted for the purpose of inflaming damages were in the highest degree calculated to promote

vexatious litigation, to increase the costs incurred by the respondents, and to prevent any settlement of his claim upon reasonable terms."

In my opinion that language (and other similar expressions in the same report) is singularly appropriate to one who puts forward "absolutely preposterous" claims. See also *Forster* v. *Farquhar* (1893), 1 Q.B. 564, *per* Lord Justice Bowen; and *Roberts* v. *Jones* (1891), 2 Q.B. 194, for the application of these principles to particular cases, and further illustration thereof.

The mere fact of the bringing of the action in the Supreme Court, as permitted by statute, does not, as the learned judge seems to have thought (doubtless being misled by the lack of authority) determined the question of "good cause." As I pointed out in *Hird* v. *E. & N. Ry. Co., supra,* "the mere recovery of so small an amount" as $191.80, is not of itself "good cause" to deprive a successful litigant of his costs, because the facts and circumstances of each case have to be considered, apart from the sum recovered, to determine whether the resort to the higher tribunal could be justified on any ground, as was done in all the cases I have cited in the earlier part of this judgment. The *Royal Bank of Canada* v. *Harris, supra,* is an illustration of the allowance of Supreme Court costs, and an analogous decision is to be found in a case in the Admiralty Court, *Cable* v. *Ship "Socotra"* (1907), 13 B.C. 309, wherein I allowed the plaintiff his full costs in a case involving an important principle, because he had been placed in a perplexing position by the neglect of the master of the ship, though he only recovered $13.35.

But on the other hand, it is just as clear that the bare fact that the sum recovered is in excess of the amount mentioned in section 110 does not of itself warrant a finding in the plaintiff's favour of want of "good cause."

I note, by way of precaution, that in my opinion the larger power of the judge under Rule 976 to deprive a successful party of his costs includes the lesser power to deprive him of a portion thereof; in other words, that, to borrow an analogy from criminal law, he may mitigate the extreme penalty which he is empowered to impose. This view is analogously supported by

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the action of the Full Court in *Richards* v. *Bank of B. N. A., supra.*

It follows from all the foregoing that the learned trial judge must, with every respect, be held to have misdirected himself in the application of the general rule before mentioned, thereby preventing himself from properly entering upon that finding of "good cause," or not, which it was necessary for him to make, the consequence being that there has been no exercise of his discretion. In such circumstances, the proper course to adopt is that referred to by Lord Fitzgerald in *Huxley* v. *West London Extension Ry. Co., supra, viz.*: the matter must go back to the trial judge for the exercise of his jurisdiction and discretion, and so long as he acts within his jurisdiction his decision, as Lord Watson points out in *Huxley's* case, *supra,* p. 34 is "final and conclusive."

MARTIN, J.A.

I have gone into this matter at this length because of its general importance to litigants, and in conclusion, I feel bound to refer to my concluding remarks in *Hird's* case, *supra,* which I repeat, and again draw attention to the necessity of a new rule being passed by the Lieutenant-Governor in Council to meet a state of affairs respecting oppressive legal expenses occasioned by the bringing of small actions in high Courts which is as much opposed to the best interests of the legal profession in the long run as it is to the public interest.

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitor for respondent: *W. P. Ogilvie.*

FREWEN v. HAYES *ET AL.*

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FREWEN v. HAYS

Sale of land—Contract for not concluded—Prices—Terms.

In negotiations between plaintiff and defendant as representative of the Grand Trunk Pacific Railway Company, for the purchase of one thousand lots in the Prince Rupert townsite, two letters constituted the principal basis of an understanding. According to these letters the lots were to be selected by plaintiff, and that the only lots which the Company would concur in transferring were those embraced in the "Phillips list," the prices to be fixed by the defendant Company. The latter and the Provincial Government employed appraisers who placed an upset price on the townsite lots for the purposes of an auction sale, but these prices were not communicated to the plaintiff. It was contended for the plaintiff that the price list fixed by the appraisers would be a list binding on the Company at his option.

Held, on appeal (affirming the judgment of HUNTER, C.J.B.C.), that there had been no identification of the lots to be selected, nor a fixing of prices during the negotiations, and, generally, that the parties were never *ad idem*.

Statement

APPEAL from the judgment of HUNTER, C.J.B.C. in an action tried by him at Vancouver in June, 1910, to enforce specific performance of an alleged agreement for the sale of one thousand lots in Prince Rupert townsite.

Davis, K.C., for plaintiff.
Bodwell, K.C., for defendants.

30th June, 1910.

Judgment

HUNTER, C.J.B.C.: In this case I see no reason to alter the opinion which I formed at the hearing, namely, that the action fails. The claim is for specific performance of an alleged agreement to sell the plaintiff a number of lots in the Prince Rupert townsite. Considerable correspondence between the parties was put in, out of which Mr. *Davis*, for the plaintiff, selected two letters set forth in the statement of claim as sufficient to set up an enforceable agreement. By their terms the lots were to be selected by the plaintiff with the concurrence of the defendant Company, and it is indisputable that the only lots which the Company would concur in transferring to the

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plaintiff were the lots embraced in the Phillips list. In addition to this, the prices were to be fixed by the defendant Company, and because two real estate valuers were employed by the Company and the Provincial Government to put reserve prices on the lots, which prices were not communicated to the plaintiff as the prices which the Company would accept from the plaintiff, it is contended that this is a price list binding on the Company at the option of the plaintiff. It seems to me that this is clearly insufficient to set up a *vinculum juris* between the parties, and that the only prices which the Company were bound to accept were those set forth in the Phillips list, but which were rejected by the plaintiff.

Judgment

There was, in my opinion, no concluded agreement which the Court can recognize and enforce, and the action must therefore be dismissed with costs.

The appeal was argued at Vancouver on the 14th and 15th of November, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., and *Pugh*, for appellants (plaintiffs).
L. G. McPhillips, K.C., and *Tiffin*, for respondents.

Cur. adv. vult.

10th January, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff is a journalist and the defendant Hays is president of the defendant Company. They met in Algonquin Park, where the plaintiff had stopped off for a few days' fishing. The defendant Company were about to sub-divide their townsite at Prince Rupert, the Pacific terminus of the Grand Trunk Pacific Railway. The suggestion was made that plaintiff might acquire part of this townsite. This was in 1906. A correspondence thereafter ensued between the plaintiff and defendant Hays, which makes it abundantly plain that there was no actual agreement between them, either written or verbal. The plaintiff's footing at the beginning is no doubt very truly indicated in the following frank appeal contained in his letter to Mr. Hays of the 11th of October, 1906:

"But please do not treat anyone else as well as yours faithfully; there will be a lot of real estate sharks after you and your townsite. Please be quite lofty with them until my maw is filled."

I think this conveys a more accurate impression of the situation and of how plaintiff came to be interested in the townsite than does his evidence at the trial.

In May, 1908, defendant Hays wrote a letter to the plaintiff which, with another written on the 1st of September of the same year, are relied upon by the plaintiff as evidencing the contract. This purports to have been written "for the purpose of having a record of our talk about Prince Rupert last night." At the end of it Hays states:

"Will keep the whole matter before us and let you know when we get far enough along to deal with the matter more definitely than is done in the foregoing."

In the letter of the 1st of September, Hays says:

"I am able to supplement my letter to you of the 8th May. One important matter I must leave open: I cannot fix a price for the thousand lots you are to select, with our concurrence, in the two thousand acre townsite, but the prices will be decided by our officials as soon as the surveys are completed, and at the prices so fixed you are to have the lots and we are to return you as your commission 25% of the purchase money. You will have no fault to find with our prices: they will be at least no higher than the price which the public will be asked to pay. I may say for your protection that should you regard the price of any lot or lots as too high, you are under no obligation to take that lot or those lots, provided you notify us to that effect within sixty days of their assignment to you."

If this constitutes a contract as contended by Mr. *Davis,* then there are two uncertain terms in it. Neither price nor identity of lots is fixed, nor are they ascertainable except with the subsequent concurrence of the defendants. It was argued that these two terms were afterwards made certain, the one when the upset prices were fixed for lots to be offered by the defendants at public auction, and the other when one thousand lots were assigned to the plaintiff. With regard to the price, Mr. *Davis's* argument was, that the Company having, subsequent to the 1st of September, in conjunction with the Provincial Government, which held one-quarter of the lots in this townsite, decided to offer lots to the public, and having procured an appraisal of all the lots in the townsite for the purpose of fixing an

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upset price, the upset prices are to be read into the letter of the 1st of September. I do not think the parties had such appraisals in mind on the 1st of September, 1908, that they were even contemplated at that time, nor do I think that the plaintiff himself, when such appraisals were made and brought to his knowledge, had any such notion in his head. On May 4th, 1909, in a letter to defendant Hays, he says:

"I shall be in Vancouver on the 10th and having made my notes of lots will be with you to fix their prices by the 18th. I am careful not to 'pick out the eye' at all and I think the selection will meet with your approval. Rand has gone over the ground and arrived at some scheme of values. I am immensely puzzled as to this valuation: every man I meet differs wide as the poles."

"Rand" was one of the real estate valuers above mentioned who was in Prince Rupert making the appraisals for the purpose of fixing the upset prices. Then on the 8th of the same month the plaintiff telegraphed to Hays as follows:

"Have made selection. Will come Montreal 18th for your approval. Will you act as appraiser?"

He knew that Rand was appraising the lots at that time. It apparently did not occur to him that Rand's valuations were the prices fixed by the defendant Company's officials. So that on that date the plaintiff himself recognized that the fixing of the prices was something quite distinct from Rand's appraisals. Hays answered:

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"Cannot act until we know what selections have been made and then have report of appraisers as to reserve prices which have been established."

Plaintiff in reply said:

"Yours received. Learn appraisals reach you to-morrow. Bonthrone and I will arrive Tuesday morning with suggested selections giving us time to return here for sale."

Again, plaintiff's letter of May 20th, 1909, indicated that he regarded the selection and prices, and perhaps even the terms of payment as still open; and again, in his letter of the 5th of June, 1909, written after the auction sale, in which, speaking of Sir Edgar Vincent, one of his associates, he says:

"The latter sent his solicitor to New York to consider your prices and as there were none to consider he returned on the next steamer."

Finally, the defendant Company assented to the selection of one thousand lots, and at the same time fixed the price of

them. This was on the 9th of June, 1909. In a letter to Hays of the 15th of June, 1909, the plaintiff complains in this wise:

"Instead of my selecting and your concurring, you have selected, I protesting, instead of the prices being 'decided by our officials as soon as the surveys are completed and at the prices so fixed you are to have the lots' you and your officials refuse to fix any prices whatever until the pick of the townsite and all the corner lots, including the very lots I selected have been sold."

There is not a word in that letter of the contention now made that the prices fixed by Rand must be regarded as the prices fixed by the officials of the Company. He did contend, however, that Hays had promised in the letter of 1st September that the prices intended to be fixed "will be at least not higher than the prices which the public will be asked to pay." He contends that the price the public was asked to pay was the upset price on each lot. It is perhaps needless to decide this, but in my opinion the price the public was asked to pay at the auction was not the upset price, but the highest bid for each lot. I am therefore of opinion that the letters of the 8th of May and 1st September were never intended by the parties to evidence a completed contract, and that there never was a completed contract; that there never was an ascertainment of the subject-matter of the contract, namely, the lots, nor a fixing of the prices until the 9th of June, 1909, when the defendant Company assented to the sale of one thousand definitely described lots to the plaintiff at prices then stated. The plaintiff refused to accept the lots at the prices and negotiations came to an end.

MACDONALD, C.J.A.

The appeal should be dismissed.

IRVING, J.A.: I would dismiss this appeal. I do not think that the defendants agreed in the letter of September 1st, 1908, to give the plaintiff the right to purchase at the Rand prices. Rand was to fix an upset price which would guide the Company in considering any offer made by the public. The public was never offered the property at the Rand prices.

IRVING, J.A.

On the question whether or not there was an acceptance of the lots at the prices named by Mr. Phillips in June, 1909, I draw attention to the terms in Mr. Hays' letter of 1st September, 1908, inserted for Mr. Frewen's protection, under which term Mr.

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Frewen could by notifying the plaintiffs within 60 days of their assignment to him decline to take any lots at the prices quoted in the assignment. On the 7th of August, 1909, Mr. Frewen wholly repudiated the assignment made by Phillips on the 9th of June, 1909.

It is therefore not necessary to speculate whether Mr. Frewen was repudiating the contract when he wrote the letter of the 15th of June, 1909.

It seems to me that on the dispatch of the cablegram, No. 99, the contract, if contract there was, was abandoned.

GALLIHER, J.A.

GALLIHER, J.A.: I agree that the appeal should be dismissed. The parties were never *ad idem.*

Appeal dismissed.

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

REX v. KINMAN.

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1911
April 11.
REX v. KINMAN

Criminal law—Assault—When justifiable—Warning—Force—Legal justification—Case stated—Finding of fact.

In a charge of assault committed by the accused when resisting removal from property of which he was placed in care, justification was set up and also warning. The trial judge made no finding on the question of warning, as he came to the conclusion on the evidence that as the assault was savage, hot-tempered and unnecessary, it could not be justified by any warning even if warning had been proved.

Held, on appeal, that in the circumstances a finding as to warning was immaterial.

Statement

APPEAL from the judgment of McINNES, Co. J. by way of a case stated on a conviction made by him in a charge of assault against the accused. The latter was in possession of certain property, in charge of a gang of workmen, with orders

to prepare the ground for the erection of a mill, when a number of men in policemen's uniform arrived on the property (an island) and arrested him pursuant to a warrant. He went with some of the officers, leaving his men on the island. The charge on which he was arrested having been dismissed by the magistrate, he returned to the island to find that his men had been driven off by the officers, and he himself was advanced upon by three of them, presumably to put him off as his men had been. He cautioned the officers to leave him alone and as they persisted in approaching him he struck one of them with a stick which he had cut to defend himself in such a contingency. The constables then desisted and he was subsequently charged with assault, and electing for speedy trial, he was convicted by McINNES, Co. J. who fined him $50. In the case stated for the opinion of the Court of Appeal, the trial judge said:

Statement

"I held that the accused used too much force on the occasion in question. I made no finding upon the question as to whether or not warning had been given by the accused to Kumer before striking him with the club used on the occasion referred to in the evidence, considering it unnecessary, because I found that the assault was savage, hot-tempered and unnecessary, and therefore could not be justified by any warning, even if such had been proven.

"The question for the Court of Appeal is: Whether in the circumstances of the case a finding as to warning was immaterial?"

The appeal was argued at Victoria on the 16th and 17th of January, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for accused: We say that while the men who attempted to put accused off the island were otherwise police constables, yet in this instance they were ordinary, hired men, and not vested with the power of police in the capacity of guardians of the peace. If accused's version of the affair is correct, he was perfectly justified in law in resisting these men by force, and it then comes down to a question of whether warning was given them by accused. We say that the judge has ignored any evidence on the question of warning, and that he must find on that: *Spires* v. *Barrick* (1856), 14 U.C. Q.B. 420. Even though there is no necessity for it here, yet a certain allowance ought to be made for a man who has been

Argument

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tricked into leaving his property. In all the circumstances a finding that it was immaterial that a warning was given is wrong, and in the circumstances, Kinman advanced upon by a body of persons parading as policemen, was justified in striking as hard a blow as he could.

Argument

Maclean, K.C., for the Crown: There is no evidence that the property from which it was sought to eject accused belonged to him, nor to whom it belonged. There is no question of law involved. The judge says: assuming that the warning was given by the defendant, was he justified in using the force that he employed? That is a pure question of fact and not open to review by this Court. *Reg.* v. *McIntyre* (1898), 3 C.C.C. 413, Roscoe's Criminal Evidence, 13th Ed., 255. The use of force is lawful for the necessary defence of self or property, but the justification for it is limited to the necessity of the occasion, but unnecessary force is an assault, and here the judge has found that the force used was unnecessary: Russell on Crimes, 7th Ed., 887, 889. The judge was quite within his rights in finding as a jury that in all the circumstances unnecessary force had been used.

Davis, in reply: We admit that the judge has found that there was too much force used, but we submit that the evidence does not bear out that finding. If accused's statement is accepted, there was no evidence to go to the jury, and therefore the judge misdirected himself.

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The accused was convicted by McINNES, Co. J. for an assault upon one W. Kumer occasioning actual bodily harm. The accused was at the time of the alleged assault endeavouring to hold possession of Deadman's Island against the City of Vancouver, which claimed the right of possession, and had sent said Kumer and several other men to oust the accused. Kumer and his men were approaching the accused with this object in view, when he struck Kumer a heavy blow with a club. The appellant's contention is that the learned County Court judge

erred in not making a finding on the evidence as to whether or not the accused warned Kumer before striking the blow. The question submitted to this Court by the learned judge is "Whether in the circumstances of this case the finding as to a warning was immaterial?" The learned judge informs us in his submission that:

"I made no finding upon the question as to whether or not warning had been given by the accused to Kumer before striking him with the club used on the occasion referred to in the evidence, considering it unnecessary, because I found that the assault was savage, hot-tempered and unnecessary, and therefore could not be justified by any warning even if such had been proven."

The evidence shews that there was evidence *pro* and *con* upon the question of warning, the preponderance being, in my opinion, in favour of the contention that warning had been given. In announcing his decision at the close of the trial, the learned judge stated that the question he had to determine was whether in all the circumstances of the case the accused was justified in assaulting Kumer on that day, and he goes on to say that in this case he was of opinion that the accused used too much force. The question of whether or not excessive force was used was one of fact to be decided on all the evidence. I do not think it was incumbent on the judge to sum up each point of the case and make a finding upon it. It is sufficient if he takes into consideration all the evidence that was before him. Looking at the matter apart from the stated case, and as it stood at the time of conviction, there was nothing to shew that the learned judge had not taken into his consideration the evidence as to warning, although he made no finding upon it. It may be conceded that a blow which, in the absence of warning, might be considered excessive could be justified after warning had been given, but we must assume in the absence of proof to the contrary that the learned judge, in coming to his conclusion, took into consideration all the evidence and properly applied the law thereto.

MACDONALD, C.J.A.

Now, does the case stated to us by the learned judge make it appear otherwise? I think not. I think the effect of what he says is this: It was not necessary in this case for me to decide on the conflicting evidence whether in fact warning had

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or had not been given, because the assault was, in my opinion, such as could not be justified assuming warning to have been proven.

I would answer the question in the affirmative and dismiss the appeal.

IRVING, J.A.: In ordering a case to be stated I was of opinion from what was said on the application that the learned County Court judge might have misdirected himself. I am satisfied now that such was not the case, and that the conviction must be upheld.

Where an accused justifies the force used by him in preventing the prosecutor from dispossessing him of his lands or goods, or the goods of another delivered to him for safe keeping, it should be made to appear that the force used was not greater than was reasonably necessary to accomplish the lawful purpose intended to be effected. If there is legal justification and no excessive force, the accused ought to be acquitted.

IRVING, J.A.

In the present instance, I assume that the warning was given and disregarded. I think that a very severe blow was necessary to impress the city officials with the view that they would not be allowed to dispossess the accused; but the question of excessive force was for the learned trial judge to determine, and he has determined that the blow was unnecessarily severe and vindictive. Having found that the force used was of that character, I think he was not called upon to make a finding whether there was or was not a warning given by the accused before the blow was struck. The judge really directed himself in this way:

> "I assume for the purpose of determining the guilt or innocence of the accused that a warning was given, but as I find the blow was unnecessarily severe—vindictive rather than preventative, the prisoner is guilty notwithstanding that he was defending property entrusted to him by another."

Having such a direction before him, it was not necessary for him to come to a conclusion as to whether the warning was or was not given.

I would, therefore, dismiss this appeal.

A point not argued before us is this: Does the rule as to justification of an assault apply where the assault is made in

resisting an attempt to dispossess a man of lands, the property of a third person? See 1 Hawk. P.C. 8th Ed., 484, chapter 28, section 23; 1. Bac. Abridg., Assault and Battery.

The limits within which English law permits so-called "self defence," or more accurately the assertion of legal rights by the use of a person's own force, is one of the obscurest legal questions. It is discussed very fully in Dicey's Law of the Constitution in the Appendix, note 4.

GALLIHER, J.A.: The question submitted to us for consideration is whether in the circumstances of the case a finding as to warning was immaterial?

If I was satisfied that the learned trial judge failed to address himself to the question as to whether warning was given or not, I would allow the appeal, as in my view what might be considered justifiable force after warning was given might not be justifiable if no warning was given, but in view of the language used by the learned judge at the trial:

"The only question I have to determine is whether having in mind all the circumstances of the case the accused was justified in assaulting Kumer on that day."

GALLIHER, J.A.

The question of warning was certainly a circumstance in the case. And in the case stated:

"I made no finding on the question as to whether or not warning had been given by the accused to Kumer before striking him with the club used on the occasion referred to in the evidence, considering it unnecessary because I found that the assault was savage, hot-tempered and unnecessary, and therefore could not be justified by any warning even if such had been proven."

I am unable to say that he did not so address himself. It is not necessary that a judge should make specific findings on the different facts, he may after considering all the facts, pronounce a general verdict.

The appeal should be dismissed.

Appeal dismissed.

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WATTSBURG LUMBER CO. v. W. E. COOKE LUMBER CO.

Contract—Verbal—Consideration—Promise—Loss through carlessness and incompetence.

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 that 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.

ACTION tried by MORRISON, J. at Nelson.

The plaintiffs owned and operated a sawmill at Proctor, B.C., on Kootenay Lake, and the defendants were also millmen carrying on business at Kaslo, B. C. On the 31st of May, 1910, the manager of the defendant Company applied to the plaintiffs for the loan of some boom sticks and chains for use in picking up logs belonging to the defendant Company then adrift in Kootenay Lake. The plaintiffs' manager agreed to lend the boom sticks and chains on condition that the defendants would move for him a large boom of logs from a point in Kootenay Lake near the plaintiffs' mill to another point more adjacent to the mill, a distance in all of about 500 feet. The defendants agreed to do so and on the following day arrived with their tug to move the boom of logs. While engaged in moving the boom, it got beyond the control of the defendants' tug and crew and as a result was swept out into the middle current, and a gale of wind springing up, the entire boom of logs was carried away and lost. The defendants contended that the loss was due to *vis major*, also that there was no consideration for the work, their action being simply a friendly act in return for the loan of the boom sticks. The

Statement

plaintiffs claimed that the defendants, while the logs were under their control in course of transit, were bailees thereof, and relied on the decision in *Coggs* v. *Bernard* (1703), 2 Raym. (Ld.), 909, Sm. L.C., 11th Ed., 173.

M. A. Macdonald, for plaintiffs.
W. A. Macdonald, K.C., and *H. C. Hall,* for defendants.

6th March, 1911.

MORRISON, J.: I find that a verbal contract was entered into between the parties hereto. Upon the plaintiffs promising to lend the boom sticks, the defendants promised to move the booms in question. The one promise was the consideration for the other. In coming to the conclusion as to the creation of the contract, I am not unmindful of the off-hand friendly way in which neighbouring lumbering and milling concerns in those remoter portions of the Province carry on their negotiations; but the results, however, are in no way less binding. The parties thereto are experienced business men in their own line of work, who have not the facilities to consult solicitors, or yet the legal experience to indite instruments setting out their contractual relations in the absence of solicitors. I cannot accept the defendants' plea that the substantial number of boom sticks sought to be borrowed, and at a time when it appears the plaintiffs could ill spare them, were to be loaned without any consideration and as a mere friendly act. It does not appear that the two concerns had had any previous intercourse of any kind. I find the defendants undertook to move the logs in question, and that their equipment in the first place was inadequate and deficient. That the captain of the boat was in this particular instance either incompetent or reckless—whether owing to the contiguity of the Proctor hotel or otherwise, I cannot say. He certainly disclosed evidence at the trial of association with spirits of an intoxicating nature. From what I can gather from the evidence the task was not one calling for a very high degree of skill, and there do not appear to have been any intervening circumstances of a distracting nature. I think the intervention of Williams and Watts was most natural at the

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juncture at which they attempted to assist the others. I do not gather from what I heard at the trial that it was a condition precedent to getting the boom sticks that the logs should have been moved that particular day, so that if the weather conditions were such as suggested by the defendants, they should not have attempted the work then. In fact, I should not have expected an experienced man with the equipment available on this occasion to have attempted the work. To have done so would be recklessness or ignorance, or both. As to the sufficiency of the rope, it is a matter of adverse comment that the defendants took possession of it and it was not produced at the trial. The defendants were in entire control of the job to move these logs, otherwise the defendants would have to prove that the contract was for the loan of the steamer by the plaintiffs, who were to do the work themselves. But that was not the contract.

Judgment

There will be judgment for the plaintiffs with costs for such amount as may be found upon a reference to the registrar as being the value of the logs, boom sticks and chains lost, and also the expense of salving.

Judgment for plaintiffs.

CARRIGAN v. THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED.

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Master and Servant—Injury to servant through defective system—Duty of employer to provide safe methods—Workmen following a system of their own.

Where a defective system of "kicking in" cars into a drift in a mine has been long established and a workman continues to use that system as he found it on entering the master's service, the master is liable at common law for injury resulting to the workman from such user.

Decision of MARTIN, J. affirmed, IRVING, J.A. dissenting.

Per GALLIHER, J.A.: The same high standard of equipment should not be required on small tracks in underground mines as on railway systems generally, and a link and pin coupling would, in the circumstances, be sufficient.

APPEAL from the judgment of MARTIN, J. in an action tried by him at Nelson on the 18th and 19th of May, 1909.

Plaintiff had been in the employ of the defendant Company for several months as a hind brakeman on their electric train running into their mines at Phœnix, and eight or ten days before the accident in question was made head brakeman, his duties being to ride on the front end of the train which was being pushed into the mine, with the motor at the other or farthermost end. He would sometimes throw switches, couple or uncouple cars which would require to be left at or taken from different parts of the mine, which parts were usually side drifts extending from the main tunnel. Into some of these side drifts short tram lines were constructed, into others including the one in question, where the accident occurred, the Company employed a system of "kicking" the cars in, which meant that they had no line of rails or trolley wire leading into such side drift, but on the main line they would take a run with the train, pushing it over the drift and up the side with such speed that the cars would, when uncoupled, with their own velocity, go to the side of such drift. Carrigan, in common with other

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brakemen, would jump off the train, wait until the car which he desired to uncouple came up, jump in between such car and the next one and draw the pin. The coupling device used was an ordinary link and pin coupling, which could not be uncoupled at the side, but required the brakeman to get in between the cars for the purpose of pulling the pins. In the particular instance in question, whilst the cars in the "kicking-in" operation were being pushed swiftly over the switch, the pin jumped out and the cars became uncoupled, causing the drawheads to interlock, and one of the cars to be pushed off the track. By this accident the plaintiff got drawn down between the cars, his legs were crushed between the drawheads and one leg had to be amputated below the knee.

It was alleged for plaintiff that the "kicking-in" was dangerous, unnecessary and that it involved the happening of just such an accident as occurred; that the Company should have constructed a short line of trolley into the drift and a short line of rails so that the engine could, at a slow rate of speed, run into the side drift pushing the train ahead and the coupling be undone without any risk to the brakeman; also that the link and pin is a defective and dangerous device which had been legislated against by the Dominion Railway Act as regards standard railways, and that an automatic coupling should have been employed.

Statement

The defence was that in cars of the size and kind in use in the mine (8 or 10 tons capacity, 12 feet long and five and a half feet wide on the truck) automatic couplings are not as a rule used; that a short line of trolley could not be constructed into the side drifts to any extent because of the danger of blasting, and some chance of the wires coming into contact with the men at work.

In reply to this contention it was alleged for plaintiff that no blasting was or could be carried on in this drift on account of the danger or damage to the chute; that in any event the trolley wire would not reach further than 70 or 80 feet of the "face," and even if blasting were carried on it would be 50 feet from the main line of the trolley.

Rule 5 of the Company's regulations reads:

"Motormen (steam and electric) must be in complete understanding with their brakemen as to the work at hand; they will follow brakeman's signals as nearly as possible and be especially careful when coupling in making up trains. Motormen are cautioned not to use excessive speed on curves or where underground openings are narrow."

And Rule 6:

"Brakemen in giving signals to motormen will give them in as distinct a manner as possible in order to reduce to a minimum the liability of an accident. In making couplings, brakemen are cautioned to use a stick to lift the link and not endeavour to do so with their unprotected hands. By using the stick all possibility of crushed hands is obviated. Brakemen are also cautioned not to get on or off train while same is in motion."

S. S. Taylor, K.C., for plaintiff.

J. A. Macdonald, K.C., for defendant Company.

30th November, 1909.

MARTIN, J.: In my opinion the more this case is carefully considered, the more does it become apparent that the accident was caused by the long established and defective system of "kicking in" (as it was aptly called) the car into the drift, and the defendant Company is liable at common law for the consequences of this negligence. Having regard to all the circumstances I am unable to take the view that the plaintiff had such a knowledge and comprehension of the danger and risk, or that he did or omitted to do anything that would relieve the Company from consequences of such negligence. Furthermore, neither number 5 nor 6 of the printed rules and regulations really applies to this case when properly understood; the Company, indeed, was in effect requiring its employees to disregard its own rules. I assess the damages at $4,000, for which amount let judgment be entered for the plaintiff.

Judgment

The appeal was argued at Victoria on the 17th of June, 1910, before IRVING and GALLIHER, JJ.A. and GREGORY, J.

Bodwell, K.C., and *A. M. Whiteside,* for appellant (defendant Company.

S. S. Taylor, K.C., for respondent (plaintiff).

Cur. adv. vult.

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IRVING, J.A.: I think the appeal should be allowed. The learned trial judge found that the accident was caused by the defective system of kicking the cars into the drift, which system had been long established. The drift was a new one, in which they were blasting. The management had caused a raise to be made there just shortly before the accident happened. Evidence was given that rocks from the blasting would fly a considerable distance varying, I presume, with the width of the tunnel.

The defendants say that the practice of kicking cars into drifts was a safe and proper one, and had been used by them for a long time, and that it was a necessary device because they were unable, having regard to the danger of electric wires being knocked down from their supports by the flying rocks, to carry the trolley wire right up the face of the work.

The master must not expose the servant to unnecessary risk, but the master, it must be remembered, has to consider the safety as well of the other men engaged, say, in blasting out rock or working in the raise, as of the men in charge of the train which is to remove the muck or ore. It is quite impossible to define what precautions are, as a matter of law, reasonable in each particular case, for in considering the duty of the employer one must have regard to the time, place or person.

IRVING, J.A.

As pointed out by Montague Smith, J. in *Crafter* v. *Metropolitan Railway Company* (1866), L.R. 1 C.P. 300 at p. 304, an action brought by one of the public:

> "The line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to the jury. It is difficult in some cases to determine where the line is to be drawn."

But here I have no hesitation in saying there was no evidence of negligence which the judge could properly leave to a jury. The question of what is a proper system is one which should be determined after hearing evidence from witnesses duly qualified to express an opinion—not necessarily of expert witnesses, but at least men of some experience. The judgment of the Court of Appeal in Ontario in *Leitch* v. *Pere Marquette R. Co.*

(1910), 1 O.W.N. 562, is very much in point so far as this alleged defective system is concerned.

In this case the only evidence that the system was defective comes from the plaintiff, naturally he would say so; but by whom is he supported? Not by Egan, formerly head brakeman and now a motorman, who declines to express an opinion as to the method, and says it worked all right during his three years' experience in the mine. On the other hand, the system was initiated and carried on by the men themselves, who had absolute freedom to do the work in a way that was safe to themselves, and worked all right. It was approved of by the management in the interest of those working in the mine—and as necessary to the conduct of their operations; and perhaps the strongest evidence of all, the plaintiff had after being several months in the mine as rear brakeman, accepted the position, true, at an increased wage—but still he accepted a position on the train where his personal danger was involved if the system was defective, and he remained in that position until the accident occurred, *i.e.*, for some nine days without complaint.

This latter fact is not conclusive, but the whole circumstances of the inauguration of the system by the men who were actually engaged in the dangerous business, and the acceptance of employment knowing what that system was, testify to the confidence felt by all in the safe working of the system now impugned. These circumstances—these acts—outweigh the verbal testimony of the injured man—be he ever so honest in expressing his present opinion.

The question of whether there is actionable negligence on the part of a master for defective system is mixed up with the question: what specific risks did the servant contract to accept, either expressly or by implication: Macdonell on Master and Servant, 2nd Ed., p. 299. In consideration of another 25 cents per day he accepted the position of head brakeman, which involved his cutting out the necessary number of cars.

Smith v. *Baker & Sons* (1891), A.C. 325 was referred to. In my opinion that decision has nothing to do with this case. That there was evidence to go to the jury of negligence on the

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part of defendants in slinging the stone was in the trial Court admitted: see pp. 329, 336, 348, 349, 358. The risk was from a defect in another department over which the injured man had no control, it was something unconnected with the work he had been employed to do. It was found as a fact that the plaintiff did not voluntarily, with a knowledge of its risks, undertake this risky employment. As he had complained, the only argument that could be used against him was that as he had continued to work he must be held to have accepted the risk and that the jury should have so found.

Here the circumstances of the accident and of the appeal are entirely different. The negligence is not admitted. The risk was immediately connected with the work he undertook to do, (the management thinking that the best and safest means, having regard to all concerned) he was paid more for accepting the job, and he accepted it after he had ample opportunity of learning its dangers. We are not precluded, as the House of Lords was in *Smith* v. *Baker & Sons, supra* (pp. 349 and 350), from examining whether there was or was not evidence to justify a jury in coming to a conclusion. In that case all three judges on the appeal were of opinion that there was no evidence of negligence. It is not clear that the Lords would have overruled the Court of Appeal had the question been, was there evidence of negligence: Lord Halsbury, p. 335; Lord Watson, p. 352; Lord Herschell, p. 359; Lords Bramwell and Morris, p. 367.

IRVING, J.A.

I think on this ground the action at common law should have been dismissed, namely, no evidence of negligence to go to the jury.

There was evidence which might justify a jury in arriving at the conclusion that there was a defect in the ways within the meaning of the Employers' Liability Act, upon which point the learned trial judge gave no finding, and I think we should direct a new trial in order that any point open to the plaintiff under that Act might be re-tried.

Much was made of the fact that the trolley wire was strung into the face of the drift two days later.

GALLIHER, J.A.: In this case the plaintiff as head brakeman was in charge of the train of ore cars. No negligence is imputed to any fellow servant, in fact the plaintiff says and the evidence shews there was no such negligence. I think the plaintiff is entitled to succeed on the ground that the system was defective, and the learned trial judge has so found, and has awarded the plaintiff common law damages.

There are two grounds on which the plaintiff claims the system is defective: (1) the link and pin instead of automatic couplers on the cars; (2) the uncoupling and "kicking in" of cars into a drift off the main line instead of carrying the trolley wire into the drift and placing the cars.

The plaintiff was working underground in the defendants' mine in which there was a main tunnel and several drifts connected therewith. A line of rails was laid along the main tunnel and into the drifts, and the train for carrying the ore, rock, etc., out of these drifts and along the tunnel was operated by an electric motor by trolley wire overhead. The trolley wire was not erected in the particular drift where the ore was being taken out on the day of the accident, so that the cars which had to be put into the drift in question could not be placed in by the motor, but the system followed was to uncouple such cars as were to be put into that drift from the rest of the train, while the train had sufficient momentum to "kick in" (as it is called) these cars from where the switch was, into the drift, the balance of the train remaining on the main tunnel track. The body of the car where the ore is put is hopper shaped, so that at the bottom the floor of the car forms a little platform at each end.

On the day in question there were six cars in the train, three of which had to be kicked into the drift and when the plaintiff, who was riding on the motor, came opposite the switch, which was about opposite the mouth of the drift, he jumped off and when the first three cars had passed he tried to swing in between cars 3 and 4 to uncouple, but he states that before he had got up on the platform above described, one of the cars jumped the track, and the coupling pin coming out, his leg

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was caught between the drawhead of one car and the frame of the other, and so badly crushed that it had to be amputated.

Now, dealing with the plaintiff's first objection, namely, the link and pin coupling, I will divide it into two parts: (1) Did the defendants provide reasonably suitable appliances and equipment for the proper carrying on of the work and protection of its employees? (2) Were these appliances and equipment in good working order at the time of the accident?

On the first branch I do not think it would be reasonable to hold that the same standard must be observed in equipping cars used in underground workings in mines such as this, as would be the case in railway systems generally.

No one doubts the greater safety of the automatic coupler, but can we say that on small tracks laid in underground mines, ore cars equipped with the link and pin coupling are not reasonably suitable and safe for the proper carrying on of the work? I think not.

On the second branch the plaintiff has attempted to shew that the appliances and equipment were not in good order, but his evidence on that point abounds in generalities only, and I hold is not sufficient.

GALLIHER, J.A.

I will now consider the second of the plaintiff's grounds, namely, the failure of the defendants to carry their trolley line into the drift, thus necessitating the "kicking-in" system." In this regard we have to ask ourselves not only, was it practicable to place and operate the trolley line in the drift at the time of the accident; but, was the failure to do so under the circumstances such a defect in the system of operation as would render the defendants liable? We must look to the evidence to a great extent to ascertain this, yet it is not so entirely a question of fact as that we should feel ourselves precluded by the finding of the learned trial judge. In the drift in question prior to the accident the defendants were not only taking ore from chutes coming from above into the drift, but were blasting in the face of the drift and removing the rock and debris as well. This was going on up to the day of the accident. After the accident

no more blasting was done in that drift, and the trolley wire was put in and ore removed from the chutes above mentioned.

The defendants contend that it was not practicable to put the trolley wires into the drift by reason of the danger to the men that might ensue from rocks in blasting being hurled against the wires, knocking them down, and the men coming in contact with these wires, and have adduced considerable evidence in support of their contention.

I have carefully read all the evidence in this connection, and it does not impress me very strongly. The conclusion I have arrived at is that the trolley wire could have been operated in the drift with safety at the time of the accident, and for some time prior thereto, and this would have dispensed with the "kicking-in" system. But even admitting this, we have still to consider whether the failure to instal the trolley wire (which I think must be admitted is the safer system) renders the defendants liable.

In this regard I refer to the language of Duff, J. in *Fralick* v. *Grand Trunk Railway Co.* (1910), 43 S.C.R. 494 at pp. 519 and 520. The learned judge there says:

> "If it would be clear to reasonable persons with competent knowledge that by the adoption of one system they would in an appreciable degree enhance the risk (*sic*) of such collisions, or that by the adoption of another system they could in an appreciable degree diminish that risk, and if the adoption of the comparatively safer system would not involve them in any appreciable difficulty or expense in the working of the railway, it was their plain duty to adopt the safer system."

Though I assume the learned judge in applying that principle did so in view of the facts in the particular case before him, I do not think I would be doing violence to that principle by applying it to the facts of the case now before us, considering that the defendants' practice was to use this "kicking-in" system only while it was unsafe to instal the trolley wire, and then replace it by erecting the trolley in the tunnels, and their delay in so doing in the present case was negligence.

The "kicking-in" system had been in vogue in the defendants' mine for some years, and there can be no question that they had full knowledge of it.

It was argued on behalf of the appellants that the plaintiff

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could have stopped the train before coming to the switch, uncoupled the cars while they were stationary and had them kicked in without danger to himself, and his failure to adopt this safer method was contributory negligence on his part, but in view of the facts as disclosed by the evidence that the method adopted by the plaintiff was the same as was carried out by his predecessors for years, and which he saw being done before being promoted to the position of head brakeman, and that he had received no instructions to the contrary (except insofar as rule 6 might be applicable) I am unable to find contributory negligence, nor do I find from all the circumstances that the plaintiff was *volens*.

GALLIHER, J.A.

The appellants raised the further point that the accident did not occur when the plaintiff was endeavouring to uncouple the cars, but when he was swinging on to the train to ride back, which he was forbidden to do.

I think this is largely conjectural, and it would be both unsafe and unwise to deprive a plaintiff of his right to recover on any such grounds not supported by positive evidence.

I would dismiss the appeal.

GREGORY, J.

*GREGORY, J.: After a careful reading of the evidence herein, I am unable to resist the conclusions arrived at by the learned trial judge, that the accident arose through the defective system of "kicking-in" the ore cars to the chute where they were to be loaded. The appellants allege that the system was inaugurated by the plaintiff and his fellow workmen without the knowledge or consent of the Company. Even if this were true it does not appear to me to relieve the defendants of their common law obligation to provide a reasonably safe plant, machinery, etc., and system for the working of their mine. It was the appellants' duty to adopt a proper system and not leave it to its workmen to inaugurate one.

The reasons given for not extending the trolley wire into the drift where the accident occurred do not impress me, and leave the impression that that drift had practically been in the same

*Sitting specially by request as a judge of the Supreme Court pursuant to section 3 of the Court of Appeal Act, 1907, Amendment Act, 1909.

condition for a considerable period. The evidence given of danger to be feared from blasting is vague as to the extent of the blasting then or recently going on, and apparently assumes that the wire would have to be carried to the face of the drift, whereas an extension of the wire about 50 feet beyond switch No. 3 would have enabled the cars to have been deliberately placed in position and uncoupled without any risk at all being incurred. The end of this wire would then have been far enough from any possible blasting at the face to be out of danger, as I understand the evidence, and certainly considerably further away than the trolley wire on the main tunnel was. This might have been done with comparatively trifling expense, and I am sure in a few hours. Had this been done there would have been no occasion for the cars to travel at a high rate of speed over switch No. 3, the plaintiff would not have been where he was, and he would not have been injured as he was, whether the pin jumped out or the car ran off the track or not. If the evidence had shewn that substantial work and blasting had been going on continuously in the drift, one would not be inclined to exact that the Company should extend the wire at the precise moment when it could be done with a reasonable expectation that it would not be knocked down by blasts, but the evidence is quite the other way, and in fact the wire was extended almost immediately after the accident.

So far as the plaintiff is concerned, it seems to me that he has not been altogether frank, but it would be unreasonable to expect him, suffering as he must have suffered, to have noted with exactness all the details of the accident; but this much is uncontradicted, namely, that he did the work as he believed he was instructed to do it by the mucker boss, Thomas Edwards; that he did it as he had always seen it done; that if he had done it otherwise he believes he would have lost his job; that he only had a limited experience in the mine, a week as mucker, about two months as head brakeman, and nine or ten days as rear brakeman—having been previous to that cook, waiter, attendant in a cigar store, etc.

Mr. *Bodwell,* for appellants, contended that there was no

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liability at common law as "the only duty it imposed on the masters was to provide competent overseers," and he referred to the well known case of *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. In that case Lord Chancellor Cairns states the law at p. 332 in the following words:

"What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do."

But even if that statement is exhaustive it does not dispose of the present case because there is no evidence here to shew that the defendants had selected proper and competent superintendents. That the Lord Chancellor considered evidence on these points essential is shewn by his statement on p. 329 that evidence had been given and was not contradicted that the superintendents there concerned had been selected with due care and were competent for the work on which they were engaged, and they had been furnished with all necessary materials and resources for working in the best manner.

But the equally well known case of *Smith* v. *Baker & Sons* (1891), A.C. 325, decides that an employer is liable at common law for a defective system. In that case, Halsbury, L.C., says at p. 339:

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"I think the cases of *Sword* v. *Cameron*, 1 Sc. Sess. Cas. 2nd Series, 493 and the *Bartonshill Coal Company* v. *McGuire* (1858), 3 Macq. H. L. 300, established conclusively that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act."

And in the same case, Lord Watson, at p. 353, says:

"It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety . . . . . As I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (43 & 44 Vict. c. 42) that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by defect in the machinery itself."

Lord Watson refers to the two cases above mentioned and also to *Weems* v. *Mathieson* (1861), 4 Macq. H.L. 215, saying:

"The judgment of Lord Wensleydale clearly shews that he was also of

opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used."

In Canada Woolen Mills v. *Traplin* (1904), 35 S.C.R. 424, Davies, J. at pp. 430, 432, draws attention to the distinction between the liability of the master for his personal negligence or for the condition of his premises, and that arising out of the negligence in the management or operation of machinery by servants, and referring to the words of the above quoted passage from the judgment of Lord Cairns, in *Wilson* v. *Merry, supra,* says:

"They were not intended to cover cases arising out of the master's liability for injuries caused by defects either in the system or in the condition of his premises," etc.

And in *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, at p. 426, Mr. Justice Davies again referring to Lord Cairns's celebrated dictum in *Wilson* v. *Merry,* says it does not cover the duties owing by the employer to the employed in respect to "defective systems of carrying on work;" and in both these cases he appears to me to quote ample authority for his comments.

In *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494, Duff, J. at pp. 519, 520, states very clearly the duty of an employer with reference to the adoption of a system which in a material degree diminishes the risk to his workmen, and at the end of his judgment points out that if he fails in this duty it is no answer to say that the injured person is in fault

"Because it was in not providing a better means of preventing such defaults and avoiding the evil effects of them when they take place that the employers' failure of duty consisted."

It was argued for the appellant that there was no necessity of extending the trolley wire into the drift and that the "kicking in" of the cars could have been done with perfect safety.

Assuming that to be so, it does not appear to me that the defendants discharged their duty to the plaintiff, for such work was unquestionably dangerous. The defendants admit that the plaintiff received no instructions as to how it should be done, and the defendants owed it to the plaintiff to give him instructions for he cannot be considered an experienced hand. This

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is a duty which they might have delegated to another (which they apparently did not) and for whose neglect they probably would not have been responsible, but it is a distinct duty and they must assume the responsibility of their neglect to perform it: *Cribb* v. *Kynoch, Limited* (1907), 2 K.B. 548; *Young* v. *Hoffman Manufacturing Company, Limited, ib.*, 646.

Other defences appear in the pleadings, but I have not considered them as they were not mentioned on the hearing of this appeal.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed, Irving, J.A. dissenting.

Solicitor for appellants: *D. Whiteside.*
Solicitors for respondent: *Taylor & Harvey.*

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Statute, construction of—Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, Secs. 60, 267, 275—Ferries Act, R.S.B.C. 1897, Cap. 78.

Section 275 of the Municipal Clauses Act, R.S.B.C. 1897, provides that, notwithstanding anything contained in the Ferries Act, where a ferry is required over any stream or other water within the Province, and the two shores of such stream or other water are in different municipalities, the Lieutenant-Governor in Council may grant a licence to ferry, without submitting the same to public competition, to either of such municipalities exclusively, or both conjointly, as may be most conducive to the public interest. Section 8 of the Ferries Act provides that "ferry licences issued after such public competition may be granted for any period not exceeding five years." The Provincial Government granted to the rural municipality of North Vancouver a licence for a ferry between the municipality and the City of Vancouver for 15 years under the provisions of section 275. The municipality sublet the licence to the plaintiff Company pursuant

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to section 277 of the Municipal Clauses Act. Subsequently the municipality obtained an Act of incorporation as a city municipality and in the Act provision was made, *inter alia*, for giving effect to such sub-lease. In an action to restrain a rival company from infringing on the rights of the plaintiff Company (the sub-lessees) an injunction was granted by CLEMENT, J. and it was

Held, on appeal, (GALLIHER, J.A. dissenting), that the provisions of the Ferries Act as to duration of a franchise do not control the granting of a licence for a ferry to be established between municipalities.

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver in February, 1909, when an injunction was granted restraining the defendants from infringing the plaintiff Company's rights in the matter of ferry transportation across Burrard Inlet between Vancouver and North Vancouver municipalities.

Davis, K.C., and *Marshall*, for plaintiff Company.

Joseph Martin, K.C., Macdonell, Killam, and *Harper*, for the various defendants.

CLEMENT, J. (oral): I do not think any benefit would arise to any of the parties by my reserving judgment. The only points upon which I was in doubt when I called upon Mr. *Davis* were as to the five years' limit and as to the application of the *ejusdem generis* rule to the phrase "stream or other water," and as to the question of there being a by-law in connection with the agreement which now exists between the Municipality and the present plaintiffs.

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As to the question of the five years' limit: I think I have expressed my view pretty fully as the argument proceeded. I do not think the ratio of that provision in the general Ferries Act exists at all under the clause of the Municipal Clauses Act as to the granting of licences to a municipality, and I do not see any reason why I should read into this licence that particular clause which upon its face is expressly a limit upon licences granted after public competition; why, I say, I should attach that time limit to a ferry licence granted under section 275, I think it is, of the Municipal Clauses Act.

As to the application of the *ejusdem generis* rule: I do not

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see how it can be applied here to remove the waters of Burrard Inlet from the "stream or other water" over which the Provincial Government have the right to grant ferry licences. The controlling idea seems to be the shore to shore idea, ferriage between two points that are separated by a more or less narrow body of water, in aid as it were of land travel. It may be that that body of water would have to be a comparatively narrow one. I certainly do not think it would apply to ferriage between points along the same shore, as for instance between here and Prince Rupert, but I think that all those comparatively narrow inlets, arms of the sea that run into the main land, of small width as compared with their length, come within the term "other water" and that ferry licences may be granted to facilitate transport from one side to the other of these inlets, avoiding a long land detour.

I think there is here, as a matter of fact, a by-law under section 277. It is suggested that that by-law is bad because it refers to a previous by-law which, it is said, is invalid. I do not think it is in any way founded or depends for its validity on the validity of the previous by-law. It recites the arrangements that have in fact been made, and provides that they are the arrangements which are in fact to govern between the municipality and the plaintiff Company. So that I think there is a valid by-law under section 277, and the plaintiff Company are in possession of a valid ferry licence. I say nothing as to the effect of the confirming Act. I have not considered it, nor see the necessity of doing so.

CLEMENT, J.

It is clear there has been infringement by the defendants. I think no distinction can be drawn between the different defendants. They all went into the enterprise together and, while their positions vary, they are all, I think, joint tort feasors.

There will therefore be a declaration in favour of the plaintiffs as asked; an injunction restraining these defendants from infringing the plaintiffs' rights, and an enquiry as to damages, and the plaintiffs of course will get their costs.

The appeal was argued at Vancouver on the 2nd of Novem-

ber, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

McCrossan, and *Harper,* for appellants (defendants): We say that the plaintiffs' title by lease from the municipality was bad by reason of the fact that the granting of the lease was beyond the powers of the municipality; (2) the Lieutenant-Governor in Council had no authority to grant a lease for more than five years; therefore the original lease being for 15 years, was bad on that ground, as well as being over a body of water constituting a public harbour and therefore being under the exclusive control of the Dominion Government.

[The latter being a constitutional question, and no notice of its being raised having been given the respective Governments concerned, was abandoned as a ground of appeal.]

The lease is for 30 years, but by section 267 of the Municipal Clauses Act, R.S.B.C. 1897, chapter 144, as amended by section 60 of the statutes of 1902, chapter 52, the limitation is 20 years. If, however, it is argued that the lease is good *pro tanto,* we say that such a transaction is a contract, and the parties never having been *ad idem,* therefore there is no contract. They cannot now substitute another contract for that which the parties entered into.

[MACDONALD, C.J.A., referred to *Hervey* v. *Hervey* (1739), 1 Atk. 561.]

Argument

Our submission is that this new lease should have been submitted to the people in the form of a by-law. It is a charter granting a franchise, and by section 64 such submission is obligatory.

They referred to *Henderson* v. *Maxwell* (1877), 5 Ch. D. 892; *Spice* v. *Bacon* (1877), 2 Ex. D. 463; *Caldow* v. *Pixell* (1877), 2 C.P.D. 562; *Crawford* v. *Spooner* (1846), 6 Moore, P.C. 1 at p. 9; *Cowper Essex* v. *Local Board for Acton* (1889), 14 App. Cas. 153.

Section 275 of the Municipal Clauses Act, and section 5 of the Ferries Act limit the licence to five years. They also referred to *The Queen* v. *Bishop of Oxford* (1879), 4 Q.B.D. 245 at p. 261; *Rothschild* v. *Commissioners of Inland Revenue*

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(1894), 2 Q.B. 142; *Jellett* v. *Anderson* (1880), 27 Gr. 411. Section 275 of the Municipal Clauses Act does not vest in the Lieutenant-Governor in Council power to grant a ferry licence over a body of water like Burrard Inlet, but only over a stream or other water, and we submit that "other water" must be read *ejusdem generis* with stream; *Williams* v. *Golding* (1865), L.R. 1 C.P. 69; *Reg.* v. *Portugal* (1885), 16 Q.B.D. 487; *Reg.* v. *Kane* (1901), 1 K.B. 472; *Reed* v. *Ingham* (1854), 3 El. & Bl. 889; *Harrison* v. *Blackburn* (1864), 17 C.B.N.S. 678; *McNab* v. *Robertson* (1897), A.C. 129 at p. 134.

Argument

Davis, K.C., for respondents (plaintiffs): As to the agreement of the 23rd of July being invalid, that was an agreement for a leasing by North Vancouver municipality to the new company, and it does not matter whether or not it was valid. There was simply an agreement to the effect that if they procured a lease, they would sub-let it, and its whole terms are re-enacted in the subsequent agreement. The argument that the lease should have been submitted to a vote of the people is not applicable here, as such a procedure is obligatory only where the municipality is purchasing, or trading for, a utility, and where the expenditure of public money is involved. Further, section 64 does not apply to a case like the present, which is not granting a public franchise, but is merely a sub-letting by the municipality of a right given to it by the Government. Section 275 and following sections comprise a complete code with reference to ferry licences to municipalities; it is special legislation. The reason for this special legislaton and the reason why muncipalities should be exempt from the provisions of the Ferries Act is that it is one thing to give a licence or right of this nature to a private company and another to give the same kind of right to a public body like a municipality; entirely different considerations are involved, and the reason why there is no necessity in having the right put up to competition when it is going to be vested in a public body is perfectly obvious. Those sections dispense with the time limit of five years. The Government do not grant the right for ever;

they may cancel it at any time. The limitation of five years refers only to licences granted after public competition. The latter part of section 276 wipes out the Ferries Act as to municipalities, and gives the Lieutenant-Governor in Council full discretion; in other words, the licences granted under the Ferries Act are one class of licence, and those granted under the Municipal Clauses Act quite a different kind. Chapter 32 of 1906, sections 8 and 23, and Schedule A is a statutory recognition of this particular agreement; therefore if there was any defect in it originally, it has been remedied by the Legislature, and if it is sought to set aside that agreement the Government must be made a party to the action.

McCrossan, in reply, referred to *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412 at p. 428.

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.: This contest is between rival ferry companies plying between the City of Vancouver and the City of North Vancouver, across Burrard Inlet, a narrow arm of the sea and a public harbour.

That ground of appeal which questioned the jurisdiction of the Province to grant ferry licences over this body of water was abandoned by counsel before us when it was pointed out that we could not properly consider a matter involving the jurisdiction of the Province in a suit between private parties.

It was argued that this arm of the sea cannot be considered to be a stream or other water within section 275 of chapter 144 of the Revised Statutes, 1897, but I am of opinion that it does fall within the purview of that section.

The main question, however, in this appeal arises in this way: The Lieutenant-Governor in Council granted to the Corporation of the District of North Vancouver (a rural municipal corporation), a licence, dated 12th December, 1903, to use and ply a ferry between the City of Vancouver and the District of North Vancouver for a period of fifteen years. This licence was granted under the powers conferred by said section 275.

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The council of the said municipality sub-let the ferry to the plaintiffs, as it had power to do under section 277 of said chapter, by indenture dated 9th January, 1904, and the plaintiffs have been operating the ferry ever since. The appellants, on or about the 1st of December, 1908, commenced to ply a rival ferry, and this action was brought for damages and to restrain them from so doing. They now contend that the Lieutenant-Governor in Council was not authorised to grant the licence to the respondents' lessors for a term exceeding five years, and they rely upon section 5 of the Ferries Act, R.S.B.C. 1897, chapter 78, which reads as follows:

"Ferry licences issued after such public competition may be granted for any period not exceeding five years."

If that Act applies to licences granted under said section 275, which I do not find it necessary to decide, but for the purposes of this opinion will assume, then I think the language of section 5 is inapplicable to a licence issued under said section 275. Putting the case for the appellants as strongly as I think it can be put by reading the provisions of said chapter 144 relating to ferries and the Ferries Act together, we find that the only section limiting the time for which a licence may be granted is to be found in said section 5. To apply that limitation to both classes of licences would involve the reading of that section in this way:

MACDONALD, C.J.A.

"Ferry licences issued after such public competition *and ferry licences issued without competition* may be granted for any period not exceeding five years;"

or we should have to exclude from the section the words "issued after such public competition."

Reading out of, or reading into a statute, words in this manner is, to my mind, a dangerous thing. In this case effect can be given to both Acts without doing this. I am therefore of opinion that the licence could be issued for a period of fifteen years.

I do not find in any of the other grounds of appeal a reason for disturbing the judgment, nor do I find it necessary to consider the effect upon this licence of the North Vancouver City Incorporation Act, 1906, nor of section 276, though I think the

words "limit and extent" used there apply to the ferry, not to the licence: See *Anderson* v. *Jellett* (1883), 9 S.C.R. 1.

I would dismiss the appeal.

IRVING, J.A.: The licence from the Crown under which the plaintiffs carry on their ferry does not specify any limit or extent. A question difficult to answer might arise if an opposition ferry were started at some distance from the termini now being used by the plaintiffs. As the defendants' termini adjoin those of the plaintiffs, there can be no trouble of that kind.

In my opinion the provisions of the Ferries Act (chapter 78) as to duration of the franchise do not control in any way the granting of a licence for a ferry to be established between municipalities. The Municipal Clauses Act, 1906, chapter 32, section 275, says "notwithstanding anything contained in the Ferries Act" (chapter 78), no competition shall be necessary where the licence is to be granted to either of such municipalities. The essence of the Ferries Act was that there should be competition open to the public. The limit of five years fixed by section 5 of the Ferries Act is only applicable to the licence issued after competition—an additional provision to secure competition.

IRVING, J.A.

As to the right to grant a ferry franchise across an arm of the sea, the books shew that there has been a ferry across the Mersey from Liverpool to Birkenhead since 1318—*Pim* v. *Curell* (1840), 6 M. & W. 234; and across Milford Haven for many years: see *Huzzy* v. *Field* (1835), 5 Tyrw. 855, and as the grant of a ferry franchise does not convey any title to right of monopoly of the use of the water, or any interference with the ownership of the harbour, I see nothing preventing the Province from granting a franchise in respect of a ferry across Burrard Inlet.

The words "stream or other water within the Province" would include the Inlet—"other water" is in my opinion not to be limited to other water *ejusdem generis* with a stream. The statute being general, the words "other water" should not be limited. Furthermore, the definition of ferry in English law

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refers to the carrying across a river or other body of water.

The North Vancouver City Incorporation Act, 1906, B.C. statutes, chapter 35, after reciting that the inhabitants of the present City of North Vancouver wished to be incorporated as a city, provided that effect should be given to a certain agreement set out in Schedule A for the distribution of the assets and liabilities made between the new city and the old district.

By clause 5 of the agreement it was agreed that:

"The ss. North Vancouver and all wharves and slips belonging to the District Corporation, and all rights thereon, and to compensation therefor, subject always to the conditions and provisions of the agreement of lease between the District Corporation and the North Vancouver Ferry and Power Company, Limited."

By clause 6 that:

"The ferry licence from the Provincial Government, subject always to the lease thereof in favour of the North Vancouver Ferry and Power Company, Limited, and to all the conditions and provisoes in said lease contained."

And by section 23 of the Act it was enacted as follows:

"The three agreements made by the Corporation of the District of North Vancouver with the Vancouver Power Company, Limited, for street car service, street lighting, and the supply of electric light and power, respectively, and the agreements made by the said corporation with the British Columbia Telephone Company, Limited, and the Vancouver Ferry and Power Company, Limited, in so far as the several agreements affect the area by Letters Patent under this statute incorporated as the City of North Vancouver, are hereby ratified and confirmed, and shall be adopted and carried into effect by the council of the City of North Vancouver, but in other respects the said companies shall be subject to the ordinary jurisdiction of the Council."

IRVING, J.A.

This 23rd section is something of a puzzle. Stripped of the matter irrelevant to this action, it declares that the agreement, *i.e.*, lease of 23rd July, 1903, as modified in January, 1904, made by the old North Vancouver Corporation with the present defendants is thereby ratified and confirmed, and the obligations of the old corporation are to be carried into effect by the new city council instead of by the old corporation. I do not see how the agreement can be ratified and confirmed unless the power to make the agreement is admitted.

The construction I put on it is that the modification of January, 1904, cut it down to the time mentioned in the

licence, *viz.*: fifteen years, except the last three days, but I think the existence of the ferry is recognized.

MARTIN, J.A.: In my opinion the provisions of the Municipal Clauses Act, R.S.B.C. 1897, chapter 144, under the group of sections 275 *et seq.* headed "Ferries between Municipalities" deal, so far as regards the granting of licences, with a state of affairs additional to and distinct from that governed by the Ferries Act, and therefore the grant of the licence in question for fifteen years was within the powers of the Lieutenant-Governor in Council. Such being the case, the objection that the agreement of the 9th of January is based upon an invalid grant is removed, and there is then, in my view, no escape from the soundness of the contention that the North Vancouver City Incorporation Act, 1906, chapter 35, validates the agreement and cures any defects in the municipal proceedings complained of. If section 8, and clauses 5 and 6 of Schedule A are not sufficient, section 23 is not merely a ratification and confirmation of what had been done, but a mandate to the City of North Vancouver that the recited agreement, based on a valid licence, shall be adopted and carried into effect "by its council." It follows that the controversy being thus ended by unmistakable legislative enactment, it is unnecessary to consider the antecedent rights of the litigants. Had the licence been *ultra vires,* I confess I should have had some doubt about the sufficiency of the said statute, having regard to the decision of the Supreme Court in *Dwyer* v. *The Town of Port Arthur* (1893), 22 S.C.R. 241, to which my attention has been directed by the learned Chief Justice.

MARTIN, J.A.

GALLIHER, J.A.: I would allow the appeal. I will deal only with the question as to whether the licence granted was *ultra vires* of the Lieutenant-Governor in Council by reason of the provisions of section 5 of chapter 78, R.S.B.C. 1897 (the Ferries Act), and if so, is the licence validated by the North Vancouver Incorporation Act, 1906?

GALLIHER, J.A.

Under the Ferries Act, all licences are to be granted after public competition, and section 5 reads:

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"Ferry licences issued after such public competition may be granted for any period not exceeding five years."

In the Municipal Clauses Act, R.S.B.C. 1897, chapter 144, under the heading "Ferries between Municipalities," section 275 is as follows:

"Notwithstanding anything contained in the Ferries Act, where a ferry is required over any stream or other water within the Province, and the two shores of such stream or other water are in different municipalities, the Lieutenant-Governor in Council may grant a licence to ferry, without submitting the same to public competition, to either of such municipalities exclusively, or both conjointly, as may be most conducive to the public interest."

And section 276 reads:

"Such licence shall confer a right on the municipality or municipalities to establish a ferry from shore to shore on such stream or other water and with such limit and extent as may appear advisable to the Lieutenant-Governor in Council and be expressed in such licence."

The defendants contend that section 276 of the Municipal Clauses Act must be read in connection with section 5 of the Ferries Act, and, so read, the Lieutenant-Governor in Council has no authority to issue a licence for a longer period than five years, and that in issuing the licence in question for a period of fifteen years he exceeded his jurisdiction.

GALLIHER, J.A.

The Ferries Act, 1874, chapter 14 (which repealed the Ferry Ordinance, 1867), with certain amendments which do not affect the question here, has been carried down to the present time. The Act relating to ferries in municipalities was first enacted in 1883, chapter 12, and with certain amendments in 1895, was incorporated in the Municipal Act, 1888, Consolidated Acts, Vol. 1, and brought down to date. Sections 1 and 2 of the Act of 1883 are almost identical with sections 275 and 276, chapter 144, R.S.B.C. 1897.

By a perusal of the Act of 1883, and its amendments as incorporated in the Municipal Clauses Act, it will, I think, be seen that they do not constitute a separate and independent Act, but that insofar as municipalities are concerned, except where specific clauses govern the procedure, they are bound by the provisions of the general Ferries Act, *e.g.*, with regard to class of boats, tolls to be charged, penalties for infraction of rules, etc.

With regard to section 276 it is contended that it is competent for the Lieutenant-Governor in Council to grant licences to municipalities for any period he may see fit for two reasons: first, because of the words therein used "and with such limit and extent as may appear advisable," and secondly, because the limitation of five years in section 5 of the Ferries Act applies only to licences granted after public competition. In their order, the words "and with such limit and extent" are identical with the words in the Ontario Act, 20 Vict., chapter 7, except that the word "within" is there used instead of "with," but I apprehend that makes no difference. In my opinion those words have no reference to the time for which a licence may be granted, but refer to the area within which ferries may be operated.

In *Anderson* v. *Jellett* (1883), 9 S.C.R. 1 at p. 9, Mr. Justice Strong deals with the words "limit and extent," and although the question there was as to the area or boundary, I feel strengthened in my opinion by what is there said.

As to the five year limitation. I take it that where there is a general Act governing ferries, and special provisions regarding same in a municipal Act applicable to municipalities, the special provisions apply only insofar as they vary, add to or detract from the general provisions, and for the rest we must look to the general Act. Section 276 is silent as to the time for which licences may be granted to municipalities, and I think the better view is that finding it so, we must rather look to the general Act than to assume that the Legislature intended that such licences might be granted for any time that the Lieutenant-Governor in Council saw fit.

As against that, it is said the five year limit in the general Act is by specific words made to apply only to licences granted after public competition. This seems at first sight a strong contention, but I do not think it is unanswerable. I think the words "after public competition" might be eliminated from sections 5 and 6 of the Ferries Act without in any way destroying its effect. For instance, section 5 might read "Every licence may be granted for any period not exceeding five years,"

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and the effect of the Act be in no way changed, as no licence could be granted without public competition under section 4. I do not seek to eliminate these words, nor do I think it would be proper to do so, but the effect which I give to them is not that it was intended by their use as contended for here, but rather as in conformation with the idea that licences would be granted only after public competition; or, to put it in another way, while there is no ambiguity in the meaning of the words themselves which calls for construction, their use while it limits the term for which licences may be granted after public competition, does not exclude the application of that term to licences granted municipalities. I think the words might be treated as surplusage. We find these very words used in the Ferries Act of 1874, some nine years before any special provisions were made in favour of municipalities, and when there was only one class of ferry licences issued.

The licences in this case granted for 15 years would, under the authorities, be good for five years, though void as to the excess, and the question is, is that excess validated by the North Vancouver Incorporation Act, 1906? I apprehend that the Legislature can, by enactment, make valid that which otherwise would be void, but when such is the intention, that intention should be clearly expressed, and not left to inference. We are referred to sections 8 and 23 of the Act, and to Schedule A to the Act.

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Section 8 gives power to the City of North Vancouver and the Corporation of the District of North Vancouver to execute the deed of agreement set out in Schedule A, and declares the deed when executed to be valid and binding upon the parties thereto. Among the grants made by the district corporation to the city corporation in said deed is the ferry licence in question (section 6 of deed, Schedule A). Section 23, as affecting the ferry licence in question, ratifies and confirms the agreement between the district corporation and the Vancouver Ferry and Power Company, Limited, and imposes on the city corporation the duty of adopting and carrying into effect the said agreement. These sections are relied on as validating a term of the licence which I have held to be void.

It seems to me they are not sufficient. I think the very absence of express words to that effect shews that the Legislature never had in contemplation at the time the Act was passed that they were being asked to or were in any way validating any matter or thing which was void. In *Dwyer* v. *The Town of Port Arthur* (1893), 22 S.C.R. 241 at p. 245, I think the words of Sir Henry Strong, C. J., are very applicable here:

"I think it is the bounden duty of the Courts to construe with the utmost strictness all retroactive legislation of this kind, and in the absence of express words to decline to enlarge by implication the terms in which such statutes are passed."

Considerable stress was laid upon the fact that the Legislature in section 23 of the Incorporation Act, 1906, had imposed on the respondents the duty of carrying out and adopting the agreement between the Corporation of the District of North Vancouver and the North Vancouver Ferry Company, but in the view I take that the Legislature had only in contemplation the carrying out of contracts of a valid nature, and not contracts which might or might not be valid, this loses much of its effect. The words used are "the agreements . . . . . are hereby ratified and confirmed."

During the argument it was stated by Mr. *McCrossan,* that the five year limit had expired before the alleged infringement, and this was not challenged by counsel for respondents, but I find on referring to the date of the licence, the transfer of same, and the evidence, that the appellants did ply their ferry for hire for a few days prior to the five year time limit, but as this was not urged upon us, and as the damages would only be nominal, and as the respondents' main remedy sought was for an injunction, I will not allow that to affect the question of costs, which should be to the appellants here and below.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellants: *McCrossan & Harper.*

Solicitors for respondent Company: *Davis, Marshall & Macneill.*

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RE B. C. COPPER CO. ASSESSMENT

RE BRITISH COLUMBIA COPPER COMPANY, LIMITED, ASSESSMENT.

Assessment—Mining Company—Taxable income—Set off for losses.

The respondent Company operated a smelter in which it treated the ores of its own mine, the Mother Lode, and also ores of other mines which were called custom ores. During the year 1902-07 the Company did not make any return of income, and the assessor having received certain information with regard to the Company's profits, assessed it for a sum of between $700,000 and $800,000 during the period mentioned. The Company appealed from this assessment, and a court of revision and appeal levied upon only $249,000 for income. Under the provisions of the Assessment Act, 1903 (Form 9), the Company was entitled to deduct from its gross income "loss and bad debts arising out of the business from which (the) income is derived, irrecoverable and actually written off during the year, but not otherwise," and under this there was deducted the loss which the Company sustained in treating its own ores. By section 10 of the Assessment Act, as enacted by section 5 of chapter 38, 1900, a tax of two per cent. is levied on the assessed value of ore or mineral bearing substances obtained from land and which have been sold or removed from the land, but ore-bearing mines not yielding $5,000, and placer or dredging mines not producing a gross value of $2,000 per annum, are entitled to a refund of half the tax in the case of ore producing mines, and the whole of the tax in the case of placer or dredging mines. This tax is in substitution for all taxes upon the land, and also all personal property used upon the mines, so long as the land and personal property are used in connection with the working of the mines. In arriving at his assessment, the assessor took the quarterly returns of the Company, made for the purposes of the mineral tax, in connection with their own mines and ore, and comparing these figures with the operating expenses of their own mines, it was found that their own ores were treated at a loss. The profit and loss statement shewed a profit, and as the only other source of revenue was the treatment of custom ores, he claimed that the losses on the Company's operations with its own ore must have been met with the profits from custom ores, and he accordingly assessed the Company for income on the profit shewn in its statement and on the deficit shewn in the treatment of its own ores.

Held, on appeal, affirming the finding below, that the result of the Company's operations in the treatment of its own ores was "income" within the definition in the Act, and therefore was used in "producing or endeavouring to produce income during the year" thus coming within the class of deductions allowed by the Act.

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APPEAL by the Crown from the judgment of a court of revision and appeal held at Nelson. The respondent is a large company carrying on business at Greenwood, where it has a smelter in which it treats the ores of its own mine, the Mother Lode property, and also the ores from other mines which are called custom ores. During the years 1902-07 the Company did not make any return of income. The assessor for the district having received certain information with regard to the Company's profits, assessed it for a sum of between $700,000 and $800,000 of income during the said period. The matter came before the court of revision and appeal, and income tax was levied upon only $249,000. This sum was arrived at by allowing the Company to deduct from its income derived from smelting custom ores the losses which the Company had sustained in its Mother Lode mining operations. The Crown appealed from this decision on the ground that the Company was not liable to pay income tax upon any income that might be derived from the operation of its Mother Lode mine, and that therefore any losses sustained by the operation of such mine could not be set off against income derived by the Company from other sources. Following is the judgment of the judge of the court of revision and appeal, Hamilton, K.C.:

Statement

This is an appeal from a supplementary assessment for the purposes of income tax of the British Columbia Copper Company, covering the years 1902 to 1907 inclusive.

During these years, excepting the year 1903, the Company made no returns as required by the Assessment Act. They claim they received no notices, while the assessor claims notices and demand for a return were sent to them each year, and the Company's returns for 1903 bear out the assessor's contention and shew that at least in this year they did receive their notice. The Company further say that owing to their system of keeping certain of their books in New York, it was impossible for them to furnish such returns. It is hardly necessary to say that such an excuse is quite untenable, as a company cannot by making any such arrangement avoid compliance with the law. In the absence of such returns the assessor took their quarterly

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sworn returns made for the purpose of the mineral tax in connection with their own mines and ore, and comparing these figures with the expenses of operating their mines as shewn by the Company's own statements, it was found that their own ores were treated at a loss. The profit and loss statement, however, shewed a profit and as the only other source of revenue was the treatment of custom ores, the assessor claimed that the losses on the Company operations with their own ore must have been paid out of the profits from custom ores, and he therefore assessed them for income an amount equal not only to the profit shewn on their statement, but in addition thereto on the deficit shewn in operating their own ores on the ground that the result of these latter operations are covered by the mineral tax and exempt from income tax, and therefore, for the purposes of assessment such results, when shewing a profit, are not income and that there cannot be taken from income any sum to pay a loss on something which does not produce income. The Company appeal from such assessment primarily on the ground that the Assessment Act does not permit of segregating the operations on custom ores and the results from the operations on their own ores and their results for the purpose of arriving at taxable income. The Company also furnish a statement of receipts for custom ores during the period in question and an estimate of the cost of treating such ores based on figures taken from the operations of one year, claiming that the difference between these is their taxable income. I am not prepared to accept this evidence as the proper or satisfactory mode of determining the question. The Act provided that the Company shall make certain returns and if the assessor is dissatisfied with them or if they are not furnished, the assessor shall make what he considers a proper assessment from which the Company may appeal, and in appealing, it is in my opinion necessary, where no returns have been made, that the Company furnish the information which should have been in the returns, and that it is on such information and not on some arbitrary estimate of cost for one particular year that such appeal should be considered and decided. In fact, I cannot refrain from saying that I do not consider that the

Statement

Company have given the assessor the assistance which he ought to have in preparing his assessments. I mention this, because it was suggested by counsel that the assessor had shewn some animus in pursuing this particular Company, while it appears to me on the contrary that this Company have been unwilling to make the necessary disclosures to allow of assessment. The Company however, say "at most we can only be assessed on the profit as shewn in our statements and the Act does not justify the assessor separating our custom department from our own ore department for the purpose of assessing our income." In coming to a consideration of this question it appears that there is no conflict on the facts or amounts, for the assessor takes the amounts of the profits as shewn in the Company's own statements, but he adds to it the loss shewn in the operations with the Company's own ores as coming from the income derived from the custom ores, and as he arrives at this loss from the Company's own sworn statements which are still undisputed, they must be taken as correct. Can he do this under the provisions of the Act? This is the whole of the main question. It was not contended that for instance, the different departments in a departmental store could be segregated for this purpose. The point, therefore, is does the imposition of the mineral tax and its substitution for the income and other taxes justify the assessor in a course which would not be justifiable under other circumstances? It would appear that section 7, sub-section 6D, of the Assessment Act, as enacted by section 7 of chapter 56 of the statutes of 1901, has not been repealed as it relates to the taxation of minerals, and therefore income from the results of such minerals is exempt from income tax.

Statement

The assessor is of the opinion that section 82, (sub-section 1, and sub-section 11), prevents the deduction of a loss on the operation of their own ores. But reading the Act, as I am bound to do, favourably towards the tax payer, and strictly as regards the imposition of the tax, I cannot agree with this. It seems to me that the result of the operations on their own ores is "income" within the definition of the word "income" in the Act, and if so, then the amount in question was used in

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"producing or endeavouring to produce income during the year," and comes within the class of deductions numbered 4 in Form 9. I can find nothing in the Act which authorizes the separation which the assessor has made between their own ore department and their custom ores department, in fact, the Act does not seem to have provided for the effect of the mineral tax on the question of income in the case of companies smelting their own ores as well as custom ores, and it does not follow that results which must be excluded from "taxable income" cannot be included in "income": see *Commissioners of Taxation* v. *Teece* (1899), A.C. 254 at p. 258.

With regard to the New York expenses, the assessor admits the principle, but quite consistently with the position which he has taken, says that only the proportion properly chargeable to custom ores can be allowed. This, from his point of view, is correct, but taking the view I do that the Act does not provide the machinery whereby the segregation can be made between these two departments, it follows that the principle being established the whole must be allowed.

As regards the items for prospecting, I do not think these can be allowed as deductions, because, in my opinion, they were not incurred in producing the income of that year, and are more properly chargeable against capital than revenue.

Statement

With regard to the personal tax, the provisions of chapter 56, of 1901, section 7, sub-section 1, prevent the collection of both personal property and income tax during the years claimed, *viz.*: 1902 and 1903.

The supplementary assessment roll, the subject-matter of this appeal, will therefore be amended in the following particulars: The personal property tax will be struck out for the year 1902, under the provisions of chapter 56, section 9, sub-section 1, 1901, but will be confirmed for 1903, being greater than income for that year, which latter shall not be taxed. The amount of income will be reduced from $818,197 to $249,060.27, which latter figure is arrived at in the following manner: [which he set out in detail by years].

Mr. *Macdonald* contended that the rate should be according

to the Acts in force during the years for which the assessment is made, and this would seem to be right, were it not for the provisions of section 25 of the Assessment Act, 1903, Amendment Act, 1906, which provide that the rate of assessment there made shall apply to all assessments thereafter to be made. It may be argued that the section was not intended to refer to supplementary assessments such as the present, but I must take the section as I find it, and it seems to me that the language is quite sufficiently broad to cover the present case, and therefore the rates must be as laid down in the Act of 1906, *viz.*: four per cent.

The appeal was argued at Victoria on the 17th of January, 1911, before IRVING, MARTIN and GALLIHER, JJ.A.

Maclean, K.C., for appellant (Crown).
Davis, K.C., for respondent Company.

Cur. adv. vult.

10th April, 1911.

IRVING, J.A.: In order to ascertain the taxable income of the Company there may be deducted from the Company's gross income by the Assessment Act, 1903 (Form 9):

"Loss and bad debts arising out of the business from which an income is derived, irrecoverable and actually written off during the year, but not otherwise."

Under this head the Company deducted the amount which they lost on treating their own ores. If there were no other tax involved, the matter would be very simple, because by section 7 (6D) chapter 56 of 1901, the Company is not to pay income tax in respect of income derived from mines in this country.

IRVING, J.A.

But there is another tax, *viz.*: the tax imposed on mines by section 5, chapter 38 of 1900. That section is as follows:

"10. There shall be assessed, levied and collected quarterly from every person owning, managing, leasing or working a mine, and paid to Her Majesty, Her heirs and successors, two per cent. on the assessed value of all ore or mineral-bearing substances raised, gotten or gained from any lands in the Province, and which have been sold or removed from the premises: Provided, however, that all ore-producing mines not yielding and realizing on ore a market value of $5,000 in any one year; and all mines (placer or dredging) not producing a gross value of $2,000 in any

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one year, shall, upon a verified statement from the owner or manager of the mine, certified by the assessor of the district, and forwarded to the Minister of Mines, be entitled to (*a*) a refund, in the case of ore-producing mines, of one-half of the tax paid, and (*b*) to a refund of the whole tax in the case of placer or dredging mines. The taxes imposed by this section shall be in substitution for all taxes upon the land from which said ore or placer gold is mined or won, so long as said land is not used for other than mining purposes, and shall also be in substitution for all taxes upon the personal property used in the working of said mines."

In ascertaining the amount in respect of that rate, the Company deducted the same losses, but as I understand it, that process of ascertaining that rate is not questioned. The assessor, however, contends that the Company is endeavouring to make these losses do double duty, that is to say, to deduct the amount of the losses under both Acts so as to reduce the amount of taxation payable. That the losses have been used to reduce the mineral tax he contends is not available to the Company as a deduction in determining the taxable income under the income tax. The deduction under the terms of one Act, it is urged, exhausts the exemption so that it cannot be claimed under the other.

IRVING, J.A.

There is a fallacy in this argument. It consists of treating the loss as an exemption in both cases. If it were an exemption in both cases, then the assessor's argument would be correct—it would in that case be doing double duty. Assuming that it is an exemption under the Mineral Act clause, it is not an exemption under the Income Tax Act. The Legislature in ascertaining the taxable income have declared that income shall be arrived at by taking the gross income, less certain deductions—one of these deductions includes loss sustained by them in treating their own ores. Possibly it is a *casus omissus,* but it does not matter how it has come about, it is not taxed at all. The Company are entitled to resist taxation on the ground put forward by the court of revision.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion this appeal should be dismissed for the reasons given by the learned judge of the court of revision and appeal; his judgment so fully covers the

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principles involved that it would be superfluous for me to add to it.

GALLIHER, J.A.: On the grounds urged before us, I am unable to distinguish this case from *Commissioners of Taxation* v. *Teece* (1898), A.C. 254. With regard to the New York expenses, I take the same view as the judge of the court of revision.

The appeal will be dismissed.

Appeal dismissed.

Solicitor for appellant: *R. S. Lennie.*
Solicitor for respondent: *I. H. Hallett.*

REX v. McDONALD.

CLEMENT, J.

1911

July 10.

REX v. McDONALD

Criminal law—"Wilfully obstructing" police constable in the discharge of his duty.

Actual physical interference with an officer in the discharge of his duty is not necessary to constitute obstruction. A menacing attitude entailing on the officers, as here, more than normal vigilance and care, such as keeping back by means of a drawn revolver, a mob apparently intent on rescuing a prisoner, is an obstruction.

The fact that a person is in custody of a police officer, and is being taken to the police station, is *prima facie*, though rebuttable, evidence that the custody is lawful.

Statement

MOTION to quash a conviction for obstructing a peace officer engaged in the execution of his duty, heard at Vancouver, by CLEMENT, J. on the 30th of June, 1911. The objections taken were: (1) that there was no evidence that the officer was engaged in the execution of his duty and (2) that there was no evidence of obstruction.

J. W. deB. Farris, for the motion.
J. K. Kennedy, contra.

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CLEMENT, J.: As I read the evidence the facts are shortly as follows: Sergeant Deacon and another officer of the Vancouver police force arrested a man on Columbia avenue and proceeded to take him to the police station, a block and a half away. A large crowd was present when the arrest took place and this crowd, including McDonald, the accused, followed the police and their prisoner. There is evidence that the accused incited the crowd to a rescue, that Detective McDonald of the police force guarded the rear with a drawn revolver to prevent any such attempt at rescue, and that in this fashion the entire distance was traversed to the police station. The accused and others ran forward from time to time shouting to the crowd to take the prisoner from the police and to take the revolver from Detective McDonald. Assuming for a moment that the peace officers were engaged in the execution of their duty, it seems to me that the facts as I have taken them from the evidence do shew obstruction. Physical interference, I take it, is not an essential ingredient. A menacing attitude on the part of the mob, entailing on the officer or officers vigilance and care beyond the normal, is an obstruction and this menacing attitude the accused and others with him assumed and persisted in maintaining for some time with the result that the journey to the police station was to the police one of anxiety, calling, as I have said, for extra vigilance and care. In my opinion, therefore, there was evidence which, if believed by the learned magistrate, established obstruction, and the second ground of objection therefore fails: see *Betts* v. *Stevens* (1910), 79 L.J., K.B. 17.

Judgment

As to the first ground, *viz.*: that there was no evidence that the officer was engaged in the execution of his duty, I think the learned magistrate was entitled to invoke the presumption *omnia rite acta,* upon the statement of the police officer that he had arrested a man and was at the time in question here engaged in taking him to the police station. The man was in the custody of the police and the presumption, *prima facie,* is that the custody was not illegal. No such presumption would exist in the case of a warrant to distrain for rent, and this difference

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suffices to make *Rex* v. *Harron* (1903), 7 C.C.C. 543, inapplicable here. The presumption that the custody was lawful was of course rebuttable, but, standing unchallenged, it was evidence on which, in my opinion, the magistrate was entitled to act. Detective McDonald could hardly question the legality of the arrest and he at all events was *prima facie* engaged in the execution of his duty in guarding the procession as he did.

In conclusion, I may say that under ancient practice this conviction would be quashed for uncertainty in not naming the officer obstructed. This objection was not taken before me for the reason, no doubt, that section 1,124 of the Criminal Code would cure it. On the evidence any one of the three officers might, in my opinion, have been named in the conviction.

Judgment

Motion to quash refused.

EMERSON v. FORD-McCONNELL, LIMITED.

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Libel—Contemptuous damages—Verdict for five cents—Costs.

In an action for libel, where the plaintiff recovered only five cents damages, it was

Held, following *Macallister* v. *Steedman* (1911), 27 T.L.R. 217, that he was entitled to costs, there being no evidence of any misconduct on his part or any reason shewn to deprive him of costs other than the smallness of the verdict.

ACTION tried at Vancouver on the 3rd and 4th of April, 1911, before GREGORY, J. and a jury when a verdict was given for five cents damages.

Statement

A. D. Taylor, K.C., for the plaintiff, moved for judgment on the verdict with costs, and cited the following authorities: Marginal Rule 976; Odgers on Libel and Slander, 4th Ed., 410 *et seq.*; Folkard on Libel and Slander, 7th Ed., 320; *Mackenzie*

Argument

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v. *Cunningham* (1901), 8 B.C. 206, and the two cases referred to in that judgment; *Parsons* v. *Tinling* (1877), 2 C.P.D. 119; *O'Connor* v. *Star Newspaper Company, Limited* (1893), 68 L.T.N.S. 148; *Roberts* v. *Jones* (1891), 2 Q.B. 197; *Macallister* v. *Steedman* (1911), 27 T.L.R. 217.

S. S. Taylor, K.C., for the defendants cited the following authorities: *The Red Man's Syndicate (Limited)* v. *The Associated Newspapers (Limited)* (1910), 26 T.L.R. 394; *Nicholas* v. *Atkinson* (1909), 25 T.L.R. 568; *Wood* v. *Cox* (1889), 5 T.L.R. 272.

25th April, 1911.

GREGORY, J.: In this action the plaintiff is, I think, entitled to his costs notwithstanding the smallness of the damages recovered: *Mackenzie* v. *Cunningham* (1901), 8 B.C. 206.

Our rule with reference to costs is in effect identical with the English rule governing costs in a trial with a jury.

In *Parsons* v. *Tinling* (1877), 2 C.P.D. 119, the plaintiff in an action for libel recovered only one farthing or contemptuous damages and the trial judge having refused to give any certificate with regard to costs, it was held on appeal that the plaintiff was entitled to his costs, and this case was distinctly approved by the House of Lords in *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, a slander action where plaintiff recovered only one farthing damages.

Judgment

The leading cases with reference to "good cause" for depriving a successful plaintiff in a libel action of his costs are collected and concisely referred to in Odgers on Libel and Slander 4th Ed., at pp. 413, 414, and it seems unnecessary to refer to them in detail here. They shew that the mere fact of a plaintiff recovering only a farthing damages is not sufficient. There must be something more than mere smallness of damages, though that is an element to be considered—if there are any other circumstances which can be taken into account and although the judge is bound to accept the finding of the jury as conclusive upon all matters of fact necessarily involved in the verdict, he is not bound to give effect to any special reasons or views the jury may have entertained or expressed in giving

their verdict: *Harnett* v. *Vise* (1880), 5 Ex. D. 307, at pages 310 and 312.

In the following cases referred to by Mr. *Taylor* there was a reason in addition to the smallness of the damages for depriving plaintiff of costs.

In *The Red Man's Syndicate (Limited)* v. *The Associated Newspapers (Limited)* (1910), 26 T.L.R. 394, Mr. Justice Phillimore certainly expressed the view that as a general rule a plaintiff recovering only a farthing damages should not have his costs paid by the defendant, but that case was between two incorporated companies and there was no moral character at stake.

In the earlier case of *Nicholas* v. *Atkinson* (1909), 25 T.L.R. 568, tried by the same judge, the facts upon which the plaintiff brought his action and recovered only one farthing damages were germane to the facts upon which the defendant based his counterclaim which the jury found in favour of the defendant and so the plaintiff was deprived of his costs.

And in the case of *Wood* v. *Cox* (1889), 5 T.L.R. 272, the jury was apparently satisfied that though the plaintiff had not been guilty of any misconduct on the two occasions mentioned in the libel, he had been guilty of misconduct of the kind alleged on many similar occasions and bore an evil reputation in consequence; and therefore awarded him only one farthing damages.

Judgment

Macallister v. *Steedman* (1911), 27 T.L.R. 217 is a still later case tried by Mr. Justice Bucknill in which the plaintiff recovered only one farthing damages. The learned judge after stating that "he had looked at all the cases and very carefully studied the whole matter" said that "he had to ask himself whether he saw in the plaintiff any misconduct in bringing the action," and because he found none he refused to deprive the plaintiff of his costs.

And so I ask myself the same question here with the same result, but without in any way wishing to express approval of the plaintiff's apparent idea of an ideal line fence.

In the case at bar, even if it could be said that the defendants had succeeded in "the event" I think their conduct has

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been such as to disentitle them to costs. The second article was admittedly written expressly with the object of bringing the plaintiff into ridicule by "getting the laugh on him" and it was followed by a third article entirely uncalled for.

In the very recent case of *Crossland* v. *Bottomley,* only reported in the newspapers, the plaintiff recovered only one farthing damages. Mr. Justice Darling declined to give the plaintiff the costs of the action; but in that case, as in some of the others, direct evidence of the plaintiff's bad character had been given, and the Court probably felt that the verdict had been rightly influenced by that fact. In the present case there was no such evidence offered.

Judgment

Judgment has already been entered for the plaintiff, and he must have his costs of the action, but I may add that it will be quite useless to make any application for an increased counsel fee.

Judgment accordingly.

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June 15.
KELLETT v. B. C. MARINE RY. CO.

KELLETT v. BRITISH COLUMBIA MARINE RAILWAYS COMPANY, LIMITED.

Master and servant—Injury to servant in the course of his employment.

Plaintiff, a workman in the defendants' employment, lost the sight of an eye through being struck with an iron splinter from the ring of a wooden hammer used in caulking operations. The condition of the tool was brought by plaintiff to the foreman's notice immediately before the accident, not in the sense of its being dangerous, as similar tools in similar condition were often used, but as to its condition to do the work effectively. The foreman directed plaintiff, as time was important, to try to do the work with the hammer, and the accident occurred. There was no question of the foreman's competence, or that the tool as supplied by the employers was defective or dangerous.

Held, on appeal, affirming the judgment of HUNTER, C.J.B.C., setting aside the verdict of the jury in favour of the plaintiff, that there had been no negligence on the part of the defendants; that if there was any negligence it was on the part of the foreman, a fellow servant, and it was shewn that he was a competent person for the position.

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COURT OF APPEAL
June 15.
KELLETT v. B. C. MARINE RY. CO.

APPEAL from the judgment of HUNTER, C.J.B.C. setting aside the verdict of the jury in favour of the plaintiff for $3,700, in an action tried at Victoria on the 17th, 18th, 19th and 20th of January, 1911.

Aikman, for plaintiff.
Harold Robertson, for defendant Company.

HUNTER, C.J.B.C. (oral): In this case the jury has returned a verdict for $3,700 damages; and it only remains for me to dispose of the motion made by Mr. *Aikman* for judgment, and of the motion made by Mr. *Robertson* that the case should be taken away from the jury, which was reserved to be dealt with, following the practice sanctioned by the Court in the case of *Nightingale* v. *Union Colliery Co.* (1903), 9 B.C. 453. The ground alleged was that a defective tool called a beetle was allowed to be used by one of the two workmen concerned in this accident, by the foreman of the shipyard. That at once raises the question, which is the main question in the case, as to whether there was any negligence in the foreman so doing, or rather, any evidence of negligence which was sufficient to go to the jury. I apprehend that there is only one test which can be applied, and that is whether any reasonable person possessed of average intelligence, could reasonably have anticipated that an accident similar to that which occurred would have occurred to the plaintiff in the use of this beetle in the circumstances.

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As to the standard of foresight which is required by the law, I do not think I can do any better than adopt the statement contained in Pollock on Torts, 8th Ed., at page 40, where he says:

"The doctrine of 'natural or probable consequence' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight; it had been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all.

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The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability. And the statement proposed, though not positively laid down, in *Greenland* v. *Chaplin* (1850), 5 Ex. 243 at p. 248, namely, 'that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur,' appears to contain the only rule tenable on principle where the liability is founded solely on negligence. 'Mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated;' may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist; but under an ordinary rule of due care and caution it cannot be taken into account."

I would also refer to the remarks of Baron Bramwell in *Lay* v. *The Midland Railway Company* (1874), 30 L.T.N.S. 539, which I think are very pertinent to this case. And it is apparent from that judgment that Baron Bramwell scouts the idea that the very happening of an accident because the material might have been in better condition than it was is in itself evidence of negligence.

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Baron Alderson also says in argument, in the case of *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Ex. 781 at p. 784: "Is it an accident which any man could have foreseen?" Similar remarks are to be found in the case of *Crafter* v. *The Metropolitan* (1866), L.R. 1 C.P. 300, in which the Court, speaking by Montague Smith, L.J. says: "The line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence."

Now, with regard to the particular case in hand, it is to be observed that according to the evidence no one ever saw or heard of any such accident before in any of the shipyards belonging to this Company. Some of the men who testified as to this had been there for long periods of years. And not only that, but the evidence also shews that it is common every day practice to use beetles which were more worn out than the one in question, for the purpose of getting on with the work,

that the only reason assigned for having them repaired from time to time was because the work could be better or more speedily accomplished.

Then we have the fair and candid statement of the plaintiff himself in which he says he never complained of any danger likely to arise from the use of the beetle, either by himself or by his mate, and that the only reason that occurred to him was that the work would be better and more quickly proceeded with by a beetle in proper condition. It is also a matter of common knowledge that workmen are constantly and daily using worn out hammers or sledges on drills, cold chisels, wedges and nails, hot and cold iron, etc., without any of them anticipating or taking precaution against an accident of this character.

I therefore think that there was no evidence of negligence to go to the jury, and this unfortunate accident was an extraordinary event for which no person can be held to blame.

In any event, if it could be said from any point of view that there was negligence chargeable against the Company, it of course could only be imputed to the foreman in charge of the yard for having permitted the use of the beetle in the circumstances. There was no allegation that the foreman was incompetent, and no effort was made to prove his incompetency, either as to his knowledge of the proper conditions in which these instruments should have been maintained, or as to his capacity to look after the welfare of the men. If there was any negligence, it being that of the foreman, according to the law as I conceive it, I do not think the defendants are liable. It was indisputable that they had similar tools ready for use at any time that they might call for, in their store, and that there was no compulsion on any workman to use a beetle in that condition, if he objected to it on the ground that it was dangerous. It was strenuously argued by Mr. *Aikman* that the case of *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420 was conclusive to shew that there was an obligation on the employers at their peril to see to it that their premises, plant and machinery were in suitable condition for the purposes for which they were intended, and that that condition goes to the extent of making employers liable in

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the event of movable chattels such as hand tools being out of order and being the cause of accidents. As at present advised, I think that the rule regarding the employer's liability with regard to the condition of the premises, plant and machinery is really only an example of the general common law principle by which the occupiers of real property are obligated to use due care to see to it that persons whom they invite or permit to be there are not injured by reason of defects in the premises which could be repaired or removed. While the cases are clear to the extent that this is a duty which cannot be evaded or deputed to officers or foreman, I do not think that the principle has ever been extended to a case such as the one at bar, or that it has ever been laid down that an employer cannot delegate to efficient servants the duty to see that movable tools are kept in proper repair. In fact I think the decision in *Hastings* v. *Le Roi* is opposed to that view. At any rate, if employers are bound at their peril, notwithstanding the due care taken to select competent servants to see to it that such tools are always in proper condition, their common law burden, in my opinion, would be found to be very serious, if not intolerable.

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I, therefore, think that I must accede to Mr. *Robertson's* motion and dismiss the action, and with costs if asked, as under the present condition of the rules the Court is left without any option in the matter.

The appeal was argued at Victoria on the 15th of June, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Aikman, for appellant: *Fakkema* v. *Brooks Scanlan O'Brien Co.* (1911), 15 B.C. 461, is applicable here. He also referred to *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; *Scott* v. *Fernie* (1904), 11 B.C. 91; *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 362; *Smith* v. *London & South Western Railway Co.* (1870), L.R. 6 C.P. 14, and *Fenton* v. *Thorley & Co., Limited* (1903), A.C. 454. There is no evidence of how long the tool had been out of repair.

[MACDONALD, C.J.A.: The employer is not bound, if he has a competent foreman, to inspect tools from day to day to see

that they are in order: see also *Canada Woolen Mills* v. *Traplin* (1904), 35 S.C.R. 424; *Heaven* v. *Pender* (1883), 11 Q.B.D. 503].

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Harold Robertson, for respondent: It was the practice for the workmen to repair the tools. We supplied proper tools and a competent foreman. The plaintiff, when he brought the condition of the tool to the notice of the foreman merely thought it was defective for the work required, not that it was dangerous to those using it. See as to liability of employer, *Wood* v. *The Canadian Pacific Railway Company* (1899), 30 S.C.R. 110.

He was stopped.

Per curiam: We do not see how the judgment can be disturbed. There was no negligence on the part of the defendants. If there was any negligence, it was that of the foreman, and it is not shewn that he was incompetent.

Judgment

Appeal dismissed.

Solicitor for appellant: *J. A. Aikman.*

Solicitors for respondents: *Barnard & Robertson.*

RATHOM v. CALWELL AND CALWELL.

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Vendor and purchaser—Agreement for sale of land—Interim receipt—Specific performance—Statute of Frauds—Memorandum within—Names of parties—Agent—Authority to make contract.

In a real estate transaction a firm of brokers arranged terms with the vendor, and on themselves paying a deposit of $50, procured the following receipt: "Received from Marriott & Fellows the sum of fifty dollars, being deposit on account of purchase of lot numbered 799 in block 10 in section 18, Victoria, at the price or sum of six thousand dollars ($6,000) two thousand five hundred on the execution of agreements, and the balance as follows: assume mortgage for ($3,500) three thousand five hundred at 7½ per cent. interest. Five per cent. commission to be paid to Marriott & Fellows when sale is completed. Taxes, insurance, rent, etc., to be adjusted to date of sale. Mrs. Minnie Calwell, wife of Hugh E. Calwell."

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Held, on appeal (IRVING, J.A. dissenting), that this was not a sufficient memorandum within the Statute of Frauds so as to entitle the purchaser to specific performance, as the name of the purchaser did not appear, nor was there any evidence in it by which to identify the purchaser.

[See *Brinson* v. *Davies* (1911), 27 T.L.R. 422].

APPEAL by defendants from the judgment of GREGORY, J. in an action for specific performance of a contract for sale of land, tried by him at Victoria on the 2nd of February, 1911.

Maclean, K.C., for plaintiff.
Bradshaw, and *Davie*, for defendants.

GREGORY, J. (oral): In this case, while it is possible that my view of the law might be wrong, I have not any doubt whatever in my own mind as to the view I have taken of the facts. I have no hesitation whatever in accepting implicitly the evidence and statement of Mr. Jubb, who tells the story of what took place. I cannot accept the statements of the defendant and her husband as to the writing of that document. It is quite possible in explanation of that, that their anxiety since the occurrence, to make a better sale whereby they would make a better profit, has caused them to think about it and dwell upon it to such an extent that they realize that that would help them, and they have forgotten it.

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As Mr. *Maclean* stated, with reference to exhibit 3, this is not a sale in a sense made by Marriott & Fellows, but by the defendants themselves, so far as this document is concerned. The negotiations were carried out by Mr. Jubb acting for Marriott & Fellows, but he went to them after he had seen Mrs. Rathom, after she had agreed to buy, and to put up the purchase price, and I am satisfied from what he says that he told Mr. Calwell that the sale had been made and it was just a case of getting the terms.

Mrs. Calwell herself says that she signed it, thinking it was an option; but she also says that she went down to Marriott & Fellows's office on Wednesday, I think it was, to complete the sale, to carry it out. What sale? The sale, the only sale according to the evidence now that she knew about; for accord-

ing to the present argument she knew absolutely nothing about the execution of exhibit 6; so then it referred to the document of sale made by exhibit 3.

I accept Mr. Jubb's statement as to the condition of the mortgage, that it was not until after the document was signed that he knew it was a blanket mortgage covering a larger amount. I also accept his statement as to the question of time. Time, I would hold, naturally would be of the essence of a contract of this kind. But it means that a reasonable time must be allowed to the plaintiff to carry out the agreement. Whether the time is or is not reasonable depends upon the circumstances. When the contract was entered into it was thought that it was a simple mortgage that was being dealt with, but it was immediately discovered that it was a blanket mortgage; and then it was part of Mrs. Calwell's duty to assist in arranging the matter so that that mortgage could be got rid of; she could not sit right back and say we will take it.

Now the deed that was presented for execution did not contain a clause that it would be subject to the mortgage, it seems to me that that would have given the protection that was required. And anyway it was quite as good protection, and a more reasonable way of carrying out the transaction than by having Mrs. Rathom pay over to the plaintiff $2,500 without having any security at all. How does she know Mrs. Calwell will not simply take the money and fail to discharge the mortgage, and her liability will still exist on it? The writing in exhibit 3 in pencil, it seems to me, tends to support and substantiate Mr. Jubb's evidence rather than the other as Mr. *Bradshaw* suggests. Mr. Calwell himself says that he saw the man writing, and he came over and looked at him and asked him what he was doing, and he said he was writing in pencil; and when he got the document we find the pencil on it just exactly as he said. Now, if he saw him writing, if he wrote the terms in ink Mr. Calwell would have seen him, and he would have replied, you are not writing in ink, but you are writing in pencil. Therefore he suggests that Mr. Jubb deliberately, after this was all done, carried it away, and in secrecy inserted the

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terms in ink, which any person who has any knowledge at all knows would be a crime of forgery for which a man is liable for a long term in the penitentiary. There is nothing about Mr. Jubb's appearance or conduct in the box which would lead me for a moment to think he would not realize his position at that time, and that he would undertake to do that.

The plaintiff has always been ready to carry out this agreement, and if the defendant had given any assistance whatever or tried to do it, it would have been done. It seems to me the natural desire to get more for the property than they were selling for, created in them a wish to birk it, in the hope that it would not go through.

Now, so far as Mr. Jubb not being the agent for Marriott & Fellows, so far as the firm is concerned, it is quite clear on the law that Mr. Jubb could act for Marriott & Fellows if necessary, if Mrs. Calwell understood that he was doing it and assented to it; and that she did assent is beyond question, because he is the only member of the firm in connection with the office that she had had any dealings with. The whole transaction was with him.

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When exhibit 3 was signed she knew, I must believe, what Mr. Jubb says, that he had found a purchaser ready to take it, on those terms, and that he was paying money to her on behalf of that purchaser, and the terms were then fixed. And she is responsible for what her husband did, because she makes it perfectly clear that he acted as her agent and with her authority.

Without coming to any conclusion at all upon the legal effect of exhibit 6, this second receipt given to Mrs. Rathom, it seems to me on exhibit 3 there is no doubt that Mrs. Rathom is entitled to specific performance of the agreement.

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

Davis, K.C., and *Davie*, for appellants (defendants): There are several defences: (1) Time was to be of the essence; (2)

the property involved was, or rather had become of a speculative value; (3) the contract which should have been carried out in a couple of days, was not attempted to be completed for some nine days; (4) the parties never came to an agreement between themselves; (5) the interim receipt, upon which the alleged contract is based, does not comply with the provisions of the Statute of Frauds, the purchaser's name not appearing on it; and (6) the second receipt also does not comply with the Statute of Frauds, as it is not signed by the owner, and it is not shewn that the manager of the agents had any authority to sign the agents' names. As to time being of the essence: *Caslake* v. *Till* (1826), 1 Russ. 376; *Macbryde* v. *Weekes* (1856), 22 Beav. 533; *Noakes* v. *Kilmorey* (1874), 1 De G. & Sm. 444; *Compton* v. *Bagley* (1892), 1 Ch. 313. As to the first receipt not being good for the reason that the owner's name does not appear: *Smith et al.* v. *Mitchell* (1894), 3 B.C. 450. As to the cheque given by plaintiff in favour of the agents, for the $50 paid by them as a deposit, this was merely a re-imbursement to the agents, a transaction between principal and agent, and is no part of the purchase and sale, because it never came to the notice of the vendor: See *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182; *Coombs* v. *Wilkes* (1891), 3 Ch. 77; *Oliver* v. *Hunting* (1890), 44 Ch. D. 205; *Pearce* v. *Gardner* (1897), 1 Q.B. 688.

Argument

The contract was not made when exhibit 3 was signed; the agents' manager had merely gone to the owner to see what arrangements could be made, and, further, exhibit 3 does not set up the whole contract. The agreement was not that plaintiff was to assume the mortgage, and the decree of the Court below does not grant what is supposed to be the terms of the agreement. There is no evidence of any proper tender of the purchase money or of a deed for execution: see *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171.

Maclean, K.C., for respondent: There was no undue delay and no laches on the part of the plaintiff. The delay that occurred was merely a part of the negotiations in completing the contract, and consisted in ascertaining whether the mortgagee was willing

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to accept plaintiff as mortgagor or desired to be paid off, and plaintiff was ready and willing to do either. The plaintiff had paid the owners all they were entitled to. There was a sufficient and proper tender, but admitting, for the sake of argument, that there had not been, where a party unequivocally repudiates, no tender is necessary: Harris on Tender, 372. For the purpose of satisfying the Statute of Frauds, so far as parties are concerned, it is sufficient if the written contract shews who the contracting parties are, although they, or one of them, may be agents or agent for others, and it makes no difference whether the fact of agency can be gathered from the written document or not. *Filby* v. *Hounsell* (1896), 2 Ch. 737. There was ratification: *Maclean* v. *Dunn* (1828), 4 Bing. 722; and there was a complete memorandum under the Statute of Frauds: *Warner* v. *Willington* (1856), 3 Drew. 523 at p. 532; *Reuss* v. *Picksley* (1866), L.R. 1 Ex. 342; *Rosenbaum* v. *Belson* (1900), 2 Ch. 267. The transaction was confirmed by defendant: *Anderson* v. *Douglas* (1908), 18 Man. L.R. 254.

Argument

Davis, in reply: *Rosenbaum* v. *Belson, supra,* is not law and is not, moreover, binding on this Court, whereas *Gilmour* v. *Simon* (1906), 37 S.C.R. 422, is. Even if the agents were acting for both parties, the agents could not purchase from defendant without divulging the identity of their principal; the presumption is against them, for, by the second receipt it is plain they were to get a commission.

Cur. adv. vult.

6th June, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There is, in my opinion, no note or memorandum in writing sufficient to satisfy the Statute of Frauds, and hence the appeal must be allowed.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal. The decision of North, J. in *Smith* v. *Bentnell,* (1888), W.N. 69, is an authority for the proposition that the insertion of the agent's name in exhibit 3 is sufficient to satisfy the Statute of Frauds.

MARTIN, J.A.: The first ground of defence raised is that there is not a sufficient memorandum to satisfy the Statute of Frauds, and I agree that in the circumstances this question must be determined solely by reference to the memorandum signed by the defendant. To put the matter briefly, I am of the opinion that on the authorities cited to us by the appellants' counsel the writing is insufficient, and I have only hesitated because of the decision of the late Full Court and of the Supreme Court of Canada in *Calori* v. *Andrews* (1906), 12 B.C. 236, (1907), 38 S.C.R. 588, which though not cited to us is the strongest case in the respondent's favour. But after a careful consideration of it I have no doubt that it does not go far enough to support the judgment at bar, though it probably indicates the greatest length to which the Courts have gone. The language of Mr. Justice Duff at p. 251 respecting the true meaning of the telegram in that case when properly expanded, shews, when applied to this case, that the "further *indicia*" which sufficed in the *Calori* case to take the "receipt . . . out of the category of the equivocal" are wanting here.

The appeal, therefore, should be allowed.

GALLIHER, J.A.: In this case the equities, in my opinion, are all in favour of the plaintiff, and the case, therefore, narrows down to the neat question of law: was there a sufficient memorandum to satisfy the Statute of Frauds?

I think the plaintiff's case must stand or fall on the memorandum, exhibit 3, which is as follows: [as set out in the headnote].

It is to be noted that this memorandum does not set out the name of the purchaser, but this in itself is not fatal if the parties are sufficiently described so that their identity cannot fairly be disputed: *Carr* v. *Lynch* (1900), 1 Ch. 613; *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4.

This point was fully dealt with in our own Courts in the case of *Calori* v. *Andrews* (1906), 12 B.C. 236, affirmed on appeal (1907), 38 S.C.R. 588.

Unless the case at bar is distinguishable from *Calori* v.

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Andrews, the appeal must fail. In that case Clark & Co., who were real estate agents in Vancouver, cabled Andrews in London enquiring as to the lowest price he would accept for certain property in Vancouver, and received a reply: "Thirteen thousand net," to which they replied "Best offer I can get $12,000 net to you, can I accept?" Andrews made no reply to this, but some weeks later Clark & Co. obtained a purchaser (Calori) at $13,000 net, and cabled Andrews as follows: "Sold lot 24, block 8, $13,000 net to you, deposit paid by client $500, confirm cable." Andrews cabled in reply to this saying: "Writing acceptance," and followed it up with a letter which is set out fully in the judgment. In the judgment delivered by DUFF, J. in the Full Court, concurred in by HUNTER, C.J., and of Mr. Justice McLennan, who delivered the judgment in the Supreme Court of Canada, it was held that the fact that Andrews knew when he cabled his acceptance and confirmed it by letter that there was a certain person willing to buy and who had paid a deposit on the property—his offer was to the person who had paid the $500 deposit and sufficiently identified that person.

GALLIHER, J.A.

In the case before us the evidence is that Marriott & Fellows came to the defendant at the request of the plaintiff to procure the property in question, when they paid a deposit of $50 and procured the memorandum, exhibit 3, to be signed by the defendant. The $50 paid was not the plaintiff's money, but was afterwards repaid by her to Marriott & Fellows.

There was nothing in this document to indicate that the defendant was selling to a person who had paid a deposit as was the case in the writing signed by Andrews in the *Calori* case, and as a matter of fact it was not the purchaser in this case who paid the deposit, unless we hold that the payment by the agents was payment by the purchaser.

In most cases that might be so, but to satisfy the statute in the sense in which it is held to be satisfied in *Calori* v. *Andrews,* there must be something appearing in the writing iself that brings it home to the party signing and sought to be charged that there is a person who, although not named, is yet sufficiently

described so that his identity cannot fairly be disputed. I am, if I may say so, with some hesitation and reluctance constrained to allow this appeal, but in the circumstances without costs.

Appeal allowed, Irving, J.A. dissenting.

Solicitor for appellants: *C. F. Davie.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

HEPBURN v. BEATTIE.

Libel—Finding by the jury that the article complained of "Did not amount to a libel"—Question of libel or no libel left entirely to the jury—No objection to the charge.

Practice—Notice of appeal—Rules 867, 867a, 868, 872.

Plaintiff was in 1910 an alderman of the City of Vancouver. At a meeting of the City Council held in March, 1910, he moved a resolution calling the attention of the authorities of adjoining municipalities to proposed real estate subdivisions, and asking them to look carefully into all subdivision plans submitted for their approval. He made some remarks in support of his resolution, in which he referred to the undue boosting of real estate by dealers, wild cat subdivisions, hotels on mountain tops, etc. The resolution and plaintiff's remarks were published in the News-Advertiser newspaper, and on the following day defendant wrote a letter to that paper commenting on plaintiff's remarks, and referred to plaintiff's connection with an hotel in Vancouver, the licence of which had been suspended by the licence commissioners, suggesting that plaintiff had used his position as alderman to secure the licence and was responsible for the conduct of the hotel business. Plaintiff then took action. A trial before CLEMENT, J. and a special jury resulted in a disagreement. On the second trial, before HUNTER, C.J.B.C. and a special jury, the verdict returned was that the article complained of "did not amount to a libel." Judgment was entered for the defendant accordingly, and plaintiff appealed. No objection was made to the charge to the jury.

Held (IRVING, J.A. dissenting), that the question of libel or no libel was for the jury, and that the verdict should not be disturbed.

Sydney Post Publishing Co. v. *Kendall* (1910), 43 S.C.R. 461, not followed.

Per IRVING and MARTIN, JJ.A.: A notice of appeal from a judgment of the Supreme Court is properly intituled in that Court.

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APPEAL from the judgment of HUNTER, C.J.B.C. and the verdict of a jury in an action for libel tried at Vancouver on the 13th of September, 1910. The facts are set out in the headnote.

The appeal was argued at Vancouver on the 5th of December, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., and *Woodworth*, for the appellant (plaintiff): The verdict was unreasonable. There was no connection between the resolution moved by the plaintiff in the Vancouver City Council and his remarks in support of it and the article complained of. The judge should have charged the jury that the article was libellous on its face. The judge also misdirected the jury on the question of provocation.

[IRVING, J.A.: That part of the charge only applied if the jury came to the conclusion that the article was libellous, and it was corrected before verdict.]

The article on its face was libellous. The case of *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461, is in point. He cited Folkard on Libel and Slander, 7th Ed., 317, Odgers on Libel and Slander, 4th Ed., 114, under heading "Words obviously defamatory."

Argument

A. D. Taylor, K.C., for the respondent (defendant): The main ground of appeal is that the article being on its face libellous, the judge misdirected the jury in leaving the question of libel or no libel to them, but the appellant cannot raise this ground, as no objection was taken to the charge: *Scott* v. *Fernie* (1904), 11 B.C. 91. The case of *Sydney Post Publishing Co.* v. *Kendall, supra,* can be distinguished, and in any case Davies and Duff, JJ. dissented. See also Odgers, 654, and Folkard, 315 and 343. No case can be found in fifty years in which a verdict of the jury for the defendant on the question of libel or no libel has been set aside. Odgers, at page 114, states that a new trial will be granted if the jury have perversely found a verdict for the defendant in spite of the summing up of the trial judge. Here the trial judge left the matter

entirely to the jury, and the verdict cannot therefore be said to be perverse. He also cited *Wills* v. *Carman* (1889), 17 Ont. 223, in which it was held that it was for the jury to say whether the matter complained of was defamatory or not, and the widest latitude is given to them.

S. S. Taylor, in reply.

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.: This is an action for libel, in which the jury returned a verdict that the article complained of "does not amount to a libel." The plaintiff appealed, and we are now asked to order a new trial on several grounds, none of which, in my view of the case, entitles us to disturb the verdict.

The direction of the learned trial judge to the jury that "when one man libels another, and the other party turns around and libels the first man, it is not incumbent on the jury to give either man damages," is too broad a statement of the law. It however was corrected before the verdict was rendered. Besides, the verdict is not based on provocation. The ground of appeal most strongly pressed before us was that the writing was clearly libellous, and as it admittedly was written by the respondent of and concerning the appellant, the jury could not, as reasonable men, find as they did.

MACDONALD, C.J.A.

A case very similar to this was recently before the Supreme Court of Canada, *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461. The Court was divided, the majority holding that the words complained of were necessarily libellous. The previous authorities are there reviewed, and the authorities referred to in that case are not dissented from. I think that I should not be justified in interfering with the verdict.

I would dismiss the appeal.

IRVING, J.A.: The plaintiff charges the defendant with libelling him in an article which accused him of being a party to the improper conduct of an hotel in Vancouver, and also with abusing his position as alderman of that city, and of acting improperly in respect of his duties as alderman.

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April 10.

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The case was tried before a jury, and after a charge had been delivered by the learned trial judge, to which charge no objection has been taken, the jury found that the article complained of "did not amount to a libel."

Judgment was entered for the defendant, but an appeal is taken on the ground that the article is on its face a libel and must be so construed. The question of libel or no libel is pre-eminently one for the jury: *per* Lord Coleridge, C.J. in *Saxby* v. *Esterbrook* (1878), 3 C.P.D. 339 at p. 342; but nevertheless, according to the principles laid down in *Kendall* v. *Sydney Post Publishing Co.* (1910), 43 S.C.R. 461, I think we ought to grant a new trial.

If the publication of which the plaintiff complains is reasonably susceptible of any construction not defamatory, the verdict should not be disturbed. If the imputation is so found that no reasonable person could take the view of the jury, the Court may set aside the verdict. There are two grounds only on which a verdict can be set aside: (1) the verdict must be manifestly wrong; (2) the alleged libel admits of no other construction than a defamatory one.

IRVING, J.A.

The plaintiff, an alderman, moved a resolution condemning the practice of certain real estate agents in advertising property, and in doing so referred to the fact that some of the plans put forward by the advertisers shewed that a hotel was being built on some subdivision, when in truth no hotel was being built or had been built on the subdivision. The defendant thereupon wrote the article in question. It has already been set out. It alleges that the hotel built on Granville street by plaintiff, and of which he was landlord, was detrimental to humanity; that although, by his influence as an alderman, he was able to get a licence for it, yet the licence had to be taken away, and it was only when he ceased to be the landlord that the tenant could obtain a licence for it. I fully appreciate the reluctance of the Court to interfere with verdicts of juries in libel cases, but nevertheless, I think this is a case where the plaintiff is entitled to a new trial, as he is charged in his private capacity with being concerned in the management of an hotel "detrimental to humanity."

As to the other inquiry raised by the question of the form of the notice of appeal, Mr. *A. D. Taylor* objects that the notice of appeal being intituled in the Supreme Court of British Columbia instead of in the Court of Appeal, makes the notice invalid.

In *Dhuleep Singh* v. *Nickson* (April, 1910), the notice of appeal was headed in the Supreme Court, but the notice was bad because in the body of the notice the motion was to be made to the said Court and not, as in the notice now under consideration, to this Court. In my opinion, the notice of appeal is properly intituled in the Supreme Court of British Columbia.

IRVING, J.A.

Marginal Rule 880 shews that the Court below has seisin of the case, notwithstanding the notice of appeal. Rules 867, 867a, 868 and 872 shew that the original notice of appeal should be filed in the registry where the proceedings are being had, and that in the Court of Appeal registry there is to be filed a copy.

MARTIN, J.A.: We are asked to set aside the verdict of "no libel" because the judge should have, it is contended, held the words to be obviously defamatory; and in such case according to the authorities cited by Odgers on Libel and Slander, 4th Ed., 144, and *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461, he should have practically directed the jury that the words were actionable and that they should have found for the plaintiff on that issue.

But it is strongly objected that even if this were the case it is now too late for the plaintiff to take such a position, because the case went to the jury in quite a different manner—they having been given, according to the trial judge's charge, a free hand to pass on the question of libel or not.

MARTIN, J.A.

After a perusal of the charge, and what occurred after it when further directions were asked for on another point, I am of the opinion that, as was said in the Full Court in *Scott* v. *Fernie* (1904), 11 B.C. 91, the course of the trial was such that the issues as submitted "were accepted on both sides as the only issues on which the jury were asked to pass"; and this is eminently a case wherein this most salutary rule should be given effect to.

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With respect to the objection taken to the form of the notice of appeal which is given in the Court below, and embodies a notice of motion to this Court, I am of the opinion that such is the correct practice according to our rules and statutes: the notice should be given in the Court appealed from, and to the Court invoked. By section 26 of the Court of Appeal Act, 1907, jurisdiction is given to the Supreme Court "in all questions and matters in relation to security for the costs of an appeal," which goes to support this view, as does also to an even greater degree, section 9 which provides that " . . . . after notice of appeal has been given all further proceedings in relation to the appeal shall be had and taken in the Court of Appeal," implying clearly that in order to take the matter out of the Court below, notice must first be given in that Court. This section, in my opinion, really puts the matter beyond argument.

The appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. The jury having found no libel, I am not prepared to say they could not reasonably have come to that conclusion on the evidence.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *Smith & Woodworth.*

Solicitors for respondent: *Taylor, Hulme & Innes.*

ROSE *ET AL.* v. BRITISH COLUMBIA REFINING COMPANY *ET AL.*

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1911

June 6.

ROSE *v.* B. C. REFINING CO.

Company law—Promotion expenses—Shares given in payment—Directors—Shares for acting as directors—Powers of Company—Ultra vires—Void transaction—Ratification—Action brought by shareholders.

The three plaintiffs were shareholders in the defendant Company, of which the defendant Melekov was the promoter and organizer. One F. A. King, carrying on business in Seattle in the name of the Keystone Oil Company, entered into an agreement with the defendant Company, whereby the latter were to acquire King's business connections in Vancouver, the consideration being 25,000 shares. It was further alleged that there was an agreement between Melekov and the Company's directors, that in consideration of his services in promoting the Company he was to receive a bonus of 25,000 shares. It was arranged that this bonus was to be given to Melekov through the transaction entered into with King; that is to say: the agreement with King should shew the consideration to him for the acquirement of his business should appear as 50,000 shares, and it should be understood that 25,000 should go to Melekov instead of there being a transfer direct to him from the Company. It also appeared that certain shares had been given to some persons to become interested in the Company and act as directors; one director getting 1,000 shares as a bonus for consenting to be a director. The prospectus of the Company stated that there were no promoters' profits, and it was, as alleged, to get over this representation that the bonus to Melekov was carried out through the King transaction.

MORRISON, J. at the trial, came to the conclusion that Melekov had rendered valuable service to the Company; that the directors were justified in recompensing him by approving of King's transfer to him of the 25,000 shares; that such action on their part was a matter of internal arrangement ratifiable by the shareholders if such were necessary, and that the plaintiffs had no status to bring the action.

Plaintiffs appealed on the grounds that the issue of the shares to Melekov and certain of the directors was *ultra vires* and illegal as being made in pursuance of a fraudulent agreement, and that the issue of the shares was a fraud on the Company.

Held, on appeal (*per* MACDONALD, C.J.A. and MARTIN, J.A.), that the plaintiffs' not having shewn that the Company had declined to bring the action, or that any proper effort had been made by them to get the Company to do so, had no status to bring the action themselves in the circumstances (IRVING, J.A. dissenting).

Per IRVING, J.A.: That the issue of the 25,000 shares to Melekov was illegal, and the contention that such issue could be ratified by the shareholders was fallacious.

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ROSE v. B. C. REFINING CO.

APPEAL from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 10th, 11th and 12th of March, 1910.

The appeal was argued at Vancouver on the 6th and 7th of December, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Argument

Craig, and *D. A. McDonald,* for appellant (plaintiff) Bearns, the only party appealing: We say that the contract mentioned in section 50 of the Companies Act must be an honest contract. The contract to give the 25,000 shares to Melekov was an illegal one; the Company have no power to give away their capital for the purpose there intended; the shares issued under section 50 must be honestly issued: *Mann* v. *Edinburgh Northern Tramways Company* (1893), A.C. 69; *Great Northwest Central Railway* v. *Charlebois* (1899), A.C. 114; *Hichens* v. *Congreve* (1828), 4 Russ. 562. The payment, by directors, of promotion expenses, where the directors expect to get a benefit from such payment, is not only *ultra vires,* but illegal: *In re Englefield Colliery Company* (1878), 8 Ch. D. 388; *Marzetti's Case* (1880), 28 W.R. 541; *Ex parte Daniell; Re Universal Provident Life Association* (1857), 1 De G. & J. 372; Lindley on Companies, 6th Ed., 196, 197. It is *ultra vires* to make presents to directors out of company's capital: Lindley, 440, 443; *The York & North Midland Railway Company* v. *Hudson* (1853), 16 Beav. 485; *Re Northern Constructions, Limited* (1910), 19 Man. L.R. 528; *Re Clinton Thresher Co.* (1910), 20 O.L.R. 555. It is *ultra vires* for a director to take shares from a company for the purpose of becoming a director: Lindley, 515: *In re Canadian Oil Works Corporation* (1875), 10 Chy. App. 593; or in any secret agreement by which the directors profit in a transaction with the Company: *In re Madrid Bank; Ex parte Williams* (1866), L.R. 2. Eq. 216; Lindley, 500. Melekov being a promoter, stood in a fiduciary relationship and could not profit by a side agreement as here: *Lagunas Nitrate Company* v. *Lagunas Syndicate* (1899), 2 Ch. 392 at p. 442. As to when the fiduciary relationship of a promoter arises: *Bagnall* v. *Carlton* (1877), 6 Ch. D. 371.

Section 50 applies to a company generally, and not to one in liquidation: *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1,004; Lindley, 569, *Mosely* v. *Koffyfontein Mines, Limited* (1904), 2 Ch. 108; *Welton* v. *Saffery* (1897), A.C. 297; *Lee* v. *Neuchatel Asphalt Company* (1889), 41 Ch. D. 1; *In re Almada and Tirito Company* (1888), 38 Ch. D. 423.

As to the plaintiffs being in a position to bring the action, we concede that if the dispute is a matter of internal management, the action would not be maintainable, but, as here, where the Act complained of is *ultra vires* and fraudulent, the majority cannot control the minority and the latter can bring an action without the necessity of calling a meeting of the Company; it was not necessary in the circumstances here to appeal to the other shareholders before applying to the Court: *Gregory* v. *Patchett* (1864), 33 Beav. 595; *Tomkinson* v. *South-Eastern Railway* (1887), 35 Ch. D. 675; *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Railway Co.* (1852), 5 De G. & Sm. 562; *Beman* v. *Rufford* (1851), 20 L.J., Ch. 537; *Bennett* v. *Havelock Electric Light and Power Co.* (1910), 21 O.L.R. 120; *Hoole* v. *Great Western Railway Co.* (1876), 3 Chy. App. 262; *Simpson* v. *Westminster Palace Hotel Company* (1860), 8 H.L. Cas. 712; *Russell* v. *Wakefield Waterworks Company* (1875), L.R. 20 Eq. 474; *Salomons* v. *Laing* (1849), 12 Beav. 339.

Argument

S. S. Taylor, K.C. (*Savage,* with him), for respondents: It is submitted that the Company might give 50,000 shares in the circumstances here, knowing that 25,000 were intended for Melekov. The question involved is whether the consideration to the promoters is concealed, and here there is no concealment, or attempt at concealment. This is not a *bona fide* shareholders' action; there has been no attempt to get a shareholders' meeting, and therefore this cannot be considered a representative shareholders' action, and consequently will not get the sanction of the Courts. Then it must be shewn that a fraudulent transaction has been entered into. While a company can commit an act which is void, yet it may be *intra vires,* and here we submit that what the Company did was *intra vires*: See *Forrest* v. *The Manchester, Sheffield and Lincolnshire Railway*

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Company (1861), 4 De G. F. & J. 126; *Hare* v. *London and North-Western Railway Company* (1860), 1 J. & H. 225, Lindley, 6th Ed., 766.

[MARTIN, J.A.: But is not this only a voidable transaction at the worst?]

All the shareholders may ratify a void transaction, so long as the void act is within the powers of the Company. Bearns is incompetent to bring this appeal: 5 Halsbury's Laws of England, 289; *Mason* v. *Harris* (1879), 11 Ch. D. 97 at p 107; *Atwood* v. *Merryweather* (1867), L.R. 5 Eq. 464n. at p. 468; *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350 at p. 353; *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13; *Burland* v. *Earle* (1902), A.C. 83; *Foss* v. *Harbottle* (1843), 2 Hare, 461; *Mozley* v. *Alston* (1847), 1 Ph. 790.

The term "getting up" the company in Table A means the expenses of promotion and payment of promoters' fees. In this instance the directors did not issue promoters' shares. We may admit that they issued vendors' shares knowing that those shares were to go to promoters, but while that may be illegal or void, it is not *ultra vires*: see *Turner* v. *Cowan* (1903), 9 B.C. 354; 34 S.C.R. 160; *Spargo's Case* (1873), 8 Chy. App. 407; *Emma Silver Mining Company* v. *Grant* (1878), 11 Ch. D. 939; *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1,218 at p. 1,236.

Argument

Craig, in reply: As to Bearns's right to appeal, see *Beckett* v. *Attwood* (1881), 18 Ch. D. 54; *Lindsay* v. *Imperial Steel and Wire Co.* (1910), 21 O.L.R. 375. The question of *bona fides* in bringing the action was not raised in the pleadings. As to *ultra vires,* see *In re Wragg, Limited* (1897), 1 Ch. 808; *In re Eddystone Marine Insurance Company* (1893), 3 Ch. 9; *In re George Newman & Co.* (1895), 1 Ch. 674; *The Society of Practical Knowledge* v. *Abbott* (1840), 2 Beav. 559. "Getting up" in Table A means all lawful expenses: *The Northwestern Electric Co.* v. *Walsh* (1898), 29 S.C.R. 33.

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6th June, 1911.

MACDONALD, C.J.A.: This action was brought by three persons suing on behalf of themselves and all other shareholders of the defendant Company.

One Fred L. King, being the owner of certain contracts and rights, proposed to the defendant Melekov that he should promote and incorporate a company to take over said contracts and rights and establish an oil refinery at the City of Vancouver. Defendant Melekov did promote and cause to be incorporated the defendant Company. It was agreed that 25,000 paid-up shares in the capital stock of the defendant Company should be issued to King in payment of his said contracts and rights. Sometime after the incorporation of the Company the directors and King entered into a contract embodying their said agreement, with this variation, that King should receive 50,000 shares instead of 25,000, and should immediately transfer to defendant Melekov 25,000 thereof to compensate him for promoting the Company. The agreement was registered with the Registrar of Joint Stock Companies before the issue of the shares, and then 50,000 shares were allotted and issued to King, 25,000 for himself and 25,000 for Melekov.

The plaintiffs sought to have that transaction set aside on the ground that it was fraudulent and void, and that it was *ultra vires* of the Company to issue shares to a promoter, as it in effect did, to remunerate him for his services as a promoter, but the learned trial judge dismissed their action.

The respondents, *inter alia,* contend that the appellants were not entitled to sue in the circumstances of this case. That shareholders are entitled to bring a suit of this nature only after the Company has declined to take action.

I think this objection is well taken, and that being so, it is unnecessary for me to consider any other ground of appeal. If the transaction were one which could be ratified by the shareholders, then it is quite clear that under no circumstances could these appellants succeed; if, on the other hand, the transaction was fraudulent or *ultra vires,* the appellants were entitled to bring this form of action only after the Company had refused to take one, or where it appeared that it would be idle

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to apply to the Company to take action. This has been established by a long line of authorities, the most authoritative of which, so far as this Court is concerned, being *Burland* v. *Earle* (1902), A.C. 83. The only exception recognized to the rule there laid down that in order to redress a wrong done to the Company, or to recover moneys or damages alleged to be due to the Company, the action should *prima facie* be brought by the Company itself, is that where the persons against whom the relief is sought themselves hold and control a majority of the shares in the Company, and will not permit the action to be brought in the name of the Company, then the shareholders may sue in the manner in which the appellants have done in this case. We have, therefore, to look to the evidence to see what these appellants did towards obtaining action by the shareholders or by the Company. We find that appellants' solicitors wrote to the Company on the 30th of November, 1909, calling the Company's attention to the wrongs complained of, and requesting that the Company bring action against Melekov for a declaration that the 25,000 shares so issued and transferred to him are unpaid, and that the sum of $25,000 is payable by him to the Company in respect of these shares, and for such further relief as the Company may be entitled to in the circumstances. This letter was written to the secretary, and he was requested in the letter to lay it before the board of directors. The board referred it to the Company's solicitors, and on the 3rd of December, 1909, appellants' solicitors wrote to the Company's solicitors asking for a reply, which was never sent, and on the 8th of December, 1909, the writ was issued. While it is not clearly proven, yet I think the fair inference to draw is that the directors were not willing to take action. This, however, I think was not sufficient to entitle the appellants to commence their action. It does not appear that the directors, or those responsible for the alleged wrong, controlled a majority of the shares. The evidence is that there were upwards of 600 shareholders. The number of shares held by the directors, so far as the evidence shews, were insignificant. The regulations of the Company provided a means by which shareholders

MACDONALD, C.J.A.

might convene a meeting whether the directors refused or neglected to convene one. If I read the cases aright, the Court only interferes at the suit of a shareholder suing on behalf of himself and other shareholders where he satisfies the Court that he has taken all reasonable steps to procure action to be taken by the proper party, namely, the Company, or where he has the majority of the shareholders behind him. In this case I think the appellants have fallen very far short of proving this, and that the action, therefore, cannot be sustained.

I would dismiss the appeal.

IRVING, J.A.: *Beckett* v. *Attwood* (1881), 18 Ch. D. 54, is, in my opinion, abundant authority in favour of Bearns's right to carry on this appeal, notwithstanding the refusal of the other two plaintiffs to join with him in the appeal.

If we think the judgment appealed from was wrong, the order would be in accordance with the ruling in *Challoner* v. *Township of Lobo* (1901), 1 O.L.R. 156, followed in (1902), 32 S.C.R. 505.

As to the right of the plaintiffs to sue on behalf of the Company, Mr. *Craig* concedes that he must shew the transaction is *ultra vires* of the Company, or of a fraudulent character to entitle the plaintiffs to sue. The facts are of an interesting nature. A Mr. King of Seattle, who had a business called the Keystone Oil Company, came to Vancouver where he was introduced by the defendant Maddock, who was his salesman, to the defendant Melekov, who is a company promoter. It was arranged that a company should be formed to purchase the goodwill and assets of the Keystone Oil Company, with all rights, contracts, etc., and to carry on an oil business. The Company was formed in September, 1908, and shortly after a contract was made by which the Company was to pay King $25,000 for his business. A prospectus was drawn up stating that the vendors in consideration of 25,000 shares had transferred to the Company certain options, etc. Melekov's name appears on this prospectus as secretary; as he resigned that position on the 5th of November, we may speak of this as the October prospectus. On the 5th of November, 1908, a resolution was passed by

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which Melekov's Company was to be paid 10 per cent. upon the stock sold by them, provided they sold 60,000 shares within four months. On the 8th of November a committee appointed by the board of directors met, and increased the consideration payable to King from 25,000 shares to 50,000 shares, but only one-half of these 50,000 shares was to be delivered to King, the other half was to be indorsed back by him, and was to be put in escrow so that they might be handed to Melekov, who was to undertake to sell 100,000 shares at a 10 per cent. commission, 60,000 to be sold within four months, and the remaining 40,000 within six months. The committee directed that a new prospectus should be issued, and the old one be called in and destroyed. By a postscript it was provided that Melekov should not receive his 25,000 shares, until he should have fulfilled his contract with the Company.

The new prospectus was prepared and it contained this statement:

"There are absolutely no promoters' profits in the company, the expenses being limited to 10 per cent. for selling the stock."

On another page it stated that:

"The vendors in consideration of 50,000 shares have transferred to the Company certain operations. The contract for the 50,000 shares was filed with the Registrar under section 50 C.C. of 1897, before any shares were issued under it."

IRVING, J.A.

On the 8th of December, 1908, the following agreement was made and executed:

"Agreement made and entered into by and between the British Columbia Refining Company, Limited, of the City of Vancouver, in the Province of British Columbia, and Leon Melekov, promoter of the said Company of the City of Vancouver, in the Province of British Columbia.

"It is hereby agreed that the said Leon Melekov is to be allotted twenty-five thousand (25,000) fully paid-up shares in the above-named Company for services rendered and to be rendered, the said shares to be held in escrow by the solicitor of the said Company and to be delivered to the said Leon Melekov as soon as one hundred thousand (100,000) shares have been sold.

"The said Leon Melekov shall be fiscal agent for the said Company for disposing of all the Company's shares at a commission of ten per cent., the said ten per cent. to be paid as follows: Five per cent. upon application, and five per cent. upon allotment.

"Signed this 8th day of December in the year of Our Lord one thousand nine hundred and eight.

"Signed and sealed in the presence of "(Sd.) W. W. B. McInnes.	"The British Columbia Refining Co., Ltd., By "(Sd.) Leon Melekov. "(Sd.) H. Maddock, Secretary. "(Sd.) H. McLean, Vice-President."

The plaintiffs' action is to have it declared:

The plaintiff's action is to have it declared:

"(1) That the allotment and issue to the defendant Melekov of said 25,000 shares of stock is a fraud on the Company and its members and shareholders, and is illegal and void; (2) that the said allotment and issue of such shares of stock be set aside; (3) that the defendant Melekov be ordered to pay to the Company the full par value of all said part of said 25,000 shares as have been sold by the said defendant; (4) or to have it declared that said 25,000 shares of stock are not fully paid up but are subject to the payment by the defendant Melekov to the defendant Company of the whole amount thereof, namely, $25,000, and for an order requiring the defendant Melekov to pay said $25,000 to the defendant Company; (5) An injunction restraining the defendant Melekov from transferring, disposing of or dealing with such shares of stock and restraining the defendant Company from registering any transfer of the same."

Mr. *Taylor* calls attention, to the amendment of 1903-04, chapter 12, section 2, which provides for the summoning of an extraordinary meeting on the requisition of not less than one tenth of the issued capital, upon which all dues have been paid, and having regard to that section and the ruling in *Mozley* v. *Alston* (1847), 1 Ph. 790, his first point is conceding for the purpose of the argument on this point that the transaction was not only misleading, but even absolutely void, that the plaintiffs cannot maintain the action, as they do not represent the Company, and he cites *Foss* v. *Harbottle* (1843), 2 Hare, 461; *Burland* v. *Earle* (1902), A.C. 83. That point can be more conveniently discussed when we have settled whether on the true state of facts the transaction complained of was or was not *ultra vires.*

IRVING, J.A.

His next point is that though the transaction may be void and voidable, it is not *ultra vires* so as to allow the plaintiffs to sue. His contention is that the 25,000 shares destined for Melekov are properly part of the expenses incurred in getting up the Company within the meaning of (55) of Table A,

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and the directors could legally do what they have done, and the shareholders can, if they think fit, ratify their action.

I cannot see that money to be spent in selling the shares after the Company has been organized is an expense incurred in getting up the Company. I do not think any amount of ratification by the shareholders can make this transaction right. Assuming that the directors and shareholders might agree to give Melekov shares for services rendered, they cannot make right what has been done in this case. The agreement filed is false and misleading, and within the mischief hit at by sections 156 and 159 of the Act of 1897. The statement in the new prospectus that the sole consideration was $50,000, and that the expenses were limited to ten per cent. for selling shares were under the circumstances, false.

Nor can any ratification by the shareholders cure the effect of non-compliance with the requirements of section 50 of 1897, as the second agreement has not been registered, assuming that such agreement could be made: *In re Eddystone Marine Insurance Company* (1893), 3 Ch. 9; and see Palmer's Company Precedents, pp. 414, 415.

In my opinion, the argument that because the shareholders can ratify the action of the directors in voting Melekov 25,000 shares, therefore nothing *ultra vires* of the Company has been done, is fallacious. What they have done is illegal and *ultra vires,* and it is no answer to say that it can be patched up by doing something else in a legal way.

IRVING, J.A.

Further, there is no authority for the directors issuing shares in payment of a commission. The general words in sub-section (*k*) do not help the defendants in this respect.

Neither the memorandum of association nor articles provide for the payment of any commission, whether out of capital or out of profits. In *Metropolitan Coal Consumers' Association* v. *Scrimgeour* (1895), 2 Q.B. 604, the Court of Appeal upheld the payment of a cash commission. That was "a case where there was no juggle and no impropriety at all," but in *Lydney and Wigpool Iron Ore Company* v. *Bird* (1886), 33 Ch. D. 85 at p. 95, the Court of Appeal, dealing with a payment to

James Bird, a promoter, of a lump sum of money wrapped up in the purchase price, the Court said that "no part of the capital of the Company could be properly so applied," and held that the only moneys that could be allowed as legitimate expenses incurred in forming and bringing out the Company (Table A, s. 55) were in addition to an amount allowed for a report, the fees paid to the solicitors and brokers and for advertisements, printing, etc. I do not say that the agreement to pay the brokerage commission of 10 per cent. on the shares sold would be illegal.

Section 50 of the British Columbia statute of 1897, is a copy of section 25, 30 & 31 Vict. (Imp.), chapter 131, The Companies Act, 1867. The practice of giving a commission was regarded as *ultra vires* by virtue of that section; in consequence the Act of 1900 was passed. The argument on behalf of the defendants would give to the directors of this Company more power than that conferred by the Imperial Act, 1900. The law as to payment of a commission prior to the passage of the Imperial Act, 1910, can be found in Palmer's Company Precedents, 10th Ed., Part I., 250.

Returning now to the right of the plaintiff to attack this transaction in a representative action, I think they have that right, because the promoter Melekov, and the directors owed a duty to the shareholders in respect of the shares, that is, not to dispose of them except for value and according to law. They, the directors and Melekov, have combined together to do something else, and by falsely stating the amount of the purchase price endeavoured to hoodwink the shareholders. In *Russell* v. *Wakefield Waterworks Company* (1875), L.R. 20 Eq. 474, it was objected that the plaintiff could not sue on the facts stated in the bill, but an amendment was allowed so as to meet that difficulty. In the course of his judgment, Jessell, M.R. points out that the technical rule that individual members cannot sue does not apply when the corporation are commencing or continuing the doing of something *ultra vires;* that if the subject of the suit is an agreement between the directors and a third party it is usual and proper to add that third party;

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and if it can be shewn that the wrongdoers have command of the majority of votes, so that it would be absurd to call a general meeting, then no meeting need be called, and the individual may maintain the suit.

The defendant Melekov found the directors who were willing to act, and to one of them, Kelly, he gave or promised to give 1,000 shares; to another, McLean, he sold shares at a reduced rate, and to others he held out promises.

The arrangement of the 8th of November was, in my opinion, an attempt on the part of those present to do, by indirect means, what they could not do by direct means. I do not exonerate Melekov, although he thought fit not to attend that meeting. On the contrary, I think he engineered the whole transaction as part of the promotion.

Now as to the plaintiff's remedy. I would give a judgment in the terms prayed in the 1st, 2nd and 5th paragraphs of the plaintiff's prayer. The plaintiff Bearns should have the costs of this appeal against Melekov and the Company. The judgment below should be set aside, and the three plaintiffs should recover their costs against the defendant Melekov and the Company.

IRVING, J.A.

Since writing the foregoing I have read *Bland's Case—In re Westmoreland Green and Blue Slate Company* (1893), 2 Ch. 612, where two men A and B permitted their names to be inserted as vendors when they had no real interest in the property sold was a device for enabling them to get fully paid-up shares for their services in the promotion of the Company. B was one of the first directors, and he received 120 shares under this arrangement in the winding up. B was declared liable to contribute to the assets £600, as compensation for his misfeasance, while a director, in accepting 120 fully paid-up £5 shares in the Company in respect of the promotion thereof; and also the further sum of £600 as compensation for his misfeasance in permitting to be issued to A the 120 shares in the Company in respect of the promotion thereof.

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MARTIN, J.A.: At the outset of this appeal the appellant

is met by the objection that assuming the transaction complained of is fraudulent or void, yet he cannot maintain the action in his own name on behalf of himself and all other shareholders, without first having made an attempt to obtain a proper authority from the corporate body itself, in public meeting assembled to sue in its name. There is nothing in the record before us to shew that such an attempt would have proved futile, as was alleged, and in my opinion the case is exactly covered by the decision of the Court of Appeal in *Gray* v. *Lewis* (1873), 8 Chy. App. 1,035, at pp. 1,050-1. The remarks therein of Lord Justice James, concurred in by Lord Justice Mellish, after considering *Mozley* v. *Alston* (1847), 1 Ph. 790; *Foss* v. *Harbottle* (1843), 2 Hare, 461, and *Attwood* v. *Merryweather* (1867), L.R. 5 Eq. 464n. explain so fully and lucidly the reason for the sale and its one exception that it would be out of place for me to seek to add to them. The case of *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350, is a later decision of the same bench illustrating in what circumstances such an action would lie. Compare also *Burland* v. *Earle* (1902), A.C. 83 at p. 93. The case of *Cannon* v. *Trask* (1875), L.R. 20 Eq. 669, illustrates another principle: that the Court will, at the instance of shareholders, in emergency, interfere by injunction to restrain directors from unlawfully preventing such shareholders from exercising their voting powers. The plaintiff at bar, however, receives no support from these last decisions.

MARTIN, J.A.

The appeal should be dismissed.

Solicitors for appellant: *Martin, Craig & Bourne.*

Solicitors for respondents: *Ellis, Brown & Creagh,* and *McLellan & Savage.*

MORRISON, J.

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LEWIS v. THE MUNICIPAL CORPORATION OF DELTA.

Statute, construction of—Proceedings by municipality to establish a waterworks system—Records obtained under Water Act, 1909—Expropriation of lands, whether under Water Act or Municipal Clauses Act.

A municipality, having obtained water records under the Water Act, 1909, must proceed under the expropriation clauses of that Act in acquiring lands for the purposes of a waterworks system, and not under the provisions of the Municipal Clauses Act.

APPLICATION to a judge of the Supreme Court for a ruling in arbitration proceedings to expropriate certain lands for the purposes of a waterworks system. Heard by MORRISON, J. at New Westminster on the 23rd of June, 1911.

Whealler, for the Municipality.
W. J. Whiteside, for plaintiff.

MORRISON, J.: I have read carefully the sections of the Municipal Clauses Act, 1906, and amendments pertaining to the acquiring of water and sewerage rights by a municipality, and have also considered the provisions of the Water Act, 1909, applicable to the point in controversy. In view of the conclusion to which I have come, it is not necessary to make any extended reference to the various sections of those respective Acts. The proceedings herein were commenced after the passage of the Water Act, 1909, and in establishing a waterworks system the Municipality obtained records pursuant to the provisions of the Water Act, 1909. In their attempt to expropriate certain lands of Lewis within the area affected for the purposes of their undertakings, and to estimate the amount of compensation they seek to invoke the provisions of the Municipal Clauses Act, under section 259 of which they had passed the by-law in question. Mr. *Whealler,* for the Municipality, contended that the arbitration herein should be held pursuant to section 251 of the same Act. I cannot agree with this submission, being of opinion that

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the Water Act, 1909, was intended by the Legislature to be what I may term a water code, under which the Municipality must proceed.

I therefore, in answer to the question submitted, hold that in considering the question of compensation herein the arbitration should be governed by the provisions of the Water Act, 1909, and amendments.

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Criminal law—Indictment—Preferment of by Crown counsel—Direction by acting Attorney-General—Amendment—Evidence—Criminal Code, Secs. 871, 872, 873 and 889.

Where the accused had been committed for trial by a magistrate the indictment was preferred by counsel acting for the Crown at the assize, and contained a direction to that effect signed by the acting Attorney-General.

Held, that the indictment was properly preferred under section 872 of the Code.

Semble, the acting Attorney-General may exercise the powers conferred on the Attorney-General by the Criminal Code, section 873, and in any event a direction to "counsel acting for the Crown at the Victoria Spring Assize, 1911," is a sufficient direction under section 873.

Held, also, that in an indictment for rape, the averment that the prosecutrix is not the wife of the accused may be proved by any lawful evidence from which such a conclusion may be properly inferred.

Held, also, that an amendment to the indictment changing the christian name of the prosecutrix was properly allowed under section 889.

Per IRVING, J.A.: That a point raised by prisoner's counsel for the first time in his reply cannot be considered by the Court of Appeal, the point not having been taken in the case reserved.

Per GALLIHER, J.A. (dissenting): That on the question of non-consent, there was not evidence upon which the jury could reasonably find the prisoner guilty on a charge of rape.

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CRIMINAL APPEAL, by way of case stated, from MURPHY, J. and the verdict of a jury in a trial for rape, held at the Victoria Spring Assize on the 14th and 15th of June, 1911. The accused was committed for trial on the charge of rape. The indictment préferred against him at the assizes included, in addition to the charge of rape, criminal seduction, seduction of a girl under promise of marriage, and indecent assault. At the end of the bill of indictment was the following direction: "I hereby direct that counsel acting for the Crown at the Victoria Spring Assizes, 1911, prefer the above bill of indictment to the grand jury. William R. Ross, acting Attorney-General." The facts out of which the points in question arise, sufficiently appear in the headnote, the arguments and the reasons for judgment.

Statement

The appeal was argued at Victoria on the 28th of June, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Maclean, K.C., for the accused: The direction to prefer the indictment is a part of the record and, it is submitted, makes it clear that this bill was preferred by the acting Attorney-General, under powers which he considered were conferred upon him by section 873 of the Code.

The case of *Abrahams* v. *The Queen* (1881), 6 S.C.R. 10 at p. 17, shews that the decision to prefer the bill in this way was a judicial or *quasi* judicial act. The bill itself clearly states that this judicial decision was pronounced by the Hon. Mr. Ross as acting Attorney-General. It is, therefore, not open to the Crown to say that this judicial decision was made by a Crown counsel under section 872 of the Code. The assurance is given to the accused in the most solemn manner in which an assurance can be given, namely, by matter of record that the acting Attorney-General passed upon this bill, and that the counsel for the Crown was merely his delegate to carry out his judicial decision.

Argument

The only question that remains, therefore, is whether an

acting Attorney-General under section 873 of the Code has power to direct that a bill of indictment be preferred.

Under section 873 the Attorney-General has power to direct the preferring of a bill of indictment, and by sub-section (2) of section 2 of the Code the term "Attorney-General" means the Attorney-General or the Solicitor-General. As the Code has clearly defined the meaning of the term "Attorney-General" in section 873, it is not competent for any Court or for any Legislature, other than the Parliament of Canada to add to or detract from that definition of the term. In the case of *Rex* v. *Duff (No. 2)* (1909), 15 C.C.C. 454 at p. 459, it was held that a deputy Attorney-General upon whom all the powers of an Attorney-General had been conferred, could not prefer a bill under this section. That case practically came before the Supreme Court of Canada in *In re Criminal Code* (1910), 43 S.C.R. 434, and the decision in *Rex* v. *Duff* was upheld.

It is quite clear that a deputy Attorney-General in this Province could not prefer a bill notwithstanding the full powers conferred upon a deputy Attorney-General by paragraph 34 of section 10 of the Interpretation Act.

The reasoning in *Rex* v. *Duff* and *In re Criminal Code,* would extend also to the case of an acting Attorney-General who is given, by the Provincial Legislature, all the powers of the Attorney-General in the absence from the Province of the Attorney-General.

Argument

The acting Attorney-General is not, as a matter of fact, the Attorney-General. When the Hon. Mr. Ross, as acting Attorney-General signed this bill of indictment the Attorney-General of the Province was the Hon. Mr. Bowser, and no legislation by the Legislature can confer upon an acting Attorney-General the powers given to an Attorney-General by section 873 of the Code: *Rex* v. *Nar Singh* (1909), 14 B.C. 192. The objection to this bill goes to the jurisdiction of the Court to try the accused: *Rex* v. *Bates* (1911), 1 K.B. 964; *Reg.* v. *Fuidge* (1864), 33 L.J., M.C. 74, and cannot be cured under the provisions of section 1,021 or any other section of the Code. Assuming that the acting Attorney-General had

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power to give this direction, it is contended that it was bad for indefiniteness. At the assize at which the accused was tried, two counsel were acting for the Crown, and it is not clear what counsel it was intended should prefer this bill.

At the close of the case for the Crown no evidence had been given by the Crown that the accused was not married to the girl on whom the assault was alleged to have been made. It is submitted that as requested, the presiding judge should have taken from the consideration of the jury the charge of rape on the ground that this essential matter had not been proved by the Crown.

At the trial before any evidence had been given, the indictment was amended by adding in every case "Sadie Paula Willsie, otherwise Polly Willsie" wherever the name Polly Willsie is mentioned in the indictment. The powers to amend a bill are clearly specified in the Code and do not extend to an amendment of this kind.

On the question of the weight of evidence it is submitted that the jury acted unreasonably in finding that the accused was guilty of the crime of rape. The only verdict against the accused that could reasonably have been found on the evidence in this case was one of an attempt to commit criminal seduction. The case bears none of the ear marks of rape.

Argument

It is further submitted that there was no evidence given by the Crown of penetration, and that consequently the charge of rape was not made out.

H. W. R. Moore, for the Crown: On the question of the right of an acting Attorney-General to direct an indictment to be preferred under section 873 of the Criminal Code, the Crown relies upon section 31, sub-section (*f*) of the Interpretation Act, R.S.C. 1906, chapter 1, where the *locum tenens* is given all the powers of the holder of the office. This clause is in no way repugnant to the interpretation section of the Code, section 2, sub-section (2), as that sub-section is obviously intended to prevent confusion between the criminal functions of the Attorney-General of Canada and the Attorneys-General of the various Provinces. The cases cited by the defence are all

cases in which a deputy Attorney-General or an agent purported to assume jurisdiction, and apparently there is no reported case in which such an objection has been taken to action by an acting Attorney-General. An acting Attorney-General, who must be a minister of the Crown, is in a totally different position, and it is submitted that the principle governing the cases cited does not apply here. The direction to "counsel acting for the Crown at the assizes" is sufficient, although no one was named, as under the practice governing the bar it would be the duty of the senior counsel present, and briefed by the Crown in the case, to obey the direction. The identity of the counsel cannot concern the defence, which is not entitled to be represented before the grand jury. But whether the direction was valid or not, the indictment was properly preferred by the counsel acting for the Crown under section 872 of the Criminal Code.

[MARTIN, J.A.: How can you claim to come under section 872, when the indorsement on the indictment shews that you purported to act under section 873?]

An indictment does not require an indorsement in order to be valid, and consequently it is submitted that if the direction indorsed by the acting Attorney-General is invalid, the effect would be to render the indorsement a nullity and the indictment would in law bear no indorsement at all. This lets in section 872 of the Code, which says nothing as to how or from whom the Crown counsel shall receive his instructions. It should be noted, too, that section 872 was not in the Code when the cases cited by the defence were decided. This section was inserted in 1900 and probably as a curative section. The only case cited which was decided since section 872 became law is *In re Criminal Code* (1910), 43 S.C.R. 434. That case turned solely on section 873a, a section which does not apply to British Columbia.

Argument

The Court cannot deal with the objection that the indictment is bad because not founded on the evidence given before the magistrate, because that evidence has not been made part of the case. Consequently there is no material upon which the Court

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could found a decision contrary to that of the learned trial judge, who did peruse that evidence.

Unlike a bigamy or divorce case where the fact of marriage has to be strictly proved, on an indictment for rape the averment that the prosecutrix is not the wife of the accused can be proved by any legal evidence. In this case there was evidence adduced by the prosecutrix from which the jury could properly conclude that they were not married, and in fact any other conclusion would have been perverse. In any event this point cannot be effectively raised here, as when the defence put in its case, it was both admitted and proved that the accused was at the time married to someone else, and the Court must now look at all the evidence.

At the preliminary hearing the prosecutrix was described by the pet name she generally went by, and the amendment allowed was merely the addition of her full baptismal name. Such an amendment falls within section 889 of the Code. There is ample authority for an amendment of this kind, *e.g., Reg.* v. *Welton* (1862), 9 Cox, C.C. 297. In that case the accused was charged with assaulting a child with intent to murder, and during the trial it developed that the child's name as given in the indictment was wrong and that her real name was unknown. In these circumstances, Byles, J. ordered the indictment to be amended accordingly.

Argument

On the question of weight of evidence it is submitted that this Court will not disturb the verdict unless it is shewn that the verdict is one which a jury, viewing the whole of the evidence reasonably, could not properly find: *Phillips* v. *Martin* (1890), 15 App. Cas. 193. The late Full Court held the same effect in *Rex* v. *Jenkins* (1908), 14 B.C. 61 at p. 66.

Maclean, in reply.

Cur. adv. vult.

25th July, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: After a preliminary investigation before a magistrate, the accused was committed for trial on a charge of rape. Indorsed on the bill of indictment were these words.

"I hereby direct that counsel acting for the Crown at the Victoria Spring Assizes, 1911, prefer the above bill of indictment to the grand jury. William R. Ross, acting Attorney-General."

Two gentlemen were instructed to act as Crown counsel at the said sittings, not together, but separately, in different cases, Mr. *Moore* being one, and the bill in this case was preferred by him. It was objected by prisoner's counsel (1) that an acting Attorney-General has no authority to direct that a bill be preferred; (2) that if he had, then the direction was bad because it did not name the counsel who was to prefer it.

The learned trial judge overruled the objections, but after verdict reserved them for our consideration. We were referred to *Reg.* v. *Lepine* (1900), 4 C.C.C. 145; *Abrahams* v. *The Queen* (1881), 6 S.C.R. 10 at p. 15; *Reg.* v. *Townsend* (1896), 3 C.C.C. 29; and *In re Criminal Code* (1910), 43 S.C.R. 434 at p. 437, in support of the prisoner's contention that an acting Attorney-General cannot as such prefer a bill of indictment.

There are, in my opinion, two outstanding distinctions between the case at bar and those referred to. In none of the cases cited was the status of an acting Attorney-General under review. In my opinion an acting Attorney-General is in a very different position to that of a deputy or agent of the Attorney-General. He is the Attorney-General for the time being, and clothed by statute with all the powers and authority of the office. But assuming for the purpose of this case that the *locum tenens* of the office was not intended to be included in the designation "Attorney-General" as defined in section 2, sub-section (2) of the Criminal Code, we have then to consider this case with reference to the power given to Crown counsel by section 872 of the Code. This section was not under consideration in any of the cases cited, as the only one of them decided after section 872 became law was *In re Criminal Code, supra,* and the decision there turned on section 873a, which relates only to Saskatchewan and Alberta.

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That section 872 confers upon counsel acting for the Crown authority to prefer this bill is not disputed. That Mr. *Moore,* acting as such counsel, preferred it, clearly appears. But it

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was contended by Mr. *Maclean* that he did so not in pursuance of the powers given him by section 872, but under the said direction, and that hence he did not exercise the discretion given him by section 872. The argument is plausible, and if we assume that Crown counsel would not have preferred the indictment in the absence of the direction, logical. But where we find an official doing an act strictly within the authority granted him by statute, and that, too, in a case where it was plainly his duty to do it, we ought not to be astute to find that he acted only on the direction given him and not on his own responsibility and in fulfilment of his duty. I think, therefore, that the learned trial judge was right in declining to give effect to these objections. This disposes also of the objection that the Crown counsel was not specially named in the direction. But in any view of the matter, I think counsel for the Crown was sufficiently designated.

I am also of the opinion that the learned judge was right in making the amendment correcting the name of the young girl, although made after the bill was found by the grand jury.

The refusal of the trial judge to withdraw the case from the jury on the ground that the Crown had failed to prove that the girl was not the wife of the accused, must also, I think, be sustained. There was evidence, if not in the Crown's case, then in that of the defence, on which the jury could find that she was not his wife: See *Rex* v. *Iman Din* (1910), 15 B.C. 476.

MACDONALD, C.J.A.

We are asked to grant a new trial on the ground that the verdict is against the weight of evidence. In cases of this nature there is always great danger of a jury being carried away by feelings of just detestation of conduct such as the accused was guilty of, and so convict of the greater crime rather than of the lesser one. There were incidents which happened before, at the time of, and after the occurrence at Cedar Hill, which justify a feeling that the accused was not given the benefit of a reasonable doubt; but once it appears, as I think it does appear here, that there was evidence upon which the jury

could reasonably find as they did, I must accept the jury's opinion and not attempt to substitute another for it.

I would answer all the questions in favour of the Crown and refuse a new trial.

IRVING, J.A.: The first question, I think, should be answered in the affirmative for the reasons stated by the learned trial judge.

Under section 872, which deals with a prosecution conducted by the Crown as opposed to the case of a person bound over to prosecute, in the event of an accused having been committed for trial, the counsel acting on behalf of the Crown was at liberty to prefer the bill on the charge of rape (that being the charge upon which the accused had been committed) without any authority in writing from the Attorney-General under section 873. To prefer a bill under section 872 it is not necessary that there should be any statement in writing by counsel.

In considering the effect of sections 871, 872 and 873, it is well to remember that at common law any person might prefer a bill before the grand jury against any one whom he accused of committing an indictable offence, and this might be done without previous enquiry before a magistrate, or by leave from the Court or otherwise.

This right was liable to be abused, and so the Vexatious Indictments Act, 22 Vict. (Imp.), chapter 17, was passed, and the right has been cut down so that now by virtue of section 873 no bill can be preferred in Canada except as provided in sections 870, 871, 872, 873.

Holding this opinion as to the validity of the bill, it is unnecessary for me to consider the direction by the acting Attorney-General.

The second question asks whether, on the evidence given for the Crown, was the judge right in refusing to accede to the prisoner's request that the charge of rape should have been withdrawn from the jury, because it was not proved that the girl was not the prisoner's wife?

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There was evidence in the case presented by the Crown from which the jury, in my opinion, could infer that she was not his wife. She states that after she got into the buggy, he gave her a ring, and said he would come back for her in August to marry her, and there is no evidence that, from the time she got into the buggy, they stopped anywhere until they reached the place where it is said the offence was committed. The testimony is rather to the effect that they had this conversation on the way out. The judge, in my opinion, could not have withdrawn the case from the jury on this ground. The third question I would answer in the affirmative. At common law an indictment could not be amended except by the grand jury that found it, but extensive powers of amendment have been given to the Court by statute. The amendment is in time if made at any time before the case goes to the jury. The following cases are cited, as they seem very similar to the one under consideration: An amendment was allowed to meet the case of a failure on the part of the Crown to prove the alleged name of a child who had been murdered: *Reg.* v. *Welton* (1862), 9 Cox, C.C. 297; and in *Rex* v. *Byers* (1907), 71 J.P. 205, an amendment was made to correct the misdescription in the name of a child in respect of whose funeral a false pretence was alleged to have been made.

IRVING, J.A.

In this case no amendment was necessary, because a person may be described either by her real name or that by which she is usually known: *Rex* v. *Norton* (1823), R. & R. 510; *Rex* v. *Berriman* (1833), 5 Car. & P. 601; *Rex* v. *Williams* (1836), 7 Car. & P. 298; *Reg.* v. *Lovell* (1872), 1 Leach, 248. Certainty to a common intent is all that the law requires.

As to the application for a new trial, I do not wish to add anything to what I said in *Rex* v. *Jenkins* (1908), 14 B.C. 61, as to the duty of the Court of Appeal under section 1,021 of the Criminal Code. In my opinion the jury might very well have reached the verdict they did on the verbal evidence alone. But they had more; they had the complainant and the accused before them, and from the appearance of these two they could form a better idea of the degree of resistance that could be

expected from a child of her age and size in the grasp of a man of the accused's build. This was real evidence, a thing submitted directly to the senses of the jurors—something which cannot be brought before an appellate Court.

Before this Court, and in his reply, prisoner's counsel raised for the first time the question, was there proof of penetration? That point was not reserved, and it is therefore not before us for this reason. If there was no proof to go to the jury, then the judge should have directed an acquittal. My point is that whether there was or was not evidence to go to the jury is a question to be reserved, and cannot be debated on a motion for a new trial under section 1,021. But assuming that we ought to consider the question, in my opinion there was sufficient evidence of penetration to leave to the jury. Penetration, like any other fact, can be proved by evidence other than verbal statements by the person ravished or by inferences to be drawn by the jury from other facts.

I would refer to what was said by Abbott, C.J., in *Rex* v. *Burdett* (1820), 4 B. & Ald. 95 at p. 161:

"A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and in case of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the

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certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know that, where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtility and refinement."

Perhaps the best test that there was proof to go to the jury is to be found in the fact that the prisoner's counsel, in moving for a dismissal at the close of the Crown's case, put forward the point set out in the third reserved question and did not raise this point until his reply before this Court.

IRVING, J.A.

If there is a defect in the case against the prisoner on this ground, it should be dealt with under section 1,022.

I do not wish to be understood as suggesting that there is any ground for such an application, but emphasize that it is not a matter that this Court can properly deal with.

MARTIN, J.A.

MARTIN, J.A.: I concur with the judgment read by the learned Chief Justice, which embodies the only conclusion that I feel we can legally reach in the matter as it comes before us. At the same time it is due to the prisoner to say, in view of any application that may be made elsewhere, that the case against him was so loosely and unsatisfactorily presented that I entertain grave doubts as to the justness of the verdict.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned Chief Justice, whose judgment I have had the advantage of reading as to the answers to be given to the questions reserved for the opinion of this Court.

As I have concluded that the accused should have a new trial, I do not propose to comment upon the evidence further than to say that, in my opinion, on the essential of non-consent, it bears none of the ear marks necessary to constitute rape and that there was not evidence upon which the jury could reasonably have so found.

Appeal dismissed, Galliher, J.A. dissenting.

GILLIS SUPPLY COMPANY, LIMITED v. CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY. (No. 1).

COURT OF APPEAL

1910

Nov. 22.

GILLIS SUPPLY CO. v. CHICAGO, MILWAUKEE AND PUGET SOUND RY. CO.

Practice—County Court—Marginal rule 100, sub-sections (1), (2), (3)—Service on foreign railway company.

A person employed in British Columbia by a foreign railway company which has no line of railway in the Province, such person acting merely as commercial agent to solicit orders for freight to be routed over the company's lines, is a person in the employ of the company, proper to be served with any process under marginal rule 100.

APPEAL from an order of GRANT, Co. J. setting aside the service of a summons and plaint in the action on a representative of the defendant Company in Vancouver, on the ground that service on the commercial agent of the Railway Company was not service on an official of the Company within sub-section (2) of marginal rule 100. The defendant Company owns and operates a line of railway in the State of Washington and elsewhere in the United States of America, but has no line of railway in the Province of British Columbia. It employs a commercial agent in Vancouver, B. C., and pays him a salary and expenses. His duties consist in soliciting for freight to be routed over the Company's lines. The summons and plaint were served on the defendant Company by delivering them to the commercial agent at Vancouver, and GRANT, Co. J. set the service aside on the ground mentioned. Plaintiffs appealed.

Statement

The appeal was argued at Vancouver on the 21st and 22nd of November, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

D. A. McDonald, for appellant: Service was properly effected and we submit that it makes no difference whether the Company is foreign in origin or not: see *Newby* v. *Colts' Patent Firearms* (1872), L.R. 7 Q.B. 293; *Compagnie Generale Transatlantique* v. *Thomas Law & Co.* (1899), A.C. 431.

Argument

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Pugh, for respondent (defendant) Company: This is an unregistered foreign corporation and does not come within Rule 100, which is a statutory provision regulating service of processes. The person on whom service was effected here was not a clerk within sub-section (2). In any event the matter is dealt with by sub-section (3), if section 171 of the Companies Act does not apply: see *Nutter* v. *Messageries Maritimes* (1885), 54 L.J., Q.B. 528. The reason, however, why English authorities are not applicable to this case is because of the presence of sub-section (3) of the rule. We say that sub-sections (1) and (2) do not apply to unregistered foreign corporations.

[MACDONALD, C.J.A.: Sub-section (2) deals with four different classes of companies; railway, telephone, express and telegraph companies, a special rule passed applicable to those particular companies; sub-section (3) is a general provision, applicable to all companies].

Argument

If it is a foreign corporation carrying on business here, it could only do so under a charter of some kind.

[MARTIN, J.A.: Is not that rule expressly for getting at companies of that kind?]

McDonald, in reply: An unregistered corporation must mean one that can register under our Act and has failed to do so. This is a railway company, and therefore cannot register under our Companies Act.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed, although I am not altogether free from doubt. It is somewhat difficult to see what the framer of this rule meant, but this stands out prominently, namely, that the rule was meant to provide a mode of service on four different classes of companies of which this Company is one. With regard to the point as to whether the person served was a clerk within the meaning of the section, I have no doubt about that at all. This is a stronger case than *Compagnie Generale Transatlantique* v. *Thomas Law & Co.* (1899), A.C. 431.

IRVING, J.A.

IRVING, J.A.: I agree. In my opinion the rule was intended as an easy method for serving companies of this kind. Sub-

section (1) deals with municipalities, sub-section (2) with various other companies, and (3) is an omnibus clause, dealing with any unregistered companies, whether they happen to be railway, express, telegraph or telephone companies.

MARTIN, J.A.: I agree with what the learned Chief Justice says.

Appeal allowed.

Solicitors for appellants: *Martin, Craig & Bourne.*

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

BUTCHART v. MACLEAN *ET AL.*

Vendor and purchaser—Agreement for sale of land—Speculative value—Forfeiture clause—Default by purchaser—Right of vendor on default—Specific performance—Supreme Court Act, Sec. 20 (7).

In January, 1907, defendant Maclean held an agreement from one Bohlman, under which he had the right to purchase some 782 acres in New Westminster District. On the 24th of January, 1907, the plaintiff and defendant entered into an agreement, under which the plaintiff obtained the right to purchase the land for the sum of $58,950, payable as follows: $1,000 down, the balance in four instalments of (about) $14,000, the first being payable on the 15th of February, 1907, the remaining three on the 1st of October, 1907, 1908, 1909, with interest. The agreement contained a provision by which, in the event of Maclean neglecting to make his payments to Bohlman as they fell due, the plaintiff could himself make the payments, and another clause provided that the plaintiff might, at any time, pay up the whole amount of the purchase money, and take a conveyance of the land. The purchaser was to pay the taxes, and reimburse the vendor for all insurance premiums paid by him during the agreement. The purchaser was permitted to occupy the premises until default was made in payment of the above instalments, or interest, subject nevertheless to impeachment for voluntary or permissive waste. On the other hand, the following provisions were inserted for the protection of the vendor:

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"It is expressly agreed that time is to be considered the essence of this agreement, and unless the payments above mentioned are punctually made at the times and in the manner above mentioned, and as often as any default shall happen in making such payments, the vendor may give the purchaser thirty days' notice in writing demanding payment thereof, and in case any default shall continue these presents shall, at the expiration of any such notice be null and void and of no effect, and the said vendor shall have the right to re-enter upon and take possession of the said land and premises; and in such event any amount paid on account of the price thereof shall be retained by the vendor as liquidated damages for the non-fulfilment of this agreement to purchase the said land and pay the price thereof and interest, and on such default as aforesaid the said vendor shall have the right to sell and convert the said lands and premises to any purchaser thereof. In the event of this agreement being registered and in the event of default being made in any payment or in respect of any of the covenants herein contained, whether before or after such registration, it is expressly agreed that the vendor shall be at liberty to cancel, remove and determine such registration on production to the registrar of a satisfactory declaration that such default has occurred and is then continuing. The purchaser hereby irrevocably appoints E. W. Maclean his true and lawful attorney for and in the name of the said purchaser, his heirs, executors, administrators, successors and assigns, to cancel, remove and determine such registration in the event of default as aforesaid."

The plaintiff paid the $1,000 at the time of the execution of the agreement, and he also paid the first instalment of $14,000, but failed to meet any of the three subsequent instalments as they fell due or at any time. Plaintiff made no improvements; as a matter of fact, he never entered upon or occupied the lands, nor did he pay the taxes. A formal demand for payment was made upon him by letter on the 30th of November, 1907, and not complied with. The plaintiff was not then, nor for a very considerable time thereafter, in a position to pay for the land, and by virtue of the agreement the contract to sell was "null and void and of no effect." The defendant Maclean, in February, 1908, proceeded to sell the land to third persons at an increased price. Some correspondence ensued between the parties, but it was not until the 27th of March, 1909, that the plaintiff offered to pay up the balance. On the 7th of October, 1909, the plaintiff issued his writ asking specific performance of the contract, and in the alternative for the return of the moneys paid by him. HUNTER, C.J.B.C. dismissed the action against the defendants other than Maclean, and refused to direct specific performance, but on the authority of *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1,022, held that the plaintiff was entitled to be relieved, and he ordered that he should recover back from Maclean the $14,000 (but not the $1,000 deposit) less the amount paid for taxes. From that decision, as to refunding the $14,000 instalment, defendant appealed.

Held, reversing the finding of the trial judge, that, in view of the circumstances of the case and the speculative nature of the property, the plaintiff's conduct was such as to amount to repudiation of the contract, and that he was not entitled to relief.

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APPEAL from the judgment of HUNTER, C.J.B.C., reported (1910), 15 B.C. 254.

Statement

The appeal was argued at Vancouver on the 29th of November and the 2nd of December, 1910, before IRVING, MARTIN and GALLIHER, JJ.A.

Davis, K.C. (*Pugh*, with him), for appellants (defendants): If specific performance is not decreed, damages in lieu of it should have been given. There is no English case in which the instalment has been ordered to be repaid to a purchaser who is in default, after the contract has been cancelled or put an end to. Relief against forfeiture, if it means anything, means that the parties are to be put back in the position occupied before default, but the question of forfeiture of the instalment does not arise at all. Here it is clear beyond all question what the parties intended. They were evidently trying to get an option, and dealt with this property on the footing of an option. They were not making a sale as understood in England; none of them ever had the faintest intention of holding the property or buying it out and out. It was gambling in real estate, a speculative transaction, and the document itself shews this, because it provides that in case of default the vendor could get the title back from the purchaser without any action. No agreement could more clearly shew that the intention of the parties was that, in case of default, there should be a procedure *inter partes* which should govern instead of an action in the Courts. There being no suggestion of fraud, we are entitled to rely on our contract. It is submitted that the fundamental basis for relief in equity against forfeiture is the intention of the parties. Therefore, if the Court finds that the parties intended that time was to be of the essence of the contract, then it will not interfere any more than a court of law will interfere. It is absolutely clear here that the parties intended to take a short way of getting that agreement out of the way in case of default:

Argument

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Ex parte Hunter (1801), 6 Ves. 94. We say that a purchaser in default cannot sue for a return of the money paid unless there has been an utter failure of consideration. Here the party has had the property in his possession for a long time, so that there is no failure of consideration. Here we did not rescind; we merely put an end to the agreement: *Blackburn* v. *Smith* (1849), 18 L.J., Ex. 187; *Cornwall* v. *Henson* (1900), 2 Ch. 298 at p. 304; 69 L.J., Ch. 581 at p. 583. If the contract were alive, then the Court could decree specific performance, but here the contract is at an end, therefore *Cornwall* v. *Henson* does not apply. We, by giving notice, had lost our right to sue on the personal covenant and the other side had lost the right to sue for specific performance. We say that, the contract being at an end, there is no principle of law requiring or compelling the refund of the instalments: *Wallace* v. *Smith* (1829), Beat. 381; *Roberts* v. *Berry* (1853), 3 De G. M. & G. 284. As to time being of the essence of the contract: *Tilley* v. *Thomas* (1867), 3 Chy. App. 61 at p. 67. There is no question here that the intention of the parties was that time was to be of the essence of the contract: *Harris* v. *Robinson* (1892), 21 S.C.R. 390 at p. 398; *Palmer* v. *Temple* (1839), 9 A. & E. 508; *Oppenheim* v. *Henry* (1853), 10 Hare 441; *Hinton* v. *Sparks* (1868), L.R. 3 C.P. 161; *Howe* v. *Smith* (1884), 27 Ch. D. 89. There is no distinction between a deposit and an instalment unless there is a distinction in the contract: *Sprague* v. *Booth* (1909), A.C. 576; *Soper* v. *Arnold* (1889), 14 App. Cas. 429; *Whelan* v. *Couch* (1878), 26 Gr. 74; *Fraser* v. *Ryan* (1897), 24 A.R. 441. This is not a rescission *ab initio;* it is merely a rescission as at the time it is made, and is, in a word, an automatic cut-off, as in *Jackson* v. *Scott* (1901), 1 O.L.R. 488; *Hansbrough* v. *Peck* (1866), 72 U.S. 497; *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519 at p. 550; *Great West Lumber Co.* v. *Wilkins* (1907), 7 W.L.R. 166; *Steele* v. *McCarthy* (1908), *ib.* 902.

Argument

Sir C. H. Tupper, K.C., for respondent (plaintiff): The words of the notice depart from the terms of the agreement. We should have thirty days' notice from the mailing or delivery of the agreement, not thirty days from date of default. The agreement is a straight agreement for sale,

and there is nothing exceptional in that class of agreement. He referred to *Salt* v. *Marquess of Northampton* (1892), A.C. 1 at p. 18; *Rose* v. *Watson* (1864), 10 H.L. Cas. 672; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499; *Beddington* v. *Atlee* (1887), 35 Ch. D. 317 at p. 324; *Levy* v. *Stogdon* (1898), 1 Ch. 478. A deposit is, of course, a guarantee, but no English decision has gone so far with respect to an instalment. *Hansbrough* v. *Peck* is distinguishable. These forfeiture clauses are really conditions *in terrorem,* and the Courts are quick to find, where the words "liquidated damages" occur, whether it is possible to give relief; because a man might proceed with a $100,000 purchase up to the last payment of say $10,000, and on default, the purchaser would seek to re-take the property and retain all the payments made. He referred to *Horner* v. *Flintoff* (1842), 9 M. & W. 678; *Edwards* v. *Williams* (1813), 5 Taunt. 247; *Atkyns* v. *Kinnier* (1850), 4 Ex. 776; *Reynolds* v. *Bridge* (1856), 26 L.J., Q.B. 12; *Clydebank Engineering and Shipbuilding Company* v. *Yzquierdo y Castaneda* (1905), A.C. 6; *Public Works Commissioner* v. *Hills* (1906), 75 L.J., P.C. 69; *Magee* v. *Lavell* (1874), 43 L.J., C.P. 131; *Barton* v. *The Capewell Continental Patents Company, Limited* (1893), 68 L.T.N.S. 857; *Shuttleworth* v. *Clews* (1910), 1 Ch. 176; 79 L.J., Ch. 121; *In re Dixon; Heynes* v. *Dixon* (1900), 2 Ch. 561. The learned trial judge had ample jurisdiction to relieve against forfeiture, and in the circumstances it cannot be said that it was improperly exercised.

Argument

W. A. Macdonald, K.C., on the same side, cited *Stringer* v. *Oliver* (1907), 6 W.L.R. 519, and *Great West Lumber Co.* v. *Wilkins* (1907), 7 W.L.R. 166. The defendant has suffered no damage. The vacating of registration of title was merely the same as the clause providing for notice, both being in the nature of provisions *in terrorem.* He cited and referred to *Steele* v. *McCarthy* (1907), 7 W.L.R. 902; *Moodie* v. *Young* (1908), 8 W.L.R. 310; *Canadian Pacific R. W. Co.* v. *Meadows, ib.* 806; *Dobson* v. *Doumani* (1909), 9 W.L.R. 692; *Hall* v. *Turnbull* (1909), 10 W.L.R. 536; *Banton* v. *March* (1909), 12 W.L.R. 598; *Hamilton* v. *Macdonell* (1910), 13 W.L.R. 495; *Hudson's Bay Company* v. *Macdonald* (1887), 4 Man. L.R.

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480; *Canadian Fairbanks Co., Ltd.* v. *Johnston* (1909), 18 Man. L.R. 589; *Whitla* v. *Riverview Realty Co.* (1910), 19 Man. L.R. 746.

Davis, in reply: The Court does not relieve against forfeiture as a matter of course, but must find some principle in the particular facts of the case, and none are shewn here. We submit that the trial judge proceeded upon a misconception; he evidently considered that relief against forfeiture in this particular case meant allowing the plaintiff to obtain the return of the instalment. That is not relief against forfeiture as properly understood. Relief is where the Court finds the party has been unfortunate, and considers that relief will put the parties back in their original position. In this case the instalment has nothing whatever to do with the breach of the condition in the agreement. The trial judge distinctly refuses to say that the plaintiff should be put back in the position he was before the non-payment of the money. Under the agreement here, if the instalment is not paid on a certain date, what takes place is not a forfeiture, but a procedure agreed upon and to be carried out by the parties. It does not provide for the payment of a larger sum if something is not done, but merely fixes a procedure to be followed in the event of non-performance. That event here is the default. A Court of Appeal will always interfere if of opinion that the judge below has gone on a wrong principle. But the judge below found in our favour on the question of forfeiture; he held that we were entitled to give this notice, but went on the misapprehension of the application of the instalment, *viz.,* that the retention of the instalment was in some way a forfeiture, a penalty, being paid by plaintiff for his default. In any event, where a person, by his own neglect, gets into a bad position, the Court will not relieve him. As a matter of fact, plaintiff had thirty days in which to make up his mind, and he sat by and did nothing.

Argument

Cur. adv. vult.

10th April, 1911.

IRVING, J.A.

IRVING, J.A. [After stating the facts as set out in the headnote]:

In *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1,022, there were many considerations which we have not in the present case. There the land had been occupied and the company, incorporated by Act of Parliament with powers of compulsory purchase, had erected thereon their works. They had been granted several extensions of time for payment, *viz.,* from the 5th of August, 1867, till November, 1869, and the relationship more akin to that of mortgagor and mortgagee than to that of vendor and purchaser had been brought about, and it was doubtful whether the agreement between the parties gave the applicant the right claimed. In the opinion of the Court it was a clear case of penalty, and as the defendants had not changed their position in any way, it was relieved against by the Court of Chancery acting under its general jurisdiction. The relief offered by the trial judge amounted to an extension of the time for payment of the remaining instalment, just as if the relationship was mortgagor and mortgagee.

In *Cornwall* v. *Henson* (1899), 2 Ch. 710, and before the Court of Appeal (1900), 2 Ch. 298, Collins, L.J. refers to the *Dagenham* case as a method of relieving in a proper case, but he as well as Webster, M.R., and Rigby, L.J., agreed that if it was shewn that the plaintiff Cornwall had by his conduct repudiated the contract, the defendant would have been justified in acting as the true owner and that the plaintiff would not be entitled to a return of his instalments, although eleven out of twelve had been paid. In that case relief was granted by giving the plaintiff damages against the defendant.

In my opinion, the question we have to determine is whether, having regard to all the circumstances, the facts in this case amount to a repudiation by the plaintiff of the right to purchase, so as to deprive the plaintiff of the right to relief.

The contract entered into between the parties to this action is plain. The plaintiff was to be at liberty to complete and sell to a purchaser at any time that he could make a profit. The instalments he was to pay were intended to keep this privilege open to him. Default on his part—after notice—was to be regarded as a consent by him to a determination of the privilege,

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and of his right to complete the purchase. These instalments were the consideration for the option he had on the property. In addition, they were to be part payment, but like the deposit in *Howe* v. *Smith* (1884), 27 Ch. D. 89, not merely part payment, but were intended to stimulate the purchaser to perform the rest of his contract. They were fixed by the parties as liquidated damages, if the purchaser failed to complete. I can see no difference, after the purchaser has made default, between instalments and deposits. One would have a less difficulty in reaching the conclusion that the purchaser intended to repudiate the contract in a case where he had paid the deposit only, than in a case where a great number of instalments had been paid, but when that point has been settled, *viz.,* that the purchaser has repudiated the contract, then I can see no difference in applying to instalments the principle of law applied in *Howe* v. *Smith, supra,* to a deposit. There the deposit was not paid on any express terms; here the instalment was paid practically on the conditions the Court there implied. It does not follow, because the right to specific performance is lost, that therefore the whole contract is at an end. The contract, as Bowen, L.J., points out in *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339, being repudiated by the plaintiff, the defendant was emancipated from continuing it further, but the contract being in part performed, it is impossible to relegate the parties to the original position they were in before the contract was made. The plaintiff we know has parted with his good money, but has not the defendant lost something? Did he not forego the right to sell in the interim, no matter what the price was offered or what his necessities were? How is it possible to assess the damages sustained by a man occupying the position of the defendant, who has his land locked up for months, and then finds it thrown on his hands with the market falling? The only way is by agreeing to liquidated damages. I would hold in this case that, as the parties went into a speculative contract and as the last thing either of them thought of was there should be any application to the Court for relief against their plainly worded contract, this is not a case for relief. In any event, the plaintiff is too late to ask for a

IRVING, J.A.

return of his money. Fry, L.J., at p. 103, says that a plaintiff to recover must prove readiness and willingness within a reasonable time. We can take judicial notice of the extraordinary rise in land values in this Province within the last few years, and I venture to think that, having regard to the fluctuations of the land market, one month after the expiration of the time fixed by the notice would be the limit, if any extension at all, that should be granted.

In *Howe* v. *Smith, supra,* where the deposit was forfeited, the contract was entered into on the 24th of March, the 24th of April being the day fixed for completion. On the 20th of June, the defendant agreed to give a month's time. It was held that, having regard to what had occurred before (that is, the delay between the 24th of April and the 20th of June), the expiration of that month, terminating 20th July, was the latest time at which the purchaser could reasonably require the vendor to accept the purchase money and complete. In the action, which was brought on the 25th of July, it was held that the purchaser was not entitled to relief.

IRVING, J.A.

In the present case, we have a man asking for relief after two years' default, where the defendant has changed his position on the faith of the express agreement made between them.

I would allow the appeal and dismiss the plaintiff's action.

MARTIN, J.A.

MARTIN, J.A. agreed in allowing the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: This is an appeal from the judgment of HUNTER, C.J.B.C. The action was brought for specific performance of an agreement, or, in the alternative, for a return of the money paid thereunder. The learned trial judge refused specific performance and repayment of the deposit, but decreed repayment of the instalment of purchase money which had been paid under the agreement, amounting to $14,000.

On January 24th, 1907, the plaintiff entered into an agreement to purchase from the defendant certain unimproved lands in British Columbia for the sum of $58,950, payable as follows: $1,000 on the execution of the agreement; $14,000 on February 15th, 1907; $14,650 on October 1st, 1907, 1908, 1909.

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The agreement also contained the following provisions: [Already set out].

The deposit of $1,000 was paid and also the first instalment due February 15th, 1907, but the plaintiff did not pay the second or any subsequent instalments, and after notice, the defendant re-sold the lands at a profit.

The short point for us to decide is: Should the stipulation for forfeiture of payments made under the agreement, in case of default, be treated (as expressed to be) as liquidated damages or as a penalty against which the Court should relieve?

While under sub-section (7) of section 20 of the Supreme Court Act, the powers given to relieve against forfeiture are very wide, I apprehend that it does not in any way affect the principle upon which relief is granted.

The plaintiff relied upon *In re Dagenham (Thames) Dock Co.* (1873), 43 L.J., Ch. 261; *Barton* v. *The Capewell Continental Patents Company, Limited* (1893), 68 L.T.N.S. 857; *Cornwall* v. *Henson* (1900), 2 Ch. 298, and a number of cases in Alberta, Manitoba and Ontario, where the *Dagenham* and *Cornwall* cases have been followed or applied. In all cases of this kind, I think it is essential that we should get at the intention of the parties, and in this respect, practically each case must be decided on its own merits.

GALLIHER, J.A.

Turner, L.J. says in *Roberts* v. *Berry* (1853), 3 De G. M. & G. 284 at p. 291:

> "Time may be made to be of the essence of a contract, by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, shewing the intention of the parties that the contract was to be completed within the limited time."

In the case at bar, there is an express stipulation that time is to be of the essence of the contract; moreover, in addition to this, the nature of the property and the surrounding circumstances leave no doubt in my mind as to what the intention of the parties was.

Then the question arises, Are we to regard the provisions relating to forfeiture as in the nature of a penalty, or as an agreement between the parties?

Before referring to the cases, it seems to me important to

examine the history of the transaction, and the nature of the property being dealt with. From the evidence, there can be no doubt the property had a speculative value at the time of the purchase; that it was bought for the purpose of speculation and that the purchaser depended upon a re-sale of the property to enable him to complete. Bearing these facts in mind, let us examine the terms of the agreement. I have already set out the clauses in the agreement bearing on this point, and I find there that we have: First, forfeiture of all moneys paid on account of purchase price after default and notice given; second, a right to the vendor to re-sell and convey to any purchaser; third, in case of registration of agreement, a method provided by which such registration can be cancelled; fourth, a power of attorney from the purchaser to the vendor to enable him to effect such cancellation. In fact, a complete procedure is provided by which, in case of default under the agreement as specified, the vendor can get complete control over the property, not only for the purpose of re-sale, but to the extent of removing from the registry any charge created in favour of the purchaser. Now, can it be said that a provision, such as we have here and in the light of the whole agreement, shall be construed as a provision creating a penalty and not as a matter of agreement? I might answer this in the words of Wetmore, C.J., in *Steele* v. *McCarthy* (1908), 7 W.L.R. 902, where he says:

"I am quite at a loss to understand how the term 'penalty' can apply to a provision of the sort I am discussing."

Again, take property such as this bought for speculation, and where the purchaser, in order to complete his purchase, relies on making a re-sale (as is amply shown by the evidence here), it seems to me it would not be going too far to say (as evidencing the intention of the parties as to forfeiture) that each payment made was regarded as giving an extended time, a new lease of life, as it were, for a further period in which the purchaser might effect a sale and save the situation. I am, however, not dependent on this view in arriving at my conclusion. The nature of the property, the agreement, and the circumstances of this case, clearly, I think, distinguish it from such cases as *In re Dagenham (Thames) Dock Co.; Barton* v. *The Capewell*

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Continental Patents Company, Limited, and *Cornwall* v. *Henson, supra.*

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Cowan, Macdonald & Parkes.*

GRANT, CO. J.
1911
Feb. 18.

THE GILLIS SUPPLY COMPANY, LIMITED v. THE CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY. (No. 2).

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June 6.

GILLIS SUPPLY CO. v. CHICAGO, MILWAUKEE AND PUGET SOUND RY. CO.

Railway—Freight rates—Inquiry by intending shipper as to rate—Incorrect rate quoted by agent—Contract based on such rate—Damages, action for—Deceit—Negligence.

Plaintiff Company, a British Columbia concern, sought from the defendant Company's agent at Seattle, Wash., U. S. A., information as to the rate on plaster from a point in Kansas, and was given a certain figure per ton. There was some dispute as to whether the rate quoted was from Kansas to Seattle (according to defendant Company's contention) or to Vancouver, B.C. (according to plaintiff Company's contention), but a letter from an official of defendant Company confirming the quotation of a rate to Vancouver was put in evidence. There was no evidence that there had been any carelessness or recklessness shewn in giving the information.

Held, on appeal, reversing the finding of the trial judge, that an action of deceit did not lie in the circumstances.

Held, further, that there is no duty cast upon a common carrier to give correct verbal information as to rates.

Held, further, that to entitle plaintiff Company to succeed, the wrong complained of, having been committed in the State of Washington, must be shewn to be actionable in British Columbia as well.

Statement

APPEAL from the judgment of GRANT, Co. J. in favour of the plaintiff Company, in an action tried by him at Vancouver

on the 18th of February, 1911. The facts fully appear in the reasons for judgment of the trial judge.

D. A. McDonald, for plaintiff Company.
Armour, for defendant Company.

GRANT, Co. J.: This is an action to recover damages in deceit from the defendant Company for false information given by the defendant to the plaintiff Company as to the legal rate of freight on a shipment of Hardwall plaster from Blue Rapids, in the State of Kansas, to the City of Vancouver, B. C., via the line of railway of defendant Company and its connections, relying on which information and believing the same to be true, the plaintiff purchased at Blue Rapids, Kansas, a large quantity of plaster at a higher rate than he would otherwise have paid, and had same shipped by defendants' lines to Vancouver.

As to the facts involved, there is not much dispute. From the evidence, it appears the plaintiff Company had a letter from the manufacturers at Blue Rapids, Kansas, quoting the freight rate from there to Vancouver, B. C., at 35 cents per 100 pounds. The manager of the plaintiff Company went to Seattle and called upon one R. M. Boyd, the commercial agent of the defendant Company, to have said rate confirmed. Mr. Boyd says: "I turned him (*i.e.,* Gillis, plaintiffs' manager) over to Mr. Wehoskey, the contracting freight agent, to look the matter up with Wehoskey." Gillis next went to the office of F. D. Burroughs, assistant general freight agent of the defendant Company, to have the quotation fully confirmed. There is some conflict as to what took place, the officials of the defendant Company asserting that they showed the legal rates to Mr. Gillis, and that they were 35 cents per 100 pounds to Seattle, plus five cents arbitrary to Vancouver. This is flatly contradicted by Mr. Gillis, who says he examined no freight rates whatever, and that such a thing as five cents arbitrary to Vancouver was never mentioned to him; that the only rate mentioned was 35 cents per 100 pounds to Vancouver. In confirmation of Mr. Gillis a letter from the office of Boyd, dictated by Wehoskey to the plaintiff Company, dated October 25th, 1909, states:

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"As per the writer's promise to your Mr. Gillis on October 9th, I wrote you on the 10th, quoting you a rate of 35 cents per cwt. or $7 per ton, delivered at Vancouver, and said that we would arrange to hold cars at Seattle without any extra charge, to be forwarded to Vancouver or Victoria as you may need them. I trust this is the confirmation you desire."

Considering the circumstances of the case, and that the letter of the 10th of October was less likely to be mixed as to facts than the memory of the witnesses some sixteen months after, and that Mr. Gillis, who only has a few matters of this nature to transact, would be less likely to confuse the facts than the officials, who are apt to think that what they should have done was what they did do, I have found as a fact that the rate given by the defendant Company to Mr. Gillis at this time was 35 cents per 100 pounds delivered at Vancouver, and that nothing whatever was said of an arbitrary rate of five cents per 100 pounds to Vancouver. I also find that at this time the officials were aware of the fact that Gillis required the information as to the rate for the purpose of deciding upon whether or not he would purchase the plaster from the Blue Rapids people, and that having got this rate, he at once, in presence of the officials, wired for its shipment, as they admit the wire was at once sent from their office to ship 400 tons to the plaintiff Company by the Company's lines. I also find that at this time Gillis was not aware that the rate so given was less than the legal rate, but believed it to be the legal rate, and the officials, Boyd, Wehoskey and Burroughs, were the proper officials for Gillis to apply to for information as to the legal rate.

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It is very apparent, from the evidence of the officials of the defendant Company, that at the time Gillis called upon them they were in possession of the legal tariff and could easily have discovered what the current rate was had they been careful enough to have turned the rate up, but instead of doing this, they contented themselves with an alleged statement of fact which was untrue, with the full knowledge that Gillis was intending, on behalf of the plaintiff Company, to act on, and in their presence did act on it, to the advantage of the defendant Company, as it thereby became the carrier of the plaster from the place of shipment, Blue Rapids, Kansas, to Vancouver,

B. C., and to the damage of the plaintiff. The evidence shews that the price of the plaster was $2.50 on the cars at Blue Rapids. Add to this the freight as stated by the defendant Company, $7 per ton, and the cost to the plaintiff of $9.50 per ton in Vancouver, B. C.

In accordance with the order so wired, some 121 tons of plaster were shipped by the Blue Rapids people to the plaintiff Company over the defendants' lines, but on arrival at Vancouver, delivery to the plaintiff Company was refused without the payment of a freight rate of 40 cents per 100 pounds, or $8 per ton, on the ground that that was the correct legal rate. As a considerable portion of the plaster had been sold by the plaintiff to its customers by this time, and delivery thereof was then required by the customers, the plaintiff was obliged to pay, and did pay the defendant Company the freight thereon at the rate of 40 cents per cwt., or $8 per ton, instead of $7 per ton, which he was led to believe by the Company was all he would have to pay.

Among the witnesses called by the defendant was Mr. Korte, an attorney-at-law of the State of Washington, called as an expert on American law. From his evidence, it appears that under American law it is wrongful and unjustifiable for one person to make a misrepresentation of fact, intending that another person shall act thereupon, provided that the other person does so act and is thereby damnified. Under this evidence, an action of this nature would lie against the defendant Company in the State of Washington, where the false representations were made and acted upon, and following *Machado* v. *Fontes* (1897), 2 Q.B. 231, the action will lie in this case, provided there was a legal obligation cast on the Company to give the information required by the plaintiff Company's manager. That such a legal obligation does exist and an action of this nature will lie, was held by the unanimous decision of the Full Court of Alberta in *A. Urquhart Co.* v. *Canadian Pacific R. W. Co.* (1909), 11 W.L.R. 425, in a case almost identical with the one at bar.

While this decision is not binding on the Courts of this

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Province, it, in my judgment, correctly states the law as to the obligation of the defendant Company to give correct information as to freight rates and the liability in damages for misinformation by officials followed, as in this case, by damage. I have said the evidence shews the selling price was $2.50 per ton, and the rate as stated was $7 per ton, making $9.50 per ton in Vancouver. On these two charges the plaintiff sold to customers, the profit being the excess over $9.50, and when the plaintiff was forced, in order to protect itself and its customers, to pay $1 per ton additional to the freight, the profits on the venture were reduced to the extent of $1 per ton, or $121 on the shipment sent. The evidence of the manager of the plaintiff Company is that if the correct rate had been quoted to him by the defendants' officials, he would not have ordered for the plaintiff Company. It is not shewn, nor do I think it need be shewn, what the profits were expected to be. Business transactions are not entered upon as a pastime or for the good of one's health, but for the legitimate purpose of profit, and by the negligence or worse of the defendants' officials, where care and truthfulness were requisites in discharge of their legal duty, the plaintiff was misled and damnified to the extent at least of $121, and there will be judgment accordingly against the defendant for that amount and the costs of this action.

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The appeal was argued at Vancouver on the 11th and 12th of April, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Armour, for appellant (defendant) Company: If there is any wrong, the remedy is against the agent who made the representation. He cited *Texas & Pacific Railway* v. *Mugg* (1906), 202 U.S. 242; *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317 at p. 326; *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394. See also *Poulton* v. *London and South Western Railway Co.* (1867), L.R. 2 Q.B. 534; *Taylor* v. *Bowers* (1876), 1 Q.B.D. 291; *Begbie* v. *Phosphate Sewage Co.* (1875), L.R. 10 Q.B. 491, affirmed (1876), 1 Q.B.D. 679; *Alexander* v. *Heath* (1899), 8 B.C.

95; *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309, 8 Halsbury's Laws of England, 386. The judge below was misled by *A. Urquhart Co.* v. *Canadian Pacific R. W. Co.* (1909), 11 W.L.R. 425.

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D. A. McDonald, for respondent (plaintiff): There was a duty on the Company to quote us a true rate; they failed, and we have an action in tort. We abandoned any right under the contract, and sued for misrepresentation, because we concede that we cannot sue on the contract either here or in the United States. Even if this action would not lie in the United States for misrepresentation, still, the action of the agent being wrongful and unjustifiable in the United States, then there is a cause of action here, provided the action was wrongful here: see *Machado* v. *Fontes* (1897), 2 Q.B. 231. Under the *Urquhart* case, we are entitled to recover in this Court.

Argument

Armour, in reply.

Cur. adv. vult.

6th June, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The respondents' counsel conceded at the outset that the contract was void, and that the judgment could be sustained only on the ground of tort. It was contended by him that it was the duty of the appellants' officials to give correct information as to freight charges, and that, as in this case, incorrect and misleading information was given to the prejudice of the defendants, the Company is liable, on the case, either as for deceit or for a breach of duty. A mistake was made by the defendants' agent, but it was an honest mistake, arising from a misunderstanding as to the particular items of the tariff applicable to the contract which the parties attempted to enter into. In these circumstances, I am unable to see how an action for deceit can be supported. As I understand the law, the representation, in order to support such an action, must have been made with a knowledge of its falsity or in reckless disregard as to whether it was true or false. In this case it was made innocently and after the official had looked at the tariff, and I think it cannot be said that the representation was made by him without caring whether it was correct or otherwise.

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Then we come to the point most strongly pressed. It was argued for the respondents that there was a legal duty imposed both by statute and the common law upon the railway company to give to intending shippers correct quotations of its rates, and that a failure to perform this duty would entitle the plaintiff to an action for damages. The authority mainly relied upon in support of this contention was *A. Urquhart Co.* v. *Canadian Pacific R. W. Co.* (1909), 11 W.L.R. 425, a judgment of the Full Court of Alberta, in which the opinion is expressed that a railway company in Canada can be made liable on the principle above adverted to. It is said in that case that the law casts upon the railway company an obligation or duty to give correct information to intending shippers respecting the rates fixed by the board of railway commissioners, and which are the only legal rates which can be charged by the railway company, and that if an official or agent of the company innocently quotes a different rate to the prejudice of the shipper, the company thereupon becomes liable to an action for damages for a breach of such duty. Apart from statutory enactment, on what principle can it be said that the law imposes such a duty? The suggestion is that because a common carrier is bound to carry goods, it is under a legal obligation to give in advance information as to its rates. If this were so, then it must follow that a refusal to quote any rate would be a breach of that obligation, and an actionable wrong.

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Then, turning to the statute, we find the duties of the railway company in this respect clearly defined. It must deposit and keep on file in a convenient place, open to the inspection of the public during office hours, a copy of each of its tariffs, and must post notices at certain specified places, directing public attention to the places where such tariffs are kept for public inspection, and that the station agent or person in charge shall produce to any applicant any particular tariff which he may desire to inspect. These are the statutory requirements, and they declare just what information it is the legal duty of the railway company to furnish, and there is nothing imposing a duty on the railway company or its agents to give any other information than that above referred to. If, as contended, the law imposes a legal duty upon a rail-

way company to give correct verbal information through its agents, then any shipper can demand a verbal quotation of a rate, and if the agent declines to give it, there has been a breach of duty with a corresponding legal remedy to the shipper. If we can fix the railway company with such a duty, then it would perhaps be correct to say that the information to be given must be correct information, but unless the law imposes upon the company an obligation to give the information, then the giving of any information is purely gratuitous, and if given incorrectly but honestly, is not tortious. A case precisely similar to the one at bar, a decision of the Supreme Court of the United States, namely, *Texas & Pacific Railway* v. *Mugg* (1906), 202 U.S. 242, was decided against the respondents' contention. That case is commented on in the *Urquhart* case, where it is suggested that the Court overlooked the distinction between an action founded on an alleged breach of duty, as that was, and an action to replevy goods held for non-payment of freight, such as was *Gulf, Colorado, &c. Railway* v. *Hefley* (1895), 158 U.S. 98, the decision in which was accepted by the Supreme Court as conclusive. It is true that no reference was made to this distinction by Mr. Justice White, in delivering the opinion of the Court, but that may be because the Court considered that if an action would not lie to recover the goods held for the lawful freight charges which were higher than those agreed upon, then no action would lie, either for deceit in innocently quoting a wrong rate, or for breach of alleged duty to give correct information. If this case depended upon the law of the United States, the respondent would have against him a judgment of the Supreme Court on facts precisely similar to those of the case at bar.

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The plaintiff who brings his action here for an alleged wrong committed in the State of Washington, must prove that the Act complained of was wrongful in both countries, or wrongful there and not rightful here: see *Machado* v. *Fontes* (1897), 2 Q.B. 231. In my opinion he has failed, and the appeal should be allowed.

IRVING, J.A.: I agree that this appeal must be allowed for

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many reasons. The wrong, if wrong is the word to use, was not of such a character as it would have been actionable if committed in British Columbia. There was no fraud, nor infringement of a legal right.

I am not satisfied from the language used by the learned judge that the plaintiff has sustained any actual damage. I infer from what the judge says that no damage was actually proved, but that he felt at liberty to act upon the statement of the plaintiff, that if the correct rate had been quoted to him, he would not have ordered the goods. This statement is too vague to be acted upon. The action of deceit (if this can be regarded as an action of deceit) only lies where the plaintiff sustains damage by acting on the false statement: *Pontifex* v. *Bignold* (1841), 3 Man. & G. 63. But the facts here will not support an action for deceit. One of the conditions necessary to support an action for deceit is that the defendant either knows it to be untrue, or is recklessly and consciously ignorant whether it be true or not: see *Derry* v. *Peek* (1889), 14 App. Cas. 337, *per* Lord Herschell, at p. 374.

In *Derry* v. *Peek* (1887), 37 Ch. D. 541, the Court of Appeal was in favour of making a man responsible for his statements. Cotton, L.J. said at pp. 567-8:

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"When a man makes statements which he desires that others should act upon, especially when they are in a prospectus like the present, intended to be circulated among the public in order to induce them to take shares, in my opinion there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which, in fact, are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others. And although, in my opinion, it is not necessary that there should be what I should call fraud, yet, in these actions, according to my view of the law, there must be a departure from duty; and in my opinion, when a man makes an untrue statement with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have, to have true statements only made to them. And I should say that when a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is liable

civilly as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth."

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This seems a very proper standard, but the House of Lords thought it was not good law. They held that, according to English law, an inaccuracy of statement does not constitute a cause of action in the absence of a *mens rea.* Lord Bramwell put it this way: There must be a contract and breach, or fraud to found an action for damages.

In *Angus* v. *Clifford* (1891), 2 Ch. 463, Lindley, L.J. said at p. 469:

"An action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is, of course, fraud."

Low v. *Bouverie,* decided in the Court of Appeal, just after *Angus* v. *Clifford,* was a decision by the same Lord Justices, *viz.*: Lindley, Bowen and Kay (1891), 3 Ch. 82, and turned upon a mistake made by a trustee who had forgotten that Admiral Bouverie's interest in an estate had been already mortgaged. Low, relying on information given by the trustee, advanced money to the admiral, but discovered the true state of affairs later. He sued the trustee, who was held not liable because acting honestly he had not bound himself by a statement amounting to a warranty, nor was he bound by estoppel, nor was he guilty of any breach of duty to the plaintiff.

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The estoppel referred to in *Freeman* v. *Cooke* (1848), 2 Ex. 654 (see *Low* v. *Bouverie*, p. 93) does not prevent a corporation denying an *ultra vires* contract: *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (1887), 18 Q.B.D. 714. The contract being *ultra vires,* the Company is not bound either by contract or by estoppel.

The evidence shews that the defendants are not under any legal obligation to inform the plaintiffs what the rates are.

MARTIN, J.A.: I agree that the appeal should be allowed, because there is no duty at common law or by statute cast upon the common carrier to give correct information of his rates. While it is the duty of a common carrier to carry goods, yet it is no more his duty to quote his rates in advance than it is the

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duty of an innkeeper to quote his rates before discharging his duty at common law to take in travellers, if he has the accommodation and they have the means to pay.

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GALLIHER, J.A. concurred with MACDONALD, C.J.A.

Appeal allowed.

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Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Martin, Craig, Bourne & Hay.*

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HUSON *ET AL.* v. HADDINGTON ISLAND QUARRY CO., LIMITED, *ET AL.* (No. 2).

Practice—Appeal—Stay of proceedings pending appeal to Privy Council from Court of Appeal—Want of jurisdiction in Supreme Court to grant stay.

In an appeal to the Court of Appeal, judgment was given allowing the appeal with costs. Respondent having decided to appeal to the Judicial Committee of the Privy Council, took out a summons for an order granting a stay of proceedings pending such appeal, and MORRISON, J., to whom the application was made, granted the order. An appeal was taken from this order to the Court of Appeal on the ground, *inter alia,* that the judge had no jurisdiction to stay the execution of an order of the Court of Appeal.

Held, IRVING, J.A. dissenting, that a judge of the Supreme Court had no jurisdiction to order a stay of proceedings in the circumstances, and that the proper tribunal to apply to was the Court of Appeal.

Statement

APPEAL from an order made by MORRISON, J. at Chambers, staying proceedings on a judgment of the Court of Appeal pending an appeal to the Judicial Committee of the Privy Council.

The appeal was argued at Vancouver on the 4th of April, 1911, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Argument

Higgins, in support of the appeal: The application to stay proceedings should have been made to the Court of Appeal:

Order LVIII., rule 16; *The Khedive* (1879), 5 P.D. 1; *Hamill* v. *Lilley* (1887), 19 Q.B.D. 83. In any event, proceedings on a judgment should not be stayed as a rule; special grounds ought to be shewn. Unless the accounts are taken, it will be impossible to know what amount is due, or what is in dispute.

A. M. Whiteside, for respondent: We say that MORRISON, J. had jurisdiction to make the order, and properly exercised it: see *Taylor* v. *Mostyn* (1883), 25 Ch. D. 48; *Exchange and Hop Warehouses, Limited* v. *Association of Land Financiers* (1886), 34 Ch. D. 195.

Cur. adv. vult.

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MACDONALD, C.J.A.: This Court reversed the judgment of the trial judge in dismissing the plaintiffs' action, declared the plaintiffs entitled to redeem, directed that the usual accounts should be taken and reserved further directions and costs to be disposed of by the Court below. Subsequently, the plaintiffs obtained an order or certificate from a judge of that Court directing the registrar with respect to the taking of accounts. The defendants have applied to the Privy Council for, and have obtained leave to appeal from our judgment. They then applied for and obtained from a judge of the Court below a stay of proceedings in the taking of the accounts. From this order the plaintiffs appeal on the ground that a judge of the Supreme Court cannot stay proceedings merely because an appeal is pending to the Privy Council from the judgment of this Court.

The question is an important one of practice raised for the first time in this Province. There are two lines of decisions elsewhere, namely, those of the Supreme Court of Canada and of the Courts of Ontario on the one side, and those of the English Courts on the other. The Supreme Court of Canada and Ontario cases, however, are founded, in the one case upon section 58 of the Supreme Court Act, and in the other upon the Ontario rule 818, which are practically identical, and provide that the registrar of the appellate Court shall certify the judg-

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ment of that Court to the Court below, where it shall be entered, and that thereupon all subsequent proceedings shall be had and taken in the lower Court. It was decided that when this had been done the appellate Court no longer had jurisdiction over the case, because the statute and rule declare that all subsequent proceedings are to be taken in the lower Court.

The Act constituting this Court confers jurisdiction in terms very similar to those contained in the Judicature Act relating to the Court of Appeal in England. Neither there nor here is there any enactment similar to the ones above mentioned. This being so, I think we ought to ascertain and follow the practice in England governing the question now before us. In *The Khedive* (1879), 5 P.D. 1, the facts were very similar to those in the case at bar; the Court of Appeal reversed the judgment at the trial, and condemned the plaintiffs in damages, which were referred to the registrar to be assessed. An application was made to the Admiralty judge to suspend these proceedings pending an appeal to the House of Lords. Doubting his jurisdiction, he desired that the application should be made to the Court of Appeal, which was done, and there James, L.J., at p. 2 said:

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"This Court is the proper Court to which to apply to suspend any order which this Court has made. The order will be that on the plaintiffs' undertaking to present a petition of appeal to the House of Lords within a month, proceedings to assess damages be stayed pending the appeal."

It is quite obvious that these damages were being assessed in the Admiralty Court, and not by the registrar of the Court of Appeal, so that there, as here, the subsequent proceedings were to be carried on in the Court below. In *Hamill* v. *Lilley* (1887), 19 Q.B.D. 83, Lord Esher, M.R. delivering the judgment of the Court of Appeal, laid it down as a rule of practice that an application to stay execution pending an appeal to the House of Lords should be made solely to the Court of Appeal. In *The Ratata* (1897), P. 118, the Court of Appeal reversed the judgment at the trial dismissing the action, and held the plaintiff entitled to damages, which involved sending the case back for assessment. On an application to the Court subsequently, a stay was granted on terms. In *Meux's*

Brewery Company v. *City of London Electric Lighting Company* (1895), 2 Ch. 388, the Court of Appeal varied the judgment below, directing an inquiry as to damages occasioned by a nuisance by granting an injunction as well, but suspended its operation pending an appeal to the House of Lords. The defendants afterwards abandoned their appeal, and desiring a further suspension of the injunction in order to make alterations in their works, so as to abate the nuisance complained of, applied to Kekewich, J., who doubted his right to suspend the order, and application was then made to the Court of Appeal. The Court granted further suspension, but expressed the opinion that application had rightly been made to Kekewich, J. and might have been disposed of by him. At first sight, this case might seem in conflict with the other decisions of the Court of Appeal above referred to, but I think it is distinguishable. The appeal to the House of Lords being abandoned, the order of the Court of Appeal was being carried out in the lower Court. The further suspension of the injunction was in aid of these proceedings and not for a purpose foreign thereto.

It is suggested in this case that as the Supreme Court is again seised of the action, and is proceeding to carry out the directions contained in our decree, we have parted with control over the matter. The same argument would apply to the cases in England above referred to. Judgments of the Court of Appeal in England are enforced in the High Court, not because of any rule or enactment to that effect, but as a matter of practice, and in the absence of any rule or enactment here, the Supreme Court in like manner should carry our judgments into execution. There is here an additional reason, absent in England, for holding that this is the proper Court to stay proceedings pending an appeal to the Privy Council, to be found in the recent order of His Majesty in Council of the 23rd of January, 1911, which confers power and imposes a correlative duty upon this Court to stay the execution of our judgments or direct that they shall not be stayed in certain cases. It would be exceedingly inconvenient to have conflicting orders, as might arise in the absence of a settled practice on the point.

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I would allow the appeal.

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IRVING, J.A.: I would dismiss this appeal. The obvious intention of the order of the Court of Appeal was to refer the case back to the Supreme Court that the accounts might be taken. The registrar of that Court is not an officer of this Court, and there was no intention of directing the accounts to be taken in this Court. The solicitor for the appellant recognized that the matter was in the Supreme Court when he applied to a judge of that Court for directions on the summons to proceed under rule 795. If there had been any doubt as to the jurisdiction of the judge of the Supreme Court to deal with the case under the decree, it was waived by the application of the plaintiffs to the judge of the Supreme Court: see *H. Tolputt & Co., Limited* v. *Mole* (1910), W.N. 252, where the registrar of the County Court taxed his own bill of costs, and it was held that the plaintiff's application to a judge to review the taxation amounted to a waiver to the objection to jurisdiction.

This Court having allowed the appeal, and referred the case back for the accounts, had no further jurisdiction: compare *Peters* v. *Perras* (1909), 42 S.C.R. 361. The case was then back in the Supreme Court, and was not within rule 880 at all.

It was suggested on the argument before us that no application to the judge of the Supreme Court for directions was necessary, but a summons to proceed is always necessary: see Daniell's Chancery Practice, 17th Ed., 815.

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The argument that as the application was made to a judge at the suggestion or instigation of the registrar, and that therefore the appellant is not prevented from now saying that he should not have gone to the judge at all, is not entitled to any consideration. If the suggestion that such an application was necessary came from the registrar, the solicitor who adopted it cannot escape the consequences of making the application, even if the registrar was wrong: see the same principle, you cannot approbate and reprobate, in another form, in *Guilbault* v. *Brothier* (1904), 10 B.C. 449 at p. 461.

I agree with the conclusion reached during the argument that if the judge had jurisdiction, the order appealed from was

of a discretionary nature, and one which we should not set aside.

MARTIN, J.A.: It was admitted by the respondents' counsel that all he could rely upon in support of the jurisdiction of the learned judge appealed from, was the last clause in the order reserving "further directions and the costs of the action and of the reference hereby directed (to) be disposed of by a judge of the Supreme Court."

This language must be read with the prior direction to which it refers, whereby this Court ordered "the registrar of the Supreme Court to take the following accounts" (thereinafter specified).

This direction was to the registrar immediately, and it was argued that he could have proceeded to act upon it of his own motion, and therefore the order of the 1st of March, 1911, whereby he was again ordered by a judge of the Supreme Court to take the accounts, was superfluous, and may be disregarded; or at best it may be deemed to be an implementary order merely. The result is the same in either case, and for the purposes of this appeal it is unnecessary to decide the point, because even if the plaintiff did, of his own motion, apply to the judge below for directions, that could not be construed as a waiver of his right to later object that the judge was exceeding his jurisdiction by staying proceedings which it was his duty to expedite in due course as directed by a higher Court, and which he had no power to frustrate or arrest.

The point is that while, with the object of carrying out the said order of this Court (*viz.*, that the registrar should take these accounts), a judge below was empowered to give further directions, yet all such directions would necessarily be given with the intention of continuing the proceeding of taking the accounts, not of arresting it. For example, it might be that in the course of taking such accounts adjournments or postponements should be granted, yet they would be so granted to the intent and on the understanding that the taking of the accounts was, nevertheless, proceeding continuously step by step in due course of law and procedure towards the fulfilment of our

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decree, and therefore no objection could be taken to any direction of this nature given below. The case of *Shelfer* v. *City of London Electric Lighting Company* (1895), 2 Ch. 388, 64 L.J., Ch. 736, illustrates this principle and shews that the Court of Appeal was of the opinion that the Court below could properly even extend the time fixed by the Court of Appeal within which defendants had to obey an injunction granted by the Court of Appeal, because such action would be in compliance with the order of that Court, and not contrary to it. But the order complained of is of a totally different nature, contemplating the arrest of, and in fact arresting all the proceedings pending the determination of an appeal from this Court to a still higher tribunal. Such an order cannot, I think, on the language of our decree, be upheld because it is fundamentally opposed both to the letter and spirit thereof, however long or short might be its operation, and is in fact a frustration of it.

So far, I have dealt with the question upon the language of the order of this Court, but the same result would follow if the reference had been simply to the Court itself and not to the registrar. No objection was taken before us to this direction to that officer, but if it had been the action taken by the Court of Appeal in England in the case of *The Khedive* (1879), 5 P.D. 1, wherein the Court of Appeal set aside the judgment of the Admiralty Court and ordered the registrar of that Court to assess damages, shews that our direction is supported by authority.

MARTIN, J.A.

With respect to the practice that ought to prevail in this Province respecting the judgments of this Court, I am in entire accord with what has been said by the learned Chief Justice.

Appeal dismissed, Irving J.A. dissenting.

Solicitor for appellants: *F. Higgins.*

Solicitors for respondents: *W. J. Taylor and Harold Robertson.*

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Criminal law—Affirmation—Conditions precedent to—Duty of judge—Discretion—New trial—Criminal Code, Sec. 1,018.

At the trial the evidence on which the accused was convicted was given by a witness who was a Church of England minister, but not actively following his profession. On being offered the Bible to take the oath in the usual form, he said: "I affirm." No objection was made at the time, but on the cross-examination being reached, he was asked: "What is your objection in making an affirmation, then, instead of taking an oath on the Bible?" He answered: "I believe it is optional with the Court," and, "I consider that that is a private matter of my own discretion." To a statement that for private reasons he had retired from the diocese of British Columbia, he was asked: "Are those reasons that you do not believe in Christian doctrines?" He answered: "I appeal to the judge whether I have to reveal my private conscience to the gentleman." He was not asked whether he had conscientious scruples against the taking of an oath on the Scriptures. His appeal was sustained and the defence was not allowed to cross-examine witness on his religious belief. Two questions were reserved for the opinion of the Court of Appeal: (1) Could I consider the statements of the said William George Hollingworth Ellison as evidence, inasmuch as he did not state that his objection to taking an oath was on grounds of conscientious scruples? (2) Should I have allowed accused's counsel to cross-examine said witness on the question of his belief in Christian doctrines, and was the accused prejudiced in his defence by my refusal?

Held, on appeal, that a witness claiming the right to affirm instead of taking the oath must make it clear to the Court that he has conscientious scruples to the taking of an oath.

Per IRVING, J.A.: The facts in this case shewed that the witness in demanding to affirm, and refusing to take the book, really objected to being sworn.

APPEAL, by way of case stated, from the decision of LAMPMAN, Co. J., in a trial before him at Victoria on the 20th of March, 1911, under the speedy trials provisions of the Code.

Statement

The appeal was argued at Victoria on the 19th of June, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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Aikman, in support of the appeal: The oath was administered according to the form chosen by the witness and without examination as to that choice, and I submit I should not have been prevented from cross-examining him on the point. The witness is not entitled, as a matter of right, to affirm if he objects on conscientious scruples.

[MACDONALD, C.J.A.: It may have been the duty of the judge to ascertain if the witness had conscientious scruples to the taking of an oath; but that fact has not been ascertained; at any rate it does not appear here.]

It is on the person giving or offering evidence to shew that he objects on conscientious grounds to taking an oath. In any event I made the objection. The sole evidence of ownership of the property in question was given by this witness, and the question is, is it evidence at all, or the mere statement of a person coming into Court.

Argument

Maclean, K.C., for the Crown, *contra*: There can be no inquiry into a man's religious belief in the circumstances here. It is sufficient objection for him to state to the Court that he affirms. There has been sufficient objection by the witness.

[MACDONALD, C.J.A.: It was the duty of the trial judge to ascertain.]

As to that, there was no objection at the time. The matter has been gone into sufficiently to shew that the witness had conscientious scruples, and if he had, and the judge is satisfied, that is all that is necessary. The objection should have been taken on the *voire dire,* but the witness was allowed to proceed and give his evidence.

Aikman, in reply.

Cur. adv. vult.

28th August, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: A proper foundation was not laid to permit the witness Ellison to affirm. A witness who is called to the stand must take an oath unless he objects to do so on grounds of conscientious scruples. It is not sufficient that he should merely object to be sworn or express a preference to affirm. The objection must be based on the statutory ground,

and I am at a loss to see how a witness can establish his right to affirm except by an expressed, not a mental, objection, accompanied by a statement that the objection is upon grounds of conscientious scruples. If this be so then there is no real distinction in this respect between section 14 of the Canada Evidence Act and the section in the English Act in question in *Reg.* v. *William Moore and Alice Brooks* (1892), 17 Cox, C.C. 458, which on its facts is indistinguishable from the case at bar.

As to the second question I see no objection to the course pursued by the learned trial judge. Had it been made plain that counsel was endeavouring to ascertain from the witness whether or not he refused the oath on grounds of conscientious scruples he should have been permitted to go that far, but the object of counsel, as I gather it from his questions, was to discredit the witness on account of his religious belief or disbelief. I think a large discretion rests with the presiding judge to say how far counsel shall be permitted to pursue a line of questioning on collateral issues, and in this instance I think the discretion was, in the absence of any intimation that the questions were directed to ascertaining conscientious scruples and the right to affirm, properly exercised. I would answer both questions in the negative.

MACDONALD, C.J.A.

As the testimony of Mr. Ellison was not given under legal sanction, there has, in my opinion, been a mistrial and in exercise of the power given to the Court by section 1,018 of the Criminal Code a new trial should be directed.

IRVING, J.A.: I would answer the points reserved in favour of the Crown.

As to the first point: It seems to me that the witness did, in fact, object to being sworn on the Bible. His demand to give his evidence on affirmation, and his refusal to take the Book, amounted to an objection. The question then reduces itself to this, must the witness, in refusing, state the grounds on which his refusal is founded; or if the witness is allowed to affirm without stating his grounds, can his evidence be rejected later

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on? I think both questions should be answered in the negative. The English cases are on a different statute. There a duty is cast on the judge. Here a privilege is given to the witness who can claim it as of right, and, in my opinion, the object of drafting the Canadian statute in different language was to prevent an inquiry into a man's conscientious scruples.

The judge was quite right in stopping the examination.

MARTIN, J.A.

MARTIN, J.A. agreed that there should be a new trial.

GALLIHER, J.A.: I would answer the first question in the negative.

There is some difference in the wording of the Imperial Act under which *Reg.* v. *William Moore and Alice Brooks* (1892), 17 Cox, C.C. 458 was decided and the Canada Evidence Act, but I think it is clear that it must be made known to the Court by the witness that his reason for affirming instead of taking an oath is on the ground of conscientious scruples.

GALLIHER, J.A.

A witness merely stating that he "wants to affirm" is not sufficient. His reason might be different from that permitted by the statute, and it should be expressly stated and not left to inference what that reason is, otherwise, in my opinion, he makes no affirmation under the Act.

Personally I felt inclined to quash the conviction, but as my learned brothers the Chief Justice and MARTIN, J.A. think there should be a new trial, I do not dissent from their view.

New trial ordered, Irving, J.A. dissenting.

SWIFT *ET AL.* v. DAVID.

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SWIFT v. DAVID

Timber—What constitutes—Cruisers' estimates of contents of a timber area from a marketable point of view.

In an agreement for the transfer of certain stock of a lumber company, it was provided the vendor was "to give a satisfactory guarantee . . . that the quantity of *timber* on the different tracts of land, as shewn by the statement . . . . copy of which is attached hereto . . . . is true and accurate, it being the intention, and made one of the conditions of this trade that the *timber* shall at least run equal in quantity to the number of feet shewn in the attached statement." And that the "second parties are to have until September 1, 1907, to cruise and verify the figures . . . . regarding the quantity of *timber* on said various tracts, and in the event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented . . . . first party is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of *timber* estimated . . . . " And "in event second party fails to find the quantity of *timber* on said tracts . . . . ":—

Held, that the term "timber" as here used, was intended to include not merely that which was presently marketable at the time of entering into the agreement, but that future conditions, as to market, logging facilities and improved means of transportation should be taken into consideration in estimating the value of the tracts in question as timber areas.

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver in May and June, 1910. The facts are set out in the reasons for judgment.

Statement

Davis, K.C., and *Pugh*, for plaintiffs.
Bodwell, K.C., and *Reid, K.C.*, for defendant.

29th September, 1910.

CLEMENT, J.: The facts are set out in *Swift et al.* v. *David* (1910), 15 B.C. 70, the question there decided being, of course, not open before me.

The figures upon which my judgment is based are annexed hereto, but some explanation of them and of the general principles which I have laid down for myself in deciding this case is due to the parties.

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Under the circumstances here I construe "timber" as meaning what should be included by a cruiser sent out by an operating firm or company desirous of ascertaining their available raw material. The result of such a cruise could honestly be set down as an asset. The "timber" about which these parties were contracting was entered as an asset in the Company's books to the extent in feet and money set out in the statement of the 30th of April, 1907, attached to the agreement sued on. The proper point of view, therefore, in my opinion, is not that of the speculator in timber lands or the optimistic seller, but of the actual operator who looks to present conditions. Mr. Rankin, one of the plaintiffs' witnesses, put it fairly and correctly when he said: "I considered everything I could get on the market," and in another place, "a fair cutting estimate." Acting on this principle I have included "dead and down," as estimated by plaintiffs' cruisers, and have also in one instance allowed a large estimate of "shingle bolts," because I believe and find that the plaintiffs' cruisers have in the main cruised with intent to arrive at a correct estimate of what these plaintiffs could get on the market, and it appears that "dead and down" and "shingle bolts" may, to some extent, be profitably marketed. "Piles and poles" I have not considered. There is no evidence that they can be profitably marketed from these lands, and it is besides practically impossible to reduce any of the estimates on this head to board measure.

CLEMENT, J.

It will be seen by the annexed statement that I have rejected the estimates of defendant's cruisers. I do so mainly for the reason that the principle which I have adopted as correct was palpably ignored. Mr. Olts, one of the defendant's witnesses, testified that he cruised "everything there was on the ground" under a specific direction to that effect from Mr. Walker, who has charge of this litigation for the defendant. Olts "did not cruise it to see what about taking the timber out." In short, he and the other cruisers for defendant, cruised without regard to the two crucial tests, cost of logging and market price; in other words, without regard to present conditions. In saying so I do not wish to cast any reflection upon the

competence or honesty of defendant's cruisers. They acted, I think, under instructions, but the fact remains that they cruised in such a way that their results are of very little use to me in this case, however honestly their work for their employer was done. Then, again, they adopted a system of cross-verification, which in its result practically puts them all in the same boat, as shewing identity of aim and warrants the application of the Virgilian maxim as urged by Mr. *Davis, ex uno disce omnes.*

There is a good deal of uncertainty, too, as to the areas actually cruised by defendant's cruisers. They had not the data which plaintiffs' cruiser had. They cruised moreover on a 16-foot log basis, giving larger results, as is generally admitted, when, in fact, there is practically no such log in the British Columbia trade. I refer to these matters for fear it might be thought that I consider them of no importance. They are matters to be taken into account, but in view of the general system pursued, as above outlined, they do not bulk so large as they otherwise might.

In the result, therefore, my judgment as to the amount of "timber" upon the tracts in question here is based upon the estimates of the plaintiffs' cruisers. Recognizing that the onus is on the plaintiffs to satisfy me affirmatively that there is a certain shortage, I have had in view as to each tract the point where I could say: "I am satisfied that the timber on this tract does not exceed so much." It seems to me not unfair to debit the plaintiffs with their highest cruise in each case, and that is what I have done with something added to make good measure. In some few instances the figures appearing on the estimate sheets put in at the trial are modified by the evidence, but on the whole I have taken percentage deductions with a large grain of salt. I have not taken any account of differences in the scales which the various cruisers were in the habit of using—Doyle's, Scribner's, B.C., etc.—because I can find nothing sufficiently tangible in the evidence to warrant me in saying that the work of cruisers is appreciably affected thereby. In actual scaling of logs there is, of course, a difference, not

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very clearly brought out in evidence, but as the witnesses say, "cruising is a different proposition," and the small variations in the different scales "cut very little figure."

On the question of title, I debit the plaintiffs with the timber on the six disputed Provincial licences. The guarantee must be read as referring to the 50 licences mentioned in the statement of the 30th of April, 1907, and the defendant cannot, on this record, be held responsible for the action of the Company in regard to these licences after that date. As to other disputes in reference to the ground covered by the statement, I adopt the lists put in by the plaintiffs there being really nothing to contradict the evidence of Mr. R. J. McRae on this point.

I can find nothing in the evidence to warrant a finding that the plaintiffs at any time accepted the properties in dispute or any "cruise or other verification" of them, or any of them, as correct; or that they did anything to work an estoppel.

Nor can I accede to Mr. *Bodwell's* argument that the "just proportion," which defendant agreed to pay in case of a shortage, is to be arrived at by assuming without evidence that some assets of the Company were accepted as worth the figure set out in the statement, leaving the timber lands to be taken as acquired for 19 cents per thousand. With all respect for the learned counsel, I think the suggestion too fanciful for serious consideration. In my opinion the language of the guarantee shews with sufficient clearness that the defendant was to pay for any shortage upon the various classes the value per thousand respectively specified in the statement. How one would arrive at a "just proportion" if one or more of the classes had overrun the estimate does not arise here on the facts, for there was, I find, a shortage to at least the amount mentioned in the annexed statement in respect of each and every of the specific classes, [which was set out in detail].

CLEMENT, J.

The plaintiffs are entitled to judgment for $171,500 with costs.

The appeal was argued at Vancouver on the 25th, 26th and 27th of April, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bodwell, K.C., for appellant (defendant).
Davis, K.C., and *Pugh*, for respondents (plaintiffs).

Cur. adv. vult.

6th June, 1911.

MACDONALD, C.J.A.: The defendant agreed to guarantee that the "timber" in question "shall at least run equal in quantity to the number of feet shewn in the attached statement," and that "in the event of all the tracts from a cruising or other verification failing to reach the quantity represented in the attached statement," the defendant would pay for the shortage. The plaintiffs sued on this guarantee and attempted to prove the shortage by the evidence of a number of timber cruisers, as they are called in the trade, who had estimated the quantity on the various tracts. The learned trial judge accepted these estimates as substantially correct, found a shortage of upwards of 277,000,000 feet, and gave judgment for $171,500. The defendant's witnesses estimated the timber on these tracts at upwards of 500,000,000 feet in excess of the quantity guaranteed. The learned judge has stated that in his opinion the witnesses on both sides were honestly endeavouring to give proper estimates. The enormous discrepancy between them is, I believe to be accounted for by their different interpretation of the term "timber" as used in the contract. If I come to the conclusion that the plaintiffs' witnesses made their estimate on a right understanding of that term, then I think the judgment below ought to be sustained; but if, on the contrary, these witnesses have excluded from their estimates timber which would properly fall within said term on a right construction thereof, then the plaintiffs' case fails. The onus was upon the plaintiffs to prove a definite shortage, as definite as could reasonably be proven by the only means which I think were in contemplation of the parties, namely, by estimates to be made of the timber in the forests standing or down, by timber cruisers. The quantity, reduced to board measure, was to be ascertained in that way, and not by actual measurement of each tree. The only question then is, did the plaintiffs' cruisers include all the trees or wood

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they should have included in their estimates. If they did not, then, in my opinion, the plaintiffs must fail, as in that case there is no evidence of shortage, and the plaintiffs having rested on their interpretation of the agreement, or on that of their witnesses, must take the consequences.

The plaintiffs, who had professional assistance in the drawing up of the written agreement, while the defendant had none, and who neglected to define what the term timber was meant to include, now contend, if I have not misunderstood Mr. *Davis* in his argument before us, that the only timber to be included in the estimates was such as could, under conditions which existed at the date of the contract, be manufactured at a mill into merchantable lumber, saleable at a profit, and if I do not misapprehend the reasoning of the learned trial judge, he has adopted practically the same interpretation. The crucial tests applied by him were "a fair cutting estimate," and cost of logging and market price under present conditions.

The plaintiffs' cruisers proceeded each in his own way to estimate the timber on the particular tract or tracts to which he was assigned, and followed his own bent as to what ought or ought not to be included under the term "timber." The result is illustrated by comparing the evidence of several of the plaintiffs' cruisers. Rankin included in his estimate only such timber as could be put on the market, which I take to mean in the shape of sawlogs and under present conditions, and excluded what he considered inaccessible at present prices. Easton made deductions for timber which he considered defective in quality; Faulkner excluded trees fit for the manufacture of telephone and telegraph poles, and piling. This witness made a preliminary cruise before litigation commenced, and found in one section 6,600,000 feet; but in his final cruise for the purpose of this litigation, 3,150,000 feet only. It is only fair to say that a preliminary cruise is not intended to be as accurate as a final one, but still the discrepancy is out of all reason. This cruiser in another section found 800,000 feet, while McRae, another of the plaintiffs' cruisers, found in the same section 1,520,000 feet. McRae deducts a percentage for what he considers inac-

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cessible timber. Hooker estimates only what he thinks is fit to cut, which I take it means for sawlogs. Gilkey makes deductions for breakage, and other non-merchantable timber. The deduction for breakage was because the witness thought that in felling the trees a considerable number of them would break owing to the roughness of the ground, as if the timber was to be delivered in logs at the mill and was not to be estimated as standing upon the land. Hamer estimated on the basis of what he thought would be taken off the land at the present time; Sheehan, what a man could log and get back his money for. This witness also makes deductions for breakage. McLarty took all that could be profitably logged at the present time; and Myers, who was a logger, estimated the fir which he thought fit to cut, the cedar, and some of the hemlock; discriminating against hemlock because at that particular time hemlock was not in demand. It is apparent that he estimated the timber in the manner in which it would be estimated by a logger who cuts the merchantable logs for sale to millmen and has no further interest in anything left. Some of these witnesses estimated poles and piling separately; others did not include that class of timber at all. None of them included what was fit for railroad ties and cordwood.

An attempt was made on behalf of the plaintiffs to shew that the term "timber" had a trade meaning, or a local customary meaning such as was placed upon it in this litigation by the plaintiffs. The want of unanimity amongst the witnesses above referred to would tend to destroy this theory; but even the witnesses relied upon by the plaintiffs to prove such trade or customary meaning specially, completely failed to do so.

Alexander, an experienced lumber man, who has carried on business in this Province on a very large scale, said: "I might buy timber that would not be worth getting out at that particular date, but at some"—(here he was interrupted). This witness further said that he had timber which he could not get out at present prices, yet he called it timber. He said that poles and piling are not timber in a milling sense, but that they have a value in a business sense, as also has cordwood; that he had

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limits which had been logged over, the licences for which were still being kept alive by the payment of fees because he expected to go back for the balance of the timber which was not merchantable to-day. Patterson, another witness, said that piling and poles have a value, and that trees fit for the making of skidways would strictly be considered timber, but he would not want it estimated in a cruise if he were buying. Parkes, another witness, would discount hemlock because not much in demand at the present time. All this is matter of individual opinion and not of what is generally understood.

An effort was made to put in evidence certain declarations stated to have been made by the defendant to the plaintiffs at the time the contract was entered into. The witness McRae, one of the plaintiffs, was asked by Mr. *Davis*:

"You were going to tell me what Mr. David told you was the usual thing in the lumber business in British Columbia? He said that in his guarantees—'that he would guarantee his statement of April 30th, 1907' (the statement in question) 'that the timber generally in that statement would cut out that many feet in logs as they were operating at that time in B. C."

And again:

"He said 'that the minimum log they were taking out was 16 inches at that time.' "

And it is also stated, in this evidence, that defendant "talked always of green standing timber." The evidence was admitted subject to objection, and with deference I think erroneously admitted. It was an attempt to add to the written agreement. Mr. *Davis* further contended that this was a sale of a going business, and that millmen, such as were the parties to this transaction, would have in contemplation when using the term "timber" a meaning restricted to the purpose to which the timber was to be put, and that that purpose was the manufacture of lumber to be sold at a profit under the conditions and at the prices then existing, and hence that everything not presently fit for the purpose was not intended to be included by them in the indefinite term "timber." This contention to my mind narrows down the meaning of the term to an extent not justified by the circumstances under which the contract was made. Why should we infer that the purchasers were men of one idea only; that they did not care for any profits other than

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those which would flow from the manufacture of lumber; that they were not alive to everything which gives a value to timber limits, whether capable of being sawn into lumber or not; and whether capable of being utilized at the present moment and under present conditions or not. I think they had in contemplation everything which would be present to the minds of holders of timber rights which would give either a present or prospective value to the timber; the fact that forests are being rapidly exhausted, that prices of their products are increasing, and are likely to increase very greatly in the future; that the increased demand will bring into the market the classes of lumber and of other products of the forests which are now not considered marketable, in other words, inferior in grade to that which now readily finds a market. The parties may also well have had in mind the increasing facilities to be provided by railways now in the course of construction, or in contemplation, which will make accessible, or help to make accessible tracts of timber which are at present inaccessible. True, the plaintiffs' principal object was the manufacture of lumber, but that does not exclude their contemplation of all the incidental profits and advantages to be derived from their timber holdings, advantages which may not all accrue at the present time, but may well accrue during the period over which in the ordinary course of business the operations of the plaintiffs will extend. The defendant provided for the future as well as for the present when he acquired the limits in question, and the advantages which would accrue from such ownership passed to the plaintiffs under the terms of the agreement.

There is another phase of the matter not unworthy of notice. The timber was valued in the inventory at from 50 cents to $1 a thousand. It is clear from the evidence that some of it was worth a great deal more than $1 a thousand standing in the tree. It is too much to assume that the parties here ignored the fact that all limits contain good, bad and indifferent timber. While a certain proportion of the timber on these tracts was of little or no value, another proportion was of a value beyond that specified in the inventory. The plaintiffs virtually claim

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the benefit of getting the high class timber, and that they should be paid by defendant as for a shortage figured out by rejecting the poorer class, or that which at the moment could not be manufactured into a saleable product. The evidence of the plaintiffs' witnesses shews that milling companies may and do take off part of the timber for present purposes, and hold the balance either for the future use of themselves, or to dispose of to others for the manufacture of poles, railroad ties, piling, cordwood, or anything else fit for the market. According to plaintiffs' contention this marketable commodity is not an asset, and it was excluded in the estimates of the plaintiffs' cruisers.

Another point which may be noticed is that under the legislation of this Province the term timber includes not only sawlogs, but poles, piling, railroad ties and cordwood, and I think some other classes. The timber these parties were dealing with was held under licence, lease or grant from the Crown, subject to a royalty upon the different classes of timber mentioned above, when cut and, with the exception of one or two of the classes, reduced to board measure. This is the "timber" that is bought and sold in a business way constantly, and I find no circumstances in this case which would lead me to the conclusion that the parties dealing with respect to timber held under such licence, lease or grant, intended a more restricted meaning to be placed upon the term "timber" in the contract than it bears generally in connection with the acquisition or sale of timber lands generally.

MACDONALD, C.J.A.

I think the appeal should be allowed and the action dismissed with costs.

IRVING, J.A.: In my opinion the learned trial judge proceeded on a wrong principle in accepting the estimate of the plaintiffs' witnesses, and in taking the view of the actual operator who only looks at the present conditions as to cost of logging and market price.

IRVING, J.A.

The defendant did not agree to any such stipulations in favour of the purchaser, and I do not see why we should now read them into the contract.

In making selection of timber areas the ability to supply immediate demand at a profit cannot be the only guide. Prices will change, facilities for logging will improve; what to-day is regarded as inaccessible may next week be easily brought to the mill. Their promise was that the "timber on the ground" should be at least equal in quantity to the number of feet shewn in the statement. In other words, the contract may fairly be read as if the plaintiffs said "we are willing to abide by your views as to suitability of timber areas and to accept your selection of limits, provided those limits contain the timber you say they do." As the defendant had, or was supposed to have, opportunities to make good selections, there is nothing unreasonable in this view when we consider the plaintiffs were taking over the whole concern.

IRVING, J.A.

In reaching an estimate I do not see why the 16-foot basis is to be rejected. The competition in business will force timber men in this Province to figure more closely than in the past, and as there was no standard agreed upon, other than a reasonable standard, I do not think we should now read into the contract any words not agreed to. Poles and piles, I am inclined to think, were properly rejected, but it is a doubtful point. On the whole I think the evidence establishes that the timber was on the area as scheduled in the statement—perhaps I had better say I am not satisfied that there was a shortage.

I would allow the appeal and dismiss the action.

GALLIHER, J.A.

GALLIHER, J.A.: In this case the learned trial judge has adopted the standard of cruising carried out by the plaintiffs' witnesses, and rejected the defendant's cruise entirely. The action is based upon a guarantee contained in an agreement and turns largely upon the interpretation of paragraph 3 of that agreement.

The onus is upon the plaintiffs to shew that there is a deficiency in the quantity of timber on the limits as guaranteed by the defendant, and this is sought to be established by the evidence of a number of timber cruisers and other witnesses as to what should be regarded as timber within the meaning of a contract such as the one before us.

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The plaintiffs' cruisers based their estimate upon what could be logged off and put upon the market at that time at a profit, and that is the standard adopted by the learned trial judge. Had these cruisers made an estimate of all the timber over a certain diameter at the top, and then specified what amount was rejected by them, and their reasons for such rejection, we would have something to guide us, but instead almost all of them went upon the limits decided in their own mind what should be counted, and made a return of that only; in fact, constituted themselves arbitrators.

To illustrate: supposing a cruiser had gone on to a certain area and reported that there were, say, 100,000,000 feet of timber, but that 35,000,000 feet of that should be deducted, and give his reasons therefor, the Court would have something definite to go upon, but instead, he simply returns so much which he himself has decided comes up to his standard, and disregards the rest. It does not seem to me that the plaintiffs should succeed on such evidence.

Moreover, I do not agree with the construction put upon the word 'timber" by the learned trial judge. As applied to the circumstances here, I think it is too restricted.

IRVING, J.A.

A mill owner with a large plant carrying on extensive lumbering operations has in view not only the procuring of timber areas for their present requirements, but for a considerable period in the future, and to say that no timber should be included under a guarantee such as is here given except such as could be presently cut and placed upon the market at a profit is, to my mind giving to the word "timber" a meaning that was not in the contemplation of either party to the contract, and does not fit the circumstances of this case.

It may be, on the other hand, that the defendant is giving to the word a too extended meaning, but in the view I take of the case that need not enter into our consideration, for the judgment must stand or fall upon the evidence of the plaintiffs' own witnesses, and if that judgment is based, as I think it is, upon erroneous premises, it cannot stand.

I would allow the appeal with costs.

Appeal Allowed.

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

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

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REX v. FERGUSON.

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REX v. FERGUSON

Criminal law—Certiorari—Writ of—Recognizance by party applying for —When to be ordered—Crown Office Rule (Criminal) 36.

It is too early, on an application for a writ of *certiorari*, to order the party applying to give the recognizances provided for by Crown Office Rule 36.

APPEAL from an order made by MORRISON, J. at Victoria on the 7th of March, 1911, on an application for a writ of *certiorari*. On the application, *Maclean, K.C.*, for the Crown, took the preliminary objection that the recognizances required by the Crown Office Rules had not been entered into, and MORRISON, J. upheld the objection and dismissed the application. Accused appealed, and the appeal was argued at Victoria on the 12th of June, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Statement

Fulton, K.C., in support of the appeal: The preliminary objection on which the application was dismissed was premature. It was taken under rule 36 of the Crown Office Rules, which provides that no writ of *certiorari* shall be allowed unless the party prosecuting such *certiorari* shall, before the allowance thereof, enter into a recognizance, etc. This recognizance could not be granted in the present case as no writ of *certiorari*

Argument

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had been granted: it was merely being applied for. He referred to *Rex* v. *The Inhabitants of Abergele* (1836), 5 A. & E. 795; *Reg.* v. *Cluff* (1882), 46 U.C.Q.B. 565.

Maclean, K.C., contra: It has always been the practice to get the recognizance.

Judgment

Per curiam: The appeal should be allowed. No matter what the local practice may be, or may have been, an accused person has the undoubted right to have his case tried and dealt with according to the strict law and the reported decisions thereon.

Order set aside.

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Malicious prosecution—Reasonable and probable cause—Honest belief—Malice—Indirect motive—Reasonable care to ascertain facts—Motive—Non-suit.

Plaintiff was employed, in Vancouver, to proceed to the defendant Company's logging camp and work there as an engineer. He was given a pass, was also supplied with his meals on the journey. He arrived on Saturday, and before going to work on Monday morning he obtained a pair of working gloves at the Company's store. He worked for a few hours, had his dinner and left the camp without any explanation. The cost of transportation, meals and gloves were to have been deducted from his wages. The Company's manager having been advised of the facts, consulted the Company's solicitor, on whose advice an information was laid charging plaintiff with obtaining credit and goods under false pretenses, and plaintiff was arrested, tried and convicted, but afterwards released on the order of a judge. Plaintiff then brought action against defendant Company for malicious prosecution, and a jury found (1) that defendant Company had not taken reasonable care to ascertain the facts; (2) that they honestly believed the case laid before the magistrate; (3) that they were actuated by malice. Damages $500.

Held (GALLIHER, J.A. dissenting), that the plaintiff should have been nonsuited, as there was no ground for the first finding; that there was not absence of reasonable and probable cause, and no malice had been shewn. The appeal was therefore allowed.

Statement

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in a trial at Vancouver on the 14th of May, 1910. The facts shortly appear in the headnote.

The appeal was argued at Victoria on the 17th of January, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Bodwell, K.C., and *Reid, K.C.,* for appellant (defendant) Company: We say plaintiff did wrong in leaving our employment about an hour or so after entering it, when we had gone to some expense and trouble in securing his services. The fore-

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man of the camp, who had known of this course of conduct on the part of certain men getting transportation and other advances, took the advice of a solicitor, and acted upon that advice. Such conduct certainly did not shew any malice. We say the jury were wrong in giving the answers they did: see *Brown* v. *Hawkes* (1891), 2 Q.B. 718; *Longdon* v. *Bilsky* (1910), 22 O.L.R. 4.

Argument

J. A. Russell, for respondent: There was no possibility of the charge as laid being sustained; the obtaining of the goods was not on the representation of a past fact, but on the strength of a promise that plaintiff would do something in the future; that eliminates the elements of an offence being committed. There was a representation made to plaintiff that there were no Chinese employed on the works and when plaintiff arrived he found a Chinaman working there. *Brown* v. *Hawkes, supra,* is distinguishable. We have the verdict of the jury that the defendants did not make reasonable enquiries before commencing the action, and also that there was malice.

[MACDONALD, C.J.A.: Surely, when a Company has been victimized from time to time, it does not shew malice or a corrupt motive on their part if they endeavour to stop such proceedings by making an example.]

It was not with the sole intention of putting the criminal law into operation that these proceedings were taken, but it was with a view to putting a stop to the practice complained of.

[MACDONALD, C.J.A.: The foreman first went to a solicitor for advice as to whether a criminal act had been committed, and having found that there had, he laid this charge.]

Bodwell, in reply.

Cur. adv. vult.

6th June, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action was for malicious prosecution, and the jury found that the defendants had not taken reasonable care to inform themselves of the facts of the case; that they honestly believed the case which they laid before the magistrate; and that they were actuated by malice. The jury awarded the plaintiff $500 damages. On this verdict judgment

was entered for the plaintiff. The appellants argued that the learned trial judge should have decided that there was not an absence of reasonable and probable cause, and should have dismissed the action without submitting it to the jury. I agree with this contention. The case is almost identical with *Brown* v. *Hawkes* (1891), 2 Q.B. 718. The findings of the jury are exactly identical. In this case there appears to be no dispute concerning the truth of the circumstances upon which the defendant Jeremiason acted when he submitted the facts to defendants' solicitor and to the magistrate. The undisputed evidence, and it was largely obtained from the plaintiff himself, is that he engaged with the defendant Company at Vancouver to go to the Company's logging camp near Union Bay to work for the Company as an engineer. That on the strength of this engagement the Company gave him a pass to the camp, the value of which was to be deducted from his wages. That he was also supplied with meals on his way to and at the camp, where he arrived on Saturday or Sunday; that on Monday morning, before going to work, he bought a pair of gloves from Jeremiason, the Company's manager, the price of which was to be deducted from his wages; that he worked, as he claims himself, for four and a half hours, returned to the camp, and had dinner, and then left without the knowledge either of the manager or the foreman, taking the gloves with him, and making no explanation of his sudden departure. Jeremiason had been advised by letter of the engagement at Vancouver of the plaintiff; knew of his coming on the pass; knew of his being furnished with meals, and with the gloves; he knew that the plaintiff had disappeared without notice, and with this knowledge he went first to the Company's solicitor for advice, and then he and the solicitor went to the magistrate, and upon laying the facts before the magistrate an information was drawn up charging the plaintiff with obtaining credit under false pretences, and this was sworn to by Jeremiason, and on it a warrant was issued, plaintiff was arrested, tried before the magistrate and convicted, but was afterwards discharged by a judge. The jury found that the defendants had not taken reasonable care to ascertain

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MACDONALD, C.J.A.

the facts. There appears to me to be no ground for such a finding, nor was there any necessity for leaving that question to the jury in the circumstances above recited. The excuse which plaintiff gave at the trial for leaving in the manner he did was that the defendants' secretary at Vancouver represented that no Chinamen were employed at this camp, and that as he found Chinamen employed there he left. He made no complaint to the manager or foreman in this regard. This is the only circumstance which, in my reading of the evidence, can be said to have been unknown to Jeremiason when he laid the case before the solicitor and the magistrate. But this alleged representation was not disputed, and therefore it was unnecessary to submit any question to the jury as to the truth or otherwise of the circumstances which go to prove or disprove the absence of reasonable and probable cause. If, as I think is the case here, there was not absence of reasonable and probable cause, then the action was unsustainable, and the fact of malice was immaterial, though I must say I can find no evidence of malice.

I think the appeal should be allowed and the action dismissed with costs here and below.

IRVING, J.A.

IRVING, J.A.: The information is based on the following facts, that the plaintiff had obtained a pass from the defendants from Vancouver to Union Bay, where he had agreed to work for the defendants; that he also obtained from the defendants a lodging from Saturday night until Monday morning and three meals during that time; that on Monday, before going to work, he obtained from the defendants' storekeeper, on representing that he was going to work, a pair of gloves; and that after working a few hours, he left his work without notifying the foreman and returned to camp, had another meal, and then, without notifying anybody, left the camp for good. These facts were not disputed.

The defendants' foreman, after the plaintiff's departure, consulted a solicitor, and he advised him that criminal proceedings would lie. The plaintiff was thereupon arrested on a charge of falsely and fraudulently obtaining credit for his fare, meals and

gloves, by falsely and fraudulently representing that he would forthwith engage in daily work for the defendants. The foreman, who obtained the opinion of counsel, being at Union Bay, could not know as a fact what had occurred at Vancouver, *i.e.*, that the plaintiff had there promised to work for defendants, or that he had there actually received a pass, and it was pressed upon us that he had not made a full and fair disclosure of all the facts, and that, therefore, the advice of the solicitor was no defence to the action.

I do not think this argument is sound. It is sufficient if he was in possession of evidence, hearsay or otherwise, which would constitute a *prima facie* case of the crime charged.

The foreman, knowing the practice of the Vancouver office, made certain statements to the solicitor as to what took place in Vancouver. The plaintiff, who went into the box as a witness, proved that the information given to the solicitor was correct. It does not follow that because it would be reasonable to make further inquiry, it is not reasonable to act without doing so: *Perryman* v. *Lister* (1868), L.R. 3 Ex. 197, *per* Bramwell, B., and, again, in the House of Lords, in the same case, L.R. 4 H.L. 521, Lord Colonsay, at p. 542, says:

"This is not essential, though it might have been a very good and cautious thing to do. In such cases men make more or less previous investigation, according to their dispositions; but it does not follow that it is necessary to make the utmost investigation that can be made. If a reasonable amount of credible information has been received, that appears to me to be all that is required."

IRVING, J.A.

Mr. *Russell* urged that to entitle a defence of this kind to weight, the advice should be given by an independent solicitor, one wholly unconnected with the defendants. There is no authority for such a proposition, and it seems to me impractical, until some paternal government establishes a bureau for that purpose.

I do not think this was a case in which it was necessary for the judge to refer the first of the two questions touching reasonable and probable cause to the jury, because there was no dispute with reference to the facts on that point. There might be a difficulty in deciding whether, from the facts established, the

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proper inference was whether he had or had not taken due care, but that was for the judge: see *Brown* v. *Hawkes* (1891), 2 Q.B. 718 at p. 726; and *Archibald* v. *McLaren* (1892), 21 S.C.R. 588, *per* Strong, C.J. at p. 589, and Gwynne, J. at p. 595. There is an old case, *Davis* v. *Hardy* (1827), 6 B. & C. 225, where it is held that the judge may act on unimpeached testimony, without leaving its credit to the jury.

Nor should the second question have been submitted to the jury, as there was no evidence fit to submit to them, that is, none upon which they could find there was an absence of honest belief. The answer they gave, however, is correct, and so I need not refer to the matter except for the purpose of calling attention to the fact that in applying *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 440; (1886), 11 App. Cas. 247, regard must be had to the fact that in that case the evidence on which the defendants acted in prosecuting Dr. Abrath was the testimony of persons of bad character, and their evidence if true established that they were accomplices with the plaintiff in the conspiracy. Cave, J., whose judgment in *Brown* v. *Hawkes, supra,* has been styled by Lord Justice Bowen as an admirable exposition of the law, says, at p. 721, that:

IRVING, J.A.

> "If such a question is to be put in every case, the result will be to transfer the decision of the question of what is reasonable and probable cause from the judge to the jury, except when the judge holds that there is an absence of such cause. If wherever the judge is of opinion that there is a *prima facie* case of reasonable and probable cause, he is still bound to ask the jury whether the defendant took reasonable care to inform himself of the whole of the facts, the result will be that the jury will always be able to overrule the view of the judge by finding that the defendant did not take such reasonable care."

Returning to the first question. If we read the sworn information and reach the conclusion, as the jury did, that the defendants honestly believed in it at the time they laid it, how is it possible to draw any inference unfavourable to the defendants on the ground that the knowledge they had was only knowledge of the practice and not personal knowledge? The knowledge that the man was sent up on a pass existed in the foreman's mind. He stated it in the information. The jury have found that he did believe in it. The plaintiff has acknowledged that

the usual practice was followed out in his case. I would therefore come to the conclusion that the answer to the first question is not justified by the facts.

Mr. *Bodwell* asked us to permit an amendment to be made to the notes furnished by the official stenographer. He informs us that Mr. *Reid,* who appeared for the defendants at the trial, asked the learned trial judge to charge the jury in a certain way, but that the judge refused to alter his charge.

Application should have been made to the trial judge to correct the mistake, if mistake there was. We therefore refused the application.

MARTIN, J.A.: This case cannot be distinguished from that of *Brown* v. *Hawkes* (1891), 2 Q.B. 718, unless there is some evidence of indirect, meaning by that sinister, motive (as Lord Justice Kay uses the term in *Brown* v. *Hawkes*) on which the jury could reasonably find that the defendants were actuated by malice. The defendant Jeremiason says his object was to put a stop to the practice of men engaging themselves in town, getting a pass there, and going up to the camp and then going away without working. But that would be a perfectly proper object to have in view in a proper case; that is, if he thought an employee was swindling the Company he would be justified in trying to put a stop to the practice in general by proceeding against the employee in particular; the motive is none the less direct because its results are far-reaching against would-be offenders of the same class, who would naturally be expected to take warning by the example made of one of their number. The fact, indeed, that Jeremiason treated the matter in this impersonal way, tends to negative malice. His motive obviously was a dual one—the punishment of the plaintiff as a concrete example of an offender against the laws, and the consequent prevention of the continuance of the same offence in the abstract. But the duality of a motive does not make it indirect. There may be concurrent direct motives just as there may be a single indirect one. An example of a dual indirect motive would be the prosecution of an offender of a certain class for the purpose of deterring offenders of a different class. The concurrent

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motives must be restricted to the same subject matter, or they will become indirect—*i.e.*, sinister. The case, therefore, is to my mind brought exactly within *Brown* v. *Hawkes, supra,* as there is no evidence of indirect motive, in the true sense, to go to the jury. Such being my view, there is no need to consider the second question as to how far, if at all, the defendants could have sheltered themselves from the charge of malice by referring the matter to their solicitor, not counsel, in the way they did.

The appeal should be allowed, and the action dismissed.

GALLIHER, J.A.: The case is one for damages for malicious prosecution, and was tried before MORRISON, J. with a jury. At the close of the plaintiff's case, Mr. *Reid* moved for a non-suit, which was refused, and the case going to the jury, a verdict for $500 was rendered and judgment entered accordingly. From this the defendants appeal.

Three questions were left to the jury: [Already set out].

The defendants urge that under the authority of *Brown* v. *Hawkes* (1891), 2 Q.B. 718, the jury having answered the question of honest belief of the defendants in the affirmative, had negatived any inference which depended solely on such evidence, and in the absence of any other evidence of indirect motive, the finding of the jury that the defendants were actuated by malice could not be supported.

GALLIHER, J.A.

If the case at bar is on all fours with this, I would allow the appeal.

I am satisfied from the evidence that the plaintiff *bona fide* engaged to work for the defendants, and went to their camp with the full intention of so doing. It is absurd to suppose that a man would go many miles up the coast from Vancouver into a lumber camp in the woods for a free passage and a few meals. When he arrived there the engine with which he was to work was found to be out of order, and after spending some hours trying to fix it up, he quit work and left without notice to anyone. When the manager, Jeremiason, found the plaintiff had quit work, he went to the Company's solicitor and asked him what could be done to stop men coming up and going away without working, and he says the solicitor advised prosecuting

for obtaining credit under false pretences, the plaintiff having got transportation up, a few meals and a pair of gloves, in all amounting to $6.50—the transportation and the gloves would have been deducted from his wages had he worked.

An information was sworn to by Jeremiason, acting for the Company, the plaintiff arrested, tried and sentenced to six months' imprisonment. Subsequently, after serving some weeks, the commitment was quashed and the plaintiff released on *habeas corpus.*

I have referred to the facts so far to shew upon what grounds the defendants proceeded. It becomes necessary to determine whether the defendants had reasonable and probable cause for initiating criminal proceedings against the plaintiff, for, if they had, the plaintiff's case ends there, and the appeal must be allowed.

The words in the warrant of arrest and information are as follows:

"For that one M. L. Prentiss on the 27th day of September, 1909, falsely and fraudulently represented to the said David Jeremiason, manager of the Anderson Logging Company, that he the said M. L. Prentiss would forthwith engage in daily work for the said Company, thereby falsely and fraudulently obtaining credit from the said Company for his fare, four meals and one pair of gloves amounting in all to a value of $6.50 supplied and advanced by the said Company to the said M. L. Prentiss by reason of and account of such false and fraudulent representation."

It seems to me clear from the evidence that the plaintiff hired in the usual way with the defendants, received his pass on the boat, the meals and the gloves in the usual way at the camp, and in accordance with the custom of the defendants, that the manager at the camp was notified by letter from the Vancouver office of the plaintiff's coming to work, that the plaintiff identified himself and the class of work he was to perform by production of a card furnished by the Vancouver office, that he made no other representations or false representations of any kind; that he *bona fide* intended all along to go to work, and did go to work, and on finding the engine with which he was to work unsatisfactory, he got disgusted and quit.

In the face of this evidence, which is uncontradicted, and which was all known to the defendants, I fail to see where there

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can be reasonable and probable cause for charging and prosecuting the plaintiff for obtaining credit by false and fraudulent representations.

Having found absence of reasonable and probable cause, in view of the finding of the jury on the second question, and of the authority of *Brown* v. *Hawkes, supra,* it becomes necessary to inquire as to whether the defendants were actuated by motives other than those of bringing the plaintiff to justice to support the finding of the jury on the third question as to malice.

I think the evidence shews that the motive was not to prosecute the plaintiff criminally because he was guilty of a criminal offence, but to make an example of him, so that others might be deterred from doing the same; in other words, to make use of the criminal law for an indirect purpose. The evidence follows:

"And that information charged him with falsely and fraudulently obtaining credit from the said Company for his fare, four meals and one pair of gloves, amounting in all to a value of $6.50, supplied and advanced by the said Company to the said M. L. Prentiss? Yes.

"Now, what was your object in doing that? I wanted to have it stopped —I was trying to get it stopped, men coming up there—getting a pass in town and coming up there and going away without working.

"Your Company have suffered from the practice that you have just spoken of? Yes.

"And you wanted to stop it? That is it.

"What did you do with Mr. Harrison? I went to him to lay the facts before him and ask him what I could do in the matter, if there was any way for us to get that kind of practice stopped—men coming up there with a pass and going away without—"

GALLIHER, J.A.

The second ground urged by counsel for the defendants was that having taken the advice of their solicitor, and honestly acting thereon after a full disclosure of the facts, constitutes reasonable and probable cause for the prosecution, and *Longdon* v. *Bilsky* (1910), 22 O.L.R. 4, is relied on.

Holding as I do that the proceedings here were initiated from an indirect and improper motive, and not in furtherance of justice, I doubt if any advice they might receive from their solicitor, and upon which they acted in furtherance of that motive, would protect them; but if that is a wrong view, I hold that the facts as outlined above, and as supported by the evidence, could not have been fully disclosed to the solicitor, as I

cannot conceive any solicitor on such a state of facts advising the action that was taken. Moreover, the evidence as to the facts disclosed is of the most general character. I would dismiss the appeal.

Appeal allowed, Galliher, J.A. dissenting.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *Russell, Russell & Hannington.*

ISHITAKA v. BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED.

Chattel mortgage—Illegal seizure of goods under—Notice of sale—Sale before date named—Refusal of offer of payment—Improvident sale—Damages.

Where plaintiff, holding under an overdue chattel mortgage, was given notice that foreclosure and sale would take place at a certain time, and where his solicitor attended just before the time fixed for sale, intending to pay off the mortgage, and was told that he was too late, that the chattels were sold:—

Held (IRVING, J.A. dissenting), that the seizure was unlawful.

APPEAL from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 3rd of March and 25th of April, 1910. Plaintiff, a logger, purchased a logging outfit from one Ford, upon which there was a mortgage for $1,800 to defendant Company. The mortgage was reduced by payments to about $1,100, but had been overdue for some months when defendants decided to exercise their power of sale. They agreed to sell the property to one Bowes for $1,500, providing it was not redeemed, and on the 22nd of April, 1909, they gave the plaintiff a written notice that they would sell the property at the price named unless redeemed by noon of the 1st of May following. Plaintiff's solicitor had several interviews with defendants' solicitors between then and the 1st of May, endeavouring to effect a settlement, and on the morning of the 1st of May attended at the office of defendants' solicitors to pay

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off the mortgage, but was told he was too late, that the goods had been sold. There was some conflict of evidence as to when this interview took place, but MORRISON, J. found that the plaintiff was not in a *bona fide* manner carrying on his business of logger and that he was in such serious financial difficulties, known to the defendants, that he could not meet his obligations to his creditors or the defendants; that he was in default under the mortgage and had had ample time to redeem it if he was able to do so; that he did not respond to the notice of the 21st of April, and was not in a position on the 1st of May to redeem his mortgage and that he did not in fact offer to do so; that the defendants did not seize and sell any goods or chattels belonging to the plaintiff not included in the mortgage. He therefore dismissed the plaintiff's action and the counterclaim with costs. Plaintiff appealed.

Statement

The appeal was argued at Vancouver on the 23rd of November, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

R. M. Macdonald, for appellant, was stopped, and *Price* was called upon for respondent Company.

Cur. adv. vult.

6th June, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendant was mortgagee of chattels owned by the plaintiff, and the mortgage moneys being in arrear, sold the chattels to one J. R. Bowes about the 1st of April, 1909, the sale being conditional upon the failure of the plaintiff to discharge the sum due on the mortgage before 12 o'clock noon on the 1st of May. About the 21st of April defendant served a notice on the plaintiff that if he did not pay this sum before the hour above mentioned the chattels would be sold by private sale for $1,500, and on the same day a bailiff was sent, accompanied by the purchaser, to seize and take possession of the chattels. The purchaser says that he was really acting for the bailiff and as man in possession until the 1st of May, after which date if the plaintiff failed to pay the amount due on the mortgage the purchase was to become absolute. The

plaintiff was no party to this arrangement, and does not even appear to have been notified of it otherwise than by the notice above mentioned. Bowes, the purchaser, paid at least part of the purchase moneys to defendants' solicitors before the 1st of May. There is no evidence that any attempt was made by defendants to obtain a better price than $1,500, which was the sum claimed by it under the mortgage. No advertisements were published, nor was anything done by the mortgagor other than to make this conditional sale to Bowes and to notify the plaintiff as aforesaid. The purchaser admits in his evidence that he got a "highly desirable" bargain.

Before the 1st of May, Mr. Wallbridge, plaintiff's solicitor, made several attendances upon Messrs. Livingstone, Garrett & King, defendants' solicitors, in an endeavour to come to some arrangement that would be satisfactory to the defendants, but without success. On the morning of the 1st of May, before 12 o'clock noon, Mr. Wallbridge states in his evidence that he attended the defendants' solicitors prepared to pay off the mortgage, but that Mr. Garrett told him the chattels were sold, and that he was too late. This evidence is corroborated by entries in Mr. Wallbridge's day book, which he says were made on his return. The evidence of Mr. Garrett falls far short of contradicting that of Mr. Wallbridge, and that of Mr. King, his partner, does not touch upon this point, because he was not present when this conversation took place. The learned trial judge finds that there was a misunderstanding between these solicitors, but he does not discredit the evidence of Mr. Wallbridge; on the contrary, at the close of the trial, when the matter was fresh in his mind, he said:

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> "What I say now is that I feel I am right to accept Mr. Wallbridge's version of what took place at the time referred to."

Now, if Mr. Wallbridge's evidence is to be accepted, and I think it must be accepted as the only consistent and satisfactory evidence upon this point, the plaintiff was entitled to succeed in his action. There does not appear to have been an actual tender, but that was dispensed with when plaintiff's solicitor was told that he was too late. It cannot, I think, be successfully contended that a sale conducted in the manner that this

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one was could be supported as a provident one apart from the opportunity given the plaintiff to pay before noon on the 1st of May. It may even be open to question whether that opportunity would support it, in view of the mortgagor's duty to take all reasonable steps to obtain the best price. But be that as it may, without that opportunity, or with it cut down in the manner it was, the defendants acted unlawfully in making the sale, and it makes no difference whether the sale was in truth made before 12 o'clock or after 12 o'clock, the plaintiff being misled by the statements made to his solicitor. Nor was care taken to seize and sell only the chattels included in the mortgage. I think others were taken, perhaps of small value, but the seizure, I think, was conducted in a high-handed and reckless manner.

There should be judgment for the plaintiff, with costs here and below, and the action should be referred back to a judge of the Supreme Court to assess the damages and dispose of any further costs.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal. I assume that the sale was made actually and completed before noon of the 1st of May, but no tender was made. *Blumberg* v. *Life Interests, &c., Corporation* (1897), 1 Ch. 171, affirmed (1898), 1 Ch. 27, is authority for the proposition that if you wish to make a tender to a solicitor, it must be a tender of cash, as the solicitor is not authorized to receive a cheque. But apart from that, the power of sale in the mortgage did not stipulate for notice prior to sale. In *Hawkins* v. *Ramsbottom & Co.* (1814), 1 Price 138, a sale made without notice, but after default was upheld. In *Major* v. *Ward* (1847), 5 Hare 598, the sale was valid although made before the expiration of the time named in the notice. The defendants had a right to sell, notwithstanding the misleading notice.

In *Williams* v. *Stern* (1879), 5 Q.B.D. 409, the plaintiff was in default, the defendant said he would wait for a week, but nevertheless sold before the promised time had expired. It was held that as it was not shewn that plaintiff had changed his position, this promise, being without any consideration to support it, did not deprive the defendant of his accrued legal right.

As to selling at an undervalue, the goods were in a remote part, far from any market, and the evidence as to their condition is very unsatisfactory. We must remember that a mortgagee is justified in accepting a fair price, even without advertising: *Davey* v. *Durrant* (1857), 1 De G. & J. 535. The mortgagee is not a trustee of a power of sale for the mortgagor: *Warner* v. *Jacob* (1882), 20 Ch.D. 220; *Farrar* v. *Farrars, Limited* (1888), 40 Ch.D. 395; *Kennedy* v. *De Trafford* (1896), 1 Ch. 762 at p. 772.

There is still another ground. The plaintiff asks damages for seizing and selling. How can any action be maintained for seizing? When the plaintiff made default in April, 1909, the property had passed; the right to possession passed by the terms of the agreement. The utmost that remained to the plaintiff was a right to redeem: see *Johnson* v. *Diprose* (1893), 1 Q.B. 512, *per* Bowen, L.J. at p. 517. The damages for selling (if any) would not be the full value of the property sold; the plaintiff had only an equity of redemption in the property. The plaintiff has only lost (if anything) the actual damages sustained: *Moore* v. *Shelley* (1883), 8 App. Cas. 285 at p. 294; that is the value of the equity of redemption.

IRVING, J.A.

MARTIN, J.A.: This is a case in which I feel I must bring myself to say, with all deference to the learned trial judge, that the weight of evidence is clearly against his finding, and the facts respecting the important interview between the solicitors when the plaintiff endeavoured to redeem the mortgage must be found substantially as testified to by the plaintiff's solicitor. Such being the case, there is really no legal point of substance calling for consideration, and the appeal should be allowed and the case sent back for the entry of the proper judgment in favour of the plaintiff, and assessment of damages.

MARTIN, J.A.

Appeal allowed, Irving, J.A. dissenting.

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

Solicitors for respondent Company: *Brydone-Jack, Ross, Price & Woods.*

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BASANTA v. CANADIAN PACIFIC RAILWAY COMPANY.

Workmen's Compensation Act, 1902—Motion to set aside award under—Review of arbitrator's finding—Case stated under section 2, sub-section (3)—Engineering work—What constitutes under Act—Arbitration Act—Application of to proceedings under Workmen's Compensation Act, 1902.

An arbitrator under the Workmen's Compensation Act, 1902, Section 2, Sub-section (3) having jurisdiction to settle any question as to whether the employment is one to which the Act applies:—

Held, (IRVING, J.A. dissenting), that the only way to review the arbitrator's finding thereon is by a case submitted under Section 4 of the Second Schedule.

Per MORRISON, J, on the motion to set aside the award of the arbitrator: The work of clearing land from the natural growth thereon is not a work of construction, alteration or repair meant by the Act to be termed an engineering work.

Statement

APPEAL from the decision of MORRISON, J. setting aside the award of an arbitrator under the Workmen's Compensation Act, 1902. Heard at Vancouver on the 3rd of December, 1910.

Harper, for the applicant.
McMullen, for respondent Company.

23rd December, 1910.

MORRISON, J.

MORRISON, J.: The applicant was a labourer employed by the respondent Company to clear some land on Shaughnessy Heights, from trees, stumps, and other natural growth. Whilst he was so engaged he received the injury for which he claims damages and in respect of which he has invoked the provisions of the Workmen's Compensation Act, 1902. The learned judge to whom the matter was referred, found in the applicant's favour, and in so doing decided that the clearing operation in question constituted an engineering work by sub-section 2, section 8. This is an appeal from the finding. The contention is that there was no jurisdiction to deal with the matter inasmuch

as the work is not one which is contemplated by the Act. Sub-section 2, insofar as it relates to this, reads as follows:

"Engineering work means any work of construction, alteration, or repair of a wharf, harbour, dock, canal or sewer, and includes any other work for the construction, alteration, or repair, of which machinery driven by steam, water or other mechanical means, is used."

The learned judge does not specify from which part of the definition he takes his finding. Collins, M.R., in *Atkinson* v. *Lumb* (1903),1 K.B. 861 at p. 864, in dealing with the precise form of the definition, says that:

"The word 'work' is used in two senses: In the first part, it is used as meaning the labour bestowed, and in the second place, as meaning that upon which the labour is bestowed, and it there indicates a physical thing embraced in a physical area."

Obviously the work in question was not one of those specified in the first part, in respect of which when labour is bestowed and an injury is received, damages can be claimed. The question then narrows down to the meaning of the last portion of the definition. I was at first inclined to support the learned judge's view, but Mr. *McMullen's* contention convinces me that it would be extending the scope of the enactment far beyond what the legislators intended.

I do not think that the work of clearing land from the natural growth thereon is a work of construction, alteration or repair, which is meant by the Act to be termed an engineering work. I therefore allow the appeal.

The appeal was argued at Vancouver on the 12th of April, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

McCrossan, and *Harper,* for appellant (applicant): The award is valid on its face, and no objection was taken to the jurisdiction. The only means of getting before this Court now is by means of section 9 of the Arbitration Act.

Argument

McMullen, for respondent Company, referred to *Duke of Buccleuch* v. *The Metropolitan Board of Works* (1870), 39 L.J., Ex. 130. Under the Arbitration Act the Court has power to set aside this award as being made without jurisdiction.

McCrossan was not called upon in reply.

Cur. adv. vult.

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MACDONALD, C.J.A. concurred with MARTIN, J.A. in allowing the appeal.

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IRVING, J.A.: I would dismiss this appeal on the ground that the Court had jurisdiction.

The English rules of 1897 from which our rules were taken, expressly declare (rule 4, schedule 2), that the Arbitration Act, 1899, shall not apply to any arbitration under this Act.

Under section 12, sub-section (2) of the British Columbia Arbitration Act, it is provided that where an award has been improperly procured, the Court may set it aside. If an award is made without jurisdiction, that award in my opinion is improperly procured within the meaning of the statute, and the award cannot stand. As pointed out by Lord Blackburn, then Blackburn, J., in *Duke of Buccleuch* v. *The Metropolitan Board of Works* (1870), 39 L.J., Ex. 130, in the old days the only way of enforcing an award was by an action upon it, and one of the modes of resisting the enforcement of the award was pleading that the award was void for excess of jurisdiction. A practice arose in the time of Charles II. of making submission Rules of Court so as to give the Court summary jurisdiction over the reference. To this practice the powers of the Court under the Arbitration Act are to be traced. Bearing this piece of history in mind, we see why it was necessary that the English rules should declare expressly that the Arbitration Act should not apply.

IRVING, J.A.

There is nothing inconsistent in the Court having the summary power given by section 11 sub-section (2), and the arbitrator being authorized, if he thinks fit, to submit a question of law for decision to a judge of the Supreme Court. This is quite clear if we take the case of an arbitrator refusing to submit any question of law, though requested so to do. That would be misconduct: see *In re Palmer & Co. and Hosken & Co.* (1898), 1 Q.B. 131; or if after stating a case he refused to act upon the statement of law by the judge. In either case the award could be set aside under section 11, sub-section (2).

The question involved here was really passed upon in

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Disourdi v. *Sullivan Group Mining Co.* (1909), 14 B.C. 241 at p. 244, where HUNTER, C.J. said:

"In my opinion such an award is clearly within the language of the Arbitration Act which is of the widest possible character. It enacts in terms that the Act is to apply to any arbitration held under any existing Act or any Act hereafter to be passed except so far as any future Act might require some other inconsistent course of procedure.

MARTIN, J.A.: This appeal must, I think, be allowed because, quite apart from anything that may be said about the Arbitration Act, sub-section 3 of section 2 of the Workmen's Compensation Act expressly confers upon the arbitrator jurisdiction to settle "any question as to whether the employment is one to which this Act applies," and the only way to review the arbitrator's finding thereon is by means of a case submitted under section 4 of the second schedule.

GALLIHER, J.A. concurred with MARTIN, J.A. in allowing the appeal.

Appeal allowed, Irving, J.A. dissenting.

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NAISMITH v. BENTLEY AND WEAR

NAISMITH v. BENTLEY AND WEAR.

Principal and agent—Listing for sale—Agent securing option for purchase or sale—Whether original agency precluded agent from dealing with property on his own account.

Defendants listed certain real estate with an agent for sale at a certain price, and subsequently he obtained from them an option for 30 days to buy or sell at $200 per acre and on such option entered into a contract for sale at $400 per acre; defendants, on being requested to complete their contract under the option, refused on the ground that plaintiff, when securing the option, had not disclosed to them the information in his possession regarding a change or probable change in the value. The trial judge concluded that the original listing did not preclude the plaintiff from dealing with the property on his own account as a purchaser. On appeal, the Court was evenly divided.

APPEAL from the judgment of CLEMENT, J., who gave judgment for the plaintiff at the trial in an action for specific performance of an alleged contract for the sale of some 46 acres in Coquitlam District. Tried at Vancouver on the 29th of March, 1911.

Statement

Plaintiff was a real estate agent, and defendants, who are builders, also had a real estate business in connection with their trade. Defendants were owners of 46 acres of land at Coquitlam, which they mentioned to plaintiff in August, 1910. Plaintiff entered this property on his listing card but did not offer the property for sale. On the 19th of November, 1910, the plaintiff learned that there was likely to be a sharp rise in real estate values in the vicinity of the 46 acres. He decided to get an option to purchase the 46 and went to the defendants, whom he asked for an option to buy or sell for 30 days at $200 per acre. On the 24th he entered into a contract for sale of the property at $400 per acre. Defendants took the position, on being asked to complete the sale at the rate of $200 per acre, that the plaintiff was really their agent, and as he had not disclosed to them the information in his possession, he had not dealt fairly with them; they there-

fore refused to complete the sale to him at $200. An action for specific performance was brought, and tried by CLEMENT, J., who held that although the property was listed with the plaintiff for sale, yet such listing did not prevent him from dealing with the property on his own account, as a purchaser.

Defendants appealed, and the appeal was argued at Victoria before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A., on the 7th of June, 1911.

Argument

A. H. MacNeill, K.C., for appellants (defendants): There was the relationship of principal and agent and it was the duty of the agent to disclose to his principals all the knowledge or information which he had affecting the property. But even if there was no fiduciary relationship created between the parties by the August listing, yet the conduct of the plaintiff in securing to himself the option of the 19th of November was such as to prevent the Court from exercising its equitable jurisdiction, on the strength of the maxim that he who seeks equity must come into Court with clean hands.

E. A. Lucas, for respondent (plaintiff): There was no evidence of knowledge on the part of plaintiff of the sudden rise in value, and also it is submitted that the listing in August was not an agency. Therefore there was no duty on the plaintiff to make known to the vendors any information as to rise in value. The occasion in August was a mere offer to a known real estate agent by a person who was not a known real estate agent of a property which the defendants had bought for a speculative purpose and which they wished to turn over.

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with the learned trial judge that there was no agency prior to the 21st of November, 1910. Much of the litigation arising out of real estate transactions is the result of attempts to construe every casual conversation or act into an agreement of agency. In this case the defendants endeavoured to place the plaintiff in a fiduciary relationship to

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them because he listened to them when they told him in August that they had some land in Coquitlam which they were willing to sell at a stated price, and which fact the plaintiff noted in a book, and afterwards on a card for future reference. Because of this it is contended that when the plaintiff came back to the defendants in November to obtain the agreement in question in this action, it was his duty to disclose all he knew about the state of the market before he could honestly enter into the agreement of the 21st November, by which he obtained an option from the defendants entitling him to either himself buy the property, or sell it as agent for the defendants upon a commission. The defendants' counsel further contended before us that the plaintiff was bound to notify the defendants of his election to buy under the option before he could agree to sell the property to another person, and that if he did agree to sell to another person before notifying the defendants of such election, it must be held that the sale was made by him as agent for the defendants, and not by him as principal. This option agreement, made in consideration of $50 paid by the plaintiff to defendants, gave the plaintiff a right to elect before the expiration of one month whether he would himself buy or would, as the agent of the defendants, sell to some one else, and thereby earn a commission. The plaintiff bargained for and obtained the right to deal with the property in either alternative, as best suited himself. When he found a purchaser, he was at liberty to decide whether he would sell to that purchaser as principal or assume the role of agent. When the plaintiff made the sale to the third person as principal, that act was an election to exercise his option to purchase, and he had no longer the other alternative, and as the appellants were made aware of that election within one month, no one can complain. There is no pretence that in making the sale he either purported to or intended to act as agent, but he both purported to and intended to act as principal.

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal on the ground stated by the learned trial judge. The mere listing with a real estate agent of a property for sale does not in itself establish the

relationship of principal and agent so as to give the owner the rights which are conferred on a principal in the case of a solicitor or general agent managing his property.

The listing of a property with an agent for sale is an unilateral act. It may never develop into a contract. I have examined a number of cases, *e.g., Cane* v. *Allen* (1814), 2 Dow, 289; *Edwards* v. *Meyrick* (1842), 2 Hare, 60; *Murphy* v. *O'Shea* (1845), 2 Ir. Eq. R., 329; 69 R.R. 337; and *McPherson* v. *Watt* (1877), 3 App. Cas. 254.

IRVING, J.A.

The impression left on my mind after reading them is that each case must be determined on its own facts. The question is not, was there a listing, but was the relationship, call it what you like, between the parties such as called for full disclosure before entering into a contract of purchase.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the evidence is sufficient to establish an agency in the first interview, and the plaintiff did not discharge his duty to disclose material facts in November, when he procured the option in question, and therefore this is a case where, clearly, specific performance should be refused. What was done here is tantamount to a fraud upon the principals.

GALLIHER, J.A.

GALLIHER, J.A.: It is clear to my mind that if the transaction of August, 1910, constituted Naismith the agent of Bentley and Wear for the sale of the property in question, this appeal should be allowed.

The evidence upon this is far from satisfactory, but on the whole I am inclined to agree with the learned trial judge that agency has not been established.

Such being my view, it becomes necessary to consider the agreement of November 19th, 1910, following, and which, for reasons given by Mr. Naismith, was dated the 21st of November. This is as follows:

Vancouver, Nov. 21st, 1910.

"In consideration of the sum of $50 (fifty dollars), receipt of which is hereby acknowledged, we, the undersigned, agree to give Samuel J. Naismith, of the City of Vancouver, the exclusive right to purchase or

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sell for the term of one month from date that property consisting of 46 acres more or less, situated and described as the westerly 46 acres of the south half of the south-east quarter of section seven (7), township forty (40), Municipality of Coquitlam, New Westminster District, the price asked being ($200) two hundred dollars per acre. Terms: ¼ cash, balance payable Feb. 22nd, 1915, with interest on balance payable on the 22nd day of February of each year till principal is paid at the rate of 7% per annum. We agree to pay Mr. J. S. Naismith 2½% commission in the event of a sale being made.

Witness: "W. Jones."

"Signed ppro. Bentley & Wear,
"Joseph Bentley
"Tom Wear."

Under that agreement Naismith acquired the exclusive right for thirty days (as I read it) to purchase himself or to sell to others the property in question, and in the latter event was to receive a commission of 2½ per cent.

Apart from some conversation over the telephone, which I will refer to later, nothing passed between the parties until the 28th, but in the meantime, on the 25th, Naismith and Drummond made a sale to a client of Perdue & Hoar, real estate agents, giving an interim receipt signed "Naismith & Drummond," agents for J. S. Naismith.

This sale was made at $400 per acre, while the price stipulated in the agreement of November 19th at which Naismith could purchase or sell, was $200 per acre. This, of course, meant a handsome profit to Naismith.

GALLIHER, J.A.

Naismith claims to have made this sale on his own behalf, as purchaser under the agreement of November 19th, while Bentley and Wear say: "You never exercised your right to purchase and never notified us of your intention to do so," and refuse to carry out the sale unless they receive the $400 per acre, less the commission of two and a half per cent.

The question arises—Can Naismith, having the right either to purchase or sell, sell as principal without having first elected to purchase? It is clear from the evidence that Naismith did not intend to purchase himself unless he had some one in sight to whom he could sell. I take it he would be entitled to look around and make enquiries in this regard during the life of the option, or even negotiate for a sale, without affecting his right

to purchase, but here he did more, he actually made a sale, and after having done so, notified his election to purchase on his own behalf. It seems to me that Naismith, having the option either to purchase himself, or sell to another, must, before making a sale as owner of the property, have indicated an election to purchase by word or act, or in some way have become obligated or bound as purchaser, otherwise the sale made should be deemed to have been made under the option on behalf of the appellants.

Some communication over the telephone has been given in evidence, and is more or less contradictory, but I find nothing in it which convinces me that Naismith either then or before elected to purchase, and certainly nothing was done by him which would bear out that contention.

Unless the act of selling to Perdue and Hoar's client as the ostensible owner can be taken to be an election to purchase from, and not sell on behalf of the real owner, then there has been no election to purchase, and supposing Perdue and Hoar's client had failed to complete the cash payment and forfeited their deposit before Naismith had notified Bentley and Wear that he intended to purchase, it seems to me he would have been back where he started, and could either purchase or sell to another, and would have in no way by that act obligated himself to Bentley and Wear as a purchaser, because it would have been quite consistent with his position to say: "I endeavoured to make this sale on your behalf, and as your agent, at the best obtainable price," and when a person occupies a dual position, as Naismith did under the option, it should not be left to him (to be determined by what may be in his own interest, dependent upon whether the sale goes through or not) to say on whose behalf a sale is made; in other words, before he sells as owner he should have first indicated his election to purchase, or, at all events, become obligated to purchase.

GALLIHER, J.A.

I would allow the appeal.

Solicitor for appellants: *J. E. Bird.*
Solicitor for respondent: *F. G. T. Lucas.*

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MORRISON THOMPSON HARDWARE COMPANY, LIMITED v. WESTBANK TRADING COMPANY, LIMITED *ET AL.*

MORRISON THOMPSON HARDWARE CO. *v.* WESTBANK TRADING CO.

Company law—Chattel mortgage by company—Registration of in County Court instead of with registrar of joint-stock companies—Rectification of error—Ex parte order—Party aggrieved thereby—Procedure to set aside such order.

An appeal in this case, reported *ante*, p. 33, was dismissed.

Statement

APPEAL from a judgment of HUNTER, C.J.B.C. reported *ante*, p. 33. The appeal was argued at Victoria on the 8th of June, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

R. M. Macdonald, for appellant (plaintiff).
Griffin, for respondent.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I am unable to find anything fraudulent on the part of the Bank, either in taking the mortgage or in procuring the extension. A successful attack might possibly have been made on the mortgage within sixty days of its date by virtue of the Fraudulent Preference Act, 1905, section 3, subsection 3. The fact of the non-registration in time, and the subsequent extension after the lapse of 60 days, may have had the effect, the first, of keeping creditors in the dark, the second, of giving life to the mortgage with the defence of pressure restored, but I cannot see that we can help that. The remedy against such a state of things, if remedy be needed, must be sought in legislation.

A judge has, by section 104 of the Companies Act, 1910, power to extend the time on one or more of four or five distinct and independent grounds. This power has been exercised many times in England under an identical section in the English Companies Act, and this appears to have been done in much the

same manner as it was done here, *ex parte,* and merely upon proof of the particular excuse put forward. One of the grounds upon which the extension may be granted is that the omission to register in time was not of a nature to prejudice creditors or shareholders of the Company, and when this is the ground relied upon it must be proved; but where the excuse is based upon one of the other grounds, as it was here, I do not think it is the practice to require the petitioner to disclose to the judge the financial condition of the mortgagor in relation to his creditors. It has been thought proper in England to insert in the order granting the extension a proviso intended to protect creditors; but this proviso was held to extend only to secured creditors, and not to those who had no property interest in the goods mortgaged: see Palmer's Company Precedents, 10th Ed., 1,316 *et seq.,* and *In re Ehrmann Brothers, Limited* (1906), 2 Ch. 697. If a good excuse for non-registration is made out, the judge does not, as I read the cases, concern himself with the effect which the registration may have upon the unsecured creditors. Nor does the proviso in the order of MURPHY, J. which we are asked to set aside, and which purports to protect creditors, assist the plaintiffs. Even if plaintiffs fall within it, the term "creditors" would, in my opinion, have to be construed as it was in *In re Ehrmann Brothers, Limited, supra,* as not extending to unsecured creditors, such as the plaintiffs then were. Besides, if the plaintiffs are within the proviso, they are not in this action claiming relief under it.

MACDONALD, C.J.A.

The appeal should be dismissed.

IRVING, J.A.: The plaintiffs' appeal is based on this, that the order made by MURPHY, J. on the 11th of October was obtained by fraudulently concealing from the judge that the Company was insolvent, and that meetings of its creditors were being held.

IRVING, J.A.

After reading the affidavits filed on the application to extend the time, it is plain that a slip had occurred. The document had been registered in the wrong office, and the application was, in my opinion, fairly made. I see no reason why the applicant should proceed to set out on affidavit his views as to the solvency of the mortgagor.

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IRVING, J.A.

The learned Chief Justice came to the conclusion that it was not proved satisfactorily that the plaintiffs, or any of them, were creditors of the Company at the time the bill of sale was given, and in that conclusion I agree.

To maintain an action to set aside the order (assuming that such an action lies), and I do not see why it should not lie, it is necessary that there should be creditors in existence at the time of the execution of the bill of sale who could maintain an action to set it aside.

As no such creditors have been shewn to exist, I would dismiss the appeal on that ground.

MARTIN, J.A.

MARTIN, J.A.: It is clear that the failure to duly register the mortgage was "due to inadvertence," and therefore the judge had jurisdiction to make the order under section 104 of the Companies Act, 1910. But it is urged by paragraph 9 of the statement of claim that on the application material facts were concealed from him, and a declaration is sought that the said order was obtained by fraudulent concealment, and judgment is prayed for to set aside the order. Now, apart from all other questions, it is well to decide at the outset if this allegation of fact is correct, because the whole case turns on it, and therefore I have carefully considered the evidence, with the result that, in my opinion, there was no such concealment, and it would have been of no assistance in the circumstances to bring to the learned judge's notice the, for example, indecisive and fruitless meetings which were in September held after the giving of the mortgage had become known to all concerned in July, or the beginning of August.

I am unable to hold, therefore, that any case has been made out for interference, assuming that we would have power to do so had the facts been established.

GALLIHER, J.A.

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

Appeal dismissed.

RAKHA RAM v. TINN *ET AL.*

MORRISON, J. (At Chambers)

1911

Nov. 13.

RAKHA RAM *v.* TINN

Practice—Action launched by attorney-in-fact after plaintiff's death—Subsequent knowledge of his decease—Substitution of executor as plaintiff—Order 16, rr. 2, 11.

While plaintiff's attorney-in-fact was pressing a claim on his behalf, plaintiff died abroad. Before proof of his death was produced the writ herein was issued. After proof of death, and probate granted, an application was made to substitute the executor as plaintiff.

Held, that there had been a *bona fide* mistake in naming the proper plaintiff, and that the substitution of the executor was necessary for the determination of the question involved.

APPLICATION to substitute an executor as plaintiff in circumstances set out in the head note. Heard by MORRISON, J. at Vancouver.

Statement

McDougal, for plaintiff.
Orr, for defendant.

13th November, 1911.

MORRISON, J.: This is an application to substitute the executor of the late Rakha Ram as plaintiff herein. In March of this year Rakha Ram was reported to have died abroad whilst a claim of his was being made against the defendants by his attorney-in-fact. During the period of uncertainty as to his death, and failing a settlement the writ herein was issued. Subsequently definite evidence of his death came to hand, and upon probate issuing, the present application was made. It is contended on behalf of the defendants that the plaintiff Ram having died before the writ was issued, there is no suit properly in Court and that this application cannot be entertained.

Judgment

The rules applicable are rules 2 and 11 of Order XVI. To be within these rules it must be shewn (1) that the action was commenced in the name of the original plaintiff by mistake; (2) that the substitution is necessary for the determination of

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the real matter in dispute: Yearly Practice, 1912, p. 145, where the cases are assembled.

I think that there was a *bona fide* mistake on the part of the plaintiff's solicitor, and that the substitution of the executor is necessary for the determination of the matters involved in the action. The application is granted in terms of the summons.

Application granted.

CLEMENT, J.
1911
March 2.
BAIN v. HENDERSON

BAIN v. HENDERSON.

Copyright—Registration—Right to in book containing pirated material—Authorship—What constitutes.

The plaintiff published a "Directory of Vancouver Island and Adjacent Islands for 1909," and registered same under the Copyright Act. The defendant Company later published "Henderson's British Columbia Gazeteer and Directory for 1910," and the plaintiff complained that in its preparation the defendant Company made such an unfair use of his, the plaintiff's, directory by copying names from it that the publication of the defendant Company's book was an infringement upon his copyright. The defendant Company had published directories in previous years and their defence was that plaintiff's directory was itself the result to a large extent of an unfair use of, particularly, the defendant Company's British Columbia Directory for 1905, the Victoria Directory for 1908, and the Directory for Western Canada for 1908.

Held, that the plaintiff could not, within the meaning of the term under the Copyright Act, be considered as the "author" of his own directory, the material being partly pirated, to what extent it being impossible to determine.

Statement

ACTION claiming injunction against infringement of copyright, and damages. Tried by CLEMENT, J. at Vancouver on the 13th, 14th and 15th of February, 1911.

G. Duncan and *Scrimgeour,* for plaintiff.
Reid, K.C., for defendant Company.

2nd March, 1911.

CLEMENT, J.: On the facts as brought out at the trial, and as plainly discernible upon a comparison of the books, I have no trouble in finding that both are right and, to that extent, both wrong. As between the two, the plaintiff began the stealing. His book was his first and, so far, his only directory, and he certainly copied some of the descriptions of places almost verbatim from the defendant Company's directories, and so perpetuated certain errors which appear in those directories that I am irresistibly driven to conclude that much copying was done. On the other hand, I think the same element of perpetuated errors, the inclusion, particularly, of "dummy" or decoy names taken from plaintiff's directory, shews that the defendants are not wholly guiltless. In each case the material compiled in the earlier stages is not forthcoming, and in its absence each side invokes against the other the application of the familiar quotation, *Ex uno disce omnes;* each asks me to infer that much more stealing was done than has been traced.

Under these circumstances, the plaintiff's own book being to some extent pirated, I asked at the trial if copyright could be obtained in such a book, to which Mr. *Reid* gave no direct answer, but urged that as plaintiff came into Court with unclean hands, he was not entitled to the equitable remedy of an injunction, whatever his right to damages might be. In my opinion a direct answer can be given, that of such a book as the plaintiff's directory, he is not the "author" within the meaning of the Copyright Act. No definition is given in the Act, but the question was much discussed in the case arising out of the publication in the London Times of certain of Lord Rosebery's speeches: *Walter* v. *Lane* (1899), 2 Ch. 749, 68 L.J., Ch. 736, 760; (1900), 69 L.J., Ch. 699. The directory cases are discussed, and the position as to such books, as well as all others, is summed up by Lord Brampton:

Judgment

"Of course, if an author of a book is unscrupulous enough to pirate and include in it the protected composition of another, no registration could give him property in that which he had stolen."

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I cite this passage simply to shew that in such a case registration goes for nothing, and that if the defendant Company had chosen to seek an injunction against publication of the plaintiff's book they would have succeeded. And on the evidence here, I think the injunction would have covered the entire book: see *Jarrold* v. *Houlston* (1857), 3 K. & J. 708: because it is impossible, in my opinion, to ascertain the extent of the pirating. In other words, I cannot say that the plaintiff's book is "in substance a new and original work" so as to entitle him as its "author" to copyright: *Hogg* v. *Kirby* (1803), 8 Ves. 215.

Judgment

The action is dismissed with costs.

Action dismissed.

LANGHAN v. ISAACSON AND ISAACSON.

COURT OF APPEAL

1911

Nov. 10.

LANGHAN v. ISAACSON

Practice—Joint defendants—Husband and wife—Order for discovery—Inability to serve on female defendant—Default—Contempt—Defence struck out and judgment in default—Appeal.

Where a married woman, joint defendant with her husband, had not been served personally with an order for discovery examination, but the fact of the issue of the order, and its effect, had been explained to her, a further order, consequent upon her non-attendance was made. This was served upon her solicitor, but personal service upon her was not effected. Two orders were then made contemporaneously by MORRISON, J., one striking out her defence, and another giving judgment against her.

Held, on appeal, that the orders must be sustained; it could not be said upon the evidence that defendant did not understand her position, as the situation had been explained to her.

APPEAL from an order made by MORRISON, J. at Chambers in New Westminster on the 17th of June, 1911, in an action for specific performance of two agreements for the sale of certain real estate. The two defendants are husband and wife. The latter entered an appearance and defence separately. An appointment for her examination for discovery was taken out, but she did not attend, and a further appointment resulted similarly. On the 16th of May, 1911, CLEMENT, J. made an order, which was served upon the solicitor of the female defendant, but not upon herself personally. This order required her to attend for examination, in default of which her defence would be struck out. She did not attend on the date of that order either, and a motion was made under rule 370k to strike out her defence, and in the notice of motion was incorporated a motion for judgment. Upon this two orders were made by MORRISON, J., one striking out her defence, and the other giving judgment against her. The evidence was that, although personal service of the appointments for examination was ineffectual, yet the effect of the first one had been explained to the defendant, and on the other occasions on which service was attempted, it was said that she was absent from the Province. No affidavit in support of this seems to have been filed on the motion for judgment. The female defendant appealed.

Statement

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LANGHAN v. ISAACSON

The appeal was argued at Vancouver on the 10th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellant: We submit that the two motions, that is, to strike out the defence and also for judgment, could not be incorporated in one motion; that under rule 370k, defendant should first have been placed in default before the motion for judgment could be set down under rules 304 and 305; that in any event the cause of action was not severable, and the motion should not have been made until the trial of the action as against the remaining defendant; that the notice of motion for judgment should have stated the minutes of judgment, or the exact judgment desired; that the judgment given against the appellant was not justified by the statement of claim, the action given by the remaining defendant was not assignable, and appellant was not privy to it.

Argument

Bodwell, K.C., for respondent, called upon as to the position under rule 305: We submit that the cause of action was severable; the husband and wife were tenants in common; one could sell his interest without the assent of the other, and a contract as to the sale from the female defendant could be held good, and not good as against the husband. The appellant, by not appearing on the appointments and motion is taken to have admitted that the contract as to herself was good, and judgment would go for that. The result would be that if the husband should be successful at the trial, he and the purchasers would be the owners of the property instead of himself and his wife.

Taylor, in reply:

Per curiam: The appeal should be dismissed. Effect cannot be given to Mr. *Taylor's* contention. There is no hardship being inflicted, the appellant having been not only in default, but in contempt. It cannot be said that she did not understand her position, because the situation had been explained to her.

Judgment

Appeal dismissed.

Solicitor for appellant: *J. A. Harvey.*
Solicitor for respondent: *Gordon E. Corbould.*

REX v. DAY.

COURT OF APPEAL

1911

Nov. 8.

REX v. DAY

Criminal law—Speedy trial—Election—Right to change—Absence of sheriff on such election—Right of civil Courts to try offenders for theft from naval premises.

A person committed for trial and out on bail, appearing voluntarily with his counsel, before a County judge and electing to be tried speedily, cannot change his election so as to choose trial by jury.

The fact that the sheriff was not present on such occasion, or that he did not notify the judge of the accused coming before him for election, does not invalidate such election.

An objection to a conviction by a criminal Court of a person for receiving property stolen from the navy, on the ground that such an offence should be dealt with by a naval Court, is bad.

MOTION for an order directing the County Court judge of Victoria to state a case for the opinion of the Court of Appeal. Heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A. at Vancouver on the 7th and 8th of November, 1911.

The facts were that the accused, having been charged with the receipt of certain stores stolen from the Navy Yard at Esquimalt, was committed for trial by the stipendiary magistrate. He was allowed out on bail, and on the 26th of July went with his counsel before the County judge and elected for speedy trial. On the application of the prosecution the judge postponed until the 15th of August the question of fixing the date of trial. On the 15th, there being no judge present, the matter was adjourned by the clerk of the peace, all parties as before being ready, but on the 18th of August, another judge (MCINNES, Co. J.), fixed the trial for September 1st. After a further adjournment the trial took place on the 18th of September. On that occasion, before arraignment, counsel for accused applied to re-elect, or to take trial before a jury, instead of speedy trial. On this application, it was submitted that, not having yet pleaded, or been arraigned, the prisoner had the right to re-elect. The judge was of opinion that, the prisoner having come up for

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trial, in pursuance of his election, the witnesses being present, and everyone and everything being ready, it was too late to apply to change his election. The judge therefore refused to state a case for the opinion of the Court of Appeal.

Stuart Henderson, and *Maclean, K.C.,* for the motion: We say that there was no proper election in the first place. According to the statute, prisoner should have been brought up by the sheriff for election. Here he came voluntarily and without the sheriff. Further, there was no entry of consent to be tried speedily made by the judge, as required by the 1900 amendment to the Code. They cited and referred to *Rex* v. *Keefer* (1901), 5 C.C.C. 122, 2 O.L.R. 572; *Reg.* v. *Cameron* (1897), 1 C.C.C. 169; *Reg.* v. *Gibson* (1896), 3 C.C.C. 451; *Reg.* v. *Smith* (1898), *ib.* 467; *Rex* v. *Breckenridge* (1903), 7 C.C.C. 406. The clerk of the peace had no authority to make the entry required by the statute; it should have been made by the judge.

Per curiam: We consider your points altogether too technical and we are against you on both.

Henderson, proceeding: Then we proceed to the third point: Where the theft is by a petty officer in the navy on Admiralty territory, such as the Imperial dockyards at Esquimalt, section 8 of the Code prevents a conviction of the accused on the charge of retaining under section 399 of the Code.

Argument

[MACDONALD, C.J.A.: What is your contention? That the Court has not jurisdiction?]

Yes. This is a matter affecting the government of the navy, and is not subject to the jurisdiction of the civil Courts.

[GALLIHER, J.A.: The accused here is not in the navy; he is the receiver of the stolen goods. Your argument would lead you into the impossible position that the receivers of goods stolen from the navy would all go scot free.]

Why so?

[GALLIHER, J.A.: The naval authorities have no control over this man; they cannot court martial him; so how is he to be punished?

MACDONALD, C.J.A.: Have you any authority for the

proposition that where a petty officer in the navy steals naval property in Canada, the Canadian Courts cannot deal with the offender?]

I have not, but I hope to make some authority for that proposition in the present case.

[IRVING, J.A., pointed out that a murder had been committed on the same premises as these stores are alleged to have been stolen from, and that the murderer was taken into custody there, tried, convicted and hanged by the civil authorities.

GALLIHER, J.A.: I do not know what the other members of the Court think, but, speaking for myself, you are wasting time with me.]

Per curiam: It is clear that we are all against you on that point also.

Henderson, then proceeded with the discussion of the evidence of identification of the goods stolen.

Argument

Per curiam: It seems from the evidence here that there were a good many unnecessary interruptions to the evidence at the trial. We think that not only should there be less of this undue interruption of the evidence, but that the trial judges should be more firm and strict in ruling on evidence.

Maclean, K.C., on the same side, on the subject of corroboration, submitted that there was no corroboration.

Aikman, for the Crown, and *Pooley, K.C.,* for the Admiralty, called upon on the question of corroboration: It is submitted that there is ample corroboration. Day paid Reid (the thief) $24 for the goods. There was an arrangement between Day and Reid by which the goods were left on the wharf; Day took them away, and subsequently Day paid Reid. There is the further fact that Day made a payment to the customs officials in respect of claims made for duty on these goods.

Judgment

Per curiam: Leave to appeal should be refused. No case has been made out on which we would be justified in ordering the trial judge to state a case. This application has been argued very fully; in fact, we have permitted counsel to argue it very exhaustively to see if it was possible to ascertain anything which would justify the granting of an order for a stated case. But

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it is perfectly clear on the uncontradicted evidence that there is no case; in other words, that it would be hopeless for the prisoner to expect to succeed on a stated case.

Leave refused.

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1911
Nov. 9.

REX
v.
THURSTAN

REX v. THURSTAN.

Criminal law—Grand jury returning true bill without taking evidence—Sent back by judge to take evidence and determine on such evidence—Discretion.

A grand jury having returned a true bill without calling any of the witnesses named on the indictment, but upon reading depositions taken at the preliminary hearing, which had not been legally submitted to them, the assize judge sent them back with instructions to take the evidence of the witnesses whose names were on the back of the indictment and determine upon such evidence whether they would bring in a true bill, which they did.

Held, that the judge had properly exercised his discretion and was right in dismissing a motion to set aside a conviction had in a trial upon such true bill.

APPEAL from the judgment of MURPHY, J. by way of case stated for the opinion of the Court of Appeal. In the case stated the learned judge set out the facts and the questions as follows:

Statement

"(1) Upon the grand jury returning a true bill and after their having left the Court room, but before being discharged, I noticed that none of the witnesses' names had been initialled by the foreman of the grand jury on the indictment. I thereupon sent for the said grand jury and pointed out to them that no names had been initialled upon the indictment, and thereupon the foreman of the grand jury in open Court stated that no witnesses had been called and that a true bill had been found

by examination of the depositions taken at the preliminary hearing. I thereupon returned the indictment so indorsed to the foreman of the grand jury, informing them that a bill so found could not be acted upon, and instructed them to again retire and take evidence, and determine by such evidence whether or not they would bring in a true bill, whereupon the grand jury did retire and later returned a true bill. Upon the prisoner being called to plead, and before his plea was entered, his counsel moved to quash the indictment on the following grounds:

"(a) The grand jury having had an indictment laid before them and having considered the same and having found a true bill thereupon, that this indictment so found was bad, inasmuch as it was not found on legal evidence and should therefore have been quashed. My view was that the first action of the grand jury was a nullity.

"(b) That even although the grand jury could bring in a second true bill on the same indictment after having acted as above set out, it should be quashed on the ground that the grand jury, having had depositions before them, were not qualified to deal with the said indictment again, on account of the fact that their minds would be prejudiced by evidence not being legal evidence.

Statement

"(2) I refused the motion to quash, and upon the trial of the prisoner, he was found guilty on the first count on the indictment, and was sentenced to five years in the penitentiary at New Westminster, with hard labour.

"(3) The questions of law arising on the above statement for the opinion of this Court therefore are:

"(a) Whether the grand jury, having returned a true bill without having called any witnesses, and merely on a perusal of the depositions, could afterwards return to the grand jury room and reconsider their finding and return another true bill on the same indictment, after having called witnesses.

"(c) Whether depositions taken on the preliminary hearing should be submitted to the grand jury.

"(d) That if the grand jury could find a second true bill

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on the same indictment, whether such indictment should be quashed on the ground that the grand jury had read the depositions taken on the preliminary hearing.

"(e) If the Court should be of the opinion that the true bill on the indictment was such a bill as entitled the Crown to place the accused on his trial, then the said conviction is to stand, but if the Court should be of opinion to the contrary, then said conviction should be quashed."

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

Argument

S. S. Taylor, K.C., for accused: It is submitted that a grand jury in the circumstances here could not hear evidence after having come to a decision on other, and that even improper, evidence. The duty of the Crown was to have either traversed the case to the next assizes, or else summon a new grand jury. *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, is, by analogy, in support of this submission.

[MACDONALD, C.J.A. referred to *Allen* v. *The King* (1911), 44 S.C.R. 331.]

Maclean, K.C., for the Crown: *Rex* v. *Walker and Chinley* is strongly in support of the submission that the true bill was properly brought in. Here the matter had been withdrawn from the grand jury, and they had been directed to consider the question entirely afresh.

He was stopped.

Judgment

Per curiam: The application should be refused. It was the duty and the province of the trial judge to decide on the facts of the case whether or not it would be just to the prisoner to send the grand jury back with instructions to eliminate from their minds any wrong evidence which they had considered, and to bring in a bill on proper evidence. We think the learned judge exercised his discretion properly, and we ought not to interfere.

Motion dismissed.

GODDARD v. SLINGERLAND.

COURT OF APPEAL

1911

June 6.

GODDARD v. SLINGERLAND

Statute—Construction of—Land Registry Act, 1906, Section 74—Agreements of similar date—Registration of at different times—Right of action—Priorities.

Plaintiff and defendant both purchased adjoining properties from a common vendor on the same date. Defendant registered his title on the 25th of June, 1910, and plaintiff registered on the 26th of July following. Plaintiff for two or three years occupied as a tenant the property which she purchased, and during such tenancy her house was drained into the adjoining property, which was purchased by defendant. On the 3rd of June defendant disconnected and stopped the drain at the boundary of his lot, and denied the plaintiff's right to use the drain and cesspool. GRANT, Co. J., before whom the action was tried, gave judgment for plaintiff in $1,000 damages on the ground that defendant, not having any registered title, under section 74 of the Land Registry Act, had no right to tear up or stop the drain.

Held, on appeal, that neither party having any registered ownership in the lands at the time of the occurrences in question, the appeal should be allowed and the action dismissed.

Per IRVING, J.A.: Reservations of easements should be shewn on subdivision plans.

Remarks on the propriety of a judge increasing, during the trial, the damages claimed, from $150 to $1,000.

APPEAL from the judgment of GRANT, Co. J. in a trial before him at Vancouver on the 19th of October, 1910. The facts on which the judgment rests are set out shortly in the headnote.

Statement

The appeal was argued at Victoria on the 23rd of January, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellant.
Bodwell, K.C., for respondent.

Cur. adv. vult.

6th June, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: On the 26th of April, 1910, Catherine Stewart Hayes, then being the owner of certain lots in South Vancouver, by agreement in writing, sold some of the lots to

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the plaintiff, "together with the privileges and appurtenances thereto belonging." On the same day Mrs. Hayes sold one of her other lots to the defendant "free and clear of all encumbrances." There is no evidence to shew which agreement in point of time was made first on that day. The defendant did not register his agreement until the 23rd of June, nor the plaintiff until the 6th of July of the same year. On the plaintiff's lots was a house which had been occupied by her as Mrs. Hayes's tenant for some time before the purchase, and the sanitary conveniences of this house were connected by a drain with a covered cesspool situate on the lot sold to the defendant. On the 3rd of June defendant disconnected the drain at the boundary of his lot, and denied the plaintiff's right to use the cesspool.

The plaintiff bases her right of action upon her said agreement, and an alleged easement acquired thereunder, and claims that the cutting off of the connection with the cesspool was an invasion of that easement.

MACDONALD, C.J.A.

I think the sale and purchase agreements fall within section 74 of the Land Registry Act, 1906, and as they were not registered at the time of the alleged wrongful acts, neither the plaintiff nor defendant with respect to his or her complaints against the other had any interest at law, or in equity, in the properties in question. Each was in possession as purchaser under an unregistered agreement, and in no other capacity. The plaintiff's tenancy had ceased, and she has shewn no title either to the property or to the occupation of it, other than that which she claims under the agreement. At the time of the alleged wrongful act, the defendant was in actual possession of his lot. Each was a stranger to the other in the legal sense. Neither could, as against the other, appeal to rights derived from Mrs. Hayes. Section 74 precludes that, and as the plaintiff's claim is based entirely upon her property rights under her said agreement, and as, in my opinion, she cannot set that agreement up as against the defendant; and as she has neither alleged nor proven any other title, the onus of proof being upon her, I think she has failed in this action. Nor do I think she could succeed if we were to leave section 74 out of consideration. Assume

for the moment that the defendant's agreement was first in point of time. He was entitled to have his lot free from any encumbrance. Mrs. Hayes could not insist upon a right to drain her house into this lot, and a purchaser from her afterwards could have no better right. It follows, then, that the plaintiff would have to prove that her agreement was first in time. Had she shewn this, then we should have had to consider the further question whether or not her agreement would give her the easement she claims, as to which I find it unnecessary in this case to decide.

I would allow the appeal, and dismiss the action, with costs, here and below.

IRVING, J.A.: We are not aware whether it was the defendant or the plaintiff who first obtained an agreement for sale from Mrs. Hayes. It seems to me that if anything turns on the plaintiff's priority of title, she has neglected to prove it. We cannot assume that hers is the earlier agreement. But prior to the execution of either agreement there was the subdivision of the property, and the registration of a plan. That fact, in my opinion, is of the utmost importance. Having regard to the rule that when the grantor intends to reserve any right over a tenement granted, it is his duty to reserve it expressly; if a person files a plan after subdividing, he should shew on such plan that the intention is to deprive the purchaser of any lot of any of the general rights of property. At any rate it is the duty of the grantor selling to reserve it expressly in the grant of the servient tenement.

In my opinion, as it is conceded that this is not an easement of necessity, without which no enjoyment at all would be possible, the grantor, Mrs. Hayes, could not maintain this action, because she would not be at liberty to derogate from her grant to Slingerland. The plaintiff is in no better position. The action therefore fails.

It is unnecessary to deal with the amount of damages. With all due deference to the learned County Court judge, I think he was not well advised in allowing the plaintiff in the

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middle of the trial to increase her claim for damages from $150 to $1,000, in view of the fact that she only claimed $100 before action brought. It is a useless precaution to obtain before trial particulars of damage alleged to be sustained if an amendment is to be made at the trial without reasonable notice being given of the intention to apply for such amendment.

MARTIN, J.A.: It is clear that this appeal should be allowed, in any event for wrongful rejection of the evidence proffered by the defendant to shew the effect upon his land of the sewage which the plaintiff was discharging upon it, thereby creating, it is alleged, a nuisance dangerous to the public health, which it would be the duty of the defendant to abate, as the owner of the premises upon which the nuisance was continuously maintained. Nor can I see any necessity for the existence of this so-called easement, strangely extending, as the plaintiff himself shews, across a public lane which is the property, by statute, of the Municipality of South Vancouver—see section 242 of the Municipal Clauses Act, 1906—because the receptacle for the sewage, called a septic tank, though manifestly an imperfect one, could have been originally, as it was later, constructed on the plaintiff's own premises. The damages awarded are, moreover, excessive, because the plaintiff, on his own admission, after the defendant stopped up the drain where it entered his land, deliberately allowed, incredible as it may sound, the sewage from his bathroom and watercloset to run into his own cellar for a period of three weeks, rather than make temporary arrangements outside.

MARTIN, J.A.

But apart from all other matters, and without passing upon the question of the easement, which I note was only shewn to have been in existence for three and a half years, and not ten, I think the case will have to be decided on section 74 of the Land Registry Act, 1906, chapter 23. In the face of that very unusual and positive enactment, the result of which is to declare that, at the time of the matters complained of, neither of the parties had obtained "any estate or interest at law or in equity" under their similar agreements for sale from their common vendor, I confess I cannot see how the plaintiff is to succeed against

the defendant, who was and is an absolute stranger to him in a legal sense. No right *inter partes* arises here, as was suggested in *Levy v. Gleason* (1907), 13 B.C. 357, nor question of fraud or notice, to complicate the question before us, which presents to us for the first time a clear cut point, under this embarrassing section, for our consideration. The reasoning in the case of *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, supports this view, and in my opinion this Court cannot recognize any right in the plaintiff to complain of interference with an easement appurtenant to property which the said section declares he had not "any estate or interest" in at the time of the said interference. It is unnecessary, therefore, to consider the effect of the subsequent registrations of the agreements, which question in part arose in *Westfall* v. *Stewart and Griffith* (1907), 13 B.C. 111 on an assignment for benefit of creditors.

The appeal should be allowed with costs, and the action dismissed with costs.

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

Appeal allowed.

Solicitor for appellant: *W. P. Ogilvie.*
Solicitor for respondent: *D. S. Wallbridge.*

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1911

Nov. 7.

CHAPMAN v. EDWARDS, CLARK AND BENSON

CHAPMAN v. EDWARDS, CLARK AND BENSON.

Sale of land—Contract for—Specific performance—Possessory title—Failure to register—Priority of registration—Notice—Fraud—Land Registry Act, B.C. Stats. 1906, Cap. 23, Sec. 74.

The defendant Edwards is the owner of certain property in Kamloops, fronting on the Thompson River. In July, 1909, he agreed to sell to the plaintiff for $2,500, the sum of $600 down, and the balance on time. The first payment was made, but there was some delay about the second on account of Edwards having only a possessory or unregistered title to a part of the property, and he was endeavouring to complete his title. In July, 1910, the defendant Clark wanted to purchase some property on the river front, and was shewn the property in question by the defendant Benson, a real estate agent. Clark told Benson that if he could secure it at anything under $6,000 he would pay him $300 on his bargain. Benson thereupon saw the plaintiff, Chapman, and tried to purchase the lot from him, but being unable to arrange terms with him, went to Edwards, who agreed to sell the property at $5,500. He made an agreement for sale to Benson on the 30th of July, 1910, which agreement was at once assigned to Clark and placed in the Land Registry office for registration. Benson had reported to Clark his negotiations with Chapman, and about Chapman being in possession.

GREGORY, J. gave judgment in favour of plaintiff for specific performance as to those lots to which the title was not in dispute, and as to the lot to which plaintiff had only a possessory title, it was decreed that plaintiff accept such title as Edwards had, and if that should not be acceptable, that there be an abatement of the purchase price and a reference to the registrar to settle the amount. Defendant Edwards appealed, and the appeal was dismissed on the ground that he had actual notice of Chapman's title, and could not be allowed in the circumstances to take advantage of section 74 of the Land Registry Act.

APPEAL from the judgment of GREGORY, J. in an action for specific performance of an agreement for sale, tried at Kamloops on the 17th and 18th of November, 1910.

Statement

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

Argument

A. H. MacNeill, K.C., for appellant: In the circumstances here, Chapman had no title, legal or equitable, by reason of sec-

tion 74 of the Land Registry Act. Clark, having applied to register, takes priority. Even if the trial judge was right in finding fraud, there is nothing in the statute to prevent the operation of the document which Clark holds. Plaintiff is not entitled to specific performance of his prior agreement. The trouble should fall on Chapman. He referred to *Westfall* v. *Stewart and Griffith* (1907), 13 B.C. 111; *Levy* v. *Gleason, ib.*, 357; *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51. Chapman having failed to take proper and complete measures to protect his equitable title, must be postponed.

Fulton, K.C., for respondent: Benson had full knowledge of the prior sale to Chapman. It was reported to Clark, who took chances. The second sale over Chapman's head was a fraud on him. We are entitled to go back to the old common law doctrine of notice. He referred to *Hudson's Bay Co.* v. *Kearns & Rowling* (1896), 4 B.C. 536; *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82; *Agra Bank, Limited* v. *Barry* (1874), L.R. 7 H.L. 135, at p. 157. Section 74 of the Land Registry Act appears to have been based on section 63 of the Transfer of Land Act, Victorian statutes: see *Cowell* v. *Stacey* (1887), 13 V.L.R. 80. It would not be equitable to permit this section to allow a person who has actual knowledge of a previous sale to go to the original owner of the property (because the first agreement had not been lodged in the Land Registry) and rush his agreement into the registry to oust the prior purchaser.

Argument

MacNeill, in reply: This is not a case of a prior encumbrance being got rid of, because Chapman's agreement has never been registered. Under section 29 we are entitled to be registered for this charge, subject to any prior registered charge. Ours being the first lodged, it automatically would be the first registered. The *lis pendens* was filed after our application to register, and by section 55 it would be postponed.

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: On the evidence it is clear that Chapman made a binding agreement with Edwards to purchase the

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property in question. It is unnecessary to consider closely whether or not the writing was sufficient under the Statute of Frauds because possession was given and improvements made referable only to the agreement. There has been no abandonment of that agreement by Chapman, so that when Edwards purported to sell to Benson, who was in this transaction the *alter ego* of the appellant Clark, the agreement between Edwards and Chapman was in full force. Of Chapman's rights Benson and Clark had notice, and with such notice they induced Edwards to enter into an agreement to sell to Benson, which agreement was immediately assigned in accordance with a previous understanding by Benson to Clark and deposited for registration. The character of the transaction is apparent. Clark, who is a speculator in land, wanted the property; negotiations with Chapman having failed, and having learned that there was some hitch in the transaction between Chapman and his vendor, advantage was taken of this by Clark to get an agreement of purchase from Edwards over the head of Chapman, in the hope, doubtless, that if this agreement was registered, Chapman's not being so, Clark would hold the property as against Chapman by virtue of section 74 of the Land Registry Act. The trial judge came to the conclusion that the transaction between Clark, Benson and Edwards was a fraudulent one as against the plaintiff, and I am unable to say he was wrong. Unless, therefore, the plaintiff is debarred by section 74 from asserting his equitable title, the judgment below ought to be sustained. In my opinion section 74 does not affect the rights *inter partes* of vendor and purchaser. Leaving fraud or notice out of the question for the moment, how does the case stand? If no interest, legal or equitable, in the property has yet passed to Chapman owing to his failure to register his agreement, neither has any such interest passed to Clark, because though application to register Clark's agreement was made it was not in fact registered. It is upon registration, which is defined in the Act, and not upon application for registration that an interest passes under this section. If, therefore, the section does not affect the contractual rights or

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duties of the vendor and purchaser as between themselves, and if Clark has not brought himself within its operation, then, even apart from fraud, the result must be that the plaintiff should succeed.

I would dismiss the appeal.

IRVING, J.A.: In an action for specific performance judgment was given for the plaintiff, and the defendant Clark now appeals. Edwards, the original owner, signed an agreement with Chapman to sell and let him into possession. That agreement has not yet been registered. Later, Edwards signed an agreement to sell to Benson, which agreement was assigned to plaintiff, who registered it.

The plaintiff's action brings under consideration section 74 of the Land Registry Act, which declares:

"No instrument executed after and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with or affect land, or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act, but such instrument shall confer on the person benefitted thereby, and on those claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the same registered."

Several systems of registration have been in force in certain counties in England for many years. The Yorkshire Registry Act, 2 & 3 Anne, c. 4; the Middlesex Registry Act, 7 Anne, c. 20, and the whole of Ireland was governed by the 6 Anne Act. The decisions on those statutes all recognize the equitable doctrine of notice by means of which Courts of Equity granted relief where the registered claimant had notice of the unregistered instrument. Sometimes the foundation of the relief is stated to be that the person had the knowledge and therefore registration under the Act was, so far as he is concerned, unnecessary. Sometimes it is said that the knowledge estops the registered claimant from setting up that the instrument is fraudulent and void.

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The cases are collected in 2 White & Tudor's Leading Cases, 7th Ed., 175, under *Le Neve* v. *Le Neve* (1747), Amb. 436 (*a*) and in 21 Camp. R.C. 774.

In construing our Land Registry Act, B.C. Statutes, 1906, chapter 23, and in particular section 74, originally passed in 1905, one must bear in mind that this doctrine of notice was held to survive, notwithstanding that on the first reading over of those registration Acts, one would conclude that under all circumstances the deed first registered was to take precedence of a deed which, although executed before, was not registered. The same doctrine prevails in the Australian Colony of Victoria: *Cowell* v. *Stacey* (1887), 13 V.L.R. 80 at p. 84.

Under our former system, DAVIE, C.J. said in *Hudson's Bay Co.* v. *Kearns and Rowling* (1896), 4 B.C. 536, at pp. 551-2:

"The principle which has repeatedly been held to apply to the different Register Acts of England and some of the colonies, applies equally I take it to our Act, and that is that a person who purchases with notice of the title of another is guilty of fraud, and that a Court of Equity will not permit a party so committing a fraud to avail himself of the provisions of a statute itself enacted for the prevention of fraud. As pointed out by Chief Justice Strong, in *Rose* v. *Peterkin* (1885), 13 S.C.R. 677 at p. 706, this principle is applied by Courts of Equity not merely in cases arising under the Registry Acts, but to cases under the Statute of Frauds, the Wills Act, and in many other cases; one of the reasons of the principle being laid down by Lord Westbury in *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82 at p. 97: 'The Court of Equity has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervened, the Court of Equity it is true does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud.'

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"In other words, if B, with knowledge of facts which would render a purchase a fraud upon A, deliberately carries out the purchase, which without the aid of a statute aimed at the suppression of fraud would be null and void, a Court of Equity will hold B estopped from setting up the provisions of such a statute when to permit him to set it up would be to enable him to commit a fraud. As remarked in the case above quoted, the Court does not set aside the statute; it merely, acting in equity and good conscience, enjoins a person from perpetrating a fraud by means of a statute aimed at the prevention of fraud."

Now it is said that section 74 completely wipes out this equitable doctrine of notice. Certainly the language used is

strong, but I am inclined to the opinion that to make so radical a change the language should be stronger and plainer.

Compare the provisions in the statute in *White* v. *Neaylon* (1886), 11 App. Cas. 171, where it is expressly enacted notice shall not have any effect.

The 74th section has been considered in several cases. In *Westfall* v. *Stewart & Griffith* (1907), 13 B.C. 111, by CLEMENT, J., Westfall obtained from Griffith an instrument on the 8th of July, 1905, but did not register until after the 27th of June, 1906, on which day Griffith made an assignment for the benefit of his creditors. The learned judge proceeded on the principle that the assignee could not be in any better position than the assignor, and held that the instrument related to the date of its execution.

In *Levy* v. *Gleason* (1907), 13 B.C. 357, Gleason executed a deed on the 12th of December, 1906, but registration was not effected until the 23rd of January, 1907. HUNTER, C.J. was of opinion that under section 74, Gleason's interest was not divested until after the 23rd of January.

In *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, the plaintiff in January, 1906, obtained from McArthur a conveyance of a lot, but did not register it until August, 1907. The defendants' execution creditors registered their judgment on the 3rd of April, 1907. The Full Court thought that the execution creditors were not entitled to proceed against the lot, although it was standing in the name of the debtor—as trustee —no deed required.

IRVING, J.A.

Then came the decision of this Court in *Goddard* v. *Slingerland* (1911), 16 B.C. 329, but that was not a case in any way similar to the case under consideration.

None of these cases touches the point in this case.

The notice Benson had was this: He was employed by Clark to buy four or five lots. He went to Chapman, who was in possession; he had been in possession ever since Benson knew the property; they arranged a sale. Benson suggested he should make a deposit; but Chapman said that he could not give title to one of the four or five lots; Benson learned from Chap-

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man that Edwards had been the owner of the property; he went to him; Edwards had sold to him, and Edwards said that he was the owner, and that Chapman had no right to sell; that Chapman had bought from him, but that he, Chapman, had not lived up to his agreement; upon this, Benson bought from Edwards at a lesser price than Chapman was willing to take; he knew Chapman was in possession, and claimed to have bought the property, and yet he bought it over his head. He told Clark all this, but Clark was willing to take chances.

Benson, from whose evidence I have taken the above, is obviously not speaking candidly.

IRVING, J.A.

I would dismiss the appeal on the ground that the defendant had actual notice of Chapman's title, and that to permit Clark to come in under section 74 would be allowing him to make the statute an instrument of fraud.

Our section 74 is very strong, but I think full effect can be given to it by reading it as if it expressly excepted cases of fraud.

MARTIN, J.A.: On the evidence, all of which I have carefully read, I have no doubt that the defendants Clark and Benson must be held to have had notice of the prior agreement for sale between the plaintiff and the defendant Edwards, and that they took the chance of the plaintiff not being able to establish his legal title: see Benson's evidence. Benson, I am satisfied, was the agent of Clark in the matter. At the same time I think that the defendant Benson believed that the plaintiff's rights under his agreement had lapsed or become forfeited, and that Edwards was in a position to lawfully sell the lands without regard to Chapman. But nevertheless, according to the decision of the Full Court in *Hudson's Bay Co.* v. *Kearns and Rowling* (1896), 4 B.C. 536, at p. 556, under section 35 of the old Land Registry Act,* those facts must be deemed to constitute fraud, DAVIE, C.J. observing as follows:

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*"No purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice expressed, implied or constructive, of any unregistered title, interest or disposition affecting such real estate, other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity to the contrary notwithstanding."

"In conclusion, therefore, I am of opinion that the effect of section 35 of the Land Registry Act must be taken as absolutely protecting a purchaser for value against attack on the ground of notice of any character or nature whatsoever; but its otherwise absolute effect must be held to be subject to this qualification, that a man who in consequence of any knowledge constituting actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section as distinguished from any act in the ordinary course of business or in the natural course of any pending deal or transaction, and thereby prejudicing the holder of the unregistered title, must be held to be guilty of actual fraud and to be estopped from invoking the protection of the enactment, under the inflexible rule that an Act of Parliament shall not be used as an instrument of, or in defence of, actual fraud."

Unless, therefore, the new section 74, which we have lately construed in *Goddard* v. *Slingerland, supra,* alters the situation, the judgment appealed from must stand. In support of the contention that it does not we have been referred to the Victorian case of *Cowell* v. *Stacey* (1887), 13 V.L.R. 80, decided on the following, section 42 of the Transfer of Land Statute:

"No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or as the case may be the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument or by the Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor and purporting to affect the same estate or interest be at the same time presented to the registrar for registration, he shall register and indorse that instrument which shall be presented by the person producing the duplicate grant or certificate of title."

In my opinion our section 74 goes no further than that section, and I think that it would be well for us to put the same interpretation upon it.

I can find no suggestion that *Cowell* v. *Stacey, supra,* has ever been questioned, though I have searched carefully through all the Commonwealth Reports and Victorian Reports down to date. On the contrary, it is cited, without comment, in *General Finance Agency, Etc., Co.* v. *The Perpetual Executors and Trustee Association, Etc.* (1902), 27 V.L.R. 739, at pp. 742 and

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750; the case of *Barnes* v. *James, ib.*, 749, appended as a note thereto is worthy of perusal in this connection.

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

Solicitor for appellants: *J. E. Bird.*
Solicitor for respondent: *F. J. Fulton.*

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MOFFET v. RUTTAN

MOFFET v. RUTTAN.

Municipal law—Plan of Subdivision—Refusal of mayor to approve—Grounds of refusal—Reasonableness—Discretion.

The Court will not grant a writ of *mandamus* to compel a municipal authority to approve a plan of subdivision, where the authority has refused its sanction on the ground that the subdivision did not comply with the law, and has not exercised unreasonably the discretion allowed by the statute.

Reg. on the Prosecution of Wright v. *Eastbourne Corporation* (1900), 83 L.T.N.S. 338, followed.

Statement

APPEAL from an order of CLEMENT, J., at Chambers in Vancouver, on the 3rd of June, 1911, dismissing plaintiff's application for a writ of *mandamus* commanding the defendant to approve a certain plan of subdivision.

The appeal was argued at Vancouver on the 22nd of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

S. S. Taylor, K.C., for appellant: The mayor would not approve of the plan because Salmon Arm road was only 33 feet wide. The other thoroughfares were the proper width. Salmon Arm road is an already established road, and the 33 feet were taken off our land in the first place. We did not make the road; we simply shewed our subdivision as beginning at that road.

The proper method for the mayor or council is to get the owner on the other side of the road to give the necessary land. The by-law passed by the council dealing with subdivisions does not provide for submission of plans for approval.

Ritchie, K.C., for respondent: The Court cannot force, by an action at law, a public official to perform a statutory duty: see *Reg.* v. *The Vestry of St. George, Southwark* (1892), 67 L.T.N.S. 412; *Smith* v. *Chorely District Council* (1897), 1 Q.B. 532, at p. 539; *Davies* v. *Gas Light and Coke Company* (1909), 1 Ch. 248: 10 Halsbury's Laws of England, 1,085; *Rex.* v. *Mayor, &c., of Stepney* (1902), 86 L.T.N.S. 21. It is not shewn that the action of the mayor in refusing to approve the plan was unreasonable. It was not unreasonable on his part to refuse permission to lay out building lots on a 33-foot road. Further, the Court cannot compel the mayor to approve this plan, if by approving it in its present condition, he would be doing something which would be both wrong and illegal: see *Reg. on the Prosecution of Wright* v. *Eastbourne Corporation* (1900), 83 L.T.N.S. 338.

Argument

Taylor, in reply: As to the form of the action, *Scott* v. *Fernie* (1904), 11 B.C. 91 applies. All parties consented to the procedure adopted, and the matter is now before the Court as in a stated case. This is not a question of jurisdiction, but of procedure.

Per curiam: It is perfectly clear that there was nothing unreasonable on the part of the mayor. He had a discretion vested in him to say whether this subdivision should be laid out on an existing street or road 33 feet wide, and in refusing to sanction that plan we cannot say that he did not rightly exercise that discretion. As to our authority to deal with the other point raised (the form of the action) it is not necessary to say anything. The appeal will therefore be dismissed.

Judgment

Appeal dismissed.

Solicitors for appellant: *Billings & Cochrane.*
Solicitor for respondent: *W. E. Banton.*

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CLARKE v. FORD-McCONNELL, LTD.

CLARKE v. FORD-McCONNELL, LIMITED, AND W. McCONNELL.

Practice—Action for libel—Trial by jury—Nature of—Extension of time—Order XXXVI., rr. 2, 7.

In an action for libel, notice of trial without a jury was served on defendants on the 11th of May, and on the 6th of June defendants gave notice under Order XXXVI., r. 2, of an application for an order extending the time for giving notice of trial before a judge and a common jury. The cause of the delay in giving this latter notice was due to an oversight of the solicitor's clerk.

Held, on appeal, that the time should have been extended in the circumstances.

Statement

APPEAL from an order made by CLEMENT, J. at Chambers in Vancouver on the 9th of June, 1911, refusing an application for an order for trial by a judge with a jury. The action was one for damages for libel. The writ was issued on the 29th of November, 1910, and notice of trial, without a jury, served on defendants on the 11th of May, 1911. On the 6th of June defendants, under Order XXXVI., r. 2, gave notice of application for an order extending the time for giving notice of trial on the 13th of September, 1911, before a judge and a common jury. The reason for the delay was owing to the absence of the solicitor having the conduct of the case for the defendants. CLEMENT, J., in dismissing the application, remarked:

"With our practice trial by a judge without a jury is a normal method of trial, and it seems to me that the burden is now on the party applying for a jury to shew that justice requires that that method of trial should be adopted. The slip on the part of the defendants' solicitors raises no equity as against the plaintiff, and I see nothing to justify me in thinking that a jury would dispose of the issues of fact in this case more satisfactorily than a judge. Costs to plaintiff in any event."

Defendants appealed and the appeal was argued at Vancou-

ver on the 22nd of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellants: The learned judge below, in proceeding under Order XXXVI., r. 2, did so on the basis that he had a discretion to exercise as to whether or not the case was one that should be tried by a jury, whereas rule 2 gives no discretion whatever, and only permits a judge to determine whether or not the time should be extended within which he can grant a demand for a jury, and upon this feature he has not adjudicated. As the notice of trial was given in May for September, and our motion was made in June, there is no possibility of our being prejudiced by the delay in giving the four days' notice under the rule, and the judge should have granted the extension. No harm can be done in granting the extension, as the status of neither party has been changed, and we say in any event that, for the proper trial of this action, we are entitled to a jury.

Argument

He was stopped.

Craig, for respondent, called upon: Rules 2 and 7 of Order XXXVI. should be read together. The rule is that unless a jury is asked for, the action must be tried without a jury. He cited *Gilder* v. *Morrison* (1882), 30 W.R. 815.

If the Court will not relieve in the case of a mere slip as in *Gilder* v. *Morrison,* then how can it do so here, where the party is entirely out of time? Further, on the material, we can shew that a fair trial with a jury cannot be expected in this case.

Per curiam: That, then, would be matter for an application for change of venue. We think the appeal should be allowed, with costs below to the plaintiff and costs here to the appellants.

Judgment

Appeal allowed.

Solicitors for appellant: *Taylor, Harvey, Baird & Grant.*

Solicitors for respondent: *Martin, Craig, Bourne & McDonald.*

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Nov. 21.

WILLIAMSON v. WOOLLIAMS AND NAISMITH

WILLIAMSON v. WOOLLIAMS AND NAISMITH.

Practice—Attachment of debts—Execution creditor—Assignment of debtor before judgment obtained—Garnishee proceedings.

The persons referred to in sub-section (2) of section 3 of the Creditors' Trust Deeds Act, 1901, Amendment Act, 1902, Cap. 18, as execution creditors are those having processes upon which execution can be levied. Therefore an attaching order giving a person who had not yet obtained judgment a lien on moneys in Court, was set aside.

Statement

APPEAL from an order made by GRANT, Co. J., at Vancouver on the 24th of August, 1911, in an action for the recovery of $116.10. After action brought, and before judgment was given and attaching orders obtained, the debtor made an assignment. The assignee applied to GRANT, Co. J. for an order for payment out, and it was held that the plaintiff in the action, by issuing the garnishee summons, although he had obtained no judgment, was an execution creditor, and an order was made giving him a lien on the moneys in Court.

Defendants appealed and the appeal was argued at Vancouver on the 21st of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Craig, in support of the appeal: The short question is whether the plaintiff, who has issued an attaching order, but has not recovered judgment against the debtor or garnishee, can be considered an execution creditor.

Arnold, contra: We submit that we are quite within the 1902 amendment, and while we are not an execution creditor properly speaking, we are an execution creditor by way of "equitable execution."

Judgment

Per curiam: The appeal should be allowed. It seems very clear that sub-section (2) of section 3 of the Creditors' Trust Deeds Act, 1901, Amendment Act, 1902, refers only to such attachments as can be called executions. Execution creditors

there are those having *fi. fas.* and judgments upon which execution can be levied.

Appeal allowed.

Solicitor for appellants: *G. G. Duncan.*
Solicitors for respondent: *Schultz & Arnold.*

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WILLIAMSON v. WOOLLIAMS AND NAISMITH

UNION BANK OF CANADA v. ANCHOR INVESTMENT COMPANY, LIMITED.

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UNION BANK OF CANADA v. ANCHOR INVESTMENT CO.

Practice—Affidavit verifying cause of action—Sufficiency—Judgment under Order XIV.

In an action brought by the Union Bank of Canada to recover $2,975.16, amount of principal and interest owing on a certain promissory note dated at Vancouver, B.C., 11th of November, 1910, made by the defendant in favour of one James Johnson, payable at the Union Bank of Canada, Vancouver, B.C., on or before the 1st of April, 1911, and alleged to be held by the plaintiff in due course, the plaintiff's application for judgment under Order XIV., was supported by an affidavit of one John R. Major, wherein he alleged that he was manager of the Union Bank of Canada at Boissevain, and had knowledge of the matters therein deposed to. Said affidavit further set out a copy of the indorsement on the writ of summons and alleged that "the defendant at the commencement of this action was and still is justly and truly indebted to the plaintiff in the sum of $2,975.16 in respect of the matters set forth in the indorsement on the said writ of summons." The defendant opposed the application on technical grounds, and also filed an affidavit on the merits, by the president of the defendant Company, wherein he alleged that he believed that one Milladge, a former manger of the plaintiff Bank at Boissevain, was the beneficial holder of the said note and alleged an agreement which would have constituted a good defence against the said Milladge, but it did not appear from the affidavit whether the note sued on was given in renewal of two former notes given to said Milladge. MORRISON, J. gave leave to sign judgment.

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An appeal from this order was dismissed on the ground that defendant's affidavit did not contain material which would justify interference on the part of the Court of Appeal.

[See *Chirgwin* v. *Russell* (1910), 27 T.L.R. 21.]

UNION BANK OF CANADA *v.* ANCHOR INVESTMENT CO.

APPEAL from an order made by MORRISON, J. at Chambers, in Vancouver, on the 28th of September, 1911, giving plaintiff leave to sign judgment under Order XIV.

The appeal was argued at Vancouver on the 29th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Woodworth, and *Creagh,* for appellant.
L. G. McPhillips, K. C., for respondent.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed. I am rather sorry to have to come to that conclusion, because it is just possible in the circumstances there might be a defence as to either a part or the whole; but when a matter comes before us on material which will not justify our interference, the only thing we can do is to dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: I agree.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *Woodworth & Creagh.*
Solicitors for respondent: *McPhillips & Wood.*

TURNER v. MUNICIPALITY OF SURREY. (No. 2).

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1911

Nov. 20.

TURNER v. MUNICIPALITY OF SURREY

Practice—Particulars—Interrogatories.

Where a party, having asked for and obtained particulars, and the order was reversed on appeal, and then applied for discovery by interrogatories, the judge at Chambers dismissed the application on the ground that the application was an attempt to gain by another means that which had already been refused.

Held, that the judge was right.

APPEAL from an order of MURPHY, J., at Chambers in Vancouver, on the 2nd of June, 1911, refusing interrogatories, on the ground that, having previously given an order for particulars in the same suit, which order had been reversed by the Court of Appeal, *ante* p. 79, therefore an order for interrogatories now would be granting the same information in another way. The action was one to have set aside a tax sale deed purporting to convey certain real property to the plaintiff, bought in by the defendant Municipality at a tax sale.

Statement

The appeal was argued at Vancouver on the 20th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C. (*McQuarrie,* with him), for appellant (defendant) Municipality: Particulars and interrogatories are quite different from each other: *Young and Company* v. *Scottish Union and National Insurance Company* (1907), 24 T.L.R. 73. The decision on which the judge at Chambers went does not preclude us, because if we require this information and it will be of assistance to us at the trial, we are entitled to it so as to be prepared for what we shall have to meet at the trial: *Briton Medical, &c., Life Association* v. *Britannia Fire Association and Whinney* (1889), 59 L.T.N.S. 888; *Saunders* v. *Jones* (1877), 7 Ch. D. 435; *Ashley* v. *Taylor* (1878), 38 L.T.N.S. 44.

Argument

Kappele, for respondent, was not called upon.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed.

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IRVING, J.A.

IRVING, J.A.: I agree. It seems to me that in this application for interrogatories the defendants are only asking for what has already been stated they are not entitled to. There is by a general rule of law an onus cast upon the defendants to prove that everything has been done to constitute a valid tax sale. An effort is now being made to shift that onus from the defendants to the plaintiff, and to get rid of that rule of law by means of these sweeping interrogatories. As to the duty of solicitors in a case of this kind, I agree that they should have gone through the books of the Municipality and endeavoured to find out there what they really complained of, and then bring the dry bones of the case into Court, instead of bringing forward the case in an undigested form. It is exceedingly difficult to deal with these cases at *nisi prius* unless there has been a thorough preliminary examination of the books of the Corporation before trial.

GALLIHER, J.A.

GALLIHER, J.A., agreed that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Wade, Whealler, McQuarrie & Martin.*

Solicitor for respondent: *A. J. Kappele.*

BROOKS, SCANLAN, O'BRIEN COMPANY, LIMITED v. RHINE FAKKEMA.

COURT OF APPEAL

1911

Nov. 27.

BROOKS, SCANLAN, O'BRIEN CO. v. FAKKEMA.

Master and servant—Amount paid by employer conveying injured servant to medical assistance—Such expenditure considered by jury in reaching verdict—Res judicata.

In an action against an employer for injuries received by an employee [(1911) 16 B.C.] the evidence shewed that when the employee was injured, the employers paid some $686.30 in conveying the man to the hospital and defraying his medical expenses. Counsel for the employers brought this fact to the notice of the Court and jury during the trial, when plaintiff recovered a verdict of $4,500. The Company claimed the amount disbursed, sued and recovered judgment.

Held, on appeal, that counsel for the employers, when he mentioned the amount in the former trial, did so with a view to mitigation of damages and that the jury evidently so considered it in arriving at their verdict.

Statement

APPEAL from the judgment of GRANT, Co. J. in an action tried by him at Vancouver on the 9th of June, 1911. The defendant was injured while in the employ of the plaintiff Company, and recovered $4,500 for damages. When he was injured the Company brought him down to the hospital, paid his expenses and doctor's fees, amounting to $686.30. After defendant had recovered his verdict, the Company set up a claim to the amount of the expenses, on the ground that they were included in the verdict, and that the defendant could not recover the amount and retain it, but must refund it to the Company. They sued, and GRANT, Co. J. gave judgment for the amount.

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

Argument

Woodworth, and *Creagh,* for the appellant: They cannot now sue for this amount because the matter is *res judicata,* and, second, the act was voluntary on their part. The evidence in the previous case was that these expenditures were not only

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admitted, but brought particularly to the notice of the Court and jury. The Company is estopped: *Henderson* v. *Henderson* (1843), 3 Hare 100 pt. p. 117; *Alison's Case* (1873), 9 Chy. App. 24; *Shoe Machinery Company* v. *Cutlan* (1896), 1 Ch. 667; Everest and Strode on Estoppel, 2nd Ed., 90, 91. The consideration, if any, is past. There was no promise to pay.

Ritchie, K.C., for respondent Company: There is no evidence that these expenditures were considered in reduction of damages. The burden to shew *res judicata* is upon the other side.

Woodworth, not called upon in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A., thought the appeal should be allowed; there was no doubt that the Company in the first action brought into evidence the facts concerning these expenditures just as clearly as if they had been raised on the pleadings; and it was done manifestly for the purpose of mitigating to that extent the damages that might be given. On that evidence the jury brought in a verdict of $4,500 "in full." This may mean in full of all accounts brought before the Court and this very sum sued for was before the Court.

IRVING, J.A.

IRVING, J.A., entertained considerable doubt as to the meaning of the words "in full," but on the whole was not prepared to dissent from allowing the appeal.

GALLIHER, J.A.

GALLIHER, J.A., had no doubt that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Woodworth & Creagh.*
Solicitors for respondents: *Bowser, Reid & Wallbridge.*

EASEFELT v. HOUSTON AND JOHNSON.

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Nov. 29.

EASEFELT v. HOUSTON AND JOHNSON

Practice—County Court—Speedy judgment—Motion for—Defence raised in pleadings but not set up in affidavit opposing motion for judgment—Slip of solicitor—Discretion.

In an action on a promissory note, the defence was, *inter alia*, misrepresentation. Plaintiff moved for speedy judgment, and defendant opposed it, but omitted to state in his affidavit that one of the grounds was misrepresentation.

Held, on appeal, affirming the order of the County judge, that the defendant should be allowed in to defend.

APPEAL from an order made by GRANT, Co. J. at Vancouver on the 13th of June, 1911, dismissing the plaintiff's application for leave to enter final judgment.

Statement

The appeal was argued at Vancouver on the 29th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

D. Donaghy, for appellant: The affidavit of defendant Houston contains no answer to plaintiff's affidavit; it simply, in effect, says the man is in prison and therefore cannot pay.

Dockerill, for respondent: The note has not been paid. It was obtained by misrepresentation, and we are entitled to know whether value has been received for it. We have set up misrepresentation in the pleadings, and although it was not so stated in the affidavit opposing the motion for speedy judgment, yet, the pleadings were before the judge below on the motion.

Argument

Donaghy, in reply.

MACDONALD, C.J.A.: This is a case very much like *Union Bank of Canada* v. *Anchor Investment Co.* (1911), 16 B.C. 347, where, unfortunately, we are asked to go upon evidence which is defective. A Court is always loath to take away from a party his right to trial—that is what Mr. *Donaghy* asks in this case. But we think this case ought to go to trial, because the defence of misrepresentation was raised in the pleadings

Judgment

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and it was manifestly due to a slip that it was not brought out in the affidavit opposing the motion for speedy judgment. There will be no costs to either party; in fact, we are allowing it to go to trial practically as a matter of indulgence, because we are convinced there was a slip in the affidavit.

Appeal dismissed.

Solicitor for appellant: *D. Donaghy.*
Solicitor for respondent: *W. P. Grant.*

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Nov. 7.

IN RE LEVY

IN RE LEVY.

Statute, construction of—Liquor Act, 1910, Cap. 30, Sec. 74—Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 205—Liquor licences—Regulation of by by-law.

By section 74 of the Liquor Act, 1910, the Legislature intended that the sale of liquor to travellers, to guests at hotels and restaurants, and for medical purposes should apply to all municipal by-laws restricting the sale of liquor, as well as to the Liquor Act itself, and that, too, whether the municipality had dealt with the matter of restricted hours.

IRVING, J.A. dissenting.

Statement

APPEAL from the judgment of GREGORY, J. at Victoria on the 24th of February, 1911, quashing a conviction had by the police magistrate for the City of Victoria and holding that the by-law of the corporation imposing restrictions and to make certain prohibited hours against selling liquors to guests of a restaurant with *bona fide* meals was *ultra vires.*

Luxton, K.C., for the appellant.
McDiarmid, for the Corporation.

28th February, 1911.

GREGORY, J.

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COURT OF APPEAL

Nov. 7.

IN RE LEVY

GREGORY, J.: This is an appeal by way of case stated from a conviction of the police magistrate of the City of Victoria, who convicted Mr. Levy of having sold liquor in his restaurant between the hours of 12 o'clock on Tuesday night and 7 o'clock on Wednesday morning, the 16th of November, 1910, contrary to the provisions of By-law 736.

In dealing with liquor licences and the right to sell liquor, the Legislature has clearly distinguished between saloon licences and hotel and restaurant licences. The Liquor Act, 1910, section 74, authorises the closing of saloons on Sundays, etc., but provides that those provisions of the Act shall not apply to hotel and restaurant keepers supplying liquor to their guests in a dining room with *bona fide* meals. The liquor supplied in the present instance was supplied to a guest in a dining room and with a regular *bona fide* meal. The by-law does not attempt to prohibit a similar transaction if it had taken place on Sunday. Insofar as the by-law attempts to prohibit the supplying of liquor with meals on week-days, it appears to me to attempt to circumvent the provisions of the Liquor Act and to be made in defiance of the spirit of the legislation in the matter of the regulation of the liquor traffic. A somewhat similar attempt was made on a previous occasion with reference to the closing of hotel barrooms, etc.: see *In re Moloney* (1907), 13 B.C. 194.

I am unable to distinguish this case from the principle laid down by the Full Court in the *Moloney* case, and the suggestion of the city solicitor that sub-section (*d*) of section 74, of the Liquor Act, 1910, provides that the Municipal Council shall have power to make and enforce other restrictions and prohibited hours than those provided for in the Municipal Clauses Act, cannot be sustained, because that sub-section is a part of section 74, which by sub-section (*c*) it is declared shall not apply to restaurant keepers in the position herein of Mr. Levy.

Since the council has no authority under the Municipal Clauses Act by reason of the decision in *In re Moloney, supra,* and none under the Liquor Act by reason of the provisions of the Act itself, it follows such authority, if it exists, must be

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derived from some other source. I know of none, and none has been suggested by counsel for the City. The question submitted will therefore have to be answered in the affirmative, *i.e.*, the determination of the police magistrate was erroneous in point of law.

The appeal was argued at Victoria on the 15th of June, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

McDiarmid, in support of the appeal: We submit that the council has the power claimed under the Municipal Clauses Act. Restaurants are treated throughout the statute as retail licences. *In re Moloney* (1907), 13 B.C. 194, cited by the learned judge below in support of his decision, is not applicable here. The municipality by the by-law attacked does not attempt to do more than regulate the sale of liquor in restaurants; it does not essay to close the restaurants.

[MACDONALD, C.J.A. referred to the Liquor Act, which operates throughout the Province.]

We have original authority under the Municipal Clauses Act, and the Legislature has not taken it away, even by implication, under the Liquor Act.

Luxton, K.C., contra: The sole authority of the city is derived from Part IV., of chapter 30, statutes of 1910, which applies throughout the Province, and insofar as former legislation is inconsistent with the 1910 statute, such former legislation is repealed. In other words, it had the effect of repealing the general power to municipalities.

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Section 205 of the Municipal Clauses Act, 1906, confers upon municipalities the right to prescribe the days and hours upon and during which the authority to sell liquor may be exercised. The by-law in question here prohibits the sale of liquor by restaurant licensees during certain hours of the night. The appellant was convicted of selling liquor to

a guest, with his meal, during the prohibited hours. The essential question involved in the appeal is whether or not the powers given by section 205 are cut down or modified by section 74 of the Liquor Act, 1910. Standing alone, section 205 amply supports the by-law. Reference was made by counsel to section 50, sub-section 122 of the Municipal Clauses Act, 1906, and to *In re Moloney* (1907), 13 B.C. 194; but I am unable to see that either the sub-section or the case has any bearing upon the question which we have to decide. That sub-section and case deals with closing of premises, not with sale during prohibited hours. Mr. *Luxton* argued that section 74 is now the only authority for such a by-law as this, but I cannot accede to that contention. The most that can be said is that the two sections overlap, and to some extent at least, cover the same ground, the chief difference being the exceptions contained in the sub-sections of 74. These exceptions are, in my opinion, the determining factor in this appeal. That the Legislature meant by section 74 to regulate the sale of liquor in unincorporated localities is clear, and that it meant the same restrictions and exceptions to apply to municipalities where no similar restrictions were imposed by by-laws under said section 205, is also, I think, clear; but that it meant section 74 to apply when the municipality had covered the ground, as it had done in this case, under section 205, is a matter about which I have some doubt. The best conclusion I can come to is that in municipalities, as well as in unorganized districts, whether the municipality had dealt with the matter of restricted hours or not, the intention was that sales for medical purposes and to travellers, and to guests referred to in sub-sections (*a*), (*b*) and (*c*) of section 74 should form exceptions in all restricting by-laws, as well as under section 74 itself. I would dismiss the appeal.

MACDONALD, C.J.A.

IRVING, J.A.: I would allow the appeal. The learned judge was guided by the decision in *In re Moloney* (1907), 13 B.C. 194. In my opinion section 74 (*d*) of the Act of 1910 declares the decision of the Full Court in that case not to be law.

IRVING, J.A.

Looking at the legislation, we find that by the Municipal

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Clauses Act, 1906, the council is authorized (section 50) to pass by-laws in relation to (100) saloon licences, and (121) saloons, taverns and restaurants; and by section 205 (*c*) the council is authorized to prescribe the form and conditions upon which a licence may be granted, and prescribe the hours within which liquors may be sold.

Mr. *Luxton's* argument is that the Act of 1910 repealed all these powers. If it does, it is by implication and not by express words. One would expect express words would be used if it was the intention in 1910 to deprive the Corporation of the powers conferred in 1906 by the Municipal Clauses Act.

"A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with, or repugnant to, the provisions of an earlier one, that the two cannot stand together, in which case the maxim, '*Leges posteriores priores contrarias abrogant,*' applies. Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is a necessary inconsistency in the two Acts standing together. *Thorpe* v. *Adams* (1871), L.R. 6 C.P. 125; 40 L.J., M.C. 52. Lord Coke, in *Gregory's Case* (1596), 3 Coke 295, Part VI. 19 b, lays it down, 'that a later statute in the affirmative shall not take away a former Act, and *eo potior* if the former be particular and the latter be general.' And Lord Hardwicke, in the case of *Middleton* v. *Crofts* (1736), 2 Atk. 650 at p. 675, is to the same effect": Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 474.

IRVING, J.A.

The Act of 1910 can, in my opinion, receive full effect without holding the earlier Acts repealed, or this by-law *ultra vires.*

The Act of 1910 expressly recognizes the fact that the Corporation has power to deal with the matter: see section 74.

MARTIN, J.A.: It is clear to me, as the result of the argument which we have heard, that the view of the statute taken by the learned judge below is at least as likely to be right as any other that has been advanced, and in such case we should not at all be justified in disturbing his judgment. This is another illustration of the difficulty experienced in construing patchwork legislation to which I referred in the late case of *Cook* v. *North Vancouver* (1911), 16 B.C. 129.

MARTIN, J.A.

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

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *Pooley, Luxton & Pooley.*
Solicitor for respondent: *F. A. McDiarmid.*

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Agreement—Construction of—Sale of interest in option on mining property—Alteration of terms by different agreement—Ambiguity.

Defendant Warner and his associates had an option on the Mother Lode and Kootenay Belle mineral claims, upon which they had paid certain sums of money. He went to New York, where he formed the acquaintance of the three plaintiffs, whom he told he was trying to put these two claims on the market at a lump sum of $300,000. They secured for him an introduction to Mr. McMartin, who was disposed to take a sixteenth interest in the two claims for $180,000. Part of this sum was to be expended in the construction of a smelter; a portion was to go in satisfaction of the payment of the option, and the remaining portion, $84,000, was to go to Warner and his associates. Just before the agreement was drawn up, and in contemplation of the agreement, Warner and the three defendants entered into an agreement that they should accept in full satisfaction of their charges $18,000. This sum was to be payable as and when McMartin met his payments of the options at a ratio of ten per cent. The defendants were also to receive an interest in the shares retained by Warner and his associates. McMartin shortly afterwards came to British Columbia, examined the properties and refused to go on with the agreement that he had entered into, but he made two separate agreements. He agreed to buy the whole of the Mother Lode for $75,000 and to undertake the payment of the bond. So that as to the Mother

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Lode he was to become the sole owner, Warner would not retain the six-tenths and therefore the defendants could not obtain their one-tenth interest in respect of that. McMartin entered into the other agreement with reference to the Mother Lode, under which he agreed to pay $60,000 and to satisfy the bond. The result of these two agreements would be that the defendants would receive only $135,000 in cash. CLEMENT, J. at the trial, was of opinion that the effect of the agreement was that they should be paid 10 per cent., $13,500, and not the $18,000 mentioned in the document because, as he said, it was only to be ten per cent. of the amount to be paid as arranged in any subsequent agreement.

Held, on appeal (IRVING, J.A. dissenting), that the trial judge was right.

Statement

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Nelson on the 21st of October, 1910. The facts are set out in the headnote.

Davis, K.C., and *E. A. Crease*, for plaintiffs.
W. A. Macdonald, K.C., for defendant Black.
H. C. Hall, for defendant Warner.

13th December, 1910.

CLEMENT, J.: This is an interpleader issue " as to the ownership of" a sum of $25,000, now lying in the Nelson branch of the Royal Bank of Canada. It was paid in by one McMartin on the 30th of December, 1909, as the final payment on the purchase price of the Mother Lode Group of mineral claims purchased by him from the defendants in this issue. The plaintiffs put forward a claim to the entire fund or in the alternative, to part of it. I treat the word "ownership" in the issue as framed by the parties in their pleadings as intended to secure an adjudication as to any interest in or charge or lien upon the fund, to which they, plaintiffs, may be entitled under the written agreement upon which they rely. I am not concerned to determine what personal claim for commission or otherwise these plaintiffs have against these defendants arising out of the transactions in evidence, or what claim, if any, they may have to an interest in the Kootenay Belle Group if the defendants still hold options thereon. What I have to determine is the extent of the plaintiffs' interest in or charge upon the $25,000 now in the Bank. This is the only question before me, but, of

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course, in order to determine it, I may have to pass to some extent upon the other questions indicated. For this reason Mr. *Davis,* for the plaintiffs, very properly, if I may say so, bases his clients' claim upon a certain written agreement (referred to hereafter as the remuneration agreement) signed by the parties in New York, and upon that alone, because whatever claim to remuneration the plaintiffs may have against the defendants arising out of the transactions in question (apart from the written agreement) that claim would not be one giving rise to any lien or charge upon the purchase price of the property sold. The remuneration agreement is as follows:

"New York, Dec. 16th, 1908.

"We, the undersigned, sole promoters in the negotiation for the sale of The Kootenay Belle and Mother Lode Mines of Salmo, Kootenay District, B.C., as offered through Albert Loening hereby agree to accept as complete and full satisfaction of services in any deal through the undersigned and the bondees representative of said properties, the sum of eighteen thousand dollars ($18,000.00) payable out of and in the ratio of 10% of all cash payments at the times specified in any contract agreement or successive agreement made with John McMartin or others concerning the sale of any part or all of said mining properties, and the further compensation for said services shall be the one-tenth holding in said properties option to purchase on the terms based in such rebond of McMartin contract concerning the sale of any part or all of said mining properties, said one-tenth holding referred to shall remain in trust for the undersigned jointly and is pooled with and to be voted by J. L. Warner in connection with any personal holdings said Warner may retain in the aforesaid properties by virtue of the McMartin contract. The right to purchase said one-tenth interest in trust aforesaid is hereby given J. L. Warner for ninety (90) days from this date provided the aforesaid sum of eighteen thousand dollars ($18,000.00) is placed to the joint credit of the undersigned at the Royal Bank of Canada, 88 William Street, New York City. This is in lieu of and modifies all or any previous agreements regarding sale of said properties."

"In presence of

"D. A. Nease,
"Bernhard Noon,
"D. A. Nease,

"Albert Loening,
"Lewis A. Hall,
"C. C. Ruthrauff,
"J. L. Warner.

"Received of J. L. Warner $150.00 this 17th day of December, 1908, being 10% of the first payment on McMartin contract.

"Albert Loening,
"Lewis A. Hall,
"C. C. Ruthrauff."

I have no trouble upon the evidence in finding that Warner's

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signature to this document was appended for himself and his co-defendant, who afterwards ratified the arrangement, and that both defendants are therefore bound by it, whatever its effect may be. The difficulty is to ascertain what it means.

It is couched in involved and ambiguous language and calls emphatically for all the light that can be thrown upon it by the acts, conduct and course of dealing of the parties before and at the time they entered into it. That these may be looked at "to ascertain what was in their contemplation, the sense in which they used the language they employ and the intention which their words in that sense reveal" is authoritatively established by *Houlder Bros. & Co.* v. *Commissioner of Public Works* (1908), A.C. 276, 77 L.J., P.C. 58 at p. 61. The surrounding circumstances, "the facts to which the language is applied," are also to be considered: *Butterley Co.* v. *New Bucknall Colliery Co.* (1910), 79 L.J., Ch. 411 at p. 412, where Lord Halsbury refers with approval to the language of Lord Blackburn in *The River Weir Commissioners* v. *Adamson* (1877), 47 L.J., Q.B. 193 at p. 202:

> "In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view: for the meaning of words varies according to the circumstances with respect to which they were used."

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Another principle, too, is to be borne in mind. Should the evidence disclose that the contract was made in reference to certain anticipated circumstances which failed to materialize it ceases to have any application and cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made: *Jackson* v. *The Union Marine Insurance Company, Limited* (1873), 42 L.J., C.P. 284 at p. 289, *per* Brett, J.: approved of in *Bush* v. *The Trustees of the Town and Harbour of Whitehaven* (1888), 52 J.P. 392.

Still another principle is to be remembered, with reference particularly to commercial documents such as this, is that where such a document is put forward as the basis of his claim by the

party by whom it is drawn it must bear an intelligible meaning: *Nelson Line (Liverpool), Lim.* v. *James Nelson & Sons, Lim.* (1907), 77 L.J., K.B. 82. To jumble together a number of phrases to which no legal interpretation can be given can lead to no result so far as the Courts are concerned. If the plaintiff's case depends upon a certain meaning being given to the document, he must fail; and so of a defendant.

Declarations by the parties after the making of the contract as to its meaning are, it is often said, not admissible, but in the case of an ambiguous document, evidence may be given of a course of conduct by one of the parties consistent with the interpretation which he afterwards asks the Court to put upon it: Beal, 126; and see *Attorney-General for Ireland* v. *Vandeleur* (1907), A.C. 367, 76 L.J., P.C. 89. This rule only applies where the document is equally susceptible of two interpretations, and where that is the case, I fail to appreciate why the subsequent declaration of one of the parties that it was intended to bear a meaning favourable to the other party should not be receivable in evidence as a declaration against interest and not self regarding. In this case, however, I am not, I think, relying upon any such declaration made after the contract was signed.

At the time the remuneration agreement was signed the defendant Warner, acting for himself and his associates (the defendant Black and one Morrison), had executed, or was about to execute, an agreement with one McMartin in reference to two groups of mineral claims, the Mother Lode Group and the Kootenay Belle Group. Under that agreement McMartin was given an option to purchase a six-tenths interest in the two groups for $180,000. Had that option been exercised the $180,000 would have been paid (in instalments) to the defendants, and the first clause of the remuneration agreement would have been consistent throughout; that is to say, the $18,000 could have been paid "out of" and would be in the ratio of ten per cent. of, the moneys payable under the McMartin purchase. That some $25,000 of the purchase money was in a sense earmarked for application toward putting up a stamp-mill might

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create difficulty, perhaps, but that possible difficulty was apparently considered too unlikely to arise or too trivial to call for special provision in the remuneration agreement; and even that payment was to be made to the defendants, and so would pass through their hands. Up to this time the plaintiff Loening insists that a sale of the whole property or of either group outright was not in the contemplation of the parties. I take that to be so. Nevertheless the remuneration agreement in its first clause does provide for that contingency, and the fact is that under the agreement ultimately made with McMartin he has become purchaser of the Mother Lode Group only in its entirety. The total cost to him was approximately $175,000, but of this sum approximately $100,000 was to be paid to the original owners, $75,000 going to the defendants (Morrison having no interest in the Mother Lode Group) for an out-and-out assignment of the option held by them from the original owners. The right of the defendants to make this out-and-out sale to McMartin is not denied; in fact, the first clause of the remuneration agreement does, as I have said, provide for that contingency. But, that contingency arising, the first clause of the remuneration agreement becomes inconsistent with itself; that is to say, $18,000 is not ten per cent. of the moneys payable under the final purchase agreement with McMartin. Under

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these circumstances it seems to me clear that the percentage clause as the clause which would apply under all contingencies, is the basis clause. It seems clear to me also that the remuneration agreed on could come "out of" in the sense of forming a charge upon, only that part of the purchase price payable to the defendants. Working out the first clause, therefore, of the remuneration agreement by itself, the result would be that the plaintiffs are entitled to ten per cent. of and out of the $75,000 payable to the defendants under the final sale agreement with McMartin.

But it is contended that the second clause operated to give the plaintiffs a one-tenth interest in the options held by the defendants; that as to the Mother Lode Group, that interest of the plaintiffs has been sold to McMartin; and that the plaintiffs'

interest is now represented by and has taken the form of a share (whatever its true amount may be) in the money held by the Bank. In my opinion there are insuperable difficulties in the way of such a conclusion. In the first clause of the agreement the contingency of a sale of the whole property or an entire part of it is faced. That contingency arising, as it has, the second clause falls absolutely to the ground. There is nothing on which it can operate so far as the Mother Lode Group is concerned. The real difficulty I think is this, that when the plaintiff Loening sat down to draw the remuneration agreement, the contingency of a possible sale of the whole property occurred to him in connection with the first clause of the agreement and he covered that contingency by the introduction of the percentage clause and the word "successive" and the phrase "of any part or all of said mining properties accepted by the bondees." But when he came to deal with the interest to be retained by Warner and his associates, he forgot or ignored the possibility that a sale might be made to McMartin which would leave no interest or a less interest than four-tenths to be retained. I say this notwithstanding the repetition of the phrase "or any part or all of said mining properties," for that phrase is, in the second clause, used in connection with the phrase "re-bond of McMartin contract," which in my opinion—if one can form a reliable opinion as to the meaning of such a medley of words—had reference to the possible formation of a company in which McMartin and the rest of them would have stock in proportion to their respective interests, these interests being transferred or "re-bonded" to the Company. Then again, the four-tenths not covered by the McMartin option was apparently burdened in whole or in part with the payments due to the original owners (a very large sum, $175,000, or thereabouts), and even the $180,000 payable by McMartin was to be recouped to him out of ore returns. Hence, doubtless, the provision that the holding was to be "on the terms based in such re-bond of McMartin contract"; that is to say, the problem was to be worked out when the company was organized. That contingency not having arisen, I must confess my utter inability to even guess at a

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solution of the problem or at a possible money value to be placed on such a holding: see *Douglas* v. *Baynes* (1908), A.C. 477, 78 L.J., P.C. 13 at p. 15, where, under somewhat similar conditions, the Court found itself unable to act. Then again, the antecedent arrangement as to remuneration was, so the plaintiff Loening says, a ten per cent. commission on the money secured for the venture and a half interest in whatever was retained by Warner and his associates. The half interest was cut down to one-fourth upon representations by Warner. This worked out in this way if the McMartin option were taken up: Six-tenths to McMartin, leaving four-tenths retained, of which the plaintiffs would get one-fourth; that is to say, one-tenth of the whole. It was on that contingency and that alone that the second clause of the remuneration agreement was drawn; and that contingency failing, the clause ceases to have any application. It was never intended as an absolute presently operative, transfer of a one-tenth interest in the options held by Warner and his associates, so as to make them trustees for the plaintiffs. One-fourth of whatever Warner and his associates might retain was to be the plaintiffs. That was the basis, as Loening distinctly says. As he says the retained interest "happened to be" four-tenths. It seems to me quite clear that if it happened—as it did happen ultimately—to be nothing, the plaintiffs' interest would be *nil*.

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On the whole, therefore, I conclude that the plaintiffs are entitled to ten per cent. of and out of the moneys paid to the defendants by McMartin, *i.e.*, to $7,500. Of this they have been paid $2,500, leaving a balance of $5,000, which they are entitled to have paid to them out of the moneys in the hands of the bank.

On the trial of this issue I have no jurisdiction over the costs, nor can I order a distribution of the fund. But the parties agree that I should dispose of the matter as upon further hearing of the bank's interpleader application. I therefore proceed to do so. The plaintiffs having tied up for nearly a year a sum of $25,000 should get no costs. The defendants, by their pleadings, offered to pay the sum which I have found to be the

plaintiffs' proper share, *viz.*, $5,000, and I think they should have their costs subsequent to the making of that offer, including, of course, the costs of this trial. The order, therefore, will be that there be paid to plaintiffs out of the moneys held by the bank, the sum of $5,000 (with interest, if any, allowed by the bank), less defendants' costs as above allowed to them (to be taxed), and that the balance be paid to the defendant Black, to whom, as between himself and his co-defendant, the money admittedly belongs.

The appeal was argued at Vancouver on the 6th and 7th of April, 1911, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Davis, K.C., for appellant.
W. A. Macdonald, K.C., for respondent.

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.: It was conceded by Mr. *Davis,* counsel for the appellant, that the construction to be placed upon the agreement of the 16th of December, which the learned trial judge has designated the remuneration agreement is practically the only question in this appeal. That agreement provides that the plaintiffs

"Hereby agree to accept . . . . ($18,000.00) Eighteen thousand dollars, payable out of and in the ratio of ten per cent. of all cash payments at the time specified in any contract agreement or successive agreement made with John McMartin or others concerning the sale of any part or all of said mining properties accepted by the bondees."

The persons meant to be designated by the term "bondees" are the defendants, and one Morrison. Defendants Warner and Black had taken an option on what is known as the Mother Lode Group of mineral claims at the price payable to the owners of $100,000, and the defendants and said Morrison had taken an option on what is known as the Kootenay Belle Group of mineral claims at the price payable to the owners of $84,000. Black and Morrison had authorised Warner to proceed to New

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York for the purpose of making a sale of said claims. The plaintiffs were brokers in New York, and introduced Warner to McMartin, and as a result of that introduction McMartin took an option upon said two groups of mineral claims to the extent of six-tenths thereof, agreeing to pay to the defendants and Morrison $180,000. In the agreement of option the properties are declared to be taken on the basis of a value of $300,000. The above agreement of remuneration is therefore one for the payment of a commission to the brokers not on the whole value of the property, but on the amount of money which the defendants and Morrison were to receive. When the agreement was made, the parties, in my opinion, contemplated payment of a ten per cent. commission, which is admitted to be the usual commission on the sale of mining property; and further intended to limit the ten per cent. to the interest of the defendants and Morrison, that is to say, to the sum which should be payable to them for their interest in the property. Had that option been exercised by McMartin no difficulty would have arisen; but that option was later abandoned and McMartin purchased the Mother Lode Group alone for $175,000, $100,000 to go to the owners and $75,000 to the defendants. It is now contended by the appellants that they are entitled to $18,000 by way of commission on the latter sale by virtue of the term in the agreement extending commission to successive agreements. Mr. *Davis's* contention was that the $18,000 was to be paid in any event on any successive sale either of the whole or part, and no matter what the terms were. I am unable to take that view of the agreement. Bearing in mind the fact that the first McMartin option had just been entered into, and that the parties had that in mind when they mentioned the sum of $18,000, I think the mention of the $18,000 was only incidental, and that the real agreement was for ten per cent. commission on the moneys which the defendants should receive on that or any subsequent transaction arising out of the introduction. The commission is to be paid "out of and in the ratio of ten per cent. of all cash payments." This would be impossible if appellants' contention

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be acceded to, and to my mind puts the matter beyond reasonable doubt.

It was contended that even if that be the true construction of the agreement, the ten per cent. should be paid on the total purchase price of the Mother Lode, namely, $175,000, and not merely upon the $75,000 which was to go to the defendants. I will assume that in an ordinary transaction where brokers effect the sale of property, the usual commission is payable upon the gross price, but in this case the parties were dealing rather with the option held by the defendants than with the property. The sale to McMartin was really a sale of the option which the defendants had obtained from the owners, and that was recognized by the plaintiffs in the agreement when the ten per cent. commission was limited to the value of the defendants' interest.

I think the judgment below is right and that the appeal should be dismissed.

IRVING, J.A.: I am of opinion that the plaintiffs are entitled under the memorandum of the 16th of December, 1908, to $18,000.

IRVING, J.A.

By the contract—as I understand it—they were to receive $18,000 for services in any deal between Mr. McMartin and Mr. Warner, as the result of their introduction of Mr. Warner to McMartin, whether it was the option of the 16th of December, 1908, or any substitution for it.

The agreement of the 10th of February, 1909, was the result of the introduction.

MARTIN, J.A.: On the meaning to be attached to the expression "ten per cent. of all cash payments," in the agreement of 19th December, 1908, this case turns. After a careful consideration of the document in the light of the surrounding circumstances in evidence before us I can only reach the conclusion that "cash payments" refers to those received by Warner and his associates; the mention of $18,000 means that in no case would the commission amount to more than that sum. This construction is, in my opinion, the one which business men in the circumstances would place upon the agreement, but which is, I agree, unhap-

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pily worded by the writer of it, who became involved in the pedantic misuse of pseudo-legal expressions which he did not understand, instead of resorting to plain language, thereby avoiding all this regrettable heavy expense.

The appeal should, I think, be dismissed.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellants: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondents: *Cowan, Macdonald & Parkes.*

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WILLIAMS v. SUN LIFE ASSURANCE CO. AND DAVID SPENCER, LTD.

WILLIAMS v. SUN LIFE ASSURANCE COMPANY OF CANADA AND DAVID SPENCER, LIMITED.

Mortgage—Foreclosure—Power of sale—Exercise of—Order nisi for foreclosure—Order absolute never taken out—Sale of property—Knowledge of by mortgagor.

A mortgagee having obtained an order *nisi* for foreclosure, never took out the order absolute. Negotiations were entered into and completed for the sale of the property to a third party in 1906. The mortgagor had knowledge of the sale. In 1911 he brought action to redeem the property.

Held, that he had agreed to and did in fact abandon his rights, and by his conduct and delay had induced the mortgagees to alter their position on the faith that he had done so.

Jones v. *North Vancouver Land and Improvement Co.* (1909), 14 B.C. 285; (1910), A.C. 317, followed.

Statement

ACTION tried before MORRISON, J. at Victoria on the 14th and 15th of March, 1911. On the 27th of February, 1894, the plaintiff executed a mortgage of certain property to the defendant Sun Life Assurance Company of Canada. The mortgage contained a power of sale, and provided that upon any sale made or purporting to be made in pursuance of the

power of sale, the purchaser should not be bound to inquire as to the legality, regularity or propriety of such sale and, notwithstanding any irregularity or impropriety, the sale should, as regards the safety of any purchaser, be deemed valid and effective accordingly. In the year 1899, the mortgagee entered into possession of the mortgaged premises, and on the 9th of February, 1899, the mortgagee instituted proceedings against the plaintiff in this action for the amount of what was due the mortgagee, and to have the same enforced by foreclosure, and re-possession of the premises included in the mortgage. On the 20th of March, 1899, a decree *nisi* was granted, but the decree absolute was never made.

The defendant in this action at the time of instituting proceedings against the plaintiff for foreclosure, had filed a *lis pendens* against the property, which was never removed. On the 7th of June, 1906, the defendant Sun Life Assurance Company executed an agreement for sale of the premises to David Spencer, Limited, who were purchasers for value without notice of any defect in the title of the Sun Life Assurance Company. The evidence at the trial shewed that the plaintiff had been active in endeavouring to effect a sale of the property after the decree *nisi* had been made, and was aware of and acquiesced also in the actions taken by the Sun Life Assurance Company in their endeavours to sell the property, and the plaintiff had urged the Sun Life Assurance Company to sell the property for less than the amount which the defendant David Spencer, Limited, had purchased for in the year 1906.

Statement

Moresby, and *Walls,* for the plaintiff, urged that the case was within the principle of *De Beck* v. *Canada Permanent* (1907), 12 B.C. 409, and *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857.

Wilson, K.C., for the defendant Sun Life Assurance Company: The plaintiff had knowledge of and acquiesced in the sale to David Spencer, Limited, and is estopped from disputing its validity. An account would be useless, as the evidence shews that the amount received on the sale was less than the amount owing to the defendant Sun Life Assurance Company.

Argument

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McCrossan, and *Harper*, for David Spencer, Limited: The defendant Spencer is protected by the terms of the mortgage and was absolved from making inquiries, the plaintiff being estopped by the terms of the mortgage from attacking the validity of the sale: see *Kelly* v. *Imperial Loan, &c., Co.* (1885), 11 S.C.R. 516; *Dicker* v. *Angerstein* (1876), 3 Ch. D. 600; *Campbell* v. *Imperial Loan Co.* (1908), 8 W.L.R. 502; *Ware* v. *Lord Egmont* (1854), 4 De G.M. & G. 460; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286; *Archibold* v. *Scully* (1861), 9 H.L. Cas. 360 at p. 388; *Bailey* v. *Barnes* (1894), 1 Ch. 31. The plaintiff is estopped by his conduct and laches: *Campbell* v. *Holyland* (1877), 7 Ch. D. 166; *Kennedy* v. *De Trafford* (1897), A.C. 180.

16th November, 1911.

MORRISON, J.: There was here an absolute power of sale, which power, in my opinion, was properly exercised and the property sold to the defendant Spencer—a *bona fide* purchaser without notice—at the best available current value: *Haddington Island Quarry Company, Limited* v. *Huson* (1911), A.C. 722. True, it seems he made no inquiry as to the title, but nevertheless, under the circumstances of this case he is safe: *Dicker* v. *Angerstein* (1876), 3 Ch. D. 600.

Judgment

I do not think the doctrine of constructive notice is sufficiently elastic to be stretched to reach the defendant Spencer: see Lord Cranworth's statement of the law in *Ware* v. *Lord Egmont* (1854), 4 De G.M. & G. 460, as quoted by Mr. Justice Sterling in *Bailey* v. *Barnes* (1894), 1 Ch. 31 and Lindley, L.J. at pp. 33-4. A circumstance to be considered in this connection is the fact that the *lis pendens* in question was filed by the co-defendant the Sun Life Assurance Company in the foreclosure action.

Having regard to the lapse of time and the depressed condition of the real estate market, together with the knowledge of the plaintiff of what was transpiring, including the sale to Spencer (of which I find the plaintiff had knowledge at the time), as well as the conduct of the plaintiff in respect of the whole transaction, I find that he comes within the case of *Jones* v. *North Vancouver Land and Improvement Co.* (1909),

14 B.C. 285, affirmed on appeal to Privy Council (1910), A.C. 317, and that he agreed to and did in fact abandon his rights and by his conduct and delay induced the defendants to alter their position on the faith that he had done so: 13 Halsbury's Laws of England, pp. 166-7-8, where the cases on acquiescence and laches are assembled. If I am right in thus so finding, then I do not think the exercise of the power of sale should be cut down by any implication such as was urged by plaintiff's counsel. The circumstances of the order *nisi* for foreclosure justifying the inference of abandonment of rights in respect thereof differentiate the present case from both that of *De Beck* v. *Canada Permanent* (1907), 12 B.C. 409, and *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857, upon which it is based.

At no time material to the issues here has the plaintiff been in a position to pay. Even now I give little or no credence to the allegation of his indirect capacity to do so. It would be futile to proceed with the accounts.

The action is dismissed with costs.

Action dismissed.

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IN RE POINT GREY ELECTRIC TRAMWAY BY-LAW

IN RE POINT GREY ELECTRIC TRAMWAY BY-LAW.

Municipal law—Franchise—Agreement between Tramway Company and Municipality for operation of trams—Necessity for approval of ratepayers—Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 64.

A municipal council entered into an agreement with an Electric Railway Company for the operation of a service of tram cars within the municipality and connecting with another municipality. Conditions were imposed as to rates of fare at different points, and other provisions were made. Section 64 of the Municipal Clauses Act, 1906, provides for the obtaining of the consent of the ratepayers to the granting of any particular privilege, right or franchise.

Held, on appeal, that the by-law granting this right to the Company should have been submitted to the ratepayers for approval.

Per MACDONALD, C.J.A.: The power granted to the British Columbia Electric Railway Company by its incorporating Act of 1896 to construct and operate tramways in the cities of New Westminster and Vancouver and the highways between the limits of said cities, does not extend to the streets in question.

APPEAL from the judgment of MORRISON, J. at Vancouver on the 27th of February, 1911, who refused to grant the application of certain electors to quash a by-law of Point Grey Municipality purporting to grant to the British Columbia Electric Railway Company a franchise for 40 years on all streets of the Corporation save one, and a 99-year franchise on that one. In refusing the application the learned judge below remarked:

Statement

"I think the grounds relied upon in this application are not sufficient to justify me in quashing the by-law in question. Most of them are so highly technical as to be quite ineffectual.

"As to the fourth ground, in which the provisions of section 64 of the Municipal Clauses Act, 1906, are invoked, the simple answer appears to be that section 64 does not apply. I do not think the assent of the electors was necessary. The Municipality is merely seeking to regulate the Company in the exercise of certain powers already possessed by them, and in so doing they have not been either unreasonable or uncertain.

"I do not agree that there has been an unwarranted delegation of their duties by the Council. The material herein, and what has been said by counsel, satisfy me that the limits defined by the Municipal Clauses Act whereby councils are enabled to carry into effect their corporate acts have been observed in this instance."

The applicants appealed, and the appeal was argued at Vancouver on the 28th and 29th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Woodworth, and *Creagh*, for appellants: The franchise is perpetual, and for that reason opposed to public policy. Further, it was not submitted to a vote of the ratepayers, as provided by section 64 of the Municipal Clauses Act, notwithstanding that it may be contended that this was unnecessary, in view of the Consolidated Railway Act, 1896, chapter 55, sections 33, 39 and 41. Even if these sections overbear section 64 of the Municipal Clauses Act, the Council has no power to delegate its powers in this regard to the reeve and clerk, as has been done in this instance; but that the council must itself exercise its powers. Also, even disregarding section 64 of the Municipal Clauses Act, the said chapter 55 does not enable the Council to grant a blanket franchise over all streets of the Municipality, but only to give permission for use of such particular streets or parts of streets as from time to time are about to be built upon by the Company. The by-law itself is unreasonable, vague, indefinite and uncertain; discriminates between different sections of the Municipality, between resident and non-resident electors, and between different classes of residents, and it delegates to future councils what should be determined in the by-law itself. Further, it creates a monopoly, and is bad for that reason.

Argument

[An application was made to add the British Columbia Electric Railway Company as a party to the appeal, they having a contract with the Municipality, but without deciding whether there was power to add the Company, the Court was of opinion that it would not be advisable to do so in this case.]

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Argument

Davis, K.C., for respondent Corporation: The Company gets nothing from the Municipality except a specification as to what street or streets shall be used; the Municipality could not possibly withhold consent; the Company have a statutory right already to run. They are entitled to run trams over the whole area between Vancouver and New Westminster, and that being so, there is no necessity to submit a by-law for consent of the ratepayers. This is not a by-law that is being attacked; it is an agreement between the Municipality and the Company. The necessity for obtaining approval of the ratepayers applies only where the privilege granted is special and exclusive.

Woodworth, in reply.

Cur. adv. vult.

15th December, 1911.

MACDONALD, C.J.A.: A great many objections were urged by the appellants to the by-law and agreement (which I shall hereafter call the by-law) in question in this appeal, but, in my view of the case, it is unnecessary for me to express an opinion upon these objections other than that the assent of the electors was not obtained in accordance with section 64 of the Municipal Clauses Act, B.C. statutes, 1906, chapter 32.

MACDONALD, C.J.A.

Section 33 of the Company's special Act, chapter 55 of 1896, confers upon it the right to construct and operate tramways upon and along the streets and highways in the cities of Vancouver and New Westminster and the highways between the limits of said cities, subject to a certain measure of direction and regulation by the municipal councils. The same section also confers upon the Company power to construct and operate tramways in the districts *adjacent* to said cities, but does not expressly confer any rights to construct its lines over the streets and highways of such adjacent districts other than such as lie between the limits of the said two cities. The rights given over streets and highways by said section are confined to the said cities and to streets lying between them. While Point Grey is *adjacent* to Vancouver, the streets or highways affected by the by-law do not lie between the limits of said cities.

Section 41 of the said chapter 55 points out the manner in which the Company may obtain the right to construct tramways over and along the streets in *adjacent* districts. The consent of the municipal council must be obtained, and power is given to the council to grant permission to the Company to use streets for tramway purposes. The Council granted such permission in this case by the by-law now under consideration, but without submitting the same to the vote of the electors. It is contended by appellants that said section 64 requires such submission to give validity to the by-law, as it is argued that the by-law confers upon the Company a particular privilege or that it is a charter bestowing a right, franchise or privilege. I agree with this contention. Privilege has been defined to be "a right, immunity, benefit or advantage enjoyed by a person or body of persons beyond the common advantages of other individuals." Mr. *Davis* urged that particular privilege must be held to mean exclusive privilege, but I do not think so. I think an easement such as was given over the streets by this by-law is a particular privilege within the meaning of that term as used in section 64. I also think that this very comprehensive by-law is a charter bestowing a right, franchise or privilege as that term is used in said section.

MACDONALD, C.J.A.

There is nothing repugnant between the Company's special Act and section 64. Both may be given effect to. There is therefore no substance in respondents' contention that the special Act must be preferred to the general one.

I would allow the appeal and quash the by-law, with costs here and below.

IRVING, J.A.: Conceding that section 64 of the Municipal Clauses Act must be read with and subject to section 39 of the Company's private Act, 1896, I am of opinion that the agreement was one which ought to have been submitted to the people.

IRVING, J.A.

The agreement goes beyond the matters mentioned in section 39 in the following respects: (a) In that the Council agree that in the event of the public necessities requiring that a tramway should be built along a particular street the first refusal shall

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be given to the Company (under Article 31) to build a tramway line before the Council undertakes or permits any rival tram company to undertake the construction of a tram line on the street in question; (b) In that the right is given to the Company to have a further option to build the line on such street unless advantage has been taken of the Company's refusal to build; (c) In that by Article 42 the Council, in dealing with the British Columbia Electric Railway Company under the cloak of section 39 of their special Act, have made an agreement which is assignable to persons or corporations who could not obtain the privileges thereby granted except upon a vote of the people.

IRVING, J.A.

I would allow the appeal.

[Since giving our judgment refusing to add the British Columbia Electric Railway Company as a party, I have come across the case of *Re Henderson and Township of West Nissouri* (1911), 23 O.L.R. 652.]

GALLIHER, J.A.

GALLIHER, J.A. agreed in allowing the appeal.

Appeal allowed.

Solicitors for appellants: *Woodworth & Creagh.*

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

GODDARD & SON v. ELLIOTT.

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1911

Nov. 29.

GODDARD & SON v. ELLIOTT

Principal and agent—Sale of land—Listing for time certain—Undertaking to give notice of withdrawal—Property sold by owner—Withdrawal of listing—Notice of sent by post—Non-receipt of notice—Subsequent sale by agent.

Where a principal listed property with an agent for sale for a certain period, after which time he was to give written notice of intention to withdraw the property from sale or change the price or terms:—

Held, that this was a listing for the period mentioned, and after that an agency until the property was withdrawn, in the absence of proof of notice having been given.

APPEAL by defendant from the judgment of McINNES, Co.J. in an action for commission on the sale of real estate, tried by him at Vancouver on the 12th of June, 1911. Defendant listed his property with plaintiffs on the undermentioned terms on the 16th of October, 1910. He sold it on the 22nd of December, 1910. On the 23rd of December, 1910, he testified, he sent by post a notice withdrawing the property from sale, but plaintiffs denied ever having received the notice. On the 20th of March, 1911, plaintiffs accepted a deposit on the purchase price. The following is the listing document:

"D.L. 393, block E, lot 30. Size 33 W. Arnold Avenue. $650.00. Cash, ¼; balance 6, 12 and 18 months.

"To Goddard & Son, 321 Pender Street, Vancouver, B.C.

"In consideration of your efforts to sell above property, I hereby give you the agency for 60 days at the above price; after which time I agree to give you notice in writing of my intention to withdraw said property or change the price or terms, and when sold I agree to pay you a commission of five per cent. on any price I may accept.

"J. H. Elliott.

"Dated Oct. 16th, 1910.

"Address: 1167 7th Avenue W."

Statement

The appeal was argued at Vancouver on the 29th of November, 1911, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

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Nov. 29.

GODDARD & SON v. ELLIOTT

J. Sutherland MacKay, for appellant: We say that this document is a listing for 60 days only, and plaintiffs took a risk when they endeavoured to sell the property after that time.

Ritchie, K.C., for respondents: We admit that the post office is a proper mode of communicating notice of this kind, but it is the agent of the sender of the notice. In any event, this is a case where defendant said he would give a notice, and that being so, he must give it; there cannot be constructive notice. The judge below has found as a fact that no notice was given. On the construction of the listing document here, we say that, by its terms it was a listing for 60 days, and after then the plaintiffs were to have the agency until it was withdrawn.

Argument

Judgment

Per curiam: The appeal should be dismissed. This is a clear case where the judge below was right.

Solicitors for appellant: *Gwillim, Crisp & MacKay.*
Solicitors for respondents: *Bowser, Reid & Wallbridge.*

PARRATT & CO. AND HIND, ROLFE & CO. v. THE SHIP NOTRE DAME d'AVOR.

MARTIN, LO. J.A.

1911

July 13.

PARRATT & CO. AND HIND, ROLFE & CO. v. THE SHIP NOTRE DAME d'AVOR

Admiralty law—Charter-party—Construction of—Cargo—Damage by accident to ship—Refusal by consignees to pay freight—Captain discharging freight at independent wharf to his own order—Demurrage—Claim of ship for detention by Admiralty process.

Hind, Rolfe & Co. chartered the Notre Dame d'Avor at Antwerp to load cement to be delivered at Astoria, Wash., U.S.A. This was a joint project of Hind, Rolfe & Co. and Parratt & Co. Shortly after leaving port the Notre Dame d'Avor had a collision with the English ship Rathwaite. Part of her cargo was jettisoned and part sold at Falmouth, England. She put back to port and was repaired. In an action in the English Admiralty Court, arising out of the collision, it was decided that the Notre Dame d'Avor was not to blame, the action against her was dismissed and she was allowed her counterclaim. On leaving again, she came into contact with the breakwater at Falmouth, whereby some of her plates were opened up and further damage to cargo ensued. During the voyage a portion of the cargo was sold to Balfour, Guthrie & Co., and by them to R. V. Winch & Co. Balfour, Guthrie & Co., by their contract, were only obliged to accept such portion of the cargo as might be in good condition. The ship's destination was diverted from Astoria to Victoria, where a portion of the cargo was discharged and she proceeded to Vancouver to unload the balance. After discharging a portion, some difficulty arose as to payment of freight, and the captain refused to wholly unload until the freight was paid. The consignees refusing to pay freight on the damaged portion of the cargo, the captain finished discharging at an independent warehouse to his own order.

Held, that the ship was absolved from liability for damage to cargo by the terms of her bill of lading, and that the captain was entitled to payment of freight as the cargo came over the side of the ship; in other words, that he was not bound to deliver it until after payment of freight; and that he was justified in removing his ship to another dock and discharging his cargo there to his own order.

On the question of demurrage:—

Held, that as the captain was justified in the action he took with regard to the cargo, he was entitled to demurrage caused by the plaintiffs' failure to pay freight.

The claim for detention of ship by Admiralty process was disallowed, inasmuch as the judge found that plaintiffs acted in good faith and that no gross negligence was shewn.

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ACTION for damage to cargo and for non-delivery or wrongful delivery of cargo at port of discharge. The ship counterclaimed for demurrage and detention.

The trial took place before MARTIN, LO. J.A. at Victoria on the 21st and 22nd of April, and at Vancouver on the 1st and 2nd of May, 1911.

Bodwell, K.C., and *J. H. Lawson,* for plaintiffs.

J. A. Russell, and *Robinson,* for the Ship.

Argument

Bodwell, as to damages for demurrage, cited: *Hick* v. *Raymond & Reid* (1893), A.C. 22; *Carlton Steamship Company* v. *Castle Mail Packets Company* (1898), A.C. 486 at p. 491; *Maclay* v. *Bakers and Spiller, Limited* (1900), 16 T.L.R. 401; *Smith & Service* v. *Rosario Nitrate Company* (1894), 1 Q.B. 174; *Wright* v. *New Zealand Shipping Company* (1879), 4 Ex. D. 165.

As to damages for wrongful arrest: *The "Strathnaver"* (1875), 1 App. Cas. 58; *Xenos* v. *Aldersley* (1858), 12 Moore, P.C. 352; *The Collingrove* (1885), 10 P.D. 158 at p. 161; *Wilson* v. *The Queen* (1866), L.R. 1 P.C. 405 at p. 410; *The Walter D. Wallet* (1893), P. 202 at p. 206.

Russell, cited *The Stettin* (1889), 14 P.D. 142.

13th July, 1911.

Judgment

MARTIN, LO. J.A.: With respect to the opening objection that the plaintiffs have no status to maintain this action, it is sufficient to say that this is an action for breach of a charter-party wherein the plaintiffs, Hind, Rolfe & Co., are charterers, and the fact that before action they, on the 18th of January, 1910, sold the full cargo of cement to Balfour, Guthrie & Co., would not deprive them of their right to enforce the due performance of the charter-party. Moreover, I am of the opinion that Hind, Rolfe & Co. have still an interest in the cargo, because the sale of it as a "full cargo" was subject to the condition that the "buyers are only bound to accept cement delivered in good merchantable condition." Such being the case, the charterers have a very substantial interest in this litigation respecting the cargo, since a dispute arose out of that provision.

As regards the plaintiffs, Parratt & Co., they, jointly with Hind, Rolfe & Co., are in possession of the bills of lading, duly indorsed by the shippers, and are also parties to the general average bond of the 31st of August, 1910, given by them to the owners of the ship, wherein they are shewn to be owners or shippers of the cargo, Balfour, Guthrie & Co. being stated to be the consignees, therefore the owners of the ship cannot now be heard to say that Parratt & Co. have no interest in the subject-matter and, consequently, no status in this Court. But if it should be necessary to do so I should not hesitate, in the circumstances, to add Balfour, Guthrie & Co. as party plaintiffs under the wide powers given me by rule 29.

I turn then to the main question in dispute, the determination of which has been far from easy, and has occupied much time. It is not necessary to refer to what happened in Victoria, where 6,029 barrels of cement were discharged, other than to say that the actions of R. V. Winch & Co., Ltd., and of Balfour, Guthrie & Co., from whom Winch & Co. had bought the cargo, in regard to the bills of lading and general average bond were so unbusinesslike and irregular that Captain Picard was fully justified in forming the opinion that he would have to be careful in dealing with them in future and stand upon his strict legal rights, which he had waived in a very accommodating manner in Victoria, relying upon the letters of Balfour, Guthrie & Co. of the 1st and 6th of September and telegram of the 8th, which, in view of the evidence of Greer and Barnaby, must be given full effect to and cannot be explained away. The further unjustifiable refusal or neglect to give the captain receipts for the cargo as discharged and the taking away, even temporarily, of receipts that had been given, naturally had the effect of straining the situation, and rendering him more suspicious. I make this observation because this case turns very largely upon the estimate that is to be placed upon Captain Picard's credibility, capacity and integrity, and I am glad to be able to say, after scrutinizing his conduct very carefully in the light of the evidence and exhibits—all of which I have re-read since the trial—that I have formed a favourable opinion of him and do not hesitate to place reliance upon his testimony. It is due to

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him to say this, as his conduct was at one time severely criticized by the plaintiffs. Winch & Co., indeed, according to their letter of the 29th of September, 1910, thought so highly of him that, as they say, "out of a true gratitude for the services rendered to them," they sent him what they euphemistically call "a small gratuity" in the shape of a cheque for $25 "according to our usual custom." In the circumstances of the case, in view of the dispute between themselves and the ship, such a proceeding was peculiarly improper, partaking of the nature of a bribe, and the Captain correctly interpreted it as such and returned the cheque. I trust his good example will be followed by all other ships' officers who may be approached in a similar manner, and also that I shall hear no more in this Court of such a pernicious custom.

No question was raised in Victoria about not paying the freight on damaged cement, but some days after he had arrived in Vancouver alongside Winch's wharf, on Monday, the 12th of September, 1910, and after he had discharged 5,000 barrels, Winch & Co. refused to pay freight except on barrels of cement that was in good condition and would only accept such barrels. This was clearly an improper stand to take, because, according to the charter-party, the captain was entitled to be paid his freight when it was in slings alongside, and this unjustifiable contention is what led to all the difficulty and delay. This state of affairs continued from the 15th to the 20th of September, inclusive, during which time Winch & Co. and Balfour, Guthrie & Co., on behalf of Hind, Rolfe & Co., were negotiating to settle the dispute between them on this point, though the captain notified them by letters on the 16th and 17th of September of the embarrassing position he was placed in by the stoppage of the discharge owing to their disputes.

Judgment

It was contended that the captain should have got the cargo out of the ship as soon as possible and thereby save demurrage, and consequently that when the dispute and its consequences became apparent he should have unloaded under his lien. But this raises a question of what is reasonable under the circumstances, and to unload under a lien is a serious step to take. He would naturally be expecting that the groundless contention

which was causing all the difficulty would be withdrawn at any moment, and the whole chain of unusual circumstances had placed him in such a position of embarrassment that I am unable to say he acted unreasonably.

With regard to subsequent occurrences I content myself with saying briefly that I am unable to hold, if I accept the captain's statements as correct, which I do, that he acted in other than a reasonable and proper manner, and I am satisfied that he is not answerable for any delay and that his ship is entitled to demurrage beginning on the 11th of October. The cargo, I am satisfied, was duly discharged according to the charter-party, averaging over 220 tons per weather working day, the charter-party calling for only an "average rate of not less than 150 tons." The tackle was sufficient to discharge within the lay days if there had been no interference.

The matters in which the captain was in error were two, *viz.*: (1) his original demand in Victoria of $500 too much freight, which he later admitted was an error on his part (unless his contention as to the weight of the barrels was correct); but this had no material consequences; and (2) his contention that the weight of the barrels should be taken at 400 lbs., though that weight was in conflict with the figures given in the bills of lading, and therefore, as the witness Thompson states, if he did not accept the weight in the bills of lading he should have weighed the whole cargo; the weights fixed by the custom house could not be taken as a guide, nor in any event would his estimate, based on the weighing of twenty barrels, be satisfactory.

Judgment

With respect to the alternative contention that in any event the ship is liable for the damaged cargo, it is sufficient to say that upon the evidence I think this is answered by the exceptions in the charter-party.

On the whole case, therefore, there should be judgment for the defendant ship upon the claim and upon the counter-claim, which will be referred to the registrar, assisted by merchants, if necessary, for assessment of damages, with the direction, however, that there being no gross negligence or bad faith herein, no damages will be recovered for the arrest of the ship.

Judgment accordingly.

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McDONALD v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Master and servant—Death of servant caused by collision between Company's cars—Fault of fellow servant—Negligence—Defective system—Finding of jury—Want of evidence in support.

Statute, construction of—Action under Families' Compensation Act—Time limit—Limitation in Company's Act of incorporation.

Deceased, a motorman, met his death in a collision between two cars of the defendant Company, on the 7th of November, 1908, but the writ in the action was not issued until the 2nd of August, 1909, the action being brought under Lord Campbell's Act. The questions at issue were: (1) Was the accident caused by the negligence of a fellow servant? On this point the facts were that the cars leaving Vancouver had a double line of track as far as a place called Cedar Cottage, after which there was only a single track. On foggy nights there was a watchman at Cedar Cottage to advise conductors and motormen as to the condition of traffic. The men in charge of the colliding cars were killed, so it was not possible to ascertain whether the watchman had advised the conductor or motorman whether the line was clear. The jury, on the evidence, found a defective system.

Held, that the appeal from the verdict based on this finding should be dismissed, MARTIN, J.A. expressing no opinion as to there being no evidence to support such a finding.

(2) Lord Campbell's Act gives a limitation of twelve months within which an action for damages caused by the death of a relative may be brought, so that the writ here was issued in ample time to comply with that statute. But in the defendant Company's Act of incorporation, a limitation of six months is set for bringing actions to recover damages incurred by reason of the tramway or railway or works or operations of the Company.

Per IRVING, J.A., following *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199: The limitation in the Company's statute was not applicable.

Per MARTIN, J.A.: The section was applicable and the action was therefore barred.

GALLIHER, J.A. expressed no opinion on this point.

Remarks *per* MARTIN, J.A. as to the Court of Appeal following or being bound by the decisions of the late Full Court.

Statement

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action tried by him with a jury at Vancouver

on the 14th of May, 1910, arising out of a collision between two of the defendant Company's cars.

The appeal was argued at Vancouver on the 2nd and 5th of December, 1910, before IRVING, MARTIN and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellant (defendant) Company: We say there was no evidence of a defective system, and that such a finding is not only not justified by the evidence given, but that in reality it tends to shew that every precaution was taken to ensure a safe system. The act causing the accident was that of a fellow servant. There is a doubt as to whether the watchman told the men in charge of the car to proceed, but we submit that there is sufficient evidence to shew that the watchman did tell McDonald to go on. The onus is on the plaintiff to shew that the act complained of was not that of a fellow servant. If the watchman did not give any order, then the accident was due to McDonald's own negligence: see *Lawrence* v. *Kelly* (1910), 19 Man. L.R. 359.

In any event plaintiff is barred by section 60 of the defendant Company's incorporation Act, the action here having been commenced nine months after the accident. The question is whether the Families' Compensation Act ousts our special provision: see *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 Q.B. 454. We are not contending that this is a conflict of statutes, but as to whether we are entitled to the benefit of one Act as against the other. The test is: Could the man, had he lived, himself have brought the action? We submit he could not. But, also, according to Lord Campbell's Act, the man could not have brought the action. See, further, *Kent County Council* v. *Folkestone Corporation* (1905), 1 K.B. 620 at p. 622; *Williams* v. *Mersey Docks Harbour Board, ib.* 804; *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199; *Canadian Pacific Railway Company* v. *Robinson* (1887), 14 S.C.R. 105, (1890), 19 S.C.R. 292, (1892), A.C. 481.

Argument

Craig, for respondent (plaintiff): As to the finding of a defective system: If two negligent causes contribute to the

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accident, the employer is liable: Beven on Negligence, 3rd Ed., 618. The system followed here was all right, so long as there was no mistake. We submit that instead of relying on a man's memory, there should be something tangible for preventing accident; there should have been a book kept at Cedar Cottage, or a pilot should have been stationed there. He referred to *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494; *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420. Further, the watchman, Ellis, was to all intents and purposes in charge of the points, and that being so, if he was guilty of negligence, the Company is liable. As to the contention of appellants that our action is barred, the point is, not that there was a six months' limitation of our action, but that the deceased had a right of action and that we inherited it with that infirmity; in other words, McDonald having died with a cause of action, we inherited the cause of action, and the limitation is no part of the cause of action. As to the construction of public and private Acts, see Hardcastle on Statutes, 3rd Ed., 503; Maxwell on Statutes, 4th Ed., 1,449; *Mayor of Brighton* v. *Guardians of Brighton* (1880), 5 C.P.D. 368; *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59; *Zimmer* v. *Grand Trunk Ry. Co. of Canada* (1892), 19 A.R. 693; *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199. As to the last case, the question is whether the Court of Appeal is bound by the decisions of the old Full Court. That is a matter of practice rather than of substantive law; therefore sections 6, 7, 8 and 13 having provided that the practice in the old Full Court shall be observed in the Court of Appeal, it follows that the Court of Appeal is bound by the decisions of the old Full Court. If, therefore, it should be held that this action was improperly brought, our answer is that we brought it on the strength of two judgments of the Court of Appeal.

Argument

D. A. McDonald, on the same side, referred to *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102; *Northern Counties* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 130; *Findlay* v. *Canadian Pacific R. W. Co.* (1901), 2 Can. Ry. Cas. 380; *May* v. *Ontario and Quebec R. W. Co.* (1885),

10 Ont. 70; *Zimmer* v. *Grand Trunk R. W. Co. of Canada* (1892), 19 A.R. 693; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.* (1905), 10 O.L.R. 419; *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511.

McPhillips, in reply: The authorities just cited are mostly on contract, and there is no contract here. It was no part of Ellis's duty to look after the points; he was stationed some 120 yards from them. This may be a new cause of action, as contended for by respondent, but if so, it is a new cause of action based upon any right of action which deceased may be presumed to have had. In other words, the new cause of action is based upon the fact that the man, if he were alive, could bring the action. We submit that if the man were alive he could not bring the action, *ergo* his representatives cannot bring it. As to the *Green* case, there is no rule that this Court cannot reverse a decision of the old Full Court, or even one of its own decisions.

Cur. adv. vult.

6th June, 1911.

IRVING, J.A.: The plaintiff has obtained a judgment for $3,000 for damages under the Families' Compensation Act for the death of her son, who was killed on the 7th of November, 1908, in a collision on the defendants' railway, he, at the time of the accident being the motorman in charge of one of the two colliding cars.

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The jury found that the system was defective. The appellants contend that the system was not defective; that there was no evidence to go to the jury that it was defective; and that the action ought to have been dismissed. The appellants also contend that by section 602 of their private Act, chapter 55 of 1896, entitled Consolidated Railway Company's Act, 1896, the plaintiff's action is barred. That section was considered by the Full Court in the case of *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199, where the Court came to a conclusion adverse to that now contended for by the Company. I feel bound to follow that decision—in which I fully agree: *stare decisis.*

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As to the defective system. The collision took place about 11.45 p.m. at a station a few miles south of Cedar Cottage, called Gladstone, the passenger car Gladstone going south, and another passenger car called the Ladner going north, meeting on the single track, shortly after the car Gladstone, on which the deceased was motorman, had passed from the double track on to the single track.

The usual practice of the Company in operating their cars running between Vancouver and New Westminster was to give to the motorman and conductor of each car on its departure orders in writing, indicating the places or switches where their car would cross cars moving in the opposite direction. These orders, subject to such orders as might be telephoned to the men operating the cars at certain stations on the line, would govern the running of the cars between the two termini. There were three switches on the line, *viz.*: Cedar Cottage, Central Park, and the Orphanage. At each of these places there was a telephone by which communication could be had with the despatcher's office, and it was the practice for the conductor of every car passing Central Park to telephone to the despatcher at the terminus to which his car was going as to the cars he would cross, and where. This telephoning from Central Park was done as an additional safeguard, for fear that an accident or something might have occurred between the time of telephoning and the time of leaving the written instructions.

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To assist the motorman in checking the cars he had crossed, there was placed in the vestibule of his car a system of semaphores. Before leaving the station he would pull out a number of arms corresponding to the number of cars his written order would inform him that he would meet, one arm of which he would throw down as soon as he passed a car. In this way he would keep a check on the number he crossed between the stations named in his written orders. If, when he arrived, say, at Cedar Cottage, and he found he had not met all the cars he was directed to cross between Vancouver and that point, as would be indicated by one or more arms being still up, it would be his duty to stop there and wait for its arrival. But if he had

passed the number mentioned in his orders, as would be indicated by all the arms being down, then he would go on to the next station, pulling out the number of arms to correspond with the number of cars which he, according to the written directions, ought to meet between Cedar Cottage and the next switch.

At this particular time, 7th November, 1908, the double track was completed from Vancouver only as far as Cedar Cottage. On this double track there were being operated some six passenger and two freight cars running between Vancouver and New Westminster, called the inter-urban cars, and also some eight other cars which belong to the Vancouver City system. These, which were referred to in the evidence as the Grandview cars, ran out on the double track as far as Cedar Cottage, and returned to Vancouver, consequently they, on their return to town, used the same tracks that would be used by the northbound inter-urban. The despatchers were not supposed to advise the inter-urban motormen of the number of these Grandview cars they might expect to cross before reaching Cedar Cottage; so that in a fog or on a dark night there was a risk of the motorman on an inter-urban car, such as the Gladstone was, of mistaking a passing Grandview car for an inter-urban car, and if he made such a mistake, he would pull down an arm of his semaphore system, and so be unaware that he had still to meet another crossing car.

At the time of the accident, and for some days before, there had been a good deal of fog about Cedar Cottage, and during this foggy weather the defendants placed at Cedar Cottage a watchman, William Ellis, whose duty it was to keep a correct count of all inter-urban cars passing into Vancouver from New Westminster and from Vancouver into New Westminster. He was stationed there at the end of the double track to inform any inter-urban conductor or motorman who was in doubt as to the number of inter-urban cars he had crossed since leaving Vancouver what cars had passed Central Park on their way to Vancouver. This precaution was to prevent a head-on collision. It was within his duty to stop a car from Vancouver if he knew there was a car coming from New Westminster, and for this

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purpose he was supplied with a lamp. He was also to tell any inter-urban motorman going into Vancouver how long it was since the Grandview car had started for Vancouver; this was to prevent an inter-urban car from New Westminster running into a Grandview car. With this exception he had no concern with the city cars. He was not required to make a note of the time of the arrival or departure of any cars, nor was he given a book for any such purpose. There was no office or room for him except a booth in which he kept his lamps. There was no station master at Cedar Cottage, but there was a platform and a waiting room; the double track was continued some little distance to the south beyond the platform, and it was at the end of the double track where the south-bound trains are switched on to the single track, that Ellis was required to stand. He was not in direct communication with the despatcher's office by telephone or otherwise—sometimes messages were sent to him verbally by the conductor or by letter.

Ellis had been in the employ of the defendants five years or so; he had been employed as a nightwatchman and as extra motorman, and during the foggy weather of 1907 in the same capacity in which he was acting on the night in question. He was not required to go on duty until the evening, and he was at liberty to leave after the last inter-urban car had passed through Cedar Cottage. The inter-urban system was managed by one Dunlop, who had held that situation for over a year, and who for sixteen years had been a motorman in the Company's employ.

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Coming now to the accident. Macdonald left Vancouver for New Westminster on the Gladstone about 11.45 p.m. He should have crossed one inter-urban car, *viz.*, the Ladner, before he reached Cedar Cottage. It was the regular inter-urban car, and so no orders in writing or otherwise were given by the despatcher. It was the rule not to give orders unless there was a special or extra out, in which event the motorman would be notified. If there was no special or extra out, the motorman was guided by the day's schedule, which was kept posted up on the wall in the men's room.

The collision between the cars Gladstone and Ladner took place south of Cedar Cottage on the single track, shortly after the Gladstone had passed on to the single track. It was the duty of the Gladstone to have remained on the double track until the Ladner had passed through Cedar Cottage.

The master's immunity to an action by his servant for an injury occasioned by a fellow servant in the course of their common employment, put forward in 1837 in *Priestley* v. *Fowler*, 3 M. & W. 1, came up for consideration in 1850 in a case where a railway guard was killed in a collision—*Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (1850), 5 Ex. 343, on demurrer to the defence of common employment, on the ground that the plea was an argumentative denial of the cause of action and really amounted to the general issue.

In giving judgment against the plaintiff, Baron Alderson at p. 351 says:

> "The master is not in general responsible when he has selected persons of competent care and skill."

And at p. 353:

> "The omission to discharge that duty might have made them responsible to the deceased."

The attempt on the plaintiff's behalf in this case is to avoid the true issue, and to substitute as the determining one, another, *viz.*: Was the system defective?

The decision of the *Hutchinson* case was delayed some time in order that the Court (Pollock, C.B., Barons Parke and Alderson appear to have been present) might give it the fullest consideration, and it acquires additional authority from the circumstances that it was not taken any further. In that case, at p. 355, it was said that it made no difference "whether the death resulted from the mismanagement of one train, or of the other, or of both. That carelessness on the part of one or more other servant or servants did not affect the principle. In any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run."

That judgment seems to me to be ample authority for the proposition that the plaintiff cannot rely on a "defective sys-

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tem" when the real cause is the negligence of a fellow servant, if the master has taken reasonable care to protect him by associating him with persons of ordinary skill and care.

The foundation of the principle as given by Lord Blackburn and concurred in by Lord Watson, in *Johnson* v. *Lindsay & Co.* (1891), A.C. 371 at p. 387, is:

"Because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment."

That being the foundation of the rule, it seems to me that the plaintiff should have established his case of defective system against the defendants by showing *prima facie* at least that the death was occasioned by some negligence of theirs, such as knowingly appointing incompetent servants, or omitting to observe precautions prescribed by statutory authority.

The duty of the judge is to determine whether there was any evidence of negligence or defective system upon which the jury could come to a conclusion. The duty of the jury is to determine responsibility of individual conduct. The deceased could have no cause of action if his injuries were occasioned by risks he had agreed to run. The duty of the judge is to withdraw the case if there is no evidence of some material fact which forms an essential part of the plaintiff's case. The essential fact that was not proved was that death was caused by some of the risks which he had not agreed to run.

IRVING, J.A.

What are the facts? When McDonald left Vancouver he ought to have known from reading the schedule that he had to cross a car before he left the double track. He knew that he could ascertain this fact in two ways, either by his own observation, or by consulting Ellis at Cedar Cottage. When McDonald passed on to the single track, Ellis ought to have known from his own observation that the Ladner, the regular 11 o'clock car from New Westminster, had not arrived.

Did McDonald rely on his observation and mistake a Grandview car for an inter-urban car? Did he consult Ellis, and was he misled by incorrect information? Or, did he go through without consulting Ellis because the latter was not at his post? Or, if Ellis gave him wrong information, was it because Ellis

was incompetent or had been asleep or careless in the execution of his duty? In short, was it McDonald's own fault or the fault of Ellis that he was unaware of the true condition of affairs? That seems to me to be too indefinite a case to put before the jury: see *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70; and the report of *Wakelin* v. *London and South Western Railway Co.*, referred to in *Smith* v. *South Eastern Railway Co.* (1896), 1 Q.B. 178 at p. 189, and reported in (1886), 12 App. Cas. 41.

The learned trial judge having refused to nonsuit the plaintiff, the defendants called a witness, from whose evidence the jury could infer that the fault was the fault of Ellis. He had in some way or other reached the conclusion that the 11 o'clock car from New Westminster had gone through. If the jury believed this witness and drew this inference, the fault was with Ellis, that is if McDonald consulted him, upon which point there is no evidence. If the jurors did not believe this witness, or if they did not draw that inference, the same uncertainty—was it the fault of the deceased, or was it the fault of Ellis—still remains.

The question in dealing with a defective system is not what the Company could have done, but were the precautions taken by the Company reasonable? Was the system adopted by the Company one which afforded that degree of care which the defendants were bound in the circumstances to exercise for the purpose of avoiding collisions at that point? That, I think, would be the question for the jury, and in answering it the jury would exercise their proper function, that is, to determine the responsibility; but in considering what the Company might or could have done the jurors would be in danger of setting up a standard for the prevention of such an accident as they are then concerned with without sufficient guidance as to the necessities of the other man. In the present case they have found the system defective, when not a single witness, expert or otherwise, has said so. Expert testimony is not essential to enable a jury to reach a conclusion on this matter, but I venture to think that the opinion of railway men and a discussion thereon would

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result in a much more satisfactory conclusion than one reached by a jury without such assistance. Where negligence or reasonableness is involved, the precautions to be taken under the circumstances are often gauged by what other persons do in the like conditions. Sometimes the safeguards designed by the individual whose conduct is in question are admissible as a guide, as in *Smith* v. *South Eastern Railway Co.* (1896), 1 Q.B. 178.

I would like to draw attention to a few cases. First and foremost, *Farwell* v. *Boston and Worcester Rail Road Corporation* (1842), 4 Mass. 49, 38 Am. Dec. 339, one of the first cases in which the doctrine of common employment was formulated, and which has been so often referred to in England as the leading authority. There the plaintiff, an engine driver, who was in the employment of the railway, received an injury through the negligence of a fellow servant, a switchman. The negligent fellow servant was a careful and trustworthy servant; it was therefore held that the Company was not liable.

Skipp v. *Eastern Counties Railway Co.* (1853), 9 Ex. 223, where it was suggested that it was a question for the jury whether the Company had in their employment a sufficient number of men for the performance of the work. This, in the opinion of Baron Parke, was not a proper question for the jury. Baron Alderson was of the same opinion where the question was one between the company and their own servant. That case may to-day be questioned, but I think that to entitle a plaintiff to succeed on the ground of an insufficient number of servants he must shew that the injury arose from that cause, and not from the negligence of one of those actually employed.

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In connection with this I observe in the case of *Cummings* v. *Grand Trunk,* cited by Mr. *Craig,* the Court held that if Noyes, the fellow servant, was negligent, and if the Company was also negligent, and that this negligence of the Company contributed to produce the injury, the Company would be liable. The acts of alleged negligence on the part of the Company are not set out in the report. I agree that if the Company was negligent in selecting Ellis as a suitable man, or in retaining him, after

learning that he was incompetent, the fact that he was the cause of the accident would not excuse the Company.

The onus was on the plaintiff to shew that the Company was negligent in this regard, and no evidence was given to shift this onus on to the employer. If we were to assume as a fact that Ellis was negligent on this occasion, that fact in itself would not be sufficient to justify the jury in finding that the Company was negligent in employing him: *Byrne* v. *Fennell* (1882), 10 L.R. Ir. 397; and *per* Willes, J. in *Lovegrove* v. *The London, Brighton and South Coast Railway Company* (1864), 33 L.J., C.P. 329 at pp. 334, 335; Roberts, Wallace & Graham's Duty and Liability of Employers, 4th Ed., 180. See also *Potts* v. *The Port Carlisle Dock and Railway Company* (1860), 2 L.T.N.S. 283 at p. 284, where Cockburn, C.J. said:

"The negligence of the person doing it (constructing a turn table) is not sufficient alone to charge the defendants—it must be shewn that they were negligent in not employing reasonably competent persons."

In *Saxton* v. *Hawksworth* (1872), 26 L.T.N.S. 851, the plaintiff was nonsuited by Brett, J. On discharging a rule to shew cause, Kelly, C.B. at p. 852 said:

"This case involves the question of the number of workmen a manufacturer may be bound to employ—that may be one question between the manufacturer and the public, and another as between himself and his servants."

The other judges agreed. In the Exchequer Chamber it was said that the reasons given in the Court below were clear and satisfactory, and Willes, J. at p. 853 added:

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"This is one of a great number of cases which have occurred in which the jury have invariably found for the employee—cases where a servant chooses to enter into an employment of which the system is well known, and one of them, after an accident has happened, suddenly finds out that the master was exceedingly wrong not to have a greater number of servants (although I think this must be taken to be an accident), but under such circumstances a servant has no ground to complain of the master in a court of law. I observe this, by the way, because cases of this kind ought not to be left to the jury on a mere spark of evidence."

The case of *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494, where the jury found that the death was due to the foreman allowing the engine to leave the yard without protection, turns on the facts of that case. There the engine driver of the special train got instructions

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from the train despatcher to go ahead. The yard foreman of the station through which he was passing was not on hand to stop him. Had the running of the yard engine been in the hands of the train despatcher, the instructions to go ahead could never have been given. The fault of that system, if fault there was, was that there was divided authority; the train despatcher said, "Go ahead, the line is clear," whereas under the system practised, the line might not be clear. The authority given to the yard foreman defeated the fundamental principle of train despatching approved of by the rules. It was a trap. There was a difference of judicial opinion in that case, but there is in the case we are now considering no dividing of authority. The appointment of Ellis was a safeguard. McDonald's instructions from the day's schedule did not permit to go past Cedar Cottage without meeting the Ladner. The schedule did not tell him the line was clear; it told him not to pass Cedar Cottage until he had crossed the Ladner at that place. Ellis was there to inform him if he was in doubt. Ellis's assistance was intended to be supplementary to McDonald's powers of observation, and not as superseding the day's schedule. The facts established do not justify the conclusion that the death of the deceased was the result of a faulty system.

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Ellis, in my opinion, cannot be regarded as the man in control of the switch so as to bring the case within the Employers' Liability Act.

I would allow the appeal and dismiss the action.

MARTIN, J.A.: We have first to decide the question as to whether or no this action can be maintained at all because of section 60, chapter 55 of 59 Vict., which, the defendant Company submits, bars it. In answer to this the plaintiff replies that the said section cannot be relied upon because the damage or injury was not "sustained by reason of the tramway or railway or the works or operations of the Company." I have no doubt, however, that this objection cannot prevail in the circumstances of this case, which are clearly distinguishable from those in such cases as *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102, and in principle resemble those in *Northern Coun-*

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ties v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 130, and decisions therein cited in support of it.

Then, with respect to the main question, I can see no distinction in substance between the statutes we have before us and those which were discussed by the Queen's Bench Division in *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 Q.B. 454, nor can I perceive any reason why the same effect should not be given to them, because they are, to me at least, clear in terms and, as Lord Justice Vaughan Williams says (adopting the views of Darling, J. on this point) in *Kent County Council* v. *Folkestone Corporation* (1905), 1 K.B. 620 at p. 628:

"The introduction in these two Acts respectively of different periods of limitation does not cause the two Acts in any way to conflict."

See also what the Lord Justices say in another case in the same volume—*Williams* v. *Mersey Docks and Harbour Board,* 805, at pp. 807-8. In such circumstances the fact that one of the Acts may technically be styled a private, or more correctly perhaps, a quasi-public Act, as it relates to a quasi-public corporation of common carriers, can make no difference in principle. The only matter that at all embarrasses me is the contrary decision of the late Full Court in *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199, wherein the judges declined to follow the above authorities, preferring to adopt the views of the Ontario Court of Appeal in *Zimmer* v. *Grand Trunk R. W. Co. of Canada* (1892), 19 A.R. 693. I note, however, that Osler, J.A. did not join in the opinion of the rest of the Court on that point, taking, if I may say so, the more correct view that as the damage in that case was not sustained by reason of the railway, it was quite unnecessary to consider the "grave" question of the application of the limitation section, which, however, we must pass upon. Therefore the judgments of the Ontario Court of Appeal are, strictly speaking, *obiter dicta* on the point before us, and in such circumstances I think that it would have been safer for the Full Court to have followed the later decision of the Queen's Bench Division in the *Markey* case, which, in my opinion, is exactly in point, and should be given effect to by us as a safe guide till it is reversed. With all due

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deference, I cannot follow the reasoning in *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59, which is to be found in the *Green* case, *supra,* at p. 206, seeing that the former case was before the Court in both the *Markey* and *Williams* cases.

A good deal was said during the argument, *pro* and *con,* about our being bound by the decisions of the old Full Court. Now, while as a rule I think we should follow the decisions of that Court (and invariably do in regard to practice, procedure and juridical matters on our Provincial statutes, in order to avoid confusion and uncertainty in the working of this Court), yet cases may arise where the circumstances are so exceptional as to require our independent consideration, of which the case at bar is a good example.

I think this appeal should be allowed and the action dismissed, with costs.

GALLIHER, J.A.: There is no evidence upon which a jury could reasonably find a defective system. There is evidence of methods which would be safer, but none of the cases have gone so far as to say that companies are bound to provide themselves with the most approved and up-to-date appliances.

Mr. Justice Duff, in his judgment in *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494, goes a long way. I do not understand him as laying down a general principle there, but a principle applicable to the particular facts and circumstances of that case.

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The method adopted here for checking up crossing cars by the motorman and conductor with the added precaution of a watchman, whose only duty on the night of the accident was to keep count of cars that had passed, and signal or inform the motorman if the track was clear, seems to me reasonably safe considering the evidence:

"How many cars would he (the watchman) have to remember in that half hour? He would only have one car unless there was a double header sent through and then he would be notified."

I would allow the appeal.

Appeal allowed.

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Municipal law—Tax sale assessment, validity of—Meetings of council and court of revision held outside municipal area—Municipal Clauses Act, 1894, Sec. 15—Consent inferred from absence of objection—Requirements of by-law not observed—Notice of sale—Waiver.

Plaintiff's land was sold for taxes by the Municipality of South Vancouver in 1898, for arrears 1893 to 1897. The main grounds alleged against the validity of the sale were that the meetings of the council and of the court of revision (which is composed of the members of the council) dealing with the taxes were held in another municipality, *i.e.*, the City of Vancouver, and that notice of the tax sale was not posted up on the post office building within the municipality in which the lands affected were situate. It was in evidence that at the period in question there was no post office building, as such, within the municipality, the business of post office being carried on in a local house. The meetings of the council were held in Vancouver City to the plaintiff's knowledge, and he also had knowledge of the actions of the council as to the tax sale. Plaintiff brought action in 1909 to set aside the sale, and the action was dismissed for reasons given below. Plaintiff appealed.

MACDONALD, C.J.A. thought that the appeal from the trial judge, CLEMENT, J. should be dismissed substantially for the reasons given by him.

Per IRVING and MARTIN, JJ.A.: The appeal should be allowed upon the grounds: (1) Plaintiff had not received notice of the sale; (2) he had not waived notice; (3) the meetings of the council and court of revision had not been validly held; and (4) no resolution could be shewn or inferred for a departure from the general rule.

Per GALLIHER, J.A.: The appeal should be dismissed on the ground that the plaintiff was disentitled by his laches and delay.

The Court being evenly divided, the appeal was dismissed.

Statement

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 14th and 15th of December, 1909.

A. H. MacNeill, K.C., and *H. C. Shaw*, for plaintiff.
Macdonell, and *Ladner*, for defendant Fleming.
J. A. Russell, and *R. W. Hannington*, for defendant Ralston.

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CLEMENT, J.: In this action the plaintiff impeaches a tax sale had by the defendant Municipality in October, 1898, of certain land in South Vancouver of which the plaintiff was, prior to the sale, the owner to the extent of a half interest. The defendants, Ralston and Fleming, claim through the purchaser at the tax sale, to whom (as they allege) a deed was delivered in due course. The action has been discontinued as against the Municipality.

Proof having been led of the various steps leading up to the sale, Mr. *MacNeill* objects, not that there was any omission to observe in detail the requirements of the various Municipal Acts from time to time in force during these proceedings, but that there was never a valid assessment or levy during all these years (1893-1897, both inclusive) by reason of the fact that the various meetings of the council and of the court of revision at which the question of taxes was dealt with were held not within the limits of the Municipality, but in the City of Vancouver. In addition to this, his most strongly pressed objection, Mr. *MacNeill* contends that in certain respects the Municipality did not observe the requirements of its own tax sale by-law, passed in 1898, under which this particular sale took place. A further question arises as to the validity and effect (if valid) of an order confirming the sale in question made by the late Chief Justice McColl on the 5th of April, 1899. Of these points in their order.

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The plaintiff during all these years and down to 1902 was a prominent citizen of the City of Vancouver, the holder of public positions, and actively engaged as a real estate dealer and agent. He knew that, rightfully or wrongfully, the business of the Municipality of South Vancouver, a very sparsely settled district at that time, with no common meeting point within its bounds, was conducted at what was notoriously the "office" and council chamber of the Municipality, situate on a leading thoroughfare of the City of Vancouver. He knew, what any ordinarily intelligent Canadian citizen must know, that year after year taxes were being imposed upon his real

estate; he knew that those taxes were not paid; and finally, in 1898, he knew that the lot in which he was interested was advertised for sale to satisfy the taxes against it. In spite of his denial of actual knowledge of an actual sale, I think he must be taken to have known that the advertised sale was duly carried out and that his land had been sold either to the Municipality or to some other purchaser. The real estate market was at that date very much depressed. There was an encumbrance upon the property of $900, with accrued interest (for which, however, the plaintiff says he was not personally liable), and that amount, apart altogether from the overdue taxes, was away beyond the then value of the land. Under these circumstances it may be that the plaintiff, seeing that the property was worthless to him, did not bother to inquire what had become of it. He continued to reside in Vancouver for over three years after the sale, and there is no evidence of any inquiry made or interest evinced by him as to the fate of the property, its possible redemption, or as to the source from which the taxes upon it in subsequent years were being paid. They were paid, in fact, by the tax sale purchaser and his successors in title. In 1902 the plaintiff left Vancouver and embarked in business in another part of the Province. In 1908, ten years after the sale, he learned through a formal notice from the registrar of land titles that the assignees of the purchaser of 1898 were applying for a certificate of title. The property has of late increased enormously in market price. Hence this action, which I can only characterize in the language of the Privy Council in *Toronto Corporation* v. *Russell* (1908), A.C. 493, 78 L.J., P.C. 1, as "the most unmeritorious proceeding that could well be conceived."

Dealing now with Mr. *MacNeill's* main objection: I can see no reason in law why the meetings of the council, whether for ordinary business or as a court of revision, should not have been held at any place without the limits of the Municipality, unless, indeed, there was a constitutional provision to the contrary. The provision in the Municipal Act of 1892, chapter 33, section 103, that "the jurisdiction of every council shall be confined to

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the municipality the council represents, except where authority beyond the same is expressly given," in its position and phraseology points to jurisdiction objectively, *i.e.*, as to the object matters with which the council may deal and has, in my opinion, no relation to the question under discussion. In 1894, however, an enactment was passed (B.C. statutes, 1894, chapter 34, section 15), that

"All meetings of a municipal council shall take place within the limits of the municipality, except where the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality."

The very passage of this restrictive enactment supports the view I have expressed as to the effect of section 103 of the Act of 1892. The enactment of 1894 empowers the council to hold its meetings outside the limits of the municipality only in the case, speaking broadly, of unanimous consent on the part of members. The use of the word "resolved" is unusual, pointing, in my opinion, to unanimity of sentiment on the part of members rather than to a formally passed "resolution"; and this is borne out by a comparison with, for example, section 87, which expressly requires the opinion of the council, in the case there dealt with, to be "expressed by resolution in writing." In my opinion the existence of this unanimity on the part of members of the council as to its being more convenient to hold their meetings as they did may be proved otherwise than by the passing of a formal resolution entered on the minutes. The fact is, as the evidence shews, that no hint of objection from any member of the council or from any one else appears upon the minutes or otherwise during all those years. Under these circumstances I find as a fact that the condition mentioned in the statute of 1894 was complied with; that the members of the council had resolved and did continuously and unanimously resolve (as evidenced by their acts) that it was more convenient to hold their meetings in the City of Vancouver. After this lapse of time the presumption that the meetings were regularly held seems to me insurmountable, in the absence of positive proof that some member objected to the course so notoriously pursued.

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In my opinion, meetings of the council sitting as a court of revision are in the same position as other ordinary meetings.

But, if the views so far expressed are erroneous, I am of opinion further that any illegality along the line so far discussed is fully cured by legislative provision. If the various assessment by-laws, rate by-laws, and the tax sale by-law of 1898 are valid municipal enactments, there is in them a clear adoption of the *de facto* "last revised assessment roll" in each year, so as ultimately to clear the field for the passage of the tax sale by-law. I think all these by-laws are valid municipal enactments. In 1892 this clause stood on our statute book:

"In case no application to quash a by-law is made within one month next after the publication thereof in the British Columbia Gazette, and notice as provided in section 125 of this Act, the by-law, or so much thereof as is not the subject of any such application, or not quashed upon such application, so far as the same ordains, prescribes, or directs anything within the proper competence of the Council to ordain, prescribe, or direct, shall, notwithstanding any want of substance or form, either in the by-law itself, or in the time or manner of passing the same, be a valid by-law": B.C. statutes, 1892, chapter 33, section 126, sub-section (3).

This provision continued in force until 1899: see B.C. statutes, 1896, chapter 37, section 86 (2); R.S.B.C. 1897, chapter 144, section 86 (2); and is in my opinion sufficient to cover anything short of an *ex facie ultra vires* by-law. These by-laws as promulgated are all *ex facie* valid, and in my opinion that is sufficient under the provision above quoted to make them valid and operative municipal laws.

With reference to the alleged failure to observe the requirements of the tax sale by-law: In the first place I think *Toronto Corporation* v. *Russell, supra* (which, as I read it, marks a decided swing of the pendulum as to these tax sale cases), warrants me, upon the facts I have above detailed, in holding that the plaintiff must be taken to have been a consenting party to this sale, waiving the non-observance of any provisions in his favour as to notice, publication, etc. See also *Jones* v. *North Vancouver Land and Improvement Co.* (1909), 14 B.C. 285.

In the second place there is, in my opinion, no substance in any of the objections advanced. By the by-law (British Columbia Gazette, 1898, p. 1,506), it is provided that a copy of

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the list of lands to be sold "shall be printed or published for a period of six weeks preceding the date of sale in The Weekly News-Advertiser, published in the City of Vancouver, and circulated in the said Corporation." Mr. *MacNeill* objects, first, that the phrase "and circulated in the said Corporation" points to and necessitates an active distribution throughout the Municipality, by the Municipality's officers, of the printed list, or of the paper containing it. I think it is clearly a descriptive phrase, a mere statement that the paper does in fact circulate in the Municipality. Secondly, Mr. *MacNeill* objects that the list was not printed in the issue of October 5th, 1898, the day immediately preceding the sale, although it had appeared for a period of six weeks before that issue. If the by-law had said "immediately preceding," there would be something in the objection; as it is I think the by-law was duly obeyed in this respect.

The by-law also provides that the collector of the Municipality should, "at least one month before the time of sale post a notice similar to the said list in some convenient and public places, that is to say, at the Council Chambers and in the post office buildings in the said Corporation." It is objected that no notice was posted at Epworth post office, but there is no evidence that there was any "post office building" there. All that appears is that there was a postmaster there who received and distributed mail from and to his few neighbours at his own house. In my opinion that did not make the house a "post office building" within the meaning of the by-law.

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The by-law also provides for a deposit "in the post office of the said Corporation" of notices of the sale, addressed to the various owners. It is objected that, although the plaintiff duly received the notice referred to, it was posted at the Vancouver post office, which it is contended, was not "the post office of the said Corporation." I think it was. This very by-law shews on its face that the office of the clerk of the Municipality was on Hastings street, Vancouver, and it seems to me absurd to say that for ordinary business purposes the Vancouver post office was not this Corporation's post office within the meaning of the by-law.

Mr. *MacNeill's* last objection was that the sale was made to satisfy not merely the taxes but certain alleged expenses, and that there was no evidence of any such having been incurred. In other words, I am to infer that the News-Advertiser printed the list gratuitously. I decline to do otherwise than draw the inference that services rendered would be paid for in due course. The expenses were largely contingent, as the by-law in fact terms them; and if the plaintiff had any grievance on this score he could have looked to the Municipality for a refund.

The further question remains for consideration, namely, as to the validity and effect (if valid) of the order of the late Chief Justice McColl confirming this tax sale. Mr. *MacNeill* did not press the question further than to contend that the order, being made *ex parte,* did not operate to prevent the plaintiff from attacking the sale proceedings throughout. I have in effect given full force to this contention, and without regard to the existence of this order have held that the proceedings down to the issue of the certificate to the tax sale purchaser under section 151 (see B.C. statutes, 1898, chapter 35, section 14) were valid. But on the pleadings the tax sale deed is attacked for want of any confirming order and it is open to the plaintiff, perhaps, to argue hereafter that the *ex parte* order of April, 1899, is a nullity and that, therefore, the tax sale deed must fall. In my opinion there is a two-fold answer to this contention.

In the first place, I think the order was properly made *ex parte;* in other words, that section 151, as it stood in 1898, does not in terms or by necessary implication require that notice of the application should be given to the previous owners. A judge might, perhaps, in the exercise of his discretion, decline to act except upon notice; but if *Re South Vancouver* (1901), 9 B.C. 572 goes further and is to be read as holding that the statute must be taken to imperatively require notice, I must respectfully dissent from that view. The late Chief Justice McColl acted in this very instance on the contrary view. Section 151, as it stood in the previous year (R.S.B.C. 1897, chapter 144), did in terms require the judge to whom the notice was presented to be satisfied that "notice of the sale and of the consequences

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thereof has been served on the owner," etc.—language which does not apply to any of the statutory notices to be given prior to the sale and must, in my opinion, be taken to mean a notice that the sale has actually taken place, and setting forth what the consequences of that sale will be if the owner remains inactive. The provision that the judge may order substitutional service of this notice points to its being given in connection with the application for the confirming order. Under the amendment of 1898, the change is radical. Service of any such notice after sale is not required, and the deliberate omission in this regard, coupled with the very precise statement of the different matters as to which the judge is to be satisfied, leads me to the view that the inquiry was intended to be an *ex parte* proceeding. The application for the order is not treated as a judicial proceeding *inter partes*. No provision, for instance, is made for notice to the tax sale purchaser, who is as vitally interested as the old owner. If the purchaser is not a party to the inquiry, there is no "other side" to invoke the principle *audi alteram partem*. The effect of the order, too, as far as I can see, is very slight. It did little more than fix a time from which the period of redemption should be reckoned and afford a warrant for the issue of a tax sale deed after the expiration of the time for redemption. What the effect of that deed would be is specifically stated in, and depends upon, section 154 (see B.C. statutes, 1898, chapter 35, section 17), and only very minor errors are in terms cured by the section. In all other respects the sale proceedings would be open to attack notwithstanding the confirming order. I need hardly say, however, that the opinion I have expressed as to the validity of this *ex parte* order is put forward with much distrust in view of the judgment of my brother IRVING in *Re South Vancouver* above referred to and in view also of the judgment of the Full Court recently delivered in *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412. But the question is, after all, one of interpretation; and the history of the section, its language, and the meagre operation of the order (if indeed it have any prejudicial operation), as against the old owner have convinced me that it was not intended that this step

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should be in the nature of a judicial contestation. The inquiry in no way touched the proceedings anterior to the tax sale by-law, and the order seems to be little more than a certificate by a *persona designata* to the Municipality that its officer has conducted the sale regularly. Of course there is still the question suggested by *Brigman* v. *McKenzie* (1897), 6 B.C. 56, namely: Must not the order which purports to be an order of the Supreme Court be treated as valid unless or until it is set aside upon a proper application. This question I have not found it necessary to determine, and any opinion I might express would be *obiter*.

But, in the second place, I do not think the plaintiff can take advantage in this action of the objection in question. Given proceedings valid down to and inclusive of the delivery to the tax sale purchaser of a certificate that the land "has been sold" to him, the right of the old owner is a very limited one and the title of the purchaser is fairly definite: *McConnell* v. *Beatty* (1908), A.C. 82, 77 L.J., P.C. 25. The old owner must, if he desire to put an end to the interest of the tax sale purchaser, pursue the remedy provided in section 152 (see B.C. statutes, 1898, chapter 35, section 15), namely, tender to the Municipality the purchase price paid, etc. This he has not done in this case, and the action as framed must fail. The plaintiff avowedly bases his claim upon his position as the owner of the property in question when in fact, the proceedings down to the issue of the tax sale certificate being regular, he has, even if the confirming order be a nullity, merely a right of redemption, enforceable only as set out in the statute.

The action is dismissed with costs.

The appeal was argued at Vancouver on the 7th and 8th of November, 1910, and at Victoria on the 10th, 11th and 12th of January, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

A. H. MacNeill, K.C., for appellant.
J. A. Russell, and *Ladner*, for respondents.

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April 10.

ANDERSON v. SOUTH VANCOUVER

MACDONALD, C.J.A.

10th April, 1911.

MACDONALD, C.J.A.: The appellant mainly relied upon the alleged illegality of the course adopted by the council of the defendant Municipality of holding its meetings in the City of Vancouver instead of within its own territorial jurisdiction, and upon the failure of the Corporation to post a notice of the tax sale complained of on what was alleged to be a post office building at Epworth.

With regard to the latter, I do not entertain any doubt as to how I should deal with it. In the first place, I am not satisfied that there was a post office building there within the meaning of the by-law. A mail bag may have been left at this ranch house three times a week, for the convenience of a few people in that locality. Such a thing is not uncommon in this Province, where there are so many small outlying settlements. I am inclined to think that "post office building" means a building in which a post office has been permanently established by the Post Office Department. A letter box or mail car is a post office, but not a post office building: *vide* Post Office Act. But, assuming that there was a post office building at Epworth within the meaning of the by-law, the failure to post a notice there is not, in my opinion, fatal to the tax sale. It was an irregularity in carrying out the sale, and not in the levying of the rate or the imposition of the sale, and in any case the appellant had actual notice of the sale. I refer to *Cotter* v. *Sutherland* (1868), 18 U.C.C.P. 357 at p. 385; *Connor* v. *Douglas* (1868), 15 Gr. 456; *Nichols* v. *Cumming* (1877), 1 S.C.R. 395; and *McKay* v. *Crysler* (1879), 3 S.C.R. 436 at pp. 474, 475.

We were referred to several later cases in the Supreme Court of Canada, but in none of these do I find anything inconsistent with the rule laid down in the above cases that while strict compliance with all statutory conditions as to the imposition of the tax and the by-law authorizing the sale is imperative and essential, yet substantial compliance with those relating to the carrying out of the sale may be sufficient.

But the appellant contends that the imposition of taxes yearly on the lands in question for the whole period between 1893 and

1898 were null and void, because the meetings of the council were not held in the Municipality, and he bases this contention on B.C. statutes, 1894, chapter 34, section 15, which reads as follows:

"All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality";

and says that no resolution was passed in conformity with this section.

The council held its first meeting after its incorporation within the Municipality, and at that meeting a resolution was passed that the council should hold its next meeting at a place in Hastings street, in the City of Vancouver. Thereafter that place of meeting was practically adopted as its council chamber and executive office, and the rents were paid regularly by the Corporation. This course appears to have been adopted and pursued because there was no convenient meeting place within the Municipality, and to have not been questioned by anyone. There is no suggestion that the successive councils were actuated by improper motives in thus holding their meetings without the municipal boundaries.

Said section 15 does not require a resolution in writing. I think "unanimously resolved" means no more than a unanimous determination by the members of the board, and that such determination may be inferred from the acts of the council, and that in this case the learned trial judge was quite right in inferring such a unanimous resolve from the evidence in the case. It is not as if one meeting, or even several meetings only were in question here. The evidence shews a uniform and consistent course of conduct. A first meeting in the Municipality adjourned to meet, where? At the premises leased by the Corporation for the purpose of a council chamber and executive office at which all subsequent meetings for the year were held, and all municipal business transacted.

It may be suggested that while the fact of the holding of such meetings may entitle us to infer that a majority resolved to hold them, yet we cannot infer unanimity. That objection, I think,

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is met by the circumstances of the case already referred to. It is inconceivable that such a course of conduct, implying as it does not individual, but collective action, should continue over a period of years without such unanimity. It was also contended that as the council is required to keep minutes of its proceedings, the absence of a minute on this subject is proof that there never was any resolution in the proper sense of the term, that is to say, a collective act of the council. But if I am right in holding that such a unanimous resolve may be inferred from the acts of the council, it is apparent that this question does not enter into the matter at all.

In the interpretation of section 15 insofar as the intention of the Legislature may be ascertained in using the word "resolved," I think attention should be paid to the principles laid down in *Howard v. Bodington* (1877), 2 P.D. 203 at p. 211, and *Caldow* v. *Pixell* (1877), 2 C.P.D. 562 at p. 566, where it is pointed out that it is proper to consider the consequences which would flow from one construction of the statute as against another construction, as bearing on the question of intention.

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It was strenuously contended by appellant's counsel that even if the holding of the council meetings out of the municipality was not legal, the holding of the courts of revision were, on the principle that a court must sit within its territorial jurisdiction. I am unable to agree with this contention. The statute declares that the council shall sit as a court of revision. This so-called court is merely a sitting of the council for the purpose of revising and equalizing assessments, and while it discharges judicial functions, it does so as a meeting of the council under the name of the court of revision, and if the council may meet outside the municipality, that I think is an answer to the contention on this branch of the case.

Moreover, I am of opinion that the appellant has precluded himself by his conduct from obtaining the relief he seeks.

It appears that he and one Captain McLeod became, in 1889, the owners of the land in question; that it was subject to a mortgage for $900 which was unpaid at the time of the tax sale complained of; that no taxes have been paid by either McLeod

or the plaintiff since 1892; and that the plaintiff knew that assessments were levied and rates imposed. The plaintiff was not an ignorant, but on the contrary a prominent man, engaged in the real estate business in the City of Vancouver, then a small place, and during part of the time between 1892 and 1902, was stipendiary magistrate of that city. I have no hesitation in drawing the inference from the evidence that he knew that the meetings of the council of the defendant Corporation, and the meetings of the court of revision were being held in the city. In 1894 it appears that he appealed against the assessment of this land to a court of revision sitting in the said council chamber. I think it has also been satisfactorily proved that the plaintiff knew of the proposed sale. Mr. Martin, the clerk of the Municipality, mailed him a notice that the property would be sold for taxes at a specified time and place, which notice, as Martin ascertained from a conversation with the plaintiff afterwards in the street, prior to the sale, the plaintiff had received. The plaintiff told Martin on this occasion that he did not know whether the property was worth the taxes or not. It is also shewn that the notice of this sale appeared in one of the leading newspapers published and circulating largely in the City of Vancouver. The sale was held on the 6th of October, 1898, and the tax sale deed was issued to the purchaser on the 21st of June, 1901. It was not until July, 1902, that the plaintiff left Vancouver to reside at Cranbrook, in another part of the Province.

The plaintiff made no complaints about the sale, and according to his own story did not even take the trouble to ascertain what had become of his property, though he continued to reside in Vancouver for four years after the sale. During the ten years from 1898 to 1908 he neither inquired about nor offered to pay arrears of or current taxes; it was only when the property had enormously increased in value that he came forward to disturb the sale and the title of *bona fide* purchasers who had for ten years been paying the taxes and dealing with the property as their own, relying on the tax sale title.

The last word from the plaintiff in 1898, when the real estate

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market in Vancouver and its suburbs was at a very low ebb, was that he did not know whether the property was worth the taxes or not. It will be recollected that the mortgage for $900 was unpaid at the time, as well as the taxes for several years, and presumably interest upon the mortgage moneys. Is there then any other fair conclusion to be drawn than that the plaintiff, finding in 1908 that a profit might be made out of the property, then for the first time reversed his attitude of abandonment of the property and his ten years' acquiescence, and sought by a microscopic examination of the assessments and sale proceedings to make out the case which is put forward in this action, and which, if well founded, ought to have been raised promptly ten years before.

Unless municipal corporations must be held more strictly to the formalities imposed upon them in the exercise of their powers of sale for taxes than are joint stock and other companies by their regulations in the exercise of their powers of forfeiture or sale of members' shares, this case, in my opinion, comes clearly within the principles approved of by the Judicial Committee of the Privy Council in *Jones* v. *North Vancouver Land and Improvement Co.* (1910), A.C. 317 at pp. 328-9, in which their Lordships say:

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"The principles laid down in *Prendergast* v. *Turton* (1841), 1 Y. & C.C.C. 98; and by Lord Lyndhurst on the appeal (1843), 13 L.J., Ch. 268; and in the line of cases which followed it, fortunately it would seem, in the interest of that honesty and fair dealing which ought to regulate the conduct of commercial affairs and the management of companies such as this, are strong enough to defeat such mischievous designs."

In *Prendergast* v. *Turton* (1841), 1 Y. & C.C.C. 98 and on appeal before Lord Lyndhurst (1843), 13 L.J., Ch. 268, these principles were applied to a case of forfeiture of shares where it was shewn that there were very grave informalities in the proceedings leading up to the forfeiture. To my mind that was not as strong a case against the plaintiff as this is against the plaintiff here, and yet these are the words in which Lord Lyndhurst concludes his judgment at p. 269:

"This Court can never sanction this sort of conditional acquiescence. To allow the party to lie by, in a case of this nature, to watch the course of events—to urge his claim, if it should be to his advantage to do so, and

to abandon it on a continuance of misfortune and loss, which, as a proprietor, he must have shared, would be at variance with the plainest rules of justice."

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In the case at bar, the plaintiff was really lying by for fifteen years; he paid no taxes from the beginning of 1893 up to the time of the commencement of the action in 1908; he allowed others to take the burden of his debt, first the Corporation and afterwards the purchasers. They carried the burden during the years when the property was of little value, and then when it increased and became of value, the plaintiff came forward to claim the profit.

It may be that these principles are not so clearly applicable in relation to municipal as to commercial corporations, still it appears to me that where there is, as I think there is here, conduct from which an abandonment of his property rights can, with reasonable certainty, be inferred, a Court of Equity ought not to assist the plaintiff at the expense of innocent persons who have been guilty of no laches.

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I refer also to *Scholefield* v. *Dickenson* (1863), 10 Gr. 226.

I would dismiss the appeal.

IRVING, J.A.: The plaintiff alleges that his land was improperly sold in October, 1898, for taxes improperly imposed during the years 1893 to 1897.

The statute law relating to municipal taxation had been amended in May, 1898 (chapter 35), and on the 16th of July, 1898, the Council of the District of South Vancouver had passed a by-law under the authority of the 1898 amendment.

By clause 4 of the by-law, the collector was required to mail a notice of the proposed sale in the post office of the said Corporation to the owner, and also post a list of the lots to be sold in some convenient public places, that is to say, at the council chambers, and in the post office building in the said corporation.

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It appears that there were two or three post offices in the said Corporation. In particular there was one at Epworth, which I understand was the nearest to the plaintiff's land. It is

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admitted that no notice was posted there, but some discussion took place as to whether or not this was a post office.

The plaintiff swears he did not receive any notice, but he was asked:

"And you might or might not have received all the notices that we have said you did receive? Yes, probably."

This is not very satisfactory. He may have intended to say "Yes, probably I did," or he may have intended to commence a new sentence with the word "probably," and then stopped. But taking the straight denial in his examination and this uncertain answer together, I am not able to say that the denial is displaced.

It seems to me that the onus is on the defendants to establish that the plaintiff received the notice; had the officers of the Corporation been able to shew, by a memorandum in their books, that a letter, properly directed, had been placed in the proper post office, a *prima facie* presumption would arise that the plaintiff had received such notice.

Unfortunately no such memorandum is forthcoming. The municipal clerk from 1893 to 1899 says that he did send to the plaintiff a notice of the sale, mailing it at least one month before the sale, not at a post office in the said Corporation, but at the post office in the City of Vancouver, addressing it "to the City of Vancouver," and on cross-examination he states that the notice was sent in a registered letter, and that it never came back; but a post office clerk produced the record of registered letters from the date of the warrant for sale, 10th August to 6th October, and there was no entry of any such registered letter.

IRVING, J.A.

Mr. Martin was, in December, 1909, giving testimony as to what he did, or thought he did, in 1898; and he had no memorandum to guide him. I do not think we would be justified in accepting his evidence in question. Nor can I accept it as proof of waiver of the notice. In *Toronto Corporation* v. *Russell* (1908), A.C. 493, the evidence was clear on that point.

In his affidavit made in December, 1898, Mr. Martin says (following the wording of the statute), that he mailed the notices, at least one month before the sale, but does not state the notice was contained in a registered letter. His

affidavit has not a schedule of persons to whom letters were sent, and as he omitted to post a notice on one out of three post offices in the Corporation, I do not think we should pay much regard to the affidavit.

For these reasons the evidence does not satisfy me that the plaintiff had notice of the intended sale.

In my opinion, the meeting at which the tax sale by-law was passed—or supposed to be passed—was not validly held, in that it was not held within the municipality, as required by B.C. statutes, 1894, chapter 34, section 15, and no resolution for a departure from the general rule can be shewn or inferred. The court of revision which was supposed to have passed on the assessment in question, was also improperly held without the municipal limits. "It is a general rule that all judicial acts exercised by persons whose judicial authority is limited as to locality, must appear to be done within the locality to which the act is limited": *Regina* v. *Totness* (1849), 11 Q.B. 80 at p. 89. The defect not appearing on the face of the assessment by-laws, the curative sections would not apply: *Sutherland* v. *Municipal Council of East Nissouri* (1853), 10 U.C.Q.B. 626.

IRVING, J.A.

In *Toronto Corporation* v. *Russell, supra,* and *Jones* v. *North Vancouver Land and Improvement Co.* (1909), 14 B.C. 285, (1910), A.C. 317, the plaintiff was in each case a member of the forfeiting board. Those cases in my opinion are not applicable to any ordinary tax payer.

As to a tender being necessary, B.C. statutes 1898, chapter 35, section 15, can only apply where there has been a valid sale. The defect here is in the assessment.

I would allow the appeal.

26th August, 1911.

MARTIN, J.A.: I regret that owing to unexpected pressure of urgent business in connection with another Court (Admiralty), I have been unable to give at an earlier date my promised reasons for allowing the appeal. However, I shall now proceed to state them briefly.

MARTIN, J.A.

Apart from all other questions, I am unable to see how this jurisdictional objection can be overcome, there being no evi-

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dence that the council "unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the Municipality," as required by section 15 of chapter 34 of the Acts of 1894. This is a very salutary enactment, putting it in the power of one councillor to prevent the hardship and abuse of authority that might arise from holding meetings at any distance, great or small, outside of the municipal limits. Though, in terms, one councillor has not the power to do more than give his consent to the meetings being held "outside of the limits," yet in practice, he can, in effect, safeguard the interests of the ratepayers by refusing to give his consent at all unless some place easily accessible to the body of the ratepayers be selected, though outside the limits, if it were thought more convenient to hold them there. I do not think that this wise safeguard should be lightly construed away, or any departure encouraged from the plain intention of the Legislature.

MARTIN, J.A.

While I am inclined to agree that the word "resolved" does not in the context and circumstances require a formal resolution to be passed, and even (but with much doubt), that it might possibly be inferred from the fact that at any given outside meeting all the council were present, that there was unanimity of intention to sit at a given place, in the absence of any open expression, yet it would be stretching the point to an unwarranted extent to infer unanimity in the present case where there is no evidence that even on one occasion all the members were present. The only fair inference in such a case, in my opinion, is that one or more members of the council refrained from attending so that the others would be without jurisdiction to act at all; but at best there can be no inference of consent from absence. Some remarks made during the argument induce me to call attention to the fact that no such inference can be drawn from the custom or habit of a mere municipal council as would be drawn from the acts of the Legislature, the former being an inferior tribunal from every legal point of view, whereas the Provincial Legislature must admittedly, in matters delegated to it under the British North America Act, be regarded in all

constitutional respects as of like consequence as the Federal or Imperial Parliaments, and Parliament, the High Court of Parliament, is itself not only a Court of Record, but the highest in the land: *Burdett v. Abbott* (1841), 14 East 1 at pp. 137-8, 148-9-50, 159; *Bradlaugh* v. *Gossett* (1884), 12 Q.B.D. 271, 285, 287; 9 Halsbury's Laws of England 19—wherefore the Speaker's warrant to commit for contempt is a justification for breaking open an outer door of a house to arrest the owner.

Such being my opinion, the only other point that I feel called upon to notice is the contention that on the authority of *Toronto Corporation* v. *Russell* (1908), 78 L.J., P.C. 1; *Jones* v. *North Vancouver Land and Improvement Co.* (1910), A.C. 317, and *Prendergast* v. *Turton* (1841), 11 L.J., Ch. 22, (1843), 13 L.J., Ch. 268, the plaintiff must be deemed to have waived or abandoned his rights. All I can say, with every respect to contrary opinions, is that in my opinion those cases present no similarity in principle, being based upon the fact that the plaintiff therein had been a voluntary actor in the proceedings which defeated his claim; indeed, in the two last named and strongest cases in support of the contention, he had been a shareholder, whereas in the case at bar the plaintiff, save as to an immaterial appeal from assessment in 1894, has at no time advanced beyond the stage of mere passivity towards involuntary statutory obligations.

MARTIN, J.A.

GALLIHER, J.A.: I agree that the appeal should be dismissed. I have some doubts as to the regularity of the proceedings leading up to the sale, and particularly as to the holding of the courts of revision outside the limits of the Municipality. It is very doubtful if the Municipality brought itself within the provisions of the amendment of 1894 in this respect, but I prefer to rest my judgment upon the ground that the plaintiff has by his actions and long delay disentitled himself to relief at our hands. The learned trial judge has gone so fully into this, and the evidence is so clear on the point, that is is unnecessary for me to dwell upon it.

GALLIHER, J.A.

The cases of *Prendergast* v. *Turton* (1843), 13 L.J., Ch. 268,

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and *Jones* v. *North Vancouver Land and Improvement Co.* (1909), 14 B.C. 285, (1910), A.C. 317, while containing elements not present in the case at bar, enunciate a principle which I think I am justified in applying to the facts here.

Appeal dismissed.

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

Solicitors for respondents: *Russell, Russell & Hannington,* and *Ladner & Wilson.*

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TAYLOR v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Damages—New trial—Excessive verdict—Assessment of damages by Court of Appeal—Marginal rule, 869a—Costs.

Where a plaintiff had recovered damages which in the opinion of the Court of Appeal were excessive, the Court ordered a new trial. On the second trial a jury increased the damages from $15,000 to $17,500, and the Court of Appeal, under Marginal rule 869a, reduced the damages to $12,000.

Disposition of costs in the above circumstances.

APPEAL from the judgment of MORRISON, J. and the verdict of a jury on a second trial: see *ante,* p. 109.

Statement

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 (defendant) Company: The circumstances are in no way altered from what they were on the first appeal, and if the damages were considered excessive then, they are more so now. No good purpose can be served by

ordering another trial. This Court has power to assess the damages.

McCrossan, and *Harper,* for respondent (plaintiff): The condition of the plaintiff on the second trial was shewn to be vastly worse than on the first. He is a hopeless and helpless nervous wreck, and he is growing worse.

Cur. adv. vult.

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

GALLIHER, J.A.: This case came before us on appeal at the sittings held in Vancouver: see *ante,* p. 109.

The jury at the trial awarded $15,000 damages, which a majority of the Court held excessive, and the case was sent back for a new trial. Upon the second trial the evidence disclosed that the plaintiff was in practically the same condition as at the first trial, and that little or no improvement had taken place, and that the chances for improvement in the future were slight. Upon this evidence the second jury awarded $17,500 damages, and from this verdict the defendants appeal, and the appeal was argued before us on the 27th of November, 1911.

In my opinion these damages are excessive, and as the case has already been tried twice it seems to me the better course to pursue is to proceed under marginal rule 869a of our Supreme Court Rules and reduce the damages instead of sending the case back for a new trial.

Judgment

The plaintiff's age was 51 or 52 at the time of the accident, and he was employed as a blacksmith at $80 per month, and there is some evidence of a more or less unsatisfactory nature of his making extra money after hours, buying and selling cattle and waggons.

There can be no doubt whatever from the evidence that the plaintiff was very seriously injured and can never fully recover and that he has suffered great mental and physical pain.

This is a case where no money compensation which a jury might award could fully compensate the plaintiff for the injuries

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received, but it is not upon that principle juries should proceed in awarding damages.

I think we may assume from the evidence that there is not much probability of the plaintiff ever being able to earn anything in the future, and assuming that the jury took that view of the case, they would be entitled to take into consideration (in arriving at the amount of damages), the cost of medical attendance; the pain and suffering endured by the plaintiff—both mental and physical; the impairment of faculties; the probable length of time the plaintiff would have lived; the loss of earning power; and the burden of maintaining himself, having regard to his station in life.

In this view, and upon the evidence before us, I do not think the jury could reasonably have awarded $17,500 damages.

Judgment

I come to this conclusion after fully considering and approving of the rule laid down by Lord Esher in *Praed* v. *Graham* (1889), 24 Q.B.D. 53, 59 L.J., Q.B. 230, considered and approved of in *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250, 73 L.J., K.B. 568.

I would reduce the damages to $12,000.

Judgment accordingly.

17th January, 1912.

On counsel speaking to the question of costs, it was decided:

Per MACDONALD, C.J.A. and GALLIHER, J.A., that the costs of both appeals should go to the defendant Company and the costs of the trials to the plaintiff, and

Per IRVING, J.A.: The costs of the first trial to the plaintiff; the other costs to the defendant Company.

FARMER v. THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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FARMER v. B. C. ELECTRIC RY. CO.

Master and servant—Railway—Death of servant resulting from injury in a collision on Company's line—Servant travelling on a pass—Whether printed condition on pass relieving Company of liability was known to servant—Res ipsa loquitur—Application of to relation between master and servant—Common employment.

Deceased was employed in the defendants' workshops, and travelled to and from his work on a pass. The condition on the back of the pass, exempting the Company from liability for damages to person or property of holder of pass, was not signed by the workman. Deceased was a man skilled in his particular trade, and refused to work for the Company unless given transportation. The jury found as a fact that deceased was travelling on a pass, but that there was not sufficient evidence to shew that he was made acquainted with the conditions thereon, and gave a verdict for $9,000, which, on motion for judgment, was sustained by the trial judge.

Held, per MACDONALD, C.J.A. and GALLIHER, J.A.: That the finding as to want of knowledge of the condition on the pass should not be interfered with.

Per IRVING, J.A.: That the finding was against the weight of evidence.

Deceased, while travelling on his employers' car, was injured, and subsequently died from his injuries, in a collision between a car which broke away or became detached from the motor which was pulling it and ran back down grade, crashing into the car occupied by deceased. Defendants, in their pleadings, admitted that the accident occurred through the negligence of fellow servants in the employment of defendant Company, but there was no other evidence of negligence.

Held, on appeal, that it was for the plaintiff to shew that the accident was due to some specific act of negligence for which the defendants were responsible.

Appeal allowed, and verdict set aside.

Statement

APPEAL from the judgment of MURPHY, J. and the verdict of a jury in an action under Lord Campbell's Act, tried at Vancouver on the 12th of July, 1910.

Macdonell, for plaintiff.

L. G. McPhillips, K.C., for defendant Company.

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MURPHY, J.: At the conclusion of plaintiff's case, counsel for the defendants moved that the case be taken from the jury on the ground that the only evidence of negligence adduced was based on the principle of *res ipsa loquitur,* and that deceased being at the time of his death in the employ of defendants, this principle could not be invoked. I intimated that, if called upon to rule at that juncture, I would allow the jury to pass upon the matter, but if agreeable to counsel I would reserve the point and submit the questions as to use of pass and amount of damages to the jury. As counsel agreed, or at any rate did not insist on an immediate ruling, this course was pursued. The jury has found that deceased was travelling on a pass, but was not aware of the condition thereon relieving the defendants from liability in case of accident. I am also asked to enter a verdict for the defendants on the ground that there was no evidence on which the jury could make the latter finding.

As to the first point, I agree with defendants' counsel that, under the decisions, it must be held that the relation of master and servant existed between deceased and defendants at the time he was killed.

The case of *Tunney* v. *Midland Railway Co.* (1866), L.R. 1 C.P. 291, and *Coldrick* v. *Partridge, Jones & Co., Limited* (1909), 1 K.B. 530; 79 L.J., K.B. 173, seem to me conclusive on this point. But granting this, it is true to say that the doctrine *res ipsa loquitur* does not apply as between master and servant to the extent of preventing the submission of this case to the jury. Whilst it is true that this broad principle is laid down in some of the text books, an examination of the English cases at any rate, on which it purports to be founded, shews that the facts of each case are to be considered.

MURPHY, J.

Again, I think the evidence here went further than what is contemplated by the phrase *res ipsa loquitur.* Not only was the fact of an accident having happened established, but some details pointing to a cause were given, as shall be shewn hereafter. This being so, I think I should have submitted the question of negligence to the jury, and as I did not do so, because of the discussion with counsel, I think I must now examine the

evidence on that branch of the case and see if on a consideration thereof plaintiff can succeed. The evidence was that on the morning of the accident a freight car drawn by an electric motor was seen to pass Lakeview station on defendants' line and start to ascend the grade beyond. The hour was early in the morning, and it being the fall of the year, it was still dark. Within a few minutes after the freight car passed, it was seen returning down the grade detached from the motor and apparently with no one in control. Just about the station it met and crashed into the passenger car upon which deceased was riding to his work, and, as a result of the collision, he was killed. Will these facts justify an inference as to how the freight car came to make the return trip which will fix liability on the defendants, granting that the doctrine of common employment applies as between the deceased and the train crew in charge of the freight car and motor, as I think must be done under the decisions above cited? I think they do. What would be the obvious explanation? Surely that the coupling between the freight car and the motor broke or parted under the additional strain of the grade. I think this is a much more cogent inference than that the freight car got away through some negligent act of the train crew. If so, then in the absence of any proof that the coupling was a proper one and in good repair, or that the defendants had in force a proper method of inspection and competent men to perform such duty, I think they would be liable at common law, and as no such proof was adduced, I so hold.

Next, as to the question of knowledge of conditions on the pass, I put to the jury the questions set out in *Marriott* v. *Yeoward Brothers* (1909), 2 K.B. 987; 79 L.J., K.B. 114 at p. 118, as being the proper ones to be submitted, and I think there was evidence on which the jury could answer as they have. It was shewn that defendants were anxious to have deceased work at their car shops at New Westminster, and that he refused to continue in such employment unless furnished with free transportation between there and Vancouver. The foreman thereupon obtained the pass in question and handed it to deceased, merely

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stating: "Here, Tom, is your pass," or words to that effect. The conditions exempting from liability were printed on the back of the pass and purported to require the signature of the person using it. Whilst, of course, the fact that deceased had not signed this is not conclusive evidence, it is, I think, of weight as shewing that defendants did not take reasonable steps to give him notice of the conditions. Presumably they placed the requirements as to signature on the pass expressly to avoid any dispute as to their having fulfilled the duty cast upon them of bringing home its conditions to the user, yet, in this instance, the pass was handed over without the signature being obtained. I think it may reasonably be inferred, considering their anxiety to have the deceased continue in their employ, that in his case they had no intention of insisting on the condition, and therefore did not demand his signature. It was urged that as deceased had had a pass over the Westminster city line for two or three years in his possession, on which similar conditions were indorsed, and that, as he had had the pass over the interurban line for a month, it must be concluded that he had read the condition and agreed to it. I think all this to be a matter for the jury. Further, the authorities cited in *Marriott* v. *Yeoward Brothers, ubi supra,* shew that the class of person using the pass is to be considered. Deceased was a skilled painter, but there was no evidence to shew what his education was—or indeed whether he could read at all, so that, if it were a matter for me to decide, I would be inclined to hold that a working man in his walk of life could not be reasonably expected to scrutinize closely a pass issued to him under the conditions this one was given to him, and in fact, that he would be more likely to put it in his pocket and never read the printing on it at all. In this connection it is to be remembered that the condition is printed on the back of the pass and there is no reference on its face, such as "see back," or similar words, to call the attention of anyone perusing its face that any conditions whatever attach to its use.

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

The appeal was argued at Vancouver on the 14th of November, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellant (defendant) Company: There was no evidence to shew how the accident occurred through which deceased met his death; the case should not have gone to the jury, and in any event, the deceased, not having a right of action himself had he survived the accident, no right of action accrued to his widow, the present plaintiff.

Macdonell, for respondent: In the circumstances here it must be inferred that the pass was given free of all conditions.

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.: The plaintiff's husband was, at the time of the accident which caused his death, an employee of the defendants. His home was in Vancouver. The defendants are a tramway company operating tram cars between Vancouver and New Westminster, and have at New Westminster shops for the construction and repair of their cars. They desired to employ deceased, who was a painter, in their said shops, but he declined to go unless he was given a pass over the tramway so that he might return to his home each night. This was agreed to and the pass issued to him. The jury found that he was travelling on this pass when the accident happened. There were conditions indorsed on the pass intended to relieve the defendants from liability for negligence, but the jury found that the deceased was not aware of these conditions. I do not think this finding ought to be interfered with. From the nature of the case the jury were entitled, I think, to draw the inference that the conditions on the back of the pass, even if they had come to the notice of the deceased, were not intended to apply to him, because the pass was issued to him for valuable consideration. The fact that he did not sign the conditions and was not asked to sign them would also strengthen that inference. There is no finding as to how the accident occurred beyond the fact of collision, nor is there any evidence upon this point. No

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attempt was made by either party to account for its occurrence. The jury awarded $9,000 damages.

The witness Marshall, who lived at the scene of the accident, says that a car of lumber, attached to a motor, passed his house at 10 or 15 minutes to 6 o'clock in the morning; that at 5 minutes past 6 the same morning this lumber car came back, running wild and unattached and with no one on it, and that it met and collided with a passenger car in which the deceased was riding, which was coming up from Vancouver on its way to New Westminster. This collision caused the death of the deceased. There is no other evidence on the question at all.

Had the deceased been an ordinary passenger, I think the onus would have been upon the defendants to shew that they had fulfilled their contract to carry the passenger with due regard to his safety. In *Skinner* v. *The London, Brighton and South Coast Railway Company* (1850), 5 Ex. 786, a case in which a person was injured by collision between two trains, Pollock, C.B. said, at p. 789:

"Surely the fact of the collision between two trains belonging to the same Company is *prima facie* some evidence of negligence on their part."

Alderson, B. said, at p. 789:

"This is not the case of a collision between two vehicles belonging to different persons where no negligence can be inferred against either party in the absence of evidence as to which of them is to blame. But here all three trains belong to the same Company, and whether the accident arose from the trains running at too short intervals, or from their improper management by the persons in charge of them, or from the servants at the station neglecting to stop the last train in time, the Company are equally liable; and it is not necessary for the plaintiff to trace specifically in which the negligence consists; and if the accident arose from some inevitable fatality, it is for the defendants to shew it."

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See also in *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596, at p. 600, where the majority of the Exchequer Chamber held that:

"There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of events does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care."

This is dissented from by Erle, C.J., and Mellor, J. The former said:

"As my brother Mellor and myself read them we cannot find that reasonable evidence of negligence which has been apparent to the rest of the Court."

These are cases in which the plaintiff was not an employee of the defendant, and therefore the doctrine of common employment was not under consideration.

In *The Dominion Cartridge Company* v. *Cairns* (1898), 28 S.C.R. 361, the Court declined to apply the maxim *res ipsa loquitur* to the facts of that case, but thought that the operations being carried on were not wholly under the control of the Company, but that the deceased himself was a factor in this control, and that it was at least as probable that the explosion occurred through his fault as through that of his employers.

In *Shawinigan Carbide Co.* v. *Doucet* (1908), 42 S.C.R. 281, the Court considered the maxim apart from Article 1,054 of the Quebec Code, and expressed, according to the head note, this opinion:

"*Held,* Duff and Anglin, JJ. dissenting, that, apart from any presumption arising under Article 1,054 C.C., the fact of the explosion occurring under such circumstances sufficiently established actionable negligence on the part of the Company."

But while dissenting on the facts, Duff, J. said at p. 330:

"Speaking broadly, in England and in the United States, this inference is held to be permissible when the injury has been caused by something wholly within the control of the defendant or of persons for whose actions he was responsible, and the occurrence to which the injury was due was not of such a character as would ordinarily take place in the absence of negligence. Given these conditions, the inference, in the absence of explanation, is a plain one, but the question whether the inference is, or is not permissible, is in truth, not a question of law at all. Apart from specific rule it is merely a question of right thinking."

The cases in the Supreme Court above referred to were under the laws of the Province of Quebec, where the doctrine of common employment does not prevail, and the English cases above cited were not cases between master and servant.

If the deceased were not a fellow servant of those operating the tramway, then I think the jury were justified in drawing the inference that the defendants were guilty of negligence. But that he was in common employment with such other servants I think I am bound to hold under the authority of *Coldrick* v. *Partridge, Jones & Co., Limited* (1910), A.C. 77,

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and the cases there referred to and approved of. This being so, is the maxim *res ipsa loquitur* applicable?

Beven, in his work on Negligence, 3rd Ed., p. 130, states that the maxim is not applicable in actions between master and servant. As authority for this he mentions *Paterson, Widow and Children* v. *Wallace & Company* (1854), 1 Macq. H.L. 748; and *Lovegrove* v. *London, B. &c. Railway Co.* (1864), 16 C.B.N.S. 669 at p. 692, and also two American cases. The English cases referred to are of no assistance, as in each there was clear evidence of the cause of the accident. The American cases are, however, very clear on the point, and I will refer only to *Patton* v. *Texas and Pacific Railway Co.* (1901), 179 U.S. 658 at p. 663. The Supreme Court of the United States stated the law there as follows:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence."

In *Smith* v. *Baker & Sons* (1891), A.C. 325, we have the dicta of Lord Halsbury at p. 335:

"I think the unexplained and unaccounted for fact that the stone was being lifted over the workman and that it fell and did him damage would be evidence for a jury to consider of negligence in the person responsible for the operation, but whether that was so or not, the question does not here arise."

Of Lord Watson at p. 353:

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"If on the contrary the principle of *volunti non fit injuria* were eliminated from the case, there would, in my opinion, be reasonable and sufficient warrant in the evidence for the verdict returned by the jury."

And of Lord Herschell at p. 359:

"For the reasons I have given I do not think it is necessary to determine whether there was such evidence in the present case (evidence of negligence to be submitted to the jury), but I am far from being satisfied that there was not."

Lord Bramwell and Lord Morris, on the other hand, took the opposite view.

While this was a case between master and servant, yet the action was brought under the Employers' Liability Act, which, to the extent it goes, abrogates the doctrine of common employment.

It may also be noted that in *Smith* v. *Baker & Sons, supra,* there was some evidence upon which the jury might infer a

defective system, and the opinions above referred to do not appear to have been intended to rest altogether on the inference to be drawn from the mere occurrence of the accident.

I think I would be carrying the application of the maxim further than it was ever intended to be carried if I were to hold that where there are two distinct explanations of an occurrence equally probable, one referable to the employer's own negligence, the other to that of fellow servants of the injured person, the jury is entitled to draw the inference that the mere occurrence of the accident is evidence of the employer's negligence.

With great reluctance I am forced to the conclusion that the plaintiff must fail, and that the appeal must be allowed.

IRVING, J.A.: The jury were able to come to the conclusion that the deceased was unaware of the conditions on the pass. The pass in question had been in his custody some five or six months, and he had travelled on passes such as were issued to other employees for a year or so. It is not the case of a ticket bought and popped into one's pocket in a moment. This finding seems to me to be against the weight of evidence.

The jury did not attempt to answer the third question set out in *Marriott* v. *Yeoward Brothers* (1909), 2 K.B. 987 at p. 992.

As the conditions of the pass exempt the Company from all liability, it would therefore be a bar to any action under Lord Campbell's Act.

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The 5th paragraph of the statement of claim is as follows:

"5. The deceased, Thomas Farmer, was a servant of the defendant Company at the time of his death, and his death occurred during the course of his employment as such servant, and was caused by the negligence of fellow servants in the employment of the defendant Company."

In *Coldrick* v. *Partridge, Jones & Co., Limited* (1909), 1 K.B. 530, affirmed (1910), A.C. 77, Bray, J. came to the conclusion that he must enter judgment for the defendants because at the moment of the accident the deceased was a servant engaged in the course of his employment, and that the accident was caused by the negligence of Jarvis, the man who erected the scaffold, and also of the engineer, who were fellow servants with the deceased.

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In the case at bar we have no finding that the accident was occasioned by the negligence of a fellow servant, but on the other hand in the 5th paragraph of the statement of defence, it is admitted that the death was caused by the negligence of the fellow servants of the deceased in the defendants' employment.

The plaintiffs say that the principle *res ipsa loquitur* applies.

Res ipsa loquitur I think would make the defendants responsible if it were shewn that the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence, were within the sole control and management of the defendants, or their servants, were it not for the existence of the doctrine of common employment, or what is pretty much the same thing, that principle by which a week-end visitor must, as regards the negligence of his host or his servants, take his chances. When a man avails himself of a privilege given, he must be presumed to accept the risks attending the exercise of it.

In the present case the nature of the contract between the deceased and the defendants and the circumstances of the case establish the fact that the doctrine of common employment was applicable, just as it was in the *Coldrick* case.

Where that doctrine is applicable the onus is on the plaintiff to shew that the injury complained of arose from some negligence for which the Company was responsible, that is of some person, not coming within the description of a fellow servant for whose negligence the defendants were responsible.

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It is not enough to shew that in some way or other an accident occurred, and that there must have been negligence somewhere or other. The plaintiff must shew that it was owing to some specific act of negligence on the part of some person for whose conduct the defendants are responsible: *Burr* v. *Theatre Royal, Drury Lane, Limited* (1907), 1 K.B. 544.

In *Allen* v. *New Gas Company* (1876), 1 Ex. D. 251, an accident took place, a gate falling on a workman and injuring him. There was no evidence as to what person or agency had caused the gate to open and so become dangerous. The

Court held there was no evidence of negligence on the part of the Company.

I would allow the appeal.

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

Appeal allowed.

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Mining law—Title to mineral claims—Recording transfer—Mineral Act—Non-compliance with—Trustee in bankruptcy transferring claims to purchaser.

Defendants were co-owners of certain mineral claims. S., in July, 1909, filed a petition in bankruptcy in a New York Court, which adjudged him a bankrupt and directed a reference. The petition, without in terms assigning any specific property, recited that S. was willing to surrender all his property for the benefit of his creditors, and included in a schedule of his personal property were his interests in the two mineral claims in question. On the 26th of July G. was appointed trustee of S's estate. The point was not disputed that the bankruptcy proceedings were sufficient to transfer the claims to G. if the claims had been in New York State. On the 4th of September, 1909, S., being in default in his share of assessment work, defendant duly advertised, under section 25b, forfeiture of S's interest if the amount due was not paid within 90 days. On the 18th of October, G. sold the claims to plaintiff and executed a transfer of them. This transfer, with a certificate of G's appointment, were recorded in the mining recorder's office on the 4th of November, but the sale was not confirmed by the referee in bankruptcy until the 8th of October, 1910. Before the expiration of the 90 days under the advertisement, the amount due under S's default was tendered by plaintiff to defendant, who refused to accept it, and completed his forfeiture proceedings. S's mining licence expired on the 31st of May, 1908, was not renewed until the 14th of June, 1908; it expired again on the 31st of May, 1910, and was not renewed. At the time of the transfer of S's interest to plaintiff, neither the latter nor G. held a free miner's certificate.

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Plaintiff took one out on the 26th of October, 1909, and G. on the 16th of November, 1909. It was submitted for plaintiff that a mineral claim is a chose in action, and governed by the law of the place where the owner is; therefore S., being in New York, and having been adjudged a bankrupt by a Court of that State, the sufficiency of the transfer from him should be governed by the law there.

Held, that in the absence of direct proof of domicile, and of authority for the latter proposition, it was quite consistent with the bankruptcy proceedings that S's domicile was elsewhere; that as the mineral claims were immovables within British Columbia, they were subject to British Columbia law (Mineral Act, R.S.B.C. 1897, Cap. 135, section 2); that the absence of a free miner's certificate at the time of the transfer was fatal in the case of S. and G. (section 9); that as all the proceedings alleged to constitute the transfer had not been recorded, section 50 was not complied with; and that the transfer to the plaintiff was not recorded within the time fixed by sections 19 and 49. Accordingly it had not been shewn that the plaintiff was the owner of an undivided one-third interest in the two mineral claims.

Statement

ACTION by the plaintiff for a declaration that he is the owner of a one-third interest in the "Jumbo" and "Ben Bolt" mineral claims and for other ancillary relief, in circumstances set out in the headnote. Tried by GREGORY, J. at Victoria on the 20th of December, 1910.

Bodwell, K.C., for plaintiff.
Davis, K.C., and *A. E. McPhillips, K.C.*, for defendants.

11th January, 1911.

GREGORY, J.: It is contended on behalf of the plaintiff that the defendant cannot raise any question as to the plaintiff's title. Whether that is so or not, it appears to me that the plaintiff must shew affirmatively that he has a good title before he can expect the Court to solemnly declare that he has.

The material facts in the case are as follows:

Judgment

Green and one Silverman were co-owners of the mineral claims in question. On the 1st of July, 1909, Silverman filed a petition in bankruptcy in the New York District Court of the United States, was duly adjudged a bankrupt, and the matter referred to Nathanial A. Prentiss, referee in bankruptcy, and Silverman was directed to attend before the referee on the 5th of July, 1909, and submit to an order of the referee or

Court. The petition does not in form assign any property. It is addressed to the judge of the Court, and sets out that he owes debts which he is unable to pay in full, that he is willing to surrender all his property for the benefit of his creditors, etc., and in a list of his personal property set out in a schedule to the petition these mineral claims appear.

On the 26th of July, 1909, Ellis Getzler was appointed trustee of the bankrupt's estate, the order appointing him reciting that that was the day appointed by the Court for the first meeting of creditors. I am unable to find any such appointment in the certified copy of the proceedings put in as an exhibit.

It is not disputed that the above recited proceedings would be sufficient to transfer the claims in question to the trustee if they were situated in the State of New York.

On the 4th of September, 1909, Silverman being in default for his share of the assessment work done on the claims, Green, under the provisions of section 25b of the Mineral Act, advertised that if the amount due was not paid within 90 days, Silverman's interest would be forfeited to Green.

On the 18th of October, 1909, the trustee Getzler sold the claims to the plaintiff and duly executed a transfer of the same. This transfer, as well as Getzler's appointment as trustee, were both recorded in the mining recorder's office on the 4th of November, 1909, the transfer apparently being recorded first, as the receipt number is 193927, while the receipt number of the appointment is 193928.

This sale to the plaintiff was not reported to, or confirmed by the referee in bankruptcy until nearly a year later, namely, the 8th of October, 1910. The order of confirmation, the 13th of October, 1910, does not appear to have been recorded with the mining recorder at all. Before the expiration of the ninety days referred to in Green's advertisement, all the money due him for assessment work, cost or otherwise on account of Silverman's default was duly tendered to him *by the plaintiff,* or *on his behalf.* Green refused to accept it, and completed his forfeiture or default proceedings.

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Silverman's mining licence or certificate expired at midnight on the 31st of May, 1908, and was not renewed until the 14th of June, 1908. It expired again on the 31st of May, 1910, and has not since been renewed.

At the time of the expiration in June, 1908, Green was not interested in these claims, and presumably any transfer then by operation of law (within the case of *McNaught* v. *Van Norman* (1902), 9 B.C. 131, 2 M.M.C. 7, 32 S.C.R. 690), of Silverman's interest to his co-owners has been cured.

Neither the judge nor the referee in bankruptcy appear to have had a free miner's certificate at any time.

At the time of the transfer of Silverman's interest to the plaintiff, the 18th of October, 1909, neither the plaintiff nor Getzler, the trustee in bankruptcy, had a free miner's certificate.

The plaintiff did not get one until midnight of the 26th of October, 1909, and Getzler not until midnight of the 16th of November, 1909, which expired on the 31st of May, 1910, and has not since been renewed. That certificate was issued to "Ellis R. Getzler, of New York, Trustee of Estate of Samuel I. Silverman."

Mr. *Bodwell,* for the plaintiff, contended "that a mineral claim is not real property or an interest in land, but a chose in action following him wherever he goes, and is governed by the law of the place where the owner is," and therefore, Silverman having been declared a bankrupt in the State of New York (he being then present in that State), the sufficiency of the transfer from him must be governed by the laws of that State. I cannot assent to this proposition without some authority, and none were referred to.

Judgment

If it was intended to assert that Silverman was domiciled in New York and therefore the laws of that State governed, it occurs to me that some direct proof of such domicile should be given, but it was not, and it is quite consistent with the bankruptcy proceedings that Silverman's domicile was elsewhere; for apparently the Courts of that State had bankruptcy jurisdiction by reason of the recital in the petition that he has resided there for the greater part of the six months preceding

the presentation of the petition. Residence alone is not sufficient to give one a domicile.

An English bankruptcy operates as an assignment of land situate in any of the British Dominions, *but subject to any requirement of the local laws as to the conditions necessary to effect the transfer of real estate;* it only operates as an assignment of land in a foreign country so far as the foreign law treats an English bankruptcy as an assignment.

An English bankruptcy only operates as an assignment of movables situate in a foreign country, so far as the English Courts can determine the matter: Dicey's Conflict of Laws, 2nd Ed., pp. 332 and 333, and cases there cited.

A foreign bankruptcy does not operate as an assignment of any movables situate in England: Dicey, p. 430.

Mr. Dicey's definition of an immovable is "a thing which can be touched but which cannot be moved," and includes a chattel real: see p. 68.

In Westlake's International Law, 2nd Ed., sections 156 and 157, it is laid down that all questions concerning the property in immovables, including the form of conveyance, are decided by the *lex situs;* and that interests in land which are limited in duration, whether for a term of years, or life, etc., are immovable, as well as the land itself.

Judgment

And at section 150, p. 179, the same author states that questions as to the transfer or acquisition of property in corporeal movables are generally decided by the *lex situs.*

See also *Inglis and others* v. *Usherwood* (1801), 1 East 515, when the English Court recognized the laws of Russia with reference to the right to retake possession in Russia of goods sold and delivered, notwithstanding the fact that the English law was different and the goods were subsequently shipped to England.

In *Lecouturier* v. *Rey* (1910), A.C. 262, 26 T.L.R. 368, the order of Carthusian monks, the manufacturers of chartreuse liquors, having its headquarters in France, had been dissolved, and a Government liquidator appointed there who took possession of all their property, trade marks, etc., and sold them. The

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monks transferred their headquarters to Italy and again began the manufacture of chartreuse in Spain. The liquidator sought to restrain them from using the English trade mark, but the House of Lords held that they carried with them the secrets of their manufacture and the power of securing the benefit of their reputation acquired in England, Lord Macnaghten, at p. 369, saying:

"To me it seems perfectly plain that by the very nature of things, a law of a foreign country, and a sale by a foreign Court under that law, cannot affect property not within the reach of the foreign law or the jurisdiction of the foreign Court charged with its administration."

And at p. 372, the Lord Chancellor says:

"But this property—for property it is—which has come into question in this appeal is property situated in England, and must be regulated and disposed of in accordance with the law of England."

The mineral claims in question are not only visible and tangible, but physically immovable, and situated within the Province of British Columbia.

Mr. *Davis* cited a number of cases in our own Courts where mineral claims were considered "an interest in land," but I need only refer to *Pope* v. *Cole* (1898), 6 B.C. 205; and on appeal, 29 S.C.R. 291, 1 M.M.C. 257.

Can anything more be required to make this transfer subject to the requirements of the laws of British Columbia?

Judgment

The Mineral Act (R.S.B.C. 1897, chapter 135) says, section 2:

"Mineral claims shall mean the personal right of property or interest in any mine";

and section 34:

"The interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be a chattel interest, equivalent to a lease for one year, and thence from year to year, *subject to the performance and observance of all the terms and conditions of this Act.*"

The plaintiff contends that these two sections establish that the plaintiff's interest is a chose in action and gives the New York Bankruptcy Court full jurisdiction over them for the purposes of this action. I am not prepared to say what they mean, but I cannot agree with that contention. Section 34 speaks of a "chattel interest," but it does not necessarily mean a personal chattel; it may refer to a chattel real. And in any

case it is, as the section proceeds to state, *"subject to the performance and observance of all the terms and conditions of this Act."* It cannot, therefore, in any case be read so as to give the New York Court full jurisdiction as to transfer, unless the other requirements of the statute are complied with—even if the words were omitted my conclusion would, I believe, be the same. If those sections were entirely omitted from the Act, there would be no ground whatever for the plaintiff's contention that the property in question is only a chose in action, but since they are relied upon they must be taken in their entirety. The plaintiff is in the anomalous position of claiming that these two sections of the Mineral Act give the foreign Court jurisdiction, and then having jurisdiction, the subsequent provisions of the same Act are to be ignored.

The Mineral Act has not been complied with in several respects. Section 9 provides that "no person shall be recognized as having any right or interest in or to any mineral claims unless he shall have a free miner's certificate," etc. The plaintiff claims Silverman's interest through Getzler, but neither he nor Getzler had a free miner's certificate when the transfer to him was made. Their subsequent taking out of a certificate cannot help them. It would be against the policy of the Act to permit the certificate to relate back, for sections 9 and 63 provide for the immediate forfeiture of the interest of any miner, co-owner, or mining partner who allows his certificate to lapse.

Judgment

In *McNaught* v. *Van Norman, supra,* a sheriff in possession was not allowed to take out a special certificate, as provided for in section 5b, to prevent a forfeiture of the judgment debtor's interest in his claim.

Section 50 of the Mineral Act provides that:

"No transfer of any mineral claim, or of any interest therein, shall be enforceable *unless* the same shall be in writing, *and recorded* by the Mining Recorder; and if signed by an agent, the authority of such agent shall be recorded before the record of such transfer."

Silverman never executed any transfer of his interest; it is suggested that his petition in bankruptcy can be treated as a transfer, but it is nothing more than a request to the judge in

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bankruptcy to declare him a bankrupt. The judge referred the matter to the referee in bankruptcy, but neither the petition nor reference was recorded by the mining recorder. Surely they are as much a part of the transfer from Silverman to the trustee Getzler as Getzler's election as trustee is. The latter is unmeaning without the former, and it is worthy of notice that the sale by Getzler to plaintiff was not confirmed by the Court until the 13th of October, 1910, nearly six months after his free miner's certificate had expired, and the confirmation has never been recorded. If Getzler is treated as the agent of Silverman, then his appointment should have been recorded before his transfer to the plaintiff, but it was subsequent to it.

Sections 19 and 49 provide that a transfer must be recorded within 15 days, except in certain cases; it is not shewn that the case is within the exception, and the transfer to plaintiff was not recorded within such time.

Judgment

In these circumstances it does not appear to me that the plaintiff has shewn that he is the owner of an undivided one-third interest in these mineral claims, and I cannot so declare. When in November, 1909, he tendered the delinquent assessment moneys to the defendant, his attention was drawn to the fact that he should have a transfer from Silverman, whose title to the claims was then good, he being in possession of an unexpired free miner's certificate, but having chosen to rely upon his bankruptcy title, he cannot now complain.

It is unnecessary to consider the other defences of the Statute of Frauds, etc., raised in the pleadings.

There will be judgment for the defendant, with costs.

Judgment accordingly.

BRITISH CANADIAN SECURITIES, LIMITED v. CORPORATION OF THE CITY OF VICTORIA.

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Nuisance—Action to restrain municipal corporation from constructing a public convenience—Prematureness of action—Inability to prove injury—Adding Attorney-General as party—Application out of time.

In an action to restrain the municipality from constructing a public convenience on municipal property, brought by the owners of an adjoining lot, the evidence was that they contemplated building, and alleged that substantial and special injury would be suffered by them (apart from that suffered by the general public by such an institution), in that the odours from the convenience would be offensive, and that the building, being on an alleged public highway, would obstruct the approach to the plaintiffs' proposed building.

Held, that a public convenience such as that proposed to be constructed by the Corporation is not *per se* a nuisance, and in any event it could not be considered so to the occupants of a building not yet erected, and that, therefore, the action was premature.

An application at the trial to add the Attorney-General was refused as having been made too late, without his consent, and without its being shewn that the public interest would otherwise suffer.

ACTION tried by GREGORY, J. at Victoria on the 21st of June, *et seq.*, 1911, for a declaration that a certain lot in the City of Victoria was part of a public highway; an injunction restraining the Corporation from constructing a public convenience on said lot, and an order directing them to restore the lot to the condition it was in before the commencement of the works in progress at the time of action brought.

Statement

M. B. Jackson, for plaintiffs.
McDiarmid, for defendant Corporation.

31st August, 1911.

GREGORY, J.: This is an action by the plaintiffs, claiming: (1) A declaration that Lot 1, Block 70, in the City of Victoria, as shewn upon a plan deposited in the Land Registry office and there numbered 219, is part of the common and public highway; (2) an injunction restraining the defendants from

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continuing with the construction of a public convenience on the said Lot 1; (3) an order directing the defendants to restore the said lot to its condition prior to the commencement of the defendants' works now being proceeded with.

This is a *quia timet* action. The plaintiffs claim that the convenience, when completed, will be a public nuisance, and that it will sustain a substantial injury beyond that suffered by the rest of the public; it therefore sues on its own account, without making the Attorney-General a party plaintiff. It has also waited until the defendants have, to use the language of the statement of claim, "made a great excavation in the said lands, over forty feet in width and eighty feet in length and to a depth of over ten feet, and have built concrete walls in such excavation and are proceeding with building." It has, in fact, waited until the defendants have expended a very large sum of public money before launching this action.

The plaintiffs are the owners of the lands adjoining the said Lot 1 on its westerly boundary, and allege that it has made arrangements for the erection of an office building thereon, the easterly side wall of which will come right up to the defendants' westerly boundary. The evidence does not disclose any arrangements made for the erection of this building by the plaintiffs, nor does it shew the issuing of any permit by the defendant Corporation for its erection. One witness testified that a contract had been let. The contract, however, was not produced, and it subsequently transpired that the plaintiff Company was not a party to it in any case, and that it was not executed by all the parties to it. The building was apparently to be erected by the Dominion Trust Company, of which the plaintiff Company is a subsidiary company, but no information is given as to the relations between the two companies. Apparently the plaintiff Company was to own the land and the Trust Company the building. During the progress of the trial, excavation work was commenced, presumably under the unexecuted contract with third parties.

Judgment

The evidence as to nuisance or special injury was confined to the effect of the defendants' comfort station on possible occu-

pants of this hypothetical building by reason of the disagreeable odours coming from the station, and the obstruction which the railed-off staircases of the station would offer to persons seeking entrance to the building *via* the defendants' property, which the plaintiffs contend is a part of Government street and a public highway. Assuming this contention to be right, the plaintiffs would, of course, have the right of free access to it from their property, but once upon it, would have no greater rights than any other member of the public.

This right of access, without the building, is an empty right, for plaintiffs' property is a rocky part of the harbour shore so far below the level of defendants' lot as to be available only to an acrobat; and access from the proposed building would, according to the plans produced, be almost equally impossible, as any one coming out of the building would have to jump down to the level of Government street, unless, as the plaintiffs appear to assume, the defendants would for the convenience of the owners of the building, permit it to erect steps projecting out into the so-called highway, or else, by reason of the slope of Government street, raise its grade in front of plaintiffs' property from about one foot at the northern end of the building to five or six at the southern end. This is a permission which I cannot assume the defendants would grant.

Judgment

Lot 1 was originally, like the defendants' property, much below the level of Government street. It was acquired by the City for the purpose of widening Government street at this point, and giving a better approach to it. A retaining wall was built on its westerly boundary, and the whole filled in up to the grade of Government street; the 20 easterly feet was utilized to widen the roadway, and a cement sidewalk laid upon it; the balance of the lot was planted in grass and ornamental shrubs, and so remained until the building of the convenience was commenced; it conformed to the grade of Government street, sloping from the north to the south, and was about one foot below the level of the Government street sidewalk, and conformed to the grade of that street. Plaintiffs ask that the lot be restored to this condition. If it were, it would be no

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assistance to it even with the proposed building, for tenants would, as already stated, have to jump out of the building (the ground floor of which is naturally level), down on to the grass plot, cross it, and then step up on to Government street sidewalk. If the plaintiffs made their entrances front on Wharf street, none of these conditions would exist, and the obstruction it now complains of would be no obstruction at all. It cannot insist on having the street grades changed in order to give it a frontage on Government street, and without a change of grades the building is unpracticable.

I do not think it necessary to refer to the cases cited by the plaintiffs. In every case the Attorney-General was either a party, or it was held that there had been an actual nuisance created, or the proposed erection would of necessity create a nuisance under the conditions then in existence. It is impossible to say that a urinal or water closet must of necessity be a nuisance: Cotton, L.J. in *Vernon* v. *Vestry of St. James, Westminster* (1880), 16 Ch. D. 449; 50 L.J., Ch. 81. I cannot, in view of the evidence of Doctors Jones, Fraser, Bapty and Hall, say that the defendants' comfort station will of necessity be a nuisance, and certainly not to the owners or tenants of a building which may never be erected. The plaintiffs, therefore, not having sustained any special or substantial injury, cannot maintain this action at the present time and in its present form. The application to add the Attorney-General and the Dominion Trust Company was, I think, made too late, and as the Attorney-General only represents the public, it does not seem to me that he should (even if it can be done), be made a party without his consent, unless it is manifest that the public interest must otherwise suffer. The application will be refused and the action dismissed, with costs, but without prejudice to any future proceedings in the event of a nuisance being subsequently created.

Judgment

I express no opinion on the question as to whether Lot 1 is or is not a part of the public highway, nor upon any other matter not necessarily involved in this decision.

This case has been very freely discussed in the public press

since the trial, too freely I think, but I take no notice of the statements made that the plaintiffs have abandoned their intention of building, and have actually sold their property, though it was quite evident to anyone having eyes that the work started during the trial was only continued for a few days.

Action dismissed.

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JOHNSON, LIEBER & VAN BOKKELEN, LIMITED v. IMPERIAL FISHERIES, LIMITED, HEARN LEVY AND KILROY.

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Practice—Order XIV.—Application for judgment under—Agreement signed by Company's officials, with guaranty appended, also signed by them—Whether or not personal guaranty.

An agreement by defendant Company for the purchase of a quantity of salt, f.o.b. at San Francisco, to be delivered at Nanaimo, in British Columbia, was signed by the president and secretary-treasurer. Under their signatures was added: "We, the undersigned, guarantee payment of the obligation as noted above, Imperial Fisheries, Ld., J. O. Hearn, president; Saml. J. Levy, secretary-treasurer; William Kilroy, vice-president."

Held, affirming the order of MURPHY, J. on an application for summary judgment (MARTIN, J.A. dissenting), that the three officers signing the guarantee following the execution of the agreement, were personally liable, and that judgment under Order XIV. was properly allowed.

APPEAL from an order made by MURPHY, J. under Order XIV., at Vancouver on the 23rd of March, 1911.

Statement

Plaintiffs are a subsidiary company, with head office in Vancouver, the parent company being in Seattle. The defendant Company purchased from plaintiffs a quantity of salt, f.o.b. at San Francisco, on 30 days' time, as per written contract, which was accepted on the 4th of January, 1911, signed: "Imperial

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Fisheries, Limited, J. O. Hearn, president; Samuel J. Levy, secretary-treasurer," done with a rubber stamp, with the exception of the signatures. Below this was written: "We, the undersigned, guarantee payment of the obligation as noted above. Imperial Fisheries, Limited: J. O. Hearn, president; Samuel J. Levy, secretary-treasurer; William Kilroy, vice-president."

An application was made for judgment under Order XIV., supported by the affidavit of the plaintiffs' local manager and director, A. R. Kelly, in which the main facts relied upon were: (1) That prior to selling the defendant Company said salt, and acting under instructions from the Seattle office of the plaintiff Company, he interviewed the defendants Hearn and Kilroy and informed them the plaintiff Company would not give the defendant Company credit unless the payment was guaranteed by the defendant Kilroy. The defendant Kilroy informed him he would see the other parties interested and let him know. Later the defendant Hearn said Kilroy would sign the said guarantee, which was then left with him for such purpose, and said salt was shipped to the defendant Company at Nanaimo, and some days later, and after said salt was in transit, Kelly received the guarantee signed by the defendants; (2) that the defendants Hearn, Levy and Kilroy signed said guarantee in consideration of the plaintiff Company furnishing said salt to the defendant Company and in consideration of the plaintiff Company giving the defendant Company thirty days' time in which to pay for the same, and the said Hearn and Kilroy were distinctly informed that such salt would not be furnished, nor would said thirty days' time be given unless the defendant Kilroy personally guaranteed the payment of the same, and the said defendant obtained said salt and procured the said time to be given upon the understanding that such guarantee would be given, and they were well aware that the defendant Company was insolvent and without any assets and utterly worthless.

Statement

In reply to this affidavit, Hearn swore that the salt was shipped before the guarantee was signed, and Kilroy, in his

affidavit, stated he informed Kelly that he would not sign the guarantee, that he did not agree to do so, and that he said he would only sign in his representative capacity as vice-president of the Imperial Fisheries, Limited. MURPHY, J. made the order for judgment, remarking, in giving his reasons:

On looking up the authorities, I have come to the conclusion that I must consider this document within its four corners; that no evidence can be given which can throw any light on the question as to whether these people signed it in their individual or in their official capacity. Taking the document as a whole, and considering the wording of the guarantee, or the phrase to which the second signatures are appended, I have no hesitation in saying that it was an honest transaction if they were signing in their individual capacity. I will have to presume it was, and that being so, these people did sign in their, I hold, personal capacity. I think the affidavit sufficiently proves the cause of action. I think, with regard to the point that there was no consideration, that that fails, because Kilroy does not deny that he was told by the agent, Kelly, that this salt would not be sold to the Company unless payment was guaranteed by himself and his co-directors. While it is true that the salt was shipped before this guarantee was actually given, inasmuch as I hold it is a guarantee, I do not think that his assertion that he refused to sign it is any answer to the affidavit on the other side that the salt would not be delivered, as it has come into plaintiffs' possession signed by him; besides, it is evident to me that the salt was in transit at the time that the guarantee was delivered; it would not have been delivered if that guarantee had not reached the hands of the plaintiff Company before the salt was actually handed over. Judgment against defendants.

Statement

Defendants Hearn, Levy and Kilroy appealed. The Company did not appeal. The appeal was argued before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A. at Victoria on the 12th of June, 1911.

S. S. Taylor, K.C., for appellants: There was no consideration for the guarantee under the Statute of Frauds. Inasmuch

Argument

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as the salt was purchased f.o.b. San Francisco, and actually shipped before the guarantee was signed, the consideration was a past consideration and the document therefore invalid, and in any event the guarantee is not a personal one, but was signed by the defendants in their representative capacity.

Argument

W. S. Deacon, for respondent Company: There were sufficient facts before the judge below to enable him to grant the order for judgment, and he came to the conclusion that it was a personal guarantee. Defendant Hearn's affidavit is not sufficient, and Kilroy does not pledge his oath that by signing the document he intended to bind the Company only.

Taylor, in reply: In order to hold their judgment, respondent Company must shew that the defence set up is a sham one. If there is any dispute as to how the guarantee was signed, then we are entitled to a trial.

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Judgment was given by MURPHY, J. in favour of the plaintiffs on motion made under Order XIV. It was clearly proven that the defendant Company had no valid defence to the action, but the individual defendants, who were sued as guarantors, appeal on the ground that they have shewn a good defence, or at least such a defence as entitles them to have the action tried in the usual way. The dispute narrows down to the question of whether or not the appellants signed the guarantee personally, or only as officers of the defendant Company. The document is put in evidence, and consists of an agreement by defendant Company to purchase and pay for a quantity of salt. It is signed: [as set out in the statement above].

Kelly, who made the affidavit upon which the judgment is founded, deposed that he had interviewed defendants Hearn and Kilroy, and informed them that credit would not be given unless the account was guaranteed by Kilroy; that Kilroy replied that he would see the others interested, and let Kelly know the result later; that later Hearn informed Kelly that Kilroy would sign such a guarantee; that he, Kelly, then left

the document referred to above with Hearn, and that shortly afterward he received it again signed as above set out. Now, if appellants' contention be given effect to, the latter part of the document, namely, the guarantee, means nothing at all. The Company was bound effectually by the agreement itself to buy and pay for the salt. The words containing the guarantee were put at the foot of the agreement by the plaintiffs, so that it should be signed by Kilroy. On the construction of the whole document I can come to no other conclusion than that the account was guaranteed by the appellants individually. It looks to me very much as if the guarantee was deliberately signed by the defendants in the peculiar manner that it was with the object of satisfying the plaintiffs' demand, and at the same time affording a plausible defence should action upon the guarantee be brought, on the specious pretence now put forward that the appellants simply signed the guarantee as officers of the Company, and not individually. The affidavits of Hearn and Kilroy are framed with great ingenuity to avoid meeting the direct and positive statements of Kelly referred to above, while at the same time they are designed to create the impression that Kelly is being contradicted.

MACDONALD, C.J.A.

If I had any reasonable doubt of the liability of the appellants on the clear construction of the document itself, coupled with the circumstances under which it was signed, I should set aside the judgment and let the action go to trial, but I have none.

I would dismiss the appeal.

IRVING, J.A.: I would dismiss this appeal. Kilroy's affidavit has satisfied me that the order for judgment was properly made, and that the proposed defence is a sham.

IRVING, J.A.

Whether it was the intention to bind the defendants personally is one of construction: it is to be gathered from the terms of the document alone.

MARTIN, J.A.: So far as the only appellant, J. O. Hearn, is concerned, this is an action on an alleged guarantee, which is relied upon as being signed by him, and two other co-defend-

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ants who also are officers of the defendant Company, in their personal capacity. But in the affidavit of the plaintiff's secretary, A. R. Kelly, it is alleged that: "I interviewed the defendant Hearn and the defendant Kilroy and informed them that the plaintiff Company would not give the defendant Company credit unless the payment was guaranteed by the defendant Kilroy . . . ." Kilroy, in his affidavit, gives this statement, which is the crux of the matter, a point blank denial, and the statement of Kelly is consistent with the contention of Hearn and Kilroy, that the guarantee was not intended to be a personal one, because if it were, why should Hearn voluntarily and unnecessarily give his personal guarantee for $2,520.56, when admittedly only that of Kilroy was asked for? The situation, as I regard it, is simply this—either the plaintiffs must elect to stand or fall on the document as it is written, and submit it to the Court for a true legal construction, or, if he seeks to add anything material to it by further evidence, then an opportunity must be given the other side to answer the evidence. Here the plaintiff has elected to adduce important evidence in addition to and explanatory of the written document, and that evidence directly influenced the learned judge below, as appears by his reasons for judgment. In such case the defendant cannot be shut out from meeting the case made out against him in all its aspects. If authority be needed in support of this view, it will be found in the case of *D'Avignon* v. *Jones* (1902), 9 B.C. 359, affirmed in 32 S.C.R. 650, wherein it was said, p. 362: "The plaintiff having elected to make this evidence relevant to the issue, I think the defendants were at liberty to answer it." The result is that before the true state of the relations between the parties can be ascertained, the facts must be found in the only possible way, *viz.*: by a trial, and in my opinion justice cannot be done between these parties short of that. It is unfortunate that the decision of the House of Lords in *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T.N.S. 262; 50 W.R. 49, was not cited to the learned judge below, because it materially changed the law on the subject, and if the principles there laid down are followed, as they must

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be, I cannot, with all respect to other views, see how this appellant can be deprived of his right to have his case heard in the usual way.

GALLIHER, J.A.: At the close of this case I was prepared to give judgment dismissing the appeal. A further perusal of the evidence and consideration of the arguments of counsel, and authorities cited, confirm me in that conclusion. The appeal should be dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellants: *J. A. Harvey.*
Solicitor for respondent: *E. J. Deacon.*

CUDDY AND BOYD v. CAMERON.

Agreement—Construction of—Separate and independent covenants—Sale of shares in company—Guarantee of assets—Deficiency—How to be ascertained—Reference to arbitration—Condition precedent.

In an agreement for the sale of shares in a lumber company, were the following covenants: "(2.) It is understood and agreed and the parties of the first part hereby guarantee that the assets of the said Company with their approximate values consist of the lands and tenements and goods and chattels set forth in the schedule hereunto annexed. (6.) The said parties of the first part further guarantee that the balance of the assets of the said Company over and above the logs, stock in store, piles, boom sticks and boom chains are truly and correctly set forth in the said schedule and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered the value of said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part and a third by the two arbitrators so named as aforesaid and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted

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from the said purchase money still owing and unpaid under this agreement."

Held, on appeal (*per* MACDONALD, C.J.A. and GALLIHER, J.A.), that, assuming the clauses to be independent, the defendant, not having counterclaimed under clause 2, he should not be allowed to amend on the appeal, as to do so would be simply allowing him to set up a cross-action.

Per IRVING, J.A.: That it was intended by clause 6 that any deficiency should be decided by arbitration.

Per MARTIN, J.A.: Defendant should have been permitted to establish the deficiency, if any, in Court, and then gone to arbitration to determine the value of such deficiency.

Judgment of MORRISON, J. affirmed, MARTIN, J.A. dissenting.

APPEAL by defendants from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 23rd and 24th of June, 1911.

Davis, K.C., and *Armour*, for plaintiffs.

L. G. McPhillips, K.C. and *Wood*, for defendant.

24th January, 1911.

MORRISON, J.: The sole point of controversy before me arises out of paragraph 6 of the agreement set out in paragraph 2 of the statement of claim. The plaintiffs, the parties of the first part thereof, have guaranteed that the schedule annexed truly and correctly sets forth the balance of the assets of the Company over and above certain specified items. They further agree that if upon investigation and examination it turns out, not that the schedule incorrectly sets forth the said assets, but that if the said assets, or any of them, are not forthcoming, and cannot be delivered, then the value of the deficiency, that is, the value of the assets, which, though presumably in existence, are not or cannot be delivered, must be estimated by arbitration, and it is this valuation, or ascertained amount that is to be deducted. I cannot quite read into the agreement that it was intended by the parties that the investigation or examination by which alone the parties were to determine whether an arbitration was necessary was to be made by means of an action at law. I do not think an action as a means of working out any differences that might arise in regard to the assets in ques-

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tion was ever contemplated. Yet, if I follow Mr. *McPhillips's* contention aright, that is what he now, in effect, urges upon me. Paragraph 6 in terms deals with the delivery of certain assets. If upon investigation, examination, inquiry, inspection, cruising, or any other synonymous act, if I may use the expression, delivery cannot be made of those or any portion of those assets, then is the time, according to the usual methods current amongst reputable business men for the parties to adjust their differences amicably, or failing that, to resort to the expedient invented in paragraph 6, to which, being business men of very large experience in this particular branch of commerce, they should be strictly held.

The preliminary investigation, if necessary at all, is to be as to the quantum of the so-called deficiency, the value of which quantum is to be estimated by arbitration. With the ascertainment of this quantum in respect of which there may have been failure of delivery, the arbitrators have nothing to do. The defendant, however, in his defence, claims that the investigation and examination pursuant to the agreement have been made and the deficiency ascertained. If that is so, then the arbitrators should proceed and make their award, which, when made, the amount found thereby is the amount and the only amount the defendant is entitled to deduct.

This action was commenced as far back as the 20th of August, 1909. An arbitration was held pursuant to the agreement, and an award made which in due course was set aside. Later on, in March, 1910, an order was made striking out a portion of the defence, from which order there was an appeal, which was dismissed. Thereupon the defence was amended into its present form. Having regard to what I have previously said in my judgment setting aside the award, and what my brother CLEMENT has said, in his judgment striking out the paragraph in question in the defence, I conclude that the defendant is determined to adhere to his present line of defence, which, in my opinion, is not an answer to the plaintiffs' claim.

The history of the case renders it rather difficult for me to delay the plaintiffs by staying proceedings pending the result of

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any other course which the defendant may be advised to take. As to that, however, I think I should hear counsel, and that is the reason that I requested that you might appear to-day and speak to that aspect of the matter.

There will be judgment for the plaintiffs for the amount as claimed, with costs.

The appeal was argued at Vancouver on the 10th and 11th of April, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellant.
Davis, K.C., for respondents.

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiffs sue to recover the balance of the purchase price of shares in the Harrison River Mills and Trading Company, Limited. The agreement of sale contains an article as follows:

"(2) It is understood and agreed and the parties of the first part (the plaintiffs) hereby guarantee that the assets of the said Company with their approximate values consist of the lands and tenements, goods and chattels set forth in the schedule hereunto annexed."

The schedule included "timber lands, 17,563 acres at 30 M. per acre, 526,890,000 feet at 15c., $79,033.50." This is the item in dispute in this action. In addition to the above, the agreement contains this further article:

"(6.) The said parties of the first part further guarantee that the balance of the assets of the said Company over and above the logs, stock in store, piles, boom sticks and boom chains, are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of the said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part, and a third by the two arbitrators so named as aforesaid, and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement."

We have, therefore, two distinct covenants guaranteeing the existence of the said item of the assets, one coupled with arbitration, the other not.

Prior to the commencement of this action the parties appointed arbitrators under article 6, who proceeded to make an award as to the extent of the deficiency of timber in such item and the value thereof. The award was moved against by defendant, and set aside on the ground that the arbitrators had no power to decide upon the extent of the deficiency, but only as to the value thereof after the extent had been otherwise ascertained. The order setting aside the award was not appealed from, and therefore the question as to the true interpretation of clause 6, with respect to the scope of the arbitration is now *res judicata.* The plaintiffs having brought this action, the defendant, in answer, alleges a deficiency in the item in question, but does not counterclaim in respect thereof. The defendant's attitude is that the plaintiffs cannot succeed in recovering the balance of the purchase money, because of the alleged deficiency. The covenant to pay the purchase money is independent of the covenants contained in said articles 2 and 6. It was contended by Mr. *McPhillips,* for the defendant, that article 2 is a covenant or guarantee independent of article 6. Assuming this to be so, it was open to the defendant to counterclaim under article 2 and to prove the deficiency, if any, and the value of it, and in this way obtain the fulfilment by the plaintiffs of the guarantee. But this was not the course adopted. He has not counterclaimed. He applied before us to be allowed to amend. This was objected to, and I am of opinion that the amendment ought not to be permitted at this stage of the proceedings. If we were to allow such an amendment we should have to send the case back for a new trial, not because of anything for which the plaintiffs were responsible, or for which the Court below was responsible, but to enable the defendant to set up a cross-action.

MACDONALD, C.J.A.

I think, therefore, the appeal should be dismissed.

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

IRVING, J.A.

The plaintiffs sue for $80,000, balance due them for shares in the Harrison River Mills Co. The defendant denies that he has received what the plaintiffs represented were the assets

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of the Company, and contends that by virtue of a guarantee given by the plaintiffs in the agreement, he has a right to set up this deficiency as an answer to the plaintiffs' claim. The plaintiffs say that the agreement requires an arbitration to be held before any deduction from the agreed purchase money can be made for alleged shortage.

I think the plaintiffs' contention is correct. The plain meaning of section 6 of the agreement is that there is to be an arbitration to decide what deduction is to be made, and unless and until such deduction is ascertained in the way specified in paragraph 6, the defendant has no available defence.

MARTIN, J.A.

MARTIN, J.A.: This case primarily turns upon the construction that is to be placed upon the following words in paragraph 6 of the agreement: ". . . . if upon investigation and examination it turns out that the said assets, or any of them, are not forthcoming and cannot be delivered, the value of said deficiency shall be estimated by three arbitrators . . . ." Now it is quite clear to me, at least, that the assistance of the arbitrators cannot be invoked until the condition precedent to their jurisdiction has been fulfilled, *viz.*: a preliminary investigation to establish the fact of a deficiency of assets. How can this fact be established? In two ways only, either informally, by consent of the parties (for in the absence of that consent, one party cannot establish what the other denies), or by a formal action in a Court of law in the usual manner. There is no evidence of the first course having been adopted, and why, then, should the defendant be prevented from going to the Court and establishing the extent of the deficiency and then going to the arbitrators to determine the value of it, as he tells us he is ready to do? The case, in my opinion, is a very simple one, and in view of our recent decision in *Swift* v. *David* (1910), 15 B.C. 70, affirmed by the Supreme Court of Canada, 44 S.C.R. 179, presents no real difficulty when properly understood.

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

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *McPhillips & Wood.*

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

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WOODWARD v. CORPORATION OF THE CITY OF VANCOUVER.

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1911
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Municipal law—Private drain connected with that of and with leave and knowledge of corporation—Negligence in construction—Omission to repair—Liability of corporation for damage by overflow.

In the circumstances of this case, it was

Held, on appeal, MACDONALD, C.J.A. dissenting (reversing the finding of MORRISON, J. at the trial), that the Corporation of the City of Vancouver were under no statutory or common law liability to provide means of drainage to plaintiff's basement, and that the latter voluntarily assumed the risk, which resulted in the damage complained of, by connecting with the drain in the manner he did.

APPEAL by defendant Corporation from the judgment of MORRISON, J. in an action tried by him at Vancouver, on the 8th of September, 1909, in favour of plaintiff for $8,475.65 damages, under circumstances set out in the reasons for judgment.

Statement

A. H. MacNeill, K.C., for plaintiff.

W. A. Macdonald, K.C., for defendant Corporation.

8th November, 1909.

MORRISON, J.

MORRISON, J.: The plaintiff's department stores occupy Lot 16 in Block 4, Old Granville Townsite, in the City of Vancou-

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ver. About 17 years ago the Corporation constructed a wooden basement drain for assembling the drainage of the lands at the corner of Abbott and Hastings streets, which included said Lot 16. This drain has since been extended over a greater area of drainage as the City grew, increasing the quantity of water brought through it without enlarging its capacity. Sometime subsequently the defendants placed a manhole near the north-east corner of Lot 16, cutting through the basement drain, and in the method of its construction reduced the capacity of the drain. In the fall of 1908, about the 1st of November, the woodwork of the drain, having become decayed, broke, and the debris caused by this break getting into the drain, the flow of water was obstructed in its course by the alleged defective construction. On the night of November 3rd, 1908, there was a heavy rainfall and the drain received a large additional quantity of water, and extra debris, which, meeting the obstruction aforesaid, was forced back through the plaintiff's basement drain, inundating the basement, in which were stored large quantities of perishable merchandise. The plaintiff's basement drain was put in at the request, to the knowledge, and with the consent of the defendants; it was constantly open to their inspection, particularly during construction, and I find that the defendants adopted and approved of the action of the plaintiff in constructing it. I find that the defendants' drain was structurally defective, to the knowledge of the defendants, and the damage to the goods of the plaintiff was caused by the defendants' negligence in building said drain and maintaining it in its original defective condition. I am not satisfied that there is any element of *vis major* here. The rainfall was not of such a nature as to relieve the defendants of responsibility on that ground.

MORRISON, J.

It was further contended that the provisions of certain City by-laws were not complied with. I find that there was a substantial compliance with the requisite and usual requirements, and that the usual steps were taken by and on behalf of the plaintiff in respect to their basement drain. The city engineer's evidence satisfies me on that point.

The statement of defence raised the point that the plaintiff failed to comply with the by-law relating to plumbing before proceeding to construct the drainage of the building. As I understand the case and the evidence adduced, the general drainage of the building is not involved, for apparently the closets, lavatories, etc., did not drain into this particular drain at all. In a drain of this particular kind, the city engineer states that if the street surface is not broken in its construction, a written permit is neither usual nor necessary.

I also find that the drain on Abbott street was the proper drain with which to connect, and not that on the lane north of the plaintiff's buildings. It was strongly urged that the one circumstance that the plaintiff's drain did not contain a trap or flap to prevent a back flow of water is evidence of such a degree of negligence on the plaintiff's part to disentitle them to relief. The judgment of Rose, J. in *Welsh* v. *Corporation of St. Catharines* (1886), 13 Ont. 369 at p. 380, was cited as authority for this. But, I apprehend the learned judge based his finding upon the particular facts of that case, where the basement drain was lower than the well from which the water backed up, and that it was an act of obvious precaution to place some contrivance to prevent a back flow which must have been anticipated. Besides, in that case, the drain in question was constructed under entirely different circumstances than I submit exist here.

I think that the concluding portion of Lord Macnaghten's judgment in the Privy Council case of *Hawthorn Corporation* v. *Kannuluik* (1906), A.C. 105 at p. 109, is apposite here:

"The municipal authorities might just as well pour this stuff directly on the plaintiff's land. The damage to the plaintiff cannot be denied. It is nothing to the purpose even if it be true, to say that the property in the plaintiffs' hands and in the hands of his predecessors in title was often flooded before the municipal authorities turned the watercourse into a public drain. Nor is it enough to prove that the work done in 1889 was sufficient at the time. It is insufficient now. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more of the surface becomes impervious to rainfall. It is not suggested that there is any real difficulty in remedying the mischief."

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There will be judgment for the plaintiff for the sum of $8,475.65, with costs.

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The appeal was argued at Victoria on the 20th, 21st and 22nd of June, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Peters, K.C. (*E. J. F. Jones,* with him), for appellant (defendant) Corporation: Our contention is that plaintiff was permitted to do something for a certain temporary purpose, and if it was required for a permanent purpose, he should have applied to the City with that end in view. There is no obligation on the Corporation to maintain drains; section 219 of the Vancouver Incorporation Act applies only to streets. There is, further, no by-law compelling connection with basement or surface drains as such, therefore, any liability that would attach would be at common law. The best plaintiff can shew here is a mere permissive right, and plaintiff was, in any event, only a volunteer.

A. H. MacNeill, K.C., for respondent (plaintiff): Defendants cannot raise the point of no consent now; they should have done so on the pleadings, so that we could have met it. By their own wrongful act they practically dammed up the water on us.

Peters, in reply.

[The cases cited in argument are dealt with in the reasons for judgment.]

Cur adv. vult.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The drain in question was made by the Corporation, under permissive powers contained in its Act of incorporation. The by-law or resolution authorizing its construction calls it a basement drain, and the evidence is that it was used for surface and basement drainage. Before the erection of the plaintiffs' building, the defendants re-constructed the drain, replacing the old wooden box by tile up to a point within a few feet of a manhole at the corner of plaintiffs' property. The tile was not brought up to the manhole, doubtless

because it was intended later to replace the wooden manhole by cement, but was inserted in the end of a fragment of the old wooden box which connected with the manhole. In 1905, and after plaintiffs had connected their basement with the street drain, the defendants took out the wooden manhole and replaced it with a cement one; but instead of continuing the tile drain to the new manhole, a distance of only two or three feet, a piece of tile was inserted in the said fragment of wooden box and joined to the manhole. The result was a space of less than two feet between the tiles of the drain and the tile inserted into the manhole, enclosed in two feet of badly decayed wooden box, thus forming a trap into which any debris in the drain, or the fragments of the wooden box itself, when it should break down with decay, would fall and obstruct the drain, and which afterwards happened and did the injury complained of. I think the fair inference is that the engineering department forgot, when the new manhole was put in, about the condition of the drain, but this, in my opinion, does not relieve the defendants from the charge of want of ordinary care and diligence.

It is contended by the defendants that they were guilty of no negligence, and that in any case the plaintiffs were voluntary users of the street drain, and that such user was at their own risk. It was also contended that the plaintiffs had connected their basement drain with the street drain without defendants' permission. The evidence is that when the excavation for the plaintiffs' basement was made in 1902, it filled with water; that the city engineer told the plaintiffs' contractor of this street drain, and authorized him to connect the excavation with it for the purpose of getting rid of the water. This was done, and the connection was always afterwards maintained. It is contended that this was permission for a temporary purpose only, and did not justify the continuance of the connection. But this view is not, in my opinion, one which I ought to adopt. True, the occasion for making the connection before the basement was completed was the sudden accumulation of water, but the connection would always be required for draining the basement, and in the absence of evidence that the permission was expressed

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or intended to be limited to the then emergency, I ought not, especially in the absence of a by-law requiring a formal permission, to assume that the City engineer did not then fully understand and intend that the plaintiffs should continue to drain their basement into the only proper and available outlet, as the evidence proves this drain to have been.

Finding negligence, therefore, in the construction of the drain, and its connection with the cement manhole, the question arises, did the City owe a duty to the plaintiffs who voluntarily, but with defendants' permission, made use of this drain, not to be negligent in its construction or repair?

The language used by Cameron, C.J. in *Welsh* v. *Corporation of St. Catharines* (1886), 13 Ont. 369 at p. 379, and in *M'Conkey* v. *Corporation of Brockville* (1886), 11 Ont. 322, is broad enough to cover this case, and if accepted in its widest sense, to conclude it in defendants' favour. But I do not apprehend that the learned Chief Justice meant his statements to apply beyond the facts of those cases. In *Welsh* v. *Corporation of St. Catharines, supra,* the drain (well and pipe) was not made for the drainage of cellars, and the plaintiffs' user of it was unauthorized, and it was expressly found that there was no negligence in the construction or repair of it; and in the *M'Conkey* case, *supra,* where, as here, there was merely permission to make the connection, negligence was negatived. In *Noble* v. *Corporation of Toronto* (1881), 46 U.C.Q.B. 519, Hagarty, C.J., at p. 529, said:

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> "The defendants, as a municipal corporation, in the exercise of their statutable powers in the making and maintaining drains for the public benefit, health and convenience, construct a system of drains under streets, adding, extending and altering them from time to time as the City extends. Individuals are allowed to use them for the drainage of their premises on payment of the cost of constructing the necessary connection; the cost of the general drainage being defrayed out of the general revenue except where the special rate system is adopted. It seems to me very clear that they can only be held responsible for actual negligence, and that they in no way insure parties against any possible accident, stoppage or overflow from their works. Anyone seeking to make them liable, therefore, must shew in what particular they have failed in their general duty."

The use there, if I rightly understand the facts, was merely permissive. The fact that the connection of the private drain

with the street drain was to be made under supervision of an officer of the defendant Corporation does not, in my opinion, affect the question of liability for negligence, independent of any which might arise from the manner in which the connection was made.

In *Johnston* v. *City of Toronto* (1894), 25 Ont. 312, the plaintiff was also a mere licensee. It was not suggested in the argument of counsel, or in the opinions of the judges, that the fact of the plaintiff being such would preclude recovery if it were proven that injury resulted by reason of defendants' negligence. The whole case turned on the principle which has been clearly established, that in the planning of a system of drains or sewers, a corporation acts in a *quasi* judicial capacity, and that, hence, where the damages claimed are the result of some defect or insufficiency in the system, no relief can be granted; but, on the other hand, it is just as clearly established that where the injury results from the negligence of the corporation, such as faulty construction or negligent non-repair, the action may in a proper case be sustained. The Court held in that case that there was no negligence in the construction or repair of the sewer, but that the system had become insufficient to carry all the water that was then being poured into it, and gave judgment for the defendant corporation.

We have not been referred to any case, nor have I found any, outside of American decisions, which are conflicting, where a Court has had to decide expressly whether or not a licensee using a public drain, constructed for the purpose for which he was permitted to use it, and who was not by law required to use it, and was not paying a special rate for the user of it, had a right of action against the municipal corporation for injury arising from faulty construction of the latter's drain. It may be conceded for the purposes of this case that the defendants are not bound to maintain the drain indefinitely for plaintiffs' benefit. It might revoke the plaintiffs' licence to use it; but while the licence exists, I see nothing inconsistent with sound legal principles in holding that the City should exercise at least that

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ordinary care and diligence which is required of the owner or occupier of land who permits another to come upon it to protect him from hidden dangers. A distinction is recognized between those powers and duties of municipal corporations which are of a general public character and those which relate to particular corporate interests, such as the construction of drains and sewers. With respect to the latter, a municipal corporation is in much the same position as are individuals and private corporations, and are, upon similar principles, liable to actions for negligence.

This defendant has not only the means to meet its obligations, but has also express power to exact rates for the use of the drain.

MACDONALD, C.J.A.

Faulty construction is not specifically pleaded, but as the evidence is quite clear as to the condition of the drain, and the circumstances under which the two feet was left there, any formal amendment which may be thought necessary ought to be made so as to make the pleadings conform to the facts.

I think the appeal should be dismissed.

IRVING, J.A.

IRVING, J.A.: When this building was designed, there were two basement drains, into either of which the plaintiffs could have led their drains.

From the plans I draw the inference that the drain selected was the lane drain, which passes to the rear of the building, and that the place for the connection was at or beyond the point where that drain makes a drop of two or three inches. The other basement drain passes within a few feet of the western boundary of the excavation, and no drain is shewn on the excavation plan leading to it.

From this I conclude that the connection made with the Abbott street drain was made to meet an emergency, to carry off the water from the excavation. I find no authority or evidence from which I can infer that the plaintiffs ever applied for permission to run their drain in the Abbott street drain as a permanent drain. They have elected to run their drain in there, without permission, and without putting in a check valve. I think they cannot hold the defendants responsible. The by-law is applicable, in my opinion, to the plaintiffs' building.

GALLIHER, J.A.: I think it may clearly be inferred from the evidence that at the time Jeffries, the contractor for the excavation under the Woodward building, made connection with the drain on Abbott street, it was for the purpose of draining off water which had accumulated in the excavation, and which was dangerous to City and private property, and that it was not in the contemplation of either the City or the plaintiffs that it was at that time to be the permanent drain for the basement. However, it was allowed to remain so, and no other provision was made for draining the basement, so that I think we may fairly say it remained there by the leave and licence of the City.

Assuming that, and even assuming that the plaintiffs had applied for and received permission to make this connection for the purpose of draining their basement, would that, in the circumstances of this case, render the defendants liable?

The plaintiffs allege faulty construction of the drain in the putting in of a manhole by inserting a ten inch tile pipe in a twelve inch wooden box, a part of the drain on Abbott street, for conducting water from the manhole. This contention is not, to my mind, maintainable. The tile pipe was imbedded in mortar, tapered off in the wooden box, and would certainly tend to strengthen the same, but at the same time it would reduce to a certain extent the volume of water flowing through. Had this been the cause of the accident, there might be something in the plaintiffs' contention, but the evidence shews that it was the caving in of the wooden box which stopped up the water, and caused it to flood back into the plaintiffs' basement. It becomes, therefore, a case, not of faulty construction, but one of non-repair.

There is no statutory liability cast upon corporations to keep drains in repair, as is the case in regard to streets, and their liability (if any) is under the common law. It must be borne in mind that the plaintiffs were not compelled or requested to drain their basement by connecting into the City's drain; at the most it can only be said that they were permitted to do so. In the management of their own private estate, and for their own convenience, they chose to adopt this method, and they paid nothing for the privilege. It is also to be noted that the water

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came upon the plaintiffs' premises through the drain which they had themselves connected with the City drain for their own convenience, and had it not been for such connection, the water would not have got into their basement, and the damage would not have occurred. When we bear these facts in mind, I think they distinguish this case from those cited to us by plaintiffs' counsel.

I will deal shortly with a few of them. In *Hawthorn Corporation* v. *Kannuluik* (1906), A.C. 105, the damage was caused by the overflow upon the plaintiffs' premises from a drain constructed by the defendants, with which drain the plaintiffs' premises were in no way connected. *Farrell* v. *Town Council of London* (1854), 12 U.C.Q.B. 343, was a case where a corporation, in constructing a sewer, threw up large quantities of earth and allowed it to remain for some months on the sidewalk and road opposite the plaintiff's house, causing water and mud to flow over on the plaintiff's premises. In *Reeves* v. *Corporation of Toronto* (1861), 21 U.C.Q.B. 157, it appears that it was the custom of the city to construct the connecting drains and charge the cost to the party requiring it, and it was there found that the negligent construction of the drain caused the damage. The cases of *Scroggie et al.* v. *The Town of Guelph* (1875), 36 U.C.Q.B. 534, and *Coghlan* v. *City of Ottawa* (1876), 1 A.R. 54, are also distinguishable. On the other hand, in *Noble* v. *Corporation of Toronto* (1882), 46 U.C.Q.B. 519, Cameron, J. at pp. 542 and 543, distinguishes the liability with regard to streets and sewers; and in *M'Conkey* v. *Corporation of Brockville* (1886), 11 Ont. 322, the same learned judge (then Chief Justice), says, at p. 328:

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"I have not overlooked the fact that the streets of municipal corporations are vested in them for the use of the public, and no one of the public can of his own motion open them up so as to impede or interrupt the ordinary traffic thereon. But that circumstance does not impose upon them an obligation to repair the drains as drains that may with their permission be laid down upon the streets. The moment they assume to compel the use of the drains and impose a rate upon the property owners for the privilege of draining into them, they assume the obligation of keeping them in repair; and if they get out of repair and thereby occasion damage to a property owner, and they have reasonable notice of the want of repair, or negligently or improperly construct their drains whereby

injury results, or if by means of their drains they bring water to and pour it pure or filthy upon the property of any person, that would not have reached that property without such drain, to the injury thereof, a liability will attach. Here it was not the street drain that conveyed the water to the plaintiff's land, but the drain constructed by himself connecting with the street drain."

And again, in *Welsh* v. *Corporation of St. Catharines* (1887), 13 Ont. 369 at pp. 379 and 380:

"To make a corporation liable for injury from the overflow of a drain I think it must be shewn affirmatively that the corporation required the property owners to use the public drain by connecting the private drains therewith; secondly, that the drain or sewer has been improperly and negligently constructed and injury results in consequence of such negligent and improper construction, or that the same has become obstructed and the corporation has negligently omitted to remove the obstruction within a reasonable time after knowledge or notice of the obstruction, and injury results to the plaintiff after such reasonable time for removal after such knowledge or notice has been had by the corporation; or, third, the corporation brings to the plaintiff's land by means of the drain or sewer more water than would otherwise come to the same, and pours it wilfully upon the said land, or after bringing the water to the land negligently allows it to escape and flow over the land."

The trend of authority in the Ontario Courts would seem to be against the plaintiffs' contention, and we have been referred to no authority, there or elsewhere, which directly questions the principles there laid down.

I would allow the appeal, and dismiss the plaintiffs' action, with costs here and below.

Solicitors for appellants: *Cowan, Macdonald, Parkes & Kennedy.*

Solicitors for respondents: *MacNeill & Bird.*

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1911

April 25.

WAINWRIGHT v. FARMER

WAINWRIGHT v. FARMER AND LINDSAY.

Practice—Unliquidated damages—Action for—Conditional tender before action—Payment into Court—Acceptance in satisfaction—Costs—Depriving plaintiff of.

Where the plaintiff sued for unliquidated damages, and defendants pleaded tender before action, and paid into Court a sum of money which the plaintiff accepted and obtained payment out upon an *ex parte* order:—

Held, that the tender was of no value inasmuch as it was accompanied by a statement that it was to be accepted in full satisfaction, and that the defence of tender was improper.

Held, further, that the plaintiff's conduct having been oppressive throughout the transaction, and having made an unfounded charge of fraud, he should be deprived of his costs.

Statement

ACTION for unliquidated damages, tried by GREGORY, J. at Vancouver on the 25th of April, 1911. The defendants having paid into Court a sum of money which plaintiff had accepted, there remained only the question of costs in the circumstances to be settled.

Price, for plaintiff.

Savage, and *W. P. Grant,* for defendants.

Judgment

GREGORY, J.: The real substance of this action has been disposed of some time ago by the payment into Court of a sum of money accepted by the plaintiff in satisfaction of his claim.

The only question in dispute is that of costs, and the defendant set the action down for trial on an issue of tender before action. The tender was accompanied by a statement that it was to be accepted in full satisfaction, thus attaching a condition which robbed it of any value as a tender.

Being an action for unliquidated damages, such a plea of tender was improper, and while the Court might have treated it as a payment if accompanied by a defence denying liability, the plaintiff had no right to so treat it and obtain its payment out on an *ex parte* application.

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The plaintiff's conduct has throughout the entire proceedings been oppressive. He was offered all the damages any Court in the circumstances would ever have given him, and he should have accepted it promptly, as he did eventually. He refused to claim his costs, or make, or agree to any step which would put a formal end to the action, thus preventing the defendant, a committee in lunacy, from passing his accounts and obtaining his discharge.

The proceedings were caused by the plaintiff's own most unreasonable delay in recording his agreement or deed—five years—and, although he is described in the statement of claim as a gentleman, he has apparently deliberately and without any just cause charged the committee with fraud. I therefore decline to allow him his costs. Each party will pay his own costs.

Judgment

IN RE RAHIM.

MURPHY, J.
1911
March 9.
IN RE RAHIM

Statute, construction of—Alien landing as tourist—Law changed after his arrival—Deportation—Right of alien to inquiry as to his status under changed law.

Applicant, a Hindu, came to British Columbia in January, 1910, not by continuous voyage from his own country, and was admitted as a tourist, in which capacity he travelled in Canada, reaching British Columbia again in October following. The law governing immigration had been changed in the meantime, and he was held under the new law for deportation, but without any inquiry being held as to his status as provided by the amended law.

Held, that the Act was not retrospective in this regard and did not apply; and as the old Act contained no provision for the deportation of such a person, he could not be deported thereunder.

Statement

APPLICATION for a writ of *habeas corpus,* heard by MURPHY, J. at Vancouver on the 15th of February, 1911.

Argument

McCrossan, for the applicant: It is submitted that the applicant is still a tourist: *Taylor* v. *Humphries* (1864), 17 C.B.N.S. 539; *Reg.* v. *Daggett* (1882), 1 Ont. 537. Having

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lawfully come into the country as a tourist, there is nothing in the old Act to affect his status, even assuming he has changed his mind. The arrest and detention are in any event premature. The applicant is entitled to an inquiry under the new Act, and no inquiry has been had.

Argument

Macdonell, for the Department: The statute must be construed strictly. It is retrospective, and unless the applicant has been landed in conformity with the provisions of this statute, he may not remain.

9th March, 1911.

MURPHY, J.: The applicant is a Hindu, who came from Honolulu, or some other territory under the jurisdiction of the United States. In January, 1910, he was informed by the immigration officers that under an order in council that had been passed, requiring immigrants to come by continuous voyage from the country of their birth, he could not enter Canada, but after some discussion, the immigration officers did allow him in as a tourist.

I can find no authority whatever under the old Act for this being done; and inasmuch as the man got into Canada whilst that Act was in force, and inasmuch as it contains no provision whatever for deportation of a person who has been so allowed into the country, I do not see how he can be deported.

Judgment

He represents himself as being a tourist, and on the evidence, if I had to find any facts, I would say that at the time he entered Canada he was a tourist. It is possible he may have changed his mind since, but he acquired his status before the passing of the new Act, and therefore, in my opinion, its provisions do not apply to him. Even if they did, the provisions of the new Act, with regard to tourists, contemplate an inquiry by a board, or an officer acting as such, and the new Act specifically sets out that any such inquiry must be in the presence of his counsel or the presence of the accused. Here, someone has assumed to deport this man without any investigation whatever. I find no authority under the old Act or the new Act for that, and I therefore grant the writ of *habeas corpus.*

Application granted.

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1911

Nov. 9.

IN RE RAHIM

Statute, construction of—Immigration Act, 1910 (Dominion), section 3, sub-section 10, section 36—Retroactive—Order in council—Previous arrest and discharge—Habeas corpus.

The Immigration Act, 1910 (Dominion), does not apply to an alien tourist who entered Canada before the passage of the Act. Therefore an order in council passed since the coming into force of the Act could not be held to deal with such a person.

APPLICATION for a writ of *habeas corpus* heard by MORRISON, J. at Vancouver in November, 1911. The facts are stated in the reasons for judgment.

McCrossan, for applicant.
Macdonell, for the Immigration Department.

9th November, 1911.

MORRISON, J.: Rahim, a non-immigrant Hindu, came to Canada before the passing of the Immigration Act, 1910, from Honolulu, in which place he appears to be the owner of considerable property, and in which country he had resided nearly two years. He was subsequently apprehended and held for deportation. On *habeas corpus* proceedings before Mr. Justice MURPHY, he was released (*ante,* p. 469). A second time he was apprehended and again held for deportation. Now, he again applies for release.

Judgment

In limine the plea of *res judicata* is raised on his behalf, and also that there is no valid order in council, pursuant to section 38 (a) of the Act of 1910.

The order in council in question reads as follows:

"From and after the date hereof, the landing in Canada shall be and the same is hereby prohibited of any immigrants who have come to Canada otherwise than by continuous journey from the country of which they are natives or citizens, and upon through tickets purchased in that country," etc.

For the authority to pass an order in council dealing with persons such as the applicant, I am referred to section 38 (a), *supra,* which enacts that:

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"The Governor-General in Council may, by proclamation or order, whenever he deems it necessary or expedient—(a) prohibit the landing in Canada . . . of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen," etc.

Counsel proceeded to deal with the further ground that sub-section 10 of section 33 of the Act of 1910 is retrospective and retroactive. That sub-section provides that:

"Every person who enters Canada as a tourist . . . 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 deportation, by order of a Board of Inquiry," etc.

In view of the opinion I hold as to this submission, I do not deem it necessary to deal minutely with the others above set out. I do not think the provision is either retroactive or retrospective. Buckley, L.J. deals with the meaning of the word "retrospective" in the course of his judgment in *West* v. *Gwynne* (1911), 80 L.J., Ch. 368 at p. 586, *et seq.*:

"If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective."

And it seems to me that here, as in that case:

Judgment

"The question is as to the ambit and scope of the Act and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law."

And again, the learned lord justice proceeds:

"As a matter of principle, an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future."

It seems quite clear to me that Parliament was dealing with those persons who after the passing of the Act entered Canada. I do not think the Act is retrospective. Nor do I think there is a valid order in council, pursuant to section 38 of the Act. Doubtless, the limitation which the word "naturalized" has placed upon the word "citizen" was advisedly made by Parliament; and it may well be that, when the order in council was drafted, the fact of the repeal of chapter 33 of the Acts of 1908 was overlooked.

Besides, this man has a second time within a short period been put in jeopardy on the same charge. On all grounds I think he should be released.

Application granted.

JOHNSON v. McRAE.

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JOHNSON v. McRAE

Banks and banking—Promissory note—Liability—Indorsement—Collateral security—Promise—Absence of consideration.

The Terminal City Sand and Gravel Company gave a promissory note to C. G. Johnson & Co., who indorsed it and handed it to the bank as security for general advances. The note was not paid when it fell due, and was charged by the bank back to Johnson & Co., who then sued for the amount. While the note was under discount, and after it was due, the defendant voluntarily handed to the bank a share certificate in his favour from the Terminal Gravel Company (a concern in which defendant was a director and shareholder). This certificate, the evidence shewed, was not deposited in pursuance of any previous arrangement, though probably in the hope of securing forbearance in the future.

Held, (1) that defendant was liable upon his indorsement, and (2) in the circumstances in which the share certificate was deposited, it was not available in satisfaction of the claim upon the note.

Statement

ACTION, tried by CLEMENT, J. at Vancouver on the 8th of December, 1910, to recover the amount of a promissory note made payable to a bank and not indorsed by the bank before the defendant's indorsement.

A. D. Taylor, K.C., for plaintiffs.
S. S. Taylor, K.C., for defendant.

12th December, 1910.

CLEMENT, J.: I must follow *Robinson* v. *Mann* (1901), 31 S.C.R. 484, and hold defendant liable as indorser, under section 131 of the Bills of Exchange Act, the plaintiffs being, on the authority of that case, holders in due course of the note sued on. There will, therefore, be judgment for the plaintiffs for the amount of the note, $1,000, with interest thereon to date at 7 per cent., less the amount paid by the assignee of the makers on this note with interest thereon from October 16th, 1910 (the date of payment of the assignee's cheque) to date at 7 per cent. If any question arises as to the figures the matter may be spoken to.

Judgment

CLEMENT, J.
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As to the claim in respect to the share certificate left with the Molsons Bank as collateral security (as I find), I am unable to give effect to the defendant's promise that such shares should, in the event of non-payment of the note, be available in satisfaction of the amount due thereon, such promise having been made without any consideration therefor moving from the bank or the plaintiffs. The share certificate was voluntarily handed in to the bank while the note sued on was under discount, and was not so handed in in pursuance of any previous arrangement or promise, but (as I have said) voluntarily, though in the hope, no doubt, of securing forbearance later, but absolutely without any promise of such forbearance on the part of either the bank or the plaintiffs.

Judgment

The plaintiffs should have their costs of the action, less any extra costs occasioned to defendant by the claim in respect of the share certificate.

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BEVERIDGE v. AWAYA IKEDA & COMPANY, LIMITED.

Principal and agent—Sale of mineral claims—Commission on—Option—Contract—Substituted contract—Erasures in document—Evidence as to—Inadmissibility.

In the circumstances set out in the statement following, it was

Held, on appeal, affirming the decision of MURPHY, J. at the trial (IRVING, J.A. dissenting), that plaintiff had earned only $800 of the commission claimed.

Statement

APPEAL from the judgment of MURPHY, J. at Vancouver on the 21st, 23rd and 25th of November, 1910, in an action claiming commission for the sale of the Japanese mines in the Queen Charlotte group, in the following circumstances: On the 15th of December, 1910, Beveridge secured an option from

the Japanese Company to sell their mines for the sum of $200,000. Commission was spoken of, and the Company gave Beveridge a letter, dated the 15th of December, stating that in the event of a deal being put through with a Mr. Castleman, whom Beveridge mentioned as a possible purchaser, and his associates, he would be entitled to a commission of ten per cent. Beveridge then introduced the manager and secretary of the defendant Company to Castleman and negotiations ensued, resulting in a working bond, dated December 30th, providing for the payment of $200,000 for the mine, $1,000 cash, $7,000 on the 15th of February following, and the balance on the 21st of June. On the day after this agreement was entered into, Beveridge took into the defendant Company's office what he termed an agreement under seal, and was accompanied by a notary public. This agreement set out that the Company would pay the commission at the times the payments of purchase price were to be made pursuant to the agreement of the 30th of December. The second, or commission agreement, contained the words "or any other agreement which might be substituted therefor" (having reference to the purchase agreement), but those words were struck out, and the erasure duly initialled on the execution.

MURPHY, J., at the trial, admitted evidence as to the insertion of these words and their erasure, and took into consideration in construing the document the effect of the deleted words, and the discussion leading up to the execution of the document.

Statement

In January, Castleman notified the Company that he could not comply with the terms of the purchase agreement. Beveridge, who was also notified, proceeded to negotiate, with the result that a new agreement was entered into between Castleman and the Company, extending the time for making the deferred payments. This new agreement was entered into on the 4th of February, and Beveridge was not only privy to it, but had considerable to do in bringing it about. On the 15th of February the next sum, $7,000, was paid to the vendors, and Beveridge obtained $800 commission out of it. Castleman and his associates then put a force of men at work on the mine and proceeded to develop it. In May, Castleman again approached

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the vendors, stating his inability to carry out the deal on a cash basis, owing to the heavy expenses of developing the mine, and suggested an alternative deal, by which the vendors would take part of the stock in a new company. On the Ikeda Company acquainting Beveridge with this, the latter advised them he would take no part between Castleman and the Ikeda Company in their dealings, but an extension of time was arranged for to February 4th, providing for the payment of an instalment on the 1st of September, and it was this payment which Castleman arranged in May by the substitution of the stock. There was, it was argued, no failure on the part of Castleman at any time to keep the agreement, all the extensions being made before any default occurred. On August 28th, as a result of negotiations between the Company and Castleman, the Company suggested that Castleman name some other person than himself with whom the new agreement should be entered into, as they said they wished to get rid of the commission dispute. Accordingly, one W. H. Armstrong was named as the party to the new agreement. Beveridge was notified by the defendant Company that the sale to Castleman was off, and that they were sorry that he had not earned his commission. Beveridge brought action for commission in cash and stock under this final agreement. At the trial, MURPHY, J. excluded evidence by Castleman as to the reasons for changing the agreement, stating that that meant fraud, which should have been pleaded. It was urged for the plaintiff that it was immaterial whether that evidence proved fraud, that all it was required for was to shew that the agreement with Armstrong was one and the same as that with Castleman, which was brought about by Beveridge, who had earned and was entitled to his commission. Beveridge appealed.

Statement

S. S. Taylor, K.C., and *F. G. T. Lucas,* for plaintiff.
Sir C. H. Tupper, K.C., and *Griffin,* for defendant Company.

MURPHY, J.

MURPHY, J.: In an action for commission for bringing about a sale of mining property, as pointed out in *Chapman* v. *Winson* (1904), 20 T.L.R. 663, the question in each of such cases is what are the terms of the particular contract?

On the 15th of December, 1909, the plaintiff obtained a contract from defendants *re* his commission (exhibit 1). If the matter depended on this document, much might be urged in favour of the plaintiff's contention, but having obtained it, the plaintiff then obtained his proposed purchaser, Castleman, and as a result, on the 30th of December, 1909, an option of purchase was given by defendants to Castleman covering the mining property in question. On the 31st of December, 1909, the plaintiff himself prepared a further document (exhibit 4), *re* his commission and took it to the defendants to sign, taking with him a notary, with the idea, apparently, that the attaching of a properly executed acknowledgment would make the contract more binding. The plaintiff himself admits that this was intended to be the final agreement *re* commission, and that all previous documents were to be merged in this. It is argued that because of the form of exhibit 4, it is not and cannot be a contract superseding exhibit 1, but it does contain a clause binding the plaintiff to accept payment of his commission as therein set out, and, having regard to the evidence, I hold that it is what the plaintiff says it is, the final agreement intended by both parties to embody the terms of their contract.

Now, as originally drawn, this document provides for payment of commission not only on the existing Castleman option, under which the purchase price was to be entirely in cash, but also "under any agreement which may hereafter be substituted by the said Castleman or his assigns." These words are struck out of the document as produced in Court, and the alteration is initialled by the plaintiff. I admitted evidence of what occurred at the time of the execution leading up to this alteration, and plaintiff himself admitted that defendants absolutely refused to sign unless the alteration was made. If plaintiff meant to contend that the document of December 15th gave him his commission in case of such substitution, then was the time for him to have insisted and rested his rights on that document. Instead he agreed that the alteration be made, and I can come to no other conclusion on that fact, coupled with the talk leading up to it, except that it was clearly understood by both plaintiff and defendants that commission was only to be

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paid under the circumstances therein set forth. The cash sale was not carried out, but a new and very different agreement was made between defendants and Castleman on the 31st of August, 1910, whereby the principal part of the purchase money was payable in shares. As I hold the contract to have been to pay commission only in case the original option was taken up, I think the plaintiff's case fails. He received his commission on such cash payments as were made under it.

It was urged that some extensions of time were granted under the original option, and as defendants admitted they would still pay commission had these extended payments been made, therefore commission must be paid on the share agreement. The answer to this is that these extensions were either obtained by plaintiff or not demurred to by him when he became aware of them, and therefore I think the agreement of December 31st was modified by mutual consent to that extent, but there is no suggestion in the evidence of a modification covering the share agreement.

MURPHY, J.

Again, if there was any question of the purchase going off owing to the action or default of the defendants, the case of the plaintiffs would be different, and on the evidence before me I find nothing leading to that conclusion. If my ruling on admission of evidence pointing to fraud, when nothing indicating such an issue is raised in the pleadings, is erroneous, the position of this branch of the case will be altered and a new trial be necessary. The action is dismissed.

The appeal was argued at Victoria on the 19th of January, 1911, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Argument

S. S. Taylor, K.C., and *F. G. T. Lucas,* for appellant (plaintiff): As to the words struck out of the agreement, see *Inglis* v. *Buttery* (1878), 3 App. Cas. 552. The trial judge was wrong in admitting evidence of the words struck out of the agreement because thereby he gave effect to words not in the completed contract: Taylor on Evidence, paragraphs 1,133, 1,155-8. The document of December 31st is merely a distribution agreement, supplementary or explanatory of the mode of

payment of the money to be paid as provided by the document of December 30th. As to the proposition to substitute a new agreement, Ikeda knew that Armstrong was in reality Castleman, and that therefore this deal was the same as that of December, 1910.

[IRVING, J.A.: What is the duty of the Court of Appeal in questions like this? Are we to re-try it? *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A.C. 73, 26 T.L.R. 376.]

Yes; re-try it on that point, and on that and all the other evidence we are entitled to judgment. In short, we have performed our contract and brought a purchaser; therefore we are entitled to our commission.

Sir C. H. Tupper, K.C., for respondent (defendant) Company: The agreement under seal merges all previous letters and documents and we rely on that and on the record as it stands. The commission was never earned. This is entirely a premature action. The commission was to be paid out of the cash payments. Only notes have been received, therefore there has been nothing paid yet. If we discount a note it is at our own risk, and we may have to meet it at maturity. We have not got the shares yet, and the Company was not incorporated when the action was brought. If it was not contemplated at the time that shares were to be paid, then cash is contemplated. If the agreement be referable to the new transaction, then if that new transaction does not call for cash until 90 days, the commission would not be payable until the payment in cash. Beveridge was to get a purchaser for $200,000 and then he changed the arrangements. He cited and referred to *Tribe* v. *Taylor* (1876), 1 C.P.D. 505; *Green* v. *Miles* (1861), 30 L.J., C.P. 343; *Barnett* v. *Isaacson* (1887), 4 T.L.R. 645; *Lott* v. *Outhwaite* (1893), 10 T.L.R. 76; *Beale* v. *Bond* (1901), 84 L.T.N.S. 313; *Chapman* v. *Winson* (1904), 20 T.L.R. 663; *Stubbs* v. *Slater* (1910), 1 Ch. 632.

Argument

Taylor, in reply: We did not contract to sell for $200,000, but to close a deal on satisfactory terms. The notes were given before we brought action. They discounted one note and got the whole of the proceeds; $3,000 of it belongs to us. Castle-

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man never failed to meet his new obligations before the old ones became due.

Cur. adv. vult.

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28th April, 1911.

MACDONALD, C.J.A.: The appellant claims the sum of $19,200, balance of commission for the sale, as agents for defendants, of forty-seven mineral claims. A letter dated the 15th of December, 1909, sets out the terms of the agency as first agreed upon. Acting on this authority, the appellant procured one Castleman to take an option up to the 15th of February, 1910, to purchase the said claims from the respondents, which option is embodied in a writing dated the 30th of December, 1909. The terms were $1,000 cash, and it was provided that if the purchaser should on or before the 15th of February, 1910, pay to the vendor the further sum of $7,000, the period of the option should be extended to the 1st of June, 1910; and that the option might be exercised at any time up to the said 1st of June by a notice in writing and by the payment of a further sum of $32,000 on or before that date, whereupon the agreement should cease to be an option and become a contract of purchase and sale, in which event the above sums were to form part of the purchase price of $200,000.

MACDONALD, C.J.A.

After this option was obtained, the appellant prepared a formal agreement embodying his rights in respect of commission, which bears date the 31st of December, 1909, and which recites that the agreed commission is 10 per cent. on all instalments or payments made to respondent under said agreement. Appellant's counsel argued that this agreement did not extinguish the informal one contained in the letter. I think it did, but, in my opinion, it makes no difference whether it did or did not, because by both instruments the commission was to be paid only on receipt of instalments of purchase money.

The first two payments of $1,000 and $7,000 were duly made by Castleman, and out of that sum the appellant received his 10 per cent. commission. On the 4th of February, 1910, the appellant, finding that Castleman was about to abandon his option, obtained the respondent's consent to vary the terms of

payment by providing that $5,000, instead of $32,000, might be paid on or before the 1st of June, and that, thereupon, the time for paying the balance, as well as for exercising the option, should be extended to the 1st of September, 1910. The sum of $5,000, however, was not paid as provided, and upon Castleman's representation that he could not meet the payment, defendants, in May, finally consented to extend the time for payment of that sum to the 1st of September; but later on in May Castleman informed respondents that he could not carry out the option at all. The evidence does not make it clear whether or not appellant was consulted about this extension, but in my view it makes no difference, because it is quite clear that Castleman had the right to throw up the option whenever he pleased; and that as he declared he could not meet this payment, and default would put an end to his option, the extension instead of being detrimental to appellant, was in his interest; and when he did become aware of it he did not complain, as indeed he could not honestly do in the face of the fact that Castleman informed him he could not make the payment, and that Castleman was interested with appellant in the commission.

This being the condition of affairs, Castleman opened negotiations with respondents for a new agreement; he proposed to form a joint stock company and asked the respondents to accept $150,000 of the purchase money in shares in such company. His letter to respondents of the 21st of June gives distinct notice that he finds himself unable to exercise his option. In fact, at that time his option was really at an end. These negotiations for a new agreement culminated on the 29th of August, when the new agreement was actually signed, by which respondents were to receive for their mines 150,000 shares in a company to be formed; $12,000 in cash, payable the following March; $30,000 in promissory notes, payable at ninety days, and they were to get credit for the $8,000 referred to above, making in all $200,000. While it is not so pleaded, yet it was suggested by appellant's counsel at the trial that this was a fraudulent arrangement made for the purpose of defeating the appellant with respect to his commission. Castleman, who was appellant's witness at the trial, stated that the new agree-

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ment was taken in the name of one Armstrong, an associate of Castleman's, at his (Castleman's) own suggestion, because the respondents declined to enter into a new agreement with him, fearing that they might get into trouble with appellant about his commission. I refer to this, not because it would make any difference whether the new agreement was directly with Castleman or with Armstrong, but because it shews the attitude of the respondents with regard to the old transaction. It shews that they intended to treat the old transaction as at an end, as they had a right honestly to do after Castleman's default and his declaration that he could not exercise the option, and to make it clear that the new agreement was not a continuation of the old.

There was no concealment about the negotiations for the new agreement, if, indeed, that affects the matter at all. Appellant knew of them and went so far even as to apply to the respondents for an option on the property. I think under all the circumstances of the case the learned trial judge was right in his conclusion.

MACDONALD, C.J.A.

I may add that I think the learned judge was in error in admitting the evidence with regard to the erasures in the commission agreement and that I am not influenced by it.

I would dismiss the appeal.

IRVING, J.A.: The learned judge thought that as a result of certain words being struck out of the draft agreement, the plaintiff had acquiesced in a particular construction of the document, and upon that construction the plaintiff was not entitled to a commission if there was any substitution for the contract entered into on 30th December, 1909.

IRVING, J.A.

I think, although I am not wholly satisfied on the point, that the judge was not at liberty to look below the erased line, and therefore the construction placed upon the document was too narrow.

The case was not fully tried, and a new trial is necessary.

The issue raised by the pleadings was that the substituted contract was practically with the same people as that of 30th December. If that was established the plaintiff would, in my

opinion, be entitled to his commission: see *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614; or if the new arrangement of bonds in lieu prevented the Company from receiving the cash, then he could be entitled to damages.

On the other hand, if it is established that the second agreement is quite separate and distinct from the first, and the defendants were acting in good faith, then the plaintiff, in my opinion, would not be entitled to the commission, as he was only to be paid as the defendants received the money.

The defendants raised the point that in any event the action was premature, as they have not received any money, or any shares.

If the new contract of sale was not made with the same people, or if the new contract was with the same people, but for shares instead of cash, the plaintiff, in my opinion, would not recover under the original agreement to pay a commission, although his claim for damages is undoubtedly based on that agreement; but he would be entitled to damages occasioned to him by the defendants putting it out of their power to complete the contract so that he could not now earn the full amount of the agreed commission. These damages should be ascertained in money —not money and shares. *Burchell's* case may seem to be against me as to this, but as the referee's award in that case was based on an agreement entered into between the solicitors, whereby a portion of the securities was deposited to abide the event of the suit, the form of the judgment did not come in for consideration. The new agreement for sale does not give the plaintiff the right to an increased commission—nor to shares in lieu of cash. The plaintiff's remedy being damages can only be ascertained in money; he is not concerned with the Company's shares nor the Company's formation. His cause of action was complete when they determined the first agreement and repudiated his claim for commission. The writ was issued on 8th September, 1910, and as there was due $33,000 on the 1st of September, 1910 (even if the date is fixed by the agreement of 23rd May, 1910), the action is not premature.

As to the argument based on the assignments:

The assignment of a part of a debt was considered in *Forster*

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v. *Baker* (1910), 2 K.B. 636, and Bray, J. thought it could not be assigned; but the action here lies (if at all) for damages, and not on the original agreement, and therefore this objection fails.

Plaintiff, in my opinion, is not entitled to an injunction or a declaration. A declaration is not necessary because no relief would follow it. Assessment of damages and execution are the remedies, if the plaintiff is entitled to anything.

I would allow a new trial.

MARTIN, J.A.: I think that, upon the whole case, the learned judge below reached a right conclusion, and therefore the appeal should be dismissed.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *Lucas & Lucas.*
Solicitors for respondent Company: *Tupper & Griffin.*

HESELWOOD v. JONES.

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HESELWOOD v. JONES

Statute, construction of—Land Act, sections 13, 14 and 16—Cancellation of pre-emption record—Jurisdiction of commissioner of lands—Continuous occupation of land by pre-emptor.

Although a commissioner of lands must give a pre-emption record holder thirty days' notice of the hearing of an application to cancel his pre-emption record, yet, if the pre-emptor appear and attend on the hearing at an earlier date, he cannot object afterwards that he has not received proper notice.

Held, further, on the facts, that the commissioner was right in cancelling the record for non-compliance with the Land Act as to occupation of the land.

APPEAL from decision of the assistant commissioner of lands for the Osoyoos Division of Yale District, dated the 15th of February, 1910, cancelling the pre-emption record of the appellant, Heselwood, heard by MURPHY, J. at Vancouver on the 30th of June, 1910.

Statement

On the 17th of January, 1910, the assistant commissioner notified the appellant that an application had been made to cancel his pre-emption record on the ground that he had failed to comply with the requirements of the Land Act as to residence, and further notified him that his record would be cancelled within 30 days from the date unless he shewed cause. On receipt of this notice, the appellant requested the commissioner to fix an early date for the hearing of the application to cancel his record, and in response to this, the commissioner fixed the 15th of February, on which date the appellant appeared, with his counsel, and gave evidence, and raised no objection to the hearing taking place before the expiration of the thirty days. The other facts sufficiently appear in the reasons for judgment.

Argument

Harper, for appellant, cited Maxwell on Statutes, 3rd Ed., 585; *Foster* v. *Usherwood* (1877), 47 L.J., Ex. 30; *Canadian Canning Co.* v. *Fagan* (1905), 12 B.C. 23.

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Creagh, for respondent, cited *Moore* v. *Gamgee* (1890), 59 L.J., Q.B. 505; *Ex parte Wyld, in re Wyld* (1860), 30 L.J., Bk. 10; *Wilson* v. *McIntosh* (1894), A.C. 129; *Robitaille* v. *Mason* (1903), 9 B.C. 499.

7th July, 1910.

MURPHY, J.: I am of the opinion this appeal should be dismissed. As to the first point taken, that the 30 days' notice required by section 13 of the Land Act was not given to the pre-emption holder, that is conclusively answered by the statement contained in paragraph 9 of respondent's answer, which shews that the earlier hearing before the commissioner was held at the request of the petitioner. The latter attended thereon, with counsel, and raised no objection. He cannot now be heard to complain of what was brought about by his own act. I consider the notice is required to be given for the benefit of the pre-emption holder, who can waive it wholly or in part if he so desires, and that, if he does so, as is the case here, the commissioner has jurisdiction to adjudicate and cancel the pre-emption record before the 30 days have elapsed.

As to the second point, that the commissioner was wrong in law in holding that the pre-emption holder had not complied with the provisions of the Land Act as to occupation of land, I think this, too, must fail. The pre-emptor was admittedly absent from the land continuously from July 16th, 1909, to the date of hearing, *viz.*: February 15th, 1910. Under section 15 of the Act, this would mean that he had ceased to occupy the land unless he can bring himself within the exception contained in section 16. Section 16, however, fixes a maximum of six months' absence in any one year, save in cases which do not arise here.

Judgment

Now, the pre-emptor obtained his record on January 8th, 1909, and, according to his own declaration, was on the land for the first time thereafter on March 6th, staying three days. He was there again in March, but apparently for no length of time. He next went upon it for two nights in May and again in July—for how long he does not say.

In view of the spirit of all the sections of the Land Act deal-

ing with pre-emptions, and particularly of the provisions of sections 14 and 16, I think it is impossible to hold that there is any error in point of law in the commissioner's decision. The appeal is dismissed with costs.

Appeal dismissed.

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PRUDHOMME v. THE BOARD OF LICENCE COMMISSIONERS FOR THE CITY OF PRINCE RUPERT.

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Municipal law—Liquor licence—Board of Commissioners—Discretion of—Refusal of application for licence—Grounds for—Mandamus to new Board—Change in personnel—Hotel in neighbourhood of church—Building used for mixed religious and lay purposes.

On the 17th of October, 1910, P. was granted a liquor licence for his hotel for a period ending on the 15th of January, 1911. On the 14th of December following, at the next regular meeting of the Board, he applied for a renewal. There was no objection lodged, nor was there any charge against the applicant as a licensee. After a number of adjournments, the application was eventually refused, on the 11th of January, 1911. The composition of the Board was changed on the 15th of January, 1911. P. applied to the new Board for a renewal, or, in the alternative, for a fresh licence. These applications were also finally refused on the 28th of March, 1911. On application to CLEMENT, J. a writ of *mandamus* was issued to the new Board ordering the granting of a licence unconditionally. On appeal from this order the Court was evenly divided.

Per MACDONALD, C.J.A., and GALLIHER, J.A. (applying and following *The Mayor and Assessors of Rochester, in re the Parish of St. Nicholas* v. *The Queen* (1858), 27 L.J., Q.B. 434), that the successors of the old Board, who ought to have renewed the licence, could be compelled to perform the duty which they refused to perform, and the change in the by-law, subsequently effected, making it discretionary with the new Board to grant or refuse a renewal, does not affect the position, as at the time of the commission of the wrong complained of no discretion was required, but simply a ministerial act.

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PRUDHOMME v. LICENCE COMMISSIONERS OF PRINCE RUPERT

Per IRVING, J.A.: P. had no vested right to a renewal under the by-law in force at the time he obtained his licence, and that the Court had no power to order the new Board to consider P's application according to such by-law.

Per MARTIN, J.A.: As there was no evidence of *mala fides* on the part of the Commissioners in refusing the application, the writ of *mandamus* could not be supported.

Statement

APPEAL from an order dated the 5th of June, 1911, made by CLEMENT, J., on an application for a writ of *mandamus* to the commissioners, directing them to grant the plaintiff a renewal of his liquor licence. The writ was granted, the renewal of the licence to be granted unconditionally. Prudhomme was granted a licence by the Prince Rupert commissioners on the 17th of October, 1910, which would expire on the 15th of January, 1911. He duly applied for a renewal of his licence, the application coming before the Board in the latter part of December, 1910. One of the objections to granting the renewal was that the licence had never been legally granted in the first place. It would appear that at the meeting of the 17th of October only two commissioners were present. Another commissioner, Merryfield, says that when the Prudhomme application came up, he realized that Commissioner Stork had control of the meeting, by reason of the fact that there were only two commissioners present, and the mayor had a casting vote. He, Merryfield, thereupon announced that he would retire from the meeting, and he arose and began to gather up his papers. The chairman at once put the motion not to grant a licence to Prudhomme and carried it himself. It was claimed by Prudhomme that the commissioners did not act in good faith, and that the real reason why his application for a renewal was not granted was that a petition of the carpenters' union was presented asking that Prudhomme's application be not granted on account of his having employed non-union labour in the building of his hotel, and because he purchased his supplies outside of Prince Rupert. The renewal was finally refused on the 11th of January, 1911, at the last meeting of the commissioners. On the 15th of January a new board came into office, which board, after consideration, refused his application for a renewal or, in the alternative, a fresh licence. He applied

to CLEMENT, J., with the result as above stated. The applicant appealed, and the appeal was argued before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A., at Victoria on the 12th of June, 1911.

Craig, for appellants: On behalf of the commissioners it is objected that a *mandamus* should not be granted against them by reason of some wrongful act done by their predecessors, and that, as far as they were concerned, the application was never legally before them, because it was refused by their predecessors in office, and before the application was again presented to the new Board, the original licence had run out.

Woodworth, for respondent: The renewal of the licence was refused purely on the protest of the labour unions against the practice of the applicant as a contractor employing union and non-union men on his building, and the commissioners in question were under the influence of the labour unions. This was not only an improper reason for refusing the licence, but an unjust one.

Argument

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.: The order appealed from directs that a writ of *mandamus* shall issue, directed to the Board of Licence Commissioners for the City of Prince Rupert, commanding them to renew the liquor licence previously granted and held by the plaintiff, which covered a period from the 17th of October, 1910, to the 15th of October, 1911. The licence was issued on the said 17th of October, and the only contention made before us concerning its validity was that because one of the two commissioners present at the meeting on that day rose from his seat and declared his refusal to take further part in the sitting of the Board, there ceased to be a quorum, notwithstanding that such commissioner did not leave the room. I am, however, unable to take this view of the matter, and must therefore take it that the licence was properly issued.

MACDONALD, C.J.A.

At the next regular meeting of the Board, held on the 14th of December, 1910, the plaintiff applied for a renewal of the licence. He had complied with all the formalities required by

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law, and the Board had before it a report from the chief constable certifying that the hotel and the appointments thereof were in accordance with the regulations. No complaints or charges were made against the licensee, except that in the erection of the hotel non-union men had been employed, and that some of the material had been purchased elsewhere than in Prince Rupert. By the by-law then in force, it was declared that:

> "No application for a renewal shall be refused by the Board unless it be proved that the licensee has been guilty of an infraction of the provisions of this by-law, or unless the number of licences are reduced, in which case the licences shall be reduced in order of the last issued."

There was not even a suggestion of infraction of the by-law or of a reduction of the number of licences, so that it was plainly the duty of the Board to grant the renewal. No action was taken at that meeting, and after repeated adjournments the application was refused on the 11th of January, 1911. Such refusal was a denial of the applicant's clear right.

The personnel of the Board changed after the municipal elections, held on the 15th of January, 1911, and William Manson replaced the former mayor as chairman of the Board, but the other two commissioners were re-appointed for 1911. The plaintiff persisted, before the new Board, in his application for a renewal, and in the alternative, applied for a new licence. These applications were considered, and finally, in March, denied. The professed ground of this denial was that the hotel was within 300 feet of a church, within article 7 of the by-law. This ground was the last resort of those who resisted the renewal, and was not even mooted, as far as the evidence before us shews, until the 8th of March. The so-called church is a hall, the lower storey of which was used by a religious body for public worship, but the upper storey was rented for other purposes. This building clearly was not "a building occupied exclusively as a church."

MACDONALD, C.J.A.

The question which has given me the most trouble is as to whether the Board as constituted after the 15th of January, 1911, can be commanded to do what undoubtedly the Board as theretofore constituted should have done, and could have been

compelled to do. We were not referred to any authority on this branch of the case, but I find that the question was dealt with in England in the Exchequer Chamber in appeal from the Court of Queen's Bench in *The Mayor and Assessors of Rochester, in re the Parish of St. Nicholas* v. *The Queen* (1858), 27 L.J., Q.B. 434. The majority of the Court in that case sustained the order of the Court of Queen's Bench granting a writ of *mandamus* directed to the new mayor and old assessors to revise the burgess list for the previous year, notwithstanding that the time fixed by statute within which it should have been done had expired. There was there a sharp difference of opinion among the judges, and while one may entertain a doubt as to the correctness of that decision, yet I think the doubt arises largely by reason of the peculiar terms of the order, which directed, not the old board, nor the new board, but certain persons from each, to do an act which ought to have been done by the old, and in default of that, by the new board. Here we have no such complication. The whole question is, can the successors in office of the members of the Board who ought to have renewed the licence be compelled by *mandamus* to renew it? In the case above referred to, Martin, B., at p. 436, delivering the judgment of the Chief Baron and himself, said:

"It seems to us that *The King* v. *Sparrow* (1740), 2 Str. 1,123, and *The King* v. *The Mayor of Norwich* (1830), 1 B. & Ad. 310, are authorities upon the point, and that the principle of those cases establishes the doctrine that the Court of Queen's Bench ought to compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of them has passed, and if the public officer, to whom belongs the performance of the duty, has in the meantime quitted his office, and has been succeeded by another, we think it is the duty of the successor to obey the writ, and to do the act when required, which his predecessor has omitted to perform."

And again, at p. 437:

"Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment (*mandamus*), we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

We have here also the fact that the application for a renewal was persisted in by the plaintiff before the new Board, and that that Board also denied him justice. The action of the old Board did not, in my opinion, preclude the new Board from dealing

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with the matter. It was not as if there had been a judicial decision. The old Board refused to perform the duty clearly imposed by the by-law, and therefore, in my opinion, the matter was in no sense *res judicata* when it came before the new Board. It was also urged that because a new by-law was passed omitting the part quoted above, so as to make it discretionary with the Board to renew the licence, a *mandamus* would not lie. The change in the by-law was not made until the 20th of March of this year, long after the old Board had refused to obey the law, and the new Board had had the opportunity to obey. The order appealed from was made when the renewal should have been in force, and when it would have been unaffected by the change in the by-law. I do not think the change in the by-law affected the matter. The Board has not been deprived of power to renew, and as at the time the wrong was done no exercise of discretion was required, but simply the doing of a ministerial act, I think the order appealed from is right.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: I would allow this appeal. I think the learned judge had no authority to order the present Board to consider the plaintiff's application according to the by-laws in force when it was first made. On the 11th of January, 1911, Prudhomme's application was refused by the old Board, and on the 8th of March it was refused by the new Board. Both these applications were under by-laws now repealed. On the 20th of March the new code of by-laws came into force, and on the 28th of March the plaintiff's application was again dismissed.

In my opinion, any application made after the change in the by-laws must be governed by the amendments. The plaintiff can have no vested right to have a renewal under the by-laws in force at the time he obtained his licence.

MARTIN, J.A.

MARTIN, J.A.: Unless bad faith on the part of the Licence Commissioners can be established, the order appealed from cannot clearly, in my opinion, be supported, and as no satisfactory evidence of such bad faith has been adduced, the appeal should be allowed.

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

Judgment accordingly, with costs to the respondent.

Solicitors for appellants: *Carss & Bennett.*
Solicitors for respondent: *Woodworth & Creagh.*

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PURDY v. PURDY.

CLEMENT, J.
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PURDY v. PURDY

Practice—Divorce and Matrimonial Causes Act, section 16—Decree Absolute in first instance—Amendments to English Act.

There is no provision, under the divorce law in force in British Columbia, for granting a decree *nisi* in the first place.

Statement

PETITION for divorce on behalf of husband on the usual statutory grounds, tried by CLEMENT, J. at Vancouver on the 2nd of December, 1910.

Creagh, for the petitioner.
No one appeared for the respondent or co-respondent.

Argument

At the conclusion of the evidence, counsel for the petitioner moved for a decree absolute, submitting that he was entitled to this under section 16 of the Divorce and Matrimonial Causes Act (R.S.B.C. 1897, chapter 62), and pointing out that the amendments to the English Divorce Act providing for the granting of a decree *nisi* were not in force in this Province, and therefore that the practice which had heretofore obtained in this Province of granting a decree *nisi* in the first instance was not correct.

Judgment

CLEMENT, J.: I agree that there is no provision under our Divorce Act for granting a decree *nisi,* but I do not like to depart from the practice which has obtained in this Province for such a long time. However, if you insist on it, I think you are entitled to the order asked for.

Decree absolute made.

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CUMMINGS v. THE CORPORATION OF THE CITY OF VANCOUVER.

Municipal law—Highway—Non-repair—Liability of municipality—Vancouver Incorporation Act, 1900, sections 218, 219; 1909, Cap. 63, section 10—Defect in sidewalk—Knowledge—Evidence to go to jury.

Plaintiff was injured by stepping into a hole in a sidewalk within the municipal limits, there being no evidence of how the hole came to be there, or whether the municipal authorities had actual knowledge of its existence. Under their Act of incorporation, the control of the thoroughfares is vested in the Corporation, and there is also imposed upon them the duty of keeping them in repair, and it is also made unlawful for a third person to interfere with the streets or sidewalks without permission.

Held, on appeal, affirming the verdict and judgment at the trial, that the breach of the duty to repair gave a right of action to a person injured; that in the circumstances the jury might infer that the sidewalk was broken by defendant Corporation, or with their permission; and that where by reasonable care and diligence they could and ought to know that streets require repairing, the Corporation are liable if they neglect to do so. The existence of the defect here might be strong evidence of neglect to discover it.

Per MARTIN, J.A. (expressing no opinion on the question of liability): There was no evidence from which it might be proved or reasonably inferred, that the hole was made by defendant Corporation; nor that they had, or ought to have had notice of it. The case should, therefore, have been withdrawn from the jury.

APPEAL from the judgment of MURPHY, J. and the verdict of a jury in an action for damages tried at Vancouver on the 31st of March, 1911.

Statement

The appeal was argued at Victoria on the 13th of June, 1911, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Craig, for appellant (defendant) Municipality: There is no evidence of the length of time the hole complained of had been allowed to be there, and it is submitted that there is no evidence on which the jury could find that the City had made the hole. The statutory duty cast upon the City is not a duty to keep the

sidewalks always in repair, but only a duty to repair it when they had notice it was not in repair.

A. H. MacNeill, K.C., for respondent (plaintiff): The defendants should have raised this point in the pleadings. The onus is on the City to shew that they did not give consent to the hole being made, and therefore it is not necessary for us to meet the possible presumption that it had been done by a trespasser: *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534. We desire now, on notice given to appellants, to submit additional evidence.

Craig: This is a preliminary matter and should have been brought forward at the opening. My case is now argued, and my friend has had the benefit of my argument. An application was made below to admit new evidence, was dismissed, and that has not been appealed from.

MacNeill: The new evidence is so clear and strong that it is, in my view, necessary for the decision of the case.

Argument

[MARTIN, J.A.: Is not that the best and clearest argument in support of the necessity of having these motions made at the opening of the appeal?]

This is an instance of a person who has been successful at the trial applying for leave to bring new evidence to sustain his judgment. Usually it is the unsuccessful party who makes the application to bring new evidence.

Per curiam: The application must be refused.

Craig, in reply.

Cur. adv. vult.

7th November, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff was injured by stepping into a hole broken in the permanent cement sidewalk in one of the defendants' streets, and left in an unguarded condition. The evidence does not disclose by whom this hole was made. The only question submitted to us was whether or not there was evidence to go to the jury of defendants' responsibility for the condition of the sidewalk. The plaintiff relies upon section 219 of the Vancouver Incorporation Act, 1900, as amended in 1909 by chapter 63, section 10. In *McPhalen* v. *Vancouver* (1910), 15 B.C. 367, I held, on the construction of section 219, the amend-

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ment of 1909 not being in force at the time of that accident, that the City was liable for non-repair. Section 219 is now re-inforced by the amendment, and as the section now reads, I think it cannot be successfully argued that a breach by the defendants of the duty to repair should give no right of action to the person injured. Proof that this dangerous hole existed in the sidewalk was at least *prima facie* evidence of non-repair. If defendants had any excuse to offer, such, for instance, as that the hole was made by a third person, and that defendants had no notice, even if this would avail, as to which I express no opinion, the defendants failed to offer any, and the plaintiff's *prima facie* case has not been disturbed.

MACDONALD, C.J.A.

Again, by section 218 of the said Act, the control of this street is vested in the defendants, and it is declared to be unlawful for anyone to interfere with the surface without their permission. The character of the work done in the breaking of the sidewalk was such, in my opinion, as to entitle the jury to infer that it was done by defendants, or with their permission, and as there is no evidence to rebut this inference, the plaintiff has sufficiently proven his case.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: By section 219 of the Vancouver Incorporation Act, 1900, it is enacted that every public street shall be kept in repair by the Corporation.

In my opinion, we should construe this section to repair so as not to impose upon the Corporation a liability for a thing which no reasonable care and skill could obviate. The language is consistent with making the Corporation liable where by reasonable care and diligence they can and ought to know that the streets require repairing, and where by the exercise of reasonable care and skill they can be kept repaired. This, I think, is a fair construction of the statute, having regard to the fact that the defendants are a public body having a duty imposed upon them to do a thing which, even with the exercise of the utmost care and diligence, cannot always be done.

In Comyn's Digest, Vol. 1, p. 405 (B) Action upon the case for Misfeasance, it is said: "An action upon the case does not

lie, where a man has not sufficient notice of his duty." Mr. *MacNeill* argues upon this principle that there was not sufficient evidence to justify the judge permitting the case to go to the jury.

In my opinion, the whole of the circumstances must be taken into consideration by the judge. The size and nature of the excavation; the place, having regard to the fact whether it is in the centre of the business portion of the town or in only the outskirts of the city.

If the hole was large and the place central, the jury might properly reach the conclusion that, with the exercise of reasonable care, they could not have been ignorant of its existence. Ignorance under such circumstances would not excuse them.

The fact that the Corporation did not offer any evidence as to granting permits, may properly influence the jury: *Brown* v. *Commissioner for Railways* (1890), 15 App. Cas. 240 at p. 251. And why could not the judge say to himself: The statute having cast upon the Corporation this duty to repair, it will depend upon the view taken by the jury as to the character and location of the hole, whether the onus is or is not shifted on to the defendants to shew that they had, or could have had, no knowledge of its existence, or that it was done by a third person. In short, the nature and location of the hole might be pregnant evidence that the Corporation had neglected their duty to discover its existence.

IRVING, J.A.

Stephens, in his Digest (Evidence Act, 1896), says (p. 111):

"In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved, which may be possessed by the parties respectively."

The case of *Hollis* v. *Young* (1909), 1 K.B. 629, illustrates the rule that very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side.

I would dismiss the appeal.

MARTIN, J.A.: With all due respect for the view taken by the learned trial judge, I am of the opinion that this appeal must be allowed, because there is no evidence from which it may

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be proved, or even reasonably inferred, that the hole in the sidewalk was made by the defendant Corporation, nor that it had notice, or ought to have had notice of it. The judgment entered rests only upon a presumption, which cannot be sufficient, nor is there, indeed, any ground for it, because the hole may lawfully have been made by various other statutory bodies, or by the owner of adjoining premises in lawfully making a sewer connection, or customary excavation beneath the foot pavement by permit, or by a mere trespasser. It surely cannot be the law, where an actionable wrong may have been done by, say, three different persons, that the injured party may, without further proof, arbitrarily fasten the liability on any one of them that he may choose to select for that purpose.

MARTIN, J.A.

GALLIHER, J.A.

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

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellants: *J. G. Hay.*
Solicitor for respondent: *J. E. Bird.*

DUNSMUIR v. LAST CHANCE MINING COMPANY, LIMITED.

MURPHY, J.
1911
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Agreement—Effect of cancellation—Severable covenants—Extra-lateral rights.

Where, in an agreement between the parties, the first clause contained a declaration of title, and subsequent clauses gave a right of mining with a power of cancellation under certain contingencies:—

Held, that the agreement was severable, and that the exercise of such power related to the operative clauses only and did not affect the clause containing the declaration of title.

CASE STATED by consent, asking the opinion of the Court on an agreement between the parties. Argued at Vancouver before MURPHY, J. on the 8th of November, 1911. The plaintiff was the owner of, *inter alia,* the mining claims known as the World's Fair and Maude E. and the defendant Company owned the Last Chance and Blue Jay mineral claims, adjoining the plaintiff's claims. The defendant Company's claims were located prior to the plaintiff's and carried extra-lateral rights, and relying on these rights, the defendant Company carried on mining operations in the World's Fair. The plaintiff accordingly brought an action for an injunction and damages, alleging trespass. The defendant Company justified the trespass on the grounds of extra-lateral rights and counterclaimed. This action was compromised by an agreement dated the 3rd of January, 1905, which recited the ownership above referred to; that the defendant Company had been extracting ore from the World's Fair mineral claim; and that it had been agreed that the action should be discontinued; "and that in consideration thereof this agreement with regard to the said minerals should be entered into." The agreement continued:

Statement

"Now it is hereby covenanted by the parties hereto respectively with the other of them and declared between them as follows:

"(1) That all the ore and minerals under the surface of said World's Fair and Maud E. mineral claims is the property of the said James Dunsmuir."

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Subsequent clauses gave the defendant Company the exclusive right of mining for a limited period in a specific part of the said claims, subject to the provisions contained in the agreement. Clause 7 provided for the cancellation of the agreement as follows:

Statement

"7. If the said Company shall not work said property continuously as aforesaid or if any sum or sums which may become due to the said James Dunsmuir as aforesaid shall not be paid as aforesaid or if there shall be a breach of any covenant of agreement herein on the Company's part contained or if any proceedings shall be commenced to wind up the Company or if execution shall issue against its goods or chattels or if judgment shall be obtained against it and remain unsatisfied for ten days then it shall and may be lawful for the said James Dunsmuir, his executors, administrators and assigns in any or either of said events and notwithstanding any previous waiver of the right so to do to cancel this agreement by giving to the said Company notice in writing to that effect, which notice may be given by posting the same in some post office by registered mail addressed to the Company at Cody aforesaid Sandon P.O."

The stated case further set forth that the plaintiff had cancelled the agreement pursuant to said clause 7, whereupon the defendant Company continued to carry on operations in the World's Fair claim, claiming that such cancellation had divested the plaintiff of all rights that had accrued to him by reason of such agreement, and that, therefore, they were entitled to mine in pursuance of their alleged extra-lateral rights. Accordingly the present action was started and an injunction obtained, the substantial point in the opinion of the Court being whether or not said cancellation referred to more than the operative part of the agreement.

Argument

S. S. Taylor, K.C., and *H. W. R. Moore,* for the plaintiff: The pleadings in the two actions which form part of the case shew clearly that this agreement was intended to settle all points at issue between the parties for all time. The writ asked only for an injunction restraining the defendant Company's mining in the World's Fair claim, but the agreement also relates to the Maud E. There would have been no object in including the Maud E. unless it had been the intention to settle all questions of extra-lateral rights that could ever arise. The plaintiff has always disputed the alleged extra-lateral rights of the defendant Company. Paragraph 1 of the agreement is a recognition by the defendant Company, for valuable consideration, of the jus-

tice of the plaintiff's position, and, having accepted that consideration, they are now estopped from disputing it. This agreement is clearly severable, and if it is not so construed, it will put the parties in a ridiculous position.

The defendant Company's claim in effect is that they can put themselves in a better position by reason of their own default. The provision in paragraph 4 of the agreement, that, until the royalty is paid, the ore shall "remain" the property of the plaintiff shews that the whole agreement is based upon the assumption that the minerals belong to the plaintiff and that he is merely giving a licence to mine them to the defendant Company. The cancellation clause refers merely to this licence to mine, and is a necessary and ordinary precaution for the protection of the plaintiff.

In any event clause 1 of the agreement is a declaration of title which has the effect of vesting in the plaintiff any rights which might otherwise have been in the defendant Company. The agreement being under seal, the well-established principle that the cancellation of a deed is not retroactive in effect comes into force. These minerals, quite apart from the plaintiff's original title, were vested in him by this agreement immediately upon the execution thereof, and the plaintiff can only be divested of this property upon the execution of a proper deed reconveying the same to whoever might be entitled.

Argument

Davis, K.C., and *Lennie,* for the defendant Company: This agreement was never intended as a final settlement of the question of the defendant Company's extra-lateral rights; it was merely a suspension of hostilities. The document starts with the words "This agreement," and the power given to cancel the agreement in clause 7 refers to the whole document, which embodies the arrangement between the parties, and not to a portion thereof, consequently, when the plaintiff chose to stop us from mining, we were thrown back upon our original rights. There is nothing ridiculous about this interpretation, for it is quite evident that all the plaintiff wanted was to make a sale of his ore. This he did on favourable terms, getting a large royalty, without any of the trouble, risk or expense incident to mining operations. We ask the Court to adopt the ordinary rule of

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construction, which is, that where it is possible, the language in an agreement should be given its ordinary meaning. When clause 7 speaks of cancelling the agreement, we say that that clause means just what it says, and that the wording should not be strained. The plaintiff's interpretation involves the insertion of the words "clauses 2 to 8 of" in clause 7 before the words "this agreement." If it had not been contemplated that the litigation might under certain conditions be revived, the action would not have been discontinued merely. It would have been dismissed. The principle that the cancellation of a deed is not retroactive in effect does not apply to a document of this character.

Argument

Taylor, in reply: The plaintiff could not have permitted this action to have been dismissed, as in his pleadings he sets up a claim of title, consequently a dismissal of the action would be a cloud on his title. It should be noted, too, that the defendant Company counterclaimed, alleging extra-lateral rights, and as the action was discontinued, the counterclaim must be taken to have been dismissed; so that this argument is against the defendant Company. There is nothing to shew that the plaintiff was merely looking for a chance to sell his ore; on the contrary, the whole circumstances shew that he was merely trying to protect his property. It is not necessary, in order to find for the plaintiff, to insert any words into the agreement. The word "agreement" has two meanings, and in clause 7 it is used in the sense of the agreement between the parties that the defendant Company should be allowed to mine upon the terms laid down. The fact that the document itself starts with the words "This agreement" is merely coincidence, as it may just as well have started "This indenture."

10th November, 1911.

Judgment

MURPHY, J.: In this matter it is admitted by counsel on both sides that the letter of the 12th of March, 1906, operated as a cancellation under clause 7 of the agreement of the 3rd of January, 1905. It only remains to determine what is the effect of such cancellation, and this involves an interpretation of the agreement.

If the object in view in entering into the agreement can be ascertained from its wording, and from the circumstances surrounding its execution insofar as such are admissible, the intention of the parties is arrived at. These surrounding circumstances are set out in the case stated. Was the object a mere suspension of the litigation then being carried on, subject to its being commenced *de novo* on the happening of any of the contingencies set out in paragraph 7, provided the notice therein referred to should be given, or was it the settlement once and for all of the ownership of the minerals underlying the ground owned by the plaintiff in this action? This ownership was the real question involved in said pending litigation. The wording of the agreement, in conjunction with the pleadings, seems to me to clearly indicate that the object was the final determination of the ownership of the minerals, not only in the World's Fair claim, but also in the Maude E. mineral claim, which adjoins the World's Fair claim in such a position that if the defendant Company's contention as to the apex of the vein they were working in the World's Fair ground were correct, it might well be that such vein ran also into the Maude E. claim. In fact, if the vein continued to run in the same direction as it was taking in the World's Fair ground, as indicated by defendant Company's tunnels on the map made part of the case stated, it must necessarily do so.

Judgment

A perusal of the pleadings shews that the Maude E. claim was not mentioned in them in any way. The first recital of the agreement, however, is to the effect that the plaintiff is the owner not only of the World's Fair, but of the Maude E. claim. If the object of its execution were merely the suspension of pending litigation, there could then be no reason for introducing the Maude E. into the agreement. But not only is it introduced into the first recital, but the first clause of the agreement is a declaration unqualified in any way that plaintiff is the owner of all ore and minerals in both the World's Fair and Maude E. mineral claims. The introduction of this claim into the agreement in this way, to my mind, makes it impossible to conclude that the object of the agreement was other than the final settlement, not only of pending, but of any future ligitation which might pos-

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sibly arise out of defendant Company's contention insofar as the plaintiff's property was concerned.

The only thing in the agreement which at first sight militates against this view is the recital that the pending action should be discontinued. When, however, the statement of claim is read, and when it is remembered that Mr. Dunsmuir was plaintiff in that litigation also, the difficulty disappears. The statement of claim, paragraph 3, specifically asserts ownership of the World's Fair claim, "with the minerals therein and thereunder." To have agreed to have such action dismissed rather than discontinued might have seriously impaired the plaintiff's title.

Judgment

Again, I think the agreement is clearly severable, paragraph 1 embodying the declaration contemplated by the opening operative words, and the remaining paragraphs containing the covenants, or what is referred to in paragraph 7 as the agreement. Paragraph 1 is in form declaratory, and deals with the whole question of ownership of both the World's Fair and the Maude E. mineral claims and the ore and minerals thereunder. Paragraph 2 grants a right "subject to the provisions herein contained," to mine a small part of the ore in the World's Fair claim. "The provisions herein contained" are, I think, undoubtedly all that follow said paragraph 2, and particularly those contained in paragraph 7. I hold, therefore, that the cancellation puts an end to all the paragraphs of the agreement from and including paragraph 2 to the end, but does not affect paragraph 1, which remains a valid and binding declaration as between the parties, and the questions submitted are to be answered accordingly.

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Bailment—Storage—Lien for charges—Common law lien—Goods sold under hire purchase agreement—Storage by vendee—Sale of Goods Act, R.S.B.C. 1897, Cap. 169, section 37.

R. had purchased a quantity of furniture from plaintiffs under a hire purchase agreement, which was duly registered, but, before completing her payments, she stored the furniture with defendant, a warehouseman, but without the knowledge of plaintiffs, who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Defendant refused to deliver until his warehouse charges were paid. GRANT, Co. J. at the trial, was of opinion that defendant had a lien on the goods at common law for his charges, and, in the absence of any tender by plaintiffs for same, dismissed the action. Plaintiffs appealed.

Held, on appeal, that defendant was not entitled to retain the goods until his charges were paid.

IRVING, J.A. dissenting.

APPEAL from the judgment of GRANT, Co.J. in favour of defendant in an action claiming damages for wrongful detention of goods stored with him in circumstances shortly stated in the headnote. Statement

Donaghy, for plaintiffs.
R. M. Macdonald, for defendant.

25th May, 1910.

GRANT, Co. J.: This is an action to recover damages alleged to have been sustained by the plaintiffs through the defendant wrongfully depriving them of certain furniture entrusted with the defendant as a warehouseman by one Miss Reynolds, to whom the plaintiffs had sold said goods under a lien clause note. The material facts of the case are not in dispute. The plaintiffs are dealers in furniture and house furnishings and the defendant is a warehouseman in Vancouver. GRANT, CO. J.

The plaintiffs sold to one E. A. Reynolds certain furniture and house furnishings, the payment thereon to be made by instalments, and took from her lien clause notes, which said

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notes were duly filed with the registrar in compliance with the Sale of Goods Act, chapter 169, R.S.B.C. 1897. Some time before the bringing of this action the said Miss Reynolds brought certain of the goods to the defendant's warehouse to be stored. The evidence of the defendant is that the goods so brought would not bring more than $50 if sold by auction, which I take to be the value of the goods. There is no question but that the goods came to the defendant in the usual way as a warehouseman for storage, and that the charge for same was to be one dollar per month, and that at the time they came to the defendant he had no knowledge whatever that there was any claim against the goods on the part of any one other than the said Miss Reynolds. His attention was not called to the existence of any lien clause note or notes, and the first he heard of the existence of same was when the plaintiffs demanded the delivery up of the goods.

At the time of receiving said goods on storage, the defendant gave Miss Reynolds a warehouse receipt for same, which is still outstanding. When the goods were demanded back by the plaintiffs, the defendant refused to deliver them up without the payment of the warehouse charges since the time of receiving same, and indemnity against the warehouse receipt. The plaintiffs refused either to pay warehouse charges or the indemnity, and at once instituted this action.

GRANT, CO. J.

On the part of the plaintiffs it was contended that the defendant's alleged claim came under the designation of mortgage mentioned in section 25 of the Sale of Goods Act, and that the filing of said lien notes was a notice to the world of the plaintiffs' claim in the said goods, and that the defendant is estopped from denying want of notice.

I cannot hold that the defendant's claim for lien is that of mortgage. To my mind it is not of that nature, and section 25 has no application in this case. In my judgment the parties are driven to their rights at common law, and unless I have misread the law in this connection, under the facts proven here the defendant has a lien at common law on the goods so stored with him for reasonable storage charges.

It was never contended at the trial that a charge of one dollar

per month was other than a reasonable charge, and in the absence of a payment or tender of such reasonable storage charge, the action will not lie. The action is, therefore, dismissed with costs.

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The appeal was argued at Vancouver on the 24th and 25th of November, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Donaghy, for appellant, was stopped.

R. M. Macdonald, for respondent, called upon, referred to *Singer Manufacturing Co.* v. *London and North Western Railway Co.* (1894), 1 Q.B. 833; *Canadian Gas Power and Launches, Limited* v. *Schofield* (1910), 15 O.W.R. 847.

Argument

Cur. adv. vult.

10th April, 1911.

MACDONALD, C.J.A.

MACDONALD, C.J.A. [after stating the facts]: The substantial point for our determination is whether or not the defendant was entitled to retain the goods until his warehouse charges were paid. I do not think the defendant is within the protection of section 37 of our Sale of Goods Act, and therefore, unless he is entitled at common law to a lien as against the plaintiffs, the true owners, for charges incurred by Miss Reynolds, the plaintiffs are entitled to succeed. There is no evidence in this case to shew under what circumstances Miss Reynolds warehoused the goods with defendant. It is conceivable that circumstances might arise requiring the purchaser under such a hire agreement to warehouse the goods for their protection and preservation, and that in such case the same principle might be applied as was applied in *Keene* v. *Thomas* (1905), 1 K.B. 136. On this point I wish at present to express no opinion. It is unnecessary, because, as I have said, we have no evidence of the circumstances under which the goods were warehoused.

The case, then, I think, is very clear, and is governed by the principles laid down or to be gathered from the following cases: *Helby* v. *Matthews* (1895), A.C. 471; *Buxton* v. *Baughan*

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(1834), 6 C. & P. 674; *Singer Manufacturing Co.* v. *London and South Western Railway Co.* (1894), 1 Q.B. 833. The railway company claiming the lien in the latter case, succeeded only because it was a common carrier and entitled to a lien as such.

I think the appeal should be allowed and a new trial ordered for the purpose of assessing the damages. Costs thrown away by the first trial to abide the result, and the costs of this appeal to be paid by the respondent.

IRVING, J.A.: The question involved is as to the right of a warehouseman to be paid his storage charges, and to be indemnified against liability under the terms of the warehouse receipt given by him, before he delivers up to the true owner goods which have been deposited by a purchaser holding possession under a hire agreement.

The goods were bought from the plaintiffs by a Miss Reynolds in November, 1908, under an agreement. She left Vancouver after depositing the goods with the defendant, who had no actual knowledge that there was any claim against the goods by the plaintiffs. The purchase agreement was duly filed in compliance with the Sale of Goods Act, R.S.B.C. 1897, chapter 169.

The plaintiffs' argument before the County Court judge was that the filing of the purchase agreement was notice to the world, and that is the true effect of section 25, although our Act does not say in so many words that filing shall have that effect. The defendant's answer was that the registration was not notice to them, and that they had acquired, by virtue of the Factors Act, R.S.B.C. 1897, chapter 4, a title to hold the goods against the true owners.

IRVING, J.A.

I do not think our provisions as to registration amount to notice to all the world. The registration system was inaugurated in 1892, shortly after the decision by the Court of Appeal in *Hugill* v. *Masker* (1889), 22 Q.B.D. 364, to the effect that a memorandum in writing, so as to satisfy the Statute of Frauds, was not necessary between the parties to a hire purchase agreement. Had it been the intention to make the registration notice to the world, we would have found language simi-

lar to that used in the Bills of Sale Act. In *Esnouf* v. *Gurney* (1895), 4 B.C. 144, DRAKE, J. thought the non-registration would not render the agreement void as against execution creditors, as they were not mentioned in the Act.

The Factors Act, intended to apply to mercantile transactions, in my opinion has nothing to do with this case, either directly or indirectly, by means of section 37 (2) of the Sale of Goods Act. The second sub-section of section 37 placed Miss Reynolds, the person disposing, in the position of a mercantile agent as defined in the Factors Act, "in possession of the goods with the consent of the owner." The definition of "mercantile agent" is not shewn to be applicable to Miss Reynolds, and if it were applicable to her, she could only get the benefit of the Act by shewing that what she did was in the ordinary course of mercantile business.

IRVING, J.A.

It may be thought that this would work a hardship on the warehouseman. As pointed out by Bray, J., in *Weiner* v. *Gill* (1905), 2 K.B. 172 at p. 182, that in these days of hire purchase agreements, owners of goods are every day parting with possession, without authorizing the person to whom possession is given to pledge the property, it is the duty of the person to inquire. If the mere parting with possession were sufficient, there would be no necessity for the Factors Acts. Those Acts were passed to extend estoppels. I would dismiss this appeal.

GALLIHER, J.A.

GALLIHER, J.A. [after stating the facts]: The plaintiffs contended in the Court below and before us that they were protected by section 25 of the Sale of Goods Act, R.S.B.C. 1897, chapter 169.

I agree with the learned trial judge that this section does not apply. Section 37, sub-section 2 of the above Act, which is identical with section 9 of the Factors Act, was relied upon by the defendant, but I do not think that the storing with a warehouseman comes within the meaning of the words "sale, pledge, or other disposition" in the Factors Act.

This leaves the parties to their remedy at common law. Under the circumstances of this case, has the defendant a lien at common law? I think not. The plaintiffs knew nothing

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of the storing of these goods (in fact, as between them and Miss Reynolds, the latter was not to remove the goods from her premises without plaintiffs' consent), and Miss Reynolds had no authority to make any bargain binding on the plaintiffs for storing same.

The cases cited by Mr. *Macdonald* on this point are, I think, distinguishable.

I would allow the appeal and direct a new trial for the assessment of damages.

Appeal allowed, Irving, J.A. dissenting.

Solicitors for appellants: *D. Donaghy.*
Solicitors for respondent: *J. E. Bird.*

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GEORGE v. MITCHELL.
GEORGE v. HUMPHREY BROTHERS.

Water and watercourses—Riparian rights—Proof of ownership—Obstruction—Damage—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.

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:

Held, further, 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.

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ACTION for wrongful obstruction and diversion of water. Tried by GREGORY, J. at Kamloops in November, 1910. The facts are set out in the reasons for judgment.

W. Norman Bole, K.C., and *Macintyre,* for plaintiff.
S. S. Taylor, K.C., and *Cornwall,* for defendants.

11th May, 1911.

GREGORY, J.: Although these are separate actions, they were tried together, and can conveniently be dealt with in one judgment.

The plaintiff's claim is for wrongfully obstructing and diverting water, which she claims by virtue of several water records obtained under the provisions of the Provincial statutes.

So far as the plaintiff's evidence, as to the damages sustained, and the conditions, etc., of the several watercourses referred to, is concerned, I am unable to accept it, and refer to the memoranda of the two views had by me, which for convenience are attached hereto. The plaintiff has not satisfied me that she has suffered any damage by reason of the use made by the defendants (in either action) of water claimed by her, and in view of my holding that she acquired no special water privileges under the Provincial statutes, it is unnecessary to say anything further upon that branch of the case.

Judgment

It is admitted that the lands and waters in question all lie within the railway belt. As to the plaintiff's water records, there is nothing in the records themselves to shew under what statute they were granted, nor do they contain in themselves any means of connecting them with his lands, *viz.*: Lots 410, 453 and 454, and the evidence establishing any connection is very vague.

The plaintiff's lands were originally acquired by pre-emption and purchase from the Crown since September, 1876, and it must be assumed that the water records were obtained under the provisions of the laws in force at the time of the making of the records respectively, *viz.*: section 48 of statute No. 5, British Columbia statutes, 1875, and the Land Act, 1884, chapter 16, section 43. The statute of 1875 repealed the previous pro-

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vision for recording water contained in the Land Ordinance, 1870.

At the time the lands were acquired from the Crown, and the water records obtained, British Columbia had already become a part of the Dominion of Canada, under the Terms of Union taking effect from the 20th of July, 1871, under the provisions of an Imperial order in council dated the 16th of May, 1871.

In the *Burrard Power Company, Limited* v. *Rex* (1911), A.C. 87, the Judicial Committee of the Privy Council decided that the Dominion Parliament has exclusive legislative jurisdiction over the lands and water within the railway belt until such lands are settled. In that case the water record in dispute was granted on the 7th of April, 1906, being subsequent to the B.C. statutes, 1880, chapter 11; 1883, chapter 14, and 1884, chapter 14, granting to the Dominion the railway lands in fulfilment of the Terms of Union, and it was argued by Mr. *Bole* that the exclusive authority of the Dominion Parliament dates from the passage of those statutes, and not from the date when the Terms of Union became effective. I cannot accept this contention. It appears to me that the enactment of those statutes must be likened to the execution of a conveyance in fulfilment of a previous agreement for sale. This, it seems to me, is the effect of the judgment of the Privy Council already referred to, as appears from the following passage in the judgment at p. 94:

Judgment

"The object of article 11 of the Terms of Union was on the one hand to secure the construction of the railway for the benefit of the Province, and on the other hand to afford the Dominion a means of recouping itself in respect of the liabilities which it might incur in connection with the construction, by sales to settlers of the land transferred. To hold that the Province, *after the making of such an agreement,* remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement, for if the Province could by legislation take away the water from the land, it could also by legislation resume possession of the land itself, and thereby so derogate from its own grant as to utterly destroy it."

Although the plaintiff's lands were acquired from the Crown after the coming into force of the Terms of Union, her title thereto may be good under article 11, which permits the Province to sell or alienate by pre-emption, subject to making the same good to the Dominion out of contiguous public lands. Her

title to the water stands upon an entirely different footing. The Terms of Union contain no such reservation with reference to water, and the *Burrard Power* case has decided that the Provincial Legislature had no jurisdiction over the waters which she claims under her Provincial records.

As to the plaintiff's contention that she has been deprived of her right as a riparian owner, the evidence was at no time directed to establishing that she had any such rights. Assuming that she had, the defendants in both cases had similar rights, and perhaps superior rights, because they were situated further up, or nearer to the source of the stream; they had, therefore, at least equal privileges. The plaintiff's complaint is not that she was deprived of water required for domestic purposes, but for the purpose of irrigation. If the rights of a riparian owner include the right to take water for purposes of irrigation, surely the defendants are entitled to use it as well as the plaintiff for that purpose, and in neither case did the defendants use any more than was necessary; in fact, they were unable to obtain nearly sufficient for their own requirements. In such circumstances they were under no obligation to allow their own fields to burn up, and let the water go down to the plaintiff, even if it would ever reach there, to enable her to do with her fields what the defendants were unable to do with theirs.

There will be judgment for the defendants, with costs, in both cases.

Action dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

ANDERSON v. MUNICIPALITY OF SOUTH VANCOUVER (p. 401).—Reversed by Supreme Court of Canada, 22nd December, 1911. See 45 S.C.R. 425.

HUSON *et al.* v. HADDINGTON ISLAND QUARRY CO., LIMITED, *et al.* (p. 264).—Reversed by the Judicial Committee of the Privy Council, 27th July, 1911. See (1911), A.C. 722.

ISHITAKA v. BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED (p. 299).—Reversed by Supreme Court of Canada, 6th December, 1911. See 45 S.C.R. 302.

REX v. ALLEN (p. 9).—Reversed by Supreme Court of Canada, 31st March, 1911. See 44 S.C.R. 331.

WILKINSON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 113).—Affirmed by Supreme Court of Canada, 6th November, 1911. See 45 S.C.R. 263.

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.

FAKKEMA v. BROOKS SCANLAN O'BRIEN COMPANY, LIMITED (p. 461).—Affirmed by Supreme Court of Canada, 3rd April, 1911. See 44 S.C.R. 412.

MCPHALEN v. THE CORPORATION OF THE CITY OF VANCOUVER (p. 367).—Affirmed by Supreme Court of Canada, 6th November, 1911. See 45 S.C.R. 194.

VANCOUVER LUMBER COMPANY v. THE CORPORATION OF THE CITY OF VANCOUVER (p. 432).—Affirmed by the Judicial Committee of the Privy Council, 27th July, 1911. See (1911), A.C. 722.

SWIFT v. DAVID (p. 70).—Affirmed by Supreme Court of Canada, 7th December, 1910. See 44 S.C.R. 179.

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ADMIRALTY LAW — *Charter-party — Construction of—Cargo—Damage by accident to ship—Refusal by consignees to pay freight—Captain discharging freight at independent wharf to his own order—Demurrage—Claim of ship for detention by Admiralty process.*] Hind, Rolfe & Co. chartered the Notre Dame d'Avor at Antwerp to load cement to be delivered at Astoria, Wash., U.S.A. This was a joint project of Hind, Rolfe & Co. and Parratt & Co. Shortly after leaving port the Notre Dame d'Avor had a collision with the English ship Rathwaite. Part of her cargo was jettisoned and part sold at Falmouth, England. She put back to port and was repaired. In an action in the English Admiralty Court, arising out of the collision, it was decided that the Notre Dame d'Avor was not to blame, the action against her was dismissed and she was allowed her counter-claim. On leaving again, she came into contact with the breakwater at Falmouth, whereby some of her plates were opened up and further damage to cargo ensued. During the voyage a portion of the cargo was sold to Balfour, Guthrie & Co., and by them to R. V. Winch & Co. Balfour, Guthrie & Co., by their contract, were obliged to accept only such portion of the cargo as might be in good condition. The ship's destination was diverted from Astoria to Victoria, where a portion of the cargo was discharged and she proceeded to Vancouver to unload the balance. After discharging a portion, some difficulty arose as to payment of freight, and the captain refused to wholly unload until the freight was paid. The consignees refusing to pay freight on the damaged portion of the cargo, the captain finished discharging at an independent warehouse to his own order. *Held*, that the ship was absolved from liability for damage to cargo by the terms of her bill of lading, and that the captain was entitled to payment of freight as the cargo

ADMIRALTY LAW—*Continued.*

came over the side of the ship; in other words, that he was not bound to deliver it until after payment of freight; and that he was justified in removing his ship to another dock and discharging his cargo there to his own order. On the question of demurrage: *Held*, that as the captain was justified in the action he took with regard to the cargo, he was entitled to demurrage caused by the plaintiff's failure to pay freight. The claim for detention of ship by Admiralty process was disallowed, inasmuch as the judge found that plaintiffs acted in good faith and that no gross negligence was shewn. PARRATT & CO. AND HIND, ROLFE & CO. v. THE SHIP NOTRE DAME D'AVOR. **381**

AGREEMENT—*Construction of—Sale of interest in option on mining property—Alteration of terms by different agreement—Ambiguity.*] Defendant Warner and his associates had an option on the Mother Lode and Kootenay Belle mineral claims, upon which they had paid certain sums of money. He went to New York, where he formed the acquaintance of the three plaintiffs, whom he told he was trying to put these two claims on the market at a lump sum of $300,000. They secured for him an introduction to Mr. McMartin, who was disposed to take a sixteenth interest in the two claims for $180,000. Part of this sum was to be expended in the construction of a smelter; a portion was to go in satisfaction of the payment of the option, and the remaining portion, $84,000, was to go to Warner and his associates. Just before the agreement was drawn up, and in contemplation of the agreement, Warner and the three defendants entered into an agreement that they should accept in full satisfaction of their charges $18,000. This sum was to be payable as and when McMartin met his payments of the options at a ratio of ten per cent. The defendants were also to

AGREEMENT—*Continued.*

receive an interest in the shares retained by Warner and his associates. McMartin shortly afterwards came to British Columbia, examined the properties and refused to go on with the agreement that he had entered into, but he made two separate agreements. He agreed to buy the whole of the Mother Lode for $75,000 and to undertake the payment of the bond. So that as to the Mother Lode he was to become the sole owner, Warner would not retain the six-tenths and therefore the defendants could not obtain their one-tenth interest in respect to that. McMartin entered into the other agreement with reference to the Mother Lode, under which he agreed to pay $60,000 and to satisfy the bond. The result of these two agreements would be that the defendants would receive only $135,000 in cash. CLEMENT, J. at the trial, was of opinion that the effect of the agreement was that they should be paid 10 per cent., $13,500, and not the $18,000 mentioned in the document because, as he said, it was only to be ten per cent. of the amount to be paid as arranged in any subsequent agreement. *Held*, on appeal (IRVING, J.A. dissenting), that the trial judge was right. RUTHRAUFF *et al.* v. BLACK AND WARNER. - - - - - - - **359**

2.——*Construction of — Separate and independent covenants—Sale of shares in company—Guarantee of assets—Deficiency —How to be ascertained—Reference to arbitration—Condition precedent.*] In an agreement for the sale of shares in a lumber company, were the following covenants: "(2.) It is understood and agreed and the parties of the first part hereby guarantee that the assets of the said Company with their approximate values consist of the lands and tenements and goods and chattels set forth in the schedule hereunto annexed. (6.) The said parties of the first part further guarantee that the balance of the assets of the said Company over and above the logs, stock in store, piles, boom sticks and boom chains are truly and correctly set forth in the said schedule and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered the value of said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part and a third by the two arbitrators so named as aforesaid, and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement." *Held*, on appeal (*per* MACDONALD, C.J.A. and GALLIHER, J.A.), that, assuming the clauses to be independent, the defendant, not having counterclaimed under clause 2, he should not be allowed to amend on the appeal, as to do so would be simply allowing him to set up a cross-action. *Per* IRVING, J.A.: That it was intended by clause 6 that any deficiency should be decided by arbitration. *Per* MARTIN, J.A.: Defendant should have been permitted to establish the deficiency, if any, in Court, and then gone to arbitration to determine the value of such deficiency. Judgment of MORRISON, J. affirmed, MARTIN, J.A. dissenting. CUDDY AND BOYD v. CAMERON. **451**

3.——*Construction of — Timber — What constitutes—Cruisers' estimates of contents of a timber area from a marketable point of view.*] In an agreement for the transfer of certain stock of a lumber company, it was provided the vendor was "to give a satisfactory guarantee . . . that the quantity of *timber* on the different tracts of land, as shewn by the statement . . . . copy of which is attached hereto . . . . is true and accurate, it being the intention, and made one of the conditions of this trade that the *timber* shall at least run equal in quantity to the number of feet shewn in the attached statement." And that the "second parties are to have until September 1, 1907, to cruise and verify the figures . . . . regarding the quantity of *timber* on said various tracts, and in the event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented . . . . first party is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of *timber* estimated . . . . " And "in event second party fails to find the quantity of *timber* on said tracts . . . . ": *Held*, that the term "timber" as here used, was intended to include not merely that which was presently marketable at the time of entering into the agreement, but that future conditions, as to market, logging facilities and improved means of transportation should be taken into consideration in estimating the value of the tracts in question as timber areas. SWIFT *et al.* v. DAVID. - - - - **275**

AGREEMENT—*Continued.*

4.——*Effect of cancellation—Severable covenants—Extra-lateral rights.*] Where, in an agreement between the parties, the first clause contained a declaration of title, and subsequent clauses gave a right of mining with a power of cancellation under certain contingencies: *Held*, that the agreement was severable, and that the exercise of such power related to the operative clauses only and did not affect the clause containing the declaration of title. DUNSMUIR v. LAST CHANCE MINING COMPANY, LIMITED. **499**

ASSESSMENT—*Mining company—Taxable income—Set off for losses.*] The respondent Company operated a smelter in which it treated the ores of its own mine, the Mother Lode, and also ores of other mines which were called custom ores. During the years 1902-07 the Company did not make any return of income, and the assessor having received certain information with regard to the Company's profits, assessed it for a sum of between $700,000 and $800,000 during the period mentioned. The Company appealed from this assessment, and a court of revision and appeal levied upon only $249,000 for income. Under the provisions of the Assessment Act, 1903 (Form 9), the Company was entitled to deduct from its gross income "loss and bad debts arising out of the business from which (the) income is derived, irrecoverable and actually written off during the year, but not otherwise," and under this there was deducted the loss which the Company sustained in treating its own ores. By section 10 of the Assessment Act, as enacted by section 5 of chapter 38, 1900, a tax of two per cent. is levied on the assessed value of ore or mineral bearing substances obtained from land and which have been sold or removed from the land, but ore-bearing mines not yielding $5,000, and placer or dredging mines not producing a gross value of $2,000 per annum, are entitled to a refund of half the tax in the case of ore producing mines, and the whole of the tax in the case of placer or dredging mines. This tax is in substitution for all taxes upon the land, and also all personal property used upon the mines, so long as the land and personal property are used in connection with the working of the mines. In arriving at his assessment, the assessor took the quarterly returns of the Company, made for the purposes of the mineral tax, in connection with

ASSESSMENT—*Continued.*

their own mines and ore, and comparing these figures with the operating expenses of their own mines, it was found that their own ores were treated at a loss. The profit and loss statement shewed a profit, and as the only other source of revenue was the treatment of custom ores, he claimed that the losses on the Company's operations with its own ore must have been met with the profits from custom ores, and he accordingly assessed the Company for income on the profit shewn in its statement and on the deficit shewn in the treatment of its own ores. *Held*, on appeal, affirming the finding below, that the result of the Company's operations in the treatment of its own ores was "income" within the definition in the Act, and therefore was used in "producing or endeavouring to produce income during the year" thus coming within the class of deductions allowed by the Act. *Re* BRITISH COLUMBIA COPPER COMPANY, LIMITED, ASSESSMENT. - - - **184**

ACTION—*Survival of cause of—Death of plaintiff—Injury to personal estate—Property in timber licences applied for—Fraudulent procurement of timber licences—Revival.*] In an action for a declaration that defendants were trustees for the plaintiff in certain timber licences, or in the alternative for $250,000 damages, it was alleged that the plaintiff had done all things necessary under the Land Act to obtain special timber licences; that before he made his formal application for such licences, the defendants applied and falsely represented to the commissioner that they had performed all the statutory requirements to entitle them to licences for the same limits; that the plaintiff had filed a protest against defendants' application; that before the determination of such protest, or of its having been heard, the defendants fraudulently represented to the commissioner that plaintiff had not complied with the Land Act as to staking or advertising, etc., and that he had withdrawn his protest and was willing that licences should be granted to defendants. Plaintiff died after action brought, and his executrix applied to be substituted as plaintiff. *Held*, on appeal, reversing the order of GREGORY, J. (MARTIN, J.A. dissenting), that the cause of action did not survive to the executrix. *Per* MACDONALD, C.J.A.: The right given to an individual by the Land Act to apply for a licence to cut timber on Crown Lands, though all conditions precedent to the actual grant of the

ACTION—*Continued.*

licence have been fulfilled, does not confer upon the applicant any legal or equitable interest in the subject-matter applied for. WILSON v. MCCLURE *et al.* - - **82**

BAILMENT—*Storage—Lien for charges—Common law lien—Goods sold under hire purchase agreement—Storage by vendee—Sale of Goods Act, R.S.B.C. 1897, Cap. 169, section 37.*] R. had purchased a quantity of furniture from plaintiffs under a hire purchase agreement, which was duly registered, but, before completing her payments, she stored the furniture with defendant, a warehouseman, but without the knowledge of plaintiffs, who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Defendant refused to deliver until his warehouse charges were paid. GRANT, Co. J. at the trial, was of opinion that defendant had a lien on the goods at common law for his charges, and, in the absence of any tender by plaintiffs for same, dismissed the action. Plaintiffs appealed. *Held*, on appeal, that defendant was not entitled to retain the goods until his charges were paid. IRVING, J.A. dissenting. D. A. SMITH, LIMITED v. CAMPBELL. **505**

BANKS AND BANKING — *Promissory note — Liability — Indorsement—Collateral security — Promise — Absence of consideration.*] The Terminal City Sand and Gravel Company gave a promissory note to C. G. Johnson & Co., who indorsed it and handed it to the bank as security for general advances. The note was not paid when it fell due, and was charged by the bank back to Johnson & Co., who then sued for the amount. While the note was under discount, and after it was due, the defendant voluntarily handed to the bank a share certificate in his favour from the Terminal Gravel Company (a concern in which defendant was a director and shareholder). This certificate, the evidence shewed, was not deposited in pursuance of any previous arrangement, though probably in the hope of securing forbearance in the future. *Held*, (1) that defendant was liable upon his indorsement, and (2) in the circumstances in which the share certificate was deposited, it was not available in satisfaction of the claim upon the note. JOHNSON v. MCRAE. - - - - - - - - - - **473**

CHATTEL MORTGAGE—*Illegal seizure of goods under—Notice of sale—Sale of goods claimed—Refusal of offer of payment — Improvident sale — Damages.*] Where plaintiff, holding under an overdue chattel mortgage, was given notice that foreclosure and sale would take place at a certain time, and where his solicitor attended just before the time fixed for sale, intending to pay off the mortgage, and was told that he was too late, that the chattels were sold: *Held*, (IRVING, J.A. dissenting), that the seizure was unlawful. ISHITAKA v. BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED. - - - - - - - **299**

COMPANY LAW— *Agreement — Construction of—Separate and independent covenants—Sale of shares in company—Guarantee of assets—Deficiency—How to be ascertained—Reference to arbitration—Condition precedent.*] In an agreement for the sale of shares in a lumber company, were the following covenants: "(2) It is understood and agreed and the parties of the first part hereby guarantee that the assets of the said Company with their approximate values consist of the lands and tenements and goods and chattels set forth in the schedule hereunto annexed. (6.) The said parties of the first part further guarantee that the balance of the assets of the said Company over and above the logs, stock in store, piles, boom sticks and boom chains are truly and correctly set forth in the said schedule and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered the value of said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part and a third by the two arbitrators so named as aforesaid and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement." *Held*, on appeal (*per* MACDONALD, C.J.A. and GALLIHER, J.A.), that, assuming the clauses to be independent, the defendant, not having counterclaimed under clause 2, he should not be allowed to amend on the appeal, as to do so would be simply allowing him to set up a cross-action. *Per* IRVING, J.A.: That it was intended by clause 6 that any deficiency should be decided by arbitration. *Per* MARTIN, J.A.: Defendant should have been permitted to establish the deficiency, if any, in Court, and then gone to arbitration to

COMPANY LAW—*Continued.*

determine the value of such deficiency. Judgment of MORRISON, J. affirmed, MARTIN, J.A. dissenting. CUDDY AND BOYD v. CAMERON. - - - - - - - **451**

2.——*Chattel mortgage by company—Registration of in County Court instead of with Registrar of Joint Stock Companies—Rectification of error—Ex parte order—Party aggrieved thereby—Procedure to set aside such order.*] Where a bank, in the ordinary course of business, obtained a chattel mortgage from a company indebted to it, but without the knowledge of other creditors, and there was no evidence of concealment, and registered such mortgage in the County Court instead of with the registrar of joint stock companies, the bank was granted an extension of time within which to register. In an action to set aside the mortgage, it was *Held*, that, there being no evidence of *mala fides* or dissimulation on the part of the bank, the transaction should not be set aside. *Semble*, if a party aggrieved by an order made *ex parte*, becomes possessed of facts against the making of the order, he should at once apply to the judge who made it to set it aside, and not call upon another judge to investigate the circumstances under which it was made. [An appeal from the above was dismissed.] MORRISON, THOMPSON HARDWARE COMPANY, LIMITED v. WESTBANK TRADING COMPANY, LIMITED, *et al.* - - - - **33, 314**

3.——*Promotion expenses—Shares given in payment—Directors—Shares for acting as directors—Powers of Company—Ultra vires — Void transaction — Ratification — Action brought by shareholders.*] The three plaintiffs were shareholders in the defendant Company, of which the defendant Melekov was the promoter and organizer. One F. A. King, carrying on business in Seattle in the name of the Keystone Oil Company, entered into an agreement with the defendant Company, whereby the latter were to acquire King's business connections in Vancouver, the consideration being 25,000 shares. It was further alleged that there was an agreement between Melekov and the Company's directors, that in consideration of his services in promoting the Company he was to receive a bonus of 25,000 shares. It was arranged that this bonus was to be given to Melekov through the transaction entered into with King; that is to say: the agreement with King should shew the consideration to him for

COMPANY LAW—*Continued.*

the acquirement of his business should appear as 50,000 shares, and it should be understood that 25,000 should go to Melekov instead of there being a transfer direct to him from the Company. It also appeared that certain shares had been given to some persons to become interested in the Company and act as directors; one director getting 1,000 shares as a bonus for consenting to be a director. The prospectus of the Company stated that there were no promoters' profits, and it was, as alleged, to get over this representation that the bonus to Melekov was carried out through the King transaction. MORRISON, J. at the trial, came to the conclusion that Melekov had rendered valuable service to the Company; that the directors were justified in recompensing him by approving of King's transfer to him of the 25,000 shares; that such action on their part was a matter of internal arrangement ratifiable by the shareholders if such were necessary, and that the plaintiffs had no status to bring the action. Plaintiffs appealed on the grounds that the issue of the shares to Melekov and certain of the directors was *ultra vires* and illegal as being made in pursuance of a fraudulent agreement, and that the issue of the shares was a fraud on the Company. *Held*, on appeal (*per* MACDONALD, C.J.A. and MARTIN, J.A.), that the plaintiffs' not having shewn that the Company had declined to bring the action, or that any proper effort had been made by them to get the Company to do so, had no status to bring the action themselves in the circumstances (IRVING, J.A. dissenting). *Per* IRVING, J.A.: That the issue of the 25,000 shares to Melekov was illegal, and the contention that such issue could be ratified by the shareholders was fallacious. ROSE *et al.* v. BRITISH COLUMBIA REFINING COMPANY *et al.* - - - - **215**

CONTRACT — *Verbal — Consideration — Promise—Loss through carelessness and incompetence.*] 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 that 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

COMPANY LAW—*Continued.*

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. WATTSBURG LUMBER CO. v. W. E. COOKE LUMBER CO. - - **154**

COPYRIGHT—*Registration—Right to in book containing pirated material—Authorship—What constitutes.*] The plaintiff published a "Directory of Vancouver Island and Adjacent Islands for 1909," and registered same under the Copyright Act. The defendant Company later published "Henderson's British Columbia Gazeteer and Directory for 1910," and the plaintiff complained that in its preparation the defendant Company made such an unfair use of his, the plaintiff's, directory by copying names from it that the publication of the defendant Company's book was an infringement upon his copyright. The defendant Company had published directories in previous years and their defence was that plaintiff's directory was itself the result to a large extent of an unfair use of, particularly, the defendant Company's British Columbia Directory for 1905, the Victoria Directory for 1908, and the Directory for Western Canada for 1908. *Held*, that the plaintiff could not, within the meaning of the term under the Copyright Act, be considered as the "author" of his own directory, the material being partly pirated, to what extent it being impossible to determine. BAIN v. HENDERSON. - **318**

CRIMINAL LAW—*Affirmation—Conditions precedent to—Duty of judge—Discretion—New trial—Criminal Code, Sec. 1,018.*] At the trial the evidence on which the accused was convicted was given by a witness who was a Church of England minister, but not actively following his profession. On being offered the Bible to take the oath in the usual form, he said: "I affirm." No objection was made at the time, but on the cross-examination being reached, he was asked: "What is your objection in making an affirmation, then, instead of taking an oath on the Bible?" He answered: "I believe it is optional with the Court," and, "I consider that that is a private matter of my own discretion." To a statement that for private reasons he had retired from the diocese of British Columbia, he was asked: "Are those reasons that you do not believe in Christian doctrines?" He answered: "I appeal to the judge whether I have to reveal

CRIMINAL LAW—*Continued.*

my private conscience to the gentleman." He was not asked whether he had conscientious scruples against the taking of an oath on the Scriptures. His appeal was sustained and the defence was not allowed to cross-examine witness on his religious belief. Two questions were reserved for the opinion of the Court of Appeal: (1) Could I consider the statements of the said William George Hollingworth Ellison as evidence, inasmuch as he did not state that his objection to taking an oath was on grounds of conscientious scruples? (2) Should I have allowed accused's counsel to cross-examine said witness on the question of his belief in Christian doctrines, and was the accused prejudiced in his defence by my refusal? *Held*, on appeal, that a witness claiming the right to affirm instead of taking the oath must make it clear to the Court that he has conscientious scruples to the taking of an oath. *Per* IRVING, J.A.: The facts in this case shewed that the witness in demanding to affirm, and refusing to take the book, really objected to being sworn. REX v. DEAKIN. - - **271**

2.——*Assault—When justifiable—Warning—Force—Legal justification—Case stated—Finding of fact.*] In a charge of assault committed by the accused when resisting removal from property of which he was placed in care, justification was set up and also warning. The trial judge made no finding on the question of warning, as he came to the conclusion on the evidence that as the assault was savage, hot-tempered and unnecessary, it could not be justified by any warning even if warning had been proved. *Held*, on appeal, that in the circumstances a finding as to warning was immaterial. REX v. KINMAN. - **148**

3.——*Certiorari—Writ of—Recognizance by party applying for—When to be ordered—Crown Office Rule (Criminal) 36.*] It is too early, on an application for a writ of *certiorari*, to order the party applying to give the recognizances provided for by Crown Office Rule 36. REX v. FERGUSON. - - - - - - - - **287**

4.——*Evidence—Accused testifying on his own behalf—Witness at preliminary hearing not present at trial nor absence accounted for—Accused in his evidence referring to such witness—Right of Crown to cross-examine thereon—New trial—No substantial wrong under Sec. 1,019 of the*

CRIMINAL LAW—*Continued.*

Code.] On a trial for murder, the defence set up temporary insanity caused by over-indulgence in alcohol. This defence broke down, and the prisoner was found guilty. The killing was actually proved. A witness at the preliminary hearing, who testified to certain threats by the prisoner against the deceased, was not produced at the trial, nor his absence accounted for. Prisoner entered the box and was sworn on his own behalf. In his evidence, he endeavoured to cast suspicion upon the witness referred to, and in cross-examination, counsel for the Crown asked prisoner certain questions as to his recollection of the absent witness's evidence at the preliminary hearing. This was objected to and ruled out. There was other evidence of threats by accused against deceased, independently of that objected to. *Held* (IRVING, J.A. dissenting), that there had been no substantial wrong done the prisoner within the meaning of section 1,019 of the Code, and that he was not entitled to a new trial. REX v. ALLEN. - **9**

5.——*Grand jury returning true bill without taking evidence—Sent back by judge to take evidence and determine on such evidence—Discretion.*] A grand jury having returned a true bill without calling any of the witnesses named on the indictment, but upon reading depositions taken at the preliminary hearing, which had not been legally submitted to them, the assize judge sent them back with instructions to take the evidence of the witnesses whose names were on the back of the indictment and determine upon such evidence whether they would bring in a true bill, which they did. *Held*, that the judge had properly exercised his discretion and was right in dismissing a motion to set aside a conviction had in a trial upon such true bill. REX v. THURSTAN. - - - - **326**

6.——*Indictment — Preferment of by Crown counsel—Direction by acting Attorney-General—Amendment—Evidence—Criminal Code, Secs. 871, 872, 873 and 889.*] Where the accused had been committed for trial by a magistrate the indictment was preferred by counsel acting for the Crown at the assize, and contained a direction to that effect signed by the acting Attorney-General. *Held*, that the indictment was properly preferred under section 872 of the Code. *Semble*, the acting Attorney-General may exercise the powers conferred on the Attorney-General by the Criminal Code, section 873, and in any event a direction to "counsel acting for the Crown at the Victoria Spring Assize, 1911," is a sufficient direction. *Held*, also, that in an indictment for rape, the averment that the prosecutrix is not the wife of the accused may be proved by any lawful evidence from which such a conclusion may be properly inferred. *Held*, also, that an amendment to the indictment changing the christian name of the prosecutrix was properly allowed under section 889. *Per* IRVING, J.A.: That a point raised by prisoner's counsel for the first time in his reply cannot be considered by the Court of Appeal, the point not having been taken in the case reserved. *Per* GALLIHER, J.A. (dissenting): That on the question of non-consent, there was not evidence upon which the jury could reasonably find the prisoner guilty on a charge of rape. REX v. FAULKNER. - - - - - - - **229**

7.——*Practice — Crown Office Rules — Statute, construction of—Crown Costs Act, 1910—Effect of upon criminal cases—Unsuccessful application for certiorari.*] Where an applicant for a writ of *certiorari* in a criminal proceeding was unsuccessful, the Crown asked for and was granted costs, it being *Held*, that the Crown Costs Act, 1910 (B.C. Stat., Cap. 12), which provides that no Court or judge shall have power, except under the provisions of a statute expressly authorizing it, to order that the Crown shall pay or receive costs in any cause, matter or proceeding, does not apply to criminal proceedings. REX v. JONES. **117**

8.——*Speedy trial—Election—Right to change—Absence of sheriff on such election —Right of civil Courts to try offenders for theft from naval premises.*] A person committed for trial and out on bail, appearing voluntarily with his counsel, before a County judge and electing to be tried speedily, cannot change his election so as to choose trial by jury. The fact that the sheriff was not present on such occasion, or that he did not notify the judge of the accused coming before him for election, does not invalidate such election. An objection to a conviction by a criminal Court of a person for receiving property stolen from the navy, on the ground that such an offence should be dealt with by a naval Court, is bad. REX v. DAY. - - - - **323**

9.——*"Wilfully obstructing" police constable in the discharge of his duty.*] Actual

CRIMINAL LAW—*Continued.*

physical interference with an officer in the discharge of his duty is not necessary to constitute obstruction. A menacing attitude entailing on the officers, as here, more than normal vigilance and care, such as keeping back by means of a drawn revolver, a mob apparently intent on rescuing a prisoner, is an obstruction. The fact that a person is in custody of a police officer, and is being taken to the police station, is *prima facie*, though rebuttable, evidence that the custody is lawful. REX v. MCDONALD. **191**

DAMAGES—*Judge increasing at trial—Propriety of.*] Remarks on the propriety of a judge increasing, during the trial, the damages claimed, from $150 to $1,000. GODDARD v. SLINGERLAND. - - **329**

EVIDENCE—*Lost deed—Secondary evidence of—When admissible—Order XXXIA., Marginal Rule 370r—Practice.*] In an action for redemption brought by the representative of a deceased mortgagor (one of two co-mortgagors) against the assignee of the original mortgagee, said assignee being also the wife of the still living co-mortgagor, who was also a party defendant, the latter was examined for discovery. On such examination he deposed to a settlement of accounts between himself and his co-mortgagor in 1892, under which he assumed the payment of the mortgage in question. He also deposed that as part of such settlement he received a deed of the property in question, which deed he had lost. At the trial the plaintiff put in evidence the first part of the above deposition. *Held*, that the second part should also go in under Order XXXIA., Marginal Rule 370r. *Held*, further, that on this evidence, corroborated by a letter written by the deceased co-mortgagor to the tax collector, the action was rightly dismissed at the close of the plaintiff's case. Judgment of CLEMENT, J. affirmed. SEMISCH v. KEITH AND KEITH. **62**

FRAUD—*Memorandum within Statute of Frauds.* - - - - - - - - - **201**
See VENDOR AND PURCHASER.

HUSBAND AND WIFE - - **321**
See PRACTICE. 15.

2.——*Alimony—Application for cancellation of judgment—Material necessary in support of—Order LXX., Supreme Court Rules, 1906.*] Where a defendant in an alimony action, in default in his payments, applies for an order cancelling the judgment against him, he must make a full and frank disclosure of his affairs since the obtaining of the judgment, together with the reasons for his default. MELLOR v. MELLOR. - - - - - - - - **1**

INCOME - - - - - - - - **184**
See ASSESSMENT.

JURISDICTION - - - - - **264**
See PRACTICE. 6.

LAND REGISTRY ACT, 1906, SECTION 74—*Agreements of similar date—Registration of at different times—Right of action—Priorities—Statute—Construction of.*] Plaintiff and defendant both purchased adjoining properties from a common vendor on the same date. Defendant registered his title on the 25th of June, 1910, and plaintiff registered on the 26th of July following. Plaintiff for two or three years occupied as a tenant the property which she purchased, and during such tenancy her house was drained into the adjoining property, which was purchased by defendant. On the 3rd of June defendant disconnected and stopped the drain at the boundary of his lot, and denied the plaintiff's right to use the drain and cesspool. GRANT, Co. J., before whom the action was tried, gave judgment for plaintiff in $1,000 damages on the ground that defendant, not having any registered title, under section 74 of the Land Registry Act, had no right to tear up or stop the drain. *Held*, on appeal, that neither party having any registered ownership in the lands at the time of the occurrences in question, the appeal should be allowed and the action dismissed. *Per* IRVING, J.A.: Reservations of easements should be shewn on subdivision plans. GODDARD v. SLINGERLAND. - **329**

2.——*Failure to register—Priority of registration.*] The defendant Edwards is the owner of certain property in Kamloops, fronting on the Thompson River. In July, 1909, he agreed to sell to the plaintiff for $2,500, the sum of $600 down, and the balance on time. The first payment was made but there was some delay about the second on account of Edwards having only a possessory or unregistered title to a part of the property, and he was endeavouring to complete his title. In July, 1910, the defendant Clark wanted to purchase some property on the river front, and was

LAND REGISTRY ACT, 1906, SECTION 74—*Continued.*

shewn the property in question by the defendant Benson, a real estate agent. Clark told Benson that if he could secure it at anything under $6,000 he would pay him $300 on his bargain. Benson thereupon saw the plaintiff, Chapman, and tried to purchase the lot from him, but being unable to arrange terms with him, went to Edwards, who agreed to sell the property at $5,500. He made an agreement for sale to Benson on the 30th of July, 1910, which agreement was at once assigned to Clark and placed in the Land Registry office for registration. Benson had reported to Clark his negotiations with Chapman, and about Chapman being in possession. GREGORY, J. gave judgment in favour of plaintiff for specific performance as to those lots to which the title was not in dispute, and as to the lot to which plaintiff had only a possessory title, it was decreed that plaintiff accept such title as Edwards had, and if that should not be acceptable, that there be an abatement of the purchase price and a reference to the registrar to settle the amount. Defendant Edwards appealed, and the appeal was dismissed on the ground that he had actual notice of Chapman's title, and could not be allowed in the circumstances to take advantage of section 74 of the Land Registry Act. CHAPMAN v. EDWARDS, CLARK AND BENSON. - **334**

LIBEL—*Contemptuous damages—Verdict for five cents—Costs.*] In an action for libel, where the plaintiff recovered only five cents damages, it was *Held*, following *Macallister* v. *Steedman* (1911), 27 T.L.R. 217, that he was entitled to costs, there being no evidence of any misconduct on his part or any reason shewn to deprive him of costs other than the smallness of the verdict. EMERSON v. FORD-MCCONNELL, LIMITED. - - - - - - - - - **193**

2.——*Finding by the jury that the article complained of "Did not amount to a libel"—Question of libel or no libel left entirely to the jury—No objection to the charge.*] Plaintiff was in 1910 an alderman of the City of Vancouver. At a meeting of the City Council held in March, 1910, he moved a resolution calling the attention of the authorities of adjoining municipalities to proposed real estate subdivisions, and asking them to look carefully into all subdivision plans submitted for their approval. He made some remarks in support of his resolution, in which he referred to the undue boosting of real estate by dealers, wild cat subdivisions, hotels on mountain tops, etc. The resolution and plaintiff's remarks were published in the News-Advertiser newspaper, and on the following day defendant wrote a letter to that paper commenting on plaintiff's remarks, and referred to plaintiff's connection with a hotel in Vancouver, the licence of which had been suspended by the licence commissioners, suggesting that plaintiff had used his position as alderman to secure the licence and was responsible for the conduct of the hotel business. Plaintiff then took action. A trial before CLEMENT, J. and a special jury resulted in a disagreement. On the second trial, before HUNTER, C.J.B.C. and a special jury, the verdict returned was that the article complained of "did not amount to a libel." Judgment was entered for the defendant accordingly, and plaintiff appealed. No objection was made to the charge to the jury. *Held* (IRVING, J.A. dissenting), that the question of libel or no libel was for the jury, and that the verdict should not be disturbed. *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461, not followed. HEPBURN v. BEATTIE. **209**

MALICIOUS PROSECUTION—*Reasonable and probable cause—Honest belief—Malice—Indirect motive—Reasonable care to ascertain facts—Motive—Nonsuit.*] Plaintiff was employed, in Vancouver, to proceed to the defendant Company's logging camp and work there as an engineer. He was given a pass, was also supplied with his meals on the journey. He arrived on Saturday, and before going to work on Monday morning he obtained a pair of working gloves at the Company's store. He worked for a few hours, had his dinner and left the camp without any explanation. The cost of transportation, meals and gloves were to have been deducted from his wages. The Company's manager having been advised of the facts, consulted the Company's solicitor, on whose advice an information was laid charging plaintiff with obtaining credit and goods under false pretenses, and plaintiff was arrested, tried and convicted, but afterwards released on the order of a judge. Plaintiff then brought action against defendant Company for malicious prosecution, and a jury found (1) that defendant Company had not taken reasonable care to ascertain the facts; (2) that they honestly

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believed the case laid before the magistrate; (3) that they were actuated by malice. Damages $500. *Held* (GALLIHER, J.A. dissenting), that the plaintiff should have been non-suited, as there was no ground for the first finding; that there was not absence of reasonable and probable cause, and no malice had been shewn. The appeal was therefore allowed. PRENTISS v. ANDERSON LOGGING COMPANY, LIMITED, AND JEREMIASON. - - - - - - - - **289**

MASTER AND SERVANT — *Amount paid by employer conveying injured servant to medical assistance—Such expenditure considered by jury in reaching verdict—Res judicata.*] In an action against an employer for injuries received by an employee [(1911) 15 B.C. 461] the evidence shewed that when the employee was injured, the employers paid some $686.30 in conveying the man to the hospital and defraying his medical expenses. Counsel for the employers brought this fact to the notice of the Court and jury during the trial, when plaintiff recovered a verdict of $4,500. The Company claimed the amount disbursed, sued and recovered judgment. *Held*, on appeal, that counsel for the employers, when he mentioned the amount in the former trial, did so with a view to mitigation of damages and that the jury evidently so considered it in arriving at their verdict. BROOKS SCANLAN O'BRIEN COMPANY, LIMITED v. RHINE FAKKEMA. - - - - **351**

2.——*Death of servant by collision between Company's cars—Fault of fellow servant—Negligence—Defective system—Finding of jury—Want of evidence in support—Statute, construction of—Action under Families' Compensation Act—Time limit—Limitation in Company's Act of incorporation.*] Deceased, a motorman, met his death in a collision between two cars of the defendant Company, on the 7th of November, 1908, but the writ in the action was not issued until the 2nd of August, 1909, the action being brought under Lord Campbell's Act. The questions at issue were: (1) Was the accident caused by the negligence of a fellow servant? On this point the facts were that the cars leaving Vancouver had a double line of track as far as a place called Cedar Cottage, after which there was only a single track. On foggy nights there was a watchman at Cedar Cottage to advise conductors and motormen as

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to the condition of traffic. The men in charge of the colliding cars were killed, so it was not possible to ascertain whether the watchman had advised the conductor or motorman whether the line was clear. The jury, on the evidence, found a defective system. *Held*, that the appeal from the verdict based on this finding should be dismissed, MARTIN, J.A. expressing no opinion as to there being no evidence to support such a finding. (2) Lord Campbell's Act gives a limitation of twelve months within which an action for damages caused by the death of a relative may be brought, so that the writ here was issued in ample time to comply with that statute. But in the defendant Company's Act of incorporation a limitation of six months is set for bringing actions to recover damages incurred by reason of the tramway or railway or works or operations of the Company. *Per* IRVING, J.A., following *Green* v. *B. C. Electric Ry. Co.* (1906), 12 B.C. 199: The limitation in the Company's statute was not applicable. *Per* MARTIN, J.A.: The section was applicable and the action was therefore barred. GALLIHER, J.A. expressed no opinion on this point. Remarks *per* MARTIN, J.A. as to the Court of Appeal following or being bound by the decisions of the late Full Court. McDONALD v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - **386**

3.——*Injury to servant in the course of his employment—Negligence.*] Plaintiff, a workman in the defendants' employment, lost the sight of an eye through being struck with an iron splinter from the ring of a wooden hammer used in caulking operations. The condition of the tool was brought by plaintiff to the foreman's notice immediately before the accident, not in the sense of its being dangerous, as similar tools in similar condition were often used, but as to its condition to do the work effectively. The foreman directed plaintiff, as time was important, to try to do the work with the hammer, and the accident occurred. There was no question of the foreman's competence, or that the tool as supplied by the employers was defective or dangerous. *Held*, on appeal, affirming the judgment of HUNTER, C.J.B.C., setting aside the verdict of the jury in favour of the plaintiff, that there had been no negligence on the part of the defendants; that if there was any negligence it was on the part of

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the foreman, a fellow servant, and it was shewn that he was a competent person for the position. KELLETT v. BRITISH COLUMBIA MARINE RAILWAYS COMPANY, LIMITED. - - - - - - - - - **196**

4.——*Injury to servant through defective system—Duty of employer to provide safe methods—Workmen following a system of their own.*] Where a defective system of "kicking in" cars into a drift in a mine has been long established and a workman continues to use that system as he found it on entering the master's service, the master is liable at common law for injury resulting to the workman from such user. Decision of MARTIN, J. affirmed, IRVING, J.A. dissenting. *Per* GALLIHER, J.A.: The same high standard of equipment should not be required on small tracks in underground mines as on railway systems generally, and a link and pin coupling would, in the circumstances, be sufficient. CARRIGAN v. THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED. - **157**

5.——*Negligence—Death ensuing from accident arising out of such negligence—Employee of railway travelling on a pass—Onus on Company to prove issue of pass—Fellow servant — Common employment.*] Deceased, an employee of defendant Company, was killed in a collision between the car of the defendant Company on which he was travelling to his work, and a freight car which had been allowed to get loose and run down grade alone. There was no proof of how this car got away. Some evidence was given of a pass from the Company having been found on the deceased, but not to shew that a pass had been issued to him over that portion of the line, nor was the pass produced. *Held*, that the onus was on the defendant Company to shew that deceased was travelling on a pass, and that it was not shewn that he was being carried in such circumstances as to make him a fellow servant with those operating the line. *Per* IRVING, J.A.: That the case had not been tried out, because the trial judge, after instructing the jury that defendant Company would not be liable if it was found that deceased was travelling on a pass by reason of the negligence of a fellow servant, asked the jury to find whether the accident was due to a defective system without explaining to them what constituted a defective system. WILKINSON v. BRITISH

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6.——*Railway—Death of servant resulting from injury in a collision on Company's line — Servant travelling on a pass — Whether printed condition on pass relieving Company of liability was known to servant —Res ipsa loquitur—Application of to relation between master and servant—Common employment.*] Deceased was employed in the defendants' workshops, and travelled to and from his work on a pass. The condition on the back of the pass, exempting the Company from liability for damages to person or property of holder of pass, was not signed by the workman. Deceased was a man skilled in his particular trade, and refused to work for the Company unless given transportation. The jury found as a fact that deceased was travelling on a pass, but that there was not sufficient evidence to shew that he was made acquainted with the conditions thereon, and gave a verdict for $9,000, which, on motion for judgment, was sustained by the trial judge. *Held, per* MACDONALD, C.J.A. and GALLIHER, J.A.: That the finding as to want of knowledge of the condition on the pass should not be interfered with. *Per* IRVING, J.A.: That the finding was against the weight of evidence. Deceased, while travelling on his employers' car, was injured, and subsequently died from his injuries, in a collision between a car which broke away or became detached from the motor which was pulling it and ran back down grade, crashing into the car occupied by deceased. Defendants, in their pleadings, admitted that the accident occurred through the negligence of fellow servants in the employment of defendant Company, but there was no other evidence of negligence. *Held*, on appeal, that it was for the plaintiff to shew that the accident was due to some specific act of negligence for which the defendants were responsible. Appeal allowed, and verdict set aside. FARMER v. THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - **423**

7.——*Statute, construction of—Workmen's Compensation Act, 1902—Alien dependants residing in a foreign country.*] The provisions of the Workmen's Compensation Act, 1902, awarding compensation to the dependants of a deceased workman in circumstances provided for in the Act, do not apply to alien dependants of such work-

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man resident in a foreign country. IRVING, J.A. dissenting. [Reversed by Privy Council, May, 1912.] KRZUS v. CROW'S NEST PASS COAL COMPANY, LIMITED. - **120**

8.——*Workmen's Compensation Act, 1902—Motion to set aside award under—Review of arbitrator's finding—Case stated under section 2, sub-section (3)—Engineering work—What constitutes under Act—Arbitration Act—Application of to proceedings under Workmen's Compensation Act, 1902.*] An arbitrator under the Workmen's Compensation Act, 1902, section 2, sub-section (3) having jurisdiction to settle any question as to whether the employment is one to which the Act applies: *Held* (IRVING, J.A. dissenting), that the only way to review the arbitrator's finding thereon is by a case submitted under section 4 of the Second Schedule. *Per* MORRISON, J., on the motion to set aside the award of the arbitrator: The work of clearing land from the natural growth thereon is not a work of construction, alteration or repair meant by the Act to be termed an engineering work. BASANTA v. CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - **304**

MECHANIC'S LIEN—Contractor furnishing *labour and materials for fixed sum—Work done under profit-sharing arrangement between contractor and his sons—Posting of receipted pay rolls—Wage earners—Material men—Mechanics' Lien Act, Secs. 6, 15—County Court.*] A contractor, building a house under a profit-sharing arrangement with his helpers, on completion of the work, not having any wages to pay, is not subject to section 15 of the Mechanics' Lien Act providing for the posting of a receipted pay roll. Further, where the contractor also supplies the materials, and no notice of claim is filed by any material man within the statutory period, the conditions of section 6, as to notice, do not apply to the contractor. GIDNEY v. MORGAN AND MORGAN. - - - - - - **18**

MINING LAW—*House erected in connection with mining operations—Land taken up as pre-emption—Lapse of rights under, and cancellation of pre-emption record—Land subsequently pre-empted by and Crown granted to another person—House as chattel under mining law or improvement on land under Land Act.*] In 1888, one Patterson erected a house on a portion of a pre-emption taken up by him in 1886. A small portion of the house, as shewn by a

MINING LAW—*Continued.*

survey made in 1903, was upon adjoining property, at the time of action held by plaintiffs under lease from the Crown. The house was built in connection with a mining venture of Patterson's, which did not prove successful, and before his death in 1891, he became indebted to William Palmer, defendant's testator, to whom the house and mining property were transferred as security. In 1894, one Morton, plaintiff's testator, obtained a pre-emption record to the same land, and a Crown grant in 1908. Various acts of ownership of the building were exercised by Palmer in the interval, but in April, 1908, defendant went upon the land and tore down and removed the building. It was given in evidence that Patterson had defaulted in his payments under the pre-emption record, and it had been cancelled, but when, or on whose application, was not shewn. By such cancellation, lands and improvements thereon become forfeited to the Crown under the Land Act. *Held*, on appeal (IRVING, J.A. dissenting), that the house was a chattel in connection with the mining property, that it did not pass to the plaintiff's testator under his pre-emption record as improvements on the land, and that, on the evidence, defendant or her husband could not be said to have abandoned the house, although its removal was not undertaken until 1908. Judgment of HOWAY, Co. J. reversed. TAYLOR AND SMITH v. PALMER. - - - - - - - - **24**

2.——*Title to mineral claims—Recording transfer — Mineral Act — Non-compliance with—Trustee in bankruptcy transferring claims to purchaser.*] Defendants were co-owners of certain mineral claims. S., in July, 1909, filed a petition in bankruptcy in a New York Court, which adjudged him a bankrupt and directed a reference. The petition, without in terms assigning any specific property, recited that S. was willing to surrender all his property for the benefit of his creditors, and included in a schedule of his personal property were his interests in the two mineral claims in question. On the 26th day of July G. was appointed trustee of S.'s estate. The point was not disputed that the bankruptcy proceedings were sufficient to transfer the claims to G. if the claims had been in New York State. On the 4th of September, 1909, S., being in default in his share of assessment work, defendant duly advertised, under section

MINING LAW—*Continued.*

25b, forfeiture of S.'s interest if the amount due was not paid within 90 days. On the 18th of October, G. sold the claims to plaintiff and executed a transfer of them. This transfer, with a certificate of G.'s appointment, were recorded in the mining recorder's office on the 4th of November, but the sale was not confirmed by the referee in bankruptcy until the 8th of October, 1910. Before the expiration of the 90 days under the advertisement, the amount due under S.'s default was tendered by plaintiff to defendant, who refused to accept it, and completed his forfeiture proceedings. S.'s mining licence expired on the 31st of May, 1908, was not renewed until the 14th of June, 1908; it expired again on the 31st of May, 1910, and was not renewed. At the time of the transfer of S.'s interest to plaintiff, neither the latter nor G. held a free miner's certificate. Plaintiff took one out on the 26th of October, 1909, and G. on the 16th of November, 1909. It was submitted for plaintiff that a mineral claim is a chose in action, and governed by the law of the place where the owner is; therefore S., being in New York, and having been adjudged a bankrupt by a Court of that State, the sufficiency of the transfer from him should be governed by the law there. *Held*, that in the absence of direct proof of domicile, and of authority for the latter proposition, it was quite consistent with the bankruptcy proceedings that S.'s domicile was elsewhere; that as the mineral claims were immovables within British Columbia, they were subject to British Columbia law (Mineral Act, R.S.B.C. 1897, Cap. 135, section 2); that the absence of a free miner's certificate at the time of the transfer was fatal in the case of S. and G. (section 9); that as all the proceedings alleged to constitute the transfer had not been recorded, section 50 was not complied with, and that the transfer to the plaintiff was not recorded within the time fixed by sections 19 and 49. Accordingly it had not been shewn that the plaintiff was the owner of an undivided one-third interest in the two mineral claims. BARINDS v. GREEN AND SILVERMAN. - **433**

MORTGAGE—*Duty of mortgagee—Interest of mortgagor—Leave to redeem—Assignment of mortgage—Power of sale—Notice to purchasers—Setting aside sale as made at undervalue—Equities between parties to the mortgage.*] In an instrument mortgaging certain land containing a stone quarry

MORTGAGE—*Continued.*

for $3,500, it was provided that on two months' default in payments the power of sale might be exercised without notice. Default occurred, but thereafter the mortgagee assigned the mortgage to the Chief Commissioner of Lands and Works, and it was then arranged between plaintiffs and the commissioner that a contractor was to take stone from the quarry for the erection of Government buildings, paying the Government a royalty which was to be applied on the mortgage for the benefit of the plaintiffs (mortgagors). The royalty paid under this arrangement reduced the mortgage to $1,150. The Chief Commissioner subsequently assigned this mortgage to defendant Company, who, presuming to act under the power of sale, sold the quarry to their co-defendants for $3,500. It was in evidence that the quarry was worth at least $20,000; that the sale was made without notice to anyone but the purchasers, and that the latter had sufficient knowledge of the value of the property to put them on their guard. Further, it was contended, for the plaintiffs, that the assignment of the mortgage by the commissioner did not vest the mortgage in the defendant Company, as there was no order in council of the Government authorising the assignment. In reply to this, it was submitted for defendants that to support such a contention the Attorney-General should have been made a party. *Held*, that the power of sale had not been exercised with proper regard for the interests and rights of the mortgagors, and that a sale so made should be made as a reasonably prudent man would sell his own property, and therefore that, in the circumstances, the sale should be set aside and plaintiffs allowed to redeem. *Per* GALLIHER, J.A.: That the Attorney-General was not a necessary party: also that there were no equities existing between the Government and the mortgagors (plaintiffs) which attached to the assignment from the commissioner to the defendant Company. HUSON *et al.* v. HADDINGTON ISLAND QUARRY COMPANY, LIMITED. - - **98**

2.——*Foreclosure—Power of sale—Exercise of—Order nisi for foreclosure—Order absolute never taken out—Sale of property—Knowledge of by mortgagor.*] A mortgagee having obtained an order *nisi* for foreclosure, never took out the order absolute. Negotiations were entered into and completed for the sale of the property to a

MORTGAGE—*Continued.*

third party in 1906. The mortgagor had knowledge of the sale. In 1911 he brought action to redeem the property. *Held*, that he had agreed to and did in fact abandon his rights, and by his conduct and delay had induced the mortgagees to alter their position on the faith that he had done so. *Jones* v. *North Vancouver Land and Improvement Co.* (1909), 14 B.C. 285; (1910), A.C. 317, followed. WILLIAMS v. SUN LIFE ASSURANCE COMPANY OF CANADA AND DAVID SPENCER, LIMITED. - **370**

MUNICIPAL LAW—*By-law regulating trade—Power to regulate does not include power to prohibit—Reasonableness—Intention of council in passing by-law—Object aimed at in by-law.*] A menagerie kept within the municipal area is not a nuisance *per se*. Where, therefore, a municipal council passed a by-law purporting to regulate the maintenance of a menagerie within the municipal bounds, but imposed such conditions as to make such maintenance virtually prohibitive, the by-law was held bad and was quashed. A by-law manifestly passed in pursuance of a particular section of the Municipal Clauses Act, and aimed at regulating or governing a specific matter, cannot be supported as applying to other matters. Thus, where a by-law was framed under sub-section 27 (*a*) of section 50 for regulating the keeping of wild animals in captivity, such by-law could not be supported under other provisions of the same section dealing with public health and sanitation. FRENCH v. MUNICIPALITY OF NORTH SAANICH. - - - - - - **106**

2.——*Franchise—Agreement between Tramway Company and Municipality for operation of trams—Necessity for approval of ratepayers—Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 64.*] A municipal council entered into an agreement with an Electric Railway Company for the operation of a service of tram cars within the municipality and connecting with another municipality. Conditions were imposed as to rates of fare at different points, and other provisions were made. Section 64 of the Municipal Clauses Act, 1906, provides for the obtaining of the consent of the ratepayers to the granting of any particular privilege, right or franchise. *Held*, on appeal, that the by-law granting this right to the Company should have been submitted to the ratepayers for approval. *Per* MACDONALD, C.J.A.: The power granted to

MUNICIPAL LAW—*Continued.*

the British Columbia Electric Railway Company by its incorporating Act of 1896 to construct and operate tramways in the cities of New Westminster and Vancouver and the highways between the limits of said cities, does not extend to the streets in question. *In re* POINT GREY ELECTRIC TRAMWAY BY-LAW. - - - **374**

3.——*Highway—Non-repair—Liability of municipality—Vancouver Incorporation Act, 1900, sections 218, 219; 1909, Cap. 63, section 10—Defect in sidewalk—Knowledge—Evidence to go to jury.*] Plaintiff was injured by stepping into a hole in a sidewalk within the municipal limits, there being no evidence of how the hole came to be there, or whether the municipal authorities had actual knowledge of its existence. Under their Act of incorporation, the control of the thoroughfares is vested in the Corporation, and there is also imposed upon them the duty of keeping them in repair, and it is also made unlawful for a third person to interfere with the streets or sidewalks without permission. *Held*, on appeal, affirming the verdict and judgment at the trial, that the breach of the duty to repair gave a right of action to a person injured; that in the circumstances the jury might infer that the sidewalk was broken by defendant Corporation, or with their permission; and that where by reasonable care and diligence they could and ought to know that streets require repairing, the Corporation are liable if they neglect to do so. The existence of the defect here might be strong evidence of neglect to discover it. *Per* MARTIN, J.A. (expressing no opinion on the question of liability): There was no evidence from which it might be proved or reasonably inferred, that the hole was made by defendant Corporation; nor that they had, or ought to have had notice of it. The case should, therefore, have been withdrawn from the jury. CUMMINGS v. THE CORPORATION OF THE CITY OF VANCOUVER. - **494**

4.——*Liquor licence—Board of Commissioners—Discretion of—Refusal of application for licence—Grounds for—Mandamus to new Board—Change in personnel—Hotel in neighbourhood of church—Building used for mixed religious and lay purposes.*] On the 17th of October, 1910, P. was granted a liquor licence for his hotel for a period ending on the 15th of January, 1911. On the 14th of December following, at the next

MUNICIPAL LAW—*Continued.*

regular meeting of the Board, he applied for a renewal. There was no objection lodged, nor was there any charge against the applicant as a licensee. After a number of adjournments, the application was eventually refused, on the 11th of January, 1911. The composition of the Board was changed on the 15th of January, 1911. P. applied to the new Board for a renewal, or, in the alternative, for a fresh licence. These applications were also finally refused on the 28th of March, 1911. On application to CLEMENT, J. a writ of *mandamus* was issued to the new Board ordering the granting of a licence unconditionally. On appeal from this order the Court was evenly divided. *Per* MACDONALD, C.J.A., and GALLIHER, J.A. (applying and following *The Mayor and Assessors of Rochester, in re the Parish of St. Nicholas* v. *The Queen* (1858), 27 L.J., Q.B. 434), that the successors of the old Board, who ought to have renewed the licence, could be compelled to perform the duty which they refused to perform, and the change in the by-law, subsequently effected, making it discretionary with the new Board to grant or refuse a renewal, did not affect the position, as at the time of the commission of the wrong complained of no discretion was required, but simply a ministerial act. *Per* IRVING, J.A.: P. had no vested right to a renewal under the by-law in force at the time he obtained his licence, and that the Court had no power to order the new Board to consider P.'s application according to such by-law. *Per* MARTIN, J.A.: As there was no evidence of *mala fides* on the part of the Commissioners in refusing the application, the writ of *mandamus* could not be supported. PRUDHOMME v. THE BOARD OF LICENCE COMMISSIONERS FOR THE CITY OF PRINCE RUPERT. - - - - - - - - **487**

5.——*Liquor licences—Regulation of by by-law—Statute, construction of—Liquor Act, 1910, Cap. 30, Sec. 74—Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 205.*] By section 74 of the Liquor Act, 1910, the Legislature intended that the sale of liquor to travellers, to guests at hotels and restaurants, and for medical purposes should apply to all municipal by-laws restricting the sale of liquor, as well as to the Liquor Act itself, and that, too, whether the municipality had dealt with the matter of restricted hours. IRVING, J.A. dissenting. *In re* LEVY. - - - - - **354**

MUNICIPAL LAW—*Continued.*

6.——*Plan of Subdivision—Refusal of mayor to approve—Grounds of refusal—Reasonableness—Discretion.*] The Court will not grant a writ of *mandamus* to compel a municipal authority to approve a plan of subdivision, where the authority has refused its sanction on the ground that the subdivision did not comply with the law, and has not exercised unreasonably the discretion allowed by the statute. *Reg. on the Prosecution of Wright* v. *Eastbourne Corporation* (1900), 83 L.T.N.S. 338, followed. MOFFET v. RUTTAN. - - - - **342**

7.——*Power to enter lands and take material for repair of highways—Right of action—Arbitration clauses of Municipal Clauses Act, B.C. Stats. 1906, Cap. 32; 1908, Cap. 36.*] The onus is on a district municipal council entering on land and taking any timber, stones, gravel or other material for repair of roads, etc., to shew what is intended to be taken, and the extent of the operations to be carried on. MACDONALD, C.J.A. dissenting. COOK v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER. - - - - - - **129**

8.——*Private drain connected with that of and with leave and knowledge of corporation—Negligence in construction—Omission to repair—Liability of corporation for damage by overflow.*] In the circumstances of this case (stated in the reasons for judgment of MORRISON, J.), it was *Held*, on appeal, MACDONALD, C.J.A. dissenting (reversing the finding of MORRISON, J. at the trial), that the Corporation of the City of Vancouver were under no statutory or common law liability to provide means of drainage to plaintiff's basement, and that the latter voluntarily assumed the risk, which resulted in the damage complained of, by connecting with the drain in the manner he did. WOODWARD v. CORPORATION OF THE CITY OF VANCOUVER. - **457**

9.——*Tax sale assessment, validity of—Meetings of council and court of revision held outside municipal area—Municipal Clauses Act, 1894, Sec. 15—Consent inferred from absence of objection—Requirements of by-law not observed—Notice of sale—Waiver.*] Plaintiff's land was sold for taxes by the Municipality of South Vancouver in 1898, for arrears 1893 to 1897. The main grounds alleged against the validity of the sale were that the meetings of

MUNICIPAL LAW—*Continued.*

the council and of the court of revision (which is composed of the members of the council) dealing with the taxes were held in another municipality, *i.e.*, the City of Vancouver, and that notice of the tax sale was not posted up on the post office building within the municipality in which the lands affected were situate. It was in evidence that at the period in question there was no post office building, as such, within the municipality, the business of post office being carried on in a local house. The meetings of the council were held in Vancouver City to the plaintiff's knowledge, and he also had knowledge of the actions of the council as to the tax sale. Plaintiff brought action in 1909 to set aside the sale, and the action was dismissed for reasons given below. Plaintiff appealed. MACDONALD, C.J.A., thought that the appeal from the trial judge, CLEMENT, J. should be dismissed substantially for the reasons given by him. *Per* IRVING and MARTIN, JJ.A.: The appeal should be allowed upon the grounds: (1) Plaintiff had not received notice of the sale; (2) he had not waived notice; (3) the meetings of the council and court of revision had not been validly held; and (4) no resolution could be shewn or inferred for a departure from the general rule. *Per* GALLIHER, J.A.: The appeal should be dismissed on the ground that the plaintiff was disentitled by his laches and delay. The Court being evenly divided, the appeal was dismissed. ANDERSON v. MUNICIPALITY OF SOUTH VANCOUVER. - - - - **401**

10.——*Voters—Qualification of—"Registered owner"—Holders of agreements to purchase—Municipal Elections Act, Cap. 14, B. C. Stats. 1908—Land Registry Act, 1906, Cap. 23, Sec. 74.*] Holders of agreements for purchase of real property are not owners, within the meaning of the Municipal Elections Act, entitled to vote at municipal elections. Where, therefore, a voters' list had been compiled in accordance with a practice followed of placing the names of holders of agreements for purchase of real property on the list as registered owners: *Held*, that such list was bad, and that an election had thereon should be set aside. PERRY v. MORLEY. - - - - - **91**

NEW TRIAL - - - - - - - - **9**
See CRIMINAL LAW. 4.

2.——*Assault—Legal wrong—Charge to jury—Damages—Mitigation or aggravation of—Point taken in pleadings and abandoned at trial, but put to jury.*] In a clear case of assault of an aggravated character, as here, the jury should be directed that such assault is a legal wrong, and that as a matter of law, the plaintiff is entitled to redress. They should also be directed to consider circumstances in mitigation of damages, and, conversely, questions in aggravation of damages. *Per* IRVING, J.A.: Where a point taken in the pleadings has been abandoned at the trial by the party taking such point, the judge in charging the jury should eliminate all reference to the point so abandoned; and where it is nevertheless put to the jury, who may have based their finding in favour of the party on such point, that would be reason for a new trial. SLATER v. WATTS. - - - - - **36**

3.——*Costs of—Damages—Excessive—Costs of first trial to be paid by plaintiff—Rule 869A.*] In an action for damages for injuries sustained in a railway accident, the negligence was admitted and the case tried only on the question of amount of damages. The sum of $15,000, the amount sued for, was awarded, and defendants appealed. A new trial was ordered, but it was directed that, in the circumstances, the plaintiff should pay the costs of the first trial, IRVING, J.A. dissenting. CARTY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - **3**

4.——*New trial—Damages—Assessment of under separate heads—Excessive verdict.*] Following *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, a jury should not be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independently of nervous shock. Remarks *per* IRVING, J.A. as to cases in which the damages were so assessed. In this case a new trial was ordered (IRVING, J.A. dissenting) on the ground that the damages awarded were excessive. TAYLOR v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - **109**

5.——*Damages—Excessive verdict—Assessment of damages by Court of Appeal—Marginal rule 869A—Costs.*] Where a plaintiff had recovered damages which in the opinion of the Court of Appeal were excessive, the Court ordered a new trial. On the second trial a jury increased the damages from $15,000 to $17,500, and the

NEW TRIAL—*Continued.*

Court of Appeal, under Marginal rule 869a, reduced the damages to $12,000. Disposition of costs in the above circumstances. TAYLOR v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - **420**

NUISANCE—*Action to restrain municipal corporation from constructing a public convenience—Prematureness of action—Inability to prove injury—Adding Attorney-General as party—Application out of time.*] In an action to restrain the municipality from constructing a public convenience on municipal property, brought by the owners of an adjoining lot, the evidence was that they contemplated building, and alleged that substantial and special injury would be suffered by them (apart from that suffered by the general public by such an institution), in that the odours from the convenience would be offensive, and that the building, being on an alleged public highway, would obstruct the approach to the plaintiffs' proposed building. *Held*, that a public convenience such as that proposed to be constructed by the Corporation is not *per se* a nuisance, and in any event it could not be considered so to the occupants of a building not yet erected, and that, therefore, the action was premature. An application at the trial to add the Attorney-General was refused as having been made too late, without his consent, and without its being shewn that the public interest would otherwise suffer. BRITISH CANADIAN SECURITIES, LIMITED v. CORPORATION OF THE CITY OF VICTORIA. - - **441**

PRACTICE—*Action for libel—Trial by jury—Nature of—Extension of time—Order XXXVI., rr. 2, 7.*] In an action for libel, notice of trial without a jury was served on defendants on the 11th of May, and on the 6th of June defendants gave notice under Order XXXVI., r. 2, of an application for an order extending the time for giving notice of trial before a judge and a common jury. The cause of the delay in giving this latter notice was due to an oversight of the solicitor's clerk. *Held*, on appeal, that the time should have been extended in the circumstances. CLARKE v. FORD-MCCONNELL, LIMITED, AND W. MCCONNELL. - - - - **344**

2.——*Action launched by attorney-in-fact after plaintiff's death—Subsequent knowledge of his decease—Substitution of executor as plaintiff—Order 16, rr. 2, 11.*] While

PRACTICE—*Continued.*

plaintiff's attorney-in-fact was pressing a claim on his behalf, plaintiff died abroad. Before proof of his death was produced the writ herein was issued. After proof of death, and probate granted, an application was made to substitute the executor as plaintiff. *Held*, that there had been a *bona fide* mistake in naming the proper plaintiff, and that the substitution of the executor was necessary for the determination of the question involved. RAKHA RAM v. TINN *et al.* - - - - - - - **317**

3.——*Adding Attorney-General as party—Application out of time.*] An application at the trial to add the Attorney-General was refused as having been made too late, without his consent, and without its being shewn that the public interest would otherwise suffer. BRITISH CANADIAN SECURITIES, LIMITED v. CORPORATION OF THE CITY OF VICTORIA. - - - - - - **441**

4.——*Affidavit verifying cause of action—Sufficiency—Judgment under Order XIV.*] In an action brought by the Union Bank of Canada to recover $2,975.16, amount of principal and interest owing on a certain promissory note dated at Vancouver, B.C., 11th of November, 1910, made by the defendant in favour of one James Johnson, payable at the Union Bank of Canada, Vancouver, B.C., on or before the 1st of April, 1911, and alleged to be held by the plaintiff in due course, the plaintiff's application for judgment under Order XIV., was supported by an affidavit of one John R. Major, wherein he alleged that he was manager of the Union Bank of Canada at Boissevain, and had knowledge of the matters therein deposed to. Said affidavit further set out a copy of the indorsement on the writ of summons and alleged that "the defendant at the commencement of this action was and still is justly and truly indebted to the plaintiff in the sum of $2,975.16 in respect of the matters set forth in the indorsement on the said writ of summons." The defendant opposed the application on technical grounds, and also filed an affidavit on the merits, by the president of the defendant Company, wherein he alleged that he believed that one Milladge, a former manager of the plaintiff Bank at Boissevain, was the beneficial holder of the said note and alleged an agreement which would have constituted a good defence against the said Milladge, but

PRACTICE—*Continued.*

it did not appear from the affidavit whether the note sued on was given in renewal of two former notes given to said Milladge. MORRISON, J. gave leave to sign judgment. An appeal from this order was dismissed on the ground that defendant's affidavit did not contain material which would justify interference on the part of the Court of Appeal. [See *Chirgwin* v. *Russell* (1910), 27 T.L.R. 21.] UNION BANK OF CANADA V. ANCHOR INVESTMENT COMPANY, LIMITED. - - - - - - - - - **347**

5.——*Alimony—Application for cancellation of judgment—Material necessary in support of—Order LXX., Supreme Court Rules, 1906.*] Where a defendant in an alimony action, in default in his payments, applies for an order cancelling the judgment against him, he must make a full and frank disclosure of his affairs since the obtaining of the judgment, together with the reasons for his default. MELLOR V. MELLOR. - - - - - - - - **1**

6.——*Appeal—Stay of proceedings pending appeal to Privy Council from Court of Appeal—Want of jurisdiction in Supreme Court to grant stay.*] In an appeal to the Court of Appeal, judgment was given allowing the appeal with costs. Respondent having decided to appeal to the Judicial Committee of the Privy Council, took out a summons for an order granting a stay of proceedings pending such appeal, and MORRISON, J., to whom the application was made, granted the order. An appeal was taken from this order to the Court of Appeal on the ground, *inter alia*, that the judge had no jurisdiction to stay the execution of an order of the Court of Appeal. *Held*, IRVING, J.A. dissenting, that a judge of the Supreme Court had no jurisdiction to order a stay of proceedings in the circumstances, and that the proper tribunal to apply to was the Court of Appeal. HUSON *et al.* V. HADDINGTON ISLAND QUARRY CO., LIMITED, *et al.* (No. 2). **264**

7.——*Attachment of debts—Execution creditor—Assignment of debtor before judgment obtained—Garnishee proceedings.*] The persons referred to in sub-section (2) of section 3 of the Creditors' Trust Deeds Act, 1901, Amendment Act, 1902, Cap. 18, as execution creditors are those having processes upon which execution can be levied. Therefore an attaching order giving a person who had not yet obtained judgment a lien on moneys in Court, was set aside. WILLIAMSON V. WOOLLIAMS AND NAISMITH. - - - - - - **346**

8.——*Costs of new trial—Costs of first trial to be paid by plaintiff—Rule 869A.*] In an action for damages for injuries sustained in a railway accident, the negligence was admitted and the case tried only on the question of amount of damages. The sum of $15,000, the amount sued for, was awarded, and defendants appealed. A new trial was ordered, but it was directed that, in the circumstances, the plaintiff should pay the costs of the first trial, IRVING, J.A. dissenting. CARTY V. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. **3**

9.——*Costs—Scale of—Action in Supreme Court—Amount adjudged within County Court jurisdiction—Supreme Court Act, 1903-04, Cap. 54, Sec. 100—Marginal rule 976—Costs follow event—Discretion.*] An appeal in this case, reported (1910), 15 B.C. 303, was allowed on the ground that the facts shewed that the learned judge below had not exercised his discretion, and the case was remitted to be dealt with on that basis. YOUNG HONG AND QUONG SANG HO V. MACDONALD. - - - **133**

10.——*County Court—Marginal rule 100, sub-sections (1), (2), (3)—Service on foreign railway company.*] A person employed in British Columbia by a foreign railway company which has no line of railway in the Province, such person acting merely as commercial agent to solicit orders for freight to be routed over the company's lines, is a person in the employ of the company, proper to be served with any process under marginal rule 100. GILLIS SUPPLY COMPANY, LIMITED V. CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY. (No. 1). - - **241**

11.——*County Court—Speedy judgment—Motion for—Defence raised in pleadings but not set up in affidavit opposing motion for judgment—Slip of solicitor—Discretion.*] In an action on a promissory note, the defence was, *inter alia*, misrepresentation. Plaintiff moved for speedy judgment, and defendant opposed it, but omitted to state in his affidavit that one of the grounds was misrepresentation. *Held*, on appeal, affirming the order of the County judge, that the defendant should be allowed in to defend. EASEFELT V. HOUSTON AND JOHNSON. **353**

PRACTICE—*Continued.*

12.——*Discovery—Company — Examination of officer—Order XXXIA.*] A witness, an officer of a company, being examined under Order XXXIA., may not be ordered off the witness stand to inform himself of the knowledge of his fellow servants or agents touching matters in question in an action. IRVING, J.A. dissenting. BRYDONE-JACK v. VANCOUVER PRINTING AND PUBLISHING COMPANY, LIMITED. - - **55**

13.——*Divorce and Matrimonial Causes Act, section 16—Decree Absolute in first instance—Amendments to English Act.*] There is no provision, under the divorce law in force in British Columbia, for granting a decree *nisi* in the first place. PURDY v. PURDY. - - - - - - **493**

14.——*Evidence—Lost deed—Secondary evidence of — When admissible — Order XXXIA., Marginal Rule 370r.*] In an action for redemption brought by the representative of a deceased mortgagor (one of two co-mortgagors) against the assignee of the original mortgagee, said assignee being also the wife of the still living co-mortgagor, who was also a party defendant, the latter was examined for discovery. On such examination he deposed to a settlement of accounts between himself and his co-mortgagor in 1892, under which he assumed the payment of the mortgage in question. He also deposed that as part of such settlement he received a deed of the property in question, which deed he had lost. At the trial the plaintiff put in evidence the first part of the above deposition. *Held*, that the second part should also go in under Order XXXIA., Marginal Rule 370r. *Held* further, that on this evidence, corroborated by a letter written by the deceased co-mortgagor to the tax collector, the action was rightly dismissed at the close of the plaintiff's case. Judgment of CLEMENT, J. affirmed. SEMISCH v. KEITH AND KEITH. - - - - - - - - - **62**

15.——*Joint defendants—Husband and wife—Order for discovery—Inability to serve on female defendant—Default—Contempt—Defence struck out and judgment in default—Appeal.*] Where a married woman, joint defendant with her husband, had not been served personally with an order for discovery examination, but the fact of the issue of the order, and its effect, had been explained to her, a further order, consequent upon her non-attendance was made.

PRACTICE—*Continued.*

This was served upon her solicitor, but personal service upon her was not effected. Two orders were then made contemporaneously by MORRISON, J., one striking out her defence, and another giving judgment against her. *Held*, on appeal, that the orders must be sustained; it could not be said upon the evidence that defendant did not understand her position, as the situation had been explained to her. LANGHAN v. ISAACSON AND ISAACSON. - **321**

16.——*Charge to jury—Point taken in pleadings and abandoned at trial, but put to jury.*] *Per* IRVING, J.A.: Where a point taken in the pleadings has been abandoned at the trial by the party taking such point, the judge in charging the jury should eliminate all reference to the point so abandoned; and where it is nevertheless put to the jury, who may have based their finding in favour of the party on such point, that would be reason for a new trial. SLATER v. WATTS. - - - - **36**

17.——*New trial—Damages—Excessive verdict—Assessment of damages by Court of Appeal—Marginal rule, 869a—Costs.*] Where a plaintiff had recovered damages which in the opinion of the Court of Appeal were excessive the Court ordered a new trial. On the second trial a jury increased the damages from $15,000 to $17,500, and the Court of Appeal, under Marginal rule 869a, reduced the damages to $12,000. Disposition of costs in the above circumstances. TAYLOR v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - - - - **420**

18.——*Notice of appeal—Rules 867, 867a, 868, 872.*] *Per* IRVING and MARTIN, JJ.A.: A notice of appeal from a judgment of the Supreme Court is properly intituled in that Court. HEPBURN v. BEATTIE. - - - - - - **209**

19.——*Order XIV.—Application for judgment under—Agreement signed by Company's officials, with guaranty appended, also signed by them—Whether or not personal guaranty.*] An agreement by defendant Company for the purchase of a quantity of salt, f.o.b. at San Francisco, to be delivered at Nanaimo, in British Columbia, was signed by the president and secretary-treasurer. Under their signatures was added: "We, the undersigned, guarantee payment of the obligation as noted above, Imperial Fisheries, Ld., J. O. Hearn, president;

PRACTICE—*Continued.*

Saml. J. Levy, secretary-treasurer; William Kilroy, vice-president." *Held,* affirming the order of MURPHY, J. on an application for summary judgment (MARTIN, J.A. dissenting), that the three officers signing the guarantee following the execution of the agreement, were personally liable, and that judgment under Order XIV. was properly allowed. JOHNSON, LIEBER & VAN BOKKELEN, LIMITED v. IMPERIAL FISHERIES, LIMITED, HEARN, LEVY AND KILROY. - **445**

20.——*Particulars—Facts of which the burden of proof is on the applicant—Form of order.*] In an action by plaintiff, claiming that the tax sale proceedings on which her property had been sold were invalid, it was alleged in the statement of claim (par. 7) that the plaintiff had made various demands for statements of the taxes due, and (par. 8) that the provisions of the Municipal Clauses Act had not been followed in carrying out the tax sale proceedings. On a summons for particulars of these two paragraphs, plaintiff was ordered to deliver an amended statement of claim giving such particulars. *Held,* that particulars should not have been ordered, but, in any event, the form of the order, directing the delivery of a new statement of claim, instead of particulars simply, was objectionable. TURNER v. MUNICIPALITY OF SURREY. - - - - - - **79**

21.——*Particulars — Interrogatories.*] Where a party, having asked for and obtained particulars, and the order was reversed on appeal, and then applied for discovery by interrogatories, the judge at Chambers dismissed the application on the ground that the application was an attempt to gain by another means that which had already been refused. *Held,* that the judge was right. TURNER v. MUNICIPALITY OF SURREY. (No. 2). - - - - - **349**

22.——*Unliquidated damages—Action for—Conditional tender before action—Payment into Court—Acceptance in satisfaction—Costs—Depriving plaintiff of.*] Where the plaintiff sued for unliquidated damages, and defendants pleaded tender before action, and paid into Court a sum of money which the plaintiff accepted and obtained payment out upon an *ex parte* order: *Held,* that the tender was of no value inasmuch as it was accompanied by a statement that it was to be accepted in full satisfaction, and that the defence of tender was improper. *Held,* further, that the plaintiff's conduct having been oppressive throughout the transaction, and having made an unfounded charge of fraud, he should be deprived of his costs. WAINWRIGHT v. FARMER AND LINDSAY. **468**

PRINCIPAL AND AGENT—*Listing—Net price—Commission—Change in terms Revocation of agency.*] Plaintiff and one of the defendants after a conversation, arranged on the selling price of a piece of real estate at $6,000. There was a conflict in the evidence as to whether that was to be a net price, but this difficulty was got over by the fact that on the occasion the parties next met, a few days later, the defendant in question said "property is gone up now, and I shall want $6,000 net." Plaintiff, on the same day, but before the change in price (the second occasion) brought the property to the notice of a purchaser, and told the defendant about him. Plaintiff also changed his advertisement to read $6,500, as the selling price. The purchaser refused to pay more than the $6,000, and eventually bought direct from the owners at that price. *Held,* that plaintiff was not, in these circumstances, entitled to a commission. HOLMES v. LEE HO AND LOU POY - - - - - - - **66**

2.——*Listing for sale—Agent securing option for purchase or sale—Whether original agency precluded agent from dealing with property on his own account.*] Defendants listed certain real estate with an agent for sale at a certain price, and subsequently he obtained from them an option for 30 days to buy or sell at $200 per acre and on such option entered into a contract for sale at $400 per acre; defendants, on being requested to complete their contract under the option, refused on the ground that plaintiff, when securing the option, had not disclosed to them the information in his possession regarding a change or probable change in the value. The trial judge concluded that the original listing did not preclude the plaintiff from dealing with the property on his own account as a purchaser. On appeal, the Court was evenly divided. NAISMITH v. BENTLEY AND WEAR. - **308**

3.——*Sale of land—Commission—Procuring purchaser—Net price.*] Plaintiff at one time obtained an option on defendant's ranch, with the idea of promoting a syndicate to purchase it. In this he was unsuccessful, and then undertook the sale of the ranch on a commission basis, $100,000 being the purchase price, and his commission or

PRINCIPAL AND AGENT—*Continued.*

profit to be made by adding $5,000 thereto. He endeavoured to effect a sale in various quarters and ultimately introduced H. to the defendant, telling the former that the price was $105,000, and asking the latter to protect him at that price. H. stayed for some days on the ranch inspecting it, and, having concluded to purchase, asked defendant his price and was told $100,000, which he paid. *Held*, on appeal, affirming the verdict of the jury at the trial (GALLIHER, J.A. dissenting), that plaintiff was entitled to recover the commission of $5,000 from the defendant (vendor). ROWLANDS v. LANGLEY. - - - - - - - **72**

4.——*Sale of land—Listing for time certain—Undertaking to give notice of withdrawal—Property sold by owner—Withdrawal of listing—Notice of sent by post—Non-receipt of notice—Subsequent sale by agent.*] Where a principal listed property with an agent for a certain period, after which time he was to give written notice of intention to withdraw the property from sale or change the price or terms: *Held*, that this was a listing for the period mentioned, and after that an agency until the property was withdrawn, in the absence of proof of notice having been given. GODDARD & SON v. ELLIOTT. - - **379**

5.——*Sale of mineral claims—Commission on—Option—Contract — Substituted contract—Erasures in document—Evidence as to—Inadmissibility.*] In the circumstances set out in the statement following, it was *Held*, on appeal, affirming the decision of MURPHY, J. at the trial (IRVING, J.A. dissenting), that plaintiff had earned only $800 of the commission claimed. BEVERIDGE v. AWAYA IKEDA & COMPANY, LIMITED. - - - - - - **474**

RAILWAY—*Freight rates—Inquiry by intending shipper as to rate—Incorrect rate quoted by agent—Contract based on such rate—Damages, action for—Deceit—Negligence.*] Plaintiff Company, a British Columbia concern, sought from the defendant Company's agent at Seattle, Wash., U.S.A., information as to the rate on plaster from a point in Kansas, and was given a certain figure per ton. There was some dispute as to whether the rate quoted was from Kansas to Seattle (according to defendant Company's contention) or to Vancouver, B.C. (according to plaintiff Company's contention), but a letter from an official of defendant Company confirming the quotation of a rate to Vancouver was put in evidence. There was no evidence that there had been any carelessness or recklessness shewn in giving the information. *Held*, on appeal, reversing the finding of the trial judge, that an action of deceit did not lie in the circumstances. *Held*, further, that there is no duty cast upon a common carrier to give correct verbal information as to rates. *Held*, further, that to entitle plaintiff Company to succeed, the wrong complained of, having been committed in the State of Washington, must be shewn to be actionable in British Columbia as well. THE GILLIS SUPPLY COMPANY, LIMITED v. THE CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY. (No. 2). **254**

SALE OF LAND—*Contract for—Specific performance—Possessory title—Failure to register—Priority of registration—Notice—Fraud—Land Registry Act, B.C. Stats. 1906, Cap. 23, Sec. 74.*] The defendant Edwards is the owner of certain property in Kamloops, fronting on the Thompson River. In July, 1909, he agreed to sell to the plaintiff for $2,500, the sum of $600 down, and the balance on time. The first payment was made, but there was some delay about the second on account of Edwards having only a possessory or unregistered title to a part of the property, and he was endeavouring to complete his title. In July, 1910, the defendant Clark wanted to purchase some property on the river front, and was shewn the property in question by the defendant Benson, a real estate agent. Clark told Benson that if he could secure it at anything under $6,000 he would pay him $300 on his bargain. Benson thereupon saw the plaintiff, Chapman, and tried to purchase the lot from him, but being unable to arrange terms with him, went to Edwards, who agreed to sell the property at $5,500. He made an agreement for sale to Benson on the 30th of July, 1910, which agreement was at once assigned to Clark and placed in the Land Registry office for registration. Benson had reported to Clark his negotiations with Chapman, and about Chapman being in possession. GREGORY, J. gave judgment in favour of plaintiff for specific performance as to those lots to which the title was not in dispute, and as to the lot to which plaintiff had only a possessory title, it was decreed that plaintiff accept such title as Edwards had, and if that should not be acceptable, that there be an abatement of the purchase price and a refer-

SALE OF LAND—*Continued.*

ence to the registrar to settle the amount. Defendant Edwards appealed, and the appeal was dismissed on the ground that he had actual notice of Chapman's title, and could not be allowed in the circumstances to take advantage of section 74 of the Land Registry Act. CHAPMAN v. EDWARDS, CLARK AND BENSON. - - - - - **334**

2.——*Contract for not included—Prices—Terms.*] In negotiations between plaintiff and defendant as representative of the Grand Trunk Pacific Railway Company, for the purchase of one thousand lots in the Prince Rupert townsite, two letters constituted the principal basis of an understanding. According to these letters the lots were to be selected by the plaintiff, and that the only lots which the Company would concur in transferring were those embraced in the "Phillips list," the prices to be fixed by the defendant Company. The latter and the Provincial Government employed appraisers who placed an upset price on the townsite lots for the purposes of an auction sale, but these prices were not communicated to the plaintiff. It was contended for the plaintiff that the price list fixed by the appraisers would be a list binding on the Company at his option. *Held*, on appeal (affirming the judgment of HUNTER, C.J.B.C.), that there had been no identification of the lots to be selected, nor a fixing of prices during the negotiations, and, generally, that the parties were never *ad idem*. FREWEN v. HAYES *et al.* - - **143**

SETTLED ESTATES—*Property registered in name of widow under deed from deceased—Cross deed from wife to husband not registered—Order confirming sale by widow as administratrix—Appeal by guardian of infant interested—Jurisdiction.*] Deceased, who left a widow and one child, was at the time of his death the owner of some four acres of land. The child was taken in charge by a Children's Aid Society. Letters of administration were issued to his widow. She subsequently obtained registration of the property in her own name, based upon a conveyance to her from her late husband, and on the title so obtained entered into an agreement for sale of the property, receiving a payment of $500 on account of the purchase price. It afterwards developed that there had been cross deeds between the husband and wife, but that that from the wife to the husband had never been registered. She then applied to

SETTLED ESTATES—*Continued.*

MORRISON, J. for, and obtained authority to carry out the sale as administratrix. The Children's Aid Society appealed on behalf of the infant. *Held*, on appeal, that the learned judge had not jurisdiction to make the order confirming the sale. *In re* HARRY HOWARD, DECEASED. - - - **48**

SPECIFIC PERFORMANCE - **201**
See VENDOR AND PURCHASER.

STATUTE—B.C. Stat. 1894, Cap. 34, Sec. 15. - - - - - - **401**
See MUNICIPAL LAW. 9.

B.C. Stat. 1900, Cap. 54, Secs. 218, 219. **494**
See MUNICIPAL LAW. 3.

B.C. Stat. 1902, Cap. 18, Sec. 3, Sub-sec. (2). - - - - - - - **346**
See PRACTICE. 7.

B.C. Stat. 1902, Cap. 74. - - **120**
See MASTER AND SERVANT. 7.
STATUTE, CONSTRUCTION OF. 11.

B.C. Stat. 1902, Cap. 74, Sec. 2, Sub-sec (3), Second Schedule, Sec. 4. - **304**
See MASTER AND SERVANT. 8.

B.C. Stat. 1903-04, Cap. 54, Sec. 20 (7). - - - - - - **243**
See VENDOR AND PURCHASER. 2.

B.C. Stat. 1903-04, Cap. 54, Sec. 100. - **133**
See PRACTICE. 9.

B.C. Stat. 1906, Cap. 23, Sec. 74. - - - - - - **91, 329, 334**
See LAND REGISTRY ACT, 1906, Section 74, 2.
MUNICIPAL LAW. 10.
SALE OF LAND.
STATUTE, CONSTRUCTION OF. 6.

B.C. Stat. 1906, Cap. 32. - **129, 228**
See MUNICIPAL LAW. 7.
STATUTE, CONSTRUCTION OF. 9.

B.C. Stat. 1906, Cap. 32, Sec. 50, Sub-sec. 27 (*a*). - - - - - **106**
See MUNICIPAL LAW.

B.C. Stat. 1906, Cap. 32, Sec. 64. - **374**
See MUNICIPAL LAW. 2.

B.C. Stat. 1906, Cap. 32, Sec. 205. - **354**
See MUNICIPAL LAW. 5.
STATUTE, CONSTRUCTION OF. 7.

B.C. Stat. 1908, Cap. 14. - - **91**
See MUNICIPAL LAW. 10.

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B.C. Stat. 1908, Cap. 36. - - **129**
See MUNICIPAL LAW. 7.

B.C. Stat. 1909, Cap. 48. - - **228**
See STATUTE, CONSTRUCTION OF. 9.

B.C. Stat. 1909, Cap. 63, Sec. 10. - **494**
See MUNICIPAL LAW. 3.

B.C. Stat. 1910, Cap. 12. - - **117**
See CRIMINAL LAW. 7.

B.C. Stat. 1910, Cap. 30, Sec. 74. - **354**
See MUNICIPAL LAW. 5.
STATUTE, CONSTRUCTION OF. 7.

B.C. Stat. 1910, Cap. 31, Secs. 6, 15. - **18**
See MECHANIC'S LIEN.

Canadian Stat. 1910, Cap. 27, Sec. 3, Sub-sec. 10-36. - - - - - **471**
See STATUTE, CONSTRUCTION OF. 4.

Criminal Code, Secs, 871, 872, 873, 889. - - - - - - - - - **229**
See CRIMINAL LAW. 6.

Criminal Code, Sec. 1,018. - - **271**
See CRIMINAL LAW.

Criminal Code, Sec. 1,019. - - **9**
See CRIMINAL LAW. 4.

R.S.B.C. 1897, Cap. 58. - - **386**
See STATUTE, CONSTRUCTION OF.

R.S.B.C. 1897, Cap. 62, Sec. 16. - **493**
See PRACTICE. 13.

R.S.B.C. 1897, Cap. 78. - - **170**
See STATUTE, CONSTRUCTION OF. 8.

R.S.B.C. 1897, Cap. 113. - - **24**
See MINING LAW.

R.S.B.C. 1897, Cap. 113, Secs. 13, 14 and 16. - - - - - - - - **485**
See STATUTE, CONSTRUCTION OF. 5.

R.S.B.C. 1897, Cap. 135, Secs. 2, 9, 19, 49, 50. - - - - - - **433**
See MINING LAW. 2.

R.S.B.C. 1897, Cap. 144, Secs. 60, 267, 275. - - - - - - **170**
See STATUTE, CONSTRUCTION OF. 8.

R.S.B.C. Cap. 169, Sec. 37. - - **505**
See BAILMENT.

STATUTE, CONSTRUCTION OF—*Action under Families' Compensation Act—Time limit—Limitation in Company's Act of incorporation.*] Lord Campbell's Act gives

STATUTE, CONSTRUCTION OF—*Continued.*

a limitation of twelve months within which an action for damages caused by the death of a relative may be brought, so that the writ here was issued in ample time to comply with that statute. But in the defendant Company's Act of incorporation, a limitation of six months is set for bringing actions to recover damages incurred by reason of the tramway or railway or works or operations of the Company. *Per* IRVING, J.A., following *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199: The limitation in the Company's statute was not applicable. *Per* MARTIN, J.A.: The section was applicable and the action was therefore barred. GALLIHER, J.A. expressed no opinion on this point. McDONALD V. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - - **386**

2.——*Alien landing as tourist—Law changed after his arrival—Deportation—Right of alien to inquiry as to his status under changed law.*] Applicant, a Hindu, came to British Columbia in January, 1910, not by continuous voyage from his own country, and was admitted as a tourist, in which capacity he travelled in Canada, reaching British Columbia again in October following. The law governing immigration had been changed in the meantime, and he was held under the new law for deportation, but without any inquiry being held as to his status as provided by the amended law. *Held,* that the Act was not retrospective in this regard and did not apply; and as the old Act contained no provision for the deportation of such a person, he could not be deported thereunder. *In re* RAHIM. **469**

3.——*Crown Costs Act, 1910—Effect of upon criminal cases.* - - - **117**
See CRIMINAL LAW. 7.

4.——*Immigration Act, 1910 (Dominion), section 3, sub-section 10, section 36—Retroactive—Order in council—Previous arrest and discharge—Habeas corpus.*] The Immigration Act, 1910 (Dominion), does not apply to an alien tourist who entered Canada before the passage of the Act. Therefore an order in council passed since the coming into force of the Act could not be held to deal with such a person. *In re* RAHIM. (No. 2). - - - **471**

5.——*Land Act, sections 13, 14 and 16—Cancellation of pre-emption record—Jurisdiction of commissioner of lands—Continu-*

STATUTE, CONSTRUCTION OF— *Continued.*

ous occupation of land by pre-emptor.] Although a commissioner of lands must give a pre-emption record holder thirty days' notice of the hearing of an application to cancel his pre-emption record, yet, if the pre-emptor appear and attend on the hearing at an earlier date, he cannot object afterwards that he has not received proper notice. *Held*, further, on the facts, that the commissioner was right in cancelling the record for non-compliance with the Land Act as to occupation of the land. HESELWOOD v. JONES. - - - - - **485**

6.——*Land Registry Act, 1906, Section 74—Agreements of similar date—Registration of at different times—Right of action—Priorities.*] Plaintiff and defendant both purchased adjoining properties from a common vendor on the same date. Defendant registered his title on the 25th of June, 1910, and plaintiff registered on the 26th of July following. Plaintiff for two or three years occupied as a tenant the property which she purchased, and during such tenancy her house was drained into the adjoining property, which was purchased by defendant. On the 3rd of June defendant disconnected and stopped the drain at the boundary of his lot, and denied the plaintiff's right to use the drain and cesspool. GRANT, Co. J., before whom the action was tried, gave judgment for plaintiff in $1,000 damages on the ground that defendant, not having any registered title, under section 74 of the Land Registry Act, had no right to tear up or stop the drain. *Held*, on appeal, that neither party having any registered ownership in the lands at the time of the occurrences in question, the appeal should be allowed and the action dismissed. *Per* IRVING, J.A.: Reservations of easements should be shewn on subdivision plans. GODDARD v. SLINGERLAND. - - **329**

7.——*Liquor Act, 1910, Cap. 30, Sec. 74—Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 205—Liquor licences—Regulation of by by-law.*] By section 74 of the Liquor Act, 1910, the Legislature intended that the sale of liquor to travellers, to guests at hotels and restaurants, and for medical purposes should apply to all municipal by-laws restricting the sale of liquor, as well as to the Liquor Act itself, and that, too, whether the municipality had dealt with the matter of restricted hours. IRVING, J.A. dissenting. *In re* LEVY. **354**

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8.——*Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, Secs. 60, 267, 275—Ferries Act, R.S.B.C. 1897, Cap. 78.*] Section 275 of the Municipal Clauses Act, R.S.B.C. 1897, provides that, notwithstanding anything contained in the Ferries Act, where a ferry is required over any stream or other water within the Province, and the two shores of such stream or other water are in different municipalities, the Lieutenant-Governor in Council may grant a licence to ferry, without submitting the same to public competition, to either of such municipalities exclusively, or both conjointly, as may be most conducive to the public interest. Section 8 of the Ferries Act provides that "ferry licences issued after such public competition may be granted for any period not exceeding five years." The Provincial Government granted to the rural municipality of North Vancouver a licence for a ferry between the municipality and the City of Vancouver for 15 years under the provisions of section 275. The municipality sublet the licence to the plaintiff Company pursuant to section 277 of the Municipal Clauses Act. Subsequently the municipality obtained an Act of incorporation as a city municipality and in the Act provision was made, *inter alia*, for giving effect to such sub-lease. In an action to restrain a rival company from infringing on the rights of the plaintiff Company (the sub-lessees) an injunction was granted by CLEMENT, J. and it was *Held*, on appeal, (GALLIHER, J.A. dissenting), that the provisions of the Ferries Act as to duration of a franchise do not control the granting of a licence for a ferry to be established between municipalities. NORTH VANCOUVER FERRY AND POWER COMPANY, LIMITED v. BUNBURY *et al.* - - - - - - - **170**

9.——*Proceedings by municipality to establish a waterworks system—Records obtained under Water Act, 1909—Expropriation of lands, whether under Water Act or Municipal Clauses Act.*] A municipality, having obtained water records under the Water Act, 1909, must proceed under the expropriation clauses of that Act in acquiring lands for the purposes of a waterworks system, and not under the provisions of the Municipal Clauses Act. LEWIS v. THE MUNICIPAL CORPORATION OF DELTA. **228**

10.——*Post Office Act—Right of Postmaster-General as to transmission of mail matter—"Sending" letters—What constitutes.*] The defendants contracted with an

STATUTE, CONSTRUCTION OF— *Continued.*

association to transmit to every voter in British Columbia a certain circular of a political nature. They made up a number of parcels for various city centres and sent them by express, consigned to the express company's agents in the respective places, with instructions to mail them in the local post offices. The local or drop letter postal rate of one cent on each letter was affixed. *Held*, setting aside the finding of the magistrate, that this procedure of reaching the addressees was an infringement of the rights of the Postmaster-General under the Post Office Act. REX v. BAXTER AND JOHNSON. - - - - - - - - - **6**

11.——*Workmen's Compensation Act, 1902—Alien dependants residing in a foreign country.*] The provisions of the Workmen's Compensation Act, 1902, awarding compensation to the dependants of a deceased workman in circumstances provided for in the Act, do not apply to alien dependants of such workman resident in a foreign country. IRVING, J.A. dissenting. KRZUS v. CROW'S NEST PASS COAL COMPANY, LIMITED. [Reversed by Privy Council, May, 1912]. - - - - - - - - **120**

TAXES - - - - - - - - - **185**
See ASSESSMENT.

VENDOR AND PURCHASER—*Agreement for sale of land—Interim receipt—Specific performance—Statute of Frauds—Memorandum within—Names of parties—Agent—Authority to make contract.*] In a real estate transaction a firm of brokers arranged terms with the vendor, and on themselves paying a deposit of $50, procured the following receipt: "Received from Marriott & Fellows the sum of fifty dollars, being deposit on account of purchase of lot numbered 799 in block 10 in section 18, Victoria, at the price or sum of six thousand dollars ($6,000) two thousand five hundred on the execution of agreements, and the balance as follows: assume mortgage for ($3,500) three thousand five hundred at 7½ per cent. interest. Five per cent. commission to be paid to Marriott & Fellows when sale is completed. Taxes, insurance, rent, etc., to be adjusted to date of sale. Mrs. Minnie Calwell, wife of Hugh E. Calwell." *Held*, on appeal (IRVING, J.A. dissenting), that this was not a sufficient memorandum within the Statute of Frauds so as to entitle the purchaser to specific performance, as the name of the purchaser did not appear, nor

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was there any evidence in it by which to identify the purchaser. [See *Brinson* v. *Davies* (1911), 27 T.L.R. 422]. RATHOM v. CALWELL AND CALWELL. - - **201**

2.——*Agreement for sale of land—Speculative value—Forfeiture clause—Default by purchaser—Right of vendor on default—Specific performance—Supreme Court Act, Sec. 20 (7).*] In January, 1907, defendant Maclean held an agreement from one Bohlman, under which he had the right to purchase some 782 acres in New Westminster District. On the 24th of January, 1907, the plaintiff and defendant entered into an agreement, under which the plaintiff obtained the right to purchase the land for the sum of $58,950, payable as follows: $1,000 down, the balance in four instalments of (about) $14,000, the first being payable on the 15th of February, 1907, the remaining three on the 1st of October, 1907, 1908, 1909, with interest. The agreement contained a provision by which, in the event of Maclean neglecting to make his payments to Bohlman as they fell due, the plaintiff could himself make the payments, and another clause provided that the plaintiff might, at any time, pay up the whole amount of the purchase money, and take a conveyance of the land. The purchaser was to pay the taxes, and reimburse the vendor for all insurance premiums paid by him during the agreement. The purchaser was permitted to occupy the premises until default was made in the payment of the above instalments, or interest, subject nevertheless to impeachment for voluntary or permissive waste. On the other hand, the following provisions were inserted for the protection of the vendor: "It is expressly agreed that time is to be considered the essence of this agreement, and unless the payments above mentioned are punctually made at the times and in the manner above mentioned, and as often as any default shall happen in making such payments, the vendor may give the purchaser thirty days' notice in writing demanding payment thereof, and in case any default shall continue these presents shall, at the expiration of any such notice be null and void and of no effect, and the said vendor shall have the right to re-enter upon and take possession of the said land and premises; and in such event any amount paid on account of the price thereof shall be retained by the vendor as liquidated damages for the non-fulfilment of this agreement to purchase the said land and pay the

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price thereof and interest, and on such default as aforesaid the said vendor shall have the right to sell and convert the said lands and premises to any purchaser thereof. In the event of this agreement being registered and in the event of default being made in any payment or in respect of any of the covenants herein contained, whether before or after such registration, it is expressly agreed that the vendor shall be at liberty to cancel, remove and determine such registration on production to the registrar of a satisfactory declaration that such default has occurred and is then continuing. The purchaser hereby irrevocably appoints E. W. Maclean his true and lawful attorney for and in the name of the said purchaser, his heirs, executors, administrators, successors and assigns, to cancel, remove and determine such registration in the event of default as aforesaid." The plaintiff paid the $1,000 at the time of the execution of the agreement, and he also paid the first instalment of $14,000, but failed to meet any of the three subsequent instalments as they fell due or at any time. Plaintiff made no improvements; as a matter of fact, he never entered upon or occupied the lands, nor did he pay the taxes. A formal demand for payment was made upon him by letter on the 30th of November, 1907, and not complied with. The plaintiff was not then, nor for a very considerable time thereafter, in a position to pay for the land, and by virtue of the agreement the contract to sell was "null and void and of no effect." The defendant Maclean, in February, 1908, proceeded to sell the land to third persons at an increased price. Some correspondence ensued between the parties, but it was not until the 27th of March, 1909, that the plaintiff offered to pay up the balance. On the 7th of October, 1909, the plaintiff issued his writ asking specific performance of the contract, and in the alternative for the return of the moneys paid by him. HUNTER, C.J.B.C. dismissed the action against the defendants other than Maclean, and refused to direct specific performance, but on the authority of *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1,022, held that the plaintiff was entitled to be relieved, and he ordered that he should recover back from Maclean the

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$14,000 (but not the $1,000 deposit) less the amount paid for taxes. From that decision, as to refunding the $14,000 instalment, defendant appealed. *Held*, reversing the finding of the trial judge, that, in view of the circumstances of the case and the speculative nature of the property, the plaintiff's conduct was such as to amount to repudiation of the contract, and that he was not entitled to relief. BUTCHART v. MACLEAN *et al.* - - - - - **243**

WATER AND WATERCOURSES—*Riprarian rights—Proof of ownership—Obstruction — Damage — 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 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. *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: *Held*, further, on the evidence, that the 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. GEORGE v. MITCHELL. GEORGE v. HUMPHREY BROTHERS. - - - - - - **510**

WORDS AND PHRASES—"Registered owner." - - - - - - **91**
See MUNICIPAL LAW. 10.

2.——*Res ipsa loquitur.* - - **423**
See MASTER AND SERVANT. 6.

3.——*"Wilfully obstructing."* - **191**
See CRIMINAL LAW. 9.

4.——*"Sending" letters—What constitutes under Post Office Act.* - - **6**
See STATUTE, CONSTRUCTION OF. 9.